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

BULETIN OF CASE LAW

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OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Foreword:

The Constitutional Court continued to work efficiently last year as well, in dealing with constitutional complaints, fully committed to ensuring quality decision-making, despite the difficulties faced as a result of measures and restrictions imposed by the pandemic situation.

Such efficient work was made possible, above all, by investing more capacities in the use of innovative technological solutions for the processing and review of cases, while taking all adequate measures to protect the health of the Court officials and submitting parties.

Additional evidence and reflection of the regular work process conducted in the Court are also statistical data for the past year. Compared to 195 referrals filed and 206 cases reviewed in 2020, last year 235 referrals were filed with the Court, while 276 cases were reviewed.

Of these reviewed cases, this bulletin contains only the most important judgments and decisions, in which a number of complex constitutional issues are addressed.

On this occasion, I would like to single out four referrals submitted by the deputies of the Assembly, regarding: (i) Decision of the Assembly on the Election of the Government, of 3 June 2020; (ii) Decision of the Assembly on the Election of the Government of 22 March 2021; (iii) Decision of the Assembly to dismiss five (5) members of the Independent Oversight Board for the Kosovo Civil Service; and (iv) the Recommendation of the Assembly to cover electricity for consumers in four (4) municipalities of the Republic of Kosovo.

Moreover, over the past year, the Court also handled a considerable number of cases with respect to individual referrals. In the latter, addressing the Applicants' allegations and applying the principles established by its consolidated case law and that of the European Court of Human Rights, the Court found violations of Articles of the Constitution related to: (i) lack of reasoning of the court decision; (ii) the principle of equality of arms and the principle of adversarial proceedings; (iii) the right of access to a court; (iv) the failure to hold a hearing; (v) the principle of legal certainty, as a consequence of divergence in case law; (vi) the principle of impartiality of the court; (vii) non-enforcement and observance of "*res judicata*" decisions; (viii) participation of witnesses and dealing with evidence in the proceedings; (ix) excessive length of the court proceedings; (x) the right to privacy; (xi) the principle of gender equality in representation in the Assembly; and (xii) the right to vote of Kosovo citizens by mail.

For more detailed information regarding cases of constitutional violations, the interested readers can refer to the content of the bulletin, which in addition to reflecting the consolidated case law of the Constitutional Court, it also serves as an important guide for all citizens, especially for members of the legal community to better build their constitutional arguments before the

Court, in the protection of the fundamental rights and freedoms guaranteed by the Constitution.

You can also find all the judgments published in the bulletin on the Court's website, where they are published in Albanian, Serbian and English, as well as in the Official Gazette of the Republic of Kosovo.

Through regular press releases, the Court, since the last year, has started with the practice of informing the public about each published judgment, while the interested readers can also find on its website periodic statistics regarding the number of decisions issued, as well as other data on the number of cases and submitting parties.

Finally, I would like to emphasize that this bulletin demonstrates the Court's commitment to meet every constitutional challenge and issue, and its serious commitment to maintaining and increasing public confidence in its work.

I take this opportunity to thank all the judges and other officials of the Constitutional Court, who with their professional work and valuable contribution have made possible the publication of this bulletin, thus contributing to the sustainable consolidation of the constitutional judiciary of our country and, consequently, in strengthening the rule of law based on the European standards.

Gresa Caka – Nimani

President of the Constitutional Court

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KI207/19, Judgment adopted on 10 December 2020

Keywords: *individual referral, constitutional review, election rights, votes from abroad, restriction of election rights*

The Referral was based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court, as well as Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo. The subject matter of the Referral was the constitutional review of the judgments [AAUZH. No. 20/2019] of the Supreme Court of Kosovo of 30 October 2019 and [AAUZH. No. 21/2019] of 5 November 2019, which, according to the Applicant's allegations, violate the rights guaranteed by Article 7 [Rule of Law], paragraph 1 of Article 31 [Right to Fair and Impartial Trial] and Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights, the Applicant also requested the imposition of an interim measure which would prohibit certification "*[...] of the elections [of 6 October 2019] until a final decision [...] regarding the main request*" of the case in question.

In the title – **CONCLUSIONS** – of this Judgment, the Court summarized the essence of the case and emphasized the following:

Referral KI207/19 was submitted by the Coalition "NISMA-AKR-PD after the early elections to the Assembly of 6 October 2019. In particular, this case concerned the "Voting from Abroad" conducted by citizens of the Republic of Kosovo by mail service from various countries outside Kosovo.

The constitutional issue contained in the Referral in question is the compliance with the Constitution and the ECHR of the two challenged decisions of the Supreme Court, namely the Judgment [AAUZH. No. 20/2019] of 30 October 2019 and the Judgment [AAUZH. No. 21/2019] of 5 November 2019. Specifically, if the decision of the Supreme Court that the votes from abroad should be counted despite the fact that they had arrived at the CEC after the deadline of twenty-four (24) hours from the day of elections specified in Article 96.2 of the LGE in conjunction with Article 4.4. of

Election Rule no. 03/2013, was contrary to: (i) Article 7 [Values] of the Constitution; (ii) paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR; and, (iii) Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 (Right to free elections), of Protocol No. 1 of the ECHR.

According to the facts of the case, the ECAP by Decisions [A. No. 375-2/2019 of 28 October 2019; and A. No. 381/2019 of 3 November 2019] concluded that the CEC, according to the LGE, should not count the packages received after the legal deadline nor include them in the final result. Meanwhile, afterwards, the Supreme Court annulled the decision-making of the ECAP and found that although the fact that the votes arrived after the legal deadline remains, the CEC should count those votes and include them in the final result. The Supreme Court considered that the legal norm that determines the deadline, namely Article 96.2 of the LGE and Article 4.4 of the Election Rule No. 03/2013 is a legal norm in "collision" with Article 3 of Protocol No. 1 of the ECHR and that consequently the CEC should be ordered to count the packages in question despite the fact that they arrived after the legal deadline. After the CEC implemented the challenged decisions of the Supreme Court, the election result certified by the CEC on 27 November 2019, includes also the votes counted from the contested packages that had arrived after the legal deadline.

The Applicants also alleged that the Supreme Court, contrary to the Constitution, decided to apply directly the international instruments contained in Article 22 of the Constitution and not Article 96.2 of the LGE and Article 4.4 of Election Rule No. 03/2013. They also alleged that the regular courts do not have the right to directly apply the constitutional norms and/or international instruments provided for in Article 22 of the Constitution, as well as to interpret the legal norms in harmony and according to the obligations arising from the constitutional norms, as in such cases there is a binding obligation under Article 113.8 of the Constitution to refer the matter to the Constitutional Court whenever the question of the constitutionality of legal norms is raised.

The Court, while dealing with the Applicant's allegations, initially found that according to the interpretation of Article 102.3 of the Constitution, in conjunction with Article 112.1 of the Constitution and according to the case law of the Constitutional Court, the latter considers that the right and obligation to apply and interpret the Constitution, is recognized to all courts of the Republic of Kosovo and all public authorities in the Republic of Kosovo.

However, the Court strongly reiterated that the competence to "hold" the unconstitutionality of a legal norm and to "repeal" a legal norm as incompatible with the Constitution is the exclusive competence of the Constitutional Court. Thus, despite the fact that the Constitution recognizes the competence of regular courts to interpret a norm of legal rank in line with a norm of constitutional rank and/or the direct application of a norm of constitutional rank, this does not mean that the regular courts can ascertain or declare a legal norm as a norm contrary to the Constitution or the ECHR. Such a competence, of ascertaining unconstitutionality and repeal of a legal norm, is not foreseen by the Constitution as a competence of the regular courts. Such a right, the Constitution has assigned exclusively to the Constitutional Court which can, after the submission of a referral by an authorized party under Article 113 of the Constitution, repeal a legal norm that is contrary to the Constitution and determine the effects of such a repeal.

As to the compatibility of the challenged decisions of the Supreme Court with Article 45 of the Constitution in conjunction with Article 3 of Protocol No. 1 of the ECHR, taking into account the general principles regarding the voting abroad established by the ECtHR, the Court noted that although the time for decision-making in electoral disputes is relatively short and that the right to a fair trial under Article 31 of the Constitution and Article 6 of the ECHR do not apply to electoral disputes, this does not mean that decisions related to electoral disputes should not be sufficiently reasoned. According to the ECtHR, the procedure for reviewing electoral disputes must include a "*sufficiently reasoned decision*" in order to "*prevent the abuse of power by the relevant decision-making authority*".

Following the application of these principles, the Court found that the reasoning of the Supreme Court and the conclusions reached on the basis of that reasoning were arbitrary and did not meet any of the criteria of a sufficiently reasoned court decision. This is due to the fact that the Supreme Court did not apply any relevant test of the court review nor did it elaborate on any of the following issues that were relevant and necessary to be clarified in the circumstances of the present case: (i) what is meant by the "principle of universal suffrage" which the Supreme Court referred to, how that principle relates to the right to vote from abroad and how the latter was violated in the circumstances of the present case; (ii) what are the obligations that Article 3 of Protocol no. 1 of the ECHR imposes on states regarding outside voting; and (iii) what exactly makes the deadline set out in Article 96.2 of the LGE in conjunction with Article 4.4. of Election Rule 03/2013 to be a legal norm in collision with Article 3 of Protocol no. 1 of the ECHR.

In this regard, the Court noted and found that the Supreme Court failed to establish, in any way, how the ECAP decision-making was erroneous and why the ECAP line of reasoning should be replaced by a completely different line

that was not in compliance with the LGE and the election practice so far. Consequently, the Court concluded that the Supreme Court did not provide sufficient legal and constitutional reasoning and that its decision-making in the circumstances of the present case was arbitrary and, therefore, contrary to the guarantees of Article 45 of the Constitution in conjunction with Article 3 of the Protocol no. 1 of the ECHR. Furthermore, as regards the compliance of the legal norm which required that outside voting must arrive at the CEC twenty-four (24) hours before election day, in order for them to be counted, the Court concluded that this restriction on the right to vote: (1) was a restriction provided by law; (2) there was a legitimate purpose aimed to be achieved by that restriction; and (3) there is a relationship of proportionality between the restriction of the right in question and the legitimate purpose aimed to be achieved. The Court also found that the time limit set out in Article 96.2 of the LGE in conjunction with Article 4.4 of Election Rule no. 03/2013, was not arbitrary and did not affect the impossibility of free expression of the will of the people regarding their representatives in the Assembly and as such was in compliance with Article 45 of the Constitution and Article 3 of Protocol No. 1 of the ECHR.

In conclusion, the Court unanimously found that: (i) the Referral is admissible for review on merits; (ii) the challenged decisions of the Supreme Court are not in compliance with Article 3 of Protocol No. 1 of the ECHR in conjunction with Article 45 of the Constitution, and as such the Court declares them invalid; (iii) ECAP decisions are in compliance with Article 3 of Protocol no. 1 of the ECHR in conjunction with Article 45 of the Constitution; (iv) the legal deadline set by the Assembly for arrival of the votes from abroad through Article 96.2 of the LGE in conjunction with Article 4.4. of Election Rule no. 03/2013 was a restriction of the right to vote which was in compliance with Article 55 of the Constitution because the latter: was provided by law; had a legitimate purpose to be achieved by that restriction; and there was a relationship of proportionality between the restriction of that right and the legitimate aim which was intended to be achieved by that restriction; and that, in the circumstances of the present case (v) the restriction of the right to vote (as a relative right and not an absolute right) by term has not been arbitrary and has not affected the impossibility of free expression of the will of the people with respect to their representatives in the Assembly.

With regard to the effects of this Judgment, the Court clarified that although its finding that the challenged decisions of the Supreme Court are not in compliance with Article 3 of Protocol no. 1 of the ECHR in conjunction with Article 45 of the Constitution has no retroactive effect on the announced election result in the circumstances of the present case, according to the reasons given; however, the Judgment in this case produces at least four important effects, as follows: (1) the clarification of the rights and obligations

of the regular courts in cases where they are confronted with norms of legal rank which claim to be in collision with norms of constitutional rank; (2) the repeal of the two challenged decisions of the Supreme Court and the upholding of the two decisions of the ECAP so that, while the Assembly of the Republic of Kosovo upholds Article 96.2 of the LGE, all votes that reach the CEC after the legal deadline must be declared invalid votes and must not be counted or included in the final election result; (3) clarification that in the circumstances of the present case there was no collision between the norm of the legal rank and that of the constitutional rank and that, in this respect, the Supreme Court declared the collision in question in an arbitrary manner, exceeding its constitutional powers and without sufficient and adequate reasoning; and that (4) the finding of a violation enables the Applicant to consider the use of other legal remedies available for the further exercise of its rights in accordance with the findings of this Judgment.

JUDGMENT

in

Case No. KI207/19

Applicant

The Social Democratic Initiative, New Kosovo Alliance and the Justice Party

Constitutional review of Judgments [A.A.U.ZH. No. 20/2019 of 30 October 2019; and A.A.U.ZH. No. 21/2019, of 5 November 2019] of the Supreme Court of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral is submitted by the pre-election Coalition formed by the political parties NISMA Social Democratic ("NISMA"), the New Kosovo Alliance ("AKR") and the Justice Party ("PD") (hereinafter: the Applicant or the Coalition "NISMA-AKR-PD").

2. The Applicant is represented by Mr. Albert Maxhuni, from Vushtrri.

Challenged decisions

3. The Applicant challenges two Judgments of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), namely the Judgment [AAUZH. No. 20/2019] of 30 October 2019 and the

Judgment [AAUZH. No. 21/2019] of 5 November 2019 (hereinafter referred to jointly: the challenged decisions).

Subject matter

4. The subject matter is the constitutional review of the abovementioned decisions of the Supreme Court, whereby, according to the allegation, the Applicant's rights guaranteed by Article 7 [Values]; paragraph 1 of Article 31 [Right to Fair and Impartial Trial] and Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR) have been violated.

5. The Applicant also requests the imposition of an interim measure which would prohibit certification "*[...] of the elections [of 6 October 2019] until a final decision [...] regarding the main request*" of the case in question.

Legal basis

6. The Referral was based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 19 November 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 20 November 2019, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Radomir Laban and Remzije Istrefi-Peci.

9. On 21 November 2019, the Court notified the Applicant's representative, Mr. Albert Maxhuni, about the registration of the Referral and requested him to submit a signed power of attorney through which he certifies that he is authorized to submit the Referral

to the Court and that he represents the Applicant in the proceedings before the Court.

10. On the same date, i.e 21 November 2019, the Applicant's representative submitted the power of attorney for representation of the Coalition "NISMA-AKR-PD" in the proceedings before the Court.

11. On 25 November 2019, the Applicant submitted a supplementation to the Referral requesting the Court that, in addition to the initial request for constitutional review of Judgment [AAUZH. No. 20/2019] of 30 October 2019 of the Supreme Court, the constitutionality of the Judgment [AAUZH. No. 21/2019] of 5 November 2011 of the Supreme Court is also assessed. In his supplementary request, he stated that: *"the reasons for complaint, legal-constitutional basis, constitutional arguments and the request for review [...] remain the same as in our referral submitted on 19.11.2019"*.

12. On 25 November 2019, the Court sent a copy of the Referral and a copy of the supplementation to the Referral to the following public institutions: the Supreme Court, the Election Complaints and Appeals Panel (hereinafter: the ECAP), and the Central Election Commission of (hereinafter: the CEC).

13. On 25 November 2019, the Court notified the VETËVENDOSJE Movement! (hereinafter: the LVV), in the capacity of the interested party, about the registration of the Referral and its supplementation and invited it to submit its comments regarding the referral in entirety, if any, within 7 (seven) days from the day of receipt of the notification letter of the Court.

14. On 2 December 2019, within the deadline set by the Court, the LVV submitted its comments to the Court.

15. On 5 December 2019, the Court sent to the Applicant a copy of the comments received from the LVV and invited it to submit its comments regarding the comments in question, if any, within 7 (seven) days from the date of receipt of the Court's letter. Within the set deadline, the Court did not receive any additional comments from the Applicant.

16. On 5 December 2019, the Court also notified the Supreme Court, the ECAP and the CEC about the receipt of comments from the interested party LVV and sent them a copy of the comments received, for their information.

17. On 23 December 2019, the Court requested an explanation from the CEC regarding the authorization submitted to the Court by the Applicant. More specifically, the Court requested the CEC to clarify that: (i) what entities constitute the Coalition "NISMA-AKR-PD", registered under number 122; (ii) who is the President, namely the person authorized to represent the Coalition in question; and (iii) when the Coalition in question has been certified for the elections of 6 October 2019.

18. On 24 December 2019, the CEC submitted the requested clarifications to the Court together with the accompanying documentation. On that occasion, the CEC informed the Court that: (i) The "NISMA-AKR-PD" Coalition consists of the Social Democratic NISMA, the New Kosovo Alliance and the Justice Party; (ii) President of the Coalition NISMA-AKR-PD is Mr. Fatmir Limaj while the contact person on behalf of the Coalition NISMA-AKR-PD is Mr. Albert Maxhuni; and that (iii) the Coalition in question was certified by a CEC Decision on 9 September 2019.

19. On 18 November 2020, the Court considered the case and decided to postpone the decision on this case to another session.

20. On 10 December 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

21. On the same date, the Court voted unanimously that: (i) the Referral is admissible, (ii) the challenged decisions of the Supreme Court, namely Judgment [AAUZH. No. 20/2019] of 30 October 2019 and Judgment [AAUZH. No. 21/2019] of 5 November 2019 are not in compliance with Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 (Right to Free Elections) of Protocol No. 1 of the ECHR; and ECAP decisions [A. No. 375-2/2019 of 28 October 2019, and A. No. 381/2019 of 3 November 2019] are in compliance with Article 3 of Protocol No. 1 of the ECHR in conjunction with Article 45 of the Constitution.

Summary of facts

22. On 26 August 2019, the President of the Republic of Kosovo issued the Decree [No. 236/2019] on the appointment and announcement of early elections for the Assembly of the Republic of Kosovo (hereinafter: the Assembly), which were scheduled for the 6 October 2019.

23. On 9 September 2019, the "NISMA-AKR-PD" Coalition was certified as a Coalition which would run in the elections as an entity with No. 122.

24. On 6 October 2019, the elections for the Assembly were held.

Procedure after the announcement of the Final Results of the elections for the Assembly

***The facts of the case that led to the first challenged decision of the Supreme Court:* Judgment A.A.U.ZH. No. 20/2019 of 30 October 2019**

25. On 17 October 2019, the LVV filed a complaint with the ECAP against the CEC, requesting that the CEC be ordered to transfer 4639 packages to the Results Counting Center (hereinafter: the CRC) for counting another with ballot papers received by mail but not counted and not included in the final election results.

26. In the complaint, the LVV stated that on 16 October 2019, around 23:00 hrs, the counting of ballots by mail was completed and a total of 13,491 ballots were received with 11,922 postal deliveries. According to them, 4639 ballot packages received by mail from citizens living outside Kosovo are not included in the counting process. The LVV claimed to the ECAP that not counting these ballot packages that had arrived by mail constitutes a violation of Article 45 of the Constitution because it hinders the realization of *"the will of citizens living abroad"*.

27. On the same date, on 17 October 2019, the CEC filed a response to the LVV appeal. In response, the CEC stated that in meeting no. 50/2019 of the CEC of 12 October 2019, the Report regarding the voting process outside Kosovo was also discussed. This informative Report, according to the CEC, was prepared by the Department of Electoral Operations - Voter Service Division. The latter, in the Report stated that on 10 October 2019, in post no. 6, 4058 postal deliveries were received. The latter, according to the Report, were considered *"as deliveries received after the deadline of the postal voting period"*. The same Report found that postal deliveries were sent to Kosovo within the voting period, namely on 19, 20, 23, 25 to 30 September 2019 and in accordance with Article 96.2 of the Law on General Elections (hereinafter: the LGE) and item 4.4. of Election Rule no. 03/2013 on Out-of-Kosovo Voting (hereinafter: Election Rules for Out-of-Kosovo Voting), *"Votes out of Kosovo must be received by CEC, 24 hours before Election Day* [twenty-four (24) hours before 6 October 2019 - in the circumstances of the present case]". The CEC, through a second explanatory response to the appeal, confirmed that the above report was an informative

report and that the CEC has not made a decision at that meeting but requested from the above-mentioned Department that prepared the Report *"to implement the LGE namely Article 96.2 of the LGE and Rule 03/2013, Out-of-Kosovo Voting, item 4.4"*.

28. On 19 October 2019, the ECAP reviewed the above-mentioned complaint of the LVV, together with the response to the complaint submitted by the CEC, and by Decision [A. No. 375/2019], rejected it as inadmissible. The ECAP clarified that the LVV complaint should be treated as an "appeal" within the meaning of paragraph 8 of Article 3 of the ECAP Rules and Procedures because, according to the ECAP, *"in this case, such treatment is more adequate"*. The ECAP justified its decision to dismiss the appeal as inadmissible, stating that at this stage of the election process the appealing allegations of the LVV of not counting 4639 ballot packages *"can not be the object of assessment"* because *"the CEC has not yet made a decision on the counting of these ballots"*. Further, the ECAP clarified that it is not within the jurisdiction of the ECAP to make a decision on this issue at this stage of the process as the CEC had not yet made a decision but only reported in terms of information at its meeting of 12 October 2019. In the end, it was emphasized that the ECAP decides only on CEC decisions and not on other processes which have not resulted in a concrete decision.

29. Against the above-mentioned decision of the ECAP, theLVV filed an appeal with the Supreme Court.

30. On 25 October 2019, the Supreme Court, by Judgment [AAUZH. No. 19/2019] approved the appeal of LVV as grounded and annulled the Decision [A. No. 375/2019] of 19 October 2019 of the ECAP. The latter was ordered by the Supreme Court to review again the appeal of the LVV in reconsideration, which it had rejected for the first time as inadmissible.

31. On 28 October 2019, the ECAP, in accordance with the order of the Supreme Court, reconsidered the appeal of the LVV filed on 17 October 2019. In the reconsideration, the ECAP by Decision [A. No. 375-2/2019], rejected the LVV appeal as ungrounded [Clarification: the first time dismissed it as inadmissible - see paragraphs above].

32. The ECAP, in the reasoning of its decision, stated that between the parties to the proceedings, namely the LVV and the CEC, it is not disputed that 4639 packages of ballots were received from voters abroad, from 8 October 2019 until 11 October 2019, and that they were received after the election date of 6 October 2019. Also, according to

the ECAP, it is not disputed that these ballot packages were sent by voters outside Kosovo by mail to the state where they live, from 19 October 2019 to 30 October 2019. According to ECAP it is disoutable, *"only the issue of the validity of these ballot packages "*as the latter at the CEC *"were accepted after the legal deadline for receipt of ballot packages by voters outside Kosov[o] "*.

33. In this regard, the ECAP found that the allegations made by the LVV "*are unsustainable and unfounded in law*" because the CEC acted correctly when it did not forward to the CRC 4639 packages with contested ballots which are submitted out of the legal deadline. Regarding the legal deadlines, the ECAP referred to paragraph 2 of Article 96 of the LGE which stipulates that: "*An Out of Kosovo Vote should be received by the CEC prior to election day as determined by CEC rule*"; and item 4.4. of Election Rule No. 03/2013 which stipulates that: "*Votes out of Kosovo must be received by CEC, 24 hours before Election Day* ".

34. Further, the ECAP also considered as ungrounded the allegation of the LVV that by not sending to the CRC for counting the packages received after the legal deadline, Article 45 of the Constitution was violated. In this regard, the ECAP reasoned that Article 45 of the Constitution was not violated because *"by no action or decision has the CEC denied them the right to vote, since in order to exercise their constitutional right to vote and be elected, the rules on how this right can be exercised have been determined, as defined by Article 96 paragraph 2 of the LGE, and Article 4 paragraph 4 of the Election Rule no. 03/2013, of the CEC, which means that the same [votes from abroad] must reach the CEC, within 24 hours, before election day"*. The ECAP also stated that in this case *"we are not dealing with the election and participation rights, but we are dealing with non-compliance with legal deadlines, which deadlines [are] preclusive and cannot be changed or extended, but only are implemented as defined by law. As voters within Kosovo, who have a legal deadline to vote on the voting day when the Voting Centers are opened [...] as they voted in these elections on 06.10.2019, from 07:00 to 19:00, that according to Article 88 paragraph 2 of the LGE, no one can enter the Voting Center to vote after it is closed, as well as for voters outside Kosovo, is the legal requirement under Article 96 paragraph 2 of the LGE , that the ballot papers be accepted by the CEC, before the election day, that in this case, as it was stated above, 4639 ballot papers of voters outside Kosovo, were accepted by the CEC, after the legally determined deadline"*.

35. The LVV filed an appeal with the Supreme Court against the above-mentioned ECAP decision [A. No. 375-2/2019], of 28 October 2019. In their appeal, the LVV requested that the ECAP Decision be annulled as ungrounded and the CEC be ordered to count all 4639 ballot packages out of Kosovo.

36. The ECAP filed a response to the LVV complaint stating that it stands behind the findings stated in the challenged ECAP Decision and proposed that the LVV complaint be rejected as ungrounded.

37. On 30 October 2019, the Supreme Court by Judgment [A.A.U.ZH. No. 20/2019] (i) approved the appeal of LVV as grounded; (ii) modified the ECAP Decision [A. No. 375-2/2019] of 28 October 2019; and (iii) obliged the CEC "*to recount 4,639 ballot papers of voters outside Kosovo*".

38. The Supreme Court initially presented the facts of the case and then stated that "*the allegations of LVV, filed in the appeal against the challenged ECAP decision, are grounded, because the latter contains irregularities and therefore should have been modified*". Further, the relevant reasoning of the Supreme Court reads as follows:

> *"Article 96 paragraph 2 (LGE) stipulates that the vote through voting outside Kosovo must be accepted by the CEC before election day, as defined by the CEC rules, while Article 4 paragraph 4 of Election Rule no. 03/2013, it is determined that the vote outside Kosovo must be accepted by the CEC, 24 hours before the election day.*
>
> *The provision of Article 31 par. 1 of the Constitution [...], guarantees the equal protection of rights in the proceedings before courts, other state bodies and holders of public powers, while Article 32 of the Constitution guarantees that every person has the right to use legal remedies against the court and administrative decisions which violate his rights or interests in the manner prescribed by law. Article 54 of the Constitution also stipulates that everyone enjoys the right to judicial protection in case of violation or denial of any right under the Constitution or law, as well as the rights by effective legal remedies, if it is found that such a right has been violated.*
>
> *Article 22 of the Constitution [...] establishes the proper application of International Agreements and Instruments, in case of conflict, to legal provisions and other acts of public institutions, including the European Convention on Human Rights and the Protocols thereof, the Supreme Court of Kosovo finds that the*

legal conclusion of the ECAP that the appeal filed by the political entity [...] (LVV) is ungrounded, contradicts Protocol 1-Article 3 of the European Convention on Human Rights. This is due to the fact that by the conclusion of the ECAP that the submission of ballots for which an appeal has been filed, which were received after election day, of 06.10.2019, are out of time, therefore the latter cannot be processed as valid ballots , is contrary to the said article which guarantees the right to vote and the right to be elected. The principle of universal voting is very powerful and the state is very strictly required to justify the loss of votes by certain individuals or categories of persons.

Based on such a state of the case, it results in the legal conclusion that Article 96 par. 2 of the Law on General Elections of the Republic of Kosovo and Article 4 par. 4 of Election Rule no. 03/2013 are in conflict with Article 3 of Protocol 1 of the European Convention on Human Rights which includes the right to free elections, and in this case the voters through no fault of their own were deprived of the opportunity to express their opinion regarding the election of members of the Parliament of the Republic of Kosovo, the voters were denied the very essence of the right to vote, as guaranteed by Article 3 of Protocol 1 to the European Convention on Human Rights.

In the present case (as it appears from the challenged decision of the ECAP) the voters submitted the ballots by mail service on 19, 20, 23, 25 and 30 September 2019, in sufficient time to reach the CEC, however, these ballots arrived at the CEC from 08 to 11 October 2019. According to the assessment of the Supreme Court, the late arrival of these ballots does not affect their regularity and legality, since, on the one hand, these voters voted in a timely manner and through no fault their ballot papers did not reach the CEC before election day, and on the other hand, the ballot counting process was ongoing and this would not affect the regularity of the ballot counting process. On the contrary, the non-counting of these ballots, on a legal and constitutional basis, makes the whole process of counting the ballots in these parliamentary elections questionable".

***The facts of the case that led to the second challenged decision of the Supreme Court: Judgment A.A.U.ZH. No. 21/2019 of 5 November* 2019**

39. On 2 November 2019, following the publication of the first challenged Judgment of the Supreme Court [AAUZH. No. 20/2019 of 30 October

2019], the CEC had already been ordered by the Supreme Court to count 4639 ballot papers submitted out of the legal deadline provided by the LGE. The LVV filed another complaint with the ECAP - with a similar request. In the second complaint, the LVV stated that on 1 November 2019, about 17:00 hrs, at the CRC, during the counting of 4639 ballot packages, it was noticed that 1806 packages of ballot papers, despite the fact that their delivery date is in accordance with the legal deadlines published by the CEC, were not sent by the CEC Secretariat to the CRC for verification and counting on the grounds that these ballots arrived at the CEC on 17 October 2019. According to the LVV, the action of the CEC Secretariat was contrary to Judgment [AAUZH. No. 20/2019] of 30 October 2019 of the Supreme Court.

40. The CEC responded to LVV complaint and stated that *"The CEC Secretariat has verified the packages for 4639 ballot packages, which from the evaluation of these ballot packages, which from the evaluation of these packages has resulted that: 5,882 ballot packages have been evaluated as individualized (packages assessed with ballots as individualized, it turned out that within a package there could be more than one ballot). Of these 5,882 ballot packages rated as individualized, 4,670 packages were approved, which were sent to the Counting and Results Center, while 1,212 individualized ballot packages were rejected"*. Further, the CEC announced that, *"on 31.10.2019 was presented the Notification Report for the evaluation of ballot packages, according to the Judgment of the Supreme Court [...] A.A.U.ZH. No. 20/2019, of 30.10.2019. In this report, among others, in the meeting of 31.10.2019, held at 11:30, the CEC was informed that the Secretariat, on 17.10.2019, has withdrawn from post office number 6 in Prishtina, 1,806 packages of alleged ballot papers, and recommended to the CEC to decide whether or not to proceed with the evaluation of the 1,806 alleged ballot papers"*.

41. On 3 November 2019, the ECAP issued Decision [A. No. 381/2019] through which it rejected the complaint of LVV as ungrounded. Initially, the ECAP clarified that it is not disputed for the parties in the procedure that 1806 packages of ballots from voters outside Kosovo were received by the CEC on 17 October 2019, namely a few days after the elections of 6 October 2019. Also, it was not disputed that those ballots were submitted by voters outside Kosovo by mail from 19 September 2019 to 30 September 2019. According to ECAP, it is disputable *"only the question of the validity of these ballot packages, as regular and valid, since at the CEC, they were accepted after the legal deadline for the receipt of ballot packages by voters outside Kosovo"*.

42. The ECAP subsequently reasoned its decision to declare the LVV complaint as ungrounded, stating that the allegations "*are unstable and unfounded on law*" because the CEC acted correctly when it did not transfer the 1806 packages to the CRC. ballot papers received on 17 October 2019 because Article 96 paragraph 2 of the LGE provides that: "*An Out of Kosovo should be received by the CEC prior to election day, as determined by the CEC rules",* while Article 4 paragraph 4 of the Election Rule no. 03/2013, stipulates that *"Votes out Kosovo must be received by the CEC, 24 hours before Election Day".* It turns out that, according to the ECAP, all ballots were received after election day of 6 October 2019 and consequently *"the latter cannot be processed as valid ballots".*

43. The ECAP also stated that the LGE *"is a material legal and procedural law which explicitly and clearly, has defined the deadline when the ballot packages must arrive at the CEC, to be treated as valid (this deadline is 24 hours, before election day as defined by Article 96 paragraph 2 of the LGE and Article 4 of the Election Rule No. 03/2013), and that in this case we are not dealing with situations not defined by the LGE and the Election Rules, which could find mutatis mutandis the application of the provisions of the LGE. The Law on General Elections in the Republic of Kosovo is in accordance with the European Convention on Human Rights, namely with its additional protocols, more specifically Article 3.3 of this additional protocol, because this control provides obligations for states to provide mechanisms that enable citizens to exercise their right to vote or to be elected, while Article 96 of the LGE does not infringe such a right, but limits the time limit for receiving the ballot, and in this case Voters outside Kosovo have had sufficient time to exercise their right to vote. This right has been used by thousands of other voters abroad, within the deadlines set by law and the ballot packages of the latter, have been treated as valid.*

The Law on General Elections in the Republic of Kosovo has been rendered in compliance with the best practices of EU member states, where the vast majority of these states have determined that ballots must arrive before election day, while a minority of states have regulated in such a way that the ballots must reach the closing of the polling stations on election day. All this contributes to guaranteeing the integrity of the electoral process, as the receipt of ballot packages, after the legal deadline mentioned above undermines and violates the integrity of the election process. In this spirit are also the recommendations of the (...) Venice Commission, Code of Good Practice in Electoral Matters adopted on: 18-19 October 2002, which

provide: "Voting by mail would take place under a special procedure a few days before the election.

Acceptance and handling of ballot packages received after the deadline, in addition to violating the integrity of the electoral process, puts the CEC in a vicious circle from which it is difficult to get out, because it allows the CEC, in an optimal time, to announce the election result and does not delay the process of receiving ballot packages from voters abroad. This contradicts the intention of the legislator, as the legislator intended to set a legal deadline within which the process of receiving ballot packages should be concluded, as otherwise this would go to the infinity of concluding this electoral process".

44. With regard to LVV allegations of violation of Article 45 of the Constitution, the ECAP considered this allegation ungrounded because the CEC by no action or decision denied voters the right to vote. In order to exercise the constitutional right to vote and be elected, the rules on how this right can be exercised are defined, as established by Article 96.2 of the LGE and Article 4.4 of the Election Rule No. 03/2013 of the CEC. The deadline by law and rules was 24 hours before the election day.

45. Against the Decision [A. No. 381/2019] of the ECAP, the LVV filed an appeal with the Supreme Court proposing that the appeal be accepted and that the ECAP Decision be annulled as ungrounded and that the CEC be ordered to count all packages with ballot papers of voters outside Kosovo.

46. The ECAP submitted a response to the complaint stating that it stands behind the findings presented in the challenged ECAP Decision. The latter proposed that the LVV appeal be rejected as ungrounded.

47. On 5 November 2019, the Supreme Court by the Judgment [A.A.U.ZH. No. 21/2019] of (i) approved the appeal of LVV as grounded; (ii) modified Decision [A. No. 381/2019] of 3 November 2019; and (iii) obliged the CEC to count 1806 ballot papers outside Kosovo.

48. The Supreme Court initially clarified that: *"From the case file it results that it is not disputed that these ballot packages were withdrawn by the CEC Secretariat on 17.10.2019 from Post no. 6 in Prishtina, it means many days after 6 October, when the Parliamentary Elections were held in the Republic of Kosovo. It is also not disputed that these ballot packages were delivered by voters outside Kosovo, by mail in the country where they live, from 19.09.2019 until 30.09.2019. The*

fact whether these ballot packages are valid or not remains disputable since they arrived at the CEC after the legal deadline".

49. Subsequently, the Supreme Court reasoned its decision as follows:

"The fact remains that Article 96 paragraph 2 of the Law on General Elections (LGE) stipulates that the vote through voting out of Kosovo must be accepted by the CEC before election day, as determined by CEC rules, while Article 4 paragraph 4 of the Election Rule no. 03/2013, it is determined that the vote outside Kosovo must be accepted by the CEC, 24 hours before the election day.

However, the provision of Article 31 par. 1 of the Constitution [...], guarantees equal protection of rights in the proceedings before courts, other state bodies and holders of public powers, while Article 32 of the Constitution guarantees that every person has the right to use legal remedies against the court and administrative decisions which violate his rights or interests in the manner prescribed by law. Article 54 of the Constitution also provides that everyone enjoys the right to judicial protection in case of violation or denial of any right under the Constitution or law, as well as the rights by effective legal remedies, if such a right is found to have been violated.

Whereas Article 22 of the Constitution [...] defines the correct implementation of International Agreements and Instruments, in case of conflict, against legal provisions and other acts of public institutions, including the European Convention on Human Rights and its Protocols, therefore, the Supreme Court of Kosovo finds that the legal conclusion of the ECAP that the appeal filed by the political entity [...] (the LVV) is ungrounded, contradicts Protocol 1-Article 3 of the European Convention on Human Rights. This is due to the fact that with the conclusion of the ECAP that the submission of ballots for which an appeal has been filed, which were received after election day, of 06.10.2019, are out of time, therefore the latter can not be processed as valid ballots, is contrary to the said article which guarantees the right to vote and the right to be elected. The principle of universal voting is very strong and the state is very strictly required to justify the loss of votes by certain individuals or categories of persons.

Based on such a sitation of the matter, follows the legal conclusion that Article 96 par 2. of the Law on General Elections of the Republic of Kosovo and Article 4 par.4 of Election Rule no.

03/2013 are in conflict with Article 3 of Protocol 1 of the European Convention on Human Rights which includes the right to free elections, and in this case the voters through no fault of their own were deprived of the opportunity to express their opinion regarding the election of members of the Parliament of the Republic of Kosovo, the voters were denied the very essence of the right to vote, as guaranteed by Article 3 of Protocol 1 to the European Convention on Human Rights.

In the present case (as it appears from the challenged decision of the ECAP) voters outside Kosovo, 1806 packages of ballots were delivered to them by mail on 19.09.2019 until 30.09.2019, in sufficient time to reach the CEC, however, these ballots the CEC Secretariat withdrew in Post no. 6 in Prishtina on 17.10.2019. According to the assessment of the Supreme Court, the late arrival of these ballots does not affect their regularity and legality, since, on the one hand, these voters voted in a timely manner and through no fault of their own, their ballots did not reach the CEC before the day of elections, and on the other hand, that the ballot counting process has been ongoing and this would not have affected the regularity of the ballot counting process. On the contrary, the non-counting of these ballots, on a legal and constitutional basis, makes disputed the whole process of counting the ballots in these parliamentary elections, especially when until the announcement of the final results there is a possibility that the votes of all voters within as well as outside Kosovo, to be verified and numbered.

Therefore, the ECAP claims that the Law on General Elections is in line with the European Convention on Human Rights were rejected as ungrounded. These claims are ungrounded, not only for the reasons mentioned above, but also by the fact that the state has an obligation to provide a special mechanism so that citizens without any objective obstacles exercise their right to vote, while in the present case, such an obstacle of not arriving on time for the ballots at the designated destination, through no fault of the voters, and under the responsibility of the State, violates the ECHR".

Applicant's allegations

50. The Applicant, namely the Coalition "NISMA-AKR-PD" alleges that by the two challenged decisions, the Supreme Court has violated its rights guaranteed by Articles 7 [Values] of the Constitution, 45 [Freedom of Election and Participation] of the Constitution as well as Article 31

[Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. Thus, the Applicant alleges that article of the Constitution that speaks about "*values"* has been violated; Article of the Constitution which speaks about "*voting and participation rights*" as well as Article of the Constitution and the ECHR which guarantee "*the right to fair and impartial trial"*.

51. The Applicant alleges that the challenged decisions are *"arbitrary [in entirety] due to the presumptive interpretation of the constitutional provisions of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, of the role and position of constitutional norms regarding the freedoms and human rights guaranteed by the agreements and international instruments under this article, as well as arbitrary regarding the role and constitutional position of Article 3 of Protocol 1 [Right to Free Election] of [the ECHR] and "Protocol 1"*.

52. The Applicant, referring to the reasoning where the Supreme Court referred to Article 22 of the Constitution when deciding to base its decision on the Constitution and not on the LGE, states that from this interpretation it is clear that the Supreme Court *"does not understand that the constitutional provisions of Article 22 [...] have the same constitutional force as any other provision and that the function of this provision is not to authorize the avoidance of the application of the positive laws of Kosovo, but to oblige the State of Kosovo to guarantee the exercise of the freedoms and rights guaranteed by those international agreements and instruments referred to in that Article"*.

53. The Applicant argues that *"The Constitution does not authorize any other state public authority, including the Supreme Court, to circumvent or avoid the application of laws when they are in conflict with constitutional norms. In such a case, namely when the courts come to a conclusion that the law or norm they have to apply is unconstitutional, then they have the sole authority to initiate incidental review procedures, according to Article 113.8 [Jurisdiction and Authorized Parties] of the Constitution"*. Therefore, according to the Applicant*, "any doubt about the constitutionality of [the Law on General Elections] should have been sent to the Constitutional Court for incidental constitutional review, not to avoid its implementation, as the Supreme Court has acted arbitrarily"*.

54. The Applicant alleges that the Supreme Court has arbitrarily qualified as legal norms the norms and provisions of Article 3 of Protocol No. 1, as if they were norms of an international agreement ratified within the meaning of Article 19.2 of the Constitution. In this regard, the

Applicant refers to the case of Court KO95/13, stating that the Constitutional Court has clarified that the international agreements become part of the domestic legal system, which differs from Article 22 of the Constitution because this article constitutes the will of the sovereign of Kosovo, recognizing the status of constitutional provisions to the agreements referred to in Article 22 of the Constitution. The Applicant argues that *"the norms of Article 22 are norms of the Constitution and no one can assess whether a legal norm contradicts them, except the Constitutional Court"*.

55. The Applicant alleges that the second arbitrariness consists in the fact that *"The Supreme Court did not understand the legal nature of the norm in Article 3 of Protocol No. 1 to the ECHR. That article has nothing to do with the courts of the countries that are parties to the ECHR, but only with the member states. As such, this article imposes an obligation on the member states or parties to the ECHR to take all necessary measures to exercise the right provided for in it and has no self-enforceable nature, i.e. it cannot be enforced directly by the national courts because there is nothing to enforce it"*. In this regard, the Applicant states that *"Kosovo has fulfilled this obligation when it has introduced in its Constitution the provision of Article 45 and when it has issued the LGE, as well as when it has built all other accompanying institutional and financial infrastructure for the implementation of the obligation under Article 3 of the Protocol 1"*.

56. In this context, the Applicant alleges that the Supreme Court placed *"in the role of overseer of the ECHR"* emphasizing that the oversight role of the implementation of the ECHR has the ECtHR and never the national court. According to the Applicant, *"The Constitution in Article 53 [Interpretation of Human Rights Provisions] makes it an obligation for all public authorities, not the direct application of the ECHR, but the obligation to interpret its provisions according to the case law of the ECHR."* Therefore, the Applicant alleges that this was not done by the Supreme Court, which "*has arbitrarily exercised the function of overseer of the implementation of the ECHR at the level of Kosovo regarding the elections to the Assembly"*. The Applicant also alleges that the Supreme Court has *"examined the constitutionality of the LGE by taking as a measurement parameter the constitutional norm from Article 22 relating to the ECHR and its protocols"*.

57. The Applicant alleges that the provisions of the conventions contained in Article 22 of the Constitution are not self-executing, and they must be implemented through laws, in this case through the LGE and in this case the constitutionality of the LGE *"is presumed because it was issued on the basis of the Constitution and with the aim of enforcing*

the constitutional freedoms and rights related to elections, which are anchored in Article 45 of the Constitution". According to the Applicant, when the courts adjudicate according to the "constitution and law" in accordance with Article 102, paragraph 3 of the Constitution, this does not mean that *the courts interpret the constitution and let alone they can use it as a direct basis for decision-making"*.

58. The Applicant goes on by stating that *"the LGE and all other infrastructure built for the purpose of exercising constitutional rights under Article 45 of the Constitution exist and have been created to implement the international obligation of Kosovo under Article 3 of Protocol 1 and the task of the Supreme Court is the unique implementation of the law in concrete cases for the entire territory of Kosovo. This task is performed by every supreme court in the continental system and is known as the nomofilactic function of the supreme courts. [...] By performing this function through the unique interpretation of the LGE and other laws throughout the territory of Kosovo, the Supreme Court exercise the constitutionality and legal certainty at the national level"*. The Applicant states that this primary function of the Supreme Court, [...] was established in a Judgment of the Constitutional Court of Kosovo itself, citing case KI25/10 of the Court and emphasizing that in this case the Constitutional Court has made it clear that the Supreme Court can not choose what law or norm of Kosovo will implement or treat the bodies established by law as illegitimate bodies from a constitutional point of view.

59. The Applicant also alleges that the Supreme Court "*plays the role of legislator, because it annuls the deadlines set out in Article 96.2 of the LGE and the internal rules of the CEC, which deadlines are presumed to be constitutional"*. The Applicant further adds that *in doing so, the Supreme Court has arbitrarily imposed its time limits which are common and found in the various general laws governing judicial proceedings in Kosovo (administrative, civil and criminal proceedings). [...] These laws and these deadlines do not and cannot have any relevance in the LGE due to the fact that this is not about maintaining deadlines for individual judicial needs, but about the exercise of the constitutional election rights related to and exercised in the context of electoral political processes"*.

Allegations regarding the request for an interim measure

60. The Applicant requested the Court to impose an interim measure regarding the case. The Applicant states that the Referral is *prima*

facie grounded, so that failure to impose an interim measure may cause irreparable damage and is in the public interest.

61. Regarding the *prima facie* grounds of the merits of the case, the Applicant reiterates the allegations elaborated above regarding the merits of the case. He further states that the direct applicability of Article 3 of Protocol No. 1 of the ECHR *"has undermined the legal security of entities that ran in the elections of 6 October [...]. With this implementation, lost to the Applicant the regular votes of the citizens of Kosovo, affecting the increase of the electoral threshold and the loss of votes in proportion to this unconstitutional increase of the electoral threshold"*.

62. With regard to the irreparable damage and the public interest in imposing an interim measure, the Applicant states that *"the only institution that can prevent further arbitrariness is the Constitutional Court, which has the power to impose an interim measure prohibiting the certification of elections until its final decision on the main referral described above. [...] as seen from the reasoning above, the Applicant has sufficiently proved prima facie that the case has merit so that the imposition of an interim measure is in the public interest and prevents the creation of irreparable damage to the Kosovar parliamentary democracy, in particular for the rule of law in the process of forming the central bodies of the State of Kosovo"*.

63. The Applicant also states that the public interest would be protected by imposing an interim measure because it would contribute to the strengthening of constitutional democracy by guaranteeing the observance of the rules of the political game and constitutional norms that guarantee fair and pluralistic competition of various political ideas and projects.

64. With regard to irreparable damage, the Applicant added that *"The irreparable damage, meanwhile, would be prevented from being caused because the dignity of the vote of the citizen and the Assembly of Kosovo would be preserved, because any decision of the Constitutional Court that would find the unconstitutionality of the challenged Judgment would lead to the tarnishing of the electoral process and in causing additional problems in the redistribution of seats of deputies who may have taken the oath and sat in the seats of the Assembly of the Republic"*.

Final request of the Applicant

65. Finally, the Coalition "NISMA-AKR-PD", as the Applicant, requested the Court to: (i) declare the Referral admissible for review on merits; (ii) impose an interim measure; (iii) annul the challenged Judgments of the Supreme Court; and, (iv) order the Supreme Court to *"eliminate the unconstitutionality found in accordance with the reasoning of the Constitutional Court"*.

Comments submitted by the LVV

66. In its comments regarding the Applicant's allegations, the LVV exclusively raises the issue of exhaustion of legal remedies by the Applicant as a "necessary precondition" for the admissibility of the Referral before the Court.

67. In this regard, the LVV invokes Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) of the Rules of Procedure which stipulate that the Court may consider a referral against an act of public authority if the effective legal remedies defined by Law have been exhausted.

68. The LVV claims that *"the Applicants have failed to meet this necessary prerequisite by not exhausting the legal remedies that make such a referral inadmissible. Regarding this rule, as a precondition, in terms of exhaustion of legal remedies, the Constitutional Court has issued a number of Resolutions on Inadmissibility as a result of non-fulfillment of this requirement by the Applicants"*.

69. The LVV refers to case KI152/17 (see the case of the Constitutional Court Applicant *Shaqir Totaj*, Resolution on Inadmissibility of 17 January 2018) in which case the Constitutional Court found that *"the Applicant has not exhausted any legal remedy in his behalf, as a natural person or as "person who has legal interest", with ECAP or with Supreme Court, before filing the current Referral before the Constitutional Court."*

70. The LVV alleges that *"the authorized parties have not exhausted the legal remedies when challenging Judgment AA. UZH. No. 20/2019, in the Constitutional Court, for the fact that the pre-election coalition Nisma-AKR-PD have not file appeal with the Supreme Court against the decision of the ECAP in accordance with the electoral legislation in force, alleging certain constitutional violations. The Coalition Nisma-AKR-PD, as applicant, challenged Judgment AA.UZH. No. 20/2019, of the Supreme Court in the Constitutional Court, knowing that the parties in the proceedings in the Supreme Court were [the LVV] and the ECAP. Furthermore, in challenging the ECAP decision*

in the Supreme Court and in rendering Judgment AA.UZH. No. 20/2019, by the Supreme Court, the applicant is never mentioned. Thus, the Applicant during the election process and in accordance with Article 119 in conjunction with Article 122 and 118 par. 4 of the Law on General Elections, failed to appeal to the ECAP, then to the Supreme Court, within the set deadline, in order to gain the right to meet the precondition, such as the exhaustion of legal remedies for the review of a constitutional issue, by the Constitutional Court of the Republic of Kosovo".

71. The LVV also alleges that no public authority violated the constitutional rights of the Applicant, adding that the latter did not address the instances of the regular courts to prevent or correct the alleged violation of the Constitution. Regarding the principle of subsidiarity in this context, the LVV refers to the case of the ECtHR *Selmouni v. France* (see application no. 25803/94) as well as cases: KI48/18 (see the case of the Constitutional Court with Applicant *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 23 January 2019) and KI34/17 (see the case of the Constitutional Court with Applicant *Valdete Daka*, Judgment of 1 June 2017).

72. With regard to the interim measure, the LVV states that the Applicant could not *"at any single moment substantiate the request for interim measure with evidence, or to present facts which would create trust and conviction in the Constitutional Court, knowing that the applicants with their inactions failed to meet the admissibility criteria of the constitutional referral, regarding the non-exhaustion of legal remedies".*

73. Finally, the LVV proposes to the Court to declare the Referral in question inadmissible and to reject the Applicant's request for an interim measure.

Relevant constitutional and legal provisions

The European Convention on Human Rights

Article 3
(Right to free elections)

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Constitution of the Republic of Kosovo

Article 45
[Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.
2. The vote is personal, equal, free and secret.
3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.

Article 55
[Limitations on Fundamental Rights and Freedoms]

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".

Law 03 / L-073 on the General Elections of 5 June 2008, published in the Official Gazette on 15 June 2008 (including amendments of 29 October 2010, published in the Official Gazette on 16 November 2010)

CHAPTER XIV
OUT OF KOSOVO VOTING

Article 96

General Provisions

96.1 An eligible voter who is temporarily absent from Kosovo may vote for elections for the Kosovo Assembly if he or she has successfully applied for Out of Kosovo voting in accordance with the provisions of this law and CEC rules.
96.2 An Out of Kosovo Vote should be received by the CEC prior to election day as determined by CEC rule.

Election Rule No. 03/2013 – Voting out of Kosovo, in force from 2 July 2013

Article 1
General Provisions

This rule intends to determine manner of registration to vote from outside of Kosovo, receipt of the ballot, the voting and counting of ballots from out of Kosovo.

Article 4
Manner of Voting

[…]

4.3 After filling ballot for voting abroad, voter should send it by mail to one of the mailboxes set and publicly announced by the CEC, until the date determined by the CEC.

4.4 Votes out of Kosovo must be received by CEC 24 hours before Election Day.

Article 5
Counting of Ballots for voting outside of Kosovo

5.1 CEC-Secretariat will consider invalid and will not count the ballot that is sent from outside Kosovo voting:

[…]

(d) after the deadline set forth in Article 4.4 of this electoral rule.

Admissibility of the Referral

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

75. In this regard, the Court, by applying Article 113 of the Constitution, the relevant provisions of the Law regarding the procedure in the case foreseen in Article 113, paragraph 7 of the Constitution; and Rule 39 [Admissibility Criteria] and Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure shall examine whether: (i) the Referral was filed by authorized parties; (ii) the decisions of public authorities are being challenged; (iii) all legal remedies have been exhausted; (iv) the rights and freedoms which have allegedly been violated are specified; (v) the time limits have been respected; (vi) the Referral is manifestly ill-founded; and (vii) there is an additional admissibility requirement, pursuant to Rule 39 (3) of the Rules of Procedure, which is not met.

Regarding authorized parties

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

77. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which stipulates:

> *"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."*

78. Finally, the Court also refers to paragraph (a) of paragraph (1) of Rule 39 [Admissibility Criteria], of the Rules of Procedure which establishes:

> *(1) The Court may consider a referral as admissible if:*
> *(a) the referral is filed by an authorized party.*

79. With regard to the fulfillment of these requirements for the authorized parties, the Court notes that the Coalition "NISMA-AKR-PD" appears before the Court, which participated as a coalition and registered as such with the CEC to run in the elections of 6 October 2019 for the Assembly. The request was submitted by the authorized person of the Coalition in question, according to the authorization given by the President of the Social Democratic Party NISMA, as the list holder/leader of the Coalition "NISMA-AKR-PD".

80. The Court notes that in accordance with Article 21.4 of the Constitution, the Applicant also has the right to submit a constitutional complaint, invoking the constitutional rights that apply to legal entities, to the extent that they are applicable (see the cases of the Constitutional Court, the Applicant *Arban Abrashi and the Democratic League of Kosovo,* Judgment of 21 January 2019, paragraph 101; KI41/09, Applicant *AAB-RIINVEST University L.L.C.,* Resolution on Inadmissibility i 21 janarit 2010; of 21 January 2010; see also: case of ECtHR, *Party for a Democratic Society and Others v. Turkey*, No. 3840/10, Judgment of 12 January 2016).

81. In addition, and in this regard, the Court also notes that the ECtHR through its case law has found that the right to be elected within the meaning of Article 3 of Protocol no. 1 of the ECHR, the right that it is also guaranteed to political parties as legal entities and that they may complain irrespective of their candidates (see, for example, the case of the ECtHR, *Georgia Labor Party v. Georgia*, complaint no. 9103/04, Judgment of 8 July 2008, paragraphs 72-74 and other references mentioned in that decision).

82. In this regard, the Court notes that the Coalition "NISMA-AKR-PD", although they were not parties to the proceedings before the Supreme Court that resulted in the issuance of the challenged decisions, this Coalition has challenged the constitutionality of two decisions of the Supreme Court in the capacity of an interested party. The Applicant acquired the status of a party in the procedure at the moment when the decision of the Supreme Court, which was in favor of the request of LVV, and which had resulted in different decisions compared to the decisions of the CEC and ECAP, had the potential to influence in the passive electoral rights of this Coalition that are protected by Article 45 of the Constitution and Article 3 of Protocol No. 1 of the ECHR. The Court also notes the fact that apart from the submission of the Referral to the Constitutional Court, the Applicant had no other legal remedy available to challenge the decisions of the Supreme Court, which potentially, apart from the Applicant's rights, could also have an effect

on the rights of other entities, be they individuals, coalitions, political parties or similar.

83. Therefore, the Court finds that the Referral was submitted by an authorized party that has a direct interest in the constitutionality of the challenged decisions of the Supreme Court in terms of the protection of the rights and freedoms guaranteed by the Constitution and the ECHR.

Regarding the act of public authority

84. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above and Article 47 [Individual Requests] of the Law, which provide that "*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. […]*".

85. The Court also refers to paragraph (2) of Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure, which, *inter alia*, provides "*(2) A referral under this Rule must accurately clarify […] what concrete act of public authority is subject to challenge*".

86. In this regard, the Court notes that the Applicant challenge two acts of a public authority, namely two decisions of the Supreme Court: (i) Judgment A.A.U.ZH. No. 20/2019 of 30 October 2019; and, (ii) Judgment A.A.U.ZH. No. 21/2019 of 5 November 2019.

87. Accordingly, the Court concludes that the Applicant challenges acts of a public authority.

Regarding the exhaustion of legal remedies

88. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above, and paragraph 2 of Article 47 [Individual Requests] of the Law and item (b) paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure which foresee:

Article 47
[Individual Requests]

(…)

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

Rule 39
[Admissibility Criteria]

1. The Court may consider a referral as admissible if:

(...)

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.

89. The Court notes that paragraph 7 of Article 113 of the Constitution provides for the obligation to exhaust "*all legal remedies provided by law*". This constitutional obligation is also defined by Article 47 of the Law and item (b) of paragraph (b) of Rule 39 and applies both to natural persons and to legal persons, to the extent applicable.

90. In this regard, the Court must examine whether all legal remedies have been exhausted by the first Applicant, in the capacity of the Coalition NISMA-AKR-PD, with whom they participated in the elections of 6 October 2019.

91. The Court recalls that the LVV in its response to the Referral claims that the Applicant has not exhausted legal remedies as according to them they have not appealed to the Supreme Court*, "in accordance with the electoral legislation in force, with the allegation of certain constitutional violations*".

92. In this regard, the Court recalls that the authorized parties are entitled to challenge only individual acts of public authorities infringing upon their individual rights and only after the exhaustion of all legal remedies provided for in paragraph 7 of Article 113 of the Constitution (See, *mutatis mutandis*, case of the Constitutional Court, KI102/17, Applicant: *Meleq Imeri*, Resolution on Inadmissibility, of 10 January 2018, paragraph 20).

93. In the present case, the Court recalls that the decisions of the CEC and the ECAP, which preceded the challenged decisions, were in favor of the Applicant and that the Applicant did not consider itself a victim of those decisions in order to file an appeal with the Supreme Court. Consequently, the Applicant did not use any legal remedy against the

decisions of the CEC and the ECAP before the Supreme Court. Whereas, regarding the challenged decisions of the Supreme Court, as stated above, the Applicant did not have at his disposal any other legal remedy provided by law, before the Supreme Court or any other institution. Consequently, the allegation of LVV for non-exhaustion of legal remedies by the Applicant is ungrounded.

94. Therefore, in view of the above, the Court finds that the Applicant has exhausted all legal remedies to challenge the challenged decisions before the Court.

Regarding the accuracy of the Referral and deadline

95. In addition, the Court also examines whether the Applicant has met other admissibility criteria, further specified in the Law and the Rules of Procedure. In this regard, the Court first refers to Article 48 [Accuracy of Referral] and Article 49 [Deadlines] of the Law, which provide:

Article 48
[Accuracy of the Referral]

In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

Article 49
[Deadlines]

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. (...)

96. The Court recalls that the same requirements are further provided in items (c) and (d) of paragraph (1) of Rule 39 [Admissibility Criteria] and paragraphs 2 and 4 of the Rule 76 [Referral pursuant to Article 113.7 of the Constitution and Articles 46, 47, 48, 49 and 50 of the Law] of the Rules of Procedure.

97. As to the fulfillment of these requirements, the Court notes that the Applicant has clearly specified what fundamental rights and freedoms guaranteed by the Constitution and the ECHR have been violated and have specified the act of the public authority which he challenges in accordance with Article 48 of the Law and the provisions of the Rules of Procedure and has filed the Referral within the deadline of four (4)

months stipulated in Article 49 of the Law and the provisions of the Rules of Procedure.

98. Therefore, the Court finds that the Applicant has specified his Referral and submitted it within the legal deadline.

Regarding other admissibility requirements

99. Finally and after considering the Applicants' constitutional complaint, the Court considers that the Referral cannot be considered manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure and there is no other ground for declaring it inadmissible, as none of the requirements established in Rule 39 (3) of the Rules of Procedure is applicable in the present case. (see, *inter alia*, ECHR case *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144, see also, the case of the Constitutional Court KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, cited above, paragraph 115).

Conclusion regarding the admissibility of the Referral

100. The Court concludes that the Applicant: (i) is an authorized party; (ii) challenges two decisions of a public authority; (iii) has exhausted legal remedies as specifically elaborated above; (iv) has specified the rights and freedoms which it alleges to have been violated; (v) has submitted the referral within the time limit; (vi) the referral is not manifestly ill-founded; and that (vi) there is no other admissibility requirement which is not met.

101. Therefore, the Court declares the Referral admissible and will further examine its merits.

Merits of the Referral

102. The Court first recalls that the Applicant requests the constitutional review of the two challenged decisions of the Supreme Court, namely the Judgment [A.A.U.ZH. No. 20/2019] of 30 October 2019 and the Judgment [A.A.U.ZH. No. 21/2019] of 5 November 2019. The Applicant, Coalition "NISMA-AKR-PD", alleges that the Supreme Court, by these two decisions, has acted in violation of: (i) Article 7 [Values] of the Constitution; (ii) paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR; and, (iii) Article 45 [Freedom of Election and Participation] of the Constitution in

conjunction with Article 3 (Right to free elections), of Protocol no. 1 of the ECHR.

103. However, in addition to challenging the constitutionality of the challenged acts as a result of the alleged violations of the election rights and the right to a fair trial, the Applicant alleges that the Supreme Court, contrary to the Constitution, has decided to apply directly the international instruments of included in Article 22 of the Constitution and not Article 96.2 of the LGE and Article 4.4 of Election Rule No. 03/2013.

104. Therefore, before addressing the issues related to the alleged violations of election rights and the right to a fair trial in relation to the challenged decisions, the Court deems it necessary, as a preliminary issue, to address the issue that the Applicant raises regarding the status of international instruments contained in Article 22 of the Constitution in the legal system of Kosovo, as well as the fact whether the regular courts: *i)* have the right to directly apply the constitutional norms and/or international instruments provided for in Article 22 of the Constitution, as well as to interpret the legal norms in harmony and according to the obligations arising from the constitutional norms, or *ii)* if in such cases they have the obligation according to Article 113.8 of the Constitution, to refer the matter to the Constitutional Court whenever constitutionality of legal norms is raised.

Status of international instruments included in Article 22 of the Constitution in the legal system of Kosovo

105. The Court recalls that the Applicant alleges that the international instruments contained in Article 22 of the Constitution have the force of constitutional norms and differ from international agreements ratified by the Constitution, a procedure which is done through the adoption of the law on ratification of agreements.

106. The Court refers to Article 22 of the Constitution, regarding the direct application of international agreements and instruments, which specifies that: *"human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions […]".*

107. In this regard, the Court also recalls its case law where it stated that human rights and fundamental freedoms guaranteed by the

international instruments contained in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution are directly applicable and are part of the legal order of the Republic of Kosovo (see, *inter alia*, case no. KO162/18, Applicant: *President of the Assembly of the Republic of Kosovo*, Judgment of 19 December 2018, paragraph 36).

108. Consequently, under Article 22 of the Constitution, the Republic of Kosovo has not only acknowledged that the ECHR and other international instruments contained in Article 22 of the Constitution are directly applicable in its domestic legal order, but it has also provided by the Constitution that, in case of conflict, the ECHR, as well as the seven (7) other international instruments referred to in Article 22, have precedence over the laws and other acts of public institutions of Kosovo.

109. Furthermore, according to Article 53 of the Constitution, the courts of the Republic of Kosovo, all without exception, have the obligation to interpret "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*". This means that, in all instances when the Constitutional Court or the regular courts of the Republic of Kosovo interpret the human rights and freedoms guaranteed by the Constitution, the human rights standards set out in the case law of the ECtHR, should apply to these rights and freedoms when applicable. In the event of a conflict between the two, the standards set by the ECtHR in interpreting the ECHR will prevail.

110. Also, the case law of the ECtHR is a source from which derive rights of interpretation of human rights and freedoms in accordance with the way that case law is conducted - according to the concept that the ECHR is a "living document" under development. In practice, this means that, in addition to the fact that the citizens of the Republic of Kosovo may invoke specific articles of international instruments guaranteed by Article 22 of the Constitution, they may also invoke specific cases dealt with at the level of the ECtHR, in order to substantiate their requests for the protection of freedoms and human rights provided by the Constitution.

111. Therefore, in conclusion, despite the fact and the Applicant's allegation that Kosovo is not a signatory to the international instruments contained in Article 22 of the Constitution, according to the above, the Court reiterates its position that the rights and freedoms guaranteed by the international instruments referred to in Article 22 of the Constitution have the status of norms of constitutional rank and

are an integral part of the Constitution, in the same way as all other provisions contained in the Constitution.

The rights and obligations of regular courts in the field of direct application of constitutional norms

112. In this regard, the Court will answer the questions whether the regular courts have the right to i) directly apply constitutional norms and/or international instruments under Article 22 of the Constitution as well as to interpret legal norms in harmony and according to the obligations arising from constitutional norms, or ii) are obliged under Article 113.8 of the Constitution to refer the matter to the Constitutional Court whenever the question of the constitutionality of legal norms is raised.

113. The Court recalls that the Applicant, after arguing that human rights guaranteed by international instruments and contained in Article 22 of the Constitution are considered constitutional norms, with which interpretation the Court agrees, the Applicant continues his allegation that the constitutional norms are not self-enforceable and that constitutional norms, unlike ratified international laws and agreements, including human rights guaranteed by international instruments contained in Article 22 of the Constitution, are implemented only through laws. In this regard, the Applicant alleges that the regular courts are obliged to apply the laws and not directly the Constitution and its norms.

114. In this regard, the Applicant maintains that the regular courts *"are obliged"* to refer the matter to the Constitutional Court, in accordance with Article 113.8 of the Constitution, whenever it is considered that a law is not in compliance with the Constitution.

115. In this regard, the Court recalls that there are different practices in how the legal systems of other countries regulate the issue of constitutional review of legal norms. According to a study by the Venice Commission, the legal systems of the members of the Venice Commission are divided into certain groups when it comes to the issue of constitutional control of legal norms. Regarding the determination of which system of constitutional review is applied in different countries, the study states that the classification of a legal system as "diffuse" on the one hand, or as "concentrated" on the other hand is difficult and that , consequently, the nature of the legal system is determined by the material jurisdiction of specific courts within a given system (see more on this aspect, *Study on the Access of Individuals to Constitutional Justice, adopted by the Venice*

Commission at the 85th Plenary Session 17-18 December 2010, CDL-AD (2010) 039rev, page 12).

116. Based on the provisions of the Constitution of the Republic of Kosovo, the Court will further address *i)* the role of our regular courts in applying constitutional norms and whether regular courts can interpret constitutional norms; and *ii)* if the regular courts, when they consider that a legal norm is not in compliance with the Constitution, can avoid the application of a law that they consider unconstitutional/interpret it in accordance with the Constitution or in case the issue of constitutionality of legal norms is raised, they are obliged to refer the issue to the Constitutional Court according to Article 113.8 of the Constitution.

117. The Court will make this interpretation based on the concrete provisions of the Constitution of the country.

Whether the Constitutional Court is the only authority in the Republic of Kosovo to interpret the Constitution

118. The Court first clarifies the hierarchy of legal norms and the role of the regular courts in the direct application of constitutional norms, according to the provisions of the Constitution. In this regard, the Court first refers to Article 16 [Supremacy of the Constitution] which stipulates that: *"1. The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution. [...]"*.

119. The Court refers once again to Article 22 of the Constitution, regarding the direct application of international agreements and instruments using a similar wording as Article 16 of the Constitution, emphasizing that: *"human rights and fundamental freedoms guaranteed by the following international agreements and instruments* [included in Article 22 of the Constitution], *are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions*: *[...]"*.

120. From the abovementioned provisions of the Constitution, it is clear that the Constitution is the highest legal act in Kosovo and that all other legal norms must comply with it. Such a finding has already been expressed and supported by the case law of this Court. More specifically, in this respect the Court refers to its case law where it has found that the above-mentioned constitutional Articles also guarantee the principle of "*constitutional supremacy*", according to which the

Constitution, in hierarchical terms, stands at the top of the pyramid and is the source of all laws and sub-legal acts in the Republic of Kosovo. In the latter, the "*supremacy*" of the Constitution is also ensured through the application of a mechanism for controlling the constitutionality of laws and verifying their compatibility with the Constitution, always in the manner provided by the Constitution (see the case of the Constitutional Court KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, cited above, paragraph 182).

121. With regard to the role of the regular courts in the direct application of constitutional norms, the Court recalls the content of Article 102 [General Principles of the Judicial System] of the Constitution which provides that:

> *"1. Judicial power in the Republic of Kosovo is exercised by the courts.*
> *[...]*
> *3. Courts shall adjudicate based on the Constitution and the law.*
> *[...]."*

122. The Court also recalls Article 112 [General Principles] of the Constitution which establishes that:

> *"1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.*
> *[...]."*

123. The Court also refers to Article 21 [General Principles] of the Constitution which stipulates that:

> *"1. Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.*
> *[...]*
> *3. Everyone must respect the human rights and fundamental freedoms of others.*
> *[...]."*

124. Based on the constitutional provisions mentioned above, it results that the regular courts have the right and moreover the obligation to adjudicate in the exercise of their functions, first in accordance with the Constitution, and then in accordance with the law.

125. Also, given the hierarchy of legal norms explained above, that the Constitution is the highest legal act in Kosovo and that laws and other acts must be in compliance with the Constitution, the Court notes that regular courts are obliged to interpret the legal norms in accordance with constitutional norms.

126. In this regard, the Court recalls that the role of the regular courts in interpreting the Constitution does not affect the jurisdiction and powers conferred on the Constitutional Court under Article 112 of the Constitution, as the final authority for the interpretation of the Constitution and the compatibility of laws with the Constitution.

127. In this respect, the Court notes that the Constitutional Court under the Constitution is the final authority for the interpretation of the Constitution. The content of Article 112 of the Constitution, cited above, leads to the clear conclusion that the Constitutional Court is a public body with exclusive constitutional authority to finally interpret the Constitution and to finally interpret the compatibility of laws with the Constitution - which means that before it other public authorities can also engage in constitutional interpretation. However, the manner of interpretation, both in procedure and in substance, that other public authorities, including the regular courts, have made to the Constitution can always be challenged before the Constitutional Court. In those circumstances, the Constitutional Court will give the final interpretation by agreeing or disagreeing with the interpretation given to the Constitution in advance.

128. In this regard, the Court recalls its case law where it found that *"beyond the Constitutional Court, it is also a duty of the regular courts to interpret the fundamental rights and freedoms guaranteed by the Constitution when assessing the alleged violations. This obligation derives from Article 21 [General Principles] of the Constitution, according to which, among other things, fundamental human freedoms are the basis of the legal order of the Republic of Kosovo. Within these rights are those guaranteed by international agreements and instruments included in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution; and (ii) Article 102 [General Principles of the Judicial System] of the Constitution, according to which the courts adjudicate based on the Constitution and the law. Therefore, the rights guaranteed by the Constitution are protected by all judicial instances and the Constitutional Court, which based on Article 112 of the Constitution, is the final authority to assess the alleged violations by public authorities of fundamental rights and freedoms guaranteed*

by Constitution." (See the case of the Constitutional Court KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, cited above, paragraph 181.)

129. Thus, according to the interpretation of Article 102.3 of the Constitution, in conjunction with Article 112.1 of the Constitution as well as according to the case law of the Constitutional Court, the latter considers that the right and obligation to apply and interpret the Constitution is recognized to all courts of the Republic of Kosovo. The latter, including the Supreme Court as the highest judicial instance at the level of the Republic, have the obligation to interpret laws in accordance with the Constitution.

130. In conclusion, the Constitution recognizes the authority to interpret the Constitution as well as the authority to interpret laws in accordance with the Constitution to all courts and other public authorities in the Republic of Kosovo. However, the Constitutional Court is the only authority in the Republic of Kosovo with exclusive constitutional authority to repeal a law or legal norm as well as to make the final interpretation of the Constitution and the compatibility of laws with it.

Whether the regular courts are obliged to refer the issue of constitutionality of laws to the Constitutional Court in accordance with Article 113, paragraph 8 of the Constitution

131. In this regard, the Court also recalls the Applicant's allegation that "*when the courts come to a conclusion that the law or norm they have to apply is unconstitutional, then they have the sole authority to initiate incidental control procedures, according to Article 113.8 [Jurisdiction and Authorized Parties] of the Constitution".*

132. In the following, the Court will address the Applicant's allegation that the regular courts have the obligation, whenever the issue of constitutionality of legal norms is raised, to refer the case to the Constitutional Court under Article 113.8 of the Constitution, and not to avoid the application of a law they consider unconstitutional.

133. In this regard, the Court considers it necessary to interpret once more paragraph 8 of Article 113 of the Constitution, and the obligations arising from these provisions. Paragraph 8 of Article 113 of the Constitution stipulates that:

> *"The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to*

the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue".

134. The Court, for the purposes of addressing the Applicant's allegation, will dwell on the first part of paragraph 8 of Article 113 of the Constitution which states that:*" The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court [...]".*

135. According to this criterion, the Court notes that the Constitution clearly provides that regular courts *"have the right"* to refer issues regarding the constitutional compatibility of a law. However, the Constitution in no way obliges the regular courts to necessarily address the Constitutional Court whenever such a question may arise at the level of the regular court. This clearly means that the right of regular courts to refer cases to the Constitutional Court is a discretionary right and not a binding constitutional obligation. If it were an obligation, as the Applicant alleges, the Constitution would clearly provide for this as an obligation for the regular courts.

136. The Constitution stipulates that the regular courts have "the right", in case of a "doubt", but not the "obligation" to refer matters concerning the constitutional compatibility of a law to the Constitutional Court.

137. Consequently, the Court clarifies that, regarding the compatibility of legal norms with the constitutional norms, if a constitutional issue is raised in cases before the regular courts, according to Article 113.8 of the Constitution, and when the regular courts are not certain about the constitutionality of the legal norm, thus they have "doubts" about their constitutionality, they can refer the case to the Constitutional Court under Article 113.8 of the Constitution - but they have no constitutional obligation to do so. On the other hand, the Court may decide not to refer a case to the Constitutional Court when, in the present case, it may interpret that norm in accordance with the Constitution or apply the constitutional norm directly. In this case, the regular court that has the case before it, with sufficient and adequate reasoning, can directly apply the norm of the constitutional rank and set aside the norm of the legal rank for the concrete case before it.

138. However, the Court also notes that, based on the role of the Constitutional Court under Article 112 of the Constitution, in cases where the regular courts choose not to refer a case under Article 113.8 of the Constitution, it is for the Constitutional Court to act in in this case, to assess as a final authority, after the exhaustion of all effective

legal remedies provided by law, if the interpretation of constitutional norms made by the regular courts by their decisions, is in compliance with the Constitution. This means that the reasoning given by the regular courts for setting aside the norm of a legal rank in favor of applying the norm of a constitutional rank is of paramount importance due to the fact that such a decision-making must be convincing and accurate so that it can be finally confirmed by the Constitutional Court - if the case is brought before it.

139. It is important to note that the interpretation of constitutional norms, including the right of regular courts to decide in a particular case, to apply a legal norm in accordance with the constitutional norm and/or the direct application of the constitutional norm, should be distinguished from the right to repeal legal norms which are considered to be inconsistent with the Constitution. There is a profound and important difference, on the one hand, between the interpretation of a norm of the legal rank in line with a norm of the constitutional rank and/or the direct application of a constitutional norm; and, on the other hand, the "repeal" of a legal norm as a norm contrary to a constitutional norm, with *erga omnes* effect.

140. While the Constitution recognizes to the regular courts the power to interpret a legal norm in harmony with a constitutional norm and/or the direct application of a constitutional norm, the power to "repeal" legal norms as incompatible with the Constitution, has not been envisaged by the latter as a competence for the regular courts.

141. The Constitution of Kosovo has specifically provided for the procedure, manner and institution, which has exclusive constitutional authority to finally establish the unconstitutionality of a legal norm and its repeal in case it is contrary to the Constitution. This right has been assigned by the Constitution only to the Constitutional Court which can, after submitting a referral by an authorized party under Article 113 of the Constitution, finally establish the unconstitutionality of the norm and repeal the norm that is contrary to the Constitution, also determining the effects of such repeal.

142. In the light of the circumstances of the present case, the Court finds that the regular courts have a constitutional authority to apply a legal norm in accordance with the Constitution or to apply directly a self-enforceable constitutional norm, including the international conventions which are an integral part of the Constitution, in accordance with Article 22 of the Constitution. At the principle level, this means that the Supreme Court, in the present case, had the right to directly apply the ECHR norm. Whether the finding of the collision

in question is in accordance with the constitutional powers of the Supreme Court and whether its interpretation of the circumstances of the present case is correct, is under the authority of the Constitutional Court to finally decide.

143. Therefore, in the circumstances of the present case, the Constitutional Court must interpret and finally decide whether the challenged decisions of the Supreme Court are in compliance with Article 45 of the Constitution in conjunction with Article 3 of Protocol No. 1. of the ECHR.

144. This assessment will be made by the Court following this Judgment.

Compatibility of the challenged decisions of the Supreme Court with Article 45 of the Constitution in conjunction with Article 3 of Protocol No. 1 of the ECHR

145. In this regard, the Court will assess the constitutionality of the two challenged decisions of the Supreme Court, namely Judgment A.A.U.ZH. No. 20/2019 of 30 October 2019 and Judgment A.A.U.ZH. No. 21/2019 of 5 November 2019.

146. In making this assessment, the Court will first set out the obligations regarding the guarantee of the outside voting that Article 3 of Protocol No. 1 of the ECHR decides on the states that apply the Convention - always according to the interpretation given by the ECHR to this article. The Court will then apply those principles in the circumstances of the present case and make a concrete assessment of the constitutionality of the challenged decisions.

147. Finally, the Court will address the issue of the interim measure; will state the effects of this Judgment and will present the conclusions regarding this case.

General principles of Article 3 of Protocol No. 1 of the ECHR, in particular those relating to "voting from abroad", according to the case law of the ECtHR

148. In this regard, the Court first recalls the content of Article 3 of Protocol No. 1 of the ECHR which establishes as follows: *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"*.

149. The rights guaranteed by Article 3 of Protocol No. 1 of the ECHR are fundamental rights towards establishing and maintaining the foundations of an effective and valid democracy governed by the rule of law. However, these rights are not absolute. There is room for "implied limitations" and states should be given a wide margin of appreciation in this regard (see the case of the ECtHR, *Yumak and Sadak v. Turkey*, Judgment of 8 July 2008, paragraph 109, and references cited therein).

150. In this regard, the ECtHR has clarified that Article 3 of Protocol No. 1 differs from other rights guaranteed by the Convention and its Protocols as it is phrased in terms of the "obligation" of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people - rather than in terms of a particular "right or freedom". However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the ECHR as a whole, the Court has established that this provision also implies "individual rights", including "the right to vote and to stand for election" (passive aspect) (see *Mathieu-Mohin and Clerfayt v. Belgium*, 1987, §§ 48-51; *Ždanoka v. Latvia*, Judgment of ECtHR GC of 16 March 2006, paragraph 102; see, *mutatis mutandis,* cases of the Constitutional Court KI01/18, Applicant *Gani Dreshaj and AAK*, Judgment of 4 February 2019, paragraphs 99-102 where, among other things, the other interconnected principles of Article 3 of Protocol no. 1 of the ECHR to which the Court refers are explained).

151. The active and passive aspects of the vote include substantive and procedural guarantees. However, the Court notes that passive rights have been equipped by less protection through the ECtHR case law than active rights (see ECtHR case *Zdanoka v. Latvia*, No. 588278/00, Judgment of 16 March 2006, paragraph 105 -106). The ECtHR case law in relation to passive rights has largely focused on verifying the lack of arbitrariness in the domestic proceedings that may have resulted in disqualification of a natural or legal person to run in the election (see case of the Constitutional Court KI01/18, *Applicant Gani Dreshaj and Alliance for the Future of Kosovo (AAK)*, Judgment of 4 February 2019, and other references cited therein).

152. The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Nonetheless, these rights are not absolute. There is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Matthews*, cited above, § 63; *Labita*, cited above, § 201; and *Podkolzina v. Latvia*, no.

46726/99, § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision (see *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 61, ECHR 2005-IX, see also, cases of the Constitutional Court, KI01/18, Applicant *Gani Dreshaj and Alliance for the Future of Kosovo*; and KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo,* both judgments cited above).

153. The ECtHR has also clarified that as an article with special characteristics, Article 3 of Protocol No. 1 of the ECHR does not contain a list of legitimate aims which would justify the restriction of the exercise of the right guaranteed by this article. The latter also does not refer to the "legitimate aims" which are exhaustively set out in Articles 8 to 11 of the ECHR. As a result, the ECtHR has emphasized that states are free to invoke their specific "purposes" when restricting the exercise of this right, provided that such purposes are: (i) in accordance with the rule of law; and (ii) the general objectives of the Convention (see *Ždanoka v. Latvia*, cited above, paragraph 115).

154. The ECtHR has interpreted this article of the ECHR in a number of other election-related cases. However, in the following, the Court will focus on ECtHR cases that relate exclusively to "voting from abroad" - as a key issue in this election case before this Court.

155. Among the key cases of the ECtHR discussing the issue of voting from abroad is the case of *Sitaropoulos and Giakoumopoulos v. Greece* (see Application No. 42202/07, ECtHR Judgment of 15 March 2012 - see also cases of other ECtHR cited there). Although this case is not identical in facts to the case before the Court; however, the principles set out there with regard to voting from abroad stand and, *mutatis mutandis*, may be applied to the circumstances of the present case in the light of the conclusion of what obligation Article 3 of Protocol no. 1 of the ECHR imposes on the states in relation to voting from abroad. According to the interpretations of the ECtHR in this case and several other cases, Article 3 of Protocol no. 1 of the ECHR does not oblige states to establish a system that ensures the exercise of the right to vote for non-resident citizens (for additional details see: ECHR Guide to Article 3 of Protocol No. 1 to the ECHR (also available in Albanian and Serbian), updated on 30 August 2020, pages 10-13, the cases cited there and specifically the section entitled "3. *Organizing elections abroad for non-residents"*).

156. Case *Sitaropoulos and Giakoumopoulos v. Greece* (cited above) was submitted to the ECtHR by three Greek nationals who alleged that the inability for them to vote in parliamentary elections in Greece from their country of residence (Strasbourg, France - where they lived and worked in the Council of Europe organization) consisted of disproportionate interference with the exercise of their right to vote under Article 3 of Protocol No. 1 of the ECHR. So they were Greek citizens residing in France and were unable to exercise their right to vote abroad for parliamentary elections in Greece. The inability of the Applicants to exercise this right was considered a violation of Article 3 of Protocol No. 1 of the ECHR. As will be explained below, the ECtHR found no violations in this case, concluding that not providing the opportunity to vote externally (although encouraged by the Council of Europe bodies) does not violate the essence of the right to vote.

157. In assessing this specific allegation, the ECtHR cited applicable case law, applicable international law and presented research on the comparative law of Council of Europe countries. This research showed that thirty-seven (37) Council of Europe member states enable, in principle, voting from abroad- either through external polling stations or by mail. Seven (7) Council of Europe member states do not allow any form of voting from abroad. In most countries that allow voting from abroad, there is a preliminary administrative procedure through which interested persons must appear and register - based on the legal deadlines set by the states that allow this form of voting (see the case of the ECtHR: *Sitaropoulos and Giakoumopoulos v. Greece*, cited above, paragraphs 39-45).

158. The ECtHR further cited Resolution 1459 (2005) of the Parliamentary Assembly of the Council of Europe on the "lifting of restrictions on the right to vote", which specifically states that: *"7. Given the importance of the right to vote in a democratic society, the member countries of the Council of Europe should enable their citizens living abroad to vote during national elections bearing in mind the complexity of different electoral systems. They should take appropriate measures to facilitate the exercise of such voting rights as much as possible, in particular by considering absentee (postal), consular or e-voting, consistent with Recommendation Rec(2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting. Member states should co-operate with one another for this purpose and refrain from placing unnecessary obstacles in the path of the effective exercise of the voting rights of foreign nationals residing on their territories"*.

159. The ECtHR also referred to three materials published by the Venice Commission.

160. First, the ECtHR referred to the Code of Good Practice in Electoral Matters which states that "*the right to vote and to be elected may be accorded to citizens residing abroad* (paragraph *I.1.1.c.v.)*". The other relevant part of the Code in question regarding voting from abroad provides as follows: *"iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;"* (see item 3.2 of the Code of Good Practice in Electoral Matters).

161. Second, the ECtHR referred to the Venice Commission Study no. 352/2005 which presented a Report on the Electoral Law and Electoral Administration in Europe where the relevant part stated that:

> *"Voting rights for citizens abroad:*
> *57. External voting rights, e.g. granting nationals living abroad the right to vote, are a relatively new phenomenon. Even in long-established democracies, citizens living in foreign countries were not given voting rights until the 1980s (e.g. Federal Republic of Germany, United Kingdom) or the 1990s (e.g., Canada, Japan). In the meantime, however, many emerging or new democracies in Europe have introduced legal provisions for external voting (out-of-country voting, overseas voting). Although it is yet not common in Europe, the introduction of external voting rights might be considered, if not yet present. However, safeguards must be implemented to ensure the integrity of the vote... [...]*
> *152. Postal voting is permitted in several established democracies in Western Europe, e.g. Germany, Ireland, Spain, Switzerland and, for voters abroad, the Netherlands, Norway, and Sweden (CDL-AD(2004)012, Chapter III). It was also used, for example, in Bosnia and Herzegovina and the Kosovo in order to ensure maximum inclusiveness of the election process (CG/BUR (11) 74). However, it should be allowed only if the postal service is secure and reliable. Each individual case must be assessed as to whether fraud and manipulation are likely to occur with postal voting".*

162. Third, the ECtHR referred to the Venice Commission Study no. 580/2010 which presented a Report on out-of-country voting, in which it was stated as follows:

"91. National practices regarding the right to vote of citizens living abroad and its exercise are far from uniform in Europe.
[...]
98. To sum up, while the denial of the right to vote to citizens living abroad or the placing of limits on that right constitutes a restriction of the principle of universal suffrage, the Commission does not consider at this stage that the principles of the European electoral heritage require the introduction of such a right.
99. Although the introduction of the right to vote for citizens who live abroad is not required by the principles of the European electoral heritage, the European Commission for Democracy through Law suggests that states, in view of citizens' European mobility, and in accordance with the particular situation of certain states, adopt a positive approach to the right to vote of citizens living abroad, since this right fosters the development of national and European citizenship".

163. After reviewing these materials (to which this Court also refers), the ECtHR concluded that *"none of the legal instruments examined above forms a basis for concluding that, as the situation currently stands, States are under an obligation to enable citizens living abroad to exercise the right to vote".* The ECtHR further stated that: *"As to the arrangements for exercising that right put in place by the states that allow voting from abroad, there is currently a wide variety of approaches".*

164. Therefore, the ECtHR concluded that in this case *"it cannot be said that the very essence of the applicants' voting rights guaranteed by Article 3 of Protocol No. 1 was impaired in the instant case. Accordingly, there has been no breach of that provision."* (See *Sitaropoulos and Giakoumopoulos v. Greece,* cited above).

165. In this respect, the Court notes that, to date, at the level of the Council of Europe there is no binding obligation under which states are obliged to guarantee the right to vote from abroad. The ECtHR case law in the interpretation of Article 3 of Protocol No. 1 of the ECHR also does not provide for any obligation for states to enable voting from abroad. Even in the case when Greece did not enable this type of voting for the Applicants in the case cited above, the ECtHR did not consider that the essence of the right to vote was violated.

166. It finally follows from the documents of the Venice Commission and other bodies of the Council of Europe that the European electoral legacy so far does not necessarily require that such a right be secured by states. However, the states are encouraged to establish mechanisms

that provide opportunities for the voting from abroad. When it comes specifically to postal voting, it is constantly emphasized that states that allow that form of voting must ensure that "*the mail service is reliable and secure*" so that the integrity of the ballot is maintained in all circumstances. of the exercise of the right to vote from abroad for the states that allow this form of voting, the ECtHR has only pointed out that "*different approaches and ways are applied*" - without emphasizing that Article 3 of Protocol No. 1 of the ECHR provides for an obligation for states regarding the manner of organization or deadlines that may be set in the legislation of the respective states.

167. In this regard, the Court notes that in cases where the right to vote from abroad, by mail, is guaranteed by applicable law, then the states should ensure that to persons exercising this right by mail voting the guarantees embodied in Article 3 of Protocol no. 1 of the ECHR are respected.

168. The Court clarifies that case KI207/19 is not about the right to vote abroad as a concept and as a right in itself (as it was the case of the ECtHR elaborated above) - as such a right is already guaranteed by the applicable election law in the Republic of Kosovo. The latter belongs to the group of states that guarantee this right, as stated in the ECtHR Judgment cited above, which also mentions Kosovo (see *Sitaropoulos and Giakoumopoulos v. Greece*, paragraph 152). Case KI207/19 pertains to the legal conditions governing the procedural and practical aspects of exercising the right to vote by mail voting from abroad, and more specifically the period within which the votes from abroad must reach the CEC, and whether such a term violates the rights guaranteed by Article 3 of Protocol No. 1 of the ECHR.

169. We recall that the law applicable in the Republic of Kosovo, namely Article 96.2 of the LGE provides that: *"An Out of Kosovo Vote should be received by the CEC prior to election day as determined by CEC Rule."* Further, Article 4.4 of Electoral Rule no. 03/2013 provides that: *"Votes out of Kosovo must be received by CEC 24 hours before Election Day"*.

170. The Supreme Court, in both challenged decisions, has concluded that the legal deadline for receiving votes from abroad to the CEC - twenty-four (24) hours before election day - in the present case is "*in collision*" with Article 3 of Protocol no. 1 of the ECHR, as a norm of constitutional rank, therefore in this case has avoided the application of that deadline based on Article 3 of Protocol No. 1 of the ECHR.

Application of the principles in the circumstances of the present case

171. As noted above, the Court will further examine the compatibility of the challenged decisions of the Supreme Court with Article 45 of the Constitution in conjunction with Article 3 of Protocol No. 1 of the ECHR, taking into account the general principles regarding the voting from abroad.

172. In this regard, the Court must decide whether the Supreme Court has acted in accordance with its constitutional powers and in accordance with the aforementioned articles, when it decided that the legal deadline for receiving votes from abroad, set out in Article 96.2 of the LGE and Article 4.4 of the Election Rule No. 03/2013 is in collision with Article 3 of Protocol No. 1 of the ECHR.

173. In order to reach such a finding, the Court will further assess whether (i) Article 96.2 of the LGE in conjunction with Article 4.4 of Election Rule No. 03/2013 is in conflict with Article 3 of Protocol No. 1 of the ECHR; and, subsequently, the Court will assess whether (ii) the challenged decisions of the Supreme Court are in com0-liance with Article 45 of the Constitution in conjunction with Article 3 of Protocol No. 1 of the ECHR.

Whether Article 96.2 of the Law on General Elections in conjunction with Article 4.4 of Election Rule No. 03/2013 is in collision with Article 3 of Protocol No. 1 of the ECHR

174. The Court first recalls that the Supreme Court declared Article 96.2 of the LGE in conjunction with Article 4.4 of Election Rule No. 03/2013 as a norm of legal rank in collision or contrary to Article 3 of Protocol No. 1 of the ECHR, as a norm of constitutional rank.

175. With regard to the collision declared by the Supreme Court, the Constitutional Court recalls the ECtHR clarification that the ECHR does not oblige states to necessarily guarantee the right to vote from abroad for non-resident citizens.

176. However, despite the fact that Article 3 of Protocol No. 1 of the ECHR does not oblige states to definitely enable voting from abroad, the Republic of Kosovo is among the states that has decided to guarantee this right to its non-resident citizens. In cases where states guarantee a right of a non-absolute nature, they also have the right to determine the legal conditions for the exercise of the right in question.

177. The concept of "*implied limitations*" under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 of Protocol No. 1 is not limited by a specific list of legitimate aims, which may justify the restriction of the rights guaranteed by Article 3 of Protocol no. 1 of the ECHR, this means that the ECtHR *"does not apply the traditional test of "necessity" or "pressing social need" used in Articles 8-11 of the ECHR"* (see case of ECtHR, *United Democratic Party of Russia Yabloko and others v. Russia*, application no. 18860/07, Judgment of 8 November 2016, paragraphs 68 and 69 and other decisions cited therein).

178. In the abovementioned case, the ECtHR stated that in assessing compliance with Article 3 of Protocol No. 1 of the ECHR, the ECtHR has focused on two main criteria: (i) *"whether there was arbitrariness or lack of proportionality"*; and, (ii) *"whether the limitation has affected the free expression of the will of the people"*.

179. What the ECtHR seeks to provide is that: (i) the limitations presented do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; (ii) the limitations are imposed in pursuit of a legitimate aim; and, (iii) the means employed are not disproportionate. In particular, any condition or restriction imposed on the rights of Article 3 of Protocol no. 1 of the ECHR must not thwart the free expression of the people in the choice of the legislature. This means that the restrictions in question "*must reflect, or not run counter to the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage."* (See the ECtHR case, *Russian United Democratic Party Yabloko and others v. Russia,* paragraph 63.)

180. In this context, the Court recalls that at the local level, in addition to the ECHR, the provisions of the Constitution that regulate the manner in which the rights guaranteed by the Constitution are restricted are of equal importance. In this regard, the Court recalls the content of Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, based on which the right to vote may be restricted, as one of the absolute rights guaranteed by the Constitution.

181. The test of this article seeks to assess whether: (1) the restriction of the right is provided by law; (2) there is a legitimate aim intended to be achieved by that restriction; (3) there is a relationship of proportionality between the restriction of rights and the legitimate

aim which is intended to be attained (see Court cases: KO157/18, Applicant *Supreme Court of the Republic of Kosovo*, Judgment of 13 March 2019; KO54/20, Applicant *President of the Republic of Kosovo*, Judgment of 31 March 2020, paragraphs 197-198; KO61/20, Applicant *Uran Ismaili and 29 other deputies of the Assembly of the Republic of Kosovo*, Judgment of 1 May 2020). In further assessing these points, the Court will also take into account the above criteria by which the ECtHR assesses restrictions related to the voting rights.

(1) Whether the restriction of the right to vote was provided by law

182. As to whether the restriction of the right to vote from abroad was "prescribed by law", the Court recalls that public authorities enjoy a free margin of appreciation of assessing matters of general interest and covering various areas with specific laws.

183. The Court recalls that neither Article 3 of Protocol No. 1 of the ECHR nor Article 45 of the Constitution speak specifically about the right to vote from abroad or how that right could be restricted if guaranteed. What is clear is that these two articles do not prohibit the guarantee of voting from abroad, as a way of exercising the active aspect of the right to vote. Adjustments to the legal conditions of the right to vote from abroad, if it is guaranteed by law, the Constitution has allowed them to be made with norms of legal rank.

184. In this regard, the Court notes that the state of Kosovo, pursuant to Article 3 of Protocol No. 1 of the ECHR and Article 45 of the Constitution, through the LGE, has guaranteed the right to vote from abroad and by the same law has determined the criteria, conditions and deadlines for exercising this right. Regarding the issue of the legal deadline within which the votes from abroad must arrive, the LGE has determined that the votes from abroad *"must be received by CEC 24 hours before Election Day"*.

185. In this regard, the Court finds that the obligation of a restrictive nature for all votes from abroad to arrive twenty-four (24) hours before the election date constitutes a restriction of the right to vote provided by law.

(2) Whether there is a legitimate aim intended to be achieved by the restriction in question

186. With regard to whether there was a "legitimate aim" intended to be achieved by restricting the right to vote from abroad, the Court recalls the content of the relevant articles of the LGE, which regulates this

particular way of exercising the right to vote and where the intended aims of limiting it can be identified.

187. Specifically, two of the thirteen main goals that the LGE aims to regulate: *"c) the recognition and the protection of the voting rights and the voter eligibility criteria";* and *"m) voting procedures, counting, and the announcement of results"* (see Article 1 of the LGE). The right to vote from abroad is also guaranteed to the person who *"b) he or she is residing outside Kosovo and left Kosovo on or after 1 January 1998, provided that he or she meets the criteria in applicable legislation for being a citizen of Kosovo"* (see Article 5.1 b) of the LGE). The out-of-Kosovo voting is guaranteed for *"An eligible voter who is temporarily residing outside of, or is displaced from, Kosovo is entitled to cast a ballot in an election according to procedures and deadlines as specified in this law"* (see Article 6.2 of the LGE).

188. In addition to the abovementioned provisions, the LGE has dedicated a separate chapter to the *"Out of Kosovo voting"* which sets out the general provisions, application for voting from abroad, confirmation and appeal process (see Chapter XIV of the LGE). Paragraph 1 of Article 96 states that: *"An eligible voter who is temporarily absent from Kosovo may vote for elections for the Kosovo Assembly if he or she has successfully applied for Out of Kosovo voting in accordance with the provisions of this law and CEC rules".* Further, paragraph 2 of Article 96 (which was declared by the Supreme Court as the norm in collision with Article 3 of Protocol No. 1 to the ECHR), stipulates that the vote through the voting from abroad must be received by the CEC *"prior to the election day"* (see Article 96 of the LGE) which as a provision is further specified by Article 4.4 of the Election Rule no. 03/2013 which states that the vote must arrive 24 hours before election day.

189. In this respect, the Court notes that the *ratio legis* of Article 96.2 of the LGE in conjunction with Article 4.4 of Electoral Rule no. 03/2013 is the guarantee of an efficient and effective process of counting the votes and concluding the election results within a reasonable time, including the votes from abroad so that the latter are considered legitimate to be counted and to be included in the final election result. This purpose restricts the right to vote from abroad by the deadline.

190. The Court recalls that according to the case law of the ECtHR, restrictions on the right to vote are in accordance with Article 3 of Protocol No. 1 of the ECHR if they are in accordance with: (i) the principle of rule of law; and (ii) the general objectives of the ECHR.

191. In this respect, the Court notes that even Article 45 of the Constitution does not specifically state legitimate aims on which the right to vote may be restricted. Therefore, the restriction of this right can be done if it is in compliance with Article 55 of the Constitution and if the restriction in question respects the principle of rule of law and the general objectives of the ECHR and the Constitution of the Republic of Kosovo.

192. The establishment of legal conditions and respective deadlines for exercising the right to vote are necessary to establish an effective and efficient system of elections at central and local level. In this regard, the Court considers that the intentions expressed through the LCP to regulate voting procedures from abroad with respective deadlines in the light of guaranteeing an electoral process where votes arrive within a certain time and the electoral counting process begins and ends within a certain deadline - are necessary and legitimate legal restrictions.

193. The Assembly as a legislator has considered that this is an appropriate, necessary and reasonable term. The Assembly is in the best position to decide on such a regulatory aspect and to analyze in terms of public policies what deadlines ensure an efficient and effective electoral process that enables the free expression of the will of the people. It is the Assembly that through laws has the authority to set the deadlines that it considers to preserve the integrity of the vote and the entire electoral process. In case it is necessary to change the legal norm that sets the deadline, then the existing legislative mechanisms can be used to push forward a process of eventual change. However, although the Assembly as the legislative body is the one that decides on the legal framework, including the deadlines for voting from abroad, all issues regulated by law must always be in accordance with the Constitution.

194. Therefore, the Court emphasizes that in the circumstances of the present case there is no argument in front of it that would prove that the conditionality of the validity of the vote from abroad with a specific deadline within which it must reach the CEC - be a restriction that does not pursue a legitimate aim.

195. Therefore, the Court finds that in the circumstances of the present case the restriction of the right to vote by a specific time limit within which votes must reach the CEC manifests a legitimate aim towards the aim of guaranteeing an efficient and effective counting process; and concluding the election results within a reasonable time. The restriction in question is legitimate and is in line with the principle of

the rule of law and the general objectives of the ECHR and the Constitution.

(3) If there is a proportionality relationship between the restriction of the right to vote and the legitimate aim intended to be achieved by the restriction in question

196. With regard to whether there was a "proportionality" relationship between the restriction of the right to vote from abroad and the legitimate aim intended to be achieved through this restriction, the Court will assess whether the measure in question was proportionate to the legitimate aim pursued by the corresponding restriction.

197. In this regard, the Court notes that, in essence, the legitimate aim of the LGE norm setting the deadline for the arrival of votes from abroad 24 hours before election day was to conclude the electoral process and to announce the election results within a reasonable time. The question that remains is whether the deadline set to achieve this goal is a proportional interference measure or not.

198. In cases when the ECtHR assesses whether there was an interference with proportional voting rights or not, it first emphasizes the fact that *"numerous ways of organising and running electoral systems exist"*. These profound differences, *inter alia*, are observed *"in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic vision"*. This, according to the ECtHR, means that the proportionality of electoral legislation (and of any limitations on voting rights) must be assessed also in light of the circumstances of a given country (see *Shindler v. United Kingdom*, application no. 19840/09, Judgment of 7 May 2013, paragraph 102 and references cited therein).

199. In this context, the Court notes that the electoral system of the Republic of Kosovo allows for voting from abroad and restricts its exercise, *inter alia*, with appropriate deadlines. The purpose of the legislator is to set a legal deadline within which the process of receiving ballot packages from abroad must be concluded, as otherwise this could go to infinity of concluding the electoral process. As explained in the part of the general principles, all states that guarantee this right, determine the respective procedures and deadlines for exercising it.

200. The Court recalls that for states that guarantee the right to vote abroad by mail, the ECtHR has only stated that "*different approaches and ways apply*" - without noting that Article 3 of Protocol no. 1 of the

ECHR provides for an obligation for states as to the manner of organization or deadlines that may be set in the legislation of the respective states. Those states that guarantee this right must ensure that "*the postal service is reliable and secure*" so that the integrity of the vote is preserved. The ECtHR also noted that in most countries that allow voting from abroad, there is a preliminary administrative procedure through which the interested persons must appear and register - based on the legal deadlines set by the states that allow this form of voting (see *Sitaropoulos and Giakoumopoulos v. Greece*, cited above, paragraphs 39-45).

201. In applying this case law, the Court considers that the legal norm in question does not reflect any arbitrariness or lack of proportionality and the restriction of the right to vote by term, within which it must be accepted by the competent bodies, does not preclude free expression. of the will of the people. The deadline in question does not violate the essence of the right to vote and as such does not prevent or prevent non-resident voters, in the circumstances of the present case, from exercising their right within the legal deadlines and for their votes to be counted. and then included in the final result.

202. It is quite clear that there is an urgent need for the process of receipt of the votes from abroad to be regulated with specific deadlines so as not to allow the creation of a vicious circle of continuous receipt of votes and continuous counting of votes at the moment whenever they arrive. This would make it impossible to conclude and announce the final results. Therefore, the specific deadline set by the LGE constitutes a proportionate measure that contributes to ensuring the integrity of the electoral process and its effective completion.

203. The Court ultimately finds that the measure taken is proportionate to the aim pursued and does not diminish the right to vote to the point of damaging its substance. The restriction in question is proportionate and necessary to maintain the integrity and effectiveness of the electoral procedure established in order to identify the will of the people through universal suffrage.

204. Consequently, the Court concludes that the legal deadline set by the Assembly for reaching the votes from abroad by Article 96.2 of the LGE in conjunction with Article 4.4. of Election Rule no. 03/2013 was a restriction of the right to vote which was in compliance with Article 55 of the Constitution because the latter: (1) was provided by law; (2) had a legitimate aim pursued to be achieved by that restriction; and (3) there was a relationship of proportionality between the restriction of that right and the legitimate aim to be achieved by that restriction.

In the circumstances of the present case, the limitation by legal deadline of the right to vote (as a relative right and not an absolute right) was not arbitrary and has not affected the impossibility of free expression of the will of the people regarding their representatives in the Assembly.

Whether the challenged decisions of the Supreme Court are in compliance with Article 45 of the Constitution in conjunction with Article 3 of Protocol No. 1 of the ECHR and whether the reasoning of the Supreme Court is sufficient and adequate

205. The Court again recalls that the Supreme Court declared Article 96.2 of the LGE in conjunction with Article 4.4 of Election Rule No. 03/2013 as a norm of legal rank in collision or contrary to Article 3 of Protocol No. 1 of the ECHR, as a norm of constitutional rank.

206. In this regard, the Court should emphasize that the guarantees of Article 31 of the Constitution in conjunction with Article of the ECHR, in principle, on the basis of ECtHR case law, are not applicable in the election disputes (see, *inter alia*, case of the ECtHR, *Pierre-Bloch v. France*, Judgment of 21 October 1997, paragraph 50; see also case KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, cited above, paragraph 185). Matters involving electoral disputes fall outside the scope of Article 6 of the ECHR as long as they relate to "political rights" and consequently do not meet the criterion of being "civil rights and obligations" under paragraph 1 of Article 6 of the ECHR. (see the case of the ECHR, *Paunović and Milivojević v. Serbia*, Judgment of 24 May 2016, paragraph 75).

207. This does not mean that the decisions related to electoral disputes should not be reasoned. However, the reasoning of a court decision in the election disputes must be put in the context of Article 3 of Protocol no.1 to the ECHR and Article 45 of the Constitution. According to the ECtHR, the procedure for reviewing electoral disputes should include a "*sufficiently reasoned decision*" in order to "*prevent the abuse of power by the relevant decision-making authority"* (see case of the ECtHR, *Kerimova v. Azerbaijan*, no. 20799/06, Judgment of 30 September 2010, paragraphs 44-45; see also the case of the Constitutional Court KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, cited above, paragraph 185, and other cases and reports cited therein).

208. Therefore, in accordance with the abovementioned case law, the Court will assess the constitutionality of the two challenged decisions of the

Supreme Court in the light of the guarantees of Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR.

209. In this respect, the Court first recalls the fact that the two challenged decisions of the Supreme Court are almost identical, both in reasoning and in the conclusions reached. Consequently, the Court's analysis of both decisions will be shared.

210. The circumstances of the present case show that in this election case we are dealing with the right to be elected, namely the passive aspect of the right to vote which is aimed to be protected by the Applicant, the Coalition "NISMA-AKR-PD" (see the case of the Constitutional Court KI01/18, *Gani Dreshaj and the Alliance for the Future of Kosovo*, cited above, section explaining in detail the concept of the passive aspect of the right to vote, paragraphs 99-122).

211. The Court recalls that the Supreme Court repealed two ECAP decisions that did not allow the counting of two ballot packages that had arrived out of the legal deadline, replacing that stance with the stance that those votes, despite being received out of time, had to be counted.

212. With regard to the issue of the legal deadline within which votes must arrive from abroad, as a key issue in this case, the Court recalls that neither the Supreme Court nor the CEC or the ECAP had any dilemma about the clarity of the legal norm and the fact that that legal norm provided for the obligation to receive votes from the CEC one day before election day.

213. Consequently, in both challenged decisions the Supreme Court acknowledged that according to the applicable election legislation, all votes required to be counted should reach the CEC at least one day before election day of 6 October 2019. However, unlike the CEC and ECAP which insisted on the application of the legal norm in question, the Supreme Court considered that that legal norm is in "collision" with Article 3 of Protocol No. 1 of the ECHR. Consequently, the Supreme Court decided not to apply the legal norm of the LGE, but to directly apply Article 3 of Protocol no. 1 of the ECHR - thus allowing and ordering the CEC to count the votes received after the deadline set by law and to include them in the final result.

214. The Supreme Court had initially reasoned its decision-making in the two challenged decisions by invoking Articles 31.1, 32, 54 of the Constitution and Article 3 of Protocol no. 1 of the ECHR. From the reasoning in question, it is noted that the Supreme Court only cited the content of these articles without explaining anything else about

their applicability and relevance to the circumstances of the case and the conclusion reached on the collision of norms.

215. More specifically, the Court notes that the Supreme Court did not take into account the fact that Article 31 of the Constitution in principle does not apply to electoral disputes despite the fact that in another electoral case in 2019 the Constitutional Court had already emphasized this position of the ECtHR (see the case of the Constitutional Court KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, cited above, paragraph 185). Meanwhile, regarding Articles 32 and 54 of the Constitution, the Supreme Court did not give any argument as to how the right to legal remedies has been violated or how the judicial protection of the rights of any party has been violated..

216. The Supreme Court further cited Article 22 of the Constitution and based on the content of this article found that: "*the legal conclusion of the ECAP that the appeal filed by the political entity [...] (LVV) is ungrounded, conflicts with Protocol no. 1-Article 3 of the European Convention on Human Rights"*. According to the Supreme Court the ECAP conclusion that the ballots were untimely "*is contrary to the above article which guarantees the right to vote and the right to be elected"* because "*The principle of universal suffrage is very powerful and the state is very strictly required to justify the loss of votes by certain individuals or categories of persons"*.

217. Based on the aforementioned reasoning, the Supreme Court reached the conclusion that "*Article 96 par. 2 of the Law on General Elections of the Republic of Kosovo and Article 4 par. 4 of Election Rule no. 03/2013 are in conflict with Article 3 of Protocol 1 of the European Convention on Human Rights which includes the right to free elections, and in this case the voters through no fault of their own were deprived of the opportunity to express their opinion regarding the election of members of the Parliament of the Republic of Kosovo"* and that, consequently*, "the voters were denied the very essence of the right to vote, as guaranteed by Article 3 of Protocol 1 to the European Convention on Human Rights"*.

218. Finally, the Supreme Court held that "*the late arrival of [...] ballots does not affect their regularity and legality, since, on the one hand, these voters voted in a timely manner and through no fault their ballot papers did not reach the CEC before election day, and on the other hand, the ballot counting process was ongoing and this would not affect the regularity of the ballot counting process"*. On the contrary, according to the Supreme Court, "*the non-counting of these*

ballots, on a legal and constitutional basis, makes the whole process of counting the ballots in these parliamentary elections questionable".

219. The Court recalls that especially in cases where a decision of a lower instance is modified, the court that changes the preliminary decision has the obligation to provide a "*sufficiently reasoned decision*" so that its decision-making does not turn into an arbitrary decision, but to be based on convincing arguments and relevant reasoning that support the reached conclusions.

220. The Court considers that the reasoning of the Supreme Court and the conclusions reached on the basis of that reasoning do not meet the criteria of a sufficiently reasoned decision. In the circumstances of the present case, the Supreme Court has failed to reason why the ECAP positions were erroneous and inconsistent with the LGE, the Constitution and the ECHR. The Supreme Court has also failed to specifically reason why the legal deadline set by the LGE is contrary to Article 3 of Protocol no. 1 of the ECHR.

221. The reasoning cannot pass the adequacy threshold nor be considered non-arbitrary as the Supreme Court has not elaborated any of the following issues that were relevant and necessary to be clarified in the circumstances of the present case, such as: (i) what is meant by the "principle of universal suffrage" to which it invoked, how that principle relates to the right to vote from abroad, and how it has been violated in the circumstances of the present case; (ii) what are the obligations that Article 3 of Protocol no. 1 of the ECHR imposes on states regarding voting from abroad; (iii) what exactly makes the deadline set out in Article 96.2 of the LGE in conjunction with Article 4.4. of Election Rule 03/2013 to be the norm in collision with Article 3 of Protocol no. 1 of the ECHR.

222. In this regard, the Court notes that the Supreme Court has mentioned in particular some of the concepts of Article 3 of Protocol No. 1 of the ECHR - but did not elaborate on any of them in the light of the circumstances of the present case. The Supreme Court did not uphold its decision with any valid judicial or legal argument, international document, case law of the ECtHR, opinion/report of the Venice Commission or any other convincing reasoning that would justify and support its conclusions on possible collision.

223. First, with regard to the violation of the principle of universal suffrage, the Supreme Court held that the principle of universal suffrage "*is very powerful*" and that the state was strictly required to justify the loss of a vote by certain individuals or categories of persons. The Court recalls

that according to the Code of Good Practice in Electoral Matters prepared by the Venice Commission: *"Universal suffrage covers both active (the right to vote) and passive electoral rights (the right to stand for election). The right to vote and stand for election may be subject to a number of conditions [...].The most usual are age and nationality"* (see point 1. Universal suffrage, 1.1. Rule and exceptions, page 14). In the circumstances of the present case, the Court notes that this principle was not violated and that there was no loss of vote or denial of the right to vote but simply the correct application of the legal deadlines of the LGE. The concrete issue had nothing to do with the age or nationality of the voters but only with the deadline within which the votes must arrive in Kosovo. Therefore, the Court considers that the reasoning of the Supreme Court regarding this principle is deficient and has led to incorrect interpretation of this principle.

224. Second, as regards the obligations under Article 3 of Protocol no. 1 of the ECHR imposed on states regarding voting from abroad, the Supreme Court stated that this article "*includes the right to free elections*" and that voters were denied the "*essence*" of the right to vote. While the Court agrees with the finding that this article of the ECHR includes the right to free elections, the Court does not agree with the finding that in the present case the essence of the right to vote has been violated. This is due to the fact that such a finding is manifestly contrary to the case law of the ECtHR where it was emphasized that not allowing the non-resident Greek citizens to have the opportunity to vote abroad had not violated the essence of the right to vote. Consequently, the possibility of voting from abroad, but the conditioning of this right by setting a deadline within which the votes must arrive is a much smaller interference with the right to vote that can in no way be considered to have denied the "essence" of the right to vote in the present case (see *Sitaropoulos and Giakoumopoulos v. Greece*, cited above). Therefore, the Court considers that the reasoning of the Supreme Court regarding the essence of the right to vote is deficient and has led to an incorrect interpretation of this concept.

225. Third, as regards what exactly makes the deadline set out in Article 96.2 of the LGE in conjunction with Article 4.4. of Election Rule 03/2013 to be the norm in collision with Article 3 of Protocol no. 1 of the ECHR, the Supreme Court reasoned that these legal norms "*are in collision*" because "*the voters were deprived of the opportunity to express their opinion*" regarding the election of deputies of the Assembly. This, consequently, according to the Supreme Court, had denied the voters the essence of the right to vote guaranteed by Article 3 of Protocol No. 1 of the ECHR.

226. With regard to the erroneous finding of the Supreme Court that the essence of the vote has been denied, the Court invokes its reasoning above where this issue has already been clarified on the basis of the case law of the ECtHR. Meanwhile, regarding the fact that the voters were deprived of the opportunity to express their opinion regarding their representatives in the Assembly, the Court also considers that this finding of the Supreme Court is ungrounded and contrary to the interpretation of the ECHR according to case law of the ECtHR.

227. In the most classic case, the ECtHR considers that voters are denied the opportunity to express their opinion towards the election of their representatives when they have no opportunity at all to express themselves and vote. For example, in the case *Aziz v. Cyprus* (see application no. 69949/01, Judgment of 22 June 2004, paragraphs 26-30), the ECtHR found that the Applicant was a member of the Turkish Cypriot community living in the area of Cyprus controlled by the Government of Cyprus "*was completely deprived of the opportunity to express his opinion in the election of members of the Assembly of the country in which he was a citizen and in which he lived*". Consequently, due to the absolute impossibility of exercising the right to vote, the ECtHR had found a violation of the "essence" of the right to vote guaranteed by Article 3 of Protocol no. 1 of the ECHR. In fact, in this case, the ECTHR ordered the Government of Cyprus to undertake a reform through which it would implement the appropriate and necessary measures to ensure the right to vote for persons who could not exercise that right at all (see *Aziz v. Cyprus*, cited above, paragraph 43).

228. The case law of the ECtHR does not have a single case where a violation of the essence of the right to vote is found according to the reasoning and interpretation that the Supreme Court has made to the ECHR. Nor does the existing practice of the right to vote lead to the conclusion that the conditioning of the right to vote from abroad can be considered as a violation of the essence of the right to vote. Therefore, even in this respect, the reasoning of the Supreme Court is deficient, inaccurate and arbitrary because it invokes provisions of the ECHR as a way not to apply a legal norm without providing adequate support for the conclusions reached.

229. In addition, the Court also considers the ECAP decisions, as the first instance in electoral disputes, which the Supreme Court repealed without any convincing reasoning. As stated above, in cases where the second instance for electoral disputes repeals the decision-making of the first instance authority and replaces its reasoning with its own reasoning - the need arises for a clear and sufficient legal reasoning as

to why a completely opposite conclusion has been achieved. Only such a sufficient reasoning enables "*prevention of abuse of power by the relevant decision-making authority*" (see the cases cited above, *Kerimova v. Azerbaijan*, paragraphs 44-45; KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, paragraph 185).

230. In essence, the Court recalls that the ECAP considered that Article 96.2 of the LGE and Article 4.4 of Election Rule no. 03/2013 do not deny the essence of the right to vote because this constitutional right can be used by the voters from abroad, but that the legal norms in question only have "*established the rules on how this right can be exercised, [...] which means that the same [votes from abroad] must arrive at the CEC, within 24 hours, before election day"*. According to ECAP: *"As voters within Kosovo, who have a legal deadline to vote on the voting day when the Voting Centers are opened [...] as they voted in these elections on 06.10.2019, from 07:00 to 19:00 hrs, that according to Article 88 paragraph 2 of the LGE, no one can enter the Voting Center to vote after it is closed, as well as for voters outside of Kosovo, it is the legal requirement under Article 96 paragraph 2 of the LGE , that the ballot papers be accepted by the CEC, before the election day, that in this case, as it was stated above, 4639 ballot papers of voters outside of Kosovo, were accepted by the CEC, after the legally determined deadline"*.

231. Further, the ECAP also reasoned that: "*Law on General Elections in the Republic of Kosovo* [LGE] *is in accordance with the European Convention on Human Rights, namely with its additional protocols, more specifically Article 3.3 of this additional protocol, because this control provides obligations for states to provide mechanisms that enable citizens to exercise their right to vote or to be elected, while Article 96 of the LGE does not infringe such a right, but limits the time limit for receiving the ballot, and in this case Voters outside Kosovo have had sufficient time to exercise their right to vote. This right has been used by thousands of other voters abroad, within the deadlines set by law and the ballot packages of the latter, have been treated as valid"*.

232. Also, the ECAP reasoned that: "*The Law on General Elections in the Republic of Kosovo has been rendered in compliance with the best practices of EU member states, where the vast majority of these states have determined that ballots must arrive before election day, while a minority of states have regulated in such a way that the ballots must reach before the closing of the polling stations on election day. All this contributes to guaranteeing the integrity of the*

electoral process, as the receipt of ballot packages, after the legal deadline mentioned above undermines and violates the integrity of the election process. In this spirit are also the recommendations of the (...) Venice Commission, Code of Good Practice in Electoral Matters adopted on: 18-19 October 2002, which provide: "Voting by mail would take place under a special procedure a few days before the election".

233. In conclusion, the ECAP found that: "*Acceptance and handling of ballot packages received after the deadline, in addition to violating the integrity of the electoral process, puts the CEC in a vicious circle from which it is difficult to get out, because it allows the CEC, in an optimal time, to announce the election result and does not put deadline on the process of receiving ballot packages from voters abroad. This contradicts the intention of the legislator, as the legislator intended to set a legal deadline within which the process of receiving ballot packages should be concluded, as otherwise this would go to the infinity of concluding this electoral process*".

234. The Court notes that these arguments of the ECAP, the Supreme Court failed to challenge or prove them to be incorrect. The Supreme Court failed to prove, by any convincing argument, why this line of reasoning of the ECAP had to be replaced by a completely different line that was not in line with the LGE and the electoral practice so far.

235. Therefore, the Court finds that the Supreme Court has not provided sufficient legal and constitutional reasoning and that its decision-making in the circumstances of the present case was arbitrary and, consequently, contrary to the guarantees of Article 45 of the Constitution in conjunction with Article 3 of the Protocol no. 1 of the ECHR.

Request for interim measure

236. The Court recalls that the Applicant requested the imposition of an interim measure prohibiting certification *"[...] of the elections [of 6 October 2019] until a final decision [...] regarding the main request*" of the case in question.

237. On 10 December 2020, the Court declared the Referral admissible and found the violations specified in the enacting clause of this Judgment. This decision-making makes it further unnecessary to consider the request for an interim measure.

Effects of the Judgment of the Constitutional Court

238. The Court on the one hand declared both Judgments of the Supreme Court as decisions incompatible with Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR; whereas, on the other hand, the Court has declared both ECAP Decisions as decisions in compliance with the same articles. Consequently, the Court quashed the decisions of the Supreme Court and upheld the ECAP decisions. Finally, regarding the compliance of the deadline for receipt of votes from abroad set out in Article 96.2 of the LGE in conjunction with Article 4.4 of the Election Rule no. 03/2013, the Court found that this legal norm is not in collision with Article 3 of Protocol no. 1 of the ECHR.

239. In all cases where a violation of human rights and freedoms is found which cannot be completely repaired or returned to zero point when the violation did not exist, the question of the effect of the Judgment finding the violation in question arises.

240. In this regard, the Court recalls that in its case law to date the issue of the effect of the Judgment of the Court regarding the violation of Article 3 of Protocol no. 1 of the ECHR and Article 45 of the Constitution has not been clarified. The question of the effect of the decision-making was raised only for other articles of the Constitution and the ECHR (see, in this regard, the Judgment of the Constitutional Court in case KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020, paragraphs 149-151 where, among other references, cites the case of the ECtHR, *Kingsley v. the United Kingdom*, Judgment of 28 May 2002, paragraph 40; KI10/18, Applicant *Fahri Deqani*, Judgment of 8 October 2019, paragraphs 116-120; KI108/18, Applicant *Blerta Morina*, Resolution on Inadmissibility of 1 October 2019, paragraph 196).

241. In the above-mentioned decisions, the Court has, in essence, clarified that although it *"has no legal authority to determine any form or manner of compensation in cases where it finds a violation of the relevant constitutional provisions";* such an aspect does not imply that the individuals () *"have no right to seek redress from the public authorities in the event of finding of a violation of their rights and freedoms under the laws applicable in the Republic of Kosovo"*.

242. The above cases of the Court differ from the present case in terms of the facts, the issues dealt with, the allegations raised and the articles dealt with. However, the stated principles also apply in cases when the Court finds a violation of Article 3 of Protocol no. 1 of the ECHR in

conjunction with Article 45 of the Constitution. This confirmation is also found at the level of the ECtHR.

243. In this respect, the Court refers specifically to case *Paunović and Milivojević v. Serbia*, where the ECtHR found a violation of Article 3 of Protocol No. 1 of the ECHR on the grounds that "*the termination of the Applicant's mandate [elected deputy of the Assembly of Serbia] was made in violation of the Law on the Election of Deputies of the Assembly*". The revocation of his mandate as a deputy was considered by the ECtHR an act committed outside the applicable legal framework and as such was an unlawful revocation (see the case of the ECtHR: *Paunović and Milivojević v. Serbia*, application no. 41683/06, Judgment of 24 May 2016, paragraphs 61-66).

244. As to the effects of the Judgment, the ECtHR ruled on the issue of pecuniary and non-pecuniary damage.

245. With regard to the pecuniary damage, the Applicant deputy requested to be compensated 4,600.00 euro for the pecuniary damage caused which corresponded to his net salary and the allowances he could have received as a deputy (if his mandate had not been revoked) from 16 May 2006 to 14 February 2007. The ECtHR accepted the Applicant's request and ordered the Government of Serbia to pay the same amount to the Applicant on behalf of the pecuniary damage he had suffered as a result of the unlawful revocation of the mandate. (see case of *Paunović and Milivojević v. Serbia*, cited above, paragraphs 81-84).

246. With regard to non-pecuniary damage, the Applicant deputy requested compensation of 100,000.00 € for the non-pecuniary damage he allegedly suffered as a result of being denied the opportunity to exercise his acquired mandate as a deputy and as a result of the attacks and injustices he and his family had suffered. The ECtHR rejected the Applicant's request and stated in paragraph 84 specifically that: "*[...] the finding of a violation of Article 3 of Protocol No. 1 constitutes sufficient just satisfaction in respect of non-pecuniary damage and accordingly makes no award under this head*" (see case *Paunović and Milivojević v. Serbia,* cited above, paragrafi 84).

247. Next, following the above principles, the Court will clarify what are the effects of the Judgment in case KI207/19.

248. In this regard, the Court first emphasizes the fact that this Judgment cannot produce retroactive legal effect in relation to the ballot papers

which have already been counted by the CEC by order of the Supreme Court, given the fact that those votes have already been included in the final result of the elections of 6 October 2019 certified by the CEC on 27 November 2019. As stated above, the deputies of the VII legislature of the Assembly of the Republic of Kosovo were elected based on those results already confirmed. In this regard, the Court also notes that based on paragraph 4 of Article 103 [Storage of ballots and transportation of election material] the CEC by a decision, after the official certification of the election results, destroys the election materials, including ballots, in the appropriate time within sixty (60) days, unless otherwise specified by the ECAP.

249. Having said that, this does not mean that this Judgment is merely declarative and without any effect. There are at least three immediate effects of this Judgment; and an effect that this Judgment provides depending on the will of the Applicant.

250. The first effect concerns the interpretive constitutional clarifications that this Judgment conveys regarding the rights and obligations of the regular courts when they are confronted with legal norms that claim to be in collision with norms of a constitutional rank.

251. The second effect is the repeal of the two challenged decisions of the Supreme Court as incompatible with the Constitution and the ECHR and the upholding of two ECAP decisions as compatible with the Constitution and the ECHR. Through this repeal, namely upholding, this Judgment clarifies for the future that, while the Assembly upholds Article 96.2 of the LGE, all votes that reach the CEC after the legal deadline must be declared invalid and should not be included in the final election result.

252. The third effect is the clarification that in the circumstances of the present case there was no collision between the norm of legal rank (Article 96.2 of the LGE in conjunction with Article 4.4 of Election Rule no. 03/2003) and that of constitutional rank (Article 3 of Protocol No. 1 to the ECHR); and that, the Supreme Court has exceeded its constitutional powers by declaring the collision in question arbitrarily and without sufficient and adequate reasoning.

253. The fourth effect, which this Judgment enables but does not order, is the fact that the Applicant or other parties that may be affected by this Judgment, have the right to use other legal remedies available for further exercise of the rights in accordance with the findings of this Judgment.

Conclusions

254. Referral KI207/19 was submitted by the Coalition "NISMA-AKR-PD after the early elections to the Assembly of 6 October 2019. In particular, this case concerned the "Voting from Abroad" conducted by citizens of the Republic of Kosovo by mail service from various countries outside Kosovo.

255. The constitutional issue contained in the Referral in question is the compliance with the Constitution and the ECHR of the two challenged decisions of the Supreme Court, namely the Judgment [AAUZH. No. 20/2019] of 30 October 2019 and the Judgment [AAUZH. No. 21/2019] of 5 November 2019. Specifically, if the decision of the Supreme Court that the votes from abroad should be counted despite the fact that they had arrived at the CEC after the deadline of twenty-four (24) hours from the day of elections specified in Article 96.2 of the LGE in conjunction with Article 4.4. of Election Rule no. 03/2013, was contrary to: (i) Article 7 [Values] of the Constitution; (ii) paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR; and, (iii) Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 3 (Right to free elections), of Protocol No. 1 of the ECHR.

256. According to the facts of the case, the ECAP by Decisions [A. No. 375-2/2019 of 28 October 2019; and A. No. 381/2019 of 3 November 2019] concluded that the CEC, according to the LGE, should not count the packages received after the legal deadline nor include them in the final result. Meanwhile, afterwards, the Supreme Court annulled the decision-making of the ECAP and found that although the fact that the votes arrived after the legal deadline remains, the CEC should count those votes and include them in the final result. The Supreme Court considered that the legal norm that determines the deadline, namely Article 96.2 of the LGE and Article 4.4 of the Election Rule No. 03/2013 is a legal norm in "**collision**" with Article 3 of Protocol No. 1 of the ECHR and that consequently the CEC should be ordered to count the packages in question despite the fact that they arrived after the legal deadline. After the CEC implemented the challenged decisions of the Supreme Court, the election result certified by the CEC on 27 November 2019, includes also the votes counted from the contested packages that had arrived after the legal deadline.

257. The Applicant also alleged that the Supreme Court, contrary to the Constitution, decided to directly apply the international instruments contained in Article 22 of the Constitution and not Article 96.2 of the

LGE and Article 4.4 of Election Rule No. 03/2013. They also alleged that the regular courts do not have the right to directly apply the constitutional norms and/or international instruments provided for in Article 22 of the Constitution, as well as to interpret the legal norms in harmony and according to the obligations arising from the constitutional norms, as in such cases there is a binding obligation under Article 113.8 of the Constitution to refer the matter to the Constitutional Court whenever the question of the constitutionality of legal norms is raised.

258. The Court, while dealing with the Applicant's allegations, initially found that according to the interpretation of Article 102.3 of the Constitution, in conjunction with Article 112.1 of the Constitution and according to the case law of the Constitutional Court, the latter considers that the right and obligation to apply and interpret the Constitution, is recognized to all courts of the Republic of Kosovo and all public authorities in the Republic of Kosovo.

259. However, the Court strongly reiterated that the competence to "hold" the unconstitutionality of a legal norm and to "repeal" a legal norm as incompatible with the Constitution is the exclusive competence of the Constitutional Court. Thus, despite the fact that the Constitution recognizes the competence of regular courts to interpret a norm of legal rank in line with a norm of constitutional rank and/or the direct application of a norm of constitutional rank, this does not mean that the regular courts can ascertain or declare a legal norm as a norm contrary to the Constitution or the ECHR. Such a competence, of ascertaining unconstitutionality and repeal of a legal norm, is not foreseen by the Constitution as a competence of the regular courts. Such a right, the Constitution has assigned exclusively to the Constitutional Court which can, after the submission of a referral by an authorized party under Article 113 of the Constitution, repeal a legal norm that is contrary to the Constitution and determine the effects of such repeal.

260. As to the compatibility of the challenged decisions of the Supreme Court with Article 45 of the Constitution in conjunction with Article 3 of Protocol No. 1 of the ECHR, taking into account the general principles regarding the voting from abroad established by the ECtHR, the Court noted that although the time for decision-making in electoral disputes is relatively short and that the right to a fair trial under Article 31 of the Constitution and Article 6 of the ECHR do not apply to electoral disputes, this does not mean that decisions related to electoral disputes should not be sufficiently reasoned. According to the ECtHR, the procedure for reviewing electoral disputes must

include a "*sufficiently reasoned decision*" in order to "*prevent the abuse of power by the relevant decision-making authority*".

261. Following the application of these principles, the Court found that the reasoning of the Supreme Court and the conclusions reached on the basis of that reasoning were arbitrary and did not meet any of the criteria of a sufficiently reasoned court decision. This is due to the fact that the Supreme Court did not apply any relevant test of the court review nor did it elaborate on any of the following issues that were relevant and necessary to be clarified in the circumstances of the present case: (i) what is meant by the "principle of universal suffrage" which the Supreme Court referred to, how that principle relates to the right to vote from abroad and how the latter was violated in the circumstances of the present case; (ii) what are the obligations that Article 3 of Protocol no. 1 of the ECHR imposes on states regarding the voting from abroad; and (iii) what exactly makes the deadline set out in Article 96.2 of the LGE in conjunction with Article 4.4. of Election Rule 03/2013 to be a legal norm in collision with Article 3 of Protocol no. 1 of the ECHR.

262. In this regard, the Court noted and found that the Supreme Court failed to establish, in any way, how the ECAP decision-making was erroneous and why the ECAP line of reasoning should be replaced by a completely different line that was not in compliance with the LGE and the election practice so far. Consequently, the Court concluded that the Supreme Court did not provide sufficient legal and constitutional reasoning and that its decision-making in the circumstances of the present case was arbitrary and, therefore, contrary to the guarantees of Article 45 of the Constitution in conjunction with Article 3 of the Protocol no. 1 of the ECHR.

263. Furthermore, as regards the compliance of the legal norm which required that the votes from voting abroad must arrive at the CEC twenty-four (24) hours before election day, in order for them to be counted, the Court concluded that this restriction on the right to vote: (1) was a restriction provided by law; (2) there was a legitimate purpose aimed to be achieved by that restriction; and (3) there is a relationship of proportionality between the restriction of the right in question and the legitimate purpose aimed to be achieved. The Court also found that the time limit set out in Article 96.2 of the LGE in conjunction with Article 4.4 of Election Rule no. 03/2013, was not arbitrary and did not affect the impossibility of free expression of the will of the people regarding their representatives in the Assembly and as such was in compliance with Article 45 of the Constitution and Article 3 of Protocol No. 1 of the ECHR.

264. In conclusion, the Court **unanimously** found that: (i) the Referral is admissible for review on merits; (ii) the challenged decisions of the Supreme Court **are not** in compliance with Article 3 of Protocol No. 1 of the ECHR in conjunction with Article 45 of the Constitution, and as such the Court declares them invalid; (iii) ECAP decisions are in compliance with Article 3 of Protocol no. 1 of the ECHR in conjunction with Article 45 of the Constitution; (iv) the legal deadline set by the Assembly for arrival of the votes from abroad by Article 96.2 of the LGE in conjunction with Article 4.4. of Election Rule no. 03/2013 was a restriction of the right to vote which was in compliance with Article 55 of the Constitution because the latter: was provided by law; had a legitimate purpose to be achieved by that restriction; and there was a relationship of proportionality between the restriction of that right and the legitimate aim which aimed to be achieved by that restriction; and that, in the circumstances of the present case (v) the restriction of the right to vote (as a relative right and not an absolute right) by deadline has not been arbitrary and has not affected the impossibility of free expression of the will of the people with respect to their representatives in the Assembly.

265. With regard to the effects of this Judgment, the Court clarified that although its finding that the challenged decisions of the Supreme Court are not in compliance with Article 3 of Protocol no. 1 of the ECHR in conjunction with Article 45 of the Constitution has no retroactive effect on the announced election result in the circumstances of the present case, according to the reasons given; however, the Judgment in this case produces at least four important effects, as follows: (1) the clarification of the rights and obligations of the regular courts in cases where they are confronted with norms of legal rank which claim to be in collision with norms of constitutional rank; (2) the repeal of the two challenged decisions of the Supreme Court and the upholding of the two decisions of the ECAP so that, while the Assembly of the Republic of Kosovo upholds Article 96.2 of the LGE, all votes that reach the CEC after the legal deadline must be declared invalid votes and must not be counted or included in the final election result; (3) clarification that in the circumstances of the present case there was no collision between the norm of the legal rank and that of the constitutional rank and that, in this respect, the Supreme Court declared the collision in question in an arbitrary manner, exceeding its constitutional powers and without sufficient and adequate reasoning; and that (4) the finding of a violation enables the Applicant to consider the use of other legal remedies available for the further exercise of its rights in accordance with the findings of this Judgmen

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 10 December 2020, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Judgments [A.A.U.ZH. No. 20/2019 of 30 October 2019; and A.A.U.ZH. No. 21/2019 of 5 November 2019] of the Supreme Court of the Republic of Kosovo, are not in compliance with Article 3 of Protocol No. 1 of the European Convention on Human Rights in conjunction with Article 45 of the Constitution of the Republic of Kosovo;

III. TO HOLD that Decisions [A. No. 375-2/2019 of 28 October 2019; and A. No. 381/2019 of 3 November 2019] of the Election Complaints and Appeals Panel are in compliance with Article 3 of Protocol No. 1 of the European Convention on Human Rights in conjunction with Article 45 of the Constitution of the Republic of Kosovo;

IV. TO REJECT the request for interim measure;

V. TO NOTIFY this decision to the Parties;

VI. TO PUBLISH this decision in the Official Gazette in accordance with Article 20 (4) of the Law;

VII. TO DECLARE that this decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Arta Rama-Hajrizi

KO95/20, Applicant, Liburn Aliu and 16 other deputies of the Assembly of the Republic of Kosovo, Constitutional review of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo, of 3 June 2020, on the Election of the Government of the Republic of Kosovo

KO95/20, Judgment adopted on 21 December 2020

Keywords: *institutional referral, loss of mandate, criminal offense, majority of all deputies, admissible referral*

The Referral was based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 42 [Accuracy of the Referral] and 43 [Deadline] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, as well as Rule 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo. The subject matter of the Referral was the constitutional review of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo, of 3 June 2020, on the Election of the Government of the Republic of Kosovo, which according to the Applicant's allegation, was not in compliance with paragraph 3 of Article 95 [Election of the Government], in conjunction with subparagraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies] of the Constitution.

In the title – **CONCLUSIONS** – of this Judgment, the Court summarized the essence of the case and stated the following:

On 28 March and 20 August 2019, Etem Arifi was sentenced by a final Judgment of the Court of Appeals to one year and three months of imprisonment. On 6 October 2019, the early elections were held for the Assembly of the Republic of Kosovo. Etem Arifi ran and was elected a deputy of the Assembly of the Republic of Kosovo. On 27 November 2019, the CEC certified the election results and Etem Arifi was also on the list of certified deputies. On 26 December 2019, the constitutive meeting of the Assembly was held where the mandate of Etem Arifi was confirmed. Since then, Etem Arifi continued to exercise the function of a deputy, even though he was sentenced by a final court sentence, for a criminal offense, to one year and three months of imprisonment.

In this constitutional referral, 17 deputies of the Assembly of the Republic of Kosovo challenged the constitutionality of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo, on the election of the Government, issued on 3 June 2020. The Applicants allege that the Decision in question is contrary to the Constitution, namely paragraph 3 of Article 95 [Election of

the Government], in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies] of the Constitution. This is because, according to the Applicants, Etem Arifi also participated in the voting procedure of the challenged Decision, whose vote was invalid due to his sentence of one year and three months imprisonment, by a final court decision.

The Court noted that the basic question contained in this Referral is whether Etem Arifi had a valid mandate at the time the challenged Decision was adopted in the Assembly on the election of the Government (in the voting of which he had participated).

In this respect, the Court took into account: the responses submitted by the member states of the Venice Commission Forum, the views of the Venice Commission; as well as the previous practice of the Assembly of the Republic of Kosovo, for similar situations.

With regard to the constitutional and legal provisions in the Republic of Kosovo, which provide answers to the issues raised by this Referral, the Court found that:

- Article 71.1 of the Constitution, in conjunction with Article 29.1 (q) of the Law on General Elections, stipulates that no person can be a candidate for deputy for elections to the Assembly, if he was convicted of a criminal offense by a final court decision in the past three years;

- Article 70.3 (6) of the Constitution stipulates that the mandate of a deputy ends or becomes invalid if he/she is sentenced by a final court decision to one or more years of imprisonment. This constitutional definition is reinforced by Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy, Article 112.1.a of the Law on General Elections, as well as Article 25.1.d of the Rules of Procedure of the Assembly;

The Court considers that, as regards the right to run in the parliamentary elections, Articles 45, 55 and 71.1 of the Constitution should be read in conjunction. Thus, Article 45 of the Constitution generally deals with electoral rights, stipulating in a general way that they can be limited by court decisions, while Article 55 establishes the cumulative conditions under which the human rights guaranteed by the Constitution may be limited. While Article 71 of the Constitution – which deals exclusively with the "qualifications" to run for a deputy of the Assembly – stipulates that every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the deputy. These

"legal criteria", referred to in Article 71 of the Constitution, are defined by the Law on General Elections, which in Article 29.1 (q) clearly and explicitly states that no person can be a candidate for deputy for elections to the Assembly, if he/she has been convicted for a criminal offense by a final court decision in the past three years. This constitutional and legal definition is in line with the practice followed by many democratic countries, as noted by the relevant documents of the Venice Commission, as well as the responses of the member states of the Venice Commission Forum.

The Court emphasizes that the abovementioned constitutional and legal norms, which have to do with the impossibility (ineligibility) to run for deputy in the general elections, as well as with the termination or invalidity of the mandate of the deputy, as a consequence of the sentence with imprisonment for the commission of criminal offenses, should not be seen as an end in itself. In essence, these norms do not have the primary purpose of punishing certain individuals by preventing them from exercising the function of deputy, but have as their basic purpose the protection of constitutional integrity and civic credibility in the legislature, as a pillar of parliamentary democracy.

The Court considered that the civic credibility in the Assembly of the Republic of Kosovo is violated if – despite the prohibitions imposed by Article 71 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections – it is allowed that the mandate of a deputy is won and exercised by a person convicted of a criminal offense by a final court decision valid in the Republic of Kosovo.

In this respect, the Court draws attention to the Report of the Venice Commission, which states that "*legality is the first element of the Rule of Law and implies that the law must be followed, by individuals and by the authorities. The exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle [rule of law], which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state*". (See Report of the Venice Commission on the Exclusion of Offenders from Parliament, CDL-AD(2015)036, of 23 November 2018, paragraph 168).

In this spirit, the Court noted that it is a clear constitutional requirement embodied in Article 71.1 in conjunction with Article 70.3 (6) of the Constitution, that it is incompatible with the Constitution for a person to win and hold the mandate of deputy if convicted for a criminal offense, by a final court decision, as defined by these provisions. This requirement is reinforced by Articles 29 and 112 of the Law on General Elections, as well as Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy.

The Court further emphasized that the fact that Article 70.3 (6) of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Article 112.1 (a) of the Law on General Elections refer to the conviction of a deputy (i.e. the conviction after he has won the mandate), is a reflection of the presumption that Article 29.1 (q) of the Law on General Elections, which is based on Article 71.1 of the Constitution, does not allow a person sentenced to imprisonment during the last three years before elections to run for deputy and win the mandate of deputy.

Therefore, based on the clear language of Article 71.1 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections, as well as sub-paragraph 6 of paragraph 3 of Article 70 of the Constitution, the Court considers that no person can win and hold a valid mandate of a deputy if he/she is convicted of a criminal offense as provided by these provisions, by a final court decision, if against him/her there is a sentencing decision that is in force in the Republic of Kosovo.

The Court notes the explanation of the CEC that according to Judgment AA.-Uzh. No. 16/2017, of 19 September 2017 of the Supreme Court, *"no one can be denied the right to run in the elections, if such a right has not been taken away by a court decision, which means that the candidate must be found guilty by a final decision, and the court, has imposed the accessory punishment "deprivation of the right to be elected".*

However, the Court considers that the Law on General Elections does not require that persons convicted of criminal offenses necessarily be sentenced to an accessory punishment *"deprivation of the right to be elected"*, so that they are not allowed to run in parliamentary elections. This is because, according to Article 29.1 of the Law on General Elections, among others, the following two grounds are provided: (i) deprivation of the right to be a candidate in elections by decision of the ECAP and the court; and (ii) the impossibility of being a candidate due to being found guilty of a criminal offense by a final court decision in the past three years. These are different/separate grounds that cause inability/ineligibility to be a candidate. The Court is of the opinion that this interpretation is also consistent with the related reading of Articles 45, 55 and 71 of the Constitution.

The Court considers it important to note that the candidacy of Etem Arifi in the parliamentary elections, his election as a deputy and the exercise of his mandate as a deputy – all this after he was sentenced to one year and three months imprisonment by a final court decision – reveals the existence of normative ambiguity and serious shortcomings in the institutional mechanisms of the Republic of Kosovo, which are competent to guarantee the legality and constitutional integrity of electoral processes and

parliamentary activity. This ambiguity is also evident in the answers given by the relevant bodies of the Assembly and the CEC.

In this regard, the Court emphasizes the need for the Assembly of the Republic of Kosovo with its committees, in cooperation with relevant institutions, including the KJC and the CEC, to clarify and consolidate inter-institutional cooperation and normative aspects that relate to the candidacy in parliamentary elections and the exercise of the mandate of deputy, by persons convicted of criminal offenses.

This is necessary to avoid paradoxical situations, from the constitutional point of view, where a person, after being convicted by a final court decision as provided by the relevant articles of the Constitution and laws, is allowed to run in parliamentary elections, to be elected a deputy, to have his mandate verified, as well as to continue to exercise the function of deputy in the Assembly of the Republic of Kosovo, even while serving an imprisonment sentence. Meanwhile, the Constitution and the relevant laws set clear normative barriers to prevent persons sentenced to imprisonment for committing criminal offenses, to be elected deputies and to exercise the mandate of deputies.

With regard to the election of the Government, the Court notes that in order for the Government to be elected, in accordance with paragraph 3 of Article 95 of the Constitution, at least sixty-one (61) deputies of the Assembly must vote "for" the Government. In this case, according to official documents of the Assembly, the Court notes that on 3 June 2020, sixty one (61) deputies voted "*for*" the Government, namely for the challenged Decision. Etem Arifi also voted for the adoption of the challenged Decision. As the Court found that the mandate of Etem Arifi was invalid prior to the vote of the challenged Decision, that Decision had received only sixty (60) valid votes. Consequently, the procedure for electing the Government was not conducted in accordance with paragraph 3 of Article 95 [Election of the Government] of the Constitution, because the Government did not receive a majority of votes of all deputies of the Assembly of the Republic of Kosovo.

The Court notes that Article 95 of the Constitution, as interpreted through its case law, provides for two attempts to elect the Government by the Assembly. In both cases, the Government to be considered elected must have a majority of votes of all deputies of the Assembly, namely sixty-one (61) votes. If the Government is not elected even after the second attempt, Article 95.4 of the Constitution provides for the announcement of elections by the President of the Republic of Kosovo.

The Court recalls that the Government voted by Decision No. 07/V-014 of the Assembly of 3 June 2020 is based on the Decree No. 24/2020 of the

President, of 30 April 2020, issued based on paragraph 4 of Article 95 of the Constitution, namely the second attempt to elect the Government. In this regard, the Court recalls the interpretation given in Judgment KO72/20 where it stated that *"the elections will be inevitable in case of failure of the election of the Government in the second attempt, [...] in which case, based on paragraph 4 of Article 95 of the Constitution, the President announces the elections, which must be held no later than forty (40) days from the day of their announcement"*.

In light of this, the Court notes that in the present case paragraph 4 of Article 95 of the Constitution is set in motion, according to which the President of the Republic of Kosovo announces the elections, which must be held no later than forty (40) days from the day of their announcement.

The Court considers it important to emphasize that it is aware that Etem Arifi has participated in other voting procedures in the Assembly, even though he did not have a valid mandate. However, based on the principle *non ultra petita* ("not beyond the request"), the Court is limited to the constitutional review of the challenged act by the referral submitted before it, namely Decision No. 07/V-014, of the Assembly of the Republic of Kosovo, regarding the Election of the Government of the Republic of Kosovo.

The Court considers it necessary to clarify also that, based on the principle of legal certainty, as well as the fact that this Judgment cannot have retroactive effect, the decisions of the current Government remain in force, and the Government remains in office until the election of the new Government.

JUDGMENT

in

Case No. KO95/20

Applicant

Liburn Aliu and 16 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo, of 3 June 2020, on the Election of the Government of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Liburn Aliu, Hekuran Murati, Hajrullah Çeku, Saranda Bogujevci, Jahja Koka, Valon Ramadani, Mimoza Kusari Lila, Fitim Uka, Shpejtim Bulliqi, Artan Abrashi, Alban Hyseni, Gazmend Gjyshinca, Enver Haliti, Agon Batusha, Dimal Basha, Fjolla Ujkani and Elbert Krasniqi (hereinafter: the Applicants), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

2. The Applicants authorized the deputy of the Assembly, Artan Abrashi, to represent them in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

Challenged act

3. The Applicants challenge the constitutionality of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo of 3 June 2020, on the election of the Government of the Republic of Kosovo (hereinafter: the challenged decision).

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly is not in compliance with paragraph 3 of Article 95 [Election of the Government], in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 42 [Accuracy of the Referral] and 43 [Deadline] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 11 June 2018, the Applicants submitted their Referral to the Court. On the same date, the Applicants submitted to the Court additional documents related to the case, namely, they submitted the challenged decision.

7. On the same date, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Remzije Istrefi-Peci (members).

8. On 15 June 2020, the Applicants were notified about the registration of the Referral.

9. On the same date, the Referral was communicated to the President of the Republic of Kosovo (hereinafter: the President), the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister), the Ombudsperson, and the Chairperson of the Central Election

Commission (hereinafter: the CEC), with the instruction to submit the comments to the Court, if any, by 29 June 2020.

10. On the same date, namely on 15 June 2020, the Referral was also communicated to the President of the Assembly, who was requested to notify the deputies that they may submit their comments on the Applicants' Referral, if any, by 29 June 2020.

11. On 17 June 2020, the Court requested the Secretariat of the Assembly that, by 29 June 2020, submit to the Court all relevant documents relating to the challenged decision, and to notify the Court whether there is any prior practice in the Assembly concerning the end or invalidity of the mandate of the deputies accused or convicted of criminal offenses.

12. On 24 June 2020, the Secretariat of the Assembly submitted to the Court the relevant documents related to the challenged decision, and notified the Court about the procedure followed by the Assembly, in 2016, in the case of deputy Rr. M., who lost the mandate of deputy of the Vth Legislature of the Assembly and was replaced, because he was convicted of a criminal offense.

13. On 9 July 2020, the Court requested the Secretariat of the Assembly to submit to the Court, by 16 July 2020, the following documents: a) Report of the Temporary Committee for the Verification of Quorum and Mandates, established by Decision No. 07-V-001, for the verification of the quorum in the constitutive session and the validity of the mandate of the deputies of the VII-th Legislature of the Assembly, presented on 26 December 2019; and b) Minutes of the constitutive meeting of the Assembly of the Republic of Kosovo, held on 26 December 2019.

14. On 9 July 2020, the Court requested the CEC to submit, by 16 July 2020, information to the Court regarding: a) the procedure followed at the CEC for the certification of candidates/list of candidates for participation in the general elections, especially in relation to the requirements set out in Article 29.1. (q) of Law No. 03/L-073 on General Elections in the Republic of Kosovo, amended and supplemented by Law No. 03/L-256; and b) if there is any special procedure or action taken by the CEC to prevent persons convicted of criminal offenses by a final court decision in the last three years from not being allowed to run for and be elected as deputies of the Assembly of the Republic of Kosovo, and requested the CEC to inform the Court if there have been such cases in the past.

15. On 13 July 2020, the Secretariat of the Assembly submitted to the Court the following documents: a) Report of the Temporary Committee for Verification of Quorum and Mandates, dated 26.12.2019; b) Minutes of the Constitutive Session of the Assembly of the Republic of Kosovo, held on 26 December 2020; and c) Transcript of the Constitutive Session of the Assembly of the Republic of Kosovo, held on 26 December 2019.

16. On 16 July 2020, the CEC submitted a response to the request for information by the Court.

17. On 20 July 2020, the Court notified the Applicants, the President, the Prime Minister and the President of the Assembly, about the responses received from the Secretariat of the Assembly and the CEC. The President of the Assembly was requested to inform all the deputies about the answers received regarding the Referral.

18. On 7 August 2020, the Court requested the Secretariat of the Assembly to submit to the Court, by 10 August 2020, the Legal Opinion that the Directorate for Legal Services and Approximation of Legislation of the Assembly has submitted to the President of the Assembly regarding the issue of Etem Arifi (as this document was missing from the file submitted by the Secretariat of the Assembly).

19. On 7 August, the Court received the notification from the Secretariat of the Assembly clarifying that: "*The Legal Opinion, regarding the mandate of the Deputy Etem Arifi, of 18 May 2020, of the Directorate for Legal Services and Approximation of Legislation, is an internal document addressed to the Presidency of the Assembly*". Therefore, the document in question was not submitted to the Court.

20. On 2 September 2020, at its regular session, the Court considered the report of the Judge Rapporteur and decided to adjourn the decision-making so that additional information on the case could be requested from the Assembly and the KJC.

21. On 7 September 2020, the Court requested the KJC to notify the Court by 14 September 2020 *"regarding the date when Judgment PAKR. No. 328/19 of the Court of Appeals of 20 August 2019, has become final according to the legislation in force"*.

22. On 8 September 2020, the Court requested the President of the Assembly to submit to the Court, by 15 September 2020, the Legal Opinion that the Directorate for Legal Services and Approximation of

Legislation of the Assembly has submitted to the President of the Assembly, regarding the case of Etem Arifi.

23. On 10 September 2020, the KJC submitted the response to the request for information requested by the Court.

24. On 15 September 2020, the Assembly submitted to the Court the Legal Opinion of the Directorate for Legal Services and Approximation of Legislation of the Assembly, of 18 May 2020, regarding the case of Etem Arifi.

25. On 28 October 2020, the Court considered the report of the Judge Rapporteur and decided to postpone the case to one of the following sessions, with the request that the latter be completed. At the same session it was decided to hold a public hearing and send questions related to the case to the Forum of the Venice Commission.

26. On 17 November 2020, the Court sent the invitation to participate in the public hearing to the Applicants, the President of the Assembly, the Prime Minister, the Chairman of the Committee on Legislation, Mandates, Immunities, the Rules of Procedure of the Assembly and the Oversight of the Anti-Corruption Agency (hereinafter: the Committee on Legislation, Mandates and Immunities); Chairperson of the CEC; and the Chairperson of the KJC.

27. On 23 November 2020, the Court submitted the following questions to the Venice Commission Forum:

> *"a) Does the legal framework in your country allows persons that have been convicted for criminal offence to be candidates for elections as deputies of Parliament?*
>
> *b) Which is the momentum when the mandate of a deputy of the Parliament convicted by a final court decision is considered to have been lost/terminated?*
>
> *c) Does the Parliament continue to work and make decisions in the period between the point in which the mandate of the deputy has been terminated/lost and the point in which his/her mandate has been replaced/filled in?*

d) In case the Parliament continues to work while the deputy, who has lost the mandate has not been replaced yet, what is considered the total number of the Parliament deputies for the purpose of the "majority vote of all members of the Parliament"? Are the required votes calculated based on the total number of mandates/seats of the Parliament, or only based on the total number of valid mandates/seats at a specific point?

e) What are the legal consequences for a decision adopted by the Assembly, in case one of its members who is considered to have had an invalid mandate participated in the decision making procedure of the Parliament and his/her vote is decisive for the adopted decision?"

28. Between 29 November 2020 and 15 December 2020, the Court received answers to questions raised through the Venice Commission Forum from the constitutional/supreme courts of the following countries: Sweden, Slovakia, Croatia, Czech Republic, Mexico, Brazil, Kyrgyzstan, the Netherlands, Bulgaria and Poland.

29. On 2 December 2020, a public hearing was held, via the electronic platform. The following persons participated in this session and were heard: the representative of the Applicants, the representative of the President of the Assembly, the representative of the Prime Minister, the Chairperson of the Committee on Legislation, Mandates and Immunities; Chairperson of the CEC; and the representative of the President of the KJC.

30. On 7 December 2020, the Court received comments regarding the hearing from the Applicants' representative and the Prime Minister's representative. On the same date, comments and clarifications regarding the case were submitted by the representative of Etem Arifi.

31. On 21 December 2020, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

32. On the same date, the Court voted and unanimously decided that Decision No. 07/V-014 of the Assembly of the Republic of Kosovo on the Election of the Government of the Republic of Kosovo, of 3 June 2020, is not in compliance with paragraph 3 of Article 95 [Election of the Government] of the Constitution, because it did not receive a majority of votes of all deputies of the Assembly of the Republic of Kosovo.

Summary of facts

Summary of facts regarding the criminal conviction against Etem Arifi

33. On 20 April 2018, the Basic Court in Prishtina, by Judgment PKR. 740/16, found Etem Arifi guilty because in co-perpetration (with the person B.G.) he committed the criminal offense "*Subsidy fraud*", under Article 336, paragraph 3 in conjunction with Article 31 of the Criminal Code of Kosovo (hereinafter: the CCK). At that time, Etem Arifi was a member of the previous legislature of the Assembly (namely the VI-th legislature) and he was re-elected deputy of the Assembly, in the elections of 6 October 2019. By the Judgment of the Basic Court, Etem Arifi was sentenced to imprisonment in duration of two (2) years, which decision would not be executed provided that he within the time limit of three (3) years would not commit any other criminal offense. The Basic Court also obliged Etem Arifi and the other convict (B.G.) to compensate the Ministry of Labor and Social Welfare for the damage caused, in solidarity within 6 months, the amount of 22,900 euro, as well as the Office of the Prime Minister the amount of 2,749 euro.

34. Etem Arifi and the Special Prosecution of the Republic of Kosovo filed an appeal against the abovementioned Judgment of the Basic Court.

35. On 28 March 2019, the Court of Appeals of Kosovo, by Judgment PAKR. No. 328/2018, decided that: "*I.* [...] *the Judgment of the Basic Court is modified [...] in the sentencing part regarding the decision on the sentence and the obligation regarding the legal qualification of the criminal offense so that this Court finds that in the actions of the accused Etem Arifi and of [B.G.], described in the enacting clause under item I are formed elements of the criminal offense of subsidy fraud under Article 336 par 3, in conjunction with paragraph 2 and 1 of Article 31 of the CCRK and for this criminal offense sentences the accused to (1) year and (3) months imprisonment* [...] *are obliged to compensate the Ministry of Labor and Social Welfare on behalf of the damage caused the amount of € 22,900, and the Office of the Prime Minister of the Republic of Kosovo - Office for Communities the amount of 2,749 € within six months after this judgment becomes final*".

36. Etem Arifi filed a request for protection of legality with the Supreme Court, against Judgment PAKR. No. 328/2018, of the Court of Appeals. The Supreme Court, by Judgment Pml. No. 168/2018, of 20 June 2019, remanded the case of Etem Arifi (and of person B.G.), for

reconsideration to the Court of Appeals, because "*the composition of the court was not in accordance with the law*".

37. On 20 August 2019, the Court of Appeals, by Judgment PAKR. No. 328/19, acting on retrial, decided as follows:

> *I. With the approval of the appeal of the Special Prosecution of the Republic of Kosovo, the Judgment of the Basic Court – Serious Crimes Department in Prishtina PKR. No. 740116 of 20.04.2018 is modified in the sentencing part regarding the punishment [...], and for this criminal offence the accused Etem Arifi is sentenced to 1 year and 3 months imprisonment [...].*
> *II. The accused Etem Arifi and of [B.G], are obliged to compensate the Ministry of Labor and Social Welfare on behalf of the damage caused in the amount of 22,900 euro, while the Office of the Prime Minister of the Republic of Kosovo-Office for Communities in the amount of 2,749 euro, all in time of 3 months.*
> *III. With the approval of the appeal of the SPRK, and ex officio, the judgment in the acquittal part regarding the accused Etem Arifi is annulled and the case is remanded to the Basic Court SCD in Prishtina for retrial.*
> *IV. The appeals of the defense counsels and the accused are rejected as ungrounded.*

38. According to the case file, it results that Judgment PAKR. No. 328/19, of the Court of Appeals, was served on Etem Arifi on 9 November 2019.

39. On 18 November 2019, Etem Arifi filed a request for protection of legality against Judgment PKR. No. 740/16 of the Basic Court of 20 April 2018, as well as Judgment PAKR 328/19 of the Court of Appeals of 20 August 2019, alleging violation of the provisions of criminal procedure and violation of the criminal law.

40. On 30 January 2020, the Supreme Court, by Judgment PML. No. 380/2019, rejected as ungrounded the request for protection of legality submitted by Etem Arifi.

41. On 27 April 2020, Etem Arifi submitted to the Constitutional Court Referral (KI71/20) for the constitutional review of the abovementioned Judgment of the Supreme Court.

42. On an unspecified date, the Basic Court issued an order for the arrest, detention and sentencing of Etem Arifi.

43. On 23 September 2020, the Constitutional Court declared Referral of Etem Arifi KI71/20 inadmissible and manifestly ill-founded.

44. Currently, Etem Arifi is serving his sentence.

Summary of facts regarding the challenged decision of the Assembly of the Republic of Kosovo

45. On 26 August 2019, the President of the Republic of Kosovo issued Decision No. 236/2019, on the appointment and announcement of early elections for the Assembly of the Republic of Kosovo, which were scheduled for 6 October 2019.

46. On 27 August 2019, the CEC issued Decision no. 824-2019, on Setting the Deadlines for election activities for the Early Elections for the Assembly of the Republic of Kosovo. Point II of this Decision provided, *inter alia*, that:

> *"[...]*
> *e) [Deadline] for application for certification of political entities and candidates starts on 27 August and ends on 6 September 2019.*
> *[...]*
> *g) Certification of political entities and candidates begins on 5 September and ends on 10 September 2019.*
> *[...]*
> *i) Deadline for withdrawal of candidates from the ballot lottery and deadline for replacement of candidates 08 September to 17 September 2019."*

47. On 6 October 2019, early elections were held for the Assembly of the Republic of Kosovo.

48. On 27 November 2019, the CEC certified the results of the elections for the Assembly, by Decision No. 1845/2019, based on the following list of the election results:

a. VETËVENDOSJE Movement! (hereinafter: the LVV), 29 deputies;
b. The Democratic League of Kosovo, 28 deputies;
c. Democratic Party of Kosovo, 24 deputies;
d. AAK-PSD Coalition 100% Kosovo, 13 deputies;
e. Srpska Lista, 10 deputies;
f. Social Democratic Initiative - New Kosovo Alliance, Justice Party, 6 deputies;

g. Coalition "Vakat", 2 deputies;
h. Kosova Demokratik Tyrk Partisi, 2 deputies;
i. Egyptian Liberal Party, 1 deputy;
j. Nova Demokratska Stranka, 1 deputy;
k. Ashkali Party for Integration, 1 deputy;
l. New Democratic Initiative of Kosovo, 1 deputy;
m. United Gorani Party, 1 deputy;
n. United Roma Party of Kosovo, 1 deputy.

49. The list of deputies certified by the CEC also included Etem Arifi from the Ashkali Party for Integration.

50. On 26 December 2019, the constitutive meeting of the Assembly was held, with three items on the agenda:

1. Establishment of the Temporary Committee for Verification of the Quorum and the Mandates of the Deputies;
2. Taking the oath by the deputies;
3. Election of the President and Vice-Presidents of the Assembly.

51. At the same meeting, by Decision No. 07-V-001, the Assembly formed the Temporary Committee for Verification of Quorum and Mandates, consisting of 14 members (members of the Assembly). According to item II of this Decision, *"The Committee reviews the relevant documentation of the early elections for the Assembly of the Republic of Kosovo, held on 6 October 2019, for the certification of the election results by the Central Election Commission and presents the report to the Assembly on the valid mandates of the deputies of the Assembly, and verifies the quorum in the constitutive session of the VII Legislature of the Assembly".*

52. On the same date, on 26 December 2019, the Temporary Committee for the Verification of Quorum and Mandates, based on CEC Decision No. 1845/2019, of 27 November 2019, together with the final list of candidates, submitted the Report stating that "*in the VII Legislature for the Assembly of the Republic of Kosovo are certified 120 deputies from political parties, coalitions, civic initiatives that have participated in the elections held on 6 October 2019*". Etem Arifi was one of the persons whose mandate as a deputy was confirmed. After that, the deputies took the oath (including Etem Arifi), and with the election of the President and Vice-President, the Assembly was constituted.

53. On 3 February 2020, the Assembly elected the Government with the Prime Minister Mr. Albin Kurti.

54. On 20 March 2020, a number of deputies of the Assembly submitted to the Presidency of the Assembly the Motion of No-confidence against the Government.

55. On 25 March 2020, the Assembly, by Decision No. 07-V-013, approved the Motion of No confidence in the Government.

56. On 30 April 2020, after several correspondences and at the request of the President (letter No. Prot. 382/1), in which he addressed the President of the Democratic League of Kosovo to nominate a candidate for the formation of the Government, the Democratic League of Kosovo proposed Mr. Avdullah Hoti as a candidate for Prime Minister of the Republic of Kosovo.

57. On 30 April 2020, the President issued Decree No. 24/2020, whereby "*Mr. Avdullah Hoti is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo*".

58. On the same date, 30 deputies of the Assembly of Kosovo requested from the Constitutional Court the constitutional review of the Decree of the President of the Republic of Kosovo No. 24/2020, of 30 April 2020, on the proposal of Avdullah Hoti as a candidate for Prime Minister of the Republic of Kosovo.

59. On the same date, namely 30 April 2020, the President of the Assembly requested the KJC to send to the Assembly all information and documents related to the case of Etem Arifi.

60. It follows from the case file that, on 30 April 2020, the President of the Assembly had received a letter (explanatory Memorandum) from Etem Arifi's legal counsel, regarding the latter's mandate. In this letter, among others, it is noted that: "*Mandate of Mr. Etem Arifi [..] is legal and in accordance with the Constitution of the Republic of Kosovo as he was not convicted by a final decision of the court during this term (Legislature VII) while the sentence imposed by Judgment of 20.08.2020 did not present obstacle in the certification of Mr. Arifi as a candidate for deputy and also does not pose a legal obstacle in continuing to exercise the mandate as long as these legal conditions exist*".

61. On 1 May 2020, at the request of the President of the Assembly, the KJC submitted to the Assembly copies of the judgments by which Etem Arifi was found guilty of a criminal offense, including Judgment

PAKR 328/19 of the Court of Appeals, of 20 August 2019 and Judgment PML. No. 380/20, of the Supreme Court, of 30 January 2020.

62. On 4 May 2020, the Court of Appeals submitted to the Assembly physical copies of the Judgment of the Basic Court and the Judgment of the Court of Appeals.

63. On 4 May 2020, the President of the Assembly addressed a letter to the Chairman of the Committee on Legislation, Mandates and Immunities, requesting "*to address the issue of the mandate of deputy Etem Arifi*".

64. On 12 May 2020, the Committee on Legislation, Mandates and Immunities submitted a response to the request of the President of the Assembly, explaining the following:

> "*The Committee found that no provision of the Rules of Procedure of the Assembly speaks about the cases when the deputy loses the mandate ipso jure, except in the case as defined by Article 70, paragraph 3, subparagraph 5 of the Constitution of the Republic of Kosovo and Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly […]. Therefore, based on the Rules of Procedure of the Assembly, the relevant Committee on Legislation, examines the issue of the mandate of the deputy only in cases as defined by Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly"*. The Committee on Legislation also stated that*: "It is recommended that in the future the Temporary Committee for the Verification of Quorums and Mandates be more proactive in verifying the mandate of the deputies. […] Therefore, based on the findings above, it is recommended to follow the previous practice of the Assembly"*.

65. On 28 May 2020, the Constitutional Court decided that the Presidential Decree of 30 April 2020 on the nomination of Avdullah Hoti as a candidate for Prime Minister of the Republic of Kosovo was in accordance with the Constitution.

66. On 3 June 2020, the Assembly, by the challenged Decision No. 07/V-014, elected the Government of the Republic of Kosovo, with 61 votes "for", 24 "against" and 1 abstention. According to the material submitted to the Court, Etem Arifi voted "for" the election of the Government.

Applicant's allegations

67. The Applicants allege that the challenged decision is not in compliance with paragraph 3 of Article 95 [Election of the Government], in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [Mandate of Deputies], of the Constitution.

68. The Applicants in their Referral challenge the constitutionality of the challenged decision because, according to them, *"[...] (i) the result of the voting in the extraordinary plenary session of the Assembly of 03.06.2020, is not in accordance with Article 95 paragraph 3; and (ii) during the voting procedure in the above session of 03.06.2020, which resulted in the issuance of the Decision on the establishment of the Government, the Assembly acted contrary to the procedures provided in the Constitution within the meaning of Article 70 paragraph 3, subparagraph (6), contrary to the law and sub-legal acts in force, regarding the mandate of the deputy"*.

69. The Applicants argue the alleged violations above stating that *"in the above-mentioned extraordinary plenary session of the Assembly on 03.06.2020, was present and voted Mr. Etem Arifi, a deputy of the Assembly of the Republic of Kosovo from the Ashkali Party for Integration (API), who is convicted by a final court decision in the Republic of Kosovo for the criminal offense with a sentence of 1 year and 3 months. Consequently, the composition of the Government did not receive the necessary majority of votes for its election as defined by the Constitution"*.

70. The Applicants, referring to Article 45 [Freedom of Election and Participation] of the Constitution, argue that *"The Constitution, as well as the legislation in force, are clear and define precisely and unambiguously the issue of the right and restrictions regarding the right to vote and to be elected. In this definition of guaranteeing the right to vote, the issue of the mandate of the deputy is also a part"*. They further add that *"The Constitution of Kosovo, in order not to leave any room for arbitrariness for abuse of any state power regarding one of the basic human rights, the right to vote and for deputies of the Assembly of the Republic of Kosovo, has defined the segments, the size as well as the manner of restriction, which can be done only by a "court decision"*.

71. The Applicants, referring to Article 70 [Mandate of the Deputies], paragraph 3 of the Constitution, allege that "[...] *Deputy of the Assembly Mr. Etem Arifi is convicted by a final court decision, consequently his vote should be declared invalid, his mandate as a deputy was ended"*. According to the Applicants, Article 70 [Mandate of the Deputies] clearly defines the constitutional criteria regarding

the fact when the mandate of a deputy in the Assembly of the Republic of Kosovo ends.

72. The Applicants further clarify that "*for the decision of the Court of Appeals by which the deputy Mr. Etem Arifi was sentenced with 1 year and 3 months in prison, the Assembly was notified for the first time in April 2020. Thus, according to the principle of a general legal standard, the effects of the decision begin to produce legal consequences as soon as the party, in this case the Assembly, is notified about the consequences of this decision. Therefore, the Applicants allege that the vote of the Deputy in question should be declared invalid in accordance with Article 70 paragraph 3 sub-paragraph (6) of the Constitution. Consequently, from the procedural point of view, the decision of the Assembly No. 07-V-014 of 03.06.2020, should be considered unconstitutional due to the fact that the composition of the Government has not received the majority of votes of all deputies of the Assembly, as defined in Article 95 paragraph 3 of the Constitution*".

73. The Applicants also refer to Article 112 [Replacement of Assembly Members], paragraph 1, of Law No. 03/L-073 on General Elections in the Republic of Kosovo amended and supplemented by Law no. 03/L-256 (hereinafter: the Law on General Elections), as well as Article 8 [End of Mandate], point 1.6, of the Law No. 03/L-111 on the Rights and Responsibilities of the Deputy (hereinafter: the Law on the Rights and Responsibilities of the Deputy), which provide that the mandate of the Deputy ends when he/she is convicted of a criminal offense as provided in Article 70, paragraph 3, of the Constitution.

74. The Applicants further allege that "*Article 25, point d) of the Rules of Procedure of the Assembly of the Republic of Kosovo, has the same spirit of the Constitution, which Law No. 03/L-111 as in the previous paragraph of this request. Exclude linguistic differences to express the same purpose of the norm, the essence of the constitutional and legal spirit is the reason for losing the mandate [...]*".

75. The Applicants further state that "*the mandate of the deputy Mr. Etem Arifi is unconstitutional and unlawful with constitutional consequences, non-fulfillment of the constitutional criteria for the election of the Government according to Article 95 paragraph 3 of the Constitution. In other words, the vote of the deputy in question in the extraordinary plenary session of the Assembly, which according to the Applicants was decisive in the formation of the Government, is invalid and, as such, makes Decision No. 07-V-014 of the Assembly of 03.06.2020 unconstitutional in procedural terms*".

76. Finally, the Applicants request the following from the Court:

> *"I. To declare this Referral ADMISSIBLE;*
> *II. To declare Decision No. 07-V-014 of 03.06.2020 of the Assembly of the Republic of Kosovo for the election of the Government of the Republic of Kosovo CONTRARY to the Constitution of the Republic of Kosovo, in procedural terms;*
> *III. To order this Judgment to be communicated to the parties and in accordance with Article 20.4 of the Law, to be published in the Official Gazette*
> *IV. This judgment is effective immediately".*

The response of the Secretariat of the Assembly about previous practices in the Assembly in similar cases

77. The Court recalls that it requested the Secretariat of the Assembly to notify the Court about previous practices in the Assembly regarding the termination or invalidity of the mandate of deputies convicted of criminal offenses.

78. With regard to the question raised by the Court, the Secretariat of the Assembly notified the Court that the Assembly had only one case during the V-th Legislature of the Assembly, with deputy Rr.M. In that case, the procedure followed was as follows:

> *"The Kosovo Judicial Council, on 28 January 2016, notified the President of the Assembly about the Judgment of the Court of Appeals of Kosovo in Prishtina on the sentence of the deputies, [L.G.] and [Rr.M.] (deputy [LG], on 1 December 2015, resigned from the mandate of deputy).*
>
> *The President of the Assembly, on 29 January 2016, based on Article 112.3 of Law no. 03/L-073 on General Elections in the Republic of Kosovo, requested the President of the Republic of Kosovo to replace the deputy, [Rr.M], from the Political Entity "Coalition PDK-PD-LB-PSHDK and PKK" , whose mandate has ended in accordance with Article 70, paragraph 3, point (6) of the Constitution of the Republic of Kosovo, with another member from the list of candidates of the Political Entity "Coalition PDK-PD-LB-PSHDK and PKK "- in the elections held on 8 June 2014.*

The President of the Republic of Kosovo, on 12 February 2016, notifies the President of the Assembly about the Decision, of 11 February 2016, on the replacement of the deputy [Rr.M].

In this case, the Committee on Legislation, Mandates, Immunities, Rules of Procedure and Oversight of the Anti-Corruption Agency did not play a role. […].”

The CEC response to the questions posed by the Court

79. The Court recalls that it requested the CEC to notify the Court about:

a) the procedure followed at the CEC for the certification of candidates/list of candidates for participation in the general elections, especially in relation to the requirements set out in Article 29.1 (q) of Law No. 03/1-073 on the General Elections in the Republic of Kosovo; and

b) if there is any special procedure or action taken by the CEC to prevent persons convicted of criminal offenses by a final court decision, in the last three years, from being enabled to run and be elected deputies of the Assembly of the Republic of Kosovo, and requested the CEC to inform the Court if there have been such cases in the past.

80. Regarding the abovementioned questions, the CEC initially stated that it implements the election legislation that regulates issues related to: the submitting the requests for certification of political entities and their candidates, the procedures for certification of political entities and their candidates, the reasons for the rejection of the application for certification, applicants' complaints for certification, review of applications, withdrawal or replacement of candidates of political entities, storage and verification of their data, payment of certification and ranking on ballots.

81. In this regard, the CEC clarified that the Office for Registration of Political Parties and Certifications (hereinafter: ORPPC), which operates within the CEC, assists the CEC in accepting, technical review and recommendation for certification of political entities. In this regard, the CEC stated that within fifteen days of the announcement of the election date by the President, the registered political party which does not wish to be certified for elections must notify the ORPPC/CEC that it is not running in the elections, or that the political party will seek certification through electoral coalition. The political

entity that intends to run in the elections must apply for certification at the CEC within the set deadline. Each application for certification of a political entity must be accompanied by all required documentation related to the political entity. The CEC added that the ORPPC, after reviewing all applications for certification and if it determines that the political entity has met all the requirements, makes a written recommendation to the CEC to approve the application.

82. Regarding the application of candidates for certification, according to the CEC, the political entities that have applied for certification to participate in the elections must submit to the ORPPC the list of candidates according to the specified form. Each candidate must complete the candidate certification form and with his/her signature confirm that he/she does not hold any position that would make it impossible for him/her to run as a candidate, based on Article 29 of the Law on Elections, as well as to give consent to appear as a candidate for the political entity in whose list he/she appears and pledges to act in accordance with the election laws, the CEC election rules and the Code of Conduct.

83. According to the CEC, the ORPPC during the review of applications considers the documentation of each candidate whether it is complete, and, *inter alia*, whether all the criteria set out in Article 29 of the Law on General Elections are met. According to them, *"In relation to point (q) of Article 29 of the Law [...] on General Elections [...], it is compared to the lists accepted by the KJC or the judiciary or whenever possible, the List of Candidates was sent to Judiciary through the KJC, to obtain confirmation that any candidate has been convicted of a criminal offense in the last three years. In extraordinary and early elections, due to tight deadlines, it has rarely been possible to carry out this verification properly"*. The CEC states that, for the regular elections, the verification was done until the 2013 elections, while from 2017, the certification of political entities and their candidates was made in accordance with Judgment AA.-Uzh. No. 16/2017 of the Supreme Court of 19 September 2017.

84. Furthermore, with regard to point (q) of paragraph 1 of Article 29 of the Law on General Elections, which stipulates that persons appearing on the voter list must not have been found guilty of a criminal offense by a final decision in the last three years, the CEC clarifies that according to Judgment AA. - Uzh. No. 16/2017 of the Supreme Court, this provision has been interpreted by the Supreme Court so that, *"no one can be denied the right to run in the elections, if such a right has not been removed by a court decision, which means that the*

candidate must be found guilty by a final decision, and the court, has imposed the accessory punishment "deprivation of the right to be elected". Therefore, the CEC states that *"if the ORPPC/CEC had encountered a court decision entitled "deprivation of the right to be elected" it would not recommend it, namely it would not certify any candidate of any political entity"*.

85. Explaining the procedure that preceded Judgment Uzh. No. 16/2017 of the Supreme Court the CEC clarified that: "*on 11 September 2017, has decided to not to certify 87 candidates for mayor and municipal assembly for the elections of 22 October 2017, a part of this decision is also Z.B. candidate for mayor of Prizren [...]. The decision of the CEC came as a result of data from the Judiciary, final decisions that these persons have been convicted of criminal offenses. But after the appeal of the decision of the CEC and the ECAP comes Judgment Uzh. No. 16/2017 of the Supreme Court [...] which orders the CEC to return the certification of the candidates removed from the list of certified*".

86. Regarding Etem Arifi, the CEC in its response stated that *"was not and is not informed that by final decision, it was prohibited to Mr. Arifi, before 10 September 2019 when he was certified, to be a candidate for deputy"*.

87. The CEC attached to its response the request for certification of the political entity PAI; the certification form of the candidate Etem Arifi; the decision for certification of the political entity PAI; and Judgment of the Supreme Court A.A.-U.zh. No. 16/2017, of 19 September 2017.

Arguments given by the parties participating in the public hearing

88. At the public hearing of 2 December 2020, the Applicant's representative, the representative of the President of the Assembly, the representative of the Government, the Chairman of the Committee on Legislation, Mandates and Immunities, the representative of the KJC and the Chairperson of the CEC presented their arguments and counter-arguments in relation to the case, as well as answering the questions of the judges of the Court, which the Court will summarize below.

Arguments of the Applicant's representative

89. The Applicant's representative, during the presentation of the Applicants' positions at the public hearing, mainly repeated the views and arguments which were presented in the initial Referral. He

reiterated the allegations and arguments that the decision of the Assembly to elect the Government is contrary to Article 95, paragraph 3, of the Constitution, in conjunction with Article 70, paragraph 3, item 6, of the Constitution. This is because Etem Arifi, who voted for the election of the Government, did not have a valid mandate, as a result of Judgment PAKR. No. 328/19 of the Court of Appeals of 20 August 2019, through which he was sentenced to a year and three months imprisonment. Therefore, Etem Arifi had lost his mandate, based on Article 70 paragraph 3 item 6 of the Constitution.

90. Consequently, according to the Applicants' representatives, the election of the Government did not have a majority of the votes of all the deputies, taking into account the fact that the vote of Etem Arifi which was the decisive vote in the formation of the Government, as the 61st vote, out of a total of 120 deputies, was invalid.

91. According to the Applicants' representative, there are two forms of restriction of the right to be elected. Thus, the ineligibility to be elected a deputy limits the passive right to vote guaranteed by Article 45 of the Constitution, which stipulates that this right "*can be limited only by a court decision"*. This right is also limited by Article 55 of the Constitution, which stipulates that *"rights and freedoms may be limited only by law"*.

92. The Applicants' representative further stated that according to the case law of the ECtHR, this restriction should be made only by law "*to ensure the proper functioning of the democratic regime"*. According to his allegations, Etem Arifi was not denied the right to run for a deputy in the parliamentary elections of 6 October 2019, in accordance with Article 45, paragraph 1, of the Constitution, due to the fact that the imposition of the main sentence related to the criminal offence was not accompanied by an accessory punishments [...]. The Court has not rendered any additional court decision within the meaning of Article 45, paragraph 1 of the Constitution, in conjunction with Article 63 of the Criminal Code and Article 29 paragraph 1, item p of the Law on General Elections, by which restricts the candidacy of the person in question.

93. However, according to the Applicants' representative, Etem Arifi should not have been certified as a candidate for deputy, based on Article 55 of the Constitution, which provides that rights and freedoms may be limited only by law and, consequently, Article 29 of the Law on General Elections, which stipulates that a person is capable of running as a candidate for deputy, unless found guilty of a criminal offense by a final court decision in the last three (3) years. The Applicants'

representative stated that the non-application of Article 29 of the Law on General Elections is "*total legal irresponsibility of the CEC*".

94. The Applicants' representative stated that the exercise of political power by people who seriously violate the law could jeopardize the democratic nature of the state, adding that a person who does not know the standards of conduct in a democratic society may not be willing to respect the constitutional or international standards for democracy and the rule of law. In addition, the Applicants' representative raised the question of how it is possible for someone from prison to represent the interests of those who elected him.

95. In this regard, the Applicants' representative claimed that the certification of the candidate Etem Arifi by the CEC occurred also because the deputy lied when submitting the form, when he stated that his candidacy is in accordance with Article 29, paragraph 1 item (q). This, according to him, is confirmed by the CEC response to the Court, which states that the candidate did not notify the CEC that he was convicted by a final court decision, with imprisonment of over one year. According to his allegations, neither the KJC has notified the CEC, nor any other institution about the fact that Etem Arifi had a final decision, through which he was sentenced to one year and three months imprisonment.

96. The Applicants' representative also referred to Judgment AA.-Uzh. No. 16/2017 of the Supreme Court, according to which the right to be elected can be limited only by a supplementary court decision. According to him, the Supreme Court without any legal basis returned to Article 45 of the Constitution, declaring, in a way, Article 29, paragraph 1 point q, of the Law on General Elections – unconstitutional, which is not within the competence of this court.

97. The Applicants' representative further stated that the Assembly had not been notified until 4 May 2020 that the deputy in question had been convicted by a final decision. Thus, according to the principle of the general legal standard, the effects of the decision begin to produce legal consequences once the party, in this case the Assembly, became aware of the consequences of this decision. In this case, this means on 4 May 2020, namely during the current legislature.

98. The Applicants' representative argued that the Presidential Decree appointing Mr. Avdullah Hoti as a candidate for Prime Minister has no legal effect, given that the procedure for the election of the Government, in the session of the Assembly of 3 June 2020, has been exhausted. According to the representatives of the Applicants, since

the Presidential Decree for the appointment of Mr. Avdullah Hoti as a candidate for Prime Minister has no legal effect, the Constitutional Court must declare the challenged decision unconstitutional and must decide to go to elections, *"or that the situation is returned to zero",* regarding the election of the Government, in accordance with paragraph 2 of Article 95 of the Constitution.

Arguments of the representative of the President of the Assembly

99. The representative of the President of the Assembly held that the President of the Assembly was initially notified about the conviction of Etem Arifi from the media and immediately requested the KJC and the Court of Appeals to submit to the Assembly the court decisions regarding the case in question.

100. He stressed that following the receipt of court decisions from the KJC, addressed to the President of the Assembly, on 4 May 2020, the President addressed the Committee on Mandates and Immunities of the Assembly to seek clarification regarding the status of Etem Arif in the current legislature. This Committee has not provided a specific answer on this issue. In the meantime, the Assembly elected the new Government by the challenged decision, in which case the Applicants addressed the Court requesting that the Constitutional Court assesses the constitutionality of the challenged decision, where the subject of review was the validity of Etem Arifi's mandate.

101. In further clarification, the representative of the President of the Assembly stated that the President of the Assembly, being aware that the Applicants had submitted a request for constitutional review of the challenged decision to the Constitutional Court, had not taken any further action, including the replacement of the deputy in question according to the legislation in force. The representative of the President of the Assembly also confirmed that Etem Arifi is still on the list of deputies of the Assembly of the current legislature.

Arguments of the representative of the Committee on Legislation, Mandates and Immunities

102. The Chairperson of the Committee on Legislation, Mandates and Immunities, during his presentation, notified the Court that the positions of this Committee are that no provision of the Rules of Procedure of the Assembly speaks about the cases when the deputy loses the mandate *ipso jure*, except as defined by Article 70, paragraph 3, subparagraph 5 of the Constitution, and Article 25 paragraph 1 item

e) of the Rules of Procedure of the Assembly. According to him, the relevant Committee on Legislation examines the issue of the mandate of the deputy only in cases defined by Article 25 paragraph 1, item e) of the Rules of Procedure of the Assembly, when a deputy is absent for six (6) consecutive months in the sessions of the Assembly. Therefore, this Committee has no legal obligations to take an action in cases where a deputy loses his mandate as a result of committing a criminal offense.

Arguments of the Government's representative

103. The Government's representative held that the Applicants' Referral should be declared inadmissible by the Court, "*in the spirit of its formal inadequacy, which allows the Constitutional Court to declare the Referral inadmissible".*

104. The Government's representative, referring to the Opinion of the Venice Commission, of 23 November 2018, "*regarding the exclusion of offenders from parliament*", stated that regarding the restriction of voting rights "*a legitimate constraint must be pursued, which is necessary in a democratic society, while the restrictive means and the constraint itself must be proportionate to the aim pursued".* According to the Government's representative, the invalidity of the mandate from Article 70. 3 (6), as well as the impossibility of running from Article 73.2 of the Constitution, which the Applicants refers to, are two completely different things and are not related to the restriction of the election rights, under Article 45 of the Constitution.

105. While arguing the Government's position, he added that the essence of the constitutional problem in this case is not whether Etem Arifi lost or did not lose his mandate as a deputy in the sixth legislature, but whether he had judicial restrictions on the exercise of his constitutional rights, under Article 45 of the Constitution, for candidacy in the seventh legislature.

106. The representative of the Government, regarding the fact whether Etem Arifi had restrictions of his constitutional rights in accordance with Article 45 of the Constitution, stated that "*Article 73.2 of the Constitution deals with the case of impossibility of candidacy and not with the restriction of any constitutional right according to Article 45 of the Constitution. In Article 73.3 of the Constitution this impossibility has to do with the cases when a person has problems with the ability to act".*

107. With regard to the Applicants' allegation that the loss of the mandate of a deputy produces constitutional moments, when a deputy is sentenced by a final court decision to imprisonment of one year or more, the Government's representative argued that if such an approach is not respected "*then there a total legal uncertainty would be created, in which no constitutional guarantee would apply, and following such a logic would mean that the legal institute of rehabilitation in a democratic society would be deprived of any content*".

108. The representative of the Government held that Etem Arifi lost his mandate as a deputy when he was convicted by Judgment PAKR. No. 328/2018, of the Court of Appeals, of 28 March 2019, and, according to him, a deputy loses his mandate only once. In the present case, Etem Arifi had lost his mandate when he was first convicted by the above Judgment and which had to do with the previous legislature and not the current legislature.

109. Also, according to the Government's representative, if the Court finds that Etem Arifi did not have a valid mandate, then he maintains that the Government was elected with a sufficient number of votes, given the fact that since Etem Arifi's mandate was invalid, and then the Assembly had a total of 119 deputies with valid mandates. Consequently, according to him, the challenged decision received the majority of votes of all members of the Assembly who had a valid mandate, namely 60 votes.

Arguments of the KJC representative

110. The KJC representative clarified that the KJC has no specific legal obligation to notify the institutions of the Republic of Kosovo in the event that a deputy of the Assembly is convicted by a final decision.

111. He further clarified that, although there is no legal obligation, the KJC is set in motion only at the request of the parties, as it did in the present case following the request of 30 April 2020 of the President of the Assembly, where the KJC submitted to the Assembly the copies of the judgments by which Etem Arifi was found guilty of a criminal offense, including Judgment PAKR 328/19, of the Court of Appeals, of 20 August 2019 and Judgment PML. No. 380/20, of the Supreme Court, of 30 January 2020. He further added that the KJC has consistently provided such information when requested by the CEC, or by other institutions.

Arguments of the CEC Chairperson

112. The CEC Chairperson emphasized that the CEC implements the electoral legislation that regulates issues related to the application for certification of political entities and candidates, procedures for certification of political entities and their candidates, the reasons for rejecting the request for certification, applicants' complaints about certification, review of applications, as well as withdrawal or replacement of candidates of political entities.

113. With regard to point (q) of paragraph 1 of Article 29 of the Law on General Elections, which stipulates that persons appearing on the voter list must not have been found guilty of a criminal offense by a final court decision within the past three years, the CEC Chairperson clarified that according to Judgment AA.-Uzh. No. 16/2017 of the Supreme Court, this provision was interpreted by the Supreme Court so that no one can be denied the right to run in elections if such a right has not been revoked by a court decision, which means that the candidate must be found guilty by a final decision and the court has imposed the accessory punishment "*deprivation of the right to be elected*". Therefore, the CEC Chairperson clarified that only if the CEC had encountered a court decision on "*deprivation of the right to be elected*" it would have considered not recommending, namely not certifying any candidate of any political entity.

114. Regarding the abovementioned Decision of the Supreme Court, the CEC Chairperson stated that the latter is controversial and with which she personally disagrees.

115. The CEC Chairperson further clarified before the Court that, following Judgment AA..Uzh. No. 16/2017 of the Supreme Court, the CEC allowed the certification of 87 candidates who had previously been decertified by the CEC (as the latter received information from the KJC, the candidates were convicted of criminal offenses during the past three years).

116. Regarding Etem Arifi, the CEC Chairperson informed that in the application submitted and signed by Mr. Etem Arifi, he vowed that he met all the requirements to run for deputy and that he had nowhere stated that he was convicted of a criminal offense.

Important provisions of the Constitution, laws and sub-legal acts

The Constitution of the Republic of Kosovo

Article 45 [Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

[…]

Article 64 [Structure of Assembly]

1. The Assembly has one hundred twenty (120) deputies elected by secret ballot on the basis of open lists. The seats in the Assembly are distributed amongst all parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly.

Article 70 [Mandate of the Deputies]

1. Deputies of the Assembly are representatives of the people and are not bound by any obligatory mandate.
2. The mandate of each deputy of the Assembly of Kosovo begins on the day of the certification of the election results.
3. The mandate of a deputy of the Assembly comes to an end or becomes invalid when:

(1) the deputy does not take the oath;
(2) the deputy resigns;
(3) the deputy becomes a member of the Government of Kosovo;
(4) the mandate of the Assembly comes to an end;
(5) the deputy is absent from the Assembly for more than six
(6) consecutive months. In special cases, the Assembly of Kosovo can decide otherwise;
(6) the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime;
(7) the deputy dies.

4. Vacancies in the Assembly will be filled immediately in a manner consistent with this Constitution and as provided by law.
[…]

Article 71 [Qualification and Gender Equality]

1. Every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the Assembly.
2. The composition of the Assembly of Kosovo shall respect internationally recognized principles of gender equality.

Article 72 [Incompatibility]

A member of the Assembly of Kosovo shall neither keep any executive post in the public administration or in any publicly owned enterprise nor exercise any other executive function as provided by law.

Article 73 [Ineligibility]

1. The following cannot be candidates or be elected as deputies of the Assembly without prior resignation from their duty*:*

(1) judges and prosecutors;
(2) members of the Kosovo Security Force;
(3) members of the Kosovo Police;
(4) members of the Customs Service of Kosovo;
(5) members of the Kosovo Intelligence Agency;
(6) heads of independent agencies;
(7) diplomatic representatives;
(8) chairpersons and members of the Central Election Commission.

2. Persons deprived of legal capacity by a final court decision are not eligible to become candidates for deputies of the Assembly.

3. Mayors and other officials holding executive responsibilities at the municipal level of municipalities cannot be elected as deputies of the Assembly without prior resignation from their duty.

Article 74 [Exercise of Function]

Deputies of the Assembly of Kosovo shall exercise their function in best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly.
[…]

Article 75 [Immunity]

1. Deputies of the Assembly shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly.
2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly.

Artcile 95 [Election of the Government]

1. After elections, the President of the Republic of Kosovo proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government.
2. The candidate for Prime Minister, not later than fifteen (15) days from appointment, presents the composition of the Government to the Assembly and asks for Assembly approval.
3. The Government is considered elected when it receives the majority vote of all deputies of the Assembly of Kosovo.
4. If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. If the Government is not elected for the second time, the President of the Republic of Kosovo announces elections, which shall be held not later than forty (40) days from the date of announcement..
5. If the Prime Minister resigns or for any other reason the post becomes vacant, the Government ceases and the President of the Republic of Kosovo appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the Government.
6. After being elected, members of the Government shall take an Oath before the Assembly. The text of the Oath will be provided by law.

Law No. 03/l-073 on General Elections in the Republic of Kosovo (amended and supplemented by Law No. 03/L-256)

Article 29
Candidate Eligibility

29.1 Any person whose name appears on the Voters List is eligible to be certified as a candidate, except if he or she is:

a) judge or prosecutor in Kosovo or elsewhere;
b) member of the Kosovo Security Force;
c) member of the Kosovo Police;
d) member of the Customs Service of Kosovo;
e) member of the Kosovo Intelligence Agency;
f) head of an independent agency;
g) diplomatic representative;
h) chairperson or a member of the CEC;
i) member of the ECAC;
j) member of a Municipal Election Commission;
k) member of the armed forces of any state;
l) member of any police force or similar body;
m) serving a sentence imposed by the International Tribunal for the Former Yugoslavia;
n) under indictment by the Tribunal and has failed to comply with an order to appear before the Tribunal;
o) deprived of legal capacity by a final court decision;
p) deprived by a final court decision, including an ECAC decision, of the right to stand as a candidate;
q) found guilty of a criminal offence by a final court decision in the past three (3) years;
r) has failed to pay a fine imposed by the ECAC or the CEC; or
has failed to obey an order of the ECAC.
[...]

29.4 If a candidate who has been certified by the CEC has or acquires a status that would render him or her ineligible to be a candidate by reference to the provisions of paragraph 1 of this Article, that person shall be decertified by the CEC and removed from the candidates list of the relevant Political Entity.

Article 112
Replacement of Assembly Members

112.1 Seats allocated in accordance with the present Law are held personally by the elected kandidate and not by the Political Entity. A member's mandate may not be altered or terminated before the expiry of the mandate except by reason of:

a) the conviction of the member of a criminal offence for which he or she is sentenced to prison term as provided by

the article 69.3 (6) of the Constitution;
b) the failure of the member to attend for six (6) consecutive months a session of the Assembly or the Committee(s) of which he or she is a member, unless convincing cause is shown as per Assembly Rules;
c) the member's forfeiture of his or her mandate under article 29 of this Law;
[…]

112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:

a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election;
b) if there is no other eligible candidate of the same gender on the candidate list, by the next eligible candidate who won the highest number of votes from the candidate list;
c) if there are no other eligible candidates on the candidate list, by the next eligible candidate on the candidate list of the Political Entity which had the next largest quotient of votes under the formula set out in article 111.4 of this Law in the most recent election of the same type; and
d) if the member is an independent candidate, by the next eligible candidate on the candidate list of the Political Entity that had the next largest quotient of votes under the formula set out in article 111.4 of this Law.

112.3 Upon a seat becoming vacant, the Speaker of the Assembly shall make a request in writing to the President for the vacancy to be filled. Such request shall include an explanation as to how the vacancy.
112.4 Upon receipt of a request under paragraph 3 of this Article, President shall, if the explanation provided is satisfactory, request the CEC to recommend the name of a person to fill the vacancy. The CEC shall, within five (5) working days of being requested to do so, provide the President with the name of the next eligible candidate under paragraph 2 of this Article.

Law No. 03/L-111 on Rights and Responsibilities of the Deputy

Article 5

Deputy's mandate

[...]
2. The mandate of the deputy shall commence from the moment when his/her mandate is certified by the competent authority in accordance with the Law. The mandate of the deputies of the previous composition of the Assembly ends on the same day.
[...]

Article 8
End of mandate

1. The deputy's mandate ends prematurely:
[...]

1.6. if he is by a valid decision convicted of a crime, with imprisonment for a period of at least six (6) months;

Rules of Procedure of the Assembly of the Republic of Kosovo

Article 9
Chairing of the inaugural session of the Assembly
[...]

3. After the agenda has been presented, the Chairperson of the inaugural session shall request from political parties represented in the Assembly, to appoint one member each in the ad hoc Committee for verification of quorum and mandates.
4. . The ad hoc Committee shall review the relevant documentation of elections and shall present a report on the validity of mandates of Members of the Assembly and shall verify the quorum of the inaugural session of the Assembly.

Article 22
Immunity of Members of the Assembly

1. A Member of the Assembly shall enjoy immunity in accordance with the Constitution.
[...]
4. The immunity of a Member of Assembly shall commence on the day of verification of his/her mandate and shall cease at the end of the mandate.

5. As an exception of paragraph 4 of this Article the Assembly of Kosovo may waive the immunity of the Member of Assembly before the end of the mandate.
6. The request to waive the immunity of a Member shall be made by the competent body in charge of criminal prosecution. The decision to waive the immunity of a Member shall be taken by the Assembly following the recommendations of the Committee for Mandates and Immunities.
7. The measure of detention or arrest may be taken against the Member of the Assembly even without waiving the immunity in advance by the Assembly in cases when the Member of the Assembly commits a serious criminal offence which is punishable by five (5) years or more of imprisonment.

Article 23
Procedure of Waiving the Immunity

1. The competent body of criminal prosecution shall file the request for waiving the immunity of the Member of the Assembly together with other complementary documents to the President of the Assembly. The President of the Assembly shall submit the request of the prosecution body along with the complementary documentation to the Committee on Mandate, Immunity and Regulation within 48 hours.
2. The Committee on Mandate, Immunities and Regulations shall, upon receiving the request under paragraph 1 of the present Article, review the Request and submit the report and recommendations to the Assembly within 30 days.
3. The Committee shall inform the Member of the Assembly, whose immunity is to be waived, of the request and the time of its review in the Committee.
4. The Member of the Assembly shall be invited to participate in the meeting of the Committee and the plenary session to provide explanations and remarks on the matter.
5. The non-attendance of the invited Member of the Assembly shall not hinder the Committee and the Assembly to take a decision in his absence.
6. The Assembly shall review the report with recommendations in the second coming session at the latest. At the beginning of reviewing the matter, the floor shall be given to the Member of the Assembly to provide explanations and answer to questions of the Members of Assembly.
7. The Assembly shall decide on waiving the immunity of the Member of the Assembly by a secret ballot of majority of the members of Assembly.

[…]

Article 25
Loss of the status as a Member of the Assembly

1. *A Member of the Assembly shall lose the mandate in the following cases:*

a) he/she fails to take the oath,
b) he/she tenders the resignation,
c) his/her mandate ceases,
d) he/she is convicted for a criminal offence with imprisonment of one (1) year or more,
e) in a period of six (6) months attends none of the sessions of the Assembly. If the Member of Assembly does not show good cause to the satisfaction of the President of the Assembly, the President shall seek the recommendation of the Committee on Mandate, Immunity and Regulation. After the recommendation of the Committee the President shall propose to the Assembly that the Member concerned cease to be a Member of Assembly. The Assembly shall decide on the matter in the next session;
f) a final decision of the court confirming the absence of his legal capacity to act,
g) death.

2. In regards to cases under item 1. e) of this article, Member of Assembly may submit written argument to the Assembly to explain good cause for non-attendance in meetings and he/she shall be allowed to address to the Assembly, if he/she wishes so.
3. Vacated seats of Member of Assembly in whatever case that is defined by these Rules shall be filled in accordance with Article 70.4 of the Constitution of Republic of Kosovo and Article 112 of the Law on General Elections.
[…]

ANNEX No. 2 of the Rules of Procedure of the Assembly

Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency (According to the Decision of the Assembly 07-V-008 of 13.2.2020)

The scope of this Committee includes:

"[…]
- Interprets the Rules of Procedure of the Assembly, when requested by the Assembly;
- Considers the requests for the abolition of the Immunity and Mandate of Members of Parliament and submits recommendations to the Assembly;
[…]"

Criminal Code No. 04/L-082 of the Republic of Kosovo

"ACCESSORY PUNISHMENTS

Article 62
Accessory punishments

1. An accessory punishment may be imposed together with a principal or alternative punishment.
2. The accessory punishments are:
2.1 deprivation of the right to be elected;
[…]

Article 63
Deprivation of right to be elected

The court shall deprive a perpetrator of the right to be elected for one (1) to four (4) years, if such person, with the intent of becoming elected, commits a criminal offence against voting rights or any other criminal offence for which a punishment of at least two (2) years imprisonment is provided."

Article 336
Subsidy fraud

1. Whoever, in connection with the application for a grant, continuation, or modification of the terms of a subsidy, provides a competent authority with incorrect or incomplete information which is a condition for the granting, continuation or modification of a subsidy, or conceals such information in violation of an obligation to disclose such information to a competent authority, shall be punished by a fine or by imprisonment of up to five (5) years.
2. Whoever uses such subsidy in violation of the law or for purposes other than those for which it was originally granted by

the subsidy provider shall be punished by a fine or by imprisonment of up to five (5) years.
3. If the offense provided for in paragraphs 1 or 2 of this Article results in material gain or material damage exceeding twenty-five thousand (25,000) EUR, the perpetrator shall be punished by imprisonment of one (1) to eight (8) years.
[...]

Criminal Procedure Code No. 04/L-123

Article 407
Appeal against Judgment from Court of Appeals to Supreme Court

1. An appeal against a judgment of a Court of Appeals may be filed with the Supreme Court of Kosovo if the Court of Appeals has modified a judgment of acquittal by the Basic Court and rendered instead a judgment of conviction or when the judgment by the Basic Court or Court of Appeals has imposed a sentence of life-long imprisonment.

Article 485
Finality and enforceability of Decisions

1. A judgment shall become final when it may no longer be contested by an appeal or when no appeal is permitted.
2. A final judgment shall be executed if its service has been effected and if there are no legal obstacles to its execution. If an appeal has not been filed, or if the parties have waived the right to appeal or abandoned the appeal filed, the judgment shall be considered executable upon the expiry of the period of time prescribed for appeal or upon the day of the waiver or abandonment of the appeal.
[...]

Admissibility of the Referral

117. The Court first examines whether the Referral meets the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

118. In this respect, the Court refers to paragraph 1 of Article 113 of the Constitution, which establishes that:

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

119. In addition, the Court also refers to Article 113.5 of the Constitution, which provides:

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

120. The Court finds that the Referral is filed by 17 (seventeen) deputies the Assembly, in accordance with Article 113.5 of the Constitution. Therefore, the Applicants are authorized parties to submit this Referral.

121. In addition, the Court takes into account Article 42 [Accuracy of the Referral] of the Law, which establishes that the Referral submitted in accordance with Article 113.5 of the Constitution must contain:

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

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

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

123. The Court notes that the Applicants entered the names of the deputies and their signatures; submitted the power of attorney for the person representing them before the Court; specified the challenged decision and submitted a copy; referred to specific constitutional provisions, which they claim that the challenged decision is not in compliance with; as well as presented evidence and proof to support their allegations. Therefore, the Court considers that the criteria set out in Article 42 of the Law and further specified in Rule 74 of the Rules of Procedure have been met.

124. Regarding the deadline set for submitting the Referral, which is 8 (eight) days from the date of approval of the challenged act, the Court notes that the challenged decision was adopted on 3 June 2020, while the Referral was submitted to the Court on 11 June 2020.

125. In this regard, the Court recalls that, in accordance with Rule 30 (1) of the Rules of Procedure, the final deadline for submitting the referral is calculated as follows: "*when a period is expressed in days, [...] is to be calculated starting from the following day after an event takes place*".

126. In the case of the present Referral, this is the day following the adoption of the challenged decision. Consequently, the Court finds that the Referral was filed within the time limit set by Article 113. 5 of the Constitution.

127. In view of the above, the Court finds that the Applicants have met the admissibility requirements, established in the Constitution and further specified in the Law and the Rules of Procedure.

128. Therefore, the Court declares the Referral admissible and will consider its merits in the following.

Merits of the Referral

129. The Court first recalls that the Applicants request the constitutional review of the challenged decision, claiming that the latter is contrary to paragraph 3 of Article 95 [Election of the Government], in conjunction with subparagraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies], of the Constitution.

130. The Court notes that the constitutional issue raised by the Applicants in their Referral relates to the compliance with the Constitution of the challenged decision, by which the Assembly, on 3 June 2020, had elected the Government. The Applicants allege that the procedure followed by the Assembly for the election of the Government was contrary to paragraph 3 of Article 95 [Election of the Government], of the Constitution, which states that "*the Government* [...] *is considered elected if it receives a majority of votes of all deputies of the Assembly*" which, based on Article 64 [Structure of the Assembly] which provides that the Assembly of Kosovo has 120 deputies, means that to elect the Government it is necessary that 61 deputies of the Assembly vote "for" the election of the Government. According to the Applicants, this violation occurred because during the procedure for issuing the challenged decision, the Assembly acted in violation of Article 70 [Mandate of the Deputies], paragraph 3, subparagraph 6.

131. Accordingly, the Applicants build their argument by stating that, despite the fact that according to paragraph 3 of Article 95, to elect the Government, 61 valid votes of the deputies are required, in the voting held in the Assembly for the election of the Government on 3 June 2020, only 60 votes of the deputies were valid. This is because, according to them, Etem Arifi's vote was counted as the 61st vote for the election of the Government, despite the fact that his mandate as a deputy was not valid because he was convicted by a final decision for the criminal offence with a sentence of more than one year imprisonment. According to the Applicants, this means that Etem Arifi has automatically lost his mandate as a deputy, in accordance with subparagraph 6 of paragraph 3 of Article 70 of the Constitution, which stipulates that the mandate of a deputy expires or becomes invalid if he/she is "*sentenced to one or more years imprisonment by a final court decision of committing a crime"*. In this regard, the Applicants allege that the mandate of Etem Arifi became invalid on the day when the Assembly was notified that the deputy in question was convicted of a criminal offense with imprisonment of more than one year.

132. Consequently, the Applicants allege that the election of the Government by the challenged decision, which was approved by the vote of Etem Arifi, whose vote was decisive, is contrary to the Constitution.

133. In light of this, the Court considers that the Applicants' Referral raises two essential issues: *firstly*, whether Etem Arifi had a valid mandate at the time of the issuance of the challenged decision in the Assembly (in the voting of which the deputy in question participated); *secondly*,

is the challenged decision of the Assembly in accordance with the Constitution if a deputy who did not have a valid mandate participated in its adoption.

134. In dealing with the two issues in question, the Court will first refer to: *(i)* the views of the Venice Commission on the impossibility (ineligibility) of running in parliamentary elections and the loss of the mandate of deputies of Parliament as a result of a conviction for criminal offenses; *(ii)* answers of the member states of the Venice Commission Forum to questions sent by the Court in connection with the present case; *(iii)* the current practices of the Assembly of the Republic of Kosovo regarding the termination or invalidity of the mandate of deputies as a result of convictions for criminal offenses.

(i) The views of the Venice Commission regarding the impossibility (ineligibility) for running in parliamentary elections and the loss of the mandate of deputies as a result of a criminal conviction

135. The standards on the issue of running in parliamentary elections and the loss/invalidity of the mandate of deputies are comprehensively elaborated in the *Report of the Venice Commission on the Exclusion of Offenders from Parliament*, adopted by the Venice Commission at its 104th Plenary Meeting of 23-24 October 2015, CDL-AD (2015) 036 and promulgated through Opinion No. 807/2015, of 23 November 2018 (hereinafter: Report of the Venice Commission on the Exclusion of Offenders from Parliament).

136. In addition, in order to fully reflect the position of the Venice Commission on issues related to the parliamentary elections and the loss/invalidity of the mandate of the deputies, the Court will also note the main elements of the following two documents:

- - *Code of Good Practice in Electoral Matters of the Venice Commission* No. CDL-AD (2002) 023rev2-cor, adopted in the Plenary Session of 18-19 October 2002 and promulgated through Opinion No. 190/2002, of 25 October 2018 (hereinafter: the Code of Good Practice in Electoral Matters of the Venice Commission); and

- - *Report of the Venice Commission on Electoral Law and Electoral Administration in Europe* No. CDL-AD (2006) 018, of 12 June 2006, adopted at the Plenary Session of 9-10 June 2006, of the Venice Commission and promulgated through Study No. 352/2005, of 12 June 2006 (hereinafter: Report of the Venice

Commission on Electoral Law and Electoral Administration in Europe).

Report of the Venice Commission on the Exclusion of Offenders from Parliament

137. The report of the Venice Commission on the Exclusion of Offenders from Parliament made a comparative analysis, in the light of the restriction of the passive right to vote, namely the right to be elected, guaranteed by Article 3 of Protocol 1 [Right to free elections], of the European Convention on Human Rights (hereinafter: the ECHR). In this regard, the above-mentioned Report of the Venice Commission refers to the rich case law of the ECtHR, regarding the impossibility of running for a member of parliament. Thus, in its practice regarding the restriction of the passive right to vote, the ECtHR has pointed out that, in order to comply with the ECHR, such a restriction must be provided by law, pursue a legitimate aim and be proportional (see, inter alia: *Hirst v. the United Kingdom*, ECtHR judgment of 6 October 2005).

138. However, in the present case, the Court notes that the Referral does not raise allegations of individual election rights, but of adopting decision by the Assembly. Thus, in this case we are not dealing with a referral submitted by an individual claiming to violate his constitutional rights, but with a request for so-called "abstract review" of constitutionality submitted by seventeen deputies, against a decision of Assembly. Therefore, the Court will emphasize the analysis and findings of the Venice Commission Report on the Exclusion of Offenders from Parliament, which reflects the practice of some Council of Europe member states regarding: 1) Inability to run in parliamentary elections; 2) Loss or invalidity of the mandate of a member of parliament.

139. *With regard to the inability (ineligibility) to run in parliamentary elections*, the above-mentioned Report of the Venice Commission notes that in most Council of Europe member states, the issue of inability (or ineligibility) to run in parliamentary elections is not determined by special constitutional provisions, but is regulated by relevant laws (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, pages 6-7).

140. In addition, as regards the legal basis for the inability (ineligibility) to run for a member of parliament, the above report distinguishes the states where the impossibility of running depends on the nature of the

criminal offense, as well as the states where the impossibility of running depends on the nature of the sentence.

141. Thus, in the countries such as the United Kingdom, France, and Cyprus, parliamentary elections are prohibited for persons convicted of criminal election-related offense. In some countries (Iceland, Turkey, Denmark, etc.), the persons convicted of criminal offenses that violate moral values (honor, reputation, etc.) may not be candidates for parliamentary elections. In Canada (a non-Council of Europe country), for example, persons convicted of corrupt actions over the past five years, or serving prison sentences, cannot run for parliament. In Latvia, a person convicted of an intentional criminal offense may not run in the parliamentary elections. On the other hand, in some countries the impossibility of running in parliamentary elections depends on the nature (length) of the sentence for criminal offenses. This group includes countries such as: Austria, Germany, Montenegro, Luxembourg, etc. In Germany, for example, the Criminal Code imposes an automatic ban (for a period of five years) on running in elections for persons sentenced to not less than one year in prison. A limited number of countries (Finland, Slovenia, USA) do not have specific constitutional or legal obstacles for persons convicted of criminal offenses to run in parliamentary elections (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, pages 11-13).

142. In addition, the above-mentioned Report of the Venice Commission points out that in countries where the right to run in parliamentary elections is restricted, this is done: 1) by law, in general, specifying the type of punishment or a criminal offense which prevents the exercise of the right to be elected; or 2) the restriction is imposed by court decisions, as a case-by-case sentence (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, page 13).

143. Regarding the loss/invalidity of the mandate of a member of parliament, the above-mentioned report of the Venice Commission states that more than 40% of the member states of the Council of Europe have constitutional provisions regarding the loss/invalidity of the mandate of members of parliament, while the rest of the states regulate this issue by legal provisions (see Report of the Venice Commission on the Exclusion of Offencers from Parliament, page 15).

144. According to the comparative analysis contained in the above-mentioned Report of the Venice Commission, the loss/invalidity of the parliamentary mandate is regulated in different ways, in the countries included in the analysis (including some non-member states of the

Council of Europe). However, there are generally three normative bases that determine the loss/invalidity of the mandate of a member of parliament: first, the nature of the criminal offense; second, the nature of the sentence; third, the circumstances that make it impossible to run in parliamentary elections (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, page 15).

145. The first group of countries - where the loss/invalidity of the parliamentary mandate is related to the nature of the criminal offense - include Finland, France, Italy, Malta, Cyprus, Canada, Portugal, etc. The category of criminal offenses that lead to the loss/invalidity of the parliamentary mandate includes: criminal offenses related to the electoral process, criminal offenses that are considered particularly immoral, serious criminal offenses, intentional criminal offenses or other specific offenses.

146. The second group includes states where the loss/invalidity of the mandate of the deputy is related to the nature (length) of the sentence. In this context, in some countries, any conviction for a criminal offense by a court decision is the basis for the loss/invalidity of the mandate of the deputy (Albania, Azerbaijan, Estonia, Finland, etc.). In some other countries, the loss/invalidity of a deputy's mandate depends on the length of the sentence and other aspects related to the sentence. Thus, in Croatia and Ireland the deputy loses the mandate if he is sentenced to effective imprisonment of 6 months or more. In Greece, the deputy loses his/her mandate in the Parliament if he/she loses the general right to vote (the loss of the general right to vote is determined by the Constitution and a special law). In Canada, the deputies lose their mandate if they are sentenced to two or more years imprisonment. Whereas in some countries, such as Bulgaria, the loss/invalidity of the parliamentary mandate occurs if a prison sentence is imposed, the execution of which has not been suspended.

147. The third group belongs to the countries where the loss/invalidity of the mandate of the deputy is related to the fulfillment of the conditions for the inability (ineligibility) to run in the parliamentary elections. Thus, the deputy loses the parliamentary mandate if during the exercise of the mandate of the member of parliament the conditions and circumstances are met which would make it impossible for him/her to run in the parliamentary elections. This is done automatically or by a special decision of the parliament.

148. Always referring to the Report of the Venice Commission for the Exclusion of Offenders from Parliament, the Court notes that the above practices are not comprehensive and uniform. Thus, in

countries such as the USA, Israel, etc., the loss/invalidity of the mandate of the deputy (or senator) occurs only in very rare cases. In the US, for example, there are no express constitutional provisions for losing a seat in Congress, except for acts of treason (see Venice Commission Report on Exclusion of Offenders from Parliament, p. 23).

149. With regard to the procedure for the loss/invalidity of the mandate of a deputy, the abovementioned Report of the Venice Commission points out that this procedure has been regulated in different ways. In some countries, a member of parliament automatically loses his or her mandate (is disqualified) as soon as he or she is deprived of his or her civil political rights by a court decision (eg, Belgium). In Estonia, the Constitution stipulates that the mandate of a deputy is terminated as soon as he or she enters a court decision in force on his sentence, which would prevent him from running for a deputy.

150. In other countries, it is provided that the loss/invalidity of the mandate (disqualification) is realized through a certain action in the parliament. Thus, in Denmark the parliament can take the mandate of a member who has been convicted of a criminal offense which renders him unworthy to hold a seat in the legislature. A similar practice is followed in countries like Germany and Hungary. While in France, the loss of civil rights leads to the loss of the parliamentary mandate of the deputy, but this is confirmed by a decision of the Constitutional Council.

Code of Good Practice in Electoral Matters of the Venice Commission

151. Through its Code of Good Practice in Electoral Matters, the Venice Commission clarifies the possibilities for restricting political rights, including the right to vote and to stand for election, through the provisions of electoral legislation. In the relevant part, this Code states that:

> *"[...] provision may be made for clauses suspending political rights. Such clauses must, however, comply with the usual conditions under which fundamental rights may be restricted; in other words, they must:*
>
> *1. be provided for by law;*
> *2. observe the principle of proportionality;*
> *3. be based on mental incapacity or a criminal conviction for a serious offence.*

152. Furthermore, according to the abovementioned Code, in the case of the acquisition of rights on the basis of mental incapacity, such a decision may relate to the incapacity but also imply *ipso jure* the acquisition of civil rights. While the conditions for denial of the right of individuals to be elected may be less strict than the deprivation of the right to elect (to vote), as in this case it is a question of holding a public position [...] (see: Venice Commission Code of Good Practice in Electoral Matters, p. 14).

Report of the Venice Commission on Electoral Law and Electoral Administration in Europe

153. The report of the Venice Commission on Electoral Law and Electoral Administration in Europe addresses key issues concerning electoral legislation and the administration of elections in Europe. In the relevant part of this Report, regarding the loss of the mandate of the elected, the Venice Commission determines the following:

> *"[...]*
> *78. It is not uncommon that due to a criminal conviction for a serious offence, individuals are deprived of the right to stand for election. However, it can be regarded as problematic if the passive right of suffrage is denied on the basis of any conviction, regardless of the nature of the underlying offence. Such a blanket prohibition might not be in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms. With regard to the Law on Elections of People's Deputies of the Ukraine, for instance, the Venice Commission recommended that the law should provide greater protection for candidate rights, including removing the blanket and indiscriminate prohibition on candidacy for persons who have a criminal conviction (see CDL-AD(2006)002, paras 16 and 100). The OSCE/ODIHR recommendation that the right to be a candidate should be restored to those persons who were convicted and subsequently pardoned after the 2003 post-election disturbances in Azerbaijan goes in the same direction.*
>
> *79. On the other hand, it might be not appropriate not to include (or not to implement) any restriction to eligibility to be elected for criminals at all. For instance the delegation of the Congress of Local and Regional Affairs of the Council of Europe was most concerned at the issue of the validity of the candidatures that were put forward in the 2005 local elections in "the Former Yugoslav Republic of Macedonia". An elected mayor was able to*

run for Mayor there despite having being sentenced to four years imprisonment for large scale theft by the court" (see Report of the Venice Commission on Electoral Legislation and Electoral Administration in Europe, paragraphs 78 and 79)".

154. As a conclusion regarding the positions of the Venice Commission, in all three documents of the Venice Commission analyzed above, emphasis is placed on the general conclusion that the impossibility, namely the ineligibility to run in the parliamentary elections, as well as the loss of the parliamentary mandate, is a restriction of electoral rights, guaranteed by Article 3 of Protocol 1 to the ECHR. Therefore, they must be based on clear norms of law, pursue a legitimate aim and respect the principle of proportionality. But also, as the Venice Commission strongly emphasizes, it is in the general public interest to avoid the active role in political decision-making of serious violators of the law.

Answers received from the Venice Commission Forum to questions sent by the Constitutional Court

155. The Court will present in the following chronologically the answers of the states of the Venice Commission Forum. As explained in the part of the proceedings before the Court, the latter addressed questions to the members of the Forum of the Venice Commission. Answers were received from the constitutional/supreme courts of the following countries: Sweden, Slovakia, Croatia, Czech Republic, Mexico, Kyrgyzstan, the Netherlands, Bulgaria and Poland.

156. The answers of the Supreme Court of **Sweden** and the Supreme Administrative Court of Sweden, state that: (a) in Sweden, it is not forbidden by law to run for members of the Assembly (Riksdag) if you have been convicted of a criminal offense. However, political parties are presumed to have internal rules that prevent persons from running for office if they have committed a criminal offense; (b) the deputy loses the mandate due to commission of a criminal offense, while the decision to remove the mandate of a deputy of Parliament (Riksdag) is taken by the court that decides on the criminal offense, if we are dealing with a imprisonment sentence of two (2) years or more; (c) in the event that a member of Parliament (Riksdag) is absent (or loses office), he/she shall be replaced by a deputy. If the deputy member is also absent, then, until his/her replacement is appointed, the Parliament (Riksdag) is incomplete but continues to work and take decisions; (d) there are no rules as to how many members must be present in Parliament to have a quorum, although there are certain cases where a certain number of deputies are required to take a

decision. To make a decision, the majority of members present must vote "for" the proposal; and (e) a member of Parliament (Riksdag) has the right to vote until he/she is removed from office. The fact that the deputy has been dismissed does not mean that the previous decisions where he voted (before he was dismissed) are invalid. This is because in Sweden the law that has been passed can only be repealed or amended by the Parliament (Riksdag), which can issue a new law, while the decisions of the Parliament cannot be appealed or reviewed.

157. The answer from the Constitutional Court of **Slovakia** states that: (a) a person may not be a candidate for elections in Slovakia if he has been convicted of an intentional criminal offense and if the decision is final until the sentence has been removed from his criminal file; (b) the term of office of a deputy of Parliament ends when the decision on his or her imprisonment for a criminal offense becomes final and that sentence of imprisonment has not been suspended; (c) there are no rules prohibiting the work of the Assembly due to the absence of a deputy as a result of the loss of his mandate; (d) the total number of deputies to be considered "*the majority of all deputies of the Assembly*" is the majority of the number of deputies as defined in the Constitution, namely of the total number of 150 deputies of the Slovak Assembly under Article 71 (3) of the Constitution of Slovakia; and (e) decisions of the Assembly taken when a certain deputy has not had a valid mandate, and his or her vote has been decisive for decision-making - although there are no written rules - may be challenged in the Slovak Constitutional Court, which has stated that serious procedural errors made by Parliament can cause a decision to be declared unconstitutional..

158. The response from the Constitutional Court of **Croatia** clarifies that in Croatia: (a) persons who have been sentenced by a final court decision to effective imprisonment of 6 months or more, and if at the time of the issuance of the decision on the announcement of the elections, sentence is being executed, or is expected to be executed. Also, persons who have been convicted and have not been rehabilitated according to the law in force, on the day the decision to announce the elections is made, may not be candidates for deputy. Fulfillment of these conditions must be proven by a relevant certificate from the candidate; (b) the deputy loses his mandate if he is sentenced by an unconditional and final decision to imprisonment of 6 months or more. However, the term of office of a deputy of Parliament shall expire on the day on which Parliament decides to terminate the term of office of a deputy, in the accordance with procedure established in Article 10 of the Rules of Procedure of the Croatian Parliament, and that decision of the Parliament is published in the Official Gazette; (c)

the Parliament shall continue to function even when a deputy loses his or her mandate; (d) the votes required for decision-making in Parliament are calculated according to the total number of mandates/seats in Parliament, and not according to the total number of seats valid at the specific moment; and (e) there is no case law of the Constitutional Court that is relevant in the present case. However, the Constitutional Court decided on a case when the Parliament rendered a law with one vote less (76 instead of 77 votes), but the deputies who decided had a valid mandate to decide.

159. The response from the **Czech Republic** specifies that the legislation of this country: (a) does not restrict the right to be a candidate for election as a result of the commission of criminal offenses; (b) no loss of mandate as a result of the commission of criminal offenses is envisaged; (c) in case of loss of the mandate of a deputy he is replaced by another deputy and the mandate of the new deputy begins the day of the end of the mandate of the deputy who is replaced. If there is no replacement, then the seat of the deputy will remain vacant even though such a situation has not yet occurred in practice; (d) with regard to the votes required for decision-making, the vote of "*all deputies of Parliament*" means the majority of the total number of seats of Parliament provided by the Constitution (in the case of the Parliament of the Czech Republic, this means a majority of 200 deputies of the Parliament, as provided in the Constitution); and, (e) the Constitution of the Czech Republic gives jurisdiction to the Constitutional Court to resolve doubts as to the loss of eligibility to hold office, but the decision of the Constitutional Court is of a declaratory nature only and the Czech Constitution or other legal acts do not regulate situations where a former deputy holds an invalid mandate at the time of voting.

160. The response from the Supreme Court of **Mexico** specifies that: (a) In Mexico the legal system does not allow persons who have been convicted of criminal offenses and are currently serving sentences to be candidates for election, but such a prohibition does not apply, in principle, in cases where a person has completed serving the sentence; (b) for deputies who are exercising their mandate in order for criminal proceedings to take place it is necessary to obtain a "Declaration of Indictment" from (other) deputies. If the deputies agree, then the deputy in question loses the mandate; (c) there is no legal provision stipulating that Parliament (Congress) does not function if a deputy resigns. If a deputy loses the mandate, the same is replaced; (d) the votes required for decision-making in Parliament (Congress) are, in principle, the majority of the votes of the deputies present at the voting session. Therefore, the number of votes required for the adoption of

decisions is not calculated on the basis of the number of members of any of the chambers of Parliament, as long as a majority of the deputies are present to make a quorum, depending on the issue under discussion; and, (e) although there is no practice similar to the circumstances of the case where a deputy without a valid mandate took part in the vote and when his vote was decisive in the decision in question, the Supreme Court of Mexico may annul laws when it finds irregularities during the procedure for their approval.

161. The response of the Supreme Court of **Brazil** emphasizes that: (a) in Brazil a person who has committed a criminal offense may not be a candidate in election for Congress without passing eight (8) years from the time he/she served the sentence for the criminal offense. As for a deputy who is exercising his duty, the term of eight (8) years starts from the day he/she completes the duty and not from the date when the conditions are created for an ineligibility of candidacy; (b) a deputy (congressman, senator) loses his or her mandate if his/her political rights are suspended, or convicted of a criminal offense by a final decision. In cases of loss of political rights, he/she loses the mandate if decided by the House of Representatives or the Federal Senate, by an absolute majority of votes. While there is also a special procedure to be followed when a deputy (congressman or senator) loses his mandate, when he is convicted of a criminal offense; (d) the deputy (congressman, senator) who loses the mandate of deputy according to the above-mentioned procedures, immediately leaves the position of deputy and he is replaced by the replacing deputy; and, (e) in Brazil, based on the principle of the presumption of innocence, the Federal Supreme Court decides whether the deputy has committed a criminal offense and then the Federal Senate, or the House of Representatives, decides definitively to remove him from office. Therefore, until he leaves the position according to the prescribed procedures, the deputy (congressman, senator) exercises his/her function. The effects of the removal are not retroactive and his vote so far remains valid.

162. The response from the Constitutional Chamber of the Supreme Court of **Kyrgyzstan** specifies that in the legislation of this country: (a) persons serving a sentence by a court decision may not be elected deputies. The registration/certification of a candidate for election should be withdrawn by the Central Election Commission, if it is confirmed that the candidate has concealed information about the lack of passive suffrage, including information about the existence of a criminal file which has not been deleted from the file as such, as provided by law; (b) the mandate of the deputy ends prematurely if there is a court decision on the sentence. The premature removal of the deputies is done by a decision of the Central Election Commission,

which decision is taken no later than 30 days from the day when the legal basis for such a thing is presented; (c) in the event of the loss of a deputy's seat, Parliament shall function normally; (d) in the absence of the composition of the Assembly under the Constitution, decisions shall be taken by the composition of the deputies who have taken the oath; and, (e) the legislation in force does not have norms governing the issue if a deputy who does not have a valid mandate participates in a vote of the Parliament.

163. The response from the Supreme Court of **the Netherlands** clarifies that: (a) a person whose voting rights have been restricted, or a person who has been convicted of a criminal offense with imprisonment of at least one (1) year, may not run for elections; (b) the deputy loses his/her mandate if he/she has been convicted by an irrevocable decision; (c) (d) and (e) the exercise of the post-disqualification function is unlawful, but the disqualification does not result in a pre-disqualification vote being invalid.

164. The response from the Constitutional Court of **Bulgaria** specifies that: (a) a person may not be a candidate for election in Bulgaria if he is serving a sentence; (b) the term of office of a deputy ends when a sentence of imprisonment due to intentional commission of a criminal offense is imposed and the serving of sentence has not been postponed. The abolition of the mandate of the deputy, however, requires the issuance of a decision by Parliament; (c) Parliament continues to function despite the fact that a deputy lost his seat; (d) the total number of deputies to be considered "*the majority of all deputies in the Assembly*" is the majority of the number of deputies in the Assembly (but the Assembly continues its work if more than half of the deputies are present); (e) the Constitution of Bulgaria or other legislation does not provide for what happens when a deputy who has lost a mandate has taken part in a decision of the Assembly and whose vote has been decisive for the decision.

165. The reply from the Constitutional Court of **Poland**, specifies that: (a) according to the Constitution of Poland, no person sentenced to imprisonment by a final judgment for an intentional criminal offence may be elected to the Sejm (Representative Chamber) and Senate. While according to the electoral legislation that regulates this issue more specifically, a person has no right to stand for election if she/he was sentenced to imprisonment by a final judgment for an intentional criminal offence prosecuted *ex officio* and/or an intentional criminal offence of fiscal nature; (b) the loss of the mandate of the deputy of the House of Representatives, (Sejm) occurs when he/she loses the right to be a candidate for deputy, as a result of the criminal offenses

mentioned in point (a). The end of the mandate is done by decision of the Marshal of the House of Representatives. The deputy who loses the mandate has the right to appeal this decision within 3 days to the Supreme Court of Poland, which evaluates the above-mentioned decision within 7 days. After a deputy has lost his mandate, according to the abovementioned procedure, the Marshal of the House of Representatives takes steps to fill the vacancy of the deputy whose mandate has ended.; (c) in case of loss of the mandate of a deputy he/she is replaced by another deputy, however neither the Constitution nor the electoral legislation provide for the suspension of the legislative function of the House of Representatives of the Polish Parliament until the filling of the vacant position of deputy; (d) with regard to the votes required for decision-making in the House of Representatives of the Polish Parliament, "*majority of deputies*" means half of the total number of mandates of Sejm, provided by the Constitution, which in case of Poland, is half of the total number of 460 deputies, As a result of losing the mandate of a deputy, until the vacant seat is filled, it is not foreseen to modify the constitutional requirement for a quorum that is necessary to pass a law, in this case, with "half the number of deputies; and, (e) it may not occur in practice for a deputy who has lost his or her mandate to participate in decision-making due to the fact that, *inter alia*, there are brief procedures within which the President of the Marshal of the House of Representatives decides on replacement, and the Supreme Court of Poland decides regarding the appeal.

(iii) Practice of the Assembly of the Republic of Kosovo so far regarding the termination or invalidity of the mandate

166. The Court notes that, based on the comments submitted to the Court by the Secretary General of the Assembly, it is noted that so far there has been only one case where the mandate of a deputy has been terminated and this has happened during the V-th Legislature of the Assembly of the Republic of Kosovo, with the deputy Rr. M.

167. In that case, on 28 January 2016, the KJC notified the President of the Assembly regarding the Judgment of the Court of Appeals, of 1 December 2015, on the imprisonment of the deputies Rr.M (sentenced to four years imprisonment) and L.G. (sentenced to six years imprisonment). On 1 December 2015, deputy L.G., had resigned from the mandate of the deputy and, consequently, the issue of loss or invalidity of his mandate had not been raised.

168. On 29 January 2016, the President of the Assembly, in accordance with paragraph 3 of Article 112 [Replacement of Assembly Members],

of the Law on General Elections, requested the President of the Republic of Kosovo to replace the deputy Rr. M.

169. Acting upon the request of the President of the Assembly and in support of the relevant legal provisions, on 11 February 2016, the President of the Republic of Kosovo issued a decision to replace deputy Rr.M, with another candidate from the same political party.

170. On the same date, the President of the Republic of Kosovo notified the President of the Assembly about the decision to replace the deputy Rr.M.

171. Based on the documents and responses submitted by the Assembly, the Court notes that in the present case in the Assembly no special procedure had been conducted to abolish or establish the invalidity of the mandate of the deputy Rr.M. But, as soon as the KJC informed the President of the Assembly about the conviction of the deputy Rr.M., by the Judgment of the Court of Appeals, the President of the Assembly addressed a letter to the President of the Republic to replace the deputy Rr.M.

172. In the light of the analysis above, the Court will continue to address the issue of the effect of a conviction for a criminal offense on the right to run in parliamentary elections, as well as the validity of the mandate of a deputy, according to constitutional and legal provisions in the Republic of Kosovo. In this regard, the Court notes that the Applicants base their constitutional referral mainly on Article 70.3.6 of the Constitution - citing the fact that Etem Arifi has been certified and elected a deputy and has continued to exercise his mandate as a deputy, despite the fact that he had been convicted of a criminal offense. However, the Court considers that the issue raised in this Referral is related to the constitutional and legal norms that have to do with the effect that the sentence for a criminal offense has and the right to run as a deputy of the Assembly of the Republic of Kosovo, in accordance with Article 71.1 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections.

Regarding the effect that the sentence for a criminal offense has on the candidacy, election and exercise of the mandate of the Deputy of the Assembly of the Republic of Kosovo

173. The Court recalls once again that the fundamental constitutional issues raised by the Referral are: whether Etem Arifi had a valid mandate at the time of the issuance of the challenged decision by the Assembly (in which vote the deputy in question participated); and, if

not, is the challenged decision of the Assembly in accordance with the Constitution, if in its adoption a deputy who did not have a valid mandate participated (moreover, as a decisive vote).

174. The Court notes that, in this case, the consideration of these two issues is related to the effect that the sentence for a criminal offense has on the candidacy, election and exercise of the mandate of a deputy.

175. Regarding the effect of the conviction for committing a criminal offense on the election and exercise of the mandate of a deputy, the Court notes that the legislation applicable in the Republic of Kosovo provides for two situations, namely the situation of inability (ineligibility) to be a candidate for deputy of the Assembly of the Republic of Kosovo, as a result of a conviction for committing criminal offenses; as well as the situation of termination or invalidity of the mandate of the deputy, as a result of the sentence for committing criminal offenses. The Court notes that the views of the Venice Commission and the responses received from the member states of the Venice Commission Forum, set out above, also emphasize these two situations.

176. Therefore, the Court will further reflect, in a concise manner, the normative framework in the Republic of Kosovo regarding*: a)* inability (ineligibility) to be a candidate for deputy of the Assembly of the Republic of Kosovo, as a result of conviction for criminal offenses; b) the invalidity of the mandate of the deputy as a result of the conviction for criminal offenses. Further, the Court will shed light on the question whether c) there is, according to the legislation in force in the Republic of Kosovo, any special procedure that should be followed for the abolition of the mandate of the deputy, after he/she has been sentenced to imprisonment of one year or more, by final court decision. Finally, the Court will analyze the issue of the mandate of Etem Arifi, in light of the conclusions reached after the consideration of the three issues mentioned above.

a) Inability (ineligibility) to be a candidate for a deputy of the Assembly of the Republic of Kosovo as a result of conviction for criminal offences

177. Regarding the inability (ineligibility) of persons to be a candidate for deputy, the Court first refers to Article 45 Freedom of Election and Participation] of the Constitution which stipulates that "*1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.* [...]".

178. The Court further refers to Article 71 [Qualifications and Gender Equality] of the Constitution, which provides that "*Every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the Assembly*".

179. The Court also refers to Article 73 [Ineligibility], of the Constitution, which expressly defines the specific cases when a person cannot run for or be elected a deputy of the Assembly. Thus, paragraph 1 of Article 73 stipulates that *"The following cannot be candidates or be elected as deputies of the Assembly without prior resignation from their duty: (1) judges and prosecutors; (2) members of the Kosovo Security Force; (3) members of the Kosovo Police; (4) members of the Customs Service of Kosovo; (5) members of the Kosovo Intelligence Agency; (6) heads of independent agencies; (7) diplomatic representatives; (8) chairpersons and members of the Central Election Commission*".

180. The Court also refers to paragraph 2 of Article 73, which stipulates that *"[p]ersons deprived of legal capacity by a final court decision are not eligible to become candidates for deputies of the Assembly."* Whereas paragraph 3 of Article 73, provides that *"Mayors and other officials holding executive responsibilities at the municipal level of municipalities cannot be elected as deputies of the Assembly without prior resignation from their duty"*.

181. In this regard, the Court notes that Article 73 [Ineligibility], of the Constitution, does not explicitly stipulate that persons convicted of criminal offenses may not run for a deputy of the Assembly of Kosovo.

182. However, the Court emphasizes Article 71 [Qualifications and Gender Equality] of the Constitution, which stipulates that "*Every citizen of the Republic of Kosovo who is eighteen (18) years or older and* ***meets the legal criteria*** *is eligible to become a candidate for the Assembly"*. In this respect, it is a constitutional requirement provided in the above-mentioned article of the Constitution which explicitly stipulates that in order to run for a deputy, each person must meet, in addition to the criteria of age and citizenship, also the "*legal criteria*". From this constitutional provision it follows that the Assembly of Kosovo may establish additional criteria, in addition to law, in order for a person to run for a deputy.

183. In this regard, the Law on General Elections, in Article 29 [Candidate Eligibility], paragraph 1, stipulates, *inter alia*, that:

29.1. *"Any person whose name appears on the Voters List is eligible to be certified as a candidate, except if he or she is:*

[...]
o) deprived by a final court decision, including an ECAC decision, of the right to stand as a candidate;
p) deprived of legal capacity by a final court decision;
q) found guilty of a criminal offence by a final court decision in the past three (3) years;
[...]"

184. According to this legal provision, a person, in addition to having to meet other criteria provided by the Constitution and the law, cannot be a candidate for deputy in parliamentary elections if "*by a court decision, including the ECAP decision, he has been deprived of the right to be a candidate", or if he has been found guilty of a criminal offense by a final court decision in the past three (3) years".*

185. The Court considers it important to note that the Law on General Elections distinguishes between situations when persons are deprived of the right to be candidates in parliamentary elections by a final court decision (or of the ECAP), and situations where such a thing is impossible for them because they have been found guilty of a criminal offense by a final court decision in the past three years.

186. Furthermore, as regards the criterion that a person has not been found guilty of a criminal offense by a final court decision in the last three years, the Court notes that the Law on General Elections specifies the nature of the criminal offense and the criminal sanction imposed, so that a person is deprived of the possibility of being a candidate for deputy, provided that the person is: *"found guilty of a criminal offence"* by *"a final court decision"* and provided that this happened in *"the past three (3) years".*

187. In this regard, the Court notes that Article 29 of the Law on General Elections attributes to the CEC the exclusive competence to assess the formal conditions of candidates when applying and certifying them to participate in elections. Paragraph 4 of this Article stipulates that *"If a candidate who has been certified by the CEC has or acquires a status that would render him or her ineligible to be a candidate by reference to the provisions of paragraph 1 of this Article, that person shall be decertified by the CEC and removed from the candidates list of the relevant Political Entity*".

188. However, the Court brings to attention the response received by the CEC and repeated by the CEC Chairperson during the public hearing, where she clarified the actions taken by the CEC in application of Article 29, paragraph 1, item (q), of Law on General Elections. This article stipulates that persons appearing on the voter list must not have been found guilty of a criminal offense by a final court decision in the last three years. In this regard, the CEC clarified that in Judgment AA.-Uzh. No. 16/2017, of 19 September 2017, the Supreme Court found that *"no one can be denied the right to run in an election, if such a right has not been taken away by a court decision, which means that the candidate must be found guilty by a final decision, and the court, has imposed the additional sentence "deprivation of the right to be elected"*. The CEC further clarified that since 2017, namely from the issuance of this Judgment of the Supreme Court *"[...] only if the ORPPC/CEC had encountered a court decision entitled "deprivation of the right to be elected", it would not have recommended, namely it would not certify any candidate of any political entity"*.

189. While regarding Etem Arifi, the CEC states that *"it was no and is not informed that by final decision it was prohibited to Mr. Arifi, before 10 September 2019 when he was certified, to be a candidate for deputy"*. In this regard, the Court notes that during the public hearing, the Applicants' representative and the CEC Chairperson stated that Etem Arifi, in the form he filled in at the CEC on the occasion of running for deputy, did not provide the information that he had convicted (and consequently, has not met the conditions required by Article 29.1 of the Law on General Elections), to run for deputy.

190. The Court notes that Article 45 of the Constitution, which the Supreme Court referred to, when rendering its Judgment of 19 September 2017, in paragraph 1, provides that: *"Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision"*.

191. The Court notes that Article 45 of the Constitution speaks generally about electoral rights, stipulating in general terms that they may be limited by court decisions - without specifying the nature of those decisions and without expressly requiring those decisions to be on the abolition of the election rights. Whereas Article 71 of the Constitution defines the conditions that must be met specifically to run for deputy of the Assembly of the Republic of Kosovo.

192. In light of this, the Court considers that, first, Article 45 of the Constitution deals with the "*restrictions*" of election rights, in general language; second, the term "*court decision*', within the meaning of this article, cannot be interpreted in such a way as to mean exclusively and only complementary court decisions of "*deprivation of the right to be elected*". Thus, a textual and logical interpretation of the language of this article, in systematic connection with Article 71 of the Constitution and Article 29.1 (q) of the Law on General Elections, leads to the conclusion that even court decisions by which citizens are convicted of criminal offenses may "restrict" the elections rights. The Court notes that such an interpretation is also consistent with the practice of the vast majority of member states of the Venice Commission, as reflected in the documents and responses presented above.

193. In addition, the Court notes that, with regard to the issue of restriction of the constitutional rights, reference to Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution is inevitable. This article stipulates that the human rights set forth in the Constitution may be limited in certain cases and, according to the Court, this includes the voting rights provided for in Article 45 of the Constitution. In this regard, the Court refers to Article 55 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".

194. In the light of these constitutional provisions, the Court notes that human rights, including the voting rights, may be restricted if the following criteria are cumulatively met:

b. if the restriction of rights is provided by law;
c. if there was a legitimate aim intended to be achieved by restriction; *and*
d. whether the interference is "necessary in a democratic society" or if there was a relationship of proportionality between the restriction of rights and the legitimate aim pursued (see, *mutatis mutandis*, the case of the Constitutional Court, KO157/18, Applicant: *the Supreme Court of Kosovo,* Judgment i March 13, 2019, paragraph 91).

195. Such an interpretation is in line with the case law of the ECtHR in the interpretation of Article 3 of Protocol no. 1 of the ECHR, as well as the relevant reports of the Venice Commission.

196. In view of the above, the Court considers that, in accordance with Article 71 of the Constitution, any citizen of the Republic of Kosovo who is eighteen years or older and meets the legal criteria may be a candidate for deputy. Whereas according to Article 29.1 (q) of the Law on General Elections, no person can be a candidate for deputy for the elections to the Assembly if he has been convicted of a criminal offense by a final decision of the court in the last three years. As stated above and as reflected in the Venice Commission Report and the responses of the member states of the Venice Commission Forum, such a practice of the impossibility of running in parliamentary elections for persons convicted of criminal offenses, with some small differences, is also followed by many democratic countries. Such a restriction serves the primary purpose of preserving constitutional integrity and civic credibility in the legislature - as a fundamental pillar of the democratic order.

197. In this connection, the Court considers it important to point out the existence of uncertainties regarding the application of Article 29 of the Law on General Elections. This was also evidenced by the answers and arguments presented during the hearing. The Court, however, emphasizes that Article 29 of the Law on General Elections does not allow for the candidacy for deputy (among others) of persons found guilty of a criminal offense by a final court decision in the last three

years. Furthermore, the Law on General Elections stipulates that if a candidate who has been certified by the CEC, is or has achieved the status by which he or she loses the ability to be a candidate under the provisions of paragraph 1 of Article 29 of the Law for the General Elections, that person is decertified by the CEC and as such cannot be a candidate for deputy.

198. The Court notes that the Law on General Elections does not require persons convicted of criminal offenses to be sentenced to an accessory punishment of "*deprivation of the right to be elected*", so that they are not allowed to run in parliamentary elections. This is because, according to Article 29.1 of the Law on General Elections, the deprivation of the right to be a candidate in elections by decision of the ECAP and the court, as well as the inability to be a candidate due to conviction for a criminal offense by a final court decision in the last three years, present different/separate grounds that cause the inability/ineligibility to be a candidate. The Court is of the opinion that this interpretation is also consistent with the systematic reading of Articles 45, 55 and 71 of the Constitution.

199. The Court considers that if the above interpretation of the Supreme Court is followed, then the regular courts should, whenever imposing convictions for criminal offenses, consider, in a completely hypothetical manner, the possibility of imposing accessory punishments on convicted persons by deprivation of the right to be elected (in accordance with the criteria provided by the Criminal Code). The regular courts cannot be expected to make assumptions about which of the perpetrators could potentially run in future elections whenever they decide to impose criminal sentences.

200. Furthermore, the Court wishes to underline that the Supreme Court, in Judgment AA.-Uzh. No. 16/2017, of 19 September 2017, did not even interpret the legal provision, namely Article 29.1 (q) of the Law on General Elections, in relation to the restrictions provided in Article 45 in conjunction with Articles 55 and 71 of the Constitution, nor it did address the Constitutional Court to request an assessment of its constitutionality. The Court notes that the Supreme Court could refer to the Constitutional Court the issue of the constitutionality of Article 29.1 (q) of the Law on General Elections, pursuant to paragraph 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, in relation to the case before it.

201. In this regard, the Court clarifies that the Law on General Elections continues to remain in force - with all its articles and provisions - until it is amended by the Assembly, or its unconstitutionality is challenged

before the Constitutional Court.

202. The Court notes its Judgment in case KI207/19, where the Constitutional Court has clarified that "*despite the fact that the Constitution recognizes the competence of regular courts to interpret a norm of legal rank in line with a norm of constitutional rank and/or the direct application of a norm of constitutional rank, this does not mean that the regular courts can ascertain or declare a legal norm as a norm contrary to the Constitution [...] Such a right, the Constitution has assigned exclusively to the Constitutional Court" (see case no. KI207/19, Applicant NISMA Social Democratic, New Kosovo Alliance and the Justice Party, Judgment of 10 December 2020, paragraph 259).*

203. Accordingly, the Court wishes to clarify that in this case the issue of the constitutionality of Article 29 of the Law on General Elections is not subject to review before the Court, just as the constitutionality of the Judgment of the Supreme Court, Uzh. No. 16/2017, of 19 September 2017 was not challenged. Therefore, the Court is limited to analyzing the provisions of the aforementioned Law only insofar as they relate to the circumstances of the present case.

204. In the light of this, the Court notes that the essential question contained in the Applicants' Referral in this case is whether Etem Arifi had a valid mandate when the challenged decision was voted in the Assembly. In this regard, in addition to the issue of inability (ineligibility) to be a candidate in parliamentary elections, the referral raises claims related to constitutional and legal provisions regarding the cases when the mandate of a deputy of the Assembly of the Republic of Kosovo ends or becomes invalid, as a result of conviction for criminal offenses.

b. Invalidity of the mandate of the deputy of the Assembly of the Republic of Kosovo as a result of conviction for criminal offenses

205. The Court first notes that Article 70 [Mandate of the Deputies] regulates the issue of the mandate of deputies, stipulating in paragraph 2 that "*the mandate of each deputy of the Assembly of Kosovo begins on the day of the certification of the election results*".

206. Whereas paragraph 3 of Article 70 of the Constitution, provides for the cases when the mandate of a deputy ends or becomes invalid, defining 7 cases when such a thing can happen.

207. In this respect, the Court notes that Article 70 of the Constitution mentions the "end" and "invalidity" of the mandate of a deputy. However, this article does not explicitly distinguish between the cases when the mandate ends, namely becomes invalid. The mandate of a deputy, according to Article 70 paragraph 3 of the Constitution, ends or becomes invalid if he/she:

> *"(1) the deputy does not take the oath;*
>
> *(2) the deputy resigns;*
> *(3) the deputy becomes a member of the Government of Kosovo;*
> *(4) the mandate of the Assembly comes to an end;*
> *(5) the deputy is absent from the Assembly for more than six*
> *(6) consecutive months. In special cases, the Assembly of Kosovo can decide otherwise;*
> *(6) the deputy is convicted and sentenced to one or more years imprisonment by a final court decision of committing a crime;*
> *(7) the deputy dies."*

208. The Court emphasizes Article 70, paragraph 3, subparagraph 6, which stipulates that the mandate of a deputy ends or becomes invalid if he or she is sentenced by a final court decision for a criminal offense, to one or more years of imprisonment.

209. Provisions similar to sub-paragraph 6 of paragraph 3 of Article 70 are also provided in the Law on General Elections, specifically in Article 112 [Replacement of Assembly Members], paragraph 112.1. a, where it is determined that: *"A member's mandate may not be altered or terminated before the expiry of the mandate except by reason of: a) the conviction of the member of a criminal offence for which he or she is sentenced to prison term as provided by the article 69.3 (6) of the Constitution* [70.3 (6)]*."*

210. Furthermore, the Court notes that the Law on General Elections, in Article 112 [Replacement of Assembly Members], paragraph 1, item c), stipulates that *"A member's mandate may not be altered or terminated before the expiry of the mandate except by reason of:* [...] *c) the member's forfeiture of his or her mandate under article 29 of this Law"*. Thus, Article 112.1.c of the Law on General Elections refers to the loss of the mandate of the deputy and if any of the conditions/circumstances provided in Article 29 of this Law are met.

Such an approach, embodied in the Law on General Elections, is also in line with the practice of many member states of the Venice Commission, as elaborated in the Report of the Venice Commission on the Exclusion of Offenders from Parliament.

211. Article 29 of the Law in question stipulates, among other things, the impossibility to run in the parliamentary elections for persons who have been found guilty of a criminal offense in the last three years before the elections (Article 29.1.q). Consequently, the interconnected interpretation of Article 112.1.c and 29.1.q of the Law on General Elections, practically leads to the conclusion that the mandate of the deputy is lost if any of the requirements which, would prevent him from running in the parliamentary elections for deputies of the Assembly is met.

212. The Court also recalls the Law on the Rights and Responsibilities of the Deputy, namely Article 8 [End of mandate] paragraph 1, item 1.6 which provides that *"The deputy's mandate ends prematurely: [...] if he is by a valid decision convicted of a crime, with imprisonment for a period of one or more years of imprisonment"*. The same provision is provided in the Rules of Procedure of the Assembly, namely Article 25 [Loss of the status as a Member of the Assembly] which in paragraph 1, point d, provides that *"A Member of the Assembly shall lose the mandate in the following cases: [...] he/she is convicted for a criminal offence with imprisonment of one (1) year or more [...]."*

213. In view of the above, the Court finds that the relevant constitutional and legal framework clearly stipulates that the mandate of a deputy expires or becomes invalid if he/she, *"is sentenced by the court decision"; "the sentence is for the criminal offence"*; "*the imprisonment sentence if for the time period of one (1) and more years";"the court decision is final"*. So, at the moment when the above four circumstances are cumulatively met against a deputy of the Assembly of the Republic of Kosovo, he/she loses the mandate.

214. The Court notes that its Judgment in case KO 98/11 is also in this line, where it had stated that: "[...] *the Constitution provides for when the mandate can end prematurely. In relation to the situation when there is a final court decision for the sentencing of a deputy for a term of one or more year of imprisonment, the deputy is stripped of his/her mandate and therefore the mandate ends and he/she no longer can enjoy the privilege and immunity attaching to the mandate [...]".*

215. With regard to the fact that when a person is sentenced to imprisonment by a "final" decision, the Court refers to the Criminal

Procedure Code, which in Article 485 [Finality and enforceability of Decisions], provides that:

> *1. A judgment shall become final when it may no longer be contested by an appeal or when no appeal is permitted.*

216. In this regard, the Court also refers to Article 407 [Appeal against Judgment from Court of Appeals to Supreme Court], which provides that:

> *1. An appeal against a judgment of a Court of Appeals may be filed with the Supreme Court of Kosovo if the Court of Appeals has modified a judgment of acquittal by the Basic Court and rendered instead a judgment of conviction or when the judgment by the Basic Court or Court of Appeals has imposed a sentence of life-long imprisonment.*

217. In light of this, the Court notes that, according to the abovementioned provisions of the Criminal Procedure Code, a court decision is considered to be final, if against that decision is not further allowed the filing of regular legal remedies, namely the appeal.

218. Against this constitutional and legal background, the Court concludes that the mandate of a deputy of the Assembly of the Republic of Kosovo ends or becomes invalid when he is imposed an imprisonment sentence to one year or more, by a court decision which cannot be challenged by an appeal, as a regular legal remedy in the criminal proceedings.

219. In the present case, the Court finds that Etem Arifi was sentenced by the Court of Appeals, initially on 28 March 2019 and, after remanding the case for retrial, he was sentenced to one year and three months imprisonment by Judgment PAKR. No. 328/19 of the Court of Appeals, of 20 August 2019. In this regard, the Court recalls the response of the KJC that,*"[a]ccording to the legislation in force the judgment becomes final on the date when it is decided by the Court of Appeals upon the appeal, which in this case is 20.08.2019".*

c. Whether there is a special procedure to be followed for the abolition of the mandate of the deputy, after the sentence of imprisonment of one year or more by a final court decision?

220. The Court first considers it important to recall that, prior to the constitution of the Assembly, according to the Rules of Procedure of

the Assembly, a Temporary Committee for the Verification of Quorums and Mandates is established. This Committee, according to paragraph 4 of Article 9 of the Rules of Procedure of the Assembly, *"shall review the relevant documentation of elections and shall present a report on the validity of mandates of Members of the Assembly and shall verify the quorum of the inaugural session of the Assembly"*.

221. In this regard, the Court notes that in the present case the above-mentioned Committee presented its Report on the verification of mandates before the Assembly, based exclusively on the CEC Decision No. 1845/2019, of 27 November 2019, for the certification of the final results of the early elections for the Assembly of the Republic of Kosovo, held on 6 October 2019, together with the final list of candidates including the name of Etem Arifi.

222. The Court further notes that neither Article 70 of the Constitution nor any other constitutional or legal provision sets out any special procedure to be followed to remove the mandate of a deputy, or to establish the termination or invalidity of the mandate of a deputy - after the circumstances provided in Article 70. 3 (6) of the Constitution have been created. The Court noted that this finding was reinforced by the arguments and interpretations of the parties presented at the hearing.

223. As regards the replacement of a deputy who has lost his mandate, the Court refers to Article 70.4 of the Constitution, as well as paragraph 3 of Article 112 [Replacement of Assembly Members], of the Law on General Elections. Thus, Article 70.4 of the Constitution stipulates that "*Vacancies in the Assembly will be filled immediately in a manner consistent with this Constitution and as provided by law*". This general constitutional provision is broken down through Article 112.3 of the Law on General Elections, which stipulates that "*Upon a seat becoming vacant, the Speaker of the Assembly shall make a request in writing to the President for the vacancy to be filled. Such request shall include an explanation as to how the vacancy*". Whereas paragraph 4 of this Article stipulates that *"[u]pon receipt of a request under paragraph 3 of this Article, President shall, if the explanation provided is satisfactory, request the CEC to recommend the name of a person to fill the vacancy. The CEC shall, within five (5) working days of being requested to do so, provide the President with the name of the next eligible candidate under paragraph 2 of this Article"*.

224. The Court notes, as explained above, that neither the Law on General Elections nor any other normative act provides for a precise procedure for determining when *"the deputy's seat remains vacant"*, but the relevant normative acts determine only the procedure how *"a seat that has been remained vacant"* is filled.

225. In relation to this case, the Court also refers to the response received from the Secretariat of the Assembly regarding the current practices of loss/invalidity of the mandate of the deputy in case of committing a criminal offense. Thus, the Court recalls that the Assembly of the Republic of Kosovo had only one case when a deputy was deprived of his mandate, as a result of a conviction for a criminal offense by a final court decision (the case of former deputy Rr.M). The Court recalls that in that case, the deputy was convicted on 1 December 2015, while the KJC notified the President of the Assembly, on 28 January 2016, regarding the sentencing Judgment of the Court of Appeals. Whereas on 29 January 2016, the President of the Assembly requested the President the replacement of the deputy in question, in accordance with Article 112.3 of the Law on General Elections.

226. The Court also notes the reply that the Committee on Legislation, Mandates and Immunities sent to the President of the Assembly (on 12 May 2020), arguing that *"[...] no provision of the Rules of Procedure of the Assembly speaks about the cases when the deputy loses his/her mandate ipso jure, except in the case as defined by Article 70, paragraph 3, sub-paragraph 5 of the Constitution of the Republic of Kosovo and Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly [...]. Thus, based on the Rules of Procedure of the Assembly, the relevant Committee on Legislation, examines the issue of the mandate of the deputy only in cases as defined by Article 25 paragraph 1 item e) of the Rules of Procedure of the Assembly "*[in six-months period does not participate in any session of the Assembly].

227. In the light of this, the Court notes that from the responses received from the member states of the Venice Commission Forum, as well as from the Venice Commission Report, cited above, it appears that there is no uniform practice in this regard as to how the issue of losing the mandate of a deputy is processed. Thus, in some European countries there are constitutional or legal provisions that define a special procedure to be followed (in the respective parliaments) after the imposition of a criminal offense against a deputy. Respect for this procedure is a precondition for the mandate of the deputy to formally end. While in some other countries this issue is not regulated and the ascertainment or formalization of the loss of the mandate of the

deputy does not require any special procedure or voting in the parliament (respective bodies), but the loss of the mandate is automatic and related to the final court decision.

228. The Court reiterates that neither in the Constitution of Kosovo, nor in the relevant laws and regulations, there is no specifically defined procedure that must be followed for determining the loss of the mandate, after the requirements for the termination or invalidity of the mandate of the deputy have been met, due to imprisonment of one year or more (as provided by Article 70.3.6. of the Constitution and the relevant articles of the Law on General Elections and the Law on the Rights and Responsibilities of the Deputy).

229. The Court reiterates that in the previous practice of the Assembly there is only one case when a mandate of the deputy was terminated as a result of committing a criminal offense. In that case, according to the case file, there is no information that any specific procedure has been followed in the Assembly for the removal of the mandate, except for the procedure for the replacement of the deputy whose mandate has ended. Consequently, after losing the mandate of the deputy in question, the President of the Assembly requested from the President the replacement of the deputy whose mandate had ended, according to the procedure defined in the Law on General Elections.

230. The Court recalls, once again, that the issue of the impossibility of being a candidate for a deputy of the Assembly is clearly and comprehensively defined in the constitutional and legal provisions, including Articles 71 and 73 of the Constitution, as well as Article 29 of the Law on General Elections. Also, the issue of loss, or invalidity, of the mandate of the deputy is regulated by Article 70 of the Constitution, Article 112 of the Law on General Elections, Article 8 of the Law on the Rights and Responsibilities of the Deputy and Article 25 of the Rules of Procedure of the Assembly.

231. The Court notes that the Constitution has expressly provided for the case in which the loss of the mandate is not automatic, but is subject to a special procedure in the Assembly, namely in cases when a deputy is absent for six (6) months in the sessions of the Assembly, unless the Assembly decides otherwise, as expressly provided in item 5 of paragraph 3 of Article 70 of the Constitution.

232. In this regard, the Court notes that even if the intention of the legislator would be to remove the mandate of a deputy, after the issuance of a final decision for a sentence of one year or more imprisonment, it is to be subject to a certain procedure, whether

through a formal vote by the Assembly or any other procedure in the Assembly, this procedure would have been defined either by constitutional provisions or by any of the relevant laws or by the Rules of Procedure of the Assembly.

233. Such a procedure cannot be determined by the Constitutional Court, unless it is provided for in any normative act and, moreover, in the absence of an established practice in the Assembly on this issue (as noted, from the responses of the Secretariat of the Assembly, it turns out that so far there has been only one such case).

234. However, the Court notes that on the fact of the absence of such a special procedure, such constitutional interpretations could not be constructed which would deprive Article 70.3.6 of the Constitution, Article 112.1.a and c of Law on General Elections, Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy, as well as Article 25 of the Rules of Procedure of the Assembly of practical effect. The Court considers that the purpose of Article 70.3.6 of the Constitution and the legal articles in question, which derive from it, is not to enable the exercise of the mandate of a deputy who is sentenced to one year or more imprisonment.

235. Therefore, the Court concludes that, in the absence of a special procedure for determining the loss, namely the invalidity of the mandate of the deputy, the mandate of the deputy is lost or becomes invalid from the moment of issuing the final court decision sentencing him/her to one year or more imprisonment. Thus, in the absence of such a procedure, the loss of the mandate is automatic and starts from the moment of issuing the final court decision on sentencing the deputy for a criminal offense with one year or more imprisonment.

236. On the other hand, the legal framework clearly defines the procedure to be followed for the replacement of a deputy who has lost his/her mandate, namely when "*the seat of a deputy remains vacant*" (Article 112.3 of the Law on General Elections). This represents another constitutional and legal moment, which follows the expiration or invalidity of the mandate of the deputy. Regarding the replacement of the deputies whose mandate has expired or has become invalid, the Assembly (namely its President), in accordance with Article 112.3 of the Law on General Elections, must take the legal actions provided for the replacement of the deputy, as soon as it is officially notified that there is a final court decision by which a deputy is sentenced to one year or more imprisonment. The Constitution, in paragraph 4 of its Article 70, clearly stipulates that the "vacancies" must be filled replaced "immediately".

237. Having regard to the abovementioned findings concerning the effect of the conviction for criminal offenses, on the impossibility of running for parliamentary elections and the loss of the mandate of a deputy, the Court will further assess whether, in the present case, Etem Arifi had a valid mandate during the conduct of the procedure for issuing the challenged decision.

I. Whether Etem Arifi had a valid mandate when the challenged decision was rendered

238. Initially, the Court recalls that on 20 April 2018, the Basic Court found Etem Arifi guilty of the criminal offense of "Subsidy fraud" and sentenced him to imprisonment for a term of 2 years, which sentence would not be executed on condition that within the time limit of 3 years he would not commit any other criminal offense. Whereas on 28 March 2019 and 20 August 2019, the Court of Appeals modified the Judgment of the Basic Court and sentenced the accused Etem Arifi to 1 year and 3 months imprisonment. These judgments of the Court of Appeals, in accordance with the provisions of the Criminal Procedure Code elaborated above, were final decisions. The last judgment of the Court of Appeals was served on Etem Arifi on 9 November 2019. On 30 January 2020, the Supreme Court rejected as ungrounded the request for protection of legality, filed by Etem Arifi.

239. On 26 August 2019, the President announced the elections for the Assembly, which were scheduled for 6 October 2019. On 27 August 2019, the CEC rendered a decision on setting deadlines for electoral activities, which provided that the deadline for applying for certification of political entities and candidates starts on 27 August 2019 and ends on 6 September 2019, while the deadline for withdrawal of candidates by draw from the ballots and the deadline for the replacement of candidates was 8-17 September 2019.

240. The Court notes that at the time of the certification of the candidates and the lists of political entities for elections, Etem Arifi was convicted of a criminal offense by a final decision of the Court of Appeals.

241. On 27 November 2019, the CEC certified the results of the elections for the Assembly. The list of deputies certified by the CEC also included Etem Arifi, who had already received the final Judgment of the Court of Appeals.

242. On 26 December 2019, the Assembly formed the Temporary Committee for the Verification of Quorum and Mandates. This

Committee presented its Report for the verification of mandates before the Assembly, based exclusively on the CEC Decision No. 1845/2019, of 27 November 2019, for the certification of the final results of the early elections for the Assembly of the Republic of Kosovo, held on 6 October 2019, together with the final list of deputies, which included Etem Arifi. The Report of the Temporary Committee for Verification of Quorum and Mandates did not mention the fact that Etem Arifi was convicted of a criminal offense with imprisonment of one year and three months.

243. On 30 April 2020, the President of the Assembly received a letter (Explanatory Memorandum) from the legal counsel of Etem Arifi, regarding the mandate of the latter, stating, *inter alia*, that "*the mandate of Mr. Etem Arifi [...] is legal and in accordance with the Constitution of the Republic of Kosovo as he was not convicted by a final decision of the court during this term (Legislature VII) [...]*".

244. On 30 April 2020, the President of the Assembly requested the KJC to send to the Assembly all information and documents related to the case in question. On 1 May 2020, the KJC submitted to the Assembly copies of the judgments by which Etem Arifi was found guilty of a criminal offense.

245. With regard to the KJC response, the Court wishes to emphasize the fact that, as can be seen from the case file as well as from the information presented at the hearing, the KJC notified the Assembly that Etem Arifi was convicted by a final court decision only after the President of the Assembly addressed the KJC requesting information regarding the case in question. In fact, if we take into account the time when Etem Arifi was convicted for the first time by a final judgment of the Court of Appeals (28 March 2019), it turns out that the Assembly was officially notified by the KJC about the conviction of Etem Arifit after more than a year.

246. On 4 May 2020, the President of the Assembly addressed a letter to the Chairperson of the Committee on Legislation, Mandates and Immunities, requesting that the issue of Etem Arifi's mandate be reviewed.

247. On 12 May 2020, the Committee on Legislation, Mandates and Immunities submitted a response to the request of the President of the Assembly, clarifying that "*[...] no provision of the Rules of Procedure of the Assembly speaks about the cases when the deputy loses the mandate ipso jure, except in the case as defined by Article 70, paragraph 3, subparagraph 5 of the Constitution of the Republic of*

Kosovo and Article 25 paragraph 1 point e) of the Rules of Procedure of the Assembly […]". In the end, this Committee recommended *"to follow the previous practices of the Assembly"*.

248. In connection with the response of the Committee on Legislation, Mandates and Immunities, the Court notes that, according to the Rules of Procedure of the Assembly of the Republic of Kosovo (Annex no. 2), the Committee in question *"reviews all issues that are related to the implementation of the Rules of Procedure of the Assembly and for mandates and immunities"*. Further, this Rules of Procedure instructs this Committee, *inter alia*, to *"interpret the Rules of Procedure of the Assembly, when requested by the Assembly"*, as well as "*to consider the requests for the abolition of the Immunity and Mandate of Members of Parliament and submits recommendations to the Assembly"*.

249. The Court notes that although the Rules of Procedure of the Assembly assigns to the Committee on Legislation, Mandates and Immunities the task of reviewing requests for the abolition of the immunity and mandate of deputies, it does not clearly define the role of this Committee in the event of loss of the mandate, or the invalidity of a mandate of the deputy, due to the imprisonment sentence by a final court decision (in accordance with Article 70.3.6 of the Constitution, Article 112.1.a of the Law on General Elections and Article 25.1.d. of the Rules of Procedure of the Assembly).

250. In the present case, the Court considers that the Committee in question was satisfied by following a narrow approach to the interpretation of its role, avoiding providing a comprehensive interpretation of the normative framework regarding the mandate of deputy in situations where a deputy of the Assembly of the Republic of Kosovo continues to exercise the mandate of a deputy, despite the fact that there is a final court sentence, by which he was sentenced to imprisonment of more than one year. This sentence was imposed before the deputy in question won the seat of the deputy, but which continues to remain active, as a criminal sanction pending its execution. Thus, this Committee was not able to express its clear position on whether Etem Arifi had a valid mandate as a deputy and, consequently, whether he should have been replaced.

251. The Court notes that following the response of the Committee on Legislation, Mandates and Immunities, neither the President of the Assembly, nor any other instance has taken any further action to clarify the issue of the validity of mandate of Etem Arifi, as well as to make his eventual replacement.

252. In the course of events, on 3 June 2020, the Assembly, by the challenged decision, with 61 votes "for", 24 "against" and 1 abstention, elected the Government of the Republic of Kosovo. According to the material submitted to the Court, Etem Arifi was one of the deputies who participated in the voting procedure by voting "for" the election of the Government.

253. On the basis of these chronological facts, it results that on the day of voting of the challenged decision in the Assembly, Etem Arifi:

- was convicted of a criminal offense by a final decision of the Court of Appeals with effective imprisonment of one year and three months, a sentence that has not yet been executed;
- the decision of the Supreme Court was rendered upholding his sentence;
- received the final decision of the Court of Appeals and the final decision of the Supreme Court; *and*
- The Assembly was also notified by the KJC regarding the final decision of the Court of Appeals and that of the Supreme Court.

254. In the light of these factual circumstances, the Court notes the different and contradictory interpretations by different bodies of the Assembly, as well as by the parties involved in this case, as to "*when the mandate of Etem Arifi became invalid*". Thus, the Court brought to attention the argument given by the Directorate for Legal Services and Approximation of Legislation of the Assembly, in the Opinion on the issue of the mandate of deputy Etem Arifi, of 18 May 2020, which stated that: *"the court decision has become final before Mr. Etem Arifi was certified as a deputy of the VII legislature. In this case, the constitutional and legal provisions related to the role of the Assembly of Kosovo for removal of the mandate of a deputy do not apply. Based on Law no. 03/L-073 on General Elections in the Republic of Kosovo, [CEC] is a competent body regarding the verification of formal criteria that must be met by candidates for deputies before their certification".*

255. In this line of argument, the Court also draws attention to the argument given by the representative of Etem Arifi, in the "Explanatory Memorandum" that he submitted to the President of the Assembly on 20 April 2020. The same submission was submitted by the representative of Etem Arifi to the Court on 7 December 2020, where he also informed the Court that before the regular courts they have made a request for the reopening of the criminal case against Etem Arifi. In the above-mentioned "Explanatory Memorandum", the

representative of Etem Arifit stated that: "*the mandate of Mr. Etem Arifi [...] is legal and in accordance with the Constitution of the Republic of Kosovo as he was not convicted by a final decision of the court during this term (Legislature VII) while the sentence imposed by Judgment of 20.08.202 has not presented an obstacle in the certification of Mr. Arifi as a candidate for deputy and also does not pose a legal obstacle in continuing to exercise the mandate as long as these legal conditions exist*".

256. In this regard, the Court considers it important to note that even during the hearing, the parties expressed opposing views on the question of whether Etem Arifi lost his mandate and if so, when. Thus, the Applicants' representative alleged that Etem Arifi won the mandate in violation of the Constitution and the law and that the loss of his mandate began to take effect for the Assembly from the moment the Assembly was notified by the KJC about the conviction of the deputy in question. The representative of the President of the Assembly said that Etem Arifi continues to have a mandate, while the representative of the Government argued that Etem Arifi lost his mandate in the previous legislature (when he was convicted by a final decision) and, according to him, the mandate of Etem Arifi in this legislature is valid.

257. In this regard, the Court initially notes that at the time of imposing the sentence by the Court of Appeals, on 19 March and 20 August 2019, Etem Arifi was a deputy of the previous legislature of the Assembly (namely the VI-th legislature), which legislature was dissolved after the vote of the Assembly on 22 August 2020. Based on the response received from the Secretariat of the Assembly, it does not appear that Etem Arifi was replaced in the previous legislature (VI legislature), as the Assembly had not taken any action regarding the mandate of Etem Arifi.

258. However, the Court notes that - beyond the question arising as to the possibility of losing a mandate of a deputy as a result of a conviction for a criminal offense during a particular legislature - the Constitution and relevant laws do not even allow a person convicted of a criminal offense to run in the elections (if he was convicted of a criminal offense during the last three years) nor to exercise the duty of deputy (if he was sentenced to one or more years of imprisonment by a final court decision).

259. Thus, the Court considers that in the present case it is not essential whether Etem Arifi should have been deprived of his mandate as a deputy in the previous legislature, pursuant to Article 70.3.6 of the

Constitution, but first of all whether he should have been allowed to run for deputy, in the elections of 6 October 2019, according to Article 71.1 of the Constitution and Article 29.1 (q) of the Law on General Elections.

260. In the Court's assessment, Article 70.3.6 of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of a Deputy and Article 112.1 (a) and (c) of the Law on General Elections should be read intertwined with Article 71.1 of the Constitution and Article 29.1.q of the Law on General Elections. The common purpose of these constitutional and legal articles is that:

a) persons convicted of criminal offenses by final court decisions, valid in the Republic of Kosovo, cannot run or be elected as deputies, if they have been convicted during the last three years before the elections; and
b) they cannot exercise the mandate of deputy if they are sentenced to one or more years of imprisonment, by a final court decision, valid in the Republic of Kosovo.

261. As such, the abovementioned constitutional and legal provisions are coherent and complementary. In a general view, those provisions reveal the legislator's clear intention that persons criminally convicted of a violation of the law may not be elected as deputies for a term of certain time, as well as not be able to exercise the duty of representative of citizens in the legislative body of the country - the Assembly of the Republic of Kosovo.

262. The Court considers that such an approach, in terms of the effect of the sentence on the mandate of the deputy, is outlined in the Judgment of the Constitutional Court in case KO98 /11, where the Court has emphasized that the mandate of the deputy ends when a final court decision "***exists***" by which a deputy is sentenced to one or more years of imprisonment. This is a reasonable interpretation, since the sentence of effective imprisonment, for a certain period of time, prevents the deputy from exercising his representative function. Accordingly, this disables the representation of voters who voted for the deputy in question and, moreover, undermines the integrity of the legislative body.

263. This is also in line with the practice of the vast majority of the member states of the Venice Commission Forum, as well as with the views expressed in the Venice Commission Reports.

264. In this light, the Venice Commission refers to the case law of the ECtHR which notes that, under Article 3 of Protocol 1 to the ECHR, "*restrictions on the right to be elected should be limited to what is necessary to ensure the proper functioning and preservation of the democratic regime. This functioning would be more seriously endangered by an elected officer than by a simple voter exercising his active electoral rights. The restrictions under consideration should not be considered as limiting democracy, but as a means of preserving it*" (see Report of the Venice Commission on the Exclusion of Offenders from Parliament, p. 28).

265. On the other hand, the Court wishes to clarify that it considers the Applicants' argument that the constitutional effect of Etem Arifi's sentence begins to run from the moment the Assembly was notified by the KJC about the existence of this sentence as ungrounded. This is because neither the Constitution nor any legal provision sets out a procedure to be followed to deprive a deputy of his mandate - after he has lost his mandate as a result of a sentence for criminal offence. As well as due to the lack of a clear normative basis that determines how and when the KJC (or courts) have an obligation to notify the Assembly that a deputy is convicted of a criminal offense.

266. Therefore, as can be seen from the case file and as noted by the KJC representative during the hearing, there is no normative provision (legal act or sub-legal act) that sets out a clear obligation for the KJC to notify the Assembly about sentencing of deputies. As a result, in this case the Assembly was informed by the KJC about the sentencing of Etem Arifi only after the President of the Assembly formally requested the KJC to inform him about this case and almost a year after his sentence (in the first time), by final decision.

267. Based on the above, and in accordance with the principles and findings elaborated above, the Court finds that Etem Arifi has not won the mandate of the deputy in accordance with Article 71.1 of the Constitution and Article 29.1 (q) of the Law on General Elections, nor he may exercise it, in accordance with Article 70.3.6 of the Constitution, in conjunction with Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Article 112.1 (a) and (c) of the Law on General Elections.

268. In such circumstances, the Court cannot assign the constitutional legitimacy to the mandate of a deputy, for whom it has been confirmed that the conditions provided by the Constitution and relevant laws were not met, to be a candidate for deputy (when he run and was elected), nor to exercise the mandate of deputy.

269. Therefore, the Court finds that when issuing the challenged decision, Etem Arifi did not have a valid mandate as a deputy, in accordance with Articles 71.1 and 70.3.6 of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Articles 29.1 (q) and 112.1.a of the Law on General Elections.

II. Whether the challenged decision of the Assembly is in accordance with the Constitution if a deputy who did not have a valid mandate participated in its voting procedure?

270. After the Court found that in the case of issuing the challenged decision, Etem Arifi did not have a valid mandate of deputy, in accordance with the relevant constitutional and legal provisions elaborated above, it will further assess whether the procedure for issuing the challenged decision was in accordance with the Constitution.

271. The Court first refers to paragraph 3 of Article 95 [Election of the Government] of the Constitution which stipulates that:

> *"3. The Government is considered elected when it receives the majority vote of all deputies of the Assembly of Kosovo".*

272. The Court notes that according to the abovementioned provisions of the Constitution, in order to elect the Government, it is required that a majority of all deputies of the Assembly vote "*for*" the proposed Government. Given that the Assembly of Kosovo, in accordance with Article 164, paragraph 1 of the Constitution, has 120 deputies, the Court notes that at least 61 deputies must vote "*for*" the Government in order for it to be considered elected.

273. The Court notes that this interpretation of the meaning of "majority of the deputies of the Assembly" was also interpreted by the Constitutional Court in Judgment KO72/20. In that case, the Court had clearly found that *"Article 95 of the Constitution is organized in 6 paragraphs, which establish the manner of electing the Government within an election cycle, [...] Its second and third paragraphs [Article 95 of the Constitution], stipulate [...] the Government is considered elected if it receives a majority of the votes of all deputies of the Assembly of Kosovo, namely the vote of sixty one (61) deputies", (*see Judgment of the Constitutional Court KO72/20, Applicant: *Rexhep Selimi and 29 other Members of the Assembly of the Republic of Kosovo*, Judgment of 28 May 2020, published on 1 June 2020, paragraph 428).

274. Further, in the same Judgment, the Constitutional Court stated that "*For the approval of no confidence in a Government, sixty one (61) votes of people's representative is required, as much as it is enough to give the confidence of the Assembly to a Government to be considered elected*" (see Judgment of the Constitutional Court KO72/20, paragraph 388).

275. Such an interpretation is also confirmed by the responses received from the states of the Venice Commission Forum, where from all the states which envisage the voting of the "*majority of all the deputies of the Parliament*" it has been clarified that the majority of all the deputies of the Parliament means the majority of the number of deputies provided by their constitutions.

276. The Court notes that, in the case of Kosovo, this majority, namely "*the majority of the votes of all deputies of the Assembly of Kosovo*", differ from the majority of votes of the deputies required to take other decisions in the Assembly. In this regard, the Constitution of Kosovo distinguishes between decision-making procedures where the decision-making requires a majority of votes of all members of the Assembly (for some very important decisions), and the decision-making procedures when a majority of present deputies and voting is required.

277. Therefore, the Court reiterates once again that in order for the Government to be elected, in accordance with paragraph 3 of Article 95 of the Constitution, at least sixty-one (61) deputies of the Assembly must vote "for" the Government.

278. In the present case, according to the official documents of the Assembly, the Court notes that on 3 June 2020, sixty-one (61) deputies had voted "*for*" the Government, namely for the challenged decision. Etem Arifi also voted for the approval of the challenged decision.

279. The Court found above that the mandate of Etem Arifi was invalid before the challenged decision was voted. Therefore, since the challenged decision received only 61 votes of the deputies of the Assembly, including the vote of Etem Arifi, the Court notes that without counting his vote, the challenged decision received only 60 votes of the deputies of the Assembly.

280. The Court further considers it important to place emphasis on Article 70 [Mandates of the Deputies] of the Constitution, which states that *"Deputies of the Assembly are representatives of the people"*. Whereas

Article 74 [Exercise of Function] of the Constitution stipulates that: *"Deputies of the Assembly of Kosovo shall exercise their function in best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly"*.

281. The Court finds that Decision No. 07/V-014, of 3 June 2020, for the Election of the Government of the Republic of Kosovo, is not in compliance with the Constitution, because that decision did not receive the majority of votes of all deputies of the Assembly, namely 61 valid votes, as defined in paragraph 3 of Article 95 of the Constitution.

282. The Court reiterates that in order for the Government to be elected, in accordance with paragraph 3 of Article 95 of the Constitution, at least sixty-one (61) deputies of the Assembly must vote "for" the Government. In this case, according to official documents of the Assembly, the Court notes that on 3 June 2020, sixty-one (61) deputies had voted "*for*" the Government, namely for the challenged Decision. Etem Arifi also voted for the approval of the challenged decision. After the Court found that Etem Arifi's mandate had been invalid prior to the vote on the challenged Decision, that Decision had received only sixty (60) valid votes.

283. Further, with regard to the effects of this Judgment, the Court considers it necessary to clarify that Article 95 of the Constitution, as interpreted through its case law, provides for two attempts to elect the Government by the Assembly. In both cases, the Government to be considered elected must have the majority of votes of all deputies of the Assembly, namely sixty one (61) votes. If the Government is not elected even after the second attempt, Article 95.4 of the Constitution expressly stipulates the announcement of elections by the President of the Republic of Kosovo, which based on this article, must be held no later than forty (40) days from the day of their announcement by the President.

284. The Court recalls that the Government voted by Decision No. 07/V-014 of the Assembly, of 3 June 2020, is based on Presidential Decree No. 24/2020, issued based on paragraph 4 of Article 95 of the Constitution, namely the second attempt to elect the Government. In this regard, the Court recalls the interpretation given in Judgment KO72/20 where it stated that *"the elections will be inevitable in case of failure of the election of the Government in the second attempt, [...] in which case, based on paragraph 4 of Article 95 of the Constitution, the President announces the elections, which must be held no later than forty (40) days from the day of their announcement"*.

285. Therefore, the Court reiterates that when a proposed Government, based on paragraph 4 of Article 95 of the Constitution, does not receive the necessary votes to be elected, the Constitution expressly stipulates that the President of the Republic of Kosovo announces elections, which must be held no later than forty (40) days from the day of their promulgation.

286. Finally, the Court also clarifies that the finding that the challenged Decision of the Assembly on the election of the Government is not in compliance with paragraph 3 of Article 95 of the Constitution, does not result in the automatic dissolution of the Assembly.

Conclusions

287. On 28 March and 20 August 2019, Etem Arifi was sentenced by a final Judgment of the Court of Appeals to one year and three months of imprisonment. On 6 October 2019, the early elections were held for the Assembly of the Republic of Kosovo. Etem Arifi ran and was elected a deputy of the Assembly of the Republic of Kosovo. On 27 November 2019, the CEC certified the election results and Etem Arifi was also on the list of certified deputies. On 26 December 2019, the constitutive meeting of the Assembly was held where the mandate of Etem Arifi was confirmed. Since then, Etem Arifi continued to exercise the function of a deputy, even though he was sentenced by a final court sentence, for a criminal offense, to one year and three months of imprisonment.

288. In this constitutional referral, 17 deputies of the Assembly of the Republic of Kosovo challenged the constitutionality of Decision No. 07/V-014 of the Assembly of the Republic of Kosovo, on the election of the Government, issued on 3 June 2020. The Applicants allege that the Decision in question is contrary to the Constitution, namely paragraph 3 of Article 95 [Election of the Government], in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [Mandate of the Deputies] of the Constitution. This is because, according to the Applicants, Etem Arifi also participated in the voting procedure of the challenged Decision, whose vote was invalid due to his sentence of one year and three months imprisonment, by a final court decision.

289. The Court noted that the basic question contained in this Referral is whether Etem Arifi had a valid mandate at the time the challenged Decision was adopted in the Assembly on the election of the Government (in the voting of which he had participated).

290. In this respect, the Court took into account: the responses submitted by the member states of the Venice Commission Forum, the views of the Venice Commission; as well as the previous practice of the Assembly of the Republic of Kosovo, for similar situations.

291. With regard to the constitutional and legal provisions in the Republic of Kosovo, which provide answers to the issues raised by this Referral, the Court found that:

- Article 71.1 of the Constitution, in conjunction with Article 29.1 (q) of the Law on General Elections, stipulates that no person can be a candidate for deputy for elections to the Assembly, if he was convicted of a criminal offense by a final court decision in the past three years;

- Article 70.3 (6) of the Constitution stipulates that the mandate of a deputy ends or becomes invalid if he/she is sentenced by a final court decision to one or more years of imprisonment. This constitutional definition is reinforced by Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy, Article 112.1.a of the Law on General Elections, as well as Article 25.1.d of the Rules of Procedure of the Assembly;

292. The Court considers that, as regards the right to run in the parliamentary elections, Articles 45, 55 and 71.1 of the Constitution should be read in conjunction. Thus, Article 45 of the Constitution generally deals with electoral rights, stipulating in a general way that they can be limited by court decisions, while Article 55 establishes the cumulative conditions under which the human rights guaranteed by the Constitution may be limited. While Article 71 of the Constitution – which deals exclusively with the "qualifications" to run for a deputy of the Assembly – stipulates that every citizen of the Republic of Kosovo who is eighteen (18) years or older and meets the legal criteria is eligible to become a candidate for the deputy. These "legal criteria", referred to in Article 71 of the Constitution, are defined by the Law on General Elections, which in Article 29.1 (q) clearly and explicitly states that no person can be a candidate for deputy for elections to the Assembly, if he/she has been convicted for a criminal offense by a final court decision in the past three years. This constitutional and legal definition is in line with the practice followed by many democratic countries, as noted by the relevant documents of the Venice Commission, as well as the responses of the member states of the Venice Commission Forum.

293. The Court emphasizes that the abovementioned constitutional and legal norms, which have to do with the impossibility (ineligibility) to run for deputy in the general elections, as well as with the termination or invalidity of the mandate of the deputy, as a consequence of the sentence with imprisonment for the commission of criminal offenses, should not be seen as an end in itself. In essence, these norms do not have the primary purpose of punishing certain individuals by preventing them from exercising the function of deputy, but have as their basic purpose the protection of constitutional integrity and civic credibility in the legislature, as a pillar of parliamentary democracy.

294. The Court considered that the civic credibility in the Assembly of the Republic of Kosovo is violated if – despite the prohibitions imposed by Article 71 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections – it is allowed that the mandate of a deputy is won and exercised by a person convicted of a criminal offense by a final court decision valid in the Republic of Kosovo.

295. In this respect, the Court draws attention to the Report of the Venice Commission, which states that "*legality is the first element of the Rule of Law and implies that the law must be followed, by individuals and by the authorities. The exercise of political power by people who seriously infringed the law puts at risk the implementation of this principle [rule of law], which is on its turn a prerequisite of democracy, and may therefore endanger the democratic nature of the state*". (See Report of the Venice Commission on the Exclusion of Offenders from Parliament, CDL-AD(2015)036, of 23 November 2018, paragraph 168).

296. In this spirit, the Court noted that it is a clear constitutional requirement embodied in Article 71.1 in conjunction with Article 70.3 (6) of the Constitution, that it is incompatible with the Constitution for a person to win and hold the mandate of deputy if convicted for a criminal offense, by a final court decision, as defined by these provisions. This requirement is reinforced by Articles 29 and 112 of the Law on General Elections, as well as Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy.

297. The Court further emphasized that the fact that Article 70.3 (6) of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy and Article 112.1 (a) of the Law on General Elections refer to the conviction of a deputy (i.e. the conviction after he has won the mandate), is a reflection of the presumption that Article 29.1 (q) of the Law on General Elections, which is based on Article 71.1 of the Constitution, does not allow a

person sentenced to imprisonment during the last three years before elections to run for deputy and win the mandate of deputy.

298. Therefore, based on the clear language of Article 71.1 of the Constitution in conjunction with Article 29.1 (q) of the Law on General Elections, as well as sub-paragraph 6 of paragraph 3 of Article 70 of the Constitution, the Court considers that no person can win and hold a valid mandate of a deputy if he/she is convicted of a criminal offense as provided by these provisions, by a final court decision, if against him/her there is a sentencing decision that is in force in the Republic of Kosovo.

299. The Court notes the explanation of the CEC that according to Judgment AA.-Uzh. No. 16/2017, of 19 September 2017 of the Supreme Court, *"no one can be denied the right to run in the elections, if such a right has not been taken away by a court decision, which means that the candidate must be found guilty by a final decision, and the court, has imposed the accessory punishment "deprivation of the right to be elected"*.

300. However, the Court considers that the Law on General Elections does not require that persons convicted of criminal offenses necessarily be sentenced to an accessory punishment *"deprivation of the right to be elected"*, so that they are not allowed to run in parliamentary elections. This is because, according to Article 29.1 of the Law on General Elections, among others, the following two grounds are provided: (i) deprivation of the right to be a candidate in elections by decision of the ECAP and the court; and (ii) the impossibility of being a candidate due to being found guilty of a criminal offense by a final court decision in the past three years. These are different/separate grounds that cause inability/ineligibility to be a candidate. The Court is of the opinion that this interpretation is also consistent with the related reading of Articles 45, 55 and 71 of the Constitution.

301. The Court considers it important to note that the candidacy of Etem Arifi in the parliamentary elections, his election as a deputy and the exercise of his mandate as a deputy – all this after he was sentenced to one year and three months imprisonment by a final court decision – reveals the existence of normative ambiguity and serious shortcomings in the institutional mechanisms of the Republic of Kosovo, which are competent to guarantee the legality and constitutional integrity of electoral processes and parliamentary

activity. This ambiguity is also evident in the answers given by the relevant bodies of the Assembly and the CEC.

302. In this regard, the Court emphasizes the need for the Assembly of the Republic of Kosovo with its committees, in cooperation with relevant institutions, including the KJC and the CEC, to clarify and consolidate inter-institutional cooperation and normative aspects that relate to the candidacy in parliamentary elections and the exercise of the mandate of deputy, by persons convicted of criminal offenses.

303. This is necessary to avoid paradoxical situations, from the constitutional point of view, where a person, after being convicted by a final court decision as provided by the relevant articles of the Constitution and laws, is allowed to run in parliamentary elections, to be elected a deputy, to have his mandate verified, as well as to continue to exercise the function of deputy in the Assembly of the Republic of Kosovo, even while serving an imprisonment sentence. Meanwhile, the Constitution and the relevant laws set clear normative barriers to prevent persons sentenced to imprisonment for committing criminal offenses, to be elected deputies and to exercise the mandate of deputies.

304. With regard to the election of the Government, the Court notes that in order for the Government to be elected, in accordance with paragraph 3 of Article 95 of the Constitution, at least sixty-one (61) deputies of the Assembly must vote "for" the Government. In this case, according to official documents of the Assembly, the Court notes that on 3 June 2020, sixty one (61) deputies voted "*for*" the Government, namely for the challenged Decision. Etem Arifi also voted for the adoption of the challenged Decision. As the Court found that the mandate of Etem Arifi was invalid prior to the vote of the challenged Decision, that Decision had received only sixty (60) valid votes. Consequently, the procedure for electing the Government was not conducted in accordance with paragraph 3 of Article 95 [Election of the Government] of the Constitution, because the Government did not receive a majority of votes of all deputies of the Assembly of the Republic of Kosovo.

305. The Court notes that Article 95 of the Constitution, as interpreted through its case law, provides for two attempts to elect the Government by the Assembly. In both cases, the Government to be considered elected must have a majority of votes of all deputies of the Assembly, namely sixty-one (61) votes. If the Government is not elected even after the second attempt, Article 95.4 of the Constitution

provides for the announcement of elections by the President of the Republic of Kosovo.

306. The Court recalls that the Government voted by Decision No. 07/V-014 of the Assembly of 3 June 2020 is based on the Decree No. 24/2020 of the President, of 30 April 2020, issued based on paragraph 4 of Article 95 of the Constitution, namely the second attempt to elect the Government. In this regard, the Court recalls the interpretation given in Judgment KO72/20 where it stated that *"the elections will be inevitable in case of failure of the election of the Government in the second attempt, [...] in which case, based on paragraph 4 of Article 95 of the Constitution, the President announces the elections, which must be held no later than forty (40) days from the day of their announcement"*.

307. In light of this, the Court notes that in the present case paragraph 4 of Article 95 of the Constitution is set in motion, according to which the President of the Republic of Kosovo announces the elections, which must be held no later than forty (40) days from the day of their announcement.

308. The Court considers it important to emphasize that it is aware that Etem Arifi has participated in other voting procedures in the Assembly, even though he did not have a valid mandate. However, based on the principle *non ultra petita* ("not beyond the request"), the Court is limited to the constitutional review of the challenged act by the referral submitted before it, namely Decision No. 07/V-014, of the Assembly of the Republic of Kosovo, regarding the Election of the Government of the Republic of Kosovo.

309. The Court considers it necessary to clarify also that, based on the principle of legal certainty, as well as the fact that this Judgment cannot have retroactive effect, the decisions of the current Government remain in force, and the Government remains in office until the election of the new Government.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113, paragraph 5 of the Constitution, Articles 42 and 43 of the Law on the Constitutional Court and pursuant to Rules 59 (1) and 72 of the Rules of Procedure, on 21 December 2020, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that, based on Article 71.1 of the Constitution of the Republic of Kosovo, in conjunction with Article 29.1 (q) of the Law on General Elections, a person convicted of a criminal offense by a final court decision in the last three (3) years, cannot be a candidate for deputy, nor win a valid mandate in the Assembly of the Republic of Kosovo;

III. TO HOLD that Decision No. 07/V-014 of the Assembly of the Republic of Kosovo on the Election of the Government of the Republic of Kosovo, of 3 June 2020, is not in compliance with paragraph 3 of Article 95 [Election of the Government] of the Constitution, because the Government did not receive the majority of votes of all deputies of the Assembly of the Republic of Kosovo;

IV. TO HOLD that considering that the Government was not elected according to paragraph 3 of Article 95 [Election of the Government] of the Constitution, based on paragraph 4 of Article 95 [Election of the Government] of the Constitution, the President of the Republic of Kosovo announces the elections, which must be held no later than forty (40) days from the day of their announcement;

V. TO HOLD that, this Judgment has no retroactive effect and based on the principle of legal certainty, the decisions of the Government remain in force, and the Government remains in office until the election of the new Government;

VI. TO DECLARE that this Judgment is effective on the date of its publication and its submission to the parties;

VII. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law.

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

KI230/19, Applicant: Albert Rakipi, Constitutional review of Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo, of 30 September 2019

KI230/19, Judgment, rendered on 9 December 2020

Keywords: *individual referral, request for holding a public hearing, admissible referral, adversarial principle, principle of equality of arms, lack of a reasoned court decision, official person, use of analogy in criminal law, violation of the right to fair and impartial trial*

1. The circumstances of the present case are related to the fact that the Applicant, in 2015 by the Special Prosecution of the Republic of Kosovo (hereinafter: SPRK) was accused that in co-perpetration, as a director of a company [ISN company] in the Republic of Albania won the contract with the University of Prishtina for the translation of some books, and in order to unlawfully benefit for the company, had "falsified the original contract", where the contract was later amended, which enabled the company a greater benefit for the same services. On 18 December 2017, the Basic Court in Prishtina, Serious Crimes Department by Judgment PKR. No. 432/15, after finding that the Applicant had the status of an official person, found him guilty of committing the criminal offense "fraud in office" in co-perpetration under Article 341, paragraph 3 in conjunction with Article 23 of the Provisional Criminal Code of Kosovo, and consequently sentenced him to imprisonment of six (6) months, replacing the imprisonment sentence with a fine of 10,000 (ten thousand) euro. Against the Judgment of the Basic Court, the Applicant, two other convicts, as well as the SPRK filed an appeal with the Court of Appeals. The Applicant specifically claimed that (i) the Basic Court had unlawfully rejected to administer the correspondence of an e-mail which he proposed as material evidence (ii) that he did not have the status of an official prson; and (iii) violation of the provisions of criminal procedure on the grounds that the legal property claim was not filed by the competent person. On the other hand, the SPRK, by its appeal requested the modification of the decision on sentence. The Court of Appeals, *inter alia*, by Judgment [PAKR No. 27/2018] of 2 May 2018 partially approved the Applicant's appeal only regarding the legal property claim, instructing the University of Prishtina in a civil dispute for the realization of this claim, while approving the appeal of the SPRK and modifying the decision on the sentence, and consequently the Applicant was sentenced to imprisonment of one (1) year. As a result of the request for protection of legality submitted by the Applicant to the Supreme Court, by which, among other things, he complained about

the non-holding of the session of the Appellate Panel, and according to him he was denied the presentation of new evidence, the Supreme Court by Judgment Pml. No. 238/2018, of 5 October 2018 approved the request for protection of legality submitted by the Applicant as grounded, annulled the Judgment of the Court of Appeals and remanded the case for reconsideration to the same court. In the retrial procedure, the Court of Appeals by Judgment PAKR. No. 528/2018 of 16 April 2019, rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court, of 18 December 2017. The Applicant in his request for protection of legality (i) alleged violation of the equality of arms and the principle of adversarial proceedings as a result of the non-administration of electronic correspondence as material evidence by the Basic Court; (ii) erroneous interpretation of the law and violation of the principle of prohibition of analogy in criminal law, as a result of his qualification as an official person. The Supreme Court by Judgment Pml. 253/2019, of 30 September 2019 rejected the Applicant's request for protection of legality as ungrounded and upheld the Judgments of the Basic Court, of 18 December 2017 and that of the Court of Appeals, of 16 April 2019. The Supreme Court upheld the position of the lower instance courts regarding their non-approval of the administration of electronic correspondence as material evidence and their interpretation regarding the qualification of the Applicant as an official person, who was consequently convicted of committing the criminal offense of fraud in office.

2. The Applicant in relation to the abovementioned findings of the regular courts, specifically to that of the Supreme Court, alleged violation of the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR), and Article 10 of the Universal Declaration of Human Rights (hereinafter: the UDHR). The Applicant, in essence, alleged a violation of the principle of adversarial proceedings and equality of arms, as a result of non-administration of electronic correspondence as material evidence and (ii) erroneous interpretation of the law by the regular courts, which according to him, by using the analogy, erroneously interpreted that he had the status of official person. Subsequently, the Applicant also requested the holding of a public hearing in the Court.

3. The Court, during the assessment of the admissibility of the Referral, found that the Applicant (i) is an authorized party, because he submitted the Referral in the capacity of an individual in order to

protect his rights; (ii) has specified the fundamental rights and freedoms guaranteed by the Constitution which he alleges to have been violated; (iii) has submitted his referral within the time limit; (iv) that the Referral is not manifestly ill-founded on constitutional basis and has, therefore, concluded that the Applicant's Referral is admissible.

4. The Court, further, regarding the Applicant's allegation of violation of his right to fair and impartial trial, as a result of the erroneous interpretation of the law by the regular courts during his qualification as an official person, decided to consider this claim within the framework of his right to a reasoned court decision, which is also an integral part of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

5. The Court, after assessing the allegations of the Applicant, applying the standards of the case law of the European Court of Human Rights, the Court regarding the adversarial principle, principle of equality of arms and the lack of a reasoned court decision, the principles and guarantees, which are guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, found as follows: (i) With regard to the Applicant's allegation of a violation of the principle of "*equality of arms*" and the principle of "*adversarial proceedings*" as a result of the rejection of evidence proposed by the regular courts, the Court found that the Applicant's allegations that his right to fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR are ungrounded; and (ii) as to the lack of a reasoned court decision, the Court found that with the issuance of Judgment Pml. No. 253/2019, of 30 September 2019, the Supreme Court failed to substantiate the substantive allegations of the Applicant and did not reason its decision regarding his qualification as an official person.

JUDGMENT

in

Case No. KI230/19

Applicant

Albert Rakipi

Constitutional review of Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo, of 30 September 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral is submitted by Albert Rakipi (hereinafter: the Applicant), a citizen of the Republic of Albania, who is represented by Artan Qerkini, a lawyer at the Law Firm *"Sejdiu and Qerkini"* L.L.C. in Prishtina.

Challenged decision

2. The Applicant challenges Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 30 September 2019, in conjunction with Judgment PAKR. No. 528/2018 of the Court of Appeals of Kosovo, Department for Serious Crimes (hereinafter: the Court of Appeals) of 16 April 2019, and Judgment

PKR. No. 432/15 of the Basic Court in Prishtina, Department for Serious Crimes (hereinafter: the Basic Court) of 18 December 2017.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgments, which allegedly violate the Applicant's rights, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR), and Article 10 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

4. The Applicant, in essence, alleges (i) violation of the principle of "*equality of arms*" and the principle of "*adversarial proceedings*", as a result of the rejection of the evidence proposed by the regular courts and (ii) the clearly arbitrary interpretation and application of law, as a result of his qualification as an "*official person*" due to the application of the analogy by the regular courts.

Legal basis

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

Proceedings before the Constitutional Court

6. On 17 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 20 December 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Bajram Ljatifi (members).

8. On 14 January 2020, the Court notified the Applicant's representative about the registration of the Referral. On the same date, the Court notified the Supreme Court about the registration of the Referral.

9. On 27 January 2020, the Basic Court submitted the original case file, as a result of its request for submission of the file in case KI239/19, in which referral are the same court decisions, which are also challenged by the other Applicant H.V. Therefore, the Court had the opportunity to access and review the original case file.

10. On 16 September 2020, the Court considered the case and decided to postpone the decision on this case to another session.

11. On 9 December 2020, the Review Panel considered the report of the Judge Rapporteur, through which it was proposed that (i) the Referral be declared admissible; (ii) to find that the Applicant's allegations regarding the violation of the principle of adversarial proceedings and the principle of equality of arms are ungrounded and consequently there has been no violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; iii) to find that the above-mentioned decisions of the regular courts which refer to the qualification of the Applicant as an official person were rendered in violation of Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, in conjunction with Article 7 (No punishment without law) of the ECHR, as a result of the use of analogy in criminal law. On the same date, the Review Panel by majority recommended to the Court the admissibility of the Referral.

12. On the same date, the Court voted as follows: (i) by majority of votes held that the Referral is admissible; (ii) by majority of votes held that the challenged Judgment of the Supreme Court was rendered in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR as a result of not non-reasoning the court decision regarding the Applicant's allegation for his qualification as an official person; and (iii) declared Judgment [Pml. no. 253/2019]of the Supreme Court of 30 September 2019 invalid regarding the Applicant, deciding to remand Judgment Pml. No. 253/2019of the Supreme Court of 30 September 2019, for retrial in accordance with the findings of this Judgment. Subsequently, Judge Radomir Laban requested to submit a concurring opinion, which was supported by Judges Bekim Sejdiu, Bajram Ljatifi and Safet Hoxha.

Summary of facts

13. On 31 July 2015, the Special Prosecution of the Republic of Kosovo (hereinafter: the SPRK) filed an indictment (PPS. No. 145/2014) against the Applicant on the grounds that in co-perpetration he committed the criminal offense "*fraud in office*" under Article 341, paragraph 3, in conjunction with Article 23 of the Provisional Criminal Code of Kosovo (hereinafter: the PCCK).

14. By the same indictment for co-perpetration of the same criminal offense, mentioned above, two other persons were charged, the first accused E.H., official person, rector of the University of Prishtina (UP) and the second accused H.V. , official person, head of procurement at the UP.

15. The Applicant was accused that in co-perpetration, as a director of a company [ISN company] in the Republic of Albania, he had won the contract with the University of Prishtina for the translation of some books, and in order to illegally benefit for the company, had "falsified the original contract", where the contract was subsequently amended, which enabled the company a greater benefit for the same amount of service.

16. On 18 December 2017, the Basic Court in Prishtina, Department for Serious Crimes (hereinafter: the Basic Court), by Judgment PKR. No. 432/15, found the Applicant guilty of having committed the criminal offense of "*fraud in office*" in co-perpetration with two other persons mentioned above and sentenced the Applicant to imprisonment for a term of six (6) months, replacing the imprisonment sentence with a fine in the amount of 10,000 (ten thousand) euro. Subsequently, the Basic Court also obliged the defendants to compensate the damage to the University of Prishtina jointly in the amount of 70,131.27 euro, as well as to jointly pay the costs of the criminal proceedings according to the final calculation of the court, as well as on behalf of the court fee to pay each separately the amount of 200 euro.

17. The Basic Court, by Judgment PKR. No. 432/15, found the Applicant guilty because he had committed the criminal offense of "*fraud in office*" in co-perpetration, reasoning that the co-perpetrators are guilty:

Because:

The accused E.H., official person Rector of the University of Prishtina (UP), H.V. official person, Head of Procurement at UP and Albert Rakipi official person, Director of the Institute for International Studies (ISN) from Tirana, in order to illegally obtain material benefit for the company ISN, according to the preliminary agreement, have falsified the original contract "Translation of books from English into Albanian for the needs of the University of Prishtina "with Ref. No. 43/8 dated 05.12.2008, which contract in Article 17 determines the total value of the contract in the amount of 500,000.00 € and the payment price 12.65 € per 1000 words, so that on 08 December 2008, the vice director of the company IMS J.Q., sent the accused E.H. request for change of the contract from the unit of measurement "word" to the unit of measurement "characters" where then the accused H.V., according to the agreement with the accused E.H., has drafted a new contract in which he changed Article 17 of the original contract, so that instead of the price of € 12.65 per 1000 words, it was marked the price of € 12.65 per 1000 characters, thus enabling ISN a greater benefit for the same amount of service, and to mislead the authorized persons of UP, for making the illegal payment, the accused H.V. in the forged contract kept the number and date of the original contract, which contract the accused E.H. on 13 December 2008, sent to Tirana to be signed by the accused Albert Rakipi, who then based on the forged contract on 13 July 2009 sent to UP the invoice for the translation of eight books at a price of € 78,999.25 , calculated according to the measuring unit "characters"", which according to the original contract calculated according to the measuring unit "word" had cost € 14,991.91, as well as the invoice for the translation of UP accreditation documents at a price of € 8,542.55, calculated according to the unit of measurement "characters" which according to the original contract calculated according to the unit of measurement "word" had cost € 106,083, and to mislead the authorized persons of the UP to make the illegal payment, the accused Albert Rakipi in those invoices wrote down the mark 1,000/F, which to the members of the UP commission for the receipt of the translated material, has created an error that the calculation of the translation was done with the unit of measurement "word", so this commission by approving the quality and quantity of services performed by ISN, recommended the execution of the payment, while the accused H.V. although he knew that ISN has calculated the price of translation according to the unit of measurement "characters" on 07 September 2009 issued a purchase order for payment in the amount of 87,541.80 €, while on 17 September 2009, the UP Finance Service this

money transferred to ISN, in which way the accused provided the company ISN with an illegal financial benefit in the amount of € 70,131.27, to the detriment of the UP. With this, in co-perpetration, the defendants committed the criminal offence of Fraud in office under Article 341 par. 3 in conjunction with par. 1 in conjunction with Article 23 of the Criminal Code of Kosovo".

18. By the abovementioned Judgment, the Basic Court, pursuant to the Law on Public Procurement, qualified the Applicant as the company's representative, with the status of "official person". The Basic Court qualified the "*Affidavit*" (as part of the file of the tender) by which it is stated: "*I, the undersigned, representing the Institute for International Studies (economic operator submitting the tender), declare under oath that the economic operator meets the eligibility requirements of the Law on Public Procurement in Kosovo, Law No. 2003/17, Article 61, as cited hereinafter. I have read the eligibility requirements in question and ensure that the economic operator in question fully meets these. I accept the mentality of criminal and civil sanctions, fines and damages if the economic operator in question intentionally or due to negligence submits any document or statement that contains materially incorrect or misleading information*".

19. Based on this "*Affidavit*", the Basic Court confirmed that "*it is a fact that the defendant Albert Rakipi represented the Institute as an official person, because he acted as a business organization - legal entity, because according to the Public Procurement Law, namely the provision of Article 61 of the mentioned law, has exercised special duties related to the public procurement activity*".

20. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the abovementioned Judgment of the Basic Court. The Applicant in his appeal alleged essential violation of the provisions of criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and legal property claim.

21. Initially, the Applicant specifically stated that the Basic Court unlawfully rejected to administer correspondence via e-mail between the Deputy Director of the company of director J.Q. and the other accused H.V. as matrial evidence.

22. Secondly, with regard to the determination of the factual situation, the Applicant alleged that it was not established that the Applicant

has committed the criminal offense for which he was accused, namely the criminal offense of fraud in office, because at the time of the alleged committing the criminal offense he did not have the status of an "*official person*".

23. Thirdly, regarding the legal property claim, the Applicant, referring to the relevant provisions of the Criminal Procedure Code 04/L-123 of the Republic of Kosovo (hereinafter: CPCRK), namely Article 459, stated that in this case, such a request has not been submitted by the competent person authorized by law who must submit a legal property claim for the annulment of a concrete action in civil proceedings, and as a result, in this case the charge determined under Article 384, paragraph 1, subparagraph 1.10 of the PCPCK has been exceeded.

24. Against the above-mentioned Judgment of the Basic Court, regarding the decision on sntence, the SPRK also filed an appeal, requesting that a more severe sentence be imposed on the Applicant.

25. On 2 May 2018, the Court of Appeals by Judgment PAKR No. 27/2018, in point I (one) approved in entirety the appeal of the first accused E.H., modifying Judgment PKR. No. 432/15 of the Basic Court of 18 October 2017. The Court of Appeals acquitted the first accused E.H. of all charges, in accordance with the provision of Article 364 paragraph, 1 item 1.3 of the CPCRK.

26. The Court of Appeals by Judgment PAKR No. 27/2018, in point II (two), approved the appeal of the SPRK regarding the decision on sentence for the Applicant and the second accused H.V., and modified Judgment PKR. No. 432/15 of the Basic Court, modifying the sentence of imprisonment for a period of six (6) months by which the Applicant and the second accused H.V. in the first instance proceedings were sentenced and the Applicant and the other accused H.V. were imposed a sentence of imprisonment of one (1) year.

27. The Court of Appeals by Judgment PAKR. No. 27/2018, in point III (three), partially approved the appeal of the Applicant and the other accused H.V. in the part regarding the legal property claim, instructing the University of Prishtina, in the capacity of the injured party, in a civil dispute, while in the other parts, the Applicant's appeal was rejected as ungrounded.

28. The Court of Appeals, by its Judgment, regarding the Applicant's allegation of unlawful refusal to administer electronic correspondence as material evidence, stated the following: *"[...] it is the court that*

assesses the legality of evidence and how much they prove the elements of the criminal offense, causing harm or any matter of importance. Since in this case we are dealing with an evidence for the issuance of which an order had to be issued by the court and the origin of its receipt is not known [...] this Court considers that the first instance court rightly has rightly rejected to administer this evidence ".

29. As to the Applicant's allegation that he does not have the status of an "*official person*", the Court of Appeals found that in relation to this allegation the Basic Court has given the necessary reasons, which reasons *"[...] are also approved by this court it and does not consider necessary to make assessments once again*".

30. Thirdly, with regard to the allgation relating to the legal property claim, the Court of Appeals considered this allegation to be grounded, considering that the University of Prishtina, in its capacity of an injured party, did not file such a claim, and consequently instructed the latter in civil dispute for the realization of this claim.

31. Finally, with regard to the SPRK appeal against the length of the sentence, the Court of Appeals accepted the application of mitigating circumstances by the Basic Court in the Applicant's case, however according to it,*"[...] they are not of a justifying nature, or are sufficient to mitigate the sentence below the limit provided by law [...]"*.

32. On 21 June 2018, the Applicant filed a request for protection of legality with the Supreme Court against Judgment PAKR. No. 27/2018 of the Court of Appeals, of 2 May 2018 and Judgment PKR. No. 432/15 of the Basic Court of 18 December 2017.

33. In his request for protection of legality, the Applicant alleged essential violations of the criminal law, essential violation of the criminal procedure law under Article 384, paragraph 1 of the CPCRK, and other provisions of the criminal procedure, which have affected the legality of the challenged judgments of the Basic Court and that of the Court of Appeals.

34. With regard to his allegation of violation of criminal law, the Applicant, *inter alia*, stated that Article 341, paragraph 3 in conjunction with paragraph 1 of the CPCK was erroneously applied, with a reasoning that the criminal offense of "*fraud in office*" can be committed only by a person who at the moment of committing this

offense has the status of an "*official person*" defined by the relevant legal provisions.

35. With regard to the allegation of essential violation of the criminal provisions, the Applicant stated, *inter alia*, that the principle of "*equality of arms*" and that of "*adversarial proceedings*" had been violated on the ground that the regular courts rejected the proposal of defense for administration of electronic correspondence as material evidence, which, according to the Applicant, would have a direct impact on the opposite determination of factual situation.

36. Further, the Applicant also alleges violations of the provisions of criminal procedure, which have affected the legality of the challenged judgments. In this context, the Applicant alleges that the principle *"Beneficium Cohesionis*" has not been applied, as well as the violation of his right to protection.

37. With regard to his allegation of violation of his right to protection, the Applicant states that as a result of the failure to schedule a hearing, namely the failure to hold the session of the Appellate Panel hearing, he was denied the presentation of new evidence which, according to him, if these relevant evidence were administered by the lower instance courts, would create a completely opposite factual situation.

38. Against the abovementioned judgments of the Basic Court and the Court of Appeals, the SPRK also filed the request for protection of legality.

39. On 15 October 2018, the Supreme Court by Judgment Pml. No. 238/2018, approved as grounded the request for protection of legality submitted by the Applicant, annulling the Judgment of the Court of Appeals and remanding the case to the same court for retrial. On the other hand, the same court rejected, as ungrounded, the request for protection of legality submitted by the SPRK.

40. The Supreme Court, referring to the case law of the Constitutional Court (Case KI104/16, Applicant *Miodrag Pavić*, Judgment of 29 May 2017) found that:

> *"[...] in the present case, the second instance judgment violated the right to a fair trial guaranteed by Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the ECHR. This Court considers that in the present case the convicts in question have indeed been violated the right to a fair trial guaranteed by the Constitution and the European Convention on*

Human Rights, as the latter as alleged in the requests of their defense counsel, were notified about the second instance hearing in order to present their aspects and arguments regarding this criminal case".

41. The Supreme Court concluded that: *"In the retrial, the second instance court must correct the violations found above, so that for the next session it notifies the convicts and their defense counsels and then render a lawful decision".*

Proceedings before the courts after remanding the case for retrial

42. On 16 April 2019, the Court of Appeals in the retrial procedure by Judgment PAKR. No. 528/2018, approved in entirety the appeal of the SPRK regarding the decision on sentence of the Applicant and the other accused H.V., by modifying Judgment PKR. No. 432/15 of the Basic Court, in such a way that the sentence of imprisonment for a period of six (6) months, by which the Applicant and the second accused H.V. in the first-instance proceedings were sentenced, modified it, and sentenced the Applicant and the second accused H.V. with an imprisonment of one (1) year.

43. By the same Judgment, the Court of Appeals in the retrial procedure partially approved the Applicant's appeal in the part relating to the legal property claim (*only in relation to the defendants' obligation to compensate the damage caused*) and instructed the University of Prishtina in the capacity of the injured party in a civil dispute, while the remainder of the Applicant's appeal was rejected as ungrounded.

44. The Court of Appeals, in its Judgment regarding the Applicant's allegation that he does not have the status of an "*official person*", held that:

"[...] the fact is that [the Applicant] is a citizen of the Republic of Albania and that the Institute for International Studies represented by the accused is established in Albania, but from this fact it cannot be concluded that this accused in this case did not have the capacity of the official person. Because, according to the Law on Public Procurement of Kosovo No. 2003/17 this Institute as an interested party has offered bid in Kosovo as an economic operator (has provided services namely contracted work) and [the Applicant] in addition to representing the Institute as an official person on the occasion of winning the tender from the

contracting authority (the University of Prishtina) has undertaken the exercise of special official duties based on the authorization given by law".

45. As to the Applicant's allegation of rejecting to administer electronic correspondence as material evidence, the Court of Appeals found that: *"[...] this Court based the reasons given by the court of first instance by Judgment PAKR. No. 27/2018 of 2 May 2018 and since these conclusions have been supported by the Supreme Court by its Judgment PML. No. 238/2018 of 15.10.2018 this Court will not make assessments in this regard. Then, even assuming that this electronic correspondence is admissible evidence, the fact that [J.Q.] communicated with the accused [H.V.] about the change of the basic contract, does not absolve [the Applicant] from criminal liability because it is precisely this accused who has signed the amended contract".*

46. Further, in relation to the appeal of the SPRK against the length of sentence, the Court of Appeals accepted the application of mitigating circumstances by the Basic Court in the Applicant's case, however according to it *"[...] they are not of a justifying nature, or are sufficient to mitigate the sentence below the limit provided by law [...]".*Consequently, the Court of Appeals approved as grounded the request of the SPRK, imposing on the Applicant the sentence of imprisonment for a period of (1) year on the grounds that *"[...] these sentences are adequate to the social danger of the criminal offense and the criminal liability of [the Applicant], and that they may affect their prevention of future criminal offenses and their rehabilitation, but also the prevention of others. from the commission of criminal offenses, namely, the purpose of the punishment provided by the provision of Article 41 of the [CCK] may be achieved".*

47. Finally, as regards the allegation concerning the legal property claim, the Court of Appeals approved as partly grounded the appeals of the Applicant and the other accused. H.V. *(only in relation to the obligation of the defendants to compensate the damage)* considering that the University of Prishtina, in the capacity of the injured party has not filed a legal property claim, and as a result instructed the latter in a civil dispute for the realization of this claim.

48. On 12 June 2019, the Applicant filed a request for protection of legality with the Supreme Court against Judgment PAKR. No. 528/2018, of the Court of Appeals of 16 April 2019, and Judgment PKR. No. 432/15 of the Basic Court of 18 December 2017.

49. On 27 August 2019, the Office of the Chief State Prosecutor, by letter KMLP II. No. 176/2019, proposed that the request for protection of legality, submitted by the Applicant, be rejected as ungrounded.

50. The Applicant in his request for protection of legality alleged: (i) violation of criminal law; (ii) essential violation of the law of criminal procedure under Article 384, paragraph 1 of the CPCRK; and (iii) other violations of the provisions of criminal procedure relating to the legality of the challenged judgments.

51. First, with regard to the allegation of a violation of criminal law, the Applicant stated that he does not have the status of an ***"official person"***. In this context, the Applicant specifies that *"[…] the economic operators do not qualify to be an "official person" under paragraph (1) [of Article 107 of the Provisional Criminal Code] as it is clear that they are not elected or appointed to a public entity"*. The Applicant further specifies that in the present case *"[…] the expression law means domestic laws and not those of other states, because if it were the opposite, that is, if this expression meant the laws of other states, then such a circumstance would represent "legal aggression" of Kosovo in other states*. The Applicant specifically claimed that*: "The implementation of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but determines procurement procedures in public tenders. Even if the Procurement Law defines the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore the provisions of this law would not apply, because the status of official person can have only the persons defined explicitly in the Criminal Code. Prohibition of the application of analogy in criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the Court of Appeals has violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted"*.

52. Secondly, the Applicant alleged that in this case the principle of "*equality of arms*" was violated on the ground that the regular courts refused to administer electronic correspondence as material evidence.

53. Thirdly, the Applicant in his request for protection of legality also alleged that no written minutes was Taken in the Court of Appeals.

54. On an unspecified date, the Applicant filed a separate submission to supplement the request for protection of legality, requesting the annulment of Judgment PAKR. No. 528/2018 of the Court of Appeals, of 16 April 2019, with the reasoning that the Panel of the Court of Appeals, which had decided in the case [PAKR. No. 27/2018 of the Court of Appeals, of 2 May 2018] even after remanding the case for retrial by the Supreme Court, with the same composition decided in the case regarding the challenged Judgment of the Court of Appeals [PAKR. No. 528/2018, of 16 April 2019].

55. On 30 September 2019, the Supreme Court by Judgment Pml. No. 253/2019 rejected as ungrounded the request for protection of legality submitted by the Applicant.

56. The Supreme Court, in relation to the Applicant's allegation raised in the supplementation of the request for protection of legality, noted that:

> *"In assessing the allegation presented in the completed request for protection of legality, the Supreme Court of Kosovo, considers that this allegation was ungrounded as the fact that after remanding the case for retrial to change the panel of the court of second instance does not represent an essential violation of the provisions of criminal procedure. Given the fact that the annulment of the judgment of the court of second instance was made only due to the failure to notify the about the hearing in the court of second instance and that this violation was corrected in retrial by the court of second instance".*

57. As to the Applicant's allegation that he did not have the status of an "*official person*", the Supreme Court found that *"[...] the criminal offense in question can be committed exclusively by an official person and in this case the lower instance courts have emphasized in their decisions the fact that [the Applicant] had this capacity, and moreover, have cited the legal provisions that determine the capacity of official person even though he is a citizen of the Republic of Albania and the organization "ISD" also had its headquarters in Tirana, however there was no doubt that the convict had the capacity of official person as in addition to the fact that he was a representative of "ISD" and had offered in Kosovo as a representative of the economic operator, had taken over the special exercise of official duties based on legal authority as defined by the provision of Article 107 of the CPCK".*

58. With regard to the Applicant's allegation of non-administration of electronic correspondence as material evidence by the regular courts, the Supreme Court found that: *"In the present case, the allegation regarding the violation of the equality of arms, namely for not accepting the defense proposals for reading the correspondence of the communications made between the convict [H.V.] and the [dep.]director of "ISD" [J.Q.], is ungrounded. The first instance court on the ninth page of its judgment reasoned the fact why this defense proposal was not accepted and that it is not known from which equipment these communications were extracted that there was no expertise regarding these communications, and moreover, for the admission of this evidence it was necessary in advance to have a special order from the court for their interception, therefore, the requirements for these communications to be accepted as evidence were not met".*

59. With regard to the Applicant's allegation raised in his request for protection of legality that no written minutes was taken in the Court of Appeals, the Supreme Court found that this allegation is ungrounded because such record is found in case file.

60. In conclusion, the Supreme Court found that the challenged judgments of the Basic Court and the Court of Appeals do not contain essential violation of the provisions of criminal procedure, nor violation of criminal law.

Applicant's allegations

61. The Applicant alleges that the challenged Judgment of the Supreme Court was rendered in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 10 of the UDHR.

62. The Applicant in his Referral, in essence, raises two different allegations, namely allegations of (i) violation of the principle of "equality of arms" and the "principle of adversarial proceedings", as a result of the rejection of the evidence proposed by the courts and (ii) interpreting and applying the law clearly arbitrarily, as a result of his qualification as an "*official person*" due to the application of the analogy by the regular courts.

(i) Applicant's allegations of violation of the principle of "equality of arms" and "principle of adversarial proceedings", as a result of the rejection of the evidence proposed by the regular courts

63. The Court recalls that the Applicant, before the regular courts, namely before the Basic Court, proposed that the electronic correspondence between J.Q. and H.V. be examined as material evidence. In the context of this proposal, the Applicant before the regular courts had consistently asserted that the contract amendment procedure took place between J.Q. and H.V.

64. In his Referral, the Applicant, regarding the principles of *"equality of arms"* and of *"adversarial proceedings",* refers to the case law of the European Court of Human Rights (hereinafter: the ECtHR), underlining that *"in case law, the ECtHR has determined that the principle of "equality of arms" is one of the key elements of the right to a fair trial"*. In relation to the principles developed by the ECtHR regarding the principle of equality of arms, the Applicant refers to the following cases: *Nideröst-Huber v. Switzerland*, 18 February 1997, paragraph 23; *Kress v. France* [GC], application no. 39594/98, paragraph 72; *Yvon v. France*, application no. 44962/98, paragraph 31; *Gorraiz Lizarraga and others v. Spain*, application no. 62543/00, paragraph 56; *Grozdanoski v. The former Yugoslav Republic of Macedonia*, application no. 21510/03, Judgment of 31 May 2007. In the following, the Applicant, in relation to the issue of respect for the principle of equality of arms in procedure, as determined by the ECtHR, mentions the following cases: *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993; *Bulut v. Austria*, Judgment of 22 February 1996; and *Komanicky v. Slovakia*, Judgment of 4 June 2002 paragraph 45; *Matyjek v. Poland*, paragraph 65; *Perić v. Croatia* and *Edward and Lewis v. United Kingdom*. In his Referral, the Applicant also refers to Decision V-III-1188/2010 of the Constitutional Court of the Republic of Croatia, of 7 November 2013.

65. The Applicant states that: *"In our procedural system, the Court acknowledges that it values the evidence presented by the parties. Referring to this system, for the evidence presented in the form of documents by the defendant, the court must carry out the necessary actions to verify their authenticity if it questions the authenticity"*.

66. The Applicant, referring to the Circular of the Supreme Court [12/2015] of 12 January 2015, alleges that the refusal of the administration of electronic communication as material evidence by

the regular courts is contrary to this Circular, which according to Applicant *"allows the Courts and the Prosecution to take any procedural action in order to provide relevant evidence on the guilt or innocence of the defendant"*.

67. In the light of his allegation of a violation of the principle of equality of arms and the principle of adversarial proceedings, the Applicant underlines that the principle of equality of arms, which was established by the ECtHR, was not respected in his case. In this regard, the Applicant specifies the following: *"The electronic communications proposed by and rejected by the lower courts were relevant evidence which would prove the innocence of [the Applicant]. These electronic communications are also relevant evidence which would prove the whole progress and process of changing the contract, respectively which persons were involved in this process and would prove the non-existence of the element of intent on the part of [the Applicant]"*.

68. The Applicant states the following: *"It is paradoxical when the Trial Panel, which rejected the proposal that electronic communications be administered as material evidence, questions the defendants who were directly related to these communications, while the Court of Appeals and the Supreme Court consider this action to be fair.*

The regular courts also err when, as a pretext for the inadmissibility of emails as evidence, state that such evidence would be admissible only if it were provided when secret investigative and surveillance measures were applied. Evidence is provided in this way only when the State Prosecution seeks their security, and not when the defendant voluntarily submits electronic communications to be administered as evidence.
The regular courts in assessing the appealing allegations that the electronic communications conducted between the witness [J.Q.] and the defendant [H.V.] are inadmissible evidence make the following basic errors:
The conclusion of the regular Courts that even if electronic communications were administered as evidence, the epilogue for [the Applicant] would be the same is entirely confusing and unacceptable. This position is confusing because it is not clear whether emails are considered inadmissible evidence, or that regular courts have entered the assessment of their probative value".

(ii) Applicant's allegations of interpretation and clearly arbitrary application of law, as a result of his qualification as an "official person" due to the application of the analogy by the regular courts

69. With regard to his allegation of a clearly arbitrary interpretation and application of law due to the application of the analogy by the regular courts, the Applicant claims the following:

> *"The Applicant was convicted of the criminal offense under Article 341 of the Provisional Criminal Code of Kosovo "fraud in office". Fraud in Office can only be committed by the "official person". Considering the fact that the NGO "ISN" (Republic of Albania) was in a contractual relationship with the University of Prishtina, the next questions that need to be addressed are:*
>
> *a. Whether each economic operator should be granted the status of "official person" under the Provisional Criminal Code, and:*
>
> *b. Is it possible that the responsible person of a foreign NGO who is not registered in the Republic of Kosovo has the status of an official person".*

70. With regard to the notion of "official person", the Applicant refers to the provisions of the Provisional Criminal Code, namely Article 107 (1), which provides:

> *"(1) The term "official person" means: 1) person elected or appointed to a public entity; 2) An authorised person in a business organization or other legal person, who by lawor by other provision issued in accordance with the law, exercises public authority, and who within this authority exercise specific duties; 3) person who exercises specific official duties, based on authorisation provided for by law*".

71. In this regard, according to the Applicant's allegations "*It is clear that economic operators do not qualify to be an "official person" under paragraph (1) as it is clear that they are not elected or appointed to a public entity*".

72. The Applicant goes on to allege that: *"[...] the term law means domestic laws and not those of other states, because if it were the opposite, that is, if this expression meant the laws of other states, then such a circumstance would represent "legal aggression" of Kosovo in the other states. It is more than clear that the expression used in the Criminal Code* ***"A person who exercises specific official duties, based on authorisation provided for by law****", means authorizations deriving from domestic laws. The authorizations that the [Applicant] has in the NGO "ISN" derive from the laws of the*

Republic of Albania and not from those of the Republic of Kosovo. This fact is confirmed by the conclusions of the Court of Appeals which are also supported by the Supreme Court where among other things it is stated that the "Institute for International Studies" is established in Albania".

73. The Applicant further reasons that: *"The implementation of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but defines the procurement procedures in public tenders. Even if the Procurement Law defines the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would not apply, because the status of official person can have only persons explicitly defined in the Criminal Code".*

74. The Applicant further states that: *"The prohibition of the application of analogy in criminal law is in the function of the legal security of the subjects of law. It is clear that in this criminal case the regular courts have violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

75. Consequently, the Applicant reiterates that the present case has to do with an arbitrary interpretation of law because in this case: *"[...] The regular courts have arbitrarily granted [the Applicant], the Executive Director of a foreign NGO (of the Republic of Albania), the status of an official person and called fraudulent an agreement based on the will of the parties".*

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

(i) approve his referral as admissible;
(ii) order, in accordance with Rule 42 of the Rules of Procedure, the holding of a hearing, and
(iii) hold violation of the individual rights of the Applicant, guaranteed by Article 31 of the Constitution of the Republic of Kosovo, Article 10 of the UDHR and Article 6 of the ECHR, as a result of violations by the Basic Court, the Court of Appeals and the Supreme Court of a number of rights of the Applicant guaranteed by these instruments and the Code of Criminal Procedure of Kosovo, and

(iv) determine any other legal measure that this honorable Court deems to be legally grounded and reasonable.

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.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

Article 33 [The Principle of Legality and Proportionality in Criminal Cases]]

1. No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.

[...]

Universal Declaration of Human Rights

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law..

3. Everyone charged with a criminal offence has the following minimum rights::

> *a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
> *b. to have adequate time and facilities for the preparation of his defence;*
> *c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so requires;*
> *d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;;*
> *e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

Article 7
(No punishment without law)

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Provisional Criminal Code [UNMIK Regulation 2003/25]

CHAPTER I:
General Provisions
Article 1
PRINCIPLE OF LEGALITY
[...]

3. The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Article 23
CO-PERPETRATION

When two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offence.

Article 107

(1) The term "official person" means:

1) person elected or appointed to a public entity;
2) An authorised person in a business organization or other legal person, who by law or by other provision issued in accordance

with the law, exercises public authority, and who within this authority exercise specific duties;
3) person who exercises specific official duties, based on authorisation provided for by law;
4) A person who is a member of UNMIK personnel or KFOR, without prejudice to the applicable privileges and immunities accorded to such person;
5) A person who is a member of personnel of liaison offices in Kosovo;
6) A person in a public international or supranational organization who is recognized
as an official or other contracted employee within the meaning of the staff
regulations of such organizations;
7) A judge, prosecutor or other official in an international tribunal which exercises jurisdiction over Kosovo.

(2) The term "responsible person" means an individual in a business organization or legal person who because of his or her function or special authorisation is entrusted with duties that are related to the implementation of the law or other provisions issued on the basis of law or
of general rules of business organizations or other legal persons in managing or administering property, or are related to the management of production or other economic process or supervision of such process. An official person as provided for in paragraph 2 of the present article shall also be considered a responsible person, when the act in question is not provided for by provisions of the chapter on criminal offences against official duty and against other duty, or by the provisions on criminal offences of an official person provided for in another chapter of the present Code.

(3) When an official person or a responsible person is described as the perpetrator of a criminal offence, all persons referred to in paragraphs 1 or 2 of the present Article may be the perpetrators of such criminal offence, provided that it does not follow from the elements the criminal offence that the perpetrator may only be one of those persons.

Article 261
FRAUD

(1) Whoever, with the intent to obtain a material benefit for himself, herself or another person, deceives another person or

keeps such person in deception by means of a false representation or by concealing facts and thereby induces such person to do or abstain from doing an act to the detriment of his or her property or another person's property shall be punished by a fine or by imprisonment of up to three years.
(2) When the offence provided for in paragraph 1 of the present article results in damage exceeding 15,000 euro, the perpetrator shall be punished by imprisonment of six months to five years.

Article 332
FALSIFYING DOCUMENTS

(1) Whoever draws up a false document, alters a genuine document with the intent to use such document as genuine or knowingly uses a false or altered document as genuine shall be punished by a fine or by imprisonment of up to one year.

(2) An attempt of the offence provided for in paragraph 1 of the present article shall be punishable..

(3) When the offence provided for in paragraph 1 of the present article is committed in relation to a public document, will, bill of exchange, public or official registry or some other registry kept in accordance with the law the perpetrator shall be punished by a fine or by imprisonment of up to three years.

Article 341
FRAUD IN OFFICE

1. An official person who, with the intent to obtain unlawful material benefit for himself, herself or another person, by presenting a false statement of an account or in any other way deceives an authorised person into making an unlawful disbursement shall be punished by a fine or by imprisonment of up to five years.

[...]

3. When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5,000 euro, the perpetrator shall be punished by imprisonment of one to ten years.

Code No. 04/L-123 of Criminal Procedure of the Republic of Kosovo

Article 87
Definition of Covert and Technical Measures of Surveillance and Investigation During Preliminary Investigation

For the purposes of the present Chapter:
1. A covert or technical measure of surveillance or investigation ("a measure under the present Chapter") means any of the following measures:
1.1. covert photographic or video surveillance;
1.2. covert monitoring of conversations;
1.3. search of postal items;
1.4. interception of telecommunications and use of an International Mobile Service Identification "IMSI" Catcher;
1.5. interception of communications by a computer network;
1.6. controlled delivery of postal items;
1.7. use of tracking or positioning devices;
1.8. a simulated purchase of an item;
1.9. a simulation of a corruption offence;
1.10. an undercover investigation;
1.11. metering of telephone-calls; and
1.12. disclosure of financial data.
[…]

Article 88
Intrusive Covert and Technical Measures of Surveillance and Investigation

1. Covert photographic or video surveillance, covert monitoring of conversations in public places, metering of telephone calls or disclosure of financial data may be ordered against a particular person or place if:
1.1. there is a grounded suspicion that a place is being used for, or such person has committed a criminal offence which is prosecuted ex officio or, in cases in which attempt is punishable, has attempted to commit a criminal offence which is prosecuted ex officio; and
1.2. the information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

2. Metering of telephone calls or disclosure of financial data may also be ordered against a person other than the suspect, where the criteria in paragraph 1 subparagraph 1.1 of the present Article apply to a suspect and the precondition in paragraph 1 subparagraph 1.2 of the present Article is met and if there is a grounded suspicion that:

2.1. such person receives or transmits communications originating from or intended for the suspect or participates in financial transactions of the suspect; or

2.2. the suspect uses such person's telephone.

3. Covert monitoring of conversations in private places, search of postal items, interception of telecommunications, interception of communications by a computer network, controlled delivery of postal items, the use of tracking or positioning devices, a simulated purchase of an item, a simulation of a corruption offence or an undercover investigation may be ordered against a particular person, place or item if:

3.1. there is a grounded suspicion that a place or item is being used for, or such person has committed or, in cases in which attempt is punishable, has attempted to commit a criminal offence listed in Article 90 of this Code.

3.2. the information that could be obtained by the measure to be ordered would be likely to assist in the investigation of the criminal offence and would be unlikely to be obtained by any other investigative action without unreasonable difficulty or potential danger to others.

4. The search of postal items, the interception of telecommunications or the interception of communications by a computer network may also be ordered against a person other than the suspect, where the criteria in paragraph 3 subparagraph 3.1 of the present Article apply to a suspect and the precondition in paragraph 3 subparagraph 3.2 of the present Article is met and if there is a grounded suspicion that:

4.1. such person receives or transmits communications originating from or intended for the suspect; or

4.2. the suspect is using such person's telephone or point of access to a computer system.

Law No. 2003/17 on Public Procurement

Section 61
Eligibility of the Candidate or Tenderer

61.1 An economic operator shall not be eligible to participate in a procurement activity or in the performance of any public contract if such economic operator, or any employee, executive, manager or director thereof:

a. participated in the preparation of the concerned contract notice or tender dossier, or any part thereof, being used by the concerned contracting authority; or

b. received assistance in preparation of its tender or requests to participate from a person or undertaking who or that participated in the preparation of the concerned contract notice or tender dossier, or any part thereof.

61.2 An economic operator shall not be eligible to participate in a procurement activity or in the performance of any public contract if such economic operator, or any executive, manager or director thereof, has, in the past ten years;

a. been determined by a court of competent jurisdiction to have committed a criminal or civil offence involving corrupt practices, money laundering, bribery, kickbacks or activities described, or similar to those described, in Section 117.1 of the present law under the laws or regulations applicable in Kosovo or any country, or under international treaties or conventions;

b. been declared ineligible, by reason of conduct such as that described above, by any bank, institution or organization providing funds for general development, public investment or reconstruction;

c. been determined by a court of competent jurisdiction to have committed a serious offence by participating in the activities of a criminal organization, defined as a structured association established over a period of time and operating in a concerted manner to achieve financial gain through activities that are criminal or otherwise illegal where they take place; or

d. been determined by a court of competent jurisdiction to have committed an act of fraud or an act equivalent to fraud;

e. been determined to have engaged in unprofessional conduct by a court of competent jurisdiction, administrative agency or organization responsible for enforcing standards of professional conduct; or

f. been determined by the PPRC on the basis of substantial evidence, to have engaged in serious professional misconduct or made serious misrepresentations in documents submitted in connection with a procurement

proceeding or activity governed by public law in Kosovo or elsewhere.

61.3 An economic operator shall not be eligible to participate in a procurement activity or in the performance of any public contract if such economic operator:

a. has, in the past two years, been adjudged to be bankrupt or insolvent by a court of competent jurisdiction;

b. is being wound up or administered, or its affairs are being wound up or administered, by a court of competent jurisdiction;

c. currently has in place an agreement or arrangement with its creditors providing for extended or reduced terms of payment if such terms were agreed to by such creditors because the economic operator had previously been unable to satisfy its obligations as they came due;

d. is in any situation analogous to a, b or c above arising from a similar procedure under the laws of its place of establishment or of a place where it conducts business; e. is currently the subject of a judicial or administrative order suspending or reducing payments by or to such economic operator and resulting in the total or partial loss of the economic operator's right to administer and/or dispose of its property;

f. is currently the subject of legal or administrative proceedings that may result in a judicial or administrative order suspending or reducing payments by or to such economic operator if such proceedings may also result in the economic operator being adjudged bankrupt or insolvent;

g. has, in the past three years, been adjudged by a court of competent jurisdiction to have seriously breached a contract with any public entity, public authority or public undertaking in Kosovo or elsewhere;

h. is currently delinquent in the payment of any social security contributions in Kosovo or the economic operator's country of establishment;

i. is currently delinquent in the payment of taxes in Kosovo or the economic operator's country of establishment; or

j. has not yet complied with an order issued by the PPRC or a review panel.

61.4 The historical time periods specified in this Section shall relate to the period immediately preceding the date of publication of the contract notice or, in the case of negotiated procedures

without a contract notice, the communication of the invitation to participate or tender.

61.5 The Rules Committee shall develop and adopt the rules regarding the types of documents, evidence and/or declarations that an economic operator must provide in order to demonstrate that such economic 45 operator is not excluded by any provision of this Section 61. The Rules Committee shall ensure that such rules do not strictly require documents or declarations that are not available in certain countries or regions. The Rules Committee shall ensure that such rules reasonably accommodate the abilities of economic operators in this respect by allowing the submission of declarations under oath, notarized statements and the like. In all cases, the submitting economic operator shall be required to acknowledge the possibility of criminal and civil sanctions, penalties and damages if such economic operator intentionally or negligently submits any document, declaration or statement containing materially false or misleading information.

Admissibility of the Referral

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

78. 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."

79. The Court also assesses whether the Applicant has met the admissibility criteria, as specified by Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, as well as Rule 39 of the Rules of Procedure, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]."

Rule 39
Admissibility Criteria

(1) The Court may consider a referral as admissible if:

(a) the referral is filed by an authorized party,
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,
(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant, and
(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

(i) Regarding the authorized party and the act of public authority

80. With regard to the fulfillment of the abovementioned criteria, the Court first finds that the Applicant is an individual who filed an individual referral because he considers that he is a victim and that his individual rights and freedoms have been violated by a public authority, therefore, the Court finds that the Applicant is an authorized party.

81. Further, the Applicant challenges several acts of public authorities, namely the Judgment Pml. No. 253/2019of the Supreme Court of Kosovo of 30 September 2019, in conjunction with Judgment PAKR. No. 528/2018 of the Court of Appeals of 16 April 2019 and Judgment PKR. No. 432/15 of the Basic Court, of 18 December 2017.

82. Therefore, the Court concludes that the Applicant (i) is an authorized party and (ii) challenges several acts of public authorities, as established in paragraph 7 of Article 113 of the Constitution, paragraph 1 of Article 47 of the Law, point (a) of paragraph (1) of Rule 39 and paragraph (2) of Rule 76 of the Rules of Procedure.

(ii) Regarding the exhaustion of legal remedies

83. The Court notes that in the circumstances of the present case, the Applicant challenges Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo of 30 September 2019, after having exhausted all legal remedies provided by law and consequently finds that the Applicant has met the admissibility requirements regarding the exhaustion of legal remedies, set out in paragraph 7 of Article 113 of the Constitution , paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

(iii) Regarding the specification of referral and deadline

84. With regard to the fulfillment of these criteria, the Court notes that the Applicant has accurately clarified what rights and freedoms guaranteed by the Constitution have allegedly been violated and has specified the concrete act of the public authority which he challenges in accordance with Article 48 of Law and relevant provisions of the Rules of Procedure, and has submitted his referral within the period of four (4) months established in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure.

(iv) Regarding other admissibility criteria

85. At the end and after examining the Applicant's constitutional complaint, the Court considers that the Referral cannot be considered as manifestly ill-founded on constitutional basis, as provided in paragraph (2) of Rule 39 of the Rules of Procedure. (see also, case of the ECtHR: *Alimuçaj v. Albania*, application no. 20134/05, Judgment of 9 July 2012, paragraph 144, and see similarly the case of Court KI27/20, Applicant *VETËVENDOSJE! Movement*, Judgment, of 22 July 2020, paragraph 43).

86. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the criteria set out in paragraph (3) of Rule 39 of the Rules of Procedure.

Conclusion regarding the admissibility of the Referral

87. The Court finds that the Applicant (i) is an authorized party and challenges the act of public authority; (ii) has exhausted all legal remedies provided by law; (iii) has specified the fundamental rights and freedoms guaranteed by the Constitution which he alleges to have been violated; (iv) has submitted his Referral within the time limit; (v) that the Referral is not manifestly ill-founded on constitutional basis; and (vi) there is no other admissibility criterion that has not been met.

88. Therefore, the Court declares the Referral admissible.

Merits of the Referral

89. The Court first recalls that the Applicant alleges that the challenged Judgment of the Supreme Court, in conjunction with Judgment PAKR. No. 528/2018 of the Court of Appeals of Kosovo of 16 April 2019, and Judgment PKR. No. 432/15 of the Basic Court of 18 December 2017 were rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 10 of the UDHR.

90. In the context of this allegation, the Applicant, in essence, raises two issues, namely the allegations of (i) violation of the principle of "*equality of arms*" and the "*principle of adversarial proceedings*", as a result of the rejection of the evidence proposed by the courts and (ii) the clearly arbitrary interpretation and application of law, as a result

of his qualification as an "*official person*" due to the application of analogy by the regular courts.

91. The Court, in order to assess the admissibility of the Referral, will initially assess the Applicant's allegations regarding the violation of his rights relating to (i) the principle of "equality of arms" and that of "adversarial proceedings", to proceed with (ii) the Applicant's allegations of clearly arbitrary interpretation and application of law due to the application of the analogy by the regular courts. In assessing the admissibility of these allegations, the Court will also apply the case-law standards of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. As to the allegations regarding violations of the principle of adversarial proceedings and the principle of equality of arms

92. The Court first recalls that the Applicant alleges that his right to fair and impartial trial has been violated because he was prevented from presenting evidence in his favor. According to him, the inability to present evidence in his favor, namely the non-approval of electronic correspondence by the regular courts constitutes a violation of the principle of "*equality of arms*" and the principle of "*adversarial proceedings*". The Court notes that these allegations according to the Applicant, represent a violation of the rights protected by Article 31 of the Constitution and Article 6 of the ECHR.

93. The Court also recalls that the Applicant, in relation to his allegation of violation of the principle of equality of arms and the principle of adversarial proceedings, refers to the case law of the ECtHR, namely the cases: *Neumeister v. Austria*, application no. 1936/63, Judgment of 27 June 1968, paragraph 2; *Nideröst-Huber v. Switzerland*, 18 February 1997, paragraph 23; *Kress v. France* [GC], application no. 39594/98, paragraph 72; *Yvon v. France,* application no. 44962/98, paragraph 31; *Gorraiz Lizarraga and others v. Spain*, application no. 62543/00, paragraph 56; *Grozdanoski v. the former Yugoslav Republic of Macedonia*, application no. 21510/03, Judgment of 31 May 2007; *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993; *Edwards and Lewis v. the United Kingdom*; *Bulut v. Austria*, Judgment of 22 February 1996; *Komanicky v. Slovakia*,

Judgment of 4 June 2002 paragraph 45; *Matyjek v. Poland*, paragraph 65; and *Perić v. Croatia*.

94. In this regard, the Court, in reviewing and elaborating the general principles established through the case law of the ECtHR regarding the principle of equality of arms and the principle of adversarial proceedings, will consider and assess whether the cases referred by the Applicant in his referral relates to similar factual and legal circumstances as in his case and will also assess whether these cases can be applied in his case as well.

95. In the following, the Court will examine the general principles developed in the case law of the ECtHR with regard to equality of arms and the principle of adversarial proceedings, and will also refer to the case law of the ECtHR regarding the issue of admissibility of evidence in criminal proceedings.

96. Therefore, the Court will apply the general principles developed in the case law of the ECtHR in the legal circumstances of the present case, namely in the Applicant's case, and on the basis of the latter will assess the constitutionality of the challenged decisions.

(i) General principles based on the case law of the Court as well as the case law of the ECtHR

97. The Court, referring also to the case law of the ECtHR, initially states that the principle of "*equality of arms*" is an element of a broader concept of a fair trial.

98. 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 given a reasonable opportunity to present his/her case, under conditions which would not place him at a significant disadvantage *vis-à-vis* the opposing party (see the cases of ECtHR *Yvon v. France*, application no. 44962/98, Judgment of 24 July 2003, paragraph 31; and *Dombo Beheer B.V. v. the Netherlands*, application no. 14448/88, Judgment of 27 October 1993, paragraph 33, see also other references in this Judgment, *Öcalan v. Turkey* [GC], paragraph 140, see 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*)*.

99. The Court further recalls that the case law of the ECtHR 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 *Dombo Beher B.V. v. the Netherlands*, Judgment of 27 October 1993, paragraph 33).

100. 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 linked to the principle of "*equality of arms*".

101. Furthermore, 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 which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence*" (see the case of ECtHR *Lea v. Estonia*, application no. 59577/08, Judgment of 6 March 2012, paragraph 77). Consequently, with regard to the principle of adversarial proceedings, the ECtHR emphasized that, in a criminal proceeding, both the prosecution and the defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see case *Brandstetter v. Austria*, cited above, paragraph 67).

102. On the other hand, with regard to issues related to the presentation of evidence and their admissibility, the Court also refers to the case law of the ECtHR which, in principle, states that "*Although Article 6 guarantees the right to a fair trial it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law*" (see ECtHR *Schenk v. Switzerland*, paragraphs 45-46 and *Heglas v. Czech Republic*, paragraph 84). However, the ECtHR has underlined that the aspect to be considered in these cases is whether the proceedings, including the manner in which the evidence was taken, were fair in its entirety (see ECtHR *Khan v. the United Kingdom*, paragraph 34; *P.G, and J.H. v. The United Kingdom*, paragraph 76; and *Allan v. the United Kingdom*, paragraph 42).

(i) Application of these principles in the case of the Applicant

103. The Court initially reiterates that the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, based on the case law of the Court and of the ECtHR, are assessed in the light of the fair and impartial trial in its entirety. Moreover, as noted above, the issues concerning the admissibility of evidence are, in principle, issues of law and, consequently, of the assessment of the regular courts

(see, by analogy, case KI14/18, Applicant *Hysen Kamberi*, Judgment of 15 January 2020, paragraph 68).

104. The Court recalls that the Applicant specifically links his allegation of violation of the principle of equality of arms and the principle of adversarial proceedings with the refusal of the regular courts to administer electronic communication as material evidence.

105. In this regard, the Court recalls that the Applicant during the conduct of criminal proceedings as material evidence before the Basic Court had also submitted the electronic correspondence between J.Q. [in his capacity as Deputy Director of ISN company] and H.V. [Applicant in case KI230/10].

106. The Basic Court by Judgment PKR. No. 432/15, of 18 December 2017, rejected the Applicant's proposal to read this correspondence with the following reasoning*:"The proposal was not initially supported by the Prosecutor but during the course of the proceedings he supported and repeated the same proposal, the Court rejected this proposal on the grounds that: based on Article 87 par. 1 subpar. 1.5. of the CPCK, Interception of Communications through the Computer Network is foreseen as a secret technical measure of surveillance and investigation, and for the application of which the law foresees a number of conditions and procedures to be followed, which procedures culminate with the issuance of the order for implementation of this measure by the court. Since in these cases these procedures were not followed and these correspondences were provided by the defendant Albert Rakipi, it is not known from which electronic devices they were extracted, nor is it known if there was any expertise in this regard, adding the fact that the Criminal Code has provided as a separate offense Intrusion into computer systems sanctioned by Article 339 of the CCK [Criminal Code No. 04/L-082], and the possibility of manipulation is potential, because this is enabled by information technology (for this reason the Court in this case has thought that the Circular of the Supreme Court of Kosovo dated 12.01.2015 cannot be implemented due to the specifics of the measure, but also the concrete case). The Court assessed that such evidence brought by a defendant, the issuance of which requires an order from the court, after all the procedures have been respected, would be considered substantially unsubstantiated evidence, at the same time this is the basis for its objection".*

107. The Basic Court further stated that it did not agree with the allegations of the Prosecution, which agreed with the reading of the evidence. In

this context, the Basic Court reasoned that "*[...] the availability of the parties is not a principle of criminal procedure, but of some other procedures, and in criminal proceedings it can be an exception when provided by law, while in the present case for the issuance of such evidence the law has provided clear procedures, because of the sensitivity to the freedoms and human rights provided by the European Convention for the Protection of Human Rights and Freedoms, and the Constitution of the Republic of Kosovo, because if such evidence is accepted, the legal security of the citizens of Kosovo or those who commit crimes in Kosovo would be violated*".

108. The Court notes that the Judgments of the regular courts, in particular the abovementioned Judgment of the Basic Court, as well as the Applicant's allegations in his Referral, also refer to the Circular of the Supreme Court regarding the covert and technical measures of surveillance and investigation of 12 January 2015, which in point 3 specifies:

> *"THE OTHER DISPUTABLE ISSUE turns out to be the admissibility of evidence, such as SMS and the register of telephone numbers with which the defendant has communicated, provided outside these measures. Both the SMS and the register of telephone numbers, collected by the prosecution or the court, outside these measures, are admissible evidence.*
>
> *THE STATE PROSECUTOR AND THE COURT have the right to take any procedural action, to provide evidence relevant to the guilt or innocence of the defendant (to establish relevant facts). Among other evidence, they may request telephone messages, the register of telephone communications and communications via the Internet, etc., without applying covert technical and surveillance measures. COVERT TECHNICAL MEASURES are applied only when the evidence cannot be provided in any other way, and if the evidence is provided through these measures, then the procedure must be respected to the maximum, otherwise the evidence turns out to be inadmissible. PROSECUTOR'S OFFICE - COURTS, just as they have the right to request, for example, accounting documentation from a company, to establish a fact, they also have the right to request telephone messages exchanged by the defendant with other persons, to prove any fact, and this evidence is lawful and admissible*".

109. However, the Court recalls the reasoning of the Basic Court, which assessed the following: "*The Basic Court concluded its reasoning by*

assessing: "At the point when the Prosecutor in her final speech refers to the Circular of the Supreme Court of Kosovo dated 12.01.2015 says that this circular is based on Article 88 par. 3, subpar. 3.2 [Criminal Procedure Code]. The prosecutor shifts the content of this article in an inverse context to what this article stipulates, because this paragraph is restrictive for the issuance of this measure, so the article has an additional requirement for the law enforcer, as in point 3.1 as standard has decided that for issuance of this measure there must be a reasonable suspicion that such a place or thing is used to commit a criminal offense, point 3.2 of this article, stipulates that the prosecuting authorities must argue how the information they want with covert measures will contribute to the investigation, and why the information they want to obtain with secret measures, they could not provide it by other conventional investigative actions (interviewing witnesses, inspecting the scene, etc., which do not violate the privacy of citizens), so other investigations methods must be exhausted, and as a last resort covert measures may be required, and this must be argued before the court".

110. The Court further recalls the Applicant's allegation, which in relation to the reasoning of the Basic Court reiterated that "*[...]as a pretext for the inadmissibility of emails as evidence, state that such evidence would be admissible only if it were provided when secret investigative and surveillance measures were applied. Evidence is provided in this way only when the State Prosecution seeks their security, and not when the defendant voluntarily submits electronic communications to be administered as evidence".*

111. The Court notes that the Applicant also raised these allegations through his appeals and requests for protection of legality submitted to the Court of Appeals and the Supreme Court, respectively.

112. Therefore, the Court recalls once again the reasoning given in the first Judgment [PAKR. No. 27/2018] of 2 May 2018 of the Court of Appeals, which states that: *"[...] it is the court that assesses the legality of evidence and how much they prove the elements of the criminal offense, causing harm or any matter of importance. Since in this case we are dealing with an evidence for the issuance of which an order had to be issued by the court and the origin of its receipt is not known [...] this Court considers that the first instance court has rightly rejected to administer this evidence".*

113. In the following, the Court also recalls the reasoning of the Court of Appeals, which by its second Judgment PAKR No. 528/2019, of 16

April 2019, stated that: *"[...] this Court based the reasons given by the first instance court by judgment PAKR. No. 27/2018 of 2 May 2018 and since these conclusions have been supported by the Supreme Court by its judgment PML. No. 238/2018 of 15.10.2018 this Court will not make assessments in this regard. Then, even assuming that these electronic correspondences are admissible evidence, the fact that [J.Q.] communicated with the accused [H.V.] about the change of the basic contract does not absolve [the Applicant] from criminal liability because it is precisely this accused who has signed the amended contract"*.

114. Finally, the Court also refers to Judgment Pml. No. 253/2019, of 30 September 2019 of the Supreme Court, which in the re-procedure assessed that: *"In the present case, the allegation regarding the violation of the equality of arms, namely for not accepting the defense proposals for reading the correspondence of the communications made between the convict* [H.V.] *and the [dep.]director of "ISD" [J.Q.], is ungrounded. The first instance court on the ninth page of its judgment reasoned the fact why this defense proposal was not accepted and that it is not known from which equipment these communications were extracted that there was no expertise regarding these communications, and moreover, for the admission of this evidence it was necessary in advance to have a special order from the court for their interception, therefore, the requirements for these communications to be accepted as evidence were not met"*.

115. The Court also recalls the Applicant's allegation that it was underlined that *"The conclusion of the regular Courts that even if electronic communications were administered as evidence, the epilogue for [the Applicant] would be the same is entirely confusing and unacceptable. This position is confusing because it is not clear whether emails are considered inadmissible evidence, or that regular courts have entered the assessment of their probative value"*.

116. The Court notes that the regular courts in their reasoning for refusing electronic correspondence as material evidence, *inter alia*, referred to the provisions of the criminal procedure (Article 87 of the Criminal Procedure Code) regarding the application of covert measures, which, according to the courts, should have been applied in this case. In this regard, the Court, in line with the Applicant's allegation or reasoning, considers that the provisions of the criminal procedure regarding the covert measures of investigation and surveillance, as already stated by the regular courts, cannot be applied in the present case, because the abovementioned evidence in the criminal proceedings before the

Court was proposed by the Applicant, in the capacity of the accused and because the electronic correspondence took place before the investigation procedure.

117. However, the Court notes that the Basic Court its reasoning for refusing electronic correspondence between H.V. and J.Q. bases, in essence, on the reliability of this evidence, namely on how this evidence was obtained and the question of whether any expertise was taken to obtain this evidence.

118. The Court also recalls that the electronic correspondence, proposed by the Applicant as material evidence, took place between H.V., who in the criminal proceedings was in the capacity of the accused and J.Q. [deputy director of the company], who was not a party to the proceedings. In this regard, the Court also refers to the reasoning of the Basic Court, which also placed emphasis on the issue of human rights and freedoms, namely when in this case other parties are involved in correspondence, as is the case with J.Q.

119. Therefore, the Court considers that the reasoning of the regular courts, and in particular that of the Basic Court regarding the rejection of the material evidence proposed by the Applicant, is very clear and complete, and is also based on the protection of rights of other parties, guaranteed by the Constitution and the ECHR.

120. Consequently, the Court notes that at the hearing before the Basic Court, J.Q. in capacity of a witness, among other things, provided his testimony regarding the electronic correspondence he had conducted with H.V., which evidence was also reflected in the Judgment of this court.

121. Further, with regard to the issue of the administration of evidence, the Court initially notes that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). The Court has consistently held this view based on the ECtHR case law, which clearly states that it is not the role of this Court to review the findings of the regular courts as to the factual situation and the application of substantive law (see ECtHR case *Pronina v. Russia*, Judgment of 30 June 2005, paragraph 24; and the Court cases KI06/17, Applicant *L.G. and five others*, Resolution on Inadmissibility of 20 December 2017, paragraph 38; and KI122/16, Applicant *Riza Dembogaj*, Resolution on Inadmissibility, of 19 June 2018, paragraph 58).

122. The Constitutional Court can only consider whether in a proceeding the evidence was presented in a correct way and whether the proceedings before the regular courts in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see, *inter alia,*, *Edwards v. United Kingdom*, no. 13071/87 Report of the European Commission on Human Rights, adopted on 10 July 1991).

123. The Court recalls that the right to a "*fair trial*" in civil and criminal proceedings, which is required by Article 31 of the Constitution, in conjunction with Article 6 is not a "substantive" fairness, but rather a "*procedural*" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See ECtHR cases *Star Cate – Epilekta Gevmata and Others v. Greece,* No. 54111/07, Decision of 6 July 2010; and see the case of Court KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility of 3 April 2019, paragraph 85).

124. The Court finally recalls that the Applicant, in support of his allegations of a violation of the principle of equality of arms and adversarial proceedings, referred to several cases of the ECtHR (listed in paragraph 91). In this regard, the Court notes that in the cases referred by the Applicant, the ECtHR in assessing the merits of the Referral, also mentioned the general principles regarding equality of arms in the procedure, which this Court had developed and confirmed consistently in its case law.

125. However, the Court notes that apart from the fact that the Applicant referred to these cases in his Referral, he did not in any way elaborate their factual or legal connection with the circumstances of the present case, a task which, based on the case law of the Court, belongs to the Applicant (see, *inter alia*, and in this context, the Judgment in case KI48/18 of 4 February 2019, Applicant *Arban Abrashi and the Democratic League of Kosovo* (LDK), paragraph 275; and case KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility of 3 May 2019, paragraph 80).

126. In the light of the abovementioned considerations and reasoning, the Court concludes that the Applicant's allegations of violation of the principle of "*equality of arms*" and "*adversarial principle*" are ungrounded, as a result of the rejection of the evidence proposed by the regular courts.

127. Therefore, the Court finds that the Applicant's allegations that his right to fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated, is ungrounded.

II. As regards the allegations of clearly arbitrary interpretation and application due to the application of the analogy by the regular courts

128. The Court recalls that the Applicant alleges that *"[...] The regular courts have arbitrarily granted [the Applicant], the Executive Director of a foreign NGO (of the Republic of Albania), the status of an official person and called fraudulent an agreement based on the will of the parties".*

129. The Applicant initially specifies that: *"[...] the term law means domestic laws and not those of other states, because if it were the opposite, that is, if this expression meant the laws of other states, then such a circumstance would represent "legal aggression" of Kosovo in the other states. It is more than clear that the expression used in the Criminal Code "A person who exercises specific official duties, based on authorisation provided for by law", means authorizations deriving from domestic laws. The authorizations that the [Applicant] has in the NGO "ISN" derive from the laws of the Republic of Albania and not from those of the Republic of Kosovo. This fact is confirmed by the conclusions of the Court of Appeals which are also supported by the Supreme Court where among other things it is stated that the "Institute for International Studies" is established in Albania".*

130. Secondly, the Applicant alleges that in his case the regular courts have *"violated the principle of prohibition of analogy"* in criminal law, in a way that has interpreted the provisions of the Law on Public Procurement. In the context of this allegation, the Applicant specifies that: *"The implementation of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but defines the procurement procedures in public tenders. Even if the Procurement Law defines the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would not apply, because the status of official person can have only persons explicitly defined in the Criminal Code".*

131. According to the Applicant *"Prohibition of the application of analogy in criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the Court of Appeals has violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

132. In this context, the Court notes that the Applicant bases his allegation of a clearly arbitrary interpretation and application of the law by the regular courts on his right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. However, based on the alleged facts and the evidence attached to the Referral, the Court will assess the Applicant's allegation, which specifically refers to his qualification as an official person, in the context of whether his allegation before the regular courts has been sufficiently addressed by the Supreme Court, in accordance with the right to a reasoned decision, as guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR (see similarly case KI145/18, Applicants *Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi*, cited above, paragraph 39).

133. In this respect, the Court recalls the case law of the ECtHR and that of the Court, where it has been determined that: "*A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on"* (See, ECtHR case *Ştefanica and Others v. Romania*, Judgment of 2 November 2010, paragraph 23; see also the cases of the Court, KI145/18, Applicants *Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi*, Judgment, of 19 July 2018, paragraph 35, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraph 83 and KO73/16, Applicant the Ombudsperson, Constitutional Review of Administrative Circular No. 1/2016 issued by the Ministry of Public Administration of the Republic of Kosovo on 21 January, 2016, Judgment of 8 December 2016, paragraph 78).

134. Therefore, the Court will examine and assess the constitutionality of the Applicant's allegation with reference to the general principles regarding the right to a reasoned court decision, as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, a review in which the Court will first (i) elaborate on the general principles; and thereafter, (ii) shall apply the same to the circumstances of the present case.

(i) General principles according to the case law of the Court and that of the ECtHR regarding the right to a reasoned court decision

135. Regarding the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court initially notes that it has already consolidated case law. This case law was built based on the ECtHR case law, including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to casesKI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018; KI143/16, *Muharrem Blaku and Others,* Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019, KI35/18, Applicant *Bayerische Versicherungsverbrand*, Judgment, of 11 December 2019).

136. In principle, based on the case law of the ECtHR, the guarantees enshrined in Article 6 of the ECHR, include the obligation for courts to give sufficient reasons for their decisions (See, the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53. A reasoned decision shows the parties that their case has truly been heard, and thus contributes to a greater acceptance of the decision (see ECtHR case *Magnin v. France*, decision of 10 May 2012, paragraph 29). This case law also stipulates that despite the fact that a court has a certain margin of appreciation when choosing arguments and admitting evidence, it is obliged to justify its activities by giving reasons for its decisions (see cases of the ECtHR, *Suominen v. Finland*, cited above, paragraph 36; *Carmel Saliba v. Malta*, Judgment of 24 April 2017, paragraph 73). In addition, the decisions must be reasoned as such as to enable the parties to make effective use of any existing right of appeal (see the ECtHR case, *Hirvisaari v. Finland*, cited above, paragraph 30).

137. The Court also notes that based on its case law in assessing the principle which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law (see ECtHR cases *Garcia Ruiz vs Spain*, application no. 30544/96, Judgment of 21 January 1999. paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42, see also the case of Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). By not seeking a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their claims that are crucial to the outcome of the proceedings (see case *Morerira Ferreira v. Portugal*, cited above, paragraph 84, and all references used therein).

138. Finally, the Court, referring to its case-law, recalls that the decisions of the courts 'will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (see among others, the Court cases: no. KI72/12, Applicants *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; KI135/14, Applicant *IKK Classic*, cited above, paragraph 58; and KI87/18, Applicant *IF Skadeforsikring,* cited above, paragraph 49).

(ii) *Application of the abovementioned principles in the Applicant's case*

139. The Court will assess whether the Applicant's allegation regarding his qualification as an official person has been properly addressed by the Supreme Court and in accordance with the right to a reasoned court decision, as guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

140. The Court recalls that in the circumstances of the present case, the Applicant in essence alleges that the regular courts, including the Supreme Court, in issuing their decisions by which he was qualified as an official person based on the analogy, have also applied the provisions of the Law on Public Procurement. In the context of this

allegation, the Applicant reiterated and specified that he did not have the status of an official person as specified in Article 107 of the Provisional Criminal Code.

141. In this context, the Court, in order to assess the constitutionality of the Applicant's allegation, first refers to Judgment PKR. No. 432/15, of 18 December 2017 of the Basic Court, by which the Applicant was qualified with the status of an official person and was consequently found guilty of committing a criminal offense under Article 341 [Fraud in office], paragraph 3 in conjunction with paragraph 1 of the Provisional Criminal Code, which stipulates that:

> *1. An official person who, with the intent to obtain unlawful material benefit for himself, herself or another person, by presenting a false statement of an account or in any other way deceives an authorised person into making an unlawful disbursement shall be punished by a fine or by imprisonment of up to five years.*
>
> *[...]*
>
> *3. When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5,000 euro, the perpetrator shall be punished by imprisonment of one to ten years.*

142. The Court further recalls that the Basic Court, referring to the "Affidavit", given by the Applicant, a statement which was part of the tender documentation, had established that the Applicant *"[...]represented the Institute as an official person, because he acted as a business organization - legal person, because according to the Public Procurement Law, namely the provision of Article 61 [Eligibility of the Candidate or Tenderer] of the mentioned law, has exercised special duties related to the public procurement activity".*

143. In this context, the Court notes that the "Affidavit" itself is not part of the Law on Public Procurement, but is derived from the provision of Article 61 of the Law on Public Procurement.

144. The Court further recalls that the Applicant raised his allegation that he did not have the status of an official person through his appeals to the Court of Appeals and his requests for protection of legality to the Supreme Court. Therefore, in the context of the allegations raised by

the Applicant, in the following the Court will also refer to the reasoning given by the Court of Appeals and those of the Supreme Court.

145. The Court of Appeals by Judgment PAKR No. 27/2018, of 2 May 2018 regarding the Applicant's allegation that he does not have the status of an official person, assessed that the Basic Court gave sufficient reasons, which reasons *"[...] approves this Court as well and does not consider it necessary to make assessments once again"*. Consequently, the Court recalls that the Court of Appeals upheld the interpretation given by the Basic Court that the Applicant had the status of *"official person"*.

146. The Court further recalls that in the retrial procedure in the Court of Appeals, the latter in its Judgment PAKR No. 528/2019, of 16 April 2019, regarding the Applicant's allegations that he does not have the status of an "*official person*", assessed that:

> *"[...] the fact is that [the Applicant] is a citizen of the Republic of Albania and that the Institute for International Studies represented by the accused is established in Albania, but from this fact it cannot be concluded that this accused in this case did not have the capacity of the official person. Because, according to the Law on Public Procurement of Kosovo No. 2003/17 this Institute as an interested party has offered bid in Kosovo as an economic operator (has provided services namely contracted work) and [the Applicant] in addition to representing the Institute as an official person on the occasion of winning the tender from the contracting authority (the University of Prishtina) has undertaken the exercise of special official duties based on the authorization given by law."*

147. The Court notes that the Court of Appeals in its second Judgment regarding the Applicant interpreted the notion "official person" referring also to the Law on Public Procurement in Kosovo No. 2003/17, without giving a specific reasoning according to which paragraph of Article 107 of the Provisional Criminal Code of Kosovo, the Applicant, as a legal entity, has the status of "*official person*", namely did not specify "***what public function or what public authority was exercised by the Applicant in order to be considered an official person***". In fact, the Court of Appeals in the end only concluded that "*... it cannot be concluded that this accused in this case* ***does not have the capacity of an official person***".

148. The Court further recalls the Applicant's specific allegation raised in his request for protection of legality, in which request stated that:

"The Applicant was convicted of the criminal offense under Article 341 of the Provisional Criminal Code of Kosovo "fraud in office". Fraud in Office can only be committed by the "official person". Considering the fact that the NGO "ISN" (Republic of Albania) was in a contractual relationship with the University of Prishtina, the next questions that need to be addressed are:

a. Whether each economic operator should be granted the status of "official person" under the Provisional Criminal Code, and:

b. Is it possible that the responsible person of a foreign NGO who is not registered in the Republic of Kosovo has the status of an official person."

149. In the context of this specific allegation, the Court recalls the reasoning given by the Supreme Court, which in its challenged Judgment Pml. No. 253/2019, of 30 September 2019, stated that: *"[...] the criminal offense in question can be committed exclusively by an official person and in this case the courts of lower instance have emphasized in their decisions the fact that [the Applicant] had this capacity, and moreover, have cited the legal provisions that determine the capacity of official person even though he is a citizen of the Republic of Albania and the organization "ISD" also had its headquarters in Tirana, however there was no doubt that the convict had the capacity of official person as in addition to the fact that he was a representative of "ISD"and had offered in Kosovo as a representative of the economic operator, had taken over the special exercise of official duties based on legal authority as defined by the provision of Article 107 of the PCCK [Provisional Criminal Code of Kosovo]".*

150. Based on the abovementioned Judgment of the Supreme Court, the Court notes that the latter, in relation to the qualification of the Applicant as an "official person", had confirmed the interpretations of the lower instance courts by finding that *"[the Applicant the claim] had taken over the special exercise of official duties based on legal authority as defined by the provision of Article 107 of the PCCK [Provisional Criminal Code of Kosovo]*". However, he did not specify what paragraph of Article 107 of the PCCK is applicable in his case, nor did he specify which was the public authority, and the specific duties which he exercised within that authority.

151. In this regard, the Court reiterates that the ECtHR in Judgment *Hadjianastassiou v. Greece*, in paragraph 33, took the view that the

national court must "*indicate with sufficient clarity the grounds on which they based their decision*" (see, in this context, also the case of Court KI87/18 Applicant *IF Skadeforsikring*, cited above, paragraph 61).

152. The Court further notes that a sufficient and clear reasoning regarding the status of the "official person" was not given to the Applicant in any of the regular court judgments, on the contrary, his status has always been ascertained by the use of analogy, based on the Law on Public Procurement No. 2003/17, without justifying with a single word according to which paragraph of Article 107 of the Provisional Criminal Code the Applicant has the status of an official person.

153. Had the Supreme Court addressed the Applicant's substantive allegation of his qualification as official person irrespective of the response to that allegation (that is, whether this allegation would have been admissible or would be rejected as ungrounded), then the requirement of "the heard party" and proper administration of justice would be met (see, *mutatis mutandis*, case of the Court KI145/18, cited above, paragraph 58).

154. The Court notes that it is not the task of the Constitutional Court to examine to what extent the Applicants' allegations in the proceedings before the regular courts are reasonable. However, the procedural fairness requires that the fundamental allegations raised by the parties before the regular courts should be properly answered - especially if they relate to the legal interpretation that refers to the qualification of the Applicant as an official person and that directly affects the qualification of the criminal offense for which he was found guilty.

155. The Court reiterates that the Applicant, both before the lower courts and before the Supreme Court, had raised the issue of interpretation and application on the basis of the analogy of the Law on Public Procurement. Furthermore, the Applicant in his request for protection of legality, filed on 12 June 2019, also specifically claimed that "*The implementation of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but defines the procurement procedures in public tenders. Even if the Procurement Law defined the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would not apply, because the status of official person can have only persons explicitly defined in the Criminal Code. Prohibition of the application of analogy in criminal law is in the*

function of the legal certainty of the subjects of law. It is clear that in this criminal case the Court of Appeals has violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".

156. Based on the above, the Court finds that the Applicant's allegations that the Law on Public Procurement does not provide the definition of "*official person*" are grounded, however, this Court reiterates that the regular courts in their decisions have referred to this law to justify that the Applicant, in his capacity as a representative of the company, had provided services as an economic operator for the needs of a public authority.

157. Therefore, taking into account the abovementioned observations and the procedure as a whole, the Court considers that the Supreme Court upheld the position of the regular courts, without responding to the Applicant's specific allegation regarding the interpretation and application of the Law on Public Procurement, in which case, as a result, the Applicant was qualified as an official person.

158. Consequently, the Court finds that the challenged Judgment [Pml. No. 253/2019] of the Supreme Court, of 30 September 2019 did not meet the criteria for a reasoned court decision as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because it failed to sufficiently address the Applicant's substantive allegations when upholding the decisions of the regular courts, through which he was classified as an official person.

159. The Court reiterates that this conclusion concerns exclusively the challenged judgments from the point of view of the interpretation of law, specifically the reasoning of the judgment of the Supreme Court in the circumstances of the Applicant's case and in no way prejudices the outcome of the merits of his case in retrial. The Court notes that it is not called upon to decide on the Applicant's individual criminal liability, which is primarily a matter for the regular courts to assess (see Judgment *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532 / 97 and 44801/98, of 22 March 2001, paragraph 51). In this context, the Court notes that its finding that the challenged Judgment of the Supreme Court was rendered in violation of the Applicant's right to a reasoned court decision, refers specifically only to the allegation raised by the Applicant in his Referral to the Court.

Conclusions

160. The Court dealt with all the allegations of the Applicant, applying on this assessment the case law of the Court and the ECtHR regarding the adversarial principle and equality of arms and the lack of a reasoned court decision, principles and guarantees that are guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

161. With regard to the Applicant's allegation of violation of the principle of "equality of arms" and "principle of adversarial proceedings" as a result of the rejection of the evidence proposed by the regular courts, the Court found that the Applicant's allegations that his right to fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, has been violated, are ungrounded.

162. With regard to the lack of a reasoned court decision, the Court found that with the issuance of Judgment Pml. No. 253/2019, of 30 September 2019, the Supreme Court failed to substantiate the substantive allegations of the Applicant and did not reason its decision regarding his qualification as an official person.

Request for hearing

163. The Court also recalls that the Applicant requested the Court to hold a hearing.

164. The Court recalls that Rule 42 [Right to Hearing and Waiver] paragraph (2) of the Rules of Procedure stipulates that *"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law"*.

165. The Court notes that the abovementioned rule of Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file suffices, beyond any doubt, to reach a decision on merits in the case under consideration (see case of the Constitutional Court KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110 - stating that "*The Court considers that the documents contained in the Referral are sufficient to decide this case […]"*).

166. In the present case, the Court had access to the original case file and all necessary documentation, therefore the Court does not consider that there is any ambiguity about the "*evidence or the law*" and, therefore, does not consider it necessary to hold a hearing. The documents included in the Referral are sufficient to decide on the Applicant's Referral.

167. Therefore, the Court, unanimously, rejects the Applicant's request for scheduling a hearing as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in its session held on 9 December 2020

DECIDES

I. TO DECLARE, by majority of votes, the Referral admissible;

II. TO HOLD, by majority of votes, that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as a result of non-reasoning the court decision regarding the Applicant's allegation of his qualification as an official person;

III. TO DECLARE Judgment Pml. No. 253/2019 of the Supreme Court of 30 September 2019 regarding the Applicant invalid;

IV. TO REMAND Judgment Pml. No. 253/2019 of the Supreme Court of 30 September 2019, for retrial in accordance with the findings of this Judgment of the Constitutional Court;

V. TO ORDER the Supreme Court to notify the Constitutional Court as soon as possible, but not later than 30 April 2021 about the measures taken to implement the Judgment of the Court, in accordance with Rule 66 (5) of the Rules of Procedure;

VI. TO REMAIN seized of the matter, pending implementation of this Judgment;

VII. TO REJECT, unanimously, the Applicant's request for holding a hearing;

VIII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20.4 of the Law, to publish the latter in the Official Gazette;

IX. TO DECLARE that this Judgment is effective immediately.

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

JOINT CONCURRING OPINION

of Judges Bajram Ljatifi, Safet Hoxha and Radomir Laban

in

Case No. KI230/19

Applicant

Albert Rakipi

Constitutional review of Judgment Pml. No. 253/2019 of the Supreme Court of Kosovo of 30 September 2019

Expressing at the beginning respect and agreement with the opinion of the majority of judges that in this case, there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR), we consider that there has been another violation of human rights committed to the Applicant and which relates to the violation of the Applicant's rights guaranteed by Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law) of the ECHR, which we will reason below.

Reasoning of joint concurring opinion

1. First of all, we remind you that the Applicant claims the following: *"[...] The regular courts have arbitrarily granted [the Applicant], the Executive Director of a foreign NGO (of the Republic of Albania), the status of an official person".*

2. The Applicant first specifies that *"[...] the term law means domestic laws and not those of other states, because if it were the opposite, that is, if this expression meant the laws of other states, then such a circumstance would represent "legal aggression" of Kosovo towards the other states. It is more than clear that the expression used in the Criminal Code "A person who exercises specific official duties, based on authorisation provided for by law", means authorizations deriving from domestic laws. The authorizations that the [Applicant] has in the NGO "ISN" derive from the laws of the Republic of Albania and not from the law of the Republic of Kosovo. This fact is confirmed*

by the conclusions of the Court of Appeals which are also supported by the Supreme Court where among other things it is stated that the "Institute for International Studies" is established in Albania".

3. Secondly, the Applicant claims that in his case the regular courts "*violated the principle of prohibition of analogy"* in criminal law by interpreting the provisions of the Law on Public Procurement. In the context of this allegation, the Applicant specifies that: *"The application of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary, because this law does not deal at all with determining the status of official persons, but defines the procurement procedures in public tenders. Even if the Procurement Law defined the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would not have applied, because the status of official person can have only persons explicitly defined in the Criminal Code".*

4. According to the Applicant: *"Prohibition of the application of analogy in the criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the regular courts have violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

5. Pursuant to the Applicant's abovementioned allegations, we consider that in the light of the circumstances of the present case, the constitutionality of the Applicant's allegations of manifestly arbitrary interpretation and application of law due to the application of analogy by regular courts should be assessed. In this context, we note that the Applicant bases his allegation of manifestly arbitrary interpretation and application of law on the right to fair and impartial trial, which is guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. However, we note that the very essence of the Applicant's allegations of "*prohibition of application of analogy in the criminal law*" which falls within the scope of the law guaranteed by Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law) of the ECHR and its application, are extensively interpreted in the case law of the ECtHR.

6. In this respect, we recall the case law of the ECtHR and that of the Court, where it has been established that: "*A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on"* (See, ECtHR case *Ştefanica and Others v. Romania*, Judgment of 2 November 2010, paragraph 23; see also the cases of the Court, KI145/18, Applicants *Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi*, Judgment, of 19 July 2018, paragraph 35, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraph 83 and KO73/16, Applicant *the Ombudsperson*, Constitutional review of Administrative Circular No. 1/2016 issued on 21 January 2016 by the Ministry of Public Administration of the Republic of Kosovo, Judgment of 8 December 2016, paragraph 78).

7. Accordingly, in the light of the reasoning above, we consider that the Applicant's allegations should be considered on the basis of the stated facts and evidence attached to the Referral, in order to respond to the Applicant's allegation regarding "*prohibition of application of analogy in criminal law*" (see, similarly, case KI145/18, Applicants *Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi,,* cited above, paragraph 36).

8. Therefore, it is necessary to assess the constitutionality of the Applicant's allegations of arbitrary interpretation and application of law as a result of the use of analogy, referring to the principles relating to "*the principle of legality"* and "*prohibition of the application of analogy in criminal law"* embodied in Article 33 of the Constitution, Article 7 of the ECHR and the relevant case law of the ECtHR.

9. In this context, in reasoning of the the concurring opinion, we will first present **a)** The principle of legality - the limit for the application of analogy in the criminal law, **b)** The justification and scope of the prohibition of analogy in criminal substantive law, in order to proceed with **c)** legal analogy in criminal law, in conjunction with the "*principle of legality*" and the "*prohibition of application of analogy in criminal law*" guaranteed by Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law).

10. At the end of the reasoning of the concurring opinion, we will set out the general principles, which relate to the application of analogy in criminal law established by the case law of the ECtHR and apply these principles to the factual and legal circumstances of the case, namely the Applicant's case, and thereafter, on the basis of the latter, we will

express our opinion regarding the constitutional review of the challenged decisions.

a) The principle of legality - the limit for the application of analogy in criminal law

11. Unlike other branches of law, the application of analogy as a form of logical interpretation of criminal law norms *"is reduced to a minimum"* due to the validity of the principle of legality: *nullum crimen, nulla poena sine lege*. In criminal substantive law, the principle of legality is inviolable - it determines the limits of interpretation of criminal law in general, as well as logical interpretation using the argument of analogy.

12. In order to understand in what way and to what extent the principle of legality is an obstacle to the application of analogy in substantive criminal law, it is necessary to point out its effect in general and its influence on determining the limits of interpretation of criminal law norms.

13. The principle of legality has multiple effects and is reflected in the following: (1) only the law can be the source of criminal law *(nullum crimen sine lege scripta),* which excludes the application of customary law; (2) the creation of new incriminations by analogy is excluded *(nullum crimen sine lege stricta);* (3) only the law in force at the time of the commission of the criminal offense is valid: *nullum crimen, nulla poena sine lege* (this requirement in theory is still referred to as the principle of prohibition of retroactive effect of criminal law *(nullum crimen sine lege praevia);* (4) descriptions of the substance of criminal offenses in legal norms must be clear and precise. The principle of legality understood in this way ensures the guaranteed function of criminal law - the protection of freedoms and human rights.

14. By its effect "*principle of legality"* also determines the limits of interpretation of criminal norms. First of all, due to the validity of this principle, the requirement that the legal text is the beginning and basis of any interpretation is especially expressed. Loyalty to the legal text leads the interpretation to the true meaning and limits of the law - the more you respect it and the less you move away from it.

15. The next specificity of the interpretation of incriminations is related to the basic function of criminal law - the protection of certain values, which must not be lost sight of in any interpretation. Determining a

protective object is a fundamental precondition for a correct interpretation of criminal law. By discovering the object of protection, we find out what the legislator wants to protect with a criminal norm, what is its goal. With this knowledge of the object of protection, the true meaning and significance of the norm being interpreted becomes clear. Hence, this interpretation according to the object of protection is a special feature of the teleological interpretation in criminal law. In addition to the object, the scope of criminal protection is also important for the interpretation of the criminal law. The fragmentary, partial character of criminal protection determines the limits that can be reached in the interpretation: to determine the true meaning of the norm, it must be known to what extent the interpreted norm provides protection to some goods (protected goods do not enjoy criminal protection from all attacks but only some, according to rule of the most difficult). The amount of the threatened punishment is also important for determining the relationship between the legal substance of certain criminal acts, especially those that are closely related to each other. Finally, any interpretation contrary to the essence and purpose of the principle of legality in criminal law, as a guarantor of legal certainty in the interpretation of criminal law, is prohibited.

16. The abovementioned interpretation of the limits of application of the analogy dominates modern criminal legislation, and if we take into account the general historical development of criminal law and individual solutions in comparative law, it can be concluded that legislators have or have had different views on this issue: (1) that analogy is explicitly forbidden, but such a legislative procedure is very rare; (2) that there is no explicit prohibition, but the principle of legality is prescribed, so from the prescribed content and diction of the norm on this inviolable principle it follows that the analogy is prohibited; (3) that by introducing the so-called general clauses in the disposition of the criminal law norm in certain provisions is provided the analogy "*intra legem*"; (4) that the legal or juridical analogy, or both, is known to the relevant legislation as a general legal institute.

b) Justification and the scope of validity of the prohibition of analogy in criminal substantive law

17. Criminal law provisions protect the most important goods of people and prescribe the most severe sanctions for their violation, so the inviolable validity of the principle of legality appears necessary to ensure the legal certainty of citizens. This is the main reason to prohibit analogy in criminal law, as a means of creating new criminal

offences, as it is directly contrary to the meaning and function of this basic principle of criminal law.

18. Such an analogy is also prohibited in our criminal law. It is not allowed for a court to qualify an act as a criminal offense if it is not provided for in the criminal law as a criminal offense, even though it is similar to a criminal offense provided by law. Such a prohibition is expressly prescribed by the Provisional Criminal Code [UNMIK Regulation 2003/25], which in paragraph 3 of Article 1:

3. The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the person being investigated, prosecuted or convicted.

19. „The principle of legality has been raised to the rank of a constitutional principle and applies to all criminal offenses, and is regulated in the provisions on the right to legal certainty in criminal law (Article 33, paragraph 1 of the Constitution). From the guarantee that there is no criminal offense or punishment without law, which is marked as the principle of determination of the offense and punishment in law, by applying the rules *argumentum a contrario*, as a form of logical interpretation, it is concluded that a criminal offense and punishment cannot be determined by a norm outside the law, which also means a norm resulted in the process of creating rights by applying analogy.

20. Therefore, the analogy by which new criminal offenses are created is prohibited: a person's behavior, no matter how socially dangerous and harmful, cannot be qualified as a criminal offense, if it is not provided by law as a criminal offense. Such an analogy is excluded from criminal law as directly contrary to the principle of legality because it creates legal uncertainty and allows for arbitrariness and abuse by the judiciary.

21. Precisely the protection of freedoms and human rights from any arbitrariness and possible abuses by the court is the decisive motive for prohibiting the analogy which creates a new criminal offense, even if it is similar to some of them provided by law. In short, the meaning and function of the principle of legality determine the scope, limits and forbidden zone of analogy in criminal law.

22. Setting from a purpose and limits of the prohibition of analogy thus determined, in criminal cases it is considered that the prohibition covers in particular:

a) prohibition of the analogy by which a new criminal offense is created by applying criminal regulations that govern the most similar case (e.g. when misconduct that is not provided by law as a criminal offense, the court would qualify as a criminal offense);
b) the prohibition to create by analogy new qualified forms of the basic criminal offense (e.g. by declaring a circumstance qualifying and which as such is not provided for in that criminal offense but is the same or similar to a qualifying circumstance provided for in another similar or related criminal offense;
c) a ban on more severe sentence by interpretation by analogy; and
d) prohibition of legal analogy, namely prohibition to create a criminal offense or punishment by an individual legal norm on the basis of general principles of criminal legislation or the spirit of the entire legal order.

23. In all these cases, by applying the analogy, the law is amended to the detriment of the defendant, which is in direct contradiction with the principle of legality in criminal law, and therefore these cases are in the zone of prohibited analogy.

c) Legal analogy in criminal law

24. Modern criminal legislation that does not explicitly provide for the application of legal analogy, but it is considered that legal analogy is not totally prohibited and that its application is still possible in the field of interpretation and application of criminal regulations, within certain principles of legality. In order to find the missing solutions in the law, the application of a legal analogy is allowed if it is in favor of the defendant and does not contradict other criminal regulations and criminal law principles. For example, the court can use this analogy, especially in the matter of excluding unlawfulness, since this area is largely not sufficiently regulated.

25. The application of the legal analogy is also advocated in other criminal law areas. There are opinions that it is extremely possible to apply this type of analogy when interpreting legal provisions: **(1)** on grounds that exclude the existence of a criminal offense, **(2)** on grounds that exclude punishment or serve for calculating sentence, and (3) on grounds relating to all those circumstances that create a favorable situation for the defendant.

26. Based on the above, on the analogy as a type of conclusion and type of interpretation of law, the position is taken that from its creation, analogy in law is associated with legal gaps and serves as a means to fill them. In discussing the place of analogy in the theory of law, the arguments presented are inspired by the idea that analogy is a procedure that lies in the middle between the interpretation of law in the strict, narrower sense of the word and the very creation of law. The scope of the analogy in criminal substantive law is limited by *"principle of legality nullum crimen, nulla poena sine lege"*.

27. Modern criminal law doctrine is of the opinion that legal analogy is always prohibited, as it is directly contrary to the principle of legality, and that the application of legal analogy is not excluded outside the forbidden zone, determined by this principle.

(ii) General principles relating to Article 7 established by the case law of the ECtHR

28. The guarantee enshrined in Article 33 of the Constitution and Article 7 of the ECHR, which is an essential element of the rule of law, occupies a prominent place in the protection system of Convention, as it is underlined by the fact that no derogation from it is permissible under Article 15 of the ECHR in time of war or other public emergency. It should be construed and applied, as follows from its objective and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see Judgment *Korbely v. Hungary* [GC], Application no. 9174/02, dated 19 September 2008, paragraph 69)

29. Accordingly, Article 33 of the Constitution and Article 7 of the ECHR *„are not confined to prohibiting the retroactive application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable"* (see Judgment *Korbely v. Hungary,* cited above, paragraph 70).

30. When speaking of "law" Article 7 of the ECHR and Article 33 of the Constitution allude to the very same concept as that to which the ECHR refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see case *EK v. Turkey*, application no. 28496/95, judgment of 7 February 2002, paragraph 51). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (see Judgment *Del Rio Prada v. Spain*, application no. 42750/09, of 21 October 2013, paragraph 91).

31. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see Judgment *Jorgić v. Germany*, application no. 74613/01, of 12 October 2007, paragraphs 100-101).

32. However, the lack of an accessible and reasonably foreseeable judicial interpretation may even lead to the finding of a violation of the accused's rights under Article 7 (see, as regards the constituent elements of the criminal offense, *Pessino v. France*, application no. 40403/02, judgment of 12 February 2007, paragraphs 35-36, for sentence see judgment *Alimuçaj v. Albania*, application no. 20134/05, 7 February 2012, paragraphs 154-162). In order to avoid this, the goal and purpose of this provision is namely that no one should be subjected to arbitrary prosecution, conviction or punishment (see Judgment *Del Rio Prada v. Spain*, cited above, paragraph 93).

33. In addition, we recall that, in principle, it is not the task of the Constitutional Court to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention and the Constitution (see Judgment

Waite and Kennedy v. Germany, application no. 26083/94, 18 February 1999, paragraph 54, see also Judgment *Korbely v. Hungary*, cited above, paragraph 72)

(ii) Application of the abovementioned principles to the Applicant's case

34. In the light of the aforementioned principles concerning the scope of its supervision, we recall that the Constitutional Court is not called upon to decide on the individual criminal liability of the Applicant, which is primarily a matter for the assessment of the regular courts. Also, the Court is not called upon to decide whether there is a criminal offense in the Applicant's actions (for example, Fraud under Article 261 of the PCCK or Falsifying Documents under Article 332 of the PCCK), this is also at the discretion of the regular courts (see Judgment *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532 / 97 and 44801/98, of 22 March 2001, paragraph 51)

35. The function of the Court, from the point of view of Article 33 of the Constitution and Article 7 paragraph 1 of the ECHR, is to consider whether the criminal offense for which the Applicant was convicted constituted a criminal offense defined with sufficient accessibility and foreseeability and whether regular courts contrary to the principle of legality applying the analogy broadly interpreted the criminal law to the detriment of the accused (see judgment *Kokkinakis v. Greece*, Application no. 14307/88, of 25 May 1993, paragraph 52).

A) Accessibility

36. As regards the application of the principles established by the ECtHR, we consider that it must first be established whether the criminal law and the Law on Public Procurement were accessible to the Applicant, given that the Applicant claims that the regular courts to him as a foreign national *"[...] have arbitrarily granted [the Applicant], the Executive Director of a foreign NGO (of the Republic of Albania), the status of an official person"*.

37. In this regard, in relation to the Applicant's allegation, we recall, first of all, the Judgment of the Basic Court PKR. No. 432/15 of 18 December 2017, in which the Applicant was characterized as an "*official person*" and found guilty of the criminal offense under Article 341 [Fraud in Office], paragraph 3 in conjunction with paragraph 1 of

the Provisional Criminal Code [UNMIK Regulation 2003/25], which prescribes:

> *2. An official person who, with the intent to obtain unlawful material benefit for himself, herself or another person, by presenting a false statement of an account or in any other way deceives an authorised person into making an unlawful disbursement shall be punished by a fine or by imprisonment of up to five years.*
>
> *[...]*
>
> *3. When the offence provided for in paragraph 1 of the present article results in a material benefit exceeding 5,000 euro, the perpetrator shall be punished by imprisonment of one to ten years.*

38. In the following, the Basic Court considers as the main material evidence the "*Declaration under oath*", signed by the Applicant, as the company's representative, who stated at the time of the submission of the tender that *" the economic operator [the company represented by the applicant] meets the eligibility requirements of the Law on Public Procurement in Kosovo, Law no. 2003/17, Article 61 [...] I accept the possibility of criminal and civil sanctions, penalties and damages if the said economic operator intentionally or through negligence submits any document or statement containing information that is incorrect in its content or may be misleading".*

39. Based on the above, we conclude that the Applicant as a representative of an economic operator from the Republic of Albania who performed works in the territory of the Republic of Kosovo and participated in public tenders in accordance with the laws of the Republic of Kosovo in accordance with the Law on Public Procurement in Kosovo, Law No. 2003/17, should have been acquainted with the positive legal regulations of the Republic of Kosovo.

40. By signing the "*Declaration under oath*", the Applicant accepted as valid the positive legal legislation of the Republic of Kosovo, regardless of the fact that he is a foreign citizen, namely a citizen of the Republic of Albania, and regardless of the fact that the NGO whose applicant is the Executive Director is registered in Albania.

41. Also, the positive legal regulations of the Republic of Kosovo, and thus the Provisional Criminal Code [UNMIK Regulation 2003/25],

according to which the Applicant was found guilty, as well as the Law on Public Procurement in Kosovo, Law no. 2003/17, according to which the Applicant participated in the public bidding, are documents available on the websites of the Assembly of the Republic of Kosovo, the Official Gazette of the Republic of Kosovo and a number of other websites of public institutions of Kosovo, which for the Applicant as a representative of the economic operator were sufficiently available.

42. Based on the above, we conclude that the laws referred to by the Basic Court in Judgment PKR. No. 432/15 of 18 December 2017, the Court of Appeals in Judgment PAKR. No. 528/2018 of 16 April 2019, as well as the Supreme Court in Judgment Pml. No. 253/2019 of 30 September 2019, namely the Provisional Criminal Code [UNMIK Regulation 2003/25] and the Law on Public Procurement in Kosovo, Law No. 2003/17, were in force and thus the applicable legal regulations were sufficiently available to the Applicant.

B) Foreseeability

43. In the continuation of the test under Article 7 of the ECHR, we must examine whether the Provisional Criminal Code [UNMIK Regulation 2003/25] and the Law on Public Procurement in Kosovo, Law no. 2003/17, were foreseeable and whether the regular courts interpreted them by analogy extensively and unpredictably to the detriment of the Applicant.

44. We remind that by signing the "*Declaration under oath*", the Applicant accepted as valid positive legal legislation of the Republic of Kosovo, regardless of whether he is a foreign citizen, namely a citizen of the Republic of Albania, and regardless of the NGO which applicant is the Executive Director registered in Albania, but the question now before us is **i)** whether the Applicant acquired the status of an "*official person*" by signing the "*Declaration under oath*" and **ii)** whether the Applicant could have foreseen that he had acquired the status of an "*official person*".

45. We note that on the basis of this "*Declaration under oath*", which is part of the tender documents, the Basic Court found that "*...it is a fact that the convict Albert Rakipi represented the Institute as an official person, because he acted as a business organization - legal person, because according to the Law on Public Procurement, namely the provision of Article 61 of the mentioned law, has exercised special duties related to the public procurement activity*".

46. We note that it is obvious that the Basic Court concluded that the Applicant has the status of an official person by applying the analogy from the Law on Public Procurement, namely under the provision of Article 61 of the said Law, where the "*Declaration under oath*" itself is not part of the Law on Public Procurement, but it is also derived from the legal norm of Article 61 of the Law on Public Procurement. Therefore, the Court notes that the Basic Court did not reason the status of "*official* person" pursuant to Article 107 of the Provisional Criminal Code of Kosovo, which was the obligation of the Basic Court.

47. Furthermore, we recall that the Applicant has already raised the allegation that he does not have the status of an "*official person*" before the regular courts, namely in his appeals to the Court of Appeals and in his requests for protection of legality. Therefore, in this case, we will refer to both the reasoning of the Court of Appeals and the reasoning of the Supreme Court regarding the claim of the Applicant.

48. First of all, the Court of Appeals, by Judgment PAKR No. 27/2018, regarding the allegation of the Applicant that he does not have the status of an *official person*, assessed that the Basic Court gave the necessary reasoning in relation to this allegation, and which reasoning "[...] *is approved by this court and does not see it necessary to do more assessment*".

49. We note that in the present case the Court of Appeals continued to apply the analogy in determining the status of the "*official person*" of the Applicant himself, accepting the earlier analogous interpretation of the Basic Court.

50. In the retrial before the Court of Appeals, in its judgment PAKR No. 528/2019 of 16 April 2019, regarding the allegations of the Applicant that he does not have the status of "*official person*", assessed that:

> *"[...] the fact is that [the Applicant] is a citizen of the Republic of Albania and that the Institute for International Studies represented by the accused is established in Albania, but from this fact it cannot be concluded that this accused in this case did not have the capacity of the official person. Because, according to the Law on Public Procurement of Kosovo No. 2003/17 this Institute as an interested party has offered bid in Kosovo as an economic operator (has provided services namely contracted work) and [the Applicant] in addition to representing the Institute as an official person on the occasion of winning the tender from the contracting authority (the University of Prishtina) has*

undertaken the exercise of special official duties based on the authorization given by law".

51. We note, that the Court of Appeals continued with a broad and analogous interpretation of the term " *official person"* referring also to the Law on Public Procurement in Kosovo No. 2003/17, without giving a specific reasoning according to which paragraph of Article 107 of the Provisional Criminal Code of Kosovo, the Applicant, as a legal entity, has the status of "*official person*", and did not reason "***what public function or what public authority was exercised by the Applicant in order to be considered an official person***". In contrast, the Court of Appeals reasons by the negation that "*... it cannot be concluded that the accused in this case* ***does not have the capacity of an official person****",* which is obviously a broad interpretation of the term "*official* person", applying a negative analogy. The Court of Appeals was obliged to prove and reason **"why the defendant has the status of an official person".**

52. We also refer to the Applicant's specific allegation raised in his request for protection of legality, where he emphasized:

> *„The Applicant was convicted of the criminal offense under Article 341 of the Provisional Criminal Code of Kosovo "fraud in office". Fraud in Office can only be committed by the "official person". Considering the fact that the NGO "ISN" (Republic of Albania) was in a contractual relationship with the University of Prishtina, the next questions that need to be addressed are:*
>
> > *a. Whether each economic operator should be granted the status of "official person" under the Provisional Criminal Code, and:*
> > *b. Is it possible that the responsible person of a foreign NGO who is not registered in the Republic of Kosovo has the status of an official person".*

53. We further recall the reasoning given by the Supreme Court, which in its challenged Judgment Pml. No. 253/2019, of 30 September 2019, stated that: *"[...] the criminal offense in question can be committed exclusively by an official person and in this case the courts of lower instance have emphasized in their decisions the fact that [the Applicant] had this capacity, and moreover, have cited the legal provisions that determine the capacity of official person even though he is a citizen of the Republic of Albania and the organization "ISD" also had its headquarters in Tirana, however there was no doubt that the convict had the capacity of official person as in addition to*

the fact that he was a representative of "ISD" and had offered in Kosovo as a representative of the economic operator, had taken over the special exercise of official duties based on legal authority as defined by the provision of Article 107 of the PCCK [Provisional Criminal Code of Kosovo]."

54. We note that in addition to the Applicant's allegations throughout the proceedings that he did not have the status of "*official person*", the only explanation regarding his status was given by the Supreme Court with the sentence "*as determined by Article 107 of the PCCK [Provisional Criminal Code of Kosovo]", accepting* previous interpretations of the Court of Appeals and the Basic Court, without explaining what paragraph of Article 107 of the PCCK is in question, what official authority and what public authority the Applicant exercised, although the law itself clearly distinguished between Kosovo citizens and foreign citizens and the status of official person in Article 107 of the PCCK.

55. In support of the Applicant's allegations that the regular courts granted the Applicant the status of an official person by analogy, we also refer to the Supreme Court's conclusion regarding the other accused H.V. where "*The Supreme Court of Kosovo assesses that the first instance court in its judgment has correctly found that the actions of the convict H. V. manifest all elements of the criminal offense of fraud under Article 341, paragraph 3 in conjunction with paragraph 1 and Article 23 of the PCCK, „**since the convicted H. V. had the status of an official person as determined by the provision of Article 107, paragraph 1, subparagraph 1.1 of the PCCK, because he was elected to represent the UP, namely the public procurement office".***

56. In this context, we note that such a clear explanation regarding the status of "*official person*" was not given to the Applicant in any judgment of the regular courts, on the contrary, his status was always determined by analogy under the Law on Public Procurement No. 2003/17, without explaining in a single letter on the basis of which paragraph of Article 107 of the Provisional Criminal Code the Applicant has the status of an official person.

57. We further recall that during the qualification of the Applicant as an official person, the regular courts also referred to the provisions of the Law on Public Procurement, reasoning that he signed the "Declaration under oath" in accordance with the procedures set out in this Law, and he offered the bid and was selected as an economic operator to

perform service for one public institution, namely the University of Prishtina.

58. We reiterate that the Applicant raised the issue of analogous interpretation and application of the Law on Public Procurement in the same way as before the lower courts, and before the Supreme Court. However, in his request for protection of legality, submitted on 12 June 2019, the Applicant also specifically stated that "*The application of the Law on Public Procurement to grant the status of official person [to the Applicant] is arbitrary. Even if the Procurement Law defined the meaning of the expression "official person" in criminal law, the analogy is prohibited, therefore, the provisions of this law would have not been applied, because the status of official person can have only persons explicitly defined in the Criminal Code. Prohibition of the application of analogy in criminal law is in the function of the legal certainty of the subjects of law. It is clear that in this criminal case the Court of Appeals has violated this principle. The prohibition of analogy is explicitly provided by Article 1 par 3 of the Provisional Criminal Code of Kosovo according to which: "The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted".*

59. Returning to the specific allegations of the Applicant on the interpretation of the Law on Public Procurement on the basis of analogy, we remind that this principle is included in the constitutional provisions, namely in Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, and Article 7 [No punishment without law] of the ECHR which stipulates that "*only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."* (see ECtHR case, *Kokkinakis v. Greece*, application no. 14307/88, judgment of 25 May 1993, paragraph 52). In addition, this principle is embodied in paragraph 3 of Article 1 [Principle of Legality] of the PCCK, which establishes: "[...] *3. The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the person being investigated, prosecuted or convicted".*

60. We consider that the Applicant's allegations that the Law on Public Procurement does not provide a definition of "*official person*" are grounded, however, we note that the regular courts in their decisions referred to this law to explain that the Applicant, as a representative of the company, provided services as an economic operator for the needs of one public authority.

61. Based on the abovementioned reasoning of the Supreme Court, we note that this court, by analogy, interpreted the law extensively and unpredictably to the detriment of the Applicant when it found that the Applicant is an official person in accordance with Article 107 of the PCCK, without explaining or elaborating in a single word Article 107 of the PCCK itself. This is because it upheld the finding or assessment of the lower instance courts, which applied the provisions of the Law on Public Procurement by analogy.

62. Accordingly, we find that the Applicant, by signing the "*Declaration under oath*" under the Law on Public Procurement, could not have sufficiently foreseen that he had acquired the status of an "*official person*". By signing the "*Declaration under oath*" based on the Law on Public Procurement, the Applicant could have foreseen that he was criminally liable under the applicable laws of the Republic of Kosovo, but not that he had acquired the status of "*official person*", which may lead to become liable for the qualified criminal offences.

63. Therefore, we consider that the regular courts throughout the entire proceedings, by analogy, interpreted the law extensively and unpredictably to the detriment of the Applicant, interpreting that by signing the "*Declaration under oath*" the Applicant acquired the status of "*official person*" under the Law on Public Procurement, and that Law does not determine or provide for the definition of an official person, whereby such an unpredictable interpretation for the Applicant directly affected the qualification of the criminal offense for which he was found guilty.

64. Furthermore, we reiterate that the Supreme Court upheld the position of the regular courts, not responding to the Applicant's specific claim regarding the interpretation and application of the Law on Public Procurement, in which case, consequently, the Applicant was qualified as an official person.

65. In the present case, we consider that the regular courts, including the Supreme Court, did not reason, or specifically explain the reasons why

the criminal offenses of "Fraud" or "Falsifying Documents" could not be applied in his case.

66. Therefore, we consider that the challenged judgments, namely: Judgment [Pml. No. 253/2019] of the Supreme Court of 30 September 2019, in conjunction with Judgment PAKR. No. 528/2018 of the Court of Appeals of 16 April 2019 and Judgment PKR. No. 432/15 of the Basic Court of 18 December 2017, did not meet the criteria of the "principle of legality" under Article 33 of the Constitution in conjunction with Article 7 of the ECHR, because the regular courts throughout the court proceedings interpreted the applicable legal provisions by applying analogy extensively and unpredictably to the detriment of the Applicant (see *Kokkinakis v. Greece*, Application no. 14307/88, no. 25). May 1993, paragraph 52).

67. Finally, we emphasize again that this conclusion concerns exclusively the challenged judgments from the point of view of the interpretation of law in the circumstances of the Applicant's case, and does not in any way prejudices the outcome of the merits of his case in retrial. We reiterate that the Court is not called upon to decide on the Applicant's individual criminal liability, which is primarily a matter for the regular courts. Furthermore, the Court is not called upon to decide whether there is a substance of another criminal offense in the Applicant's actions, which is also on the assessment of the regular courts in the retrial (see Judgment *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532/97 and 44801/98, of 22 March 2001, paragraph 51).

Conclusion

68. Based on the above, and taking into account the consideration of the Applicant's allegations in his Referral:

I. We agree that the Applicant's allegation that there has been a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, are grounded.

II. Also, we consider that the Applicant's allegations that the regular courts throughout the court proceedings by applying analogy interpreted the applicable legal provisions extensively and unpredictably to the detriment of the Applicant are grounded, and that as a result Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the

Constitution in conjunction with Article 7 (No punishment without law) of the ECHR have been violated. Also, we consider the challenged judgments, namely: Judgment [Pml. No. 253/2019] of the Supreme Court of 30 September 2019, Judgment PAKR. No. 528/2018 of the Court of Appeals of 16 April 2019 and Judgment PKR. No. 432/15 of the Basic Court of 18 December2017, did not meet the criteria of the "principle of legality" under Article 33 of the Constitution in conjunction with Article 7 of the ECHR, because the regular courts by applying analogy interpreted the applicable legal provisions extensively and unpredictably to the detriment of the Applicant.

III. In the end, we consider that Judgment Pml. No. 253/2019 of the Supreme Court of 30 September 2019, Judgment PAKR. No. 528/2018 of the Court of Appeals of Kosovo – Serious Crimes Department of 16 April 2019 and Judgment PKR. No. 432/15 of the Basic Court, Serious Crimes Department of 18 December 2017, should have been declared invalid.

Concurring opinion was submitted by Judges;

Bajram Ljatifi, Deputy President

_____

Safet Hoxha, Judge and

_____

Radomir Laban, Judge

_____

KI160/19, KI161/19, KI162/19, KI164/19, KI165/19, KI166/19, KI167/19, KI168/19, KI169/19, KI170/19,KI171/19, KI172/19, KI173/19 and KI178/19, Applicants: Muhamet Këndusi and others, Constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2019

Judgment adopted on 27 January 2021, published on 15 February 2021

Keywords: *individual referral, right to a hearing, right to fair and impartial trial*

In the circumstances of the present case, the Applicants complained to the Special Chamber of the Supreme Court against the decision of the PAK, respectively due to their non-inclusion in the final list of employees of the SOE "Agimi" Gjakova. The Specialized Panel of the Special Chamber decided that the Applicants be included in the final list of employees with a legitimate right to participate in the 20% share of the proceeds from the privatization of the SOE "Agimi" Gjakova. The Appellate Panel of the Special Chamber, following an appeal by the Privatization Agency of Kosovo, without holding a hearing, modified the decision of the Specialized Panel of the Special Chamber and rejected the Applicant's statement of claim to be included in the final list of employees eligible to participate in the 20% share of proceeds from the privatization of the SOE "Agimi" Gjakova. The Applicants submitted their Referral to the Constitutional Court alleging, inter alia, a violation of Article 31 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR), due to non-holding of the hearing.

The Court assessed the Applicants' allegations regarding the lack of a hearing in the circumstances of their case as one of the guarantees determined through Article 31 of the Constitution in conjunction with Article 6 of the ECHR, by basing this assessment upon the case law of the European Court of Human Rights (hereinafter: the ECHR).

In this regard, the Court has first elaborated on the general principles stemming from its case law and that of the ECHR, in respect of the right to a hearing, by clarifying the circumstances in which such hearing is necessary, based on, inter alia, the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*. The Court has clarified, inter alia, that (i) the absence of a party's request for a hearing does not necessarily imply the waiver of such a right and whether the absence of such a request implies the waiver of this right by a party, depends on the specifics of the law and the particular circumstances of a case; and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless "there are

exceptional circumstances that would justify the absence of a hearing", which based on the case law of the ECHR in principle relate to cases in which "exclusively legal or highly technical matters" are examined.

In the circumstances of the present case, the Court finds that (i) the fact that the Applicants have not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the SCSC; (iii) the Appellate Panel did not deal with *"exclusively legal or highly technical matters",* an consequently there are no *"exceptional circumstances that would justify the absence of a hearing"*; (iv) the Appellate Panel considered issues of *"fact and law"* in addition to modifying the Judgment of the Specialized Panel to the detriment of the Applicants; and (v) the Appellate Panel did not justify the *"waiver of the oral hearing"*. Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely the Judgment [AC-I-13- 0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

The Court also notes that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, it has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the other allegations of the Applicants because they must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

The Court also finds that the Referral no. KI178/19 submitted by the Applicant Jakup Abaz Agaj must be rejected as inadmissible, because it is manifestly ill-founded as specified in Rule 39 (2) of the Rules of Procedure, for the reason that he did not provide any evidence that would absolve him from the obligation of compliance with the legal deadline for submitting a complaint to the SCSC.

JUDGMENT

in

Cases no.KI160/19, KI161/19, KI162/19, KI164/19, KI165/19, KI166/19, KI167/19, KI168/19, KI169/19, KI170/19, KI171/19, KI172/19, KI173/19 and KI178/19

Applicant

Muhamet Këndusi and others

Constitutional review of Judgment AC-I-13-0181-A0008, of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Muhamet Këndusi (KI160/19), Fatime Llukaci (KI161/19), Gani Llukaci (KI162/19), Xhavit Meka (KI164/19), Vitore Hila-Frrokaj (KI165/19), Nerxhivane Peni (KI166/19), Bahri Qorri (KI167/19), Sabire Rudi (KI168/19), Genc Roka (KI169/19), Alush Gojani (KI170/19), Elvane Sylafeta (KI171/19), Fahredin Zeka (KI172/19), Fllanza Dylatahu-Gjoka (KI173/19) and Jakup Abaz Agaj (KI178/19) (hereinafter: the Applicants), from Gjakova, Mitrovica and Deçan.

Challenged decision

2. The Applicants challenge the constitutionality of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2019.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which as alleged by the Applicants has violated their rights guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo in conjunction with Article 6.1 (Right to a fair trial) and Article 1 (Protection of property) of Protocol no.1 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. The Applicants have submitted the Referrals by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) as follows:

   (i) Applicant Muhamet Këndusi (KI160/19) on 23 September 2019,

   (ii) Applicant Fatime Llukaci (KI161/19) on 23 September 2019,

   (iii) Applicant Gani Llukaci (KI162/19) on 23 September 2019,

   (iv) Applicant Xhavit Meka (KI164/19) on 25 September 2019,

   (v) Applicant Vitore Hila-Frrokaj (KI165/19) on 25 September 2019,

(vi) Applicant Nerxhivane Peni (KI166/19) on 25 September 2019,

(vii) Applicant Bahri Qorri (KI167/19) on 24 September 2019,

(viii) Applicant Sabire Rudi (KI168/19) on 25 September 2019,

(ix) Applicant Genc Roka (KI169/19) on 25 September 2019,

(x) Applicant Alush Gojani (KI170/19) on 25 September 2019,

(xi) Applicant Elvane Sylafeta (KI171/19) on 25 September 2019,

(xii) Applicant Fahredin Zeka (KI172/19) on 26 September 2019,

(xiii) Applicant Fllanza Dylatahu-Gjoka (KI173/19) on 26 September 2019,

(xiv) Applicant Jakup Abaz Agaj (KI178/19) on 1 October 2019.

6. On 4 October 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (presiding), Bajram Ljatifi and Radomir Laban.

7. On 4 October 2019, the President of the Court ordered the joinder of Referrals No. KI160/19, KI161/19, KI162/19, KI164/19, KI165/19, KI166/19, KI167/19, KI168/19, KI169/19, KI170/19, KI171/19, KI172/19, KI173/19 and KI178/19.

8. On 10 October 2019, the Applicants were notified about the registration and joinder of the Referrals and copies of the Referrals were sent to the Special Chamber of the Supreme Court.

9. On 27 January 2021, the Review Panel considered the report of the Judge Rapporteur, and by majority vote, recommended to the Court the admissibility of the Referral.

10. On the same date, the Court by majority found that (i) the Referrals No. KI160/19, KI161/19, KI162/19, KI164/19, KI165/19, KI166/19, KI167/19, KI168 /19, KI169/19, KI170/19, KI171/19, KI172/19, KI173/19 are admissible; (ii) for Referrals No. KI160/19, KI161/19, KI162/19, KI164/19, KI165/19, KI166/19, KI167/19, KI168/19, KI169/19, KI170/19, KI171/19, KI172/19, KI173/19 the Court found that there has been a violation of Article 31 [Right to Fair and

Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights; and, (iii) the Judgment [AC-I-13-0181-A0008] of the Appellate Panel of the SCSC, of 29 August 2019 is declared invalid.

11. On the same date, the Court declared the Referral no. KI178/19 of the Applicant Jakup Abaz Agaj as inadmissible.

Summary of facts

12. Based on the documents contained in the Referral, it results that the Socially Owned Enterprise SOE "Agimi" Gjakova was privatized by the Privatization Agency of Kosovo (hereinafter: PAK) and the contract on sale with the bidder was approved on 15 September 2010. On the same date, by letter [no.1065], the Applicants were notified that *"the consequence of the sale of the main assets is the termination of your employment"* and that the latter *"is terminated with immediate effect"*. All applicants were employees of the respective enterprise at certain time intervals.

13. The final list of employees with legitimate rights was published on 22 December 2011 and the deadline for submitting complaints to the PAK against the Final List was 14 January 2012.

14. On 13 December 2011, the PAK rejected as ungrounded the Applicants' complaints regarding the non-inclusion of their names in the provisional list of employees entitled to a share of 20% of the proceeds from the privatization of SOE "Agimi Gjakova. The Applicants were instructed on the right to complaint to the Special Chamber of the Supreme Court within twenty (20) days from the date of receipt of the PAK decision. The Applicant Jakup Abaz Agaj who submitted the Referral KI178/19 was not a party to this procedure.

15. The Applicants including the Applicant Jakup Abaz Agaj(Referral no.KI178/19) complained to the Special Chamber of the Supreme Court against the decision of the PAK respectively due to their non-inclusion in the final list of employees of the SOE "Agimi" Gjakova. In principle, all of them had alleged that they had not been treated equally with the other employees included in the Final List and consequently had been discriminated against.

16. On 4 September 2013, the Specialized Panel of the Special Chamber by Judgment (SCEL-11-0075) decided for the Applicants KI160/19, KI161/19, KI162/19, KI164/19, KI165/19, KI166/19 , KI167/19,

KI168/19, KI169/19, KI170/19, KI172/19, and KI173/19 to be included in the final list of employees with a legitimate right to participate in the 20% share of proceeds from the privatization of the SOE "Agimi" Gjakova. As to the complaint of the Applicant in case no. KI171/19 (Elvane Sylafeta) the court decided to reject it as unfounded whereas the complaint of the Applicant in case no. KI178/19(Jakup Abaz Agaj) was dismissed by the court as out of time.

17. Regarding the Applicants KI160/19, KI161/19, KI162/19, KI164/19, KI165/19, KI166/19, KI167/19, KI168/19, KI169/19, KI170/19, KI172/19 , and KI173/19 the Specialized Panel of the Special Chamber clarified: (i) that during the 90s their employment was terminated and they were dismissed from work by being replaced with Serbian workers, which is a "well known event" and that consequently they were discriminated against (ii) the Applicants would have met the requirements within the meaning of Section 10.4 of Regulation 2003/13 had they not been discriminated against, since they have been terminated their employment relationship during 90s. The Specialized Panel also assessed that the PAK as a responding party has an obligation within the meaning of Article 8 of the Anti-Discrimination Law 2004/3, which stipulates: "[...]*When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment, therefore after all this the Court came to the conclusion that the complaints of the above mentioned complainants are valid and ordered that their names be included in the Final List of employees"*

18. The complaint of the Applicant no.KI171/19 (Elvane Sylafeta) was rejected as unfounded because she had not submitted any evidence for review and administration as provided in Section 10.4 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45 which stipulates that the employees who are considered eligible to participate in the 20% share of proceeds from the privatization of socially-owned enterprises must prove: (i) to have been registered as an employee with the relevant socially-owned enterprise at the time of privatization; and, (ii) to have been on the payroll of the socially-owned enterprise for not less than three (3) years.

19. The complaint of the Applicant no. KI178/19 (Jakup Abaz Agaj) was dismissed as out of time because pursuant to Section 10.6 item (a) of UNMIK Regulation 2003/13 the deadline for filing a complaint was 21

January 2012, whereas the complaint was lodged on 30 April 2012. The Specialized Panel of the Special Chamber also added that the Applicant no. KI178/19 did not attach any evidence to justify the non-compliance with the legal deadline for filing the complaint.

20. The PAK filed an appeal with the Appellate Panel of the Special Chamber against the aforementioned Judgment by alleging that the appealed Judgment is inconsistent and not argued based on the law, it does not contain substantial facts and interprets the law in arbitrary manner. According to the PAK, no complainant who was, by the challenged judgment, included in the final list of employees with legitimate rights to receive a share of the proceeds from the privatization of the SOE "Agimi" has presented relevant facts on the basis of which he/she could corroborate the fact of unequal treatment and the reasoning for direct or indirect discrimination in accordance with Article 8.1 of the Anti-Discrimination Law.

21. Applicants KI171/19 (Elvane Sylafeta) and KI178/19 (Jakup Abaz Agaj) filed an appeal against the above-mentioned Judgment of the Specialized Panel of the Special Chamber. The Applicant KI171/19 (Elvane Sylafeta) claimed that based on the submitted evidence she has worked in the SOE "Agimi' for not less than 3 years despite the fact that the income was not paid due to the difficulties of that enterprise, the Applicant also claimed that there are many witnesses who can prove the fact that she has worked for the SOE "Agimi" from the beginning to the end. The Applicant KI178/19 (Jakup Abaz Agaj) stated that he had no previous information regarding the final list and received the list only 3 days prior to appealing to the court and that based on the submitted evidence he has worked in the SOE "Agimi" for not less than 3 years despite the fact that the income was not paid due to the difficulties of that enterprise, the Applicant also claimed that there are many witnesses who can prove the fact that he has worked in the SOE "Agimi" since the beginning.

22. On 29 August 2019, the Appellate Panel of the Special Chamber by Judgment AC-I-13-0181-A0008 upheld as founded the appeal of the PAK regarding Applicants KI160/19; KI161/19; KI162/19; KI164/19; KI165/19; KI166/19; KI167/19; KI168/19; KI169/19; KI170/19; KI172/19; and KI173 / 19 and that the same are to be removed from the list of beneficiaries of 20% share from the process of privatization of the SOE "Agimi" Gjakova. The complaints of Applicants KI171/19 (Elvane Sylafeta) and KI178/19 (Jakup Abaz Agaj) were rejected as ungrounded. As to the allegations of discrimination on ethnic basis, the Appellate Panel of the Special Chamber added that it does not agree with the finding of the Specialized Panel of the Special Chamber

about discrimination against Applicants, because in accordance with the practice of the Special Chamber, they are of "Albanian nationality" and could have not been discriminated on ethnic basis after the period of June 1999. The Appellate Panel of the Special Chamber concluded that the approach of the Specialized Panel of the Special Chamber regarding the issue of interpretation of Applicants' discrimination is incorrect and is not based on law, and as such, it is *"contrary to the case law"*.

23. The Appellate Panel of the Special Chamber based on Article 69.1 of the Annex to the Law No. 06/08 on the Special Chamber of the Supreme Court, decided *"to waive the oral part of the proceedings"* and ruled as follows:

(i) For the Applicant Bahri Qorri (KI167/19) the Appellate Panel of the Special Chamber found that he did not provide evidence on discrimination, that he had reached the retirement age prior to the privatization of SOE "Agimi' and that he did not meet the requirement of being on the payroll at the time of privatization as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently he is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi".

(ii) For the Applicant Fatime Llukaci, (KI161/19) the Appellate Panel of the Special Chamber found that she was not discriminated against, that she did not provide "any evidence" to prove the fact that she has worked in the SOE "Agimi" before or after June 1999 or that she has been on the payroll at the time of the privatization of the enterprise as provided in Section 10.4 of UNMIK Regulation.

(iii) For the Applicant Gani Llukaci (KI162/19) the Appellate Panel of the Special Chamber found that he did not provide evidence on discrimination, that he had reached the retirement age prior to the privatization of the SOE "Agimi" and that he did not meet the requirement of being on the payroll at the time of privatization as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently he is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi".

(iv) For the Applicant Vitore Hilaj Frrokaj (KI165/19) the Appellate Panel of the Special Chamber found that she was not discriminated against, that she did not provide "any evidence"

to prove the fact that she had established an employment relationship in the SOE "Agimi" or that she has been on the payroll at the time of the privatization of the enterprise as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently she is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi".

(v) For the Applicant Fllanza Dylatahu Gjoka, (KI173/19) the Appellate Panel of the Special Chamber found that she was not discriminated against, that she did not provide "any evidence" to prove the fact that she had established an employment relationship with the SOE "Agimi" or that she has been on the payroll at the time of the privatization of the enterprise as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently she is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi.

(vi) For the Applicant Alush Gojani (KI170/19) the Appellate Panel of the Special Chamber found that he was not discriminated against, that he did not provide "any evidence" to prove the fact that he had established an employment relationship with the SOE "Agimi" or that he has been on the payroll at the time of the privatization of the Enterprise as provided in Section 10.4 of UNMIK Regulation 2003/13, and that consequently he is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi".

(vii) For the Applicant Fahredin Zeka (KI172/19) the Appellate Panel of the Special Chamber found that he was not discriminated against, that he did not provide "any evidence" to prove the fact that he has continued to work in the SOE "Agimi" or that he has been on the payroll at the time of the privatization of the enterprise as provided in Section 10.4 of UNMIK Regulation 2003/13, and that consequently he is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi"

(viii) For the Applicant Genc Roka (KI169/19) the Appellate Panel of the Special Chamber found that he was not discriminated against, that he did not provide "any evidence" to prove the fact that he has continued to work in the SOE "Agimi" after 1999 or that he has been on the payroll at the time of the privatization

of the enterprise as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently he is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi"

(ix) For the Applicant Nerxhivane Peni, (KI166/19) the Appellate Panel of the Special Chamber found that she was not discriminated against, that she has established a new employment relationship with another enterprise, that she did not provide "any evidence" to prove the fact that she has continued to work in the SOE "Agimi" or that she has been on the payroll at the time of privatization of the enterprise as provided by Section 10.4 of UNMIK Regulation 2003/13 and that consequently she is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi".

(x) For the Applicant Xhavit Meka (KI164/19), the Appellate Panel of the Special Chamber found that he was not discriminated against, that he did not provide "any evidence" to prove the fact that he had established an employment relationship or continued to work in the SOE "Agimi" after 1999 or that he has been on the payroll at the time of the privatization of the enterprise as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently he is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi".

(xi) For the Applicant Muhamet Këndusi (KI160/19), the Appellate Panel of the Special Chamber found that his complaint was out of time, since the complaint was submitted by registered mail on 17 January 2012 whilst the final list could have been challenged before the Special Chamber the latest on 14 January 2012.

(xii) For the Applicant Sabire Rudi (KI168/19), it found that she did not provide "any evidence" to prove the fact that she has established an employment relationship or continued to work in the SOE "Agimi" or that she has been on the payroll at the time of privatization of the enterprise as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently she is not recognized the right be included in the final list of employees to benefit from the 20% share from the sale of the SOE "Agimi".

(xiii) For the Applicant Jakup Abaz Agaj (KI178/19), the Appellate Panel of the Special Chamber found that the reasons provided by the Specialized Panel of the Special Chamber on the dismissal of the appeal as out of time indicate that he has failed to comply with the provision of Article 10.6 item (a) of UNMIK Regulation 2003/13. The Appellate Panel of the Special Chamber also added that the Applicant had not provided any evidence to justify the non-compliance with the legal deadline for filing the complaint.

(xiv) For the Applicant Elvane Sylafeta (KI171/19), the Appellate Panel of the Special Chamber found that the Applicant she did not "deposit" any evidence to prove that she has been an employee of the SOE "Agimi" as provided in Section 10.4 of UNMIK Regulation 2003/13.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo
Article 31
[Right to Fair and Impartial Trial]

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

[…]

European Convention on Human Rights

Article 6
(Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the

court in special circumstances where publicity would prejudice the interests of justice.
[…]

LAW No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related Matters

Article 10
Judgments, Decisions and Appeals

[…]
11. When the appellate panel has accepted and is deciding on an appeal, the following rules shall be strictly observed: the appellate panel shall not modify, annul, reverse or otherwise change, in any manner, any finding of fact made by a court, specialized panel, sub-panel or single judge unless the appellate panel determines that such finding of fact is clearly erroneous. A finding of fact shall not be determined to be clearly erroneous if such finding of fact is supported by any reasonable interpretation of the record of the trial proceedings and the evidence submitted during such proceedings; and 11.2. the appellate panel shall conduct a de novo review of each issue of law raised by the appellant or a respondent in their written submissions.
[…]

Annex to Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related Matters

Rules of Procedure of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo related Matters

Article 36
General Rules on Evidence

[…]
3. A party alleging a fact or an event shall be given a reasonable opportunity to submit or produce material evidence in support of such allegation. If such party fails to submit or produce any such evidence, the party shall be determined to have not discharged its burden of proof with respect to that allegation.

Article 68
Complaints related to a List of Eligible Employees

1. The procedure for cases based on *complaints falling within the scope of paragraph* 1.6 *of Article* 4 *of the Special Chamber Law shall, except* as *specifically provided in this Article* 68, *generally follow the other procedural rules set forth in this Annex, which the Special Chamber shall apply mutatis mutandis* as *the Special Chamber deems necessary and in the interest of justice.*
2. Upon receiving a *list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such* a *list, the Agency shall publish such list together with* a *notice to the public of the right of any person to file* a *complaint with the Agency within twenty (20) days after the date of publication requesting inclusion in such list and/or challenging the inclusion of one or more other persons in such list. The person filing any such request or challenge shall include therein* a *statement of the facts and the legal arguments supporting such request or challenge; such person shall have the burden of proving all facts alleged in the request and/or challenge.*
[…]
6. The Agency shall publish its final list of eligible employees established pursuant to paragraph 5 *of this Article in conformity with Section 10.6 of UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such list, together with* a *notice to the public of the right of any person to file* a *complaint with the Special Chamber within twenty (20) days after the date of publication challenging such list and/or the Agency's distribution of escrow funds to the persons identified therein. The complainant(s) filing any such complaint shall include therein* a *statement of the facts and the legal arguments supporting such complaint; the complainant(s) shall have the burden of proving all facts alleged in the complaint.*
[…]
11. The concerned Specialized Panel, acting on *its own initiative or pursuant to* a *written request of the complainant(s) or the Agency, may decide to hold one or more oral hearings* on *the matter. If an oral hearing is to be held, the Specialized Panel shall cause the Registrar to serve* on *the parties, at least five (5) days in advance of such hearing, a written notice of the time and date of such hearing.*
[…]
14. The Appellate Panel shall dispose of all such appeals as a matter of urgency.

Article 64

Oral Appellate Proceedings

1. The Appellate shall, on its *own initiative or the written application of a party, decide whether or not to hold one or more oral hearings* on *the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application must be filed prior to the closing of written appellate procedures.*
[…]

Article 65
Submission of New Evidence

In exceptional circumstances and for good cause shown, the Appellate panel may permit a *party to present to the Appellate Panel new evidence that was not available to the party during the evidentiary portion of the first instance proceedings. A written application for such permission must first be submitted to the Appellate Panel and served on the other parties not less than fifteen (15) days before the date of the hearing where such evidence is proposed to be presented. The Appellate Panel may authorize the presentation of such new evidence if it considers it to be in the interests of justice.*

Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property

Article 10
Rights of employees

[…]
10.4 For the purpose of this section an employee shall be considered as *eligible, if such employee is registered as an employee with the Socially Owned Enterprise at the time of privatization and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting* a *complaint to the Special Chamber pursuant to subsection 10.6.*
[…]

Regulation No. 2004/45 amending Regulation No. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property

Article 1
Amendments

As of the date of entry into force of the present Regulation,
[…]
B. Sections 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13 shall be amended to read:
[…]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially Owned Enterprise at the time of privatisation or initiation of the liquidation procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[…]

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

Article 69
Oral Appellate Proceedings

1. *The Appellate shall,* on its *own initiative or the written application of a party, decide whether or not to hold one or more oral hearing sessions on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application shall be filed prior to the closing of written appellate procedures.*
[…]

Anti-Discrimination Law No.2004/3
Article 8
Burden of proof

8.1. When persons who consider themselves wronged because the principle
of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no *breach of the principle of equal treatment.*
8.2. Paragraph 8.1 *shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a complainant may establish or defend their case of discrimination by any means, including* on *the basis of statistical evidence.*

Applicants' allegations

24. The Applicants allege violations of Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial], and 46 [Protection of Property] of the Constitution in conjunction with Article 6.1 (Right to a fair trial), and Article 1 (Protection of property) of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR).

25. With respect to the allegation for a fair and impartial trial, the Applicants allege that the Appellate Panel of the Special Chamber should have held a public hearing where all complainants would be summoned to present their allegations and their evidence in a direct and transparent manner, in particular, given the fact that the Specialized Panel of the Special Chamber had recognized the right to benefit from the 20% share of the sale of SOE "Agimi" Gjakova for the vast majority of the Applicants. The Applicants also allege that the Appellate Panel of the Special Chamber should have remanded the case for retrial and reconsideration to the Specialized Panel of the Special Chamber. According to the Applicants, the above-mentioned defects of the judicial process in the Special Chamber have resulted in a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

26. The Applicant no. KI171/19 also alleges a violation of the right to a trial within a reasonable time.

27. In relation to the allegation for discrimination, the Applicants allege that the discrimination consists in the fact that the employees with legitimate rights were removed the final list of employees eligible to benefit from the sale of the SOE "Agimi" Gjakova and not on ethnic basis as justified by the Appellate Panel of the Special Chamber.

28. Finally, the Applicants request from the Court to: (i) declare the Referrals admissible; (ii) find that there has been a violation of Articles 24, 31 and 46 of the Constitution in conjunction with Article 6 and Article 1 of Protocol no. 1 of the ECHR; (iii) declare invalid the Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2019 and remand the same for retrial pursuant to the Judgment of this Court.

Assessment of the admissibility of Referral

29. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and in the Rules of Procedure.
30. 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".*
>
> *[...]*

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

Article 48
[Accuracy of the Referral]

> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".*

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision…".

32. The Court also refers to Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which specifies:

"[…]

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

33. As to the Referral KI178/9 submitted by the Applicant Jakup Abaz Agaj, the Court finds that the Applicant's allegations regarding the right to benefit from 20% share of the proceeds from the sale of the SOE "Agimi" have been declared out of time in the proceedings conducted before the Special Chamber of the Supreme Court. On the basis of the submitted documents, it results that the Applicant KI178/19 (Jakup Abaz Agaj) did not file the complaint in compliance with the legal deadline set out in Section 10.6, item (a) of UNMIK Regulation
2003/13, and he also had failed to attach any proposal to the Specialized Panel of the SCSC nor to the Appellate Panel of the SCSC in order for the latter to assess the reason for missing the deadline.

34. The Court notes that apart from the allegation that the challenged judgments of the SCSC were not served directly on him, the Applicant KI178/19 (Jakup Abaz Agaj) has failed to provide any evidence that he was late in filing the appeals through no fault of his own.

35. Consequently, the Court considers that the Referral KI178/19 of Applicant (Jakup Abaz Agaj) must be rejected as manifestly ill-founded as specified in Rule 39 (2) of the Rules of Procedure.

36. The Court also notes that the Specialized Panel of the SCSC has recognized the right of Applicant KI160/19 (Muhamet Këndusi) to benefit from the share of 20% of proceeds from the privatization of the SOE "Agimi" Gjakova and has not disputed whether the complaint of the Applicant KI160/19 is out of time. However, the Appellate Panel of the SCSC had found that the complaint of the Applicant KI160/19 lodged with the Specialized Panel is out of time, because it was submitted by registered mail on 17 January 2012, whilst the legal deadline for filing a complaint was 14 January 2012.

37. In this respect, the Court considers that the situation of the Applicant KI160/19 (Muhamet Këndusi) differs substantially from the situation of Applicant KI178 /19 (Jakup Abaz Agaj), because: (i) the Specialized Panel of the SCSC had recognized the right of the Applicant KI160/19(Muhamet Këndusi) to benefit from 20% of proceeds from the privatization of the SOE "Agimi" Gjakova; (ii) aftarwards, following a complaint by the PAK, the right in question of the Applicant KI160/19 was denied by the Appellate Panel on the grounds that the complaint was filed out of the legal deadline; (iii) whereas the complaint of the Applicant KI178/19 (Jakup Abaz Agaj) was rejected out of time in both instances, namely by the Specialized Panel and the Appellate Panel of the SCSC, respectively.

38. The Court, having assessed the situation of Applicant KI160/19(Muhamet Këndusi), considers that he has had at least a legitimate expectation to be heard by the Appellate Panel of the SCSC on all the key issues of his appeal, including an eventual explanation regarding the legal deadline.

39. Consequently, the Court considers that the Referral KI160/19 of Applicant Muhamet Këndusi should be tried on the merits with respect to the right to be heard as guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR.

40. As to the fulfilment of these requirements by the other Applicants, the Court finds that the Applicants are authorized parties who challenge an act of a public authority, namely the Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2019, after having exhausted all legal remedies provided by law. The Applicants have also clarified the rights and freedoms that they allege to have been violated, in accordance with the criteria of Article 48 of the Law and have submitted the Referral in accordance with the deadlines stipulated in Article 49 of the Law.

41. The Court also finds that the Applicants' Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. In addition, the Court considers that this Referral is not manifestly ill-founded as provided in paragraph (2) of Rule 39 of the Rules of Procedure and, consequently, must be declared admissible and have its merits examined.

Merits

42. The Court recalls that the circumstances of the present case relate to the privatization of the Socially-Owned Enterprise SOE "Agimi" in Gjakova, and the rights of the respective employees to be recognized as employees with legitimate rights to participate in the twenty percent (20%) of proceeds from this privatization, as defined in Article 68 of the Annex to the Law on SCSC, and paragraph 4 of Article 10 of Regulation no.2003/13 amended by Regulation no. 2004/45. Based on the case file, it results that the abovementioned socially-owned enterprise was privatized on 15 September 2010, the date on which the Applicants were also notified by individual letters that *"the consequence of the sale of the main assets is the termination of your employment"* and that the latter *"is terminated immediately"*. The Applicants subsequently challenged their non-inclusion in the PAK Provisional List of employees with legitimate rights to participate in twenty percent (20%) of the proceeds from the privatization of the SOE "Agimi". These complaints were rejected. Subsequently, the Applicants initiated a claim in the Specialized Panel, challenging the PAK Decision, both regarding the establishment of facts and the interpretation of the law. They had allegedly been discriminated against and all of them requested a hearing before the Specialized Panel. The latter rejected the request for a hearing on the grounds that *"the facts and evidence submitted are quite clear",* and gave the right to the Applicants, with the exception of the Applicants KI171/19(Elvana Sylafeta) and KI178/19 (Jakup Abaz Agaj), stating that the latter were discriminated against. The Specialized Panel, among other things, stated that in the absence of discrimination, the Applicants would have fulfilled the criteria stipulated by paragraph 4 of Article 10 of Regulation No.2003/13, as employees with legitimate rights to participate in the twenty percent (20%) of proceeds from the privatization of the SOE "Agimi".

43. Following the issuance of this Judgment, an appeal to the Appellate Panel was lodged by (i) Jakup Abaz Agaj (KI178/19) and Elvane Sylafeta (KI171/19), the only Applicants whose complaint was rejected by the Specialized Panel as unfounded, respectively as out of time. (ii) the PAK. Neither the first nor the second had requested a hearing. In August 2019, the Appellate Panel had issued the challenged Judgment, whereby it approved the appeal of the PAK and rejected the appeal of Elvane Sylafeta and Jakup Abaz Agaj, by amending the Judgment of the Specialized Panel and consequently, removing from the list of beneficiaries of 20% from the privatization process of SOE "Agimi" Gjakova, all Applicants. The Appellate Panel had stated that it had decided to *"waive the part of the oral hearing"*, referring to paragraph

1 of Article 69 (Oral Appellate Proceedings) of Law no.06/L-086 on the SCSC. Whereas, regarding the merits of the case, (i) had found that the evidence presented by the respective parties does not prove that they meet the legal conditions set out in paragraph 4 of Article 10 of Regulation no. 2003/13 to have the relevant rights recognized; and (ii) stated that the interpretation of discrimination by the Specialized Panel was contrary to the *"case law"* of the SCSC. These findings of the Appellate Panel are challenged by the Applicants before the Court, alleging a violation of their rights guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Articles 6(Right to a fair trial) and Article 1(Protection of Property) of Protocol no. 1 of the ECHR. With regard to violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants, as clarified above, allege that the Appellate Panel has modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without a sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

44. These allegations will be examined by the Court on the basis of the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

45. In this regard, the Court will first examine the Applicants' allegations for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the absence of a hearing at the level of the Appellate Panel. To this end, the Court will first (i) elaborate on the general principles regarding the right to a hearing as guaranteed by the aforementioned Articles of the Constitution and the ECHR; and then, (ii) apply the latter to the circumstances of the present case.

(i) General principles with regard to the right to a hearing

46. The public nature of proceedings before judicial bodies referred to in Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, protects litigants from the administration of justice in secret, in the absence of a public hearing. Publicity of court proceedings is also one of the main mechanisms through which trust in justice is maintained. Such a principle, moreover, contributes to the achievement of the goals of Article 31 of the Constitution and Article 6 of the ECHR, for a fair trial, the guarantee of which is one of the fundamental principles of any democratic society embodied in the

Constitution and ECHR(See, the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural requirements; B. Public hearing, paragraphs 381 to 404 and references used therein).

47. In principle, litigants are entitled to a public hearing, but such an obligation is not absolute. In so far as it is relevant to the present circumstances, the case law of the ECtHR has developed key principles concerning (i) the right to a hearing in the courts of first instance; (ii) the right to a hearing in the courts of second and third instance; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of the first instance hearing can be corrected through a higher instance hearing and the relevant criteria for carrying out that assessment. However, in all circumstances, the absence of a hearing must be justified by the relevant court.

48. With regard to the first issue, namely the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in the proceedings before a sole and first instance court, the right to a hearing is guaranteed by paragraph 1 of Article 6 of the ECHR (See, *inter alia,* the ECtHR cases *Fredin v. Sweden* (no. 2), Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden* (no. 2), Judgment of 19 February 1998, paragraph 46; *Göç* v. Turkey, Judgment of 11 July 2002, paragraph 47; and *Selmani and* others *v. the former Yugoslav Republic of Macedonia*, Judgment of 9 February 2017, paragraphs 37-39). Exceptions to this general principle are the cases in which "there are exceptional circumstances that would justify the absence of a hearing" in the first and sole instance. (See, in this respect, the cases of the ECtHR, *Hesse-Anger and Anger v. Germany,* Decision of 17 May 2001; and the *Mirovni Institute v. Slovenia,* Judgment of 13 March 2018, paragraph 36; see also the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural requirements; B. Public hearing, paragraph 382 and references used therein). The character of such eceptional circumstances stems from the nature of the issues involved in a case, for example, the cases that deal exclusively with legal matters or are of a very technical nature (See the case of the ECtHR, *Koottummel v. Austria,* Judgment of 10 December 2009, paragraphs 19 and 20).

49. With regard to the second issue, namely the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified on the basis of the specific characteristics of the relevant case, provided that a hearing has been held in the first instance. (See, in this context, the

case of the ECtHR, *Salomonsson v. Sweden,* Judgment of 12 November 2002, paragraph 36). Therefore, the proceedings before the courts of appeals, which involve only issues of law and not issues of fact, may be considered to be in accordance with the guarantees embodied in Article 6 of the ECHR, even if a hearing has not been held in the second instance. Consequently, the proceedings in respect of which a first-instance hearing was held and in respect of which, the second-instance proceedings involved only matters of law and not of fact, are in principle in accordance with the procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, even if a party has not been given the opportunity to be heard in person at the appellate level (See the case of the ECtHR, *Miller v. Sweden,* Judgment of 8 February 2005, paragraph 30; and see also ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural requirements; B. Public hearing, paragraph 383 and references used therein). More exactly, in cases when before the courts with appellate jurisdiction are examined matters of fact as well as of law, the absence of a hearing can be justified only by the "existence of exceptional circumstances", as defined by the case law of the ECHR. Therefore, unless "there are exceptional circumstances that would justify the absence of a hearing", the latter is guaranteed to the parties at least at one of the levels of jurisdiction, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR (See, the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Requirements; B. Public Hearing, paragraph 386 and references used therein).

50. With regard to the third issue, namely the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to the Judgment of 6 November 2018 of the ECtHR: *Ramos Nunes de Carvalho and Sá v. Portugal,* in which the Grand Chamber of the ECtHR established the principles on the basis of which the necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) involves merely legal matters of a limited nature (see, the ECtHR cases *Allan Jacobsson v. Sweden* (no. 2), cited above, para 49; and *Valová, Slezák and Slezák v. Slovakia,* Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see, the case of the ECtHR, *Varela Assalino v. Portugal,* Decision of 25 April 2002); and (ii) involves highly technical matters, which are better addressed in writing than through oral arguments in a hearing; and (iii) does not involve issues of credibility of the parties or disputed facts and the courts may decide fairly and reasonably on the basis of the parties' submissions and other written materials (see, the cases of the ECtHR, *Döry v. Sweden,*

Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria,* Judgment of 18 December 2008, paragraph 73).

51. On the contrary, based on the aforementioned Judgment, a hearing is necessary if the relevant case (i) involves the need to consider issues of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly (see, *inter alia,* the cases of the ECtHR, *Malhous v. Czech Republic,* Judgment of 12 July 2001, paragraph 60; and *Fischer v. Austria,* Judgment of 26 April 1995, paragraph 44); and (ii) requires the relevant court to gain a personal impression of the parties concerned, and to allow them the opportunity to clarify their personal situation, in person or through the relevant representative. Examples of this situation are cases where the court must hear evidence from the parties concerning personal suffering in order to determine the appropriate level of compensation (see, the ECtHR cases, *Göç v. Turkey,* cited above, paragraph 51; and *Lorenzetti v. Italy,* Judgment of 10 April 2012, paragraph 33) or must provide information about the character, conduct and dangerousness of a party (See the case of the ECtHR, *De Tommaso v. Italy,* Judgment of 23 February 2017, paragraph 167).

52. With regard to the fourth issue, namely the possibility of a second-instance correction of the absence of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on powers of the highest court. If the latter has full jurisdiction to examine the merits of the case at hand, including the assessment of the facts, then the correction of the absence of a hearing in the first instance may be made in the second instance (See the case of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal,* cited above, paragraph 192 and references used therein; and also see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural requirements; B. Public hearing, paragraph 384 and references used therein).

53. Finally, according to the case-law of the ECtHR, the fact that the parties did not request to hold a hearing does not mean that they waived their right to hold one. (For more on the waiver of the right to a hearing, see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Criteria B. Public hearing, paragraphs 401 and 402 and references used therein). Based on the case law of the ECtHR, such an issue depends on the characteristics of domestic law and the circumstances of each case individually (See the case of the ECtHR, *Göç v. Turkey,* cited above,

paragraph 48; and also see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Requirements B. Public Hearing, paragraph 403 and references used therein).

(ii) Application of the principles elaborated above to the circumstances of the present case

54. The Court first recalls that based on the case law of the ECtHR, Article 6 of the ECHR, in principle, guarantees that a hearing be held at least at one level of decision-making. Such a hearing is, in principle, mandatory (i) if the court of first instance has sole jurisdiction to decide issues of fact and law; (ii) not mandatory in the second instance if a hearing is held in the first instance, despite the fact that such a determination depends on the characteristics of the case at hand, for example, if the second instance decides on both issues of fact and of law; and (iii) mandatory in the second instance if one has not been held in the first instance, in cases where the second instance has full competence to assess the decision of the first instance, also with regard to the issues of fact and of law. Exceptions to these cases, in principle, are made only if "there are exceptional circumstances that would justify the absence of a hearing", and which the ECtHR, as explained above, through its case law has defined as cases that deal exclusively with legal issues or are of a highly technical nature.

55. Based on the principles elaborated above, in the following the Court must first assess, whether in the circumstances of the present case, the fact that the Applicants did not request a hearing before the Appellate Panel may result in the finding that the Applicants have implicitly waived the right to a hearing. If the answer to this question turns out to be negative, then the Court, based on the case law of the ECtHR, must assess whether in the circumstances of the present case "there are exceptional circumstances that would justify the absence of a hearing" in the two instances of decision-making, before the Specialized Panel and the Appellate Panel. The Court will also make this assessment based on the principles established by the Judgment of the Grand Chamber in case *Ramos Nunes de Carvalho and Sá v. Portugal*.

a) If the Applicants have waived the right to a hearing

56. In this respect, the Court first recalls that through individual complaints filed with the Specialized Panel, all Applicants requested a hearing. The Specialized Panel rejected to hold the latter, stating that based on paragraph 11 of Article 68 of Annex to the Law on the SCSC,

a hearing was not necessary because “the facts and evidence submitted are quite clear”. As it has already been clarified, the Specialized Panel, based on these “facts and evidence”, had decided that the Applicants, with the exception of Applicants Elvane Sylafeta (KI171/19) and Jakup Abaz Agaj (KI178/19), were discriminated against and that they are to be included in the Final List of PAK as employees with legitimate rights to participate in the twenty percent (20%) of proceeds from the privatization of the SOE “Agimi”.

57. It is only the PAK that filed an appeal with the Appellate Panel. The Appellate Panel decided in favour of the PAK, by modifying the Judgment of the Specialized Panel and rejecting the appeals of all Applicants regarding non-inclusion in the Final List of PAK as a result of discrimination. As explained above, the Appellate Panel had decided to “waive the oral part of the hearing”, by referring to paragraph 1 of Article 69 of the Law no.06/L-086 on the SCSC.

58. However, as explained above, the fact that the Applicants did not request a hearing does not necessarily mean that they have implicitly waived such a request, and also the lack of such a request does not necessarily exempt the relevant court from the obligation to hold such a hearing.

59. More specifically, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, the ECtHR, *inter alia,* assesses whether the absence of such a request can be considered as an implicit waiver of an applicant from the right to a hearing. However, the lack of a request for a hearing, based on the case law of the ECtHR, is never the only factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing exempts a court of the obligation to hold a hearing depends on (i) the specifics of the applicable law; and (ii) the circumstances of a case (see, the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Criteria; B. Public Hearing, paragraphs 401 to 404 and references used therein). In the following, the Court will assess these two issues.

60. First, with regard to the specifics of the applicable law, namely the Law and the Annex to the Law on the SCSC, the Court recalls that pursuant to Article 64 (Oral Appellate Proceedings) of the same law, "*The Appellate Panel shall decide whether or not to hold one or more oral hearings on the concerned appeal",* based on its initiative or upon a written request from a party. Article 69 (Oral Appellate Proceedings) of Law no.06/L-086 on the SCSC, has the same content. Based on these provisions, consequently, the holding of a hearing at the instance

of appeal, does not necessarily depend on the request of the party. It is also the task of the respective Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held. Furthermore, based on Article 60(Content of appeal) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the Appellate Panel has the competence to assess both issues of law and of fact, and consequently, it is equipped with full competence to assess how the lower authority, namely the Specialized Panel, has assessed the facts. In the circumstances of the present case, the Appellate Panel has assessed the facts and allegations of the Applicants and modified the Judgment of the Specialized Panel regarding the assessment of the facts and the interpretation of the law, to the detriment of the Applicants. In such circumstances, taking into account the legal provisions, the Court cannot find that the absence of a hearing in the Appellate Panel is justified only as a result of the absence of a request by the parties to the proceedings, especially given the fact that the Applicants did not file appeal against the Judgment of the Specialized Panel, which was in their favour. As explained above, based on Article 64 of the Annex to the Law on SCSC, it is the obligation of the Appellate Panel, even on its own initiative, to assess whether the holding of a hearing is mandatory, and if not, to justify the non-holding of the latter(see, the cases of the Constitutional Court no. KI145/ 19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others,* Judgment of 10 December 2020, paragraph 61).

61. Secondly, with regard to the circumstances of a case, the Court recalls that the case law of the ECtHR states that the absence of a request for a hearing, and the assessment of whether this fact may result in the finding that the party concerned has implicitly waived the right to a hearing, must be assessed in the entirety of the specifics of a procedure, and not as a single argument, in order to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR.

62. More specifically, in cases where a party concerned has not made a request for a hearing, the ECtHR assessed whether the absence of such a request can be considered as an implied waiver of a hearing, always in the light of applicable law and circumstances, of a case. For example (i) in the case *Miller v. Sweden* (Judgment of 6 May 2005), in which the Applicant did not request the holding of a hearing at the appellate level, but she requested a hearing at the first instance, resulted in the finding of the ECtHR that the request for a hearing was made at the "most appropriate stage of proceedings" and consequently, the ECtHR

stated that it could not be concluded that the party has implicitly waived the request for a hearing. Furthermore, in combination with the finding that at the appellate level both fact and law issues had been examined, and consequently the nature of the issues under review was neither exclusively legal nor technical, the ECtHR found that there were no exceptional circumstances that would justify the absence of a hearing, thus finding a violation of Article 6 of the ECHR (see the case of the ECtHR: *Miller v. Sweden,* cited above, paragraphs 28-37); also (ii) in the case *Salomonsson v. Switzerland* (Judgment of 12 February 2003), in which the Applicant did not request a hearing in either of the instances, although the ECtHR found that the Applicant could be considered to have implicitly waived the right to a hearing (see paragraph 35 of the case of *Salomonsson v. Switzerland),* nevertheless it found a violation of Article 6 of the ECHR due to the absence of a hearing, because it concluded that in the circumstances of the present case, there were no exceptional circumstances that would justify the absence of a hearing, especially given the fact that the appellate level also considered factual issues and not just legal issues (see the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 63 and the case of ECtHR Salomonsson v. Switzerland, cited above, paragraphs 36-40).

63. On the other hand, in the case of *Goc v. Turkey,* the ECtHR also found a violation of Article 6 of the ECHR due to the absence of a hearing, rejecting the Turkish Government's allegations that (i) the case was simple and that it could to be dealt with promptly only on the basis of the case file, in particular because the respective complainant did not request the submission of any new evidence through the complaint; and that (ii) the respective Applicant did not request the holding of a hearing. (For the facts of the case, see paragraphs 11 to 26 of the ECtHR case *Goç v. Turkey).* In its examination of the respective case, and after assessing whether there were any exceptional circumstances that would justify the absence of a hearing, the ECtHR found a violation of paragraph 1 of Article 6 of the ECHR, stating, *inter alia,* that (i) despite the fact that the Applicant concerned did not request a hearing, it does not appear from the circumstances of the case that such a request would have any prospect of success; furthermore (ii) it cannot be considered that the Applicant concerned has waived his right to a hearing by not seeking one before the Court of Appeals as the latter did not have full jurisdiction to determine the amount of compensation; (iii) the Applicant was not given the opportunity to be heard even before the lower instance and which had jurisdiction to assess both the facts and the law; and (iv) the substantial issue, in the

circumstances of this case, was whether the Applicants concerned should be offered a hearing before a court which was responsible for establishing the facts of the case (see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, *Applicant Et-hem Bokshi and others*, cited above, paragraph 64, and for the reasoning of the case, see the paragraphs 43 to 52 of the case Goç v. Turkey).

64. In contrast, in other cases, the ECtHR found that the fact that an Applicant did not request a hearing could be considered as an implied waiver of this right, but always together with the assessment of whether, in the circumstances of a case, there are exceptional circumstances which would justify the absence of a hearing. For example, in the cases of *Schuler-Zgraggen v. Switzerland* (Judgment of 24 June 1993) and *Dory v. Sweden* (Judgment of 12 February 2003), in which the Applicants did not request a hearing, the ECtHR found that the latter had implicitly waived the right to a hearing. However, this finding was reached by the ECtHR, only in connection with the finding that the circumstances of the case were of a *"technical nature",* and consequently there were exceptional circumstances justifying the absence of a hearing, by not finding a violation of Article 6 of the ECHR. (See the case of the ECtHR, *Miller v. Sweden,* cited above, paragraphs 28-37; *Dory v. Sweden,* cited above, paragraphs 36-45). Similarly, the ECtHR acted in the case *Vilho Eskelinen and others v. Finland* (Judgment of 19 April 2007), in which it found no violation of Article 6 of the ECHR (see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 65, and for the reasoning regarding the hearing, see the paragraphs 73 to 75 in the case Vilho Eskelinen and others v. Finland).

65. Based on the case law of the ECtHR, the Court also notes that the fact that the practice of conducting a written procedure without hearings prevailed before the respective courts was not considered by the ECtHR as the only fact on which a hearing could be skipped, regardless of the specific circumstances of a case. For example, in case *Madamus v. Germany* (Judgment of 9 June 2016), the ECtHR had also examined allegations based on which the applicable law provided for the holding of hearings as an exception and not as a rule, moreover based on the relevant practice, the court, the decision of which was challenged before the ECtHR, had never held a hearing. Despite this fact, the ECtHR found a violation of Article 6 of the ECHR, as it assessed and

found that in the circumstances of this case there were no exceptional circumstances which would justify the absence of a hearing. (See, the paragraphs 25 to 33 of the case *Madamus v. Germany*).

66. The Court recalls that in the circumstances of the present case, (i) the Applicants were not given the opportunity to be heard before a Specialized Panel with jurisdiction to assess the facts and the law, despite their request; (ii) the Applicants had not appealed to the Appellate Panel because the decision of the Specialized Panel was in their favour; (iii) the proceedings before the Appellate Panel were initiated through a complaint from the PAK; (iv) The Appellate Panel had "waived the right from the hearing", by referring to Article 69 of the Law 06/L-086 on the SCSC, an article identical to Article 64 of the Annex to the Law on the SCSC, which simply determine that "The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal"; and (v) the Appellate Panel had considered all the facts of the case, including the Applicants' complaints submitted to the first instance, and stated that it does not agree either with the assessment of the facts or with the interpretation of the law by the lower instance court, and modified the Judgment of the Specialized Panel in its entirety, by removing all Applicants from the List of Employees with legitimate rights to benefit from the (20%) share of the privatization of the enterprise SOE "Agimi".

67. In such circumstances, the Court cannot find that the absence of Applicants' request to hold a hearing at the level of the Appellate Panel can be considered as their implied waiver of the right to a hearing. The Court recalls that in all cases in which the ECtHR had reached such a finding, it made it in connection with the fact that the circumstances of the cases were related to the issues of an exclusively legal or technical nature, and consequently "there were exceptional circumstances which would justify the absence of a hearing". Consequently and in the following, the Court must assess whether in the circumstances of the present case, "there are exceptional circumstances that would justify the absence of a hearing", namely whether the nature of the cases before the Appellate Panel can be classified as "exclusively legal or of a highly technical nature" (see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 68).

b) Whether in the circumstances of the present case there are exceptional circumstances which would justify the absence of a hearing

68. The Court recalls that based on the case law of the ECtHR, the parties are entitled to a hearing in at least one instance. This instance is mainly the first instance, and the one which has the jurisdiction to decide on both factual and legal issues. In this context, regarding the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing may be justified based on the specific characteristics of the case, provided that a hearing is held in the first instance. In principle, if a hearing is held in the first instance, the proceedings before the courts of appeal, and which involve only matters of law, and not issues of fact, may be considered to be in accordance with the guarantees enshrined in Article 6 of the ECHR, even if in the second instance no hearing was held. In principle, the exceptions to the right to a hearing are only those cases in which it is determined that "there are exceptional circumstances that would justify the absence of a hearing". These circumstances, as explained above, were classified by the case law of the ECtHR as cases which relate to exclusively legal or highly technical issues (see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 69).

69. For example, the issues related to social security, were classified by the ECtHR mainly as issues of a technical nature, in which a hearing is not necessarily indispensable. Of course, there are exceptions to this rule. In each case, the concrete circumstances of a case are examined. For example, the ECtHR found no violations in case *Schuler-Zgraggen v. Switzerland* and *Dory v. Sweden,* but found violations in case *Miller v. Sweden* and *Salomonsson v. Switzerland,* even though all of them were related to social security issues.

70. Similarly, the ECtHR acts also in those cases in which the issues before the relevant Court are exclusively legal, and do not involve an assessment of the disputable facts. For example, in the case of *Saccoccia v. Austria* (Judgment of 18 December 2008), the ECtHR did not find a violation of Article 6 of the ECHR due to the absence of a hearing, as it found that the issues complained of by the Applicant did not contain issues of fact, but only limited issues of a legal nature *(Saccoccia v. Austria,* cited above, paragraph 78), whereas in the case of *Allan Jacobsson v. Sweden* (no.2) (Judgment of 19 February 1998), the ECtHR also found no violation of Article 6 of the ECHR due to the

absence of a hearing, as it found that the issues complained of by the respective Applicant did not involve either issues of law or fact (See, the ECtHR case *Allan Jacobsson v. Sweden,* (no. 2), cited above, paragraph 49).

71. On the contrary, in other cases in which the ECtHR found that the cases before the relevant courts involved both issues of fact and law, it did not find that there were exceptional circumstances that would justify the absence of a hearing. For example, in the cases of *Malhous v. the Czech Republic* (Judgment of 12 July 2001), the ECtHR found a violation of Article 6 of the ECHR due to the absence of a hearing, as it determined that the cases complained of by the Applicant were not limited to the issues of law but also the fact, namely the assessment of whether the lower authority had assessed the facts correctly. (See the case of the ECtHR *Malhous v. Czech Republic,* cited above, paragraph 60). Similarly, in the case of *Koottummel v. Austria* (Judgment of 10 December 2009), the ECHR found a violation of Article 6 of the ECHR due to the absence of a hearing because it found that the cases before it could not be qualified as matters of an exclusively legal nature, or of a technical nature, which could consist of exceptional circumstances which would justify the absence of a hearing. (see,the ECtHR case, *Koottummel v. Austria,* cited above, paragraphs 20 and 21).

72. In the circumstances of the present case, the Court first recalls that the Appellate Panel has jurisdiction over both fact and law issues. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Law on the SCSC) and paragraph 4 of Article 64 (Oral Appellate Proceedings) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the parties have, *inter alia,* the opportunity to raise complaints before the Appellate Panel regarding both matters of law and facts, including the opportunity of presenting new evidencee (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 73).

73. Moreover, in the circumstances of the present case, the Appellate Panel considered all the facts presented through (i) the Applicants' initial complaint submitted to the Specialized Panel and responses to the PAK appeal; and (ii) the complaint of the PAK and of Elvane Sylafeta (KI171/19) and Jakup Abaz Agaj (KI178/19)to the Appellate Panel and the relevant responses to the Applicants' appeal. Despite the fact that the Specialized Panel had assessed that the evidence *"is clear"*

recognizing the right to the Applicants, the Appellate Panel found the opposite based on the same evidence.

74. The Court also recalls that pursuant to paragraph 11 of Article 10 of the Law on the SCSC, the Appellate Panel is limited to changing the assessment of the factual situation made by the Specialized Panel, unless it determines that the factual findings of the lower court are "*clearly erroneous",* a rule that according to the same article must be *"strictly observed"*. Such reasoning is not found in the Judgment of the Appellate Panel. The latter simply disagreed with the assessment of the evidence by the Specialized Panel, and also found that the interpretation which the Specialized Panel had made regarding the allegations of discrimination was inconsistent with the *"case law*".

75. The Court further notes that in accordance with Article 68 of the Annex to the Law on the SCSC, in the event of complaints concerning the list of employees with legitimate rights, the burden of proof before the Specialized Panel falls on the Applicants. Also, the burden of proof for the opponent of such a request falls on the responding party, namely the PAK, in the circumstances of the present case. Before the Appellate Panel, the burden of proof also falls on the appellant concerned. But the circumstances of the present case are also, in essence, related to allegations of discrimination. In case of such allegations, the burden of proof, based on Article 8(Burden of proof) of the Anti-Discrimination Law, falls on the respondent, namely the PAK, and not the Applicants (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 76).

76. In such circumstances, in which (i) the Appellate Panel has considered issues both of fact and law; (ii) in which with regard to the facts, the burden of proof that they meet the criteria of paragraph 4 of Article 10 of Regulation no. 2003/13, in principle falls on the Applicants, while the burden of proof regarding discrimination falls on the PAK; and (iii) the Appellate Panel interprets the same facts presented by the parties differently from how the Specialized Panel has interpreted them, by modifying the Judgment to the detriment of the parties, despite the fact that such a possibility based on paragraph 11 of Article 10 of Law no. 04/L-033 on the SCSC was recognized only as an exception, provided that it argued that the lower authority, namely the Specialized Panel, had made a "clearly erroneous" interpretation, the Court considers that it is indisputable that the issue under consideration before the Appellate Panel, is not (i) either an

exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel contained important factual and legal issues. In such a situation, the importance for the parties to be provided an adversarial hearing before the body conducting the court review should not be underestimated. Consequently, the Court must find that in the circumstances of the present case, there are no circumstances which would justify the absence of a hearing (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 77).

77. In support of this finding, the Court recalls that the ECtHR Judgment *Ramos Nunes de Carvalho* e Sá *v. Portugal* specifically stated that a hearing was necessary in circumstances involving the need to consider matters of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly. This is especially true in circumstances in which a hearing has not been held even before the lower instance, as is the case in the circumstances of the present case.

78. In fact, in some cases the ECtHR found a violation of Article 6 of the ECHR when a hearing was not held in a court of appellate jurisdiction, even when a hearing was held in the lower instance, despite the fact that the assessment of the necessity of the hearing at the appellate level is less rigorous when a hearing is held in the first instance. For example, in Judgment *Helmers v. Sweden,* the ECtHR examined a case in which the relevant applicant was afforded a hearing in the first instance, but not at the appellate level, which had the jurisdiction to assess both the law and the facts in the circumstances of the relevant case. In this case, the ECtHR reiterated that (i) the guarantees embodied in Article 6 of the ECHR do not necessarily guarantee a hearing at the appellate level, if one was held in the first instance; and (ii) in rendering this decision, the relevant court must also take into account the need for expeditious handling of cases as well as the right to a trial within a reasonable time. However, emphasizing that such a determination depends on the nature of the case and the need for exceptional circumstances to justify the absence of a hearing, the ECtHR found a violation of Article 6 of the ECHR (for the relevant reasoning of the case, see paragraphs 31 to 39 of the case of case *Helmers v. Sweden*).

79. Finally, the Court also emphasizes the fact that the Appellate Panel did not justify its *"waiver of the hearing",* but merely referred to Article

69 of Law 06/L-086 on the SCSC. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on holding of a hearing on its own initiative or at the request of a party. The relevant judgment does not contain any additional explanation regarding the decision of the Appellate Panel to *"waive the hearing"*. In this context, the Court notes that based on the case law of the ECtHR, in assessing allegations relating to the absence of a hearing, it should also be considered whether the refusal to hold such a hearing is justified. For example, in the case of the ECtHR *Pönkä v. Estonia* (Judgment of 8 November 2016), which was related to the development of a simplified procedure (reserved for small claims), the ECtHR found a violation of Article 6 of the ECHR, because the relevant court had not justified the absence of a hearing. (See the case of the ECtHR, *Pönkä v. Estonia,* cited above, paragraphs 37-40). Also, in the case of the ECtHR, *Mirovni Institut v. Slovenia,* cited above, the ECtHR found a violation of Article 6 of the ECHR, *inter alia,* because the relevant court had not provided an explanation for not holding a hearing. (See the case of the ECtHR, *Mirovni Institut v. Slovenia,* cited above, paragraph 44). In the context of the lack of reasoning for not holding a hearing, the ECtHR, through its case law, has consistently, *inter alia,* emphasized that the lack of reasoning about the necessity of holding a hearing makes it impossible for the highest court to assess whether such a possibility has simply been neglected, or what are the arguments on the basis of which the court has ignored such a possibility in relation to the circumstances raised by a particular case(see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/ 19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 80; and the ECtHR case of *Mirovni Inštitut v. Slovenia*, paragraph 44, and references used therein).

80. Therefore, and in conclusion, the Court, considering that (i) the fact that the Applicants did not expressly request a hearing at the level of the Appellate Panel, does not imply that they implicitly waived this right, especially considering that the latter have not filed an appeal before the Appellate Panel and also that the absence of this request does not exempt the Appellate Panel from the obligation to assess the necessity of a hearing; (ii) despite the Applicants' specific request for a hearing before the Specialized Panel, such a hearing was not held and, consequently, the standards applicable to the necessity of holding a hearing before the Appellate Panel are more stringent because, in principle, the parties are entitled to a hearing at least before a court instance; (iii) the cases under review before the Appellate Panel cannot be qualified either as exclusively legal matters or as matters of a

technical nature, but rather as matters of fact and law; (iv) the Appellate Panel assessed how the lower instance , namely the Specialized Panel made the assessment of the facts, by modifying its Judgment to the detriment of the Applicants; and (v) the Appellate Panel did not justify the *"waiver of the hearing",* finds that in the present case there were no "exceptional circumstances to justify the absence of a hearing", and consequently, the challenged Judgment of the Appellate Panel, namely the Judgment [AC-I-13-0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 dhe KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 81).

81. The Court also notes at the end that, given that it has already found that the challenged Judgment of the Appellate Panel is not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a hearing, considers that it is not necessary to consider the other allegations of the Applicants. The respective allegations of the Applicants should be examined by the Appellate Panel, in accordance with the findings of this .Judgment. Furthermore, given that the Appellate Panel has full jurisdiction to review the challenged decisions of the Specialized Panel based on the applicable laws of the SCSC, it has the possibility to correct at the second instance the absence of a hearing in the first instance (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 82).
82. The Court's finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the absence of a hearing, as explained in this Judgment, and does not in any way relate to nor does it prejudice the outcome of the merits of the case.

Conclusion

83. The Court has assessed the Applicants' allegations regarding the absence of a hearing in the circumstances of their case, as one of the guarantees determined through Article 31 of the Constitution in conjunction with Article 6 of the ECHR, by basing this assessment upon the case law of the ECtHR.

84. In this respect, the Court has initially elaborated on the general principles stemming from its case-law and that of the ECtHR, regarding the right to a hearing, by clarifying the circumstances in which such a hearing is necessary, based, *inter alia,* on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal.* The Court has clarified, *inter alia,* that (i) the absence of a party's request for a hearing does not necessarily imply the waiver of such a right and that the assessment whether the absence of such a request implies that a party has waived that right depends on the specifics of the law and the particular circumstances of a case: and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless *"there* are *exceptional circumstances that would justify the absence of a hearing",* which based on the case law of the ECtHR in principle relate to cases in which "*exclusively legal or highly technical issues"* are examined.

85. In the circumstances of the present case, the Court finds that (i) the fact that the Applicants have not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the SCSC; (iii) the Appellate Panel did not deal with "exclusively legal or highly technical matters", an consequently there are no "exceptional circumstances that would justify the absence of a hearing"; (iv) the Appellate Panel considered issues of "fact and law" in addition to modifying the Judgment of the Specialized Panel to the detriment of the Applicants; and (v) the Appellate Panel did not justify the "waiver of the oral hearing". Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely the Judgment [AC-I-13- 0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

86. The Court also notes that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, it has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the other allegations of the Applicants because they must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the

procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

87. The Court also finds that the Referral no. KI178/19 submitted by the Applicant Jakup Abaz Agaj must be rejected as inadmissible, because it is manifestly ill-founded as specified in Rule 39 (2) of the Rules of Procedure, for the reason that he did not provide any evidence that would absolve him from the obligation of compliance with the legal deadline for submitting a complaint to the SCSC.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 27 January 2021, by majority of votes:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that for Referrals no. KI160/19, KI161/19,KI162/19, KI164/19, KI165/19, KI166/19,KI167/19, KI168/19, KI169/19, KI170/19,KI171/19, KI172/19, KI173/19, there has been a violation of Article 31 [Right to fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to affair trial) of the European Convention on Human Rights;

III. TO DECLARE the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court invalid;

IV. TO REMAND the case to the Appellate Panel of the Special Chamber of the Supreme Court for retrial, in accordance with the findings of this Judgment;

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court by 26 July 2021;

VI. TO DECLARE the Referral no. KI178/19 submitted by the Applicant Jakup Abaz Agaj inadmissible.

VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI181/19, KI182/19 dhe KI183/19, Applicants: Fllanza Naka, Fatmire Lima and Leman Masar Zhubi, Constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2019

KI181/19, KI182/19, KI183/19 Judgment adopted on 27 January 2021, published on 15 February 2021

Keywords: *individual referral, right to be heard, right to fair and impartial trial*

In the circumstances of the present case, the Applicants complained to the Special Chamber of the Supreme Court against the decision of the PAK, respectively due to their non-inclusion in the final list of employees of the SOE "Agimi" Gjakova. The Specialized Panel of the Special Chamber decided that the Applicants be included in the final list of employees with legitimate right to participate in the 20% share of proceeds from the privatization of the SOE "Agimi" Gjakova. The Appellate Panel of the Special Chamber, following an appeal by the Privatization Agency of Kosovo, without holding a hearing, modified the decision of the Specialized Panel of the Special Chamber and rejected the Applicant's claim seeking inclusion in the final list of employees with legitimate right to participate in the 20% share from the privatization of the SOE "Agimi" Gjakova. The Applicants submitted their Referral to the Constitutional Court alleging, inter alia, a violation of Article 31 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR), due to non-holding of the hearing.

The Court has assessed the Applicants' allegations regarding the absence of a hearing in the circumstances of their case, as one of the guarantees determined through Article 31 of the Constitution in conjunction with Article 6 of the ECHR, by basing this assessment upon the case law of the ECtHR).

In this respect, the Court has initially elaborated on the general principles stemming from its case-law and that of the ECtHR, regarding the right to a hearing, by clarifying the circumstances in which such a hearing is necessary, based, *inter alia,* on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal.* The Court has clarified, *inter alia,* that (i) the absence of a party's request for a hearing does not necessarily imply the waiver of such a right and that the assessment whether the absence of such a request implies that a party has waived that right depends on the specifics of the law and the particular circumstances of a case: and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless *"there* are *exceptional circumstances that would justify the absence of a hearing",* which based on the case law of the ECtHR in

principle relate to cases in which "*exclusively legal or highly technical matters" are examined.*

In the circumstances of the present case, the Court finds that (i) the fact that the Applicants have not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the SCSC; (iii) the Appellate Panel did not deal with *"exclusively legal or highly technical matters",* an consequently there are no *"exceptional circumstances that would justify the absence of a hearing"*; (iv) the Appellate Panel considered issues of *"fact and law"* in addition to modifying the Judgment of the Specialized Panel to the detriment of the Applicants; and (v) the Appellate Panel did not justify the *"waiver of the oral hearing"*. Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely the Judgment [AC-I-13- 0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

The Court also stated that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, it has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the other allegations of the Applicants because they must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

JUDGMENT

in

Cases no.KI181/19, KI182/19 and KI183/19

Applicants

Fllanza Naka, Fatmire Lima and Leman Masar Zhubi

Constitutional review of Judgment AC-I-13-0181-A0008, of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Fllanza Naka (KI181/19), Fatmire Lima (KI182/19) and Leman Masar Zhubi (KI183/19) from Gjakova (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge the constitutionality of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2019**.**

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which as alleged by the Applicants has violated their rights guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair

and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo in conjunction with Article 6.1 (Right to a fair trial) and Article 1 (Protection of property) of Protocol no.1 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. The Applicants have submitted the Referrals by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) as follows: (i) Applicant Fllanza Naka (KI181/19) on 3 October 2019, (ii) Applicant Fatmire Lima (KI182/19) on 3 october 2019, dhe (iii) Applicant Leman Masar Zhubi (KI183/19) on 5 October 2019.

6. On 16 October 2019, the President of the Court, in accordance with Rule 40.1 of the Rules of Procedure, appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (presiding), Bajram Ljatifi and Radomir Laban.

7. On 16 October 2019, the President of the Court in accordance with Rule 40.1 of the Rules of Procedure ordered the joinder of Referrals no. KI181/19, KI182/19 and KI183/19.

8. On 20 January 2020, the Applicants were notified about the registration and joinder of the Referrals and copies of the Referrals were sent to the Special Chamber of the Supreme Court.

9. On 27 January 2021, the Review Panel considered the report of the Judge Rapporteur, and by majority vote, recommended to the Court the admissibility of the Referral.

10. On the same day, the Court by a majority found that (i) the Referral is admissible; and unanimously found that the (ii) Judgment [AC-I-13-

0181-A0008] of the Appellate Panel of the SCSC, of 29 August 2019 is not in compliance with Article 31[Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

11. Based on the documents contained in the Referral, it results that the Socially Owned Enterprise SOE "Agimi" Gjakova was privatized by the Privatization Agency of Kosovo (hereinafter: PAK) and the contract on sale with the bidder was approved on 15 September 2010. On the same date, by letter [no.1065], the Applicants were notified that *"the consequence of the sale of the main assets is the termination of your employment"* and that the latter *"is terminated with immediate effect"*. All applicants were employees of the respective enterprise at certain time intervals.

12. The final list of employees with legitimate rights was published on 22 December 2011 and the deadline for submitting complaints to the PAK against the Final List was 14 January 2012.

13. On 13 December 2011, the PAK rejected as ungrounded the Applicants' complaints regarding the non-inclusion of their names in the provisional list of employees entitled to the share of 20% of the proceeds from the privatization of SOE "Agimi" Gjakova. The Applicants were instructed on the right to complaint to the Special Chamber of the Supreme Court within twenty (20) days from the date of receipt of the PAK decision.

14. The Applicants complained to the Special Chamber of the Supreme Court against the decision of the PAK respectively because of their non-inclusion in the final list of employees of the SOE "Agimi" Gjakova. In principle, all of them had alleged that they had not been treated equally with the other employees included in the Final List and consequently had been discriminated against.

15. On 4 September 2013, the Specialized Panel of the Special Chamber by Judgment (SCEL-11-0075) decided for the Applicants KI181/19 (Fllanza Naka), KI182/19 (Fatmire Lima) and KI183/19 (Leman Masar Zhubi) to be included in the final list of employees with legitimate right to participate in the 20% share from the privatization of the SOE "Agimi" Gjakova.

16. Regarding the discrimination of Applicants, the Specialized Panel of the Special Chamber clarified: (i) that during the 90s their

employment relationship was terminated and they were dismissed from work by being replaced with Serbian workers, which is a "well known event" and that consequently they were discriminated against (ii) the Applicants would have met the requirements within the meaning of Section 10.4 of Regulation 2003/13 had they not been subjected to discrimination, since they have been terminated their employment relationship during 90s. The Specialized Panel also assessed that the PAK as a responding party has an obligation within the meaning of Article 8 of the Anti-Discrimination Law 2004/3, which stipulates: "[...]*When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment, therefore after all this the Court came to the conclusion that the complaints of the above mentioned complainants are valid and ordered that their names be included in the Final List of employees"*

17. The PAK filed an appeal with the Appellate Panel of the Special Chamber against the aforementioned Judgment by alleging that the appealed Judgment is inconsistent and not argued based on the law, it does not contain substantial facts and interprets the law in arbitrary manner. According to the PAK, no complainant who was, by the challenged judgment, included in the final list of employees with legitimate rights to receive a share of the proceeds from the privatization of the SOE "Agimi" has presented relevant facts on the basis of which he/she could corroborate the fact of unequal treatment and the reasoning for direct or indirect discrimination in accordance with Article 8.1 of the Anti-Discrimination Law.

18. The Applicants filed a response to the PAK's appeal alleging that all personal documentation was at the disposal of the officials of the SOE "Agimi" Gjakova. The Applicants did not request holding of a hearing.

19. On 29 August 2019, the Appellate Panel of the Special Chamber by Judgment AC-I-13-0181-A0008 upheld as founded the appeal of the PAK regarding the Applicants and ordered that they be removed from the list of beneficiaries of 20% share from the process of privatization of the SOE "Agimi" Gjakova. As to the allegations of discrimination on ethnic basis, the Appellate Panel of the Special Chamber added that it does not agree with the finding of the Specialized Panel of the Special Chamber about discrimination against Applicants, because in accordance with the practice of the Special Chamber, they are of

"Albanian nationality" and could have not been discriminated on ethnic basis after the period of June 1999. The Appellate Panel of the Special Chamber concluded that the approach of the Specialized Panel of the Special Chamber regarding the issue of interpretation of Applicants' discrimination is incorrect and is not based on law, and as such, it is *"contrary to the case law"*.

20. The Appellate Panel of the Special Chamber based on Article 69.1 of the Annex to the Law No. 06/08 on the Special Chamber of the Supreme Court, decided *"to waive the oral part of the proceedings"* and ruled as follows:

(xv) For the Applicant Fllanza Naka (KI181/19) the Appellate Panel of the Special Chamber found that she did not provide evidence on discrimination, that she had established a new employment relationship, and that she does not meet the requirement of being on the payroll at the time of privatization of the SOE "AGIMI" as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently she is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi".

(xvi) For the Applicant Fatmire Lima, (KI182/19) the Appellate Panel of the Special Chamber found that she was not discriminated against, that she has established a new employment relationship with another enterprise, that she did not provide "any evidence" to prove the fact that she has continued to work at the SOE "Agimi" before or after June 1999 or that she has been on the payroll at the time of the privatization of the enterprise as provided in Section 10.4 of UNMIK Regulation 2003/13.

(xvii) For the Applicant Leman Masar Zhubi (KI183/19) the Appellate Panel of the Special Chamber found that he was not discriminated against, that he did not provide "any evidence" to prove that he had established an employment relationship with with the SOE "Agimi", that he does not meet the requirement of being on the payroll at the time of privatization as provided in Section 10.4 of UNMIK Regulation 2003/13 and that consequently he is not recognized the right to be included in the final list of employees to benefit from the 20% share from the sale of SOE "Agimi".

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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

[…]

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

LAW No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related Matters

Article 10
Judgments, Decisions and Appeals

[…]
11. When the appellate panel has accepted and is deciding on an appeal, the following rules shall be strictly observed: the appellate panel shall not modify, annul, reverse or otherwise

change, in any manner, any finding of fact made by a court, specialized panel, sub-panel or single judge unless the appellate panel determines that such finding of fact is clearly erroneous. A finding of fact shall not be determined to be clearly erroneous if such finding of fact is supported by any reasonable interpretation of the record of the trial proceedings and the evidence submitted during such proceedings; and 11.2. the appellate panel shall conduct a de novo review of each issue of law raised by the appellant or a respondent in their written submissions.
[…]

Annex to the Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo related Matters

Rules of Procedure of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo related Matters

Article 36
General Rules on Evidence

[…]
3. A party alleging a fact or an event shall be given a reasonable opportunity to submit or produce material evidence in support of such allegation. If such party fails to submit or produce any such evidence, the party shall be determined to have not discharged its burden of proof with respect to that allegation.

Article 68
Complaints related to a List of Eligible Employees

1. The procedure for cases based on *complaints falling within the scope of paragraph 1.6 of Article* 4 *of the Special Chamber Law shall, except as specifically provided in this Article* 68, *generally follow the other procedural rules set forth in this Annex, which the Special Chamber shall apply mutatis mutandis* as *the Special Chamber deems necessary and in the interest of justice.*
2. Upon receiving a *list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such* a *list, the Agency shall publish such list together with* a *notice to the public of the right of any person to file* a *complaint with the Agency within twenty (20) days after the date of publication requesting inclusion in such list and/or challenging the inclusion of one or more other persons in such list. The person filing any such request or challenge shall*

include therein a *statement of the facts and the legal arguments supporting such request or challenge; such person shall have the burden of proving all facts alleged in the request and/or challenge.*
[…]
6. The Agency shall publish its final list of eligible employees established pursuant to paragraph 5 *of this Article in conformity with Section 10.6 of UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such list, together with* a *notice to the public of the right of any person to file* a *complaint with the Special Chamber within twenty (20) days after the date of publication challenging such list and/or the Agency's distribution of escrow funds to the persons identified therein. The complainant(s) filing any such complaint shall include therein* a *statement of the facts and the legal arguments supporting such complaint; the complainant(s) shall have the burden of proving all facts alleged in the complaint.*
[…]
11. The concerned Specialized Panel, acting on *its own initiative or pursuant to* a *written request of the complainant(s) or the Agency, may decide to hold one or more oral hearings* on *the matter. If an oral hearing is to be held, the Specialized Panel shall cause the Registrar to serve* on *the parties, at least five (5) days in advance of such hearing, a written notice of the time and date of such hearing.*
[…]
14. The Appellate Panel shall dispose of all such appeals as a matter of urgency.

Article 64
Oral Appellate Proceedings

1. The Appellate shall, on its own initiative or the written application of a party, decide whether or not to hold one or more oral hearings on *the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application must be filed prior to the closing of written appellate procedures.*
[…]

Article 65
Submission of New Evidence

In exceptional circumstances and for good cause shown, the Appellate panel may permit a *party to present to the Appellate Panel new evidence that was not available to the party during the evidentiary portion of the first instance proceedings. A written application for such permission must first be submitted to the Appellate Panel and served on the other parties not less than fifteen (15) days before the date of the hearing where such evidence is proposed to be presented. The Appellate Panel may authorize the presentation of such new evidence if it considers it to be in the interests of justice.*

Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property

Article 10
Rights of employees

[…]
10.4 For the purpose of this section an employee shall be considered as *eligible, if such employee is registered as an employee with the Socially Owned Enterprise at the time of privatization and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting* a *complaint to the Special Chamber pursuant to subsection 10.6.*
[…]

Regulation No. 2004/45 amending Regulation No. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property

Article 1
Amendments

As of the date of entry into force of the present Regulation,
[…]
B. Sections 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13 shall be amended to read:
[…]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially Owned Enterprise at the time of privatisation or initiation of the liquidation procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude

employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6
[…]

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

Article 69
Oral Appellate Proceedings

2. *The Appellate shall, on its own initiative or the written application of a party, decide whether or not to hold one or more oral hearing sessions on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application shall be filed prior to the closing of written appellate procedures.*

[…]

Anti-Discrimination Law No.2004/3

Article 8
Burden of proof

8.1. When persons who consider themselves wronged because the principle
of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no *breach of the principle of equal treatment.*
8.2. Paragraph 8.1 *shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a complainant may establish or defend their case of discrimination by any means, including* on *the basis of statistical evidence.*

Applicants' allegations

21. The Applicants allege violations of Articles 24[Equality before the Law], 31 [Right to Fair and Impartial Trial], and 46[Protection of Property] of the Constitution in conjunction with Article 6.1 (Right to

a fair trial), and Article 1 (Protection of property) of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR).

22. With respect to the allegation for a fair and impartial trial, the Applicants allege that the Appellate Panel of the Special Chamber should have held a public hearing where all complainants would be summoned to present their allegations and their evidence in a direct and transparent manner, in particular, given the fact that the Specialized Panel of the Special Chamber had recognized the right to benefit from the 20% share of the sale of SOE "Agimi" Gjakova for the vast majority of the Applicants. The Applicants also allege that the Appellate Panel of the Special Chamber should have remanded the case for retrial and reconsideration to the Specialized Panel of the Special Chamber. According to the Applicants, the above-mentioned defects of the judicial process in the Special Chamber have resulted in a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

23. The Applicants also allege a violation of the right to a trial within a reasonable time as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

24. In relation to the allegation for discrimination, the Applicants allege that the discrimination consists in the fact that the employees with legitimate rights were removed the final list of employees eligible to benefit from the sale of the SOE "Agimi" Gjakova and not on ethnic basis as justified by the Appellate Panel of the Special Chamber.

25. Finally, the Applicants request from the Court to: (i) declare the Referrals admissible; (ii) find that there has been a violation of Articles 24, 31 and 46 of the Constitution in conjunction with Article 6 and Article 1 of Protocol no. 1 of the ECHR; (iii) declare invalid the Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August 2019 and remand the same for retrial pursuant to the Judgment of this Court.

Assessment of the admissibility of Referral

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

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

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

[...]

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

[...]

28. In addition, the Court also examines whethere the Applicant has fulfilled the admissibility criteria, as provided by Law. In this respect, the Court first refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

29. As to the fulfilment of these requirements, the Court finds that the Applicants are authorized parties, who challenge an act of a public authority, namely the Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, of 29 August. 2019, after having exhausted all legal remedies provided by law. The Applicants have also clarified the rights and freedoms which they allege to have been violated, in accordance with the criteria of Article 48 of the Law and have submitted the Referral in accordance with the deadlines stipulated in Article 49 of the Law.

30. The Court also finds that the Applicants' Referral meets the admissibility criteria stipulated in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The same cannot be

declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. In addition, the Court considers that this Referral is not manifestly ill-founded as provided in paragraph(2) of Rule 39 of the Rules of Procedure and, consequently, must be declared admissible and have its merits examined.

Merits

31. The Court recalls that the circumstances of the present case relate to the privatization of the Socially-Owned Enterprise SOE "Agimi" in Gjakova, and the rights of the respective employees to be recognized as employees with legitimate rights to participate in the twenty percent (20%) of proceeds from this privatization, as defined in Article 68 of the Annex to the Law on SCSC, and paragraph 4 of Article 10 of Regulation no.2003/13 amended by Regulation no.2004/45. Based on the case file, it results that the abovementioned socially-owned enterprise was privatized on 15 September 2010, the date on which the Applicants were also notified by individual letters that *"the consequence of the sale of the main assets is the termination of your employment"* and that the latter *"is terminated immediately"*. The Applicants subsequently challenged their non-inclusion in the PAK Provisional List of employees with legitimate rights to participate in twenty percent (20%) of the proceeds from the privatization of the SOE "Agimi". These complaints were rejected. Subsequently, the Applicants initiated a claim in the Specialized

    Panel, challenging the PAK Decision, both regarding the establishment of facts and the interpretation of the law. They had allegedly been discriminated against and all of them requested a hearing before the Specialized Panel. The latter had rejected the request for a hearing on the grounds that *"the facts and evidence submitted are quite clear",* and gave the right to the Applicants.

32. Following the issuance of this Judgment, an appeal to the Appellate Panel was lodged by the PAK. In August 2019, the Appellate Panel had issued the challenged Judgment, whereby it approved the appeal of the PAK by amending the Judgment of the Specialized Panel and consequently, removing from the list of beneficiaries of 20% from the privatization process of SOE "Agimi" Gjakova, all Applicants. The Appellate Panel had stated that it had decided to *"waive the part of the oral hearing"*, referring to paragraph 1 of Article 69 (Oral Appellate Proceedings) of Law no.06/L-086 on the SCSC. Whereas, regarding the merits of the case, it (i) had found that the evidence presented by the respective parties does not prove that they meet the

legal conditions set out in paragraph 4 of Article 10 of Regulation no. 2003/13 to have the relevant rights recognized; and (ii) stated that the interpretation of discrimination by the Specialized Panel was contrary to the *"case law"* of the SCSC. These findings of the Appellate Panel are challenged by the Applicants before the Court, alleging a violation of their rights guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Articles 6(Right to a fair trial) and Article 1(Protection of Property) of Protocol no. 1 of the ECHR. With regard to violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants, as clarified above, allege that the Appellate Panel has modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without a sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

33. These allegations will be examined by the Court on the basis of the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

34. In this respect, the Court will first examine the Applicants' allegations for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the absence of a hearing at the level of the Appellate Panel. To this end, the Court will first (i) elaborate on the general principles regarding the right to a hearing as guaranteed by the aforementioned Articles of the Constitution and the ECHR; and then, (ii) apply the latter to the circumstances of the present case.

(iii) General principles with regard to the right to a hearing

35. The public nature of proceedings before judicial bodies referred to in Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, protects litigants from the administration of justice in secret, in the absence of a public hearing. Publicity of court proceedings is also one of the main mechanisms through which trust in justice is maintained. Such a principle, moreover, contributes to the achievement of the objectives of Article 31 of the Constitution and Article 6 of the ECHR, for a fair trial, the guarantee of which is one of the fundamental principles of any democratic society embodied in the Constitution and ECHR(See, the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural

requirements; B. Public hearing, paragraphs 381 to 404 and references used therein).

36. In principle, litigants are entitled to a public hearing, but such an obligation is not absolute. In so far as it is relevant to the present circumstances, the case law of the ECtHR has developed key principles concerning (i) the right to a hearing in the courts of first instance; (ii) the right to a hearing in the courts of second and third instance; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of the first instance hearing can be corrected through a higher instance hearing and the relevant criteria for carrying out that assessment. However, in all circumstances, the absence of a hearing must be justified by the relevant court.

37. With regard to the first issue, namely the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in the proceedings before a sole and first instance court, the right to a hearing is guaranteed by paragraph 1 of Article 6 of the ECHR (See, *inter alia,* the ECtHR cases *Fredin v. Sweden* (no. 2), Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden* (no. 2), Judgment of 19 February 1998, paragraph 46; *Göç v. Turkey*, Judgment of 11 July 2002, paragraph 47; and *Selmani and others* v. *the former Yugoslav* Republic *of Macedonia*, Judgment of 9 February 2017, paragraphs 37-39). Exceptions to this general principle are the cases in which "*there are exceptional circumstances that would justify the absence of a hearing*" in the first and sole instance. (See, in this respect, the cases of the ECtHR, *Hesse-Anger and Anger v. Germany,* Decision of 17 May 2001; and the *Mirovni Institute v. Slovenia,* Judgment of 13 March 2018, paragraph 36; see also the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural requirements; B. Public hearing, paragraph 382 and references used therein). The character of such exceptional circumstances stems from the nature of the matters involved in a case, for example, the cases that deal exclusively with legal matters or are of a very technical nature (See the case of the ECtHR, *Koottummel v. Austria,* Judgment of 10 December 2009, paragraphs 19 and 20).

38. With regard to the second issue, namely the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified on the basis of the specific characteristics of the relevant case, provided that a hearing has been held in the first instance. (See, in this context, the case of the ECtHR, *Salomonsson v. Sweden,* Judgment of 12 November 2002, paragraph 36). Therefore, the proceedings before the

courts of appeals, which involve only issues of law and not issues of fact, may be considered to be in accordance with the guarantees embodied in Article 6 of the ECHR, even if a hearing has not been held in the second instance. Consequently, the proceedings in respect of which a first-instance hearing was held and in respect of which, the second-instance proceedings involved only matters of law and not of fact, are in principle in accordance with the procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, even if a party has not been given the opportunity to be heard in person at the appellate level (See the case of the ECtHR, *Miller v. Sweden,* Judgment of 8 February 2005, paragraph 30; and see also ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural requirements; B. Public hearing, paragraph 383 and references used therein). More exactly, in cases when before the courts with appellate jurisdiction are examined matters of fact as well as of law, the absence of a hearing can be justified only by the "existence of exceptional circumstances", as defined by the case law of the ECHR. Therefore, unless "there are exceptional circumstances that would justify the absence of a hearing", the latter is guaranteed to the parties at least at one of the levels of jurisdiction, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR (See, the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Requirements; B. Public hearing, paragraph 386 and references used therein).

39. With regard to the third issue, namely the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to Judgment of 6 November 2018 of the ECtHR: *Ramos Nunes de Carvalho and Sá v. Portugal,* in which the Grand Chamber of the ECtHR established the principles on the basis of which the necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) involves merely legal matters of a limited nature (see, the ECtHR cases *Allan Jacobsson v. Sweden* (no. 2), cited above, para 49; and *Valová, Slezák and Slezák v. Slovakia,* Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see, the case of the ECtHR, *Varela Assalino v. Portugal,* Decision of 25 April 2002); and (ii) involves highly technical matters, which are better addressed in writing than through oral arguments in a hearing; and (iii) does not involve issues of credibility of the parties or disputed facts and the courts may decide fairly and reasonably on the basis of the parties' submissions and other written materials (see, the cases of the ECtHR, *Döry v. Sweden,* Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria,* Judgment of 18 December 2008, paragraph 73).

40. On the contrary, based on the aforementioned Judgment, a hearing is necessary if the relevant case (i) involves the need to consider issues of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly (see, *inter alia,* the cases of the ECtHR, *Malhous v. Czech Republic,* Judgment of 12 July 2001, paragraph 60; and *Fischer v. Austria,* Judgment of 26 April 1995, paragraph 44); and (ii) requires the relevant court to gain a personal impression of the parties concerned, and to allow them the opportunity to clarify their personal situation, in person or through the relevant representative. Examples of this situation are cases where the court must hear evidence from the parties concerning personal suffering in order to determine the appropriate level of compensation (see, the ECtHR cases, *Göç v. Turkey,* cited above, paragraph 51; and *Lorenzetti v. Italy,* Judgment of 10 April 2012, paragraph 33) or must provide information about the character, conduct and dangerousness of a party (See the case of the ECtHR, *De Tommaso v. Italy,* Judgment of 23 February 2017, paragraph 167).

41. With regard to the fourth issue, namely the possibility of a second-instance correction of the absence of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on powers of the highest court. If the latter has full jurisdiction to examine the merits of the case at hand, including the assessment of the facts, then the correction of the absence of a hearing in the first instance may be made in the second instance (See the case of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal,* cited above, paragraph 192 and references used therein; and also see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural requirements; B. Public hearing, paragraph 384 and references used therein).

42. Finally, according to the case-law of the ECtHR, the fact that the parties did not request to hold a hearing does not mean that they waived their right to hold one. (For more details on the waiver of the right to a hearing, see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Criteria B. Public hearing, paragraphs 401 and 402 and references used therein). Based on the case law of the ECtHR, such an issue depends on the characteristics of domestic law and the circumstances of each case individually (See the case of the ECtHR, *Göç v. Turkey,* cited above, paragraph 48; and also see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural

Requirements B. Public hearing, paragraph 403 and references used therein).

(ii) Application of the principles elaborated above to the circumstances of the present case

43. The Court first recalls that based on the case law of the ECtHR, Article 6 of the ECHR, in principle, guarantees that a hearing be held at least at one level of decision-making. Such a hearing is, in principle, mandatory (i) if the court of first instance has sole jurisdiction to decide issues of fact and law; (ii) not mandatory in the second instance if a hearing is held in the first instance, despite the fact that such a determination depends on the characteristics of the case at hand, for example, if the second instance decides on both issues of fact and of law; and (iii) mandatory in the second instance if one has not been held in the first instance, in cases where the second instance has full competence to assess the decision of the first instance, also with regard to the issues of fact and of law. Exceptions to these cases, in principle, are made only if "there are exceptional circumstances that would justify the absence of a hearing", and which the ECtHR, as explained above, through its case law has defined as cases that deal exclusively with legal issues or are of a highly technical nature.

44. Based on the principles elaborated above, in the following the Court must first assess, whether in the circumstances of the present case, the fact that the Applicants did not request a hearing before the Appellate Panel may result in the finding that the Applicants have implicitly waived the right to a hearing. If the answer to this question turns out to be negative, then the Court, based on the case law of the ECtHR, must assess whether in the circumstances of the present case "there are exceptional circumstances that would justify the absence of a hearing" in the two instances of decision-making, before the Specialized Panel and the Appellate Panel, respectively. The Court will also make this assessment based on the principles established by the Judgment of the Grand Chamber in case *Ramos Nunes de Carvalho and Sá v. Portugal*.

b) Whether the Applicants have waived the right to a hearing

45. In this respect, the Court first recalls that through individual complaints filed with the Specialized Panel, all Applicants requested a hearing. The Specialized Panel rejected to hold the latter, stating that based on paragraph 11 of Article 68 of Annex to the Law on the SCSC, a hearing was not necessary because "the facts and evidence submitted are quite clear". As it has already been clarified, the Specialized Panel,

based on these "facts and evidence", had decided that the Applicants were discriminated against and that they are to be included in the Final List of PAK as employees with legitimate rights to participate in the twenty percent (20%) of proceeds from the privatization of the SOE "Agimi".

46. It is only the PAK that filed an appeal with the Appellate Panel. The Appellate Panel decided in favour of the PAK, by modifying the Judgment of the Specialized Panel and rejecting the appeals of all Applicants regarding non-inclusion in the Final List of PAK as a result of discrimination. As explained above, the Appellate Panel had decided to "waive the oral part of the hearing", by referring to paragraph 1 of Article 69 of the Law no.06/L-086 on the SCSC.

47. However, as explained above, the fact that the Applicants did not request a hearing does not necessarily mean that they have implicitly waived such a request, and also the lack of such a request does not necessarily exempt the relevant court from the obligation to hold such a hearing.

48. More specifically, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, the ECtHR, *inter alia,* assesses whether the absence of such a request can be considered as an implicit waiver of an applicant from the right to a hearing. However, the lack of a request for a hearing, based on the case law of the ECtHR, is never the only factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing exempts a court of the obligation to hold a hearing depends on (i) the specifics of the applicable law; and (ii) the circumstances of a case (see, the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Criteria; B. Public Hearing, paragraphs 401 to 404 and references used therein). In the following, the Court will assess these two issues.

49. First, with regard to the specifics of the applicable law, namely the Law and the Annex to the Law on the SCSC, the Court recalls that pursuant to Article 64 (Oral Appellate Proceedings) of the same law, "*The Appellate Panel shall decide whether or not to hold one or more oral hearings on the concerned appeal",* based on its initiative or upon a written request from a party. Article 69 (Oral Appellate Proceedings) of Law no.06/L-086 on the SCSC, has the same content. Based on these provisions, consequently, the holding of a hearing at the instance of appeal, does not necessarily depend on the request of the party. It is also the task of the respective Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held.

Furthermore, based on Article 60(Content of appeal) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the Appellate Panel has the competence to assess both issues of law and of fact, and consequently, it is equipped with full competence to assess how the lower authority, namely the Specialized Panel, has assessed the facts. In the circumstances of the present case, the Appellate Panel has assessed the facts and allegations of the Applicants and modified the Judgment of the Specialized Panel regarding the assessment of the facts and the interpretation of the law, to the detriment of the Applicants. In such circumstances, taking into account the legal provisions, the Court cannot find that the absence of a hearing in the Appellate Panel is justified only as a result of the absence of a request by the parties to the proceedings, especially given the fact that the Applicants did not file appeal against the Judgment of the Specialized Panel, which was in their favour. As explained above, based on Article 64 of the Annex to the Law on SCSC, it is the obligation of the Appellate Panel, even on its own initiative, to assess whether the holding of a hearing is mandatory, and if not, to justify the non-holding of the latter(see, the cases of the Constitutional Court no. KI145/ 19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others,* Judgment of 10 December 2020, paragraph 61).

50. Secondly, with regard to the circumstances of a case, the Court recalls that the case law of the ECtHR states that the absence of a request for a hearing, and the assessment of whether this fact may result in the finding that the party concerned has implicitly waived the right to a hearing, must be assessed in the entirety of the specifics of a procedure, and not as a single argument, in order to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR.

51. More specifically, in cases where a party concerned has not made a request for a hearing, the ECtHR assessed whether the absence of such a request can be considered as an implied waiver of a hearing, always in the light of applicable law and circumstances, of a case. For example (i) in the case *Miller v. Sweden* (Judgment of 6 May 2005), in which the Applicant did not request the holding of a hearing at the appellate level, but she requested a hearing at the first instance, resulted in the finding of the ECtHR that the request for a hearing was made at the "most appropriate stage of proceedings" and consequently, the ECtHR stated that it could not be concluded that the party has implicitly waived the request for a hearing. Furthermore, in combination with the finding that at the appellate level both fact and law issues had been

examined, and consequently the nature of the issues under review was neither exclusively legal nor technical, the ECtHR found that there were no exceptional circumstances that would justify the absence of a hearing, thus finding a violation of Article 6 of the ECHR (see the case of the ECtHR: *Miller v. Sweden,* cited above, paragraphs 28-37); also (ii) in the case *Salomonsson v. Switzerland* (Judgment of 12 February 2003), in which the Applicant did not request a hearing in either of the instances, although the ECtHR found that the Applicant could be considered to have implicitly waived the right to a hearing (see paragraph 35 of the case of *Salomonsson v. Switzerland),* nevertheless it found a violation of Article 6 of the ECHR due to the absence of a hearing, because it concluded that in the circumstances of the present case, there were no exceptional circumstances that would justify the absence of a hearing, especially given the fact that the appellate level also considered factual issues and not just legal issues (see the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 63 and the case of ECtHR *Salomonsson v. Switzerland*, cited above, paragraphs 36-40).

52. On the other hand, in the case of *Goç v. Turkey,* the ECtHR also found a violation of Article 6 of the ECHR due to the absence of a hearing, rejecting the Turkish Government's allegations that (i) the case was simple and that it could to be dealt with promptly only on the basis of the case file, in particular because the respective complainant did not request the submission of any new evidence through the complaint; and that (ii) the respective Applicant did not request the holding of a hearing. (for the facts of the case, see paragraphs 11 to 26 of the ECtHR case *Goç v. Turkey).* In its examination of the respective case, and after assessing whether there were any exceptional circumstances that would justify the absence of a hearing, the ECtHR found a violation of paragraph 1 of Article 6 of the ECHR, stating, *inter alia,* that (i) despite the fact that the Applicant concerned did not request a hearing, it does not appear from the circumstances of the case that such a request would have any prospect of success; furthermore (ii) it cannot be considered that the Applicant concerned has waived his right to a hearing by not seeking one before the Court of Appeals as the latter did not have full jurisdiction to determine the amount of compensation; (iii) the Applicant concerned was not given the opportunity to be heard even before the lower instance and which had jurisdiction to assess both the facts and the law; and (iv) the substantial issue, in the circumstances of this case, was whether the Applicants concerned should be offered a hearing before a court which was responsible for establishing the facts of the case (see, the cases of

the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, *Applicant Et-hem Bokshi and others*, cited above, paragraph 64, and for the reasoning of the case, see the paragraphs 43 to 52 of the case *Goç v. Turkey*).

53. In contrast, in other cases, the ECtHR found that the fact that an Applicant did not request a hearing could be considered as an implied waiver of this right, but always together with the assessment of whether, in the circumstances of a case, there are exceptional circumstances which would justify the absence of a hearing. For example, in the cases of *Schuler-Zgraggen v. Switzerland* (Judgment of 24 June 1993) and *Dory v. Sweden* (Judgment of 12 February 2003), in which the Applicants did not request a hearing, the ECtHR found that the latter had implicitly waived the right to a hearing. However, this finding was reached by the ECtHR, only in connection with the finding that the circumstances of the case were of a *"technical nature",* and consequently there were exceptional circumstances justifying the absence of a hearing, by not finding a violation of Article 6 of the ECHR. (See the case of the ECtHR, *Miller v. Sweden,* cited above, paragraphs 28-37; *Dory v. Sweden,* cited above, paragraphs 36-45). Similarly, the ECtHR acted in the case *Vilho Eskelinen and others v. Finland* (Judgment of 19 April 2007), in which it found no violation of Article 6 of the ECHR (see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 65, and for the reasoning regarding the hearing, see the paragraphs 73 to 75 in the case Vilho Eskelinen and others v. Finland).

54. Based on the case law of the ECtHR, the Court also notes that the fact that the practice of conducting a written procedure without hearings prevailed before the respective courts was not considered by the ECtHR as the only fact on which a hearing could be skipped, regardless of the specific circumstances of a case. For example, in case *Madamus v. Germany* (Judgment of 9 June 2016), the ECtHR had also examined allegations based on which the applicable law provided for the holding of hearings as an exception and not as a rule, moreover based on the relevant practice, the court, the decision of which was challenged before the ECtHR, had never held a hearing. Despite this fact, the ECtHR found a violation of Article 6 of the ECHR, as it assessed and found that in the circumstances of this case there were no exceptional circumstances which would justify the absence of a hearing. (See, the paragraphs 25 to 33 of the case *Madamus v. Germany*).

55. The Court recalls that in the circumstances of the present case, (i) the Applicants were not given the opportunity to be heard before a Specialized Panel with jurisdiction to assess the facts and the law, despite their request; (ii) the Applicants had not appealed to the Appellate Panel because the decision of the Specialized Panel was in their favour; (iii) the proceedings before the Appellate Panel were initiated through an appeal from the PAK; (iv) The Appellate Panel had "waived the right from the hearing", by referring to Article 69 of the Law 06/L-086 on the SCSC, an article identical to Article 64 of the Annex to the Law on the SCSC, which simply determine that "The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal"; and (v) the Appellate Panel had considered all the facts of the case, including the Applicants' complaints submitted to the first instance, and stated that it does not agree either with the assessment of the facts or with the interpretation of the law by the lower instance court, and modified the Judgment of the Specialized Panel in its entirety, by removing all Applicants from the List of Employees with legitimate rights to benefit from the (20%) share of the privatization of the enterprise SOE "Agimi".

56. In such circumstances, the Court cannot find that the absence of Applicants' request to hold a hearing at the level of the Appellate Panel can be considered as their implied waiver of the right to a hearing. The Court recalls that in all cases in which the ECtHR had reached such a finding, it made it in connection with the fact that the circumstances of the cases were related to the issues of an exclusively legal or technical nature, and consequently "there were exceptional circumstances which would justify the absence of a hearing". Consequently and in the following, the Court must assess whether in the circumstances of the present case, "there are exceptional circumstances that would justify the absence of a hearing", namely whether the nature of the cases before the Appellate Panel can be classified as "exclusively legal or of a highly technical nature" (see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 68).

b) Whether in the circumstances of the present case there are exceptional circumstances which would justify the absence of a hearing

57. The Court recalls that based on the case law of the ECtHR, the parties are entitled to a hearing in at least one instance. This instance is mainly the first instance, and the one which has the jurisdiction to decide on both factual and legal issues. In this context, regarding the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing may be justified based on the specific characteristics of the case, provided that a hearing is held in the first instance. In principle, if a hearing is held in the first instance, the proceedings before the courts of appeal, and which involve only matters of law, and not issues of fact, may be considered to be in accordance with the guarantees enshrined in Article 6 of the ECHR, even if in the second instance no hearing was held. In principle, the exceptions to the right to a hearing are only those cases in which it is determined that "there are exceptional circumstances that would justify the absence of a hearing". These circumstances, as explained above, were classified by the case law of the ECtHR as cases which relate to exclusively legal or highly technical issues (see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 69).

58. For example, the issues related to social security, were classified by the ECtHR mainly as issues of a technical nature, in which a hearing is not necessarily indispensable. Of course, there are exceptions to this rule. In each case, the concrete circumstances of a case are examined. For example, the ECtHR found no violations in case *Schuler-Zgraggen v. Switzerland* and *Dory v. Sweden,* but found violations in case *Miller v. Sweden* and *Salomonsson v. Switzerland,* even though all of them were related to social security issues.

59. Similarly, the ECtHR acts also in those cases in which the issues before the relevant Court are exclusively legal, and do not involve an assessment of the disputable facts. For example, in the case *Saccoccia v. Austria* (Judgment of 18 December 2008), the ECtHR did not find a violation of Article 6 of the ECHR due to the absence of a hearing, as it found that the issues complained of by the Applicant did not contain issues of fact, but only limited issues of a legal nature *(Saccoccia v. Austria,* cited above, paragraph 78), whereas in the case *Allan Jacobsson v. Sweden* (no.2) (Judgment of 19 February 1998), the ECtHR also found no violation of Article 6 of the ECHR due to the absence of a hearing, as it found that the issues complained of by the respective Applicant did not involve either issues of law or fact (See, the ECtHR case *Allan Jacobsson v. Sweden,* (no. 2), cited above, paragraph 49).

60. On the contrary, in other cases in which the ECtHR found that the cases before the relevant courts involved both issues of fact and law, it did not find that there were exceptional circumstances that would justify the absence of a hearing. For example, in the cases of *Malhous v. the Czech Republic* (Judgment of 12 July 2001), the ECtHR found a violation of Article 6 of the ECHR due to the absence of a hearing, as it determined that the cases complained of by the Applicant were not limited to the issues of law but also the fact, namely the assessment of whether the lower authority had assessed the facts correctly. (See the case of the ECtHR *Malhous v. Czech Republic,* cited above, paragraph 60). Similarly, in the case of *Koottummel v. Austria* (Judgment of 10 December 2009), the ECHR found a violation of Article 6 of the ECHR due to the absence of a hearing because it found that the cases before it could not be qualified as matters of an exclusively legal nature, or of a technical nature, which could consist of exceptional circumstances which would justify the absence of a hearing. (see, the ECtHR case, *Koottummel v. Austria,* cited above, paragraphs 20 and 21).

61. In the circumstances of the present case, the Court first recalls that the Appellate Panel has jurisdiction over both fact and law issues. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Law on the SCSC) and paragraph 4 of Article 64 (Oral Appellate Proceedings) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the parties have, *inter alia,* the opportunity to raise complaints before the Appellate Panel regarding both matters of law and facts, including the opportunity of presenting new evidencee (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 73).

62. Moreover, in the circumstances of the present case, the Appellate Panel had considered all the facts presented through the Applicants' initial complaint submitted to the Specialized Panel and relevant responses to the Applicants' appeal. Despite the fact that the Specialized Panel had assessed that the evidence *"is clear"* recognizing the right to the Applicants, the Appellate Panel found the opposite based on the same evidence.

63. The Court also recalls that pursuant to paragraph 11 of Article 10 of the Law on the SCSC, the Appellate Panel is limited to changing the assessment of the factual situation made by the Specialized Panel,

unless it determines that the factual findings of the lower court are "*clearly erroneous",* a rule that according to the same article must be *"strictly observed"*. Such reasoning is not found in the Judgment of the Appellate Panel. The latter simply disagreed with the assessment of the evidence by the Specialized Panel, and also found that the interpretation which the Specialized Panel had made regarding the allegations of discrimination was inconsistent with the *"case law*".

64. The Court further notes that in accordance with Article 68 of the Annex to the Law on the SCSC, in the event of complaints concerning the list of employees with legitimate rights, the burden of proof before the Specialized Panel falls on the Applicants. Also, the burden of proof for the opponent of such a request falls on the responding party, namely the PAK, in the circumstances of the Applicant concerned. But the circumstances of the present case are also, in essence, related to allegations of discrimination. In case of such allegations, the burden of proof, based on Article 8(Burden of proof) of the Anti-Discrimination Law, falls on the respondent, namely the PAK, and not the Applicants (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 76).

65. In such circumstances, in which (i) the Appellate Panel has considered issues both of fact and law; (ii) in which with regard to the facts, the burden of proof that they meet the criteria of paragraph 4 of Article 10 of Regulation no. 2003/13, in principle falls on the Applicants, while the burden of proof regarding discrimination falls on the PAK; and (iii) the Appellate Panel interprets the same facts presented by the parties differently from how the Specialized Panel has interpreted them, by modifying the Judgment to the detriment of the parties, despite the fact that such a possibility based on paragraph 11 of Article 10 of Law no. 04/L-033 on the SCSC was recognized only as an exception, provided that it argued that the lower authority, namely the Specialized Panel, had made a "clearly erroneous" interpretation, the Court considers that it is indisputable that the issue under consideration before the Appellate Panel, is not (i) either an exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel contained important factual and legal issues. In such a situation, the importance for the parties to be provided an adversarial hearing before the body conducting the court review should not be underestimated. Consequently, the Court must find that in the circumstances of the present case, there are no circumstances which would justify the absence of a hearing (see, the cases of the Constitutional Court

no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 77).

66. In support of this finding, the Court recalls that the ECtHR Judgment *Ramos Nunes de Carvalho* e Sá *v. Portugal* specifically stated that a hearing was necessary in circumstances involving the need to consider matters of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly. This is especially true in circumstances in which a hearing has not been held even before the lower instance, as is the case in the circumstances of the present case.

67. In fact, in some cases the ECtHR found a violation of Article 6 of the ECHR when a hearing was not held in a court of appellate jurisdiction, even when a hearing was held in the lower instance, despite the fact that the assessment of the necessity of the hearing at the appellate level is less rigorous when a hearing is held in the first instance. For example, in Judgment *Helmers v. Sweden,* the ECtHR examined a case in which the relevant applicant was afforded a hearing in the first instance, but not at the appellate level, which had the jurisdiction to assess both the law and the facts in the circumstances of the relevant case. In this case, the ECtHR reiterated that (i) the guarantees embodied in Article 6 of the ECHR do not necessarily guarantee a hearing at the appellate level, if one was held in the first instance; and (ii) in rendering this decision, the relevant court must also take into account the need for expeditious handling of cases as well as the right to a trial within a reasonable time. However, emphasizing that such a determination depends on the nature of the case and the need for exceptional circumstances to justify the absence of a hearing, the ECtHR found a violation of Article 6 of the ECHR (for the relevant reasoning of the case, see paragraphs 31 to 39 of the case *Helmers v. Sweden*).

68. Finally, the Court also emphasizes the fact that the Appellate Panel did not justify its *"waiver of the hearing",* but merely referred to Article 69 of Law 06/L-086 on the SCSC. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on holding of a hearing on its own initiative or at the request of a party. The relevant judgment does not contain any additional explanation regarding the decision of the Appellate Panel to *"waive the hearing"*. In this context, the Court notes that based on the case law of the ECtHR, in assessing allegations relating to the absence of a hearing, it should also be considered whether the refusal to hold such a hearing

is justified. For example, in the case of the ECtHR *Pönkä v. Estonia* (Judgment of 8 November 2016), which was related to the development of a simplified procedure (reserved for small claims), the ECtHR found a violation of Article 6 of the ECHR, because the relevant court had not justified the absence of a hearing. (See the case of the ECtHR, *Pönkä v. Estonia,* cited above, paragraphs 37-40). Also, in the case of the ECtHR, *Mirovni Institut v. Slovenia,* cited above, the ECtHR found a violation of Article 6 of the ECHR, *inter alia,* because the relevant court had not provided an explanation for not holding a hearing. (See the case of the ECtHR, *Mirovni Institut v. Slovenia,* cited above, paragraph 44). In the context of the lack of reasoning for not holding a hearing, the ECtHR, through its case law, has consistently, *inter alia,* emphasized that the lack of reasoning about the necessity of holding a hearing makes it impossible for the highest court to assess whether such a possibility has simply been neglected, or what are the arguments on the basis of which the court has ignored such a possibility in relation to the circumstances raised by a particular case(see, the cases of the Constitutional Court no. KI145/19, KI146/19, KI147/ 19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 80; and the ECtHR case of *Mirovni Inštitut v. Slovenia*, paragraph 44, and references used therein).

69. Therefore, and in conclusion, the Court, considering that (i) the fact that the Applicants did not expressly request a hearing at the level of the Appellate Panel, does not imply that they implicitly waived this right, especially considering that the latter have not filed an appeal before the Appellate Panel and also that the absence of this request does not exempt the Appellate Panel from the obligation to assess the necessity of a hearing; (ii) despite the Applicants' specific request for a hearing before the Specialized Panel, such a hearing was not held and, consequently, the standards applicable to the necessity of holding a hearing before the Appellate Panel are more stringent because, in principle, the parties are entitled to a hearing at least before a court instance; (iii) the cases under review before the Appellate Panel cannot be qualified either as exclusively legal matters or as matters of a technical nature, but rather as matters of fact and law; (iv) the Appellate Panel assessed how the lower instance , namely the Specialized Panel made the assessment of the facts, by modifying its Judgment to the detriment of the Applicants; and (v) the Appellate Panel did not justify the *"waiver of the hearing",* finds that in the present case there were no “exceptional circumstances to justify the absence of a hearing”, and consequently the challenged Judgment of the Appellate Panel, namely the Judgment [AC-I-13-0181-A0008] of

29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 dhe KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 81).

70. The Court also notes at the end that, given that it has already found that the challenged Judgment of the Appellate Panel is not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a hearing, considers that it is not necessary to consider the other allegations of the Applicants. The respective allegations of the Applicants should be examined by the Appellate Panel, in accordance with the findings of this Judgment. Furthermore, given that the Appellate Panel has full jurisdiction to review the challenged decisions of the Specialized Panel based on the applicable laws of the SCSC, it has the possibility to correct at the second instance the absence of a hearing in the first instance (see, the cases of the Constitutional Court no.KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 *Applicant Et-hem Bokshi and others*, cited above, paragraph 82).

71. The Court's finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the absence of a hearing, as explained in this Judgment, and does not in any way relate to nor does it prejudice the outcome of the merits of the case.

Conclusion

72. The Court has assessed the Applicants' allegations regarding the absence of a hearing in the circumstances of their case, as one of the guarantees determined through Article 31 of the Constitution in conjunction with Article 6 of the ECHR, by basing this assessment upon the case law of the ECtHR.

73. In this respect, the Court has initially elaborated on the general principles stemming from its case-law and that of the ECtHR, regarding the right to a hearing, by clarifying the circumstances in which such a hearing is necessary, based, *inter alia,* on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*. The Court has clarified, *inter alia,* that (i) the absence of a party's request for a hearing does not necessarily imply the waiver

of such a right and that the assessment whether the absence of such a request implies that a party has waived that right depends on the specifics of the law and the particular circumstances of a case: and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless *"there* are *exceptional circumstances that would justify the absence of a hearing",* which based on the case law of the ECtHR in principle relate to cases in which "*exclusively legal or highly technical matters"* are examined.

74. In the circumstances of the present case, the Court finds that (i) the fact that the Applicants have not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the SCSC; (iii) the Appellate Panel did not deal with "exclusively legal or highly technical matters", an consequently there are no "exceptional circumstances that would justify the absence of a hearing"; (iv) the Appellate Panel considered issues of "fact and law" in addition to modifying the Judgment of the Specialized Panel to the detriment of the Applicants; and (v) the Appellate Panel did not justify the "waiver of the oral hearing". Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely the Judgment [AC-I-13- 0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

75. The Court also stated that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, it has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the other allegations of the Applicants because they must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 27 January 2021, by majority of votes:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD there has been a violation of Article 31[Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE the Judgment [AC-I-13-0181-A0008] of the Appellate Panel of the Special Chamber of the Supreme Court, of 29 August 2019 invalid;

IV. TO REMAND the case to the Appellate Panel of the Special Chamber of the Supreme Court for retrial, in accordance with the findings of this Judgment;

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court by 26 July 2021;

VI. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI24/20, Applicant: "PAMEX SH.P.K.", Constitutional Review of Judgment Ae.nr.179/2017 of the Court of Appeals of Kosovo, of 11 November 2019.

KI24/209, Judgment of 3 February 2021, published on 24 February 2021

Key words: *individual referral, erroneous bank transfer, Law on Payment System, unreasonable decision*

The circumstances of the present case are related to a transaction of 21 June 2013, on behalf of the Applicant to a Chinese company, which was carried out by the Banka për Biznes in Prishtina. However, the latter had erroneously performed the transaction in euro and not in dollars, thus resulting in an additional payment of 17,436.85 euro, to the detriment of the Applicant, as a result of the difference in the exchange rate. Subsequently, based on the case file, it follows that the Applicant and the Bank had reached an agreement according to which (i) the part of the transfer performed erroneously would remain with the Chinese company, of which the Applicant would order additional goods; whereas (ii) the Bank would enable the Applicant an Overdraft Contract through which the Applicant would compensate the Bank for the disputed amount within a specified period.

At the beginning of 2015, the Applicant addressed the regular courts, not only requesting the return of the disputed amount but also the compensation of losses occurred a result of the actions of the Bank in question. The Basic Court in Prishtina rejected the claim of the Applicant as ungrounded, as it clarified that the disputable issues arising from the error that the Bank had made through the transaction of 21 June 2013, had been resolved upon the will of the parties through (i) a statement signed by the Applicant on 30 July 2013; and (ii) the Overdraft Contract signed on 31 July 2013. The Applicant challenged the findings of the Basic Court at the Court of Appeals, inter alia, stating the fact that the witness proposed by the Applicant was not heard in the Basic Court and requesting to assign a super expert assessment. Furthermore, the Applicant also alleged violation of the provisions of the Law on Payment System and more precisely Articles 33, 34, 41 and 53 thereof. The Court of Appeals, by the challenged Judgment had approved the findings of the Basic Court.

Before the Court, the Applicant alleged that the Judgment [Ae.nr.179/2017] the Court of Appeal, of 11 November 2019, was issued in violation of the Applicant's rights and fundamental freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights, due to lack of a reasoned judicial decision. The Applicant stated before the Court,

inter alia, that the Court of Appeals had failed to substantiate his allegations, in particular as regards (i) his request for the hearing of Witness A.B.; (ii) his request regarding a super expert assessment; and (iii) violations of Articles 33, 34, 41 and 53 of the Law on Payment System.

In addressing the allegations of the Applicant, the Court initially , based on the case law of the European Court of Human Rights, inter alia, emphasized the fact that the courts are obliged to reason the parties' allegations which are substantial or that can be decisive for the merits of a case. In this context, the Court also clarified that despite the fact that when courts with appellate jurisdiction uphold the decisions of lower courts, they are not obliged to reason every argument, they are nevertheless obliged to show sufficient consideration in reviewing the decision of the lower instance court. Moreover, in assessing a decision of a lower instance court, the higher instance court is also obliged to assess the allegations of the appeal of an applicant, and not just to assess whether the lower instance court has rightly assessed the relevant appeal claim before it.

In applying these standards in the present case, the Court found that when issuing the Judgment [Ae.nr.179/2017] of 11 November 2019, the Court of Appeals, in addition to the failure to reason the Applicant's allegations regarding super expert assessment and failure to hear certain witnesses, in its reasoning it did not include a single sentence regarding the allegations of the Applicant for violation of the provisions of the Law on Payment System, as a substantial allegation of the Applicant. The above mentioned law, in its Article 53, stipulates, among other things, that no agreement in writing between a customer and a payment institution may contain any provision that constitutes a waiver of any right conferred or cause of action created by this Law. Based on the assessment of the Court, silence of the Court of Appeals regarding such substantial and decisive allegations of the Applicants does not meet the standards of a reasoned court decision, as guaranteed by the Constitution and the European Convention on Human Rights.

As a result, the Court found that the above mentioned Judgment of the Court of Appeals is incompatible with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, due to the lack of a reasoned judgment, and consequently must be declared invalid, and remanded for retrial to the Court of Appeals.

JUDGMENT

in

Case no. KI24/20

APPLICANT

"PAMEX SH.P.K."

Constitutional review
of the Judgment Ae.no.179/2017 of the Court of Appeals of Kosovo
of 11 November 2019

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by "PAMEX SH.P.K.", with owner Vllaznim Shemsedini from the Municipality of Ferizaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [Ae.no.179/2017] of 11 November 2019 of the Department of Economic Affairs of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) regarding the Judgment [III.EK.nr.201/15] of 25 May 2017 of the Department of Economic Affairs of the Basic Court in Prishtina (hereinafter: the Basic Court).

Subject matter

3. The subject matter of the case is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 (Processing Referrals) and 47 (Individual Requests) of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 29 January 2020, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral, which he submitted by mail on 27 January 2020.

6. On 30 January 2020, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban.

7. On 11 February 2020, the Court notified the Applicant and the Court of Appeals of the registration of the Referral. The Court also requested

the Applicant to inform the Court whether he had filed a revision against the challenged Judgment with the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) and if not, to clarify the reasons for non-exercise of this remedy.

8. On 20 February 2020, the Court received the Applicant's letter, delivered by mail on 18 February 2020, informing the Court that he had not appealed against the challenged Judgment to the Supreme Court, arguing that they (i) had filed a request for protection of legality in the State Prosecutor's Office because *"from previous experiences we know that the State Prosecutor's Office responds to these requests in a record time";* and (ii)*"through the revision, we did not have the legal opportunity to invoke constitutional violations and we knew that* the submission of the Revision will have many delays from the response of the Supreme Court".

9. On 11 January 2021, the Court requested from the Basic Court the complete case file.

10. On 14 January 2021, the Basic Court submitted the complete case file to the Court.

11. On 3 February 2021, the Review Panel considered the report of the Judge Rapporteur and by a majority recommended to the Court the admissibility of the Referral.

12. On the same day, the Court by a majority found that (i) the Referral is admissible; and that (ii) Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals is not in accordance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of the facts

13. On 21 June 2013, the Applicant requested from Banka për Biznes (Bank for Business) in Prishtina (hereinafter: the Bank) to transfer the amount of USD 76,210.00 to Shangshu Mingjia Kintting Co. Ltd. Guli Town Changshu Jiangsu from China (hereinafter: the Chinese company). The Bank had made the transfer of the respective payment, but made the same in euros and not in dollars, thus resulting in an additional payment of 17,436.85 euros or 23,290.00 dollars (hereinafter: the disputed amount), to the detriment of the Applicant as a result of exchange rate differences.

14. On 22 July 2013, the Bank sent the Applicant a confirmation of the payment dated 21 June 2013, explaining the mistake made by the Bank during the transfer of payment to the Chinese company. The confirmation in question also clarifies that the procedure for the return of the disputed amount by the Chinese company was suspended by the Bank, as the Applicant had agreed with the Chinese company to receive goods from the Chinese company in the value of the disputed amount. This confirmation was also signed by the Applicant.

15. On 30 July 2013, the Applicant signed a statement stating that he had requested the Bank to allow him an overdraft of 22,000.00 euros, out of which the Applicant would compensate the Bank for the technical error made by the Bank's payment officers, while the amount allowed for overdraft, would be paid according to the agreement reflected in this statement.

16. On 31 July 2013, the Applicant and the Bank had signed a Contract [No. KO413/498] for Overdraft for Legal Entities (hereinafter: Overdraft Contract), through which the Applicant is obliged to pay the disputed amount to the Bank within a certain deadline.

17. On 17 March 2015, the Applicant filed a claim to the Basic Court in Ferizaj against the Bank, requesting (i) the return of funds in the disputed amount, which were transferred on 21 June 2013 to the Chinese company by mistake by the Bank; (ii) compensation for losses incurred as a result of this transfer; and (iii) reimbursement of other expenses as a result of the Bank's actions.

18. On 17 April 2015, the Basic Court in Ferizaj declared itself incompetent to review the claim and transferred the case to the Basic Court.

19. On 12 May 2016, the Bank filed a response to the claim requesting the Basic Court to reject the Applicant's claim as unfounded, stating that (i) the Applicant did not request the termination of the transfer and return of funds, but *"has stated that for the difference of funds from USD to EURO, he will receive goods from the supplier who had only planned such a thing earlier";* (ii) consequently, the Applicant owed the Bank the disputed amount, therefore through the statement of 30 July 2013, has admitted that "t*he amount of the difference is the obligation of the claimant, while begging the respondent to issue a loan in the form of OVD for the debt from the difference in question";* and (iii) the Applicant has had the request approved and the Overdraft Contract signed.

20. On 26 May 2016, the Applicant addressed the Basic Court with a letter clarifying the claim, through which, he specified that (i) the Bank had notified the Applicant of the error made during the transfer only on 22 July 2013, respectively one month after erroneously making the transfer; (ii) the Bank "*has never sent a written or stamped confirmation that it is making an advance payment for the transfer recipient in China";* (iii) the Bank has tried to unilaterally resolve the issue by blocking his bank accounts *"without warning";* (iv) on 4 July 2013 and 5 July 2013, respectively, had deposited on his accounts 15,000 euros and *"these funds were withdrawn by the respondent without the signature and authorization of the claimant"*; (v) the Bank had made possible for him an overdraft of up to 20,000 euro, however "*the respondent withdrew from this amount the overpaid funds and informed the claimant that he can no longer withdraw funds from this allowed amount";* (vi) on 28 April 2014, the Applicant, *"due to the financial difficulties already created",* had applied for a loan in the amount of 20,000.00 euros and *"in order to a satisfactory solution for both parties returns € 8,000.00 of the damage caused to him by the respondent",* while on 13 May 2014, a new loan was signed in the amount of 19,600.00 euros; and (vii) due to inability to make international transfers through the bank, *"Kosovo Customs re-evaluated the goods imported from Turkey in the amount of € 5,200.00, funds which it had to pay more"*.

21. Based on the case file, respectively the minutes of the sessions held before the Basic Court (i) on 15 September 2016, it results that the respondent, respectively the Bank, proposed the hearing of witnesses M.N. and S.Sh., while the Applicant proposed the hearing of witness A.B. and assignment of expertise with financial expert R.B. By Decision, the Basic Court approved the Applicant's proposal for assignment of expertise by the proposed expert, stating that the same, *"if necessary"*, will also hear witnesses proposed by the parties; and (ii) on 12 May 2017, a Decision on the Administration of Evidence was issued, which the Applicant received, inter alia, stating that he agrees with the findings of the financial expert who also took into account his remarks; and there are no objections to the proposed evidence.

22. On 15 February 2017, expert R.B. had submitted his financial expertise to the Basic Court. This expertise states, inter alia, that (i) despite the fact that there is no data on whether the Applicant received the goods from the Chinese company, and consequently whether he was damaged in the amount of 76,212.00 euros and the amount erroneously transferred by the Bank in the amount of 17,436.68 euros, the Bank is responsible only for the latter; (ii) according to the

agreement between the parties, the disputed amount has not been suspended, but the Applicant and the Bank have signed the Overdraft Contract of 31 July 2013 and the Applicant has agreed to compensate the Bank for the contested amount, initially in the amount of 12,000.00 euros, while the remaining part of 5,436.85 euros, no later than 15 August 2013; (iii) the total remaining liability of the Applicant to the Bank until 8 August 2016 is 13,201.72 euros; and (iv) the fine of Kosovo Customs, in the case of revaluation of goods, is not related to the issue of disputed transfer.

23. On 25 May 2017, the Basic Court by Judgment [III.EK.nr.201/15] rejected the Applicant's claim as unfounded. The Basic Court, by the above Judgment, stated, inter alia, that it was not disputed that the Bank had erroneously transferred the disputed value to the Chinese company, but it was disputed whether the respondent, namely the Bank, owed the disputed amount to the claimant, respectively the Applicant. The Basic Court reasoned that this is not the case, based on (i) the statement signed by the Applicant on 30 July 2013; and (ii) the Overdraft Contract signed the next day, 31 July 2013, whereby he undertook to pay the disputed amount to the Bank, having agreed with the Chinese company to accept goods in exchange for the disputed amount. The Basic Court also stated that it could not establish the fact whether the Applicant actually received the goods from the Chinese company, but for the Basic Court only the legal relationship between the claimant and the respondent and the fact that the claimant, respectively the Applicant, voluntarily undertook to compensate the disputed amount to the respondent, namely the Bank.

24. On 15 June 2017, against the above Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals. The Applicant, through this appeal, inter alia, alleged that the Basic Court through its Judgment (i) erroneously found that he had confirmed that the Bank should terminate the procedure for the return of funds by the Chinese company; (ii) erroneously found that the Applicant had acknowledged that the signature on the statement of 30 July 2013 was his; (iii) did not take into account the request for a witness to be heard in this matter, employed by the Bank, respectively A.B.; and (iv) did not take into account the violations of Law no. 04/L-155 on Payment System (hereinafter: the Law on Payments), respectively Article 33 (Authorization of transfers), paragraph 1 of Article 34 (Erroneous payment orders), sub-paragraph 1.2.1 of Article 41 (Circumstances where customer is not liable) and paragraph 1 of Article 53 (Waiver of rights and greater protection) thereof. The Applicant also requested the Court of Appeals to conduct a "super expertise by an independent

expert". On 27 June 2017, the Bank filed a response to the appeal, challenging the Applicant's allegations and proposing to the Court to reject the respective appeal as unfounded, upholding the Judgment of the Basic Court.

25. On 11 November 2019, the Court of Appeals by Judgment [Ae.nr. 179/2017], rejected as unfounded the Applicant's appeal and upheld the Judgment [III.EK.nr.201/15] of 25 May 2017 of the Basic Court. The Court of Appeals noted (i) the confirmation of 22 July 2013 signed by the Applicant; (ii) the statement of 30 July 2013 signed by the Applicant; and (iii) the Overdraft Contract signed on 31 July 2013 which the Contracting Parties had voluntarily signed, and in this case, the Applicant had waived the return of the funds erroneously paid in exchange for the additional goods.

26. On 11 December 2019, before the Chief State Prosecutor's Office, the Applicant had submitted a proposal to initiate a request for protection of legality against the above Judgment of the Court of Appeals.

27. On 17 December 2019, the Chief State Prosecutor's Office through Notification [KML.nr.195/2019] informed the Applicant that his proposal to initiate a request for protection of legality against the Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals was rejected on the ground that the allegations submitted were not sufficient because no "r*easoning regarding the erroneous application of any concrete provision of substantive law" was submitted* in the sense of point b) of paragraph 1 of Article 247 [without title] of Law no. 03/L-006 on Contested Procedure (hereinafter: LCP).

Applicant's claims

28. The Applicant claims that Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals in conjunction with Judgment [III.EK.nr.201/15] of 25 May 2017 of the Basic Court, have been rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a due process) of the ECHR.

29. Regarding the alleged violations of the abovementioned Articles of the Constitution and the ECHR, the Applicant, in essence, alleges the lack of a reasoned court decision. In this regard, the Applicant states that the Court of Appeals has failed to substantiate its substantive

allegations as follows: (i) violations of Articles 33, 34, 41 and 53 of the Law on Payments; (ii) his request for the hearing of Witness A.B., a senior officer at the Bank, through which, according to the Applicant, it would be proved that he did not request the suspension of the procedure for the return of the disputed amount by the Chinese company; (iii) its request for super expertise; and (iv) objecting to the signing of the statement of 30 July 2013. The Applicant also disputes the bias of Judge F.I. who has remanded his case to the Basic Court.

30. Finally, the Applicant requests the Court to (i) declare his Referral admissible; and (ii) quash Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals in conjunction with Judgment [III.EK.nr.201/15] of 25 May 2017 of the Basic Court, remanding his case for retrial to another trial panel.

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 power.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]"

European Convention on Human Rights Article 6
(Right to a fair trial)

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

Law No. 04/L-155 on Payment System
Article 33

(Authorization of transfers)

1. A fund transfer is considered to be authorized only if the sender has given consent to execute such transfer.
2. Consent to execute a fund transfer or a series of transfers shall be given in the form agreed between the parties.
3. In the absence of such consent, a transfer shall be considered to be unauthorized.
4. If a payment institution and its customer have agreed that the authenticity of payment orders issued to the payment institution in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving institution is effective as the order of the customer, whether or not authorized, if:
- *4.1. the security procedure is reasonable method in aspect of commercial provision of security against unauthorized payment orders; and*
- *4.2. the institution proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The institution is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the institution a reasonable opportunity to act on it before the payment order is received.*

[...]

Article 34
(Erroneous payment orders)

1. Where a payment order is initiated by the payer, payer's payment institution shall be liable to the payer for correct execution of the payment transaction, unless the payment institution can prove that the error was made by the payer, or the payment institution can prove to the payer and, where relevant, to the payee's payment institution, that the payee's payment institution correctly received the payment transaction,

in which case, the payee's payment institution shall be liable to the payee for the correct execution of the payment transaction.

[...]

Article 41
(Circumstances where customer is not liable)

1. A customer shall not be liable for loss:

1.1. not attributable to or not contributed by the customer;

1.2. caused by the fraudulent or negligent conduct of officers of or agents appointed by:

1.2.1 the institution;

1.2.2. companies and other institutions involved in networking arrangements; or

1.2.3. merchants who are linked to the card or other communication system.

1.3. relating to a card that is forged, faulty, expired; or

1.4. occurring before the customer has received his card or security access code.

2. Where any dispute arises in relation to a customer's card, it is to be presumed that the customer did not receive the card, unless the institution can prove otherwise.

Article 53
(Waiver of rights and greater protection)

1. No agreement in writing between a customer and a payment institution may contain any provision that constitutes a waiver of any right conferred or cause of action created by this Law.

2. Nothing in this Law shall prohibit any agreement, which grants a customer more extensive rights, or remedies or greater protection than those contained in this Law.

Assessment of the admissibility of the Referral

31. The court initially examines whether the admissibility criteria set out in the Constitution and further specified in the Law and the Rules of Procedure have been met.

32. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulate:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

33. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which stipulates:

> *"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."*

34. In addition, the Court also examines whether the Applicant has met the admissibility criteria as set out in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

> Article 47
> (Individual Requests)
>
> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*
>
> Article 48
> (Accuracy of the Referral)
>
> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*
>
> Article 49
> (Deadlines)
>
> *"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which*

the claimant has been served with a court decision ... ".

35. In this regard, the Court first notes that the Applicant has the right to file a constitutional complaint, citing alleged violations of his fundamental rights and freedoms, which apply to individuals and legal entities. (See Court case KI41/09, Applicant *AAB-RIINVEST University L.L.C.,* Resolution on Inadmissibility of 3 February 2010, paragraph 14; KI35/18, with Applicant "*Bayerische Versicherungsverbrand",* Judgment of 11 December 2019, paragraph 40; and KI227/19, with Applicants *N.T. "Spahia Petrol",* Judgment of 20 December 2020, paragraph 37).

36. Whereas, regarding the fulfilment of other admissibility criteria set out in the Constitution and Law and elaborated above, the Court emphasizes that the Applicant is an authorized party who challenges an act of a public authority, namely Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms that he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

37. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure and that it cannot be declared inadmissible on the basis of the conditions set out 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 grounds, as set out in paragraph (2) of Rule 39 of the Rules of Procedure, and must therefore be declared admissible and its merits examined.

Merits

38. The Court recalls that the circumstances of the present case are related to a transaction of 21 June 2013, on behalf of the Applicant to a Chinese company, which was carried out by the Bank. However, the latter had erroneously conducted the transaction in Euros and not in Dollars, thus resulting in an additional payment of 17,436.85 euros, to the detriment of the Applicant, as a result of the exchange rate difference. Subsequently, based on the case file, it appears that the Applicant and the Bank had reached an agreement under which (i) part of the erroneously transferred transfer would remain with the Chinese company, from which the Applicant would order additional goods; whereas (ii) the Bank would enable the Applicant an Overdraft

Contract through which the Applicant would reimburse the Bank for the contested amount within a specified period. It appears from the case file that there is no data on whether the Applicant received the goods ordered by the Chinese company.

39. At the beginning of 2015, the Applicant addressed the regular courts, not only requesting the return of the disputed amount but also the compensation of the losses caused, as a result of the actions of the respective Bank, the Basic Court had ordered an expertise which had ascertained that the only contentious issue in the circumstances of this case is the damage that may have been caused to the Applicant as a result of the Bank's error. The expertise had analysed the chronology of the Bank and the Applicant's actions and found that the Applicant had additional obligations to the Bank in the amount of 13,201.72 euros. The Basic Court rejected the Applicant's claim as unfounded, as it had clarified that the disputed issues arising from the error that the Bank had made through the transaction of 21 June 2013, had been resolved at the will of the parties through (i) the statement signed by the Applicant on 30 July 2013; and (ii) the Overdraft Contract signed on 31 July 2013. The Applicant challenged the findings of the Basic Court in the Court of Appeals, mainly regarding the erroneous assessment of the facts, inter alia, emphasizing the fact that the witness proposed by him was not heard in the Basic Court and requesting the appointment of a super expert. Furthermore, the Applicant also alleged a violation of the provisions of the Law on Payment System and more precisely, Articles 33, 34, 41 and 53 thereof. The Court of Appeals, through the challenged Judgment had approved the findings of the Basic Court. Subsequently, the Chief State Prosecutor's Office also rejected the Applicant's proposal to initiate a request for protection of legality against the Judgment of the Court of Appeals. Before the Court, the Applicant alleges that this Judgment, respectively Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals has been rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a due process) of the ECHR, due to the lack of a reasoned court decision. As explained above, the Applicant before the Court states that the Court of Appeals has failed to substantiate its allegations, in particular as regards (i) his request for the hearing of witness A.B.; (ii) his request for super expertise; and (iii) violations of Articles 33, 34, 41 and 53 of the Law on Payments.

40. These allegations of the Applicant will be examined by the Court based on the case law of the European Court of Human Rights (hereinafter:

ECtHR), in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, and onwards, the Court will examine the Applicant's allegations regarding the lack of a reasoned decision, an assessment in which the Court will first (i) elaborate on the general principles; and thereafter, (ii) will apply the same to the circumstances of the present case.

(i) General principles regarding the right to a reasoned court decision

41. With regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case law. This practice is built on the case law of the ECtHR, including but not limited to cases *Hadjianastassiou v. Greece,* Judgment of 16 December 1992; *Van de Hurk v. the Netherlands,* Judgment of 19 April 1994; *Hiro Balani against Spain,* Judgment of 9 December 1994; *Higgins and others v. France,* Judgment of 19 February 1998; *Garcia Ruiz v. Spain* Judgment of 21 January 1999; *Hirvisaari v. Finland,* Judgment of 27 September 2001; *Suominen v. Finland,* Judgment of 1 July 2003; *Buzescu v. Romania,* Judgment of 24 May 2005; *Pronina v. Ukraine,* Judgment of 18 July 2006; and *Tatishvili v. Russia,* Judgment of 22 February 2007. Furthermore, the basic principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, with Applicant *Naser Husaj,* Judgment of 9 June 2017; KI97/16, with Applicant "*IKK Classic",* Judgment of January 9, 2018; KI143/16, with Applicant *Muharrem Blaku and others,* Resolution on Inadmissibility of 13 June 2018; KI24/17, with Applicant *Bedri Salihu,* Judgment of 27 May 2019; KI35/1S, with Applicant *"Bayerische Versicherungsverbrand",* cited above; and KI227/19, with Applicant *N.T. "Spahia Petrol",* cited above, paragraph 45.

42. In principle, based on the case law of the ECtHR, the guarantees embodied in Article 6 of the ECHR include the obligation for courts to provide sufficient reasons for their decisions. (See ECtHR case, *H. v. Belgium,* Judgment of 30 November 1987, paragraph 53; also for more details on the right to a reasoned court decision, see the ECtHR Guide to Article 6 of the ECHR of 31 August 2020, Right to a fair trial (civil limb), IV. Procedural Requirements, 7. Reasons of Court Judgments, paragraphs 371 to 382 and references used therein). A

reasoned decision shows to the parties that their case has indeed been heard, and consequently contributes to a greater admissibility of the decisions. (See ECtHR case *Magnin v. France,* Decision of 10 May 2012, paragraph 29). This case law also stipulates that despite the fact that a court has a certain discretion regarding the selection of arguments and evidence, it is obliged to justify its activities and decision-making by giving the relevant reasons. (See ECtHR cases: *Suominen v. Finland,* cited above, paragraph 36; *Carmel Saliba v. Malta,* Judgment of 24 April 2017, paragraph 73; see also the Court case, KI227/19, with Applicant N.T. *Spahia Petrol* cited above, paragraph 46). Furthermore, the decisions must be reasoned in such a way as to enable the parties to exercise effectively any existing right of appeal. (See ECtHR case, *Hirvisaari v. Finland,* cited above, paragraph 30).

43. That said, Article 6 of the ECHR obliges courts to give reasons for their decisions, but this does not mean that a detailed answer is required on each argument. (See ECtHR cases *Van de Hurk v. The Netherlands,* cited above, paragraph 61; *Garcia Ruiz v. Spain* cited above, paragraph 26; *Jahnke and Lenoble v. France,* Decision of 29 August 2000; *Perez v. France,* Judgment of 12 February 2004, paragraph 81; and see also the Court case, KI227/19, with Applicant *N.T. "Spahia Petrol",* cited above, paragraph 47). The extent to which this obligation applies may change depending on the nature of the decision and should be determined in the light of the circumstances of each case. (See ECtHR cases: *Ruiz Torija v. Spain,* Judgment of 9 December 1994, paragraph 29; *Hiro Balani v. Spain,* cited above, paragraph 27; and see also the Court case, KI227/19, with Applicant *N.T. "Spahia Petrol",* cited above, paragraph 47). An appellate court, for example, may, in principle, reject an appeal by upholding the reasons for the lower court's decision, however even such a decision must contain sufficient reasoning to show that the relevant court has not upheld the findings reached by a lower court without sufficient consideration. (See, inter alia, the ECtHR case, *Tatishvili v. Russia,* cited above, paragraph 62; see also the Court case, KI227/19, with Applicant *N.T. "Spahia Petrol",* cited above, paragraph 47).

44. However, based on the case law of the ECtHR, courts are required to consider and provide specific and clear answers regarding (i) the substantive allegations and arguments of the party (see ECtHR cases, *Buzescu v. Romania,* cited above, paragraph 67; and *Donadze v. Georgia,* Judgment of 3 March 2006, paragraph 35); (ii) allegations and arguments that are decisive for the outcome of the proceedings

(see, ECtHR cases: *Ruiz Torija v. Spain,* cited above, paragraph 30; and *Hiro Balani v. Spain,* cited above, paragraph 28); or (iii) claims relating to the rights and freedoms guaranteed by the Constitution and the ECHR. (See the ECtHR case, *Wagner and JMWL v. Luxembourg,* Judgment of 28 June 2007, paragraph 96 and references therein; and also see the Court case, KI227/19, with Applicant N.T. *Spahia Petrol* cited above, paragraph 48).

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

45. The Court first recalls that the Basic Court through Judgment [III.EK.nr.201/15] rejected the Applicant's claim as unfounded. The Court of Appeals, through the challenged Judgment, upheld the findings of the lower Court, emphasizing "*the will of the parties"* to resolve the relevant dispute, recalling in particular (i) the confirmation dated 22 July 2013 signed by the Applicant; (ii) the statement of 30 July 2013 signed by the Applicant; and (iii) the Overdraft Contract signed on July 31, 2013. However, based on the case file, before the Court of Appeals, through the Applicant's appeal, among other things, three specific allegations were raised, including (i) violation of the applicable law, namely Article 33, paragraph 1 of Article 34, sub-paragraph 1.2.1 of Article 41 and paragraph 1 of Article 53 of the Law on Payment System; (ii) request for a super expert; and (iii) failure to hear witnesses proposed by him at the level of the Basic Court. Before the Court, the Applicant states that none of these allegations have been addressed by the Court of Appeals, alleging, consequently, a violation of his right to a reasoned court decision, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

46. The Court recalls that based on the case law of the ECtHR, courts with appellate jurisdiction, as is the case in the circumstances of the present case, are obliged to give reasons for their decisions, but this does not mean that a detailed answer is required regarding each argument. They may, in principle, reject an appeal by upholding the reasons for the lower court's decision. The Court notes that in the circumstances of the present case, the Court of Appeals rejected the Applicant's appeal, approving the position and reasoning of the Basic Court. Having said that, based on the same case law, such decisions must also contain sufficient reasoning to show that the relevant court, in this case the Court of Appeals, has not upheld the findings reached by a lower court, namely the Basic Court, without sufficient consideration. (See the Court case, KI227/19, with Applicant *N.T. "Spahia Petrol",* cited above, paragraph 54 and references used therein).

47. With regard to the sufficient consideration to be shown by the courts of appellate jurisdiction when approving the decisions of the lower courts and the necessary measure of reasoning for the court decision in such circumstances, the Court recalls the ECtHR case *Tatishvili v. Russia* (Judgment of 22 February 2007), in which the ECtHR reviewed a case related to an Applicant's application for registration of residence. All the administrative instances and the respective courts had rejected the Applicant's allegations. (For case facts see paragraphs 7 to 19 of the ECtHR case *Tatishvili v. Russia,* cited above). The ECtHR found, inter alia, a violation of Article 6 of the ECHR due to the lack of a reasoned court decision and the violation of the right to a fair trial, because the relevant court which was responsible for reviewing the lower court decision, simply, in summary and without sufficient consideration, had upheld the reasoning of the lower court, without addressing the relevant allegations of the Applicant, thus failing to correct the shortcomings of the previous decision. (For the relevant reasoning, see paragraphs 55 to 63 of the ECtHR case *Tatishvili v. Russia,* cited above).

48. To determine whether, in the circumstances of the present case, the reasoning given by the Court of Appeals meets the standards of a reasoned court decision, respectively reflects sufficient consideration in evaluating the decision of the lower court, based on the general principles of case law of the Court and the ECtHR, as discussed above, the Court recalls the reasoning of the Court of Appeals in the challenged Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals, which states the following:

> *"This court considers that the court of first instance has correctly applied the substantive law after the claimant and respondent have resolved the disputed matter between them and based on their free will they have formalized it with the Overdraft Contract no. K0413/498, dated 31.07.2013. From the submission of the respondent (confirmation for the payment of 21.06.2013) dated 22.07.2013, which was signed by the claimant, it derives that the claimant was notified of the proceedings and did not request the return of the transferred funds, therefore the respondent with the consent of the claimant has stopped the procedure of return of funds from the beneficiary. After that, the claimant has given the statement dated 30.07.2013, a copy of which (signed by the claimant) is found in the case file, whereby he accepts the agreement to regulate the issuance of the transfer. [...]*
> *The claimant in the lawsuit claims the return of the erroneously transferred funds and the compensation of the damage, but*

voluntarily gave up the return of those funds and with no evidence failed to argue that he suffered damage as a result of the erroneous transfer by the respondent."

49. Based on the above reasoning of the Court of Appeals, the Court notes that the same rejection of the Applicant's allegations submitted through the respective appeal and consequently, the approval of the Judgment of the lower court, is based mainly on (i) "*free will"* of the parties to formalize the Overdraft Contract; and (ii) "*will"* of the Applicant to waive the return of those funds, namely the funds which were initially erroneously transferred by the Bank as a result of exchange rate differences, under the conditions set out in the relevant statement. The Court notes, however, that in the reasoning of the Court of Appeals, there is no reference or reasoning regarding the Applicant's allegations regarding the failure to hear the witnesses proposed by him at the Basic Court level, the super-expertise nor the alleged violation of the provisions of the Law on Payment System, an issue which the Applicant had specifically raised before the Court of Appeals.

50. The Court emphasizes that the Law on Payment System devotes a special chapter, namely Chapter III, to unauthorized and erroneous transfers of funds, defining the rights of customers, if such banking transactions occur. Insofar as it is relevant to the circumstances of the present case (i) in Article 33 thereof, the above Law defines, inter alia, transfers that are considered unauthorized, specifying that a transfer of funds is considered authorized only if the sender has given consent for execution of such transfer; (ii) in its Article 34, the above Law regulates the issues of erroneous payment orders and the respective responsibility of the payment institution, where among other things it is specified that when a payment order is initiated by the payer, the payment institution is responsible to the payer for the correct execution of payment transaction; while (iii) in its Article 41, the above Law lists the circumstances in which the customer is not liable for damages caused as a result of unauthorized transfers, including cases where such damage is caused by the negligence of officials of institutions.

51. Moreover, and most importantly in this case, Article 53 of the Law on Payment System, defines the manner of waiving the rights and greater protection of customers, specifying that *"No agreement in writing between a customer and a payment institution may contain any provision that constitutes a waiver of any right conferred or cause of action created by this Law."* The same article also stipulates that

nothing in this law, namely the Law on the Payment System, shall prohibit any agreement, which grants a customer more extensive rights, or remedies or greater protection than those contained in this Law.

52. In the circumstances of the present case, based on the case file, as assessed by the regular courts, it is not disputed that (i) on 30 July 2013, the Applicant signed a statement stating that he had requested from the Bank to allow overdraft of 22,000.00 euros, from which amount he would compensate the Bank, for the technical error made by the Bank's payment officers, while the amount allowed for overdraft, he would pay according to the agreement reflected in this statement; and (ii) on 31 July 2013, the Applicant and the Bank had signed an Overdraft Contract, through which the Applicant was obliged to pay the disputed amount to the Bank within a specified deadline.

53. The Court notes, however, that despite the fact that it may not be disputed that the agreement between the respective parties was reached of their own free will, as assessed by the Court of Appeals, Article 53 of the Law on Payment System, violation of which the Applicant specifically alleges before the Court of Appeals, expressly laying down restrictions on written agreements between the customer and the payment institution, so that the former are protected by the latter, stating that no agreement between the client and the payment institution may contain provisions whereby customers waive the rights guaranteed under the Law on Payment System.

54. The Court, although unable to assess whether the agreement reached between the Applicant and the Bank entails the waiver of any of the Applicant's rights, or even whether Article 53 of the Law on Payment System is applicable in the present dispute, nevertheless states that such an allegation, related to the violation of legal provisions, is substantial and may also be decisive, regarding the merits of the Applicant's claim.

55. The Court, based on its case law and that of the ECtHR, reiterates that Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the sense of a reasoned judicial decision, obliges the courts to reason (i) substantive claims and arguments of the party; (ii) claims and arguments that may be decisive for the outcome of the proceedings; or (iii) claims relating to the rights and freedoms guaranteed by the Constitution.

56. In the circumstances of the present case, the Applicant's allegations regarding the violation of certain provisions of the Law on Payment System are substantive allegations of the Applicant, and as such, burden the relevant court, in this case the Court of Appeals, with the obligation to address and justify the same. Despite this obligation, in the circumstances of the present case, beyond the failure to substantiate the allegations of the Applicant regarding the super-expertise and non-hearing of certain witnesses, the same in its reasoning did not include a single sentence regarding the allegations of the Applicant on violation of the provisions of the Law on Payment System.

57. The Court also notes that in assessing a decision of a lower court, the higher court is also obliged to assess the Applicant's appeals, and not just to assess whether the lower court has correctly assessed the relevant appeal before it. Furthermore, the Court also notes that the primary purpose of a reasoned court decision is to show the parties that their case has indeed been heard, thus resulting in a greater admissibility of court decisions. In this respect, it is not necessarily relevant whether the claims of the parties are meritorious for a case pending before a court. Depending on the nature of the case before it, the relevant court is obliged to address at least those allegations which are essential or determining the merits of a case.

58. The silence of the courts regarding the relevant allegations of the respective Applicants has been specifically examined through the case law of the ECtHR. For example, in the following cases: *Ruiz Torija v. Spain,* cited above and *Hiro Balani v. Spain,* cited above, the ECtHR, beyond the general principles regarding the right to a reasoned judicial decision, also addressed the circumstances in which the relevant courts had remained silent on the arguments, which the ECtHR deemed essential. In both cases, the ECtHR considered whether the silence of the relevant court could reasonably be interpreted as an implicit rejection of the parties' arguments. (See the ECtHR case, *Hiro Balani v. Spain,* cited above, paragraph 28). However, in the absence of proper reasoning, the ECtHR stated that it was impossible to ascertain whether the respective courts had simply neglected to deal with the respective claims or implied their rejection and, if that was its purpose, what were its reasons for such an approach. (See ECtHR cases: *Hiro Balani v. Spain,* cited above, paragraph 28; and *Ruiz Torija v. Spain,* cited above, paragraphs 29 and 30). In both cases, the ECHR found a violation of Article 6 of the ECHR.

59. In the circumstances of the present case, having regard to the fact that the Court of Appeals failed to address and substantiate the substantive allegations of the Applicant raised before it through the appeal against Judgment [III.EK.nr.201/15] of 25 May 2017 of the Basic Court, it is also impossible to ascertain whether the Court of Appeals simply neglected to deal with the relevant allegations or implied their rejection and, if that was its purpose, what were its reasons for such an approach. Such a court decision may not be compatible with the standards of a reasoned court decision, as set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the relevant case law of the Court and the ECtHR.

60. Therefore, taking into account the above observations and the procedure as a whole, the Court considers that the Judgment of the Court of Appeals, respectively the Judgment [Ae.no.179/2017] of 11 November 2019, was rendered in violation of the Applicant's right to a reasoned court decision, as an integral part of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because it failed to address the Applicant's substantive allegations regarding the violation of the applicable law, Articles 33, 34 and 41, and in particular, Article 53 of the Law on Payment Systems.

61. The Court also notes, finally, that it has already found that the challenged Judgment of the Court of Appeals is not in accordance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR and due to the lack of a reasoned court decision, it considers that it is not necessary to examine the Applicant's other allegations. The Applicant's respective allegations should be considered by the Court of Appeals, during the revision of its Judgment, (i) in relation to the Applicant's appeal filed before it; and (ii) the findings of this Judgment. In this regard, the Court also notes that its finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relate exclusively to the lack of reasoning of the court decision, as explained in this Judgment, and in no way correlate with or prejudice the outcome of the case merits.

Conclusions

62. The Court has examined the Applicant's allegations, applying on this assessment the case law of the Court and the ECtHR regarding the lack

of a reasoned court decision, a guarantee determined by Article 31 of the Constitution and Article 6 of the ECHR.

63. During this assessment, the Court found that in rendering the Judgment [Ae.no.179/2017] of 11 November 2019, the Court of Appeals has failed to substantiate the substantive allegations of the Applicant. The same did not substantiate in a single sentence the allegations of the Applicant regarding the violation of the provisions of the Law on Payment System.

64. The court, based on the case law of the ECtHR, emphasized, inter alia, the fact that courts are obliged to substantiate the claims of the parties that are substantial or that may determine the merits of a case. In this context, the Court also clarified that despite the fact that when courts with appellate jurisdiction uphold the decisions of lower courts, they are not obliged to reason each argument, they are nevertheless obliged to show sufficient consideration in assessing the lower degree decision. Moreover, in assessing a decision of a lower court, the higher court is also obliged to assess the applicant's appeal allegations, and not just to assess whether the lower court has rightly assessed the relevant appeal before it. In the circumstances of the present case, the Court, based on all the explanations given in this Judgment, considers that this is not the case.

65. Consequently, the Court found that the above Judgment of the Court of Appeals is not in accordance with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a reasoned court decision, and therefore should be declared void, and remanded for retrial to the Court of Appeals.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 21.4 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 3 February 2021, in majority:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO FIND that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6

[Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE void the Judgment of the Court of Appeals [Ae.no.179/2017] of 11 November 2019;

IV. TO REMAND the Judgment of the Court of Appeals [Ae.no.179/2017] of 11 November 2019, for revision in accordance with the Judgment of this Court;

V. TO ORDER the Court of Appeals to notify the Court, pursuant to Rule 66 (5) of the Rules of Procedure, by 2 August 2021, of the measures taken to implement the Judgment of the Court;

VI. TO REMAIN committed to this matter in accordance with this order;

VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI86/18, Applicant: Slavica Đordević, Constitutional review of Decision CA. No. 2093/2017 of the Court of Appeals, of 29 January 2018

KI86/18, Judgment, of 3 February 2021, published on 11 March 2021

Key words: *individual referral, right to fair and impartial trial, protection of property, right to legal remedies, admissible referral, violation of constitutional rights*

Based on the case files, it appears that in 1997, the Applicant had started the construction of a residential building in the construction plot no. 65 C, part of cadastral parcel no. 7140/1, in Prizren, works which later were interrupted as a result of the war in Kosovo. After 1999, the parcel in question was usurped by B.M. The latter had built two more floors over the existing construction of the residential building which was under construction started by Applicant, but had not managed to finish.

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

By the Decision of the Housing and Property Claims Commission was confirmed that the Applicant: (i) enjoys the right to use the property that is the main subject matter of the dispute in this case; and that (ii) the property in question must be restituted into her possession within 30 days after the Decision of the Housing and Property Claims Commission becomes final.

As the property in question had not been vacated by the person who had usurped it, the Applicant addressed the Municipal Court in Prizren with a claim that the property in question be returned to her into repossession. The Municipal Court in Prizren, by Judgment [C. no. 462/10] had approved the claim, a Judgment which was upheld by the District Court and the Supreme Court.

Following the completion of the above mentioned proceedings for confirmation of ownership before the regular courts, the Applicant filed a request for enforcement of Judgment [C. no. 462/10] of the Municipal Court, of 21 December 2011, a request that was approved by the Basic Court and the Court of Appeals. Regarding the enforcement of the Judgment of the Municipal Court, a construction company was appointed, which had set an amount of 19,495.42 Euros for the demolition of the floors that B.M. had built on the Applicant's property, after usurping it in 1999.

The Applicant had requested to be exempted from the payment of enforcement expenses, referring to her difficult financial situation and inability to pay the amount of 19,495.42 Euros. The Basic Court in Prizren rejected such a request on the grounds that since the debtor, B.M., had not deposited the necessary amount required for the execution of works related to the demolition of the building, on the grounds that it is a rule to pay in advance those expenses by the creditor, namely the Applicant in the circumstances of the present case. The Basic Court had requested a legal opinion from the Supreme Court as to how to act in the situation when the debtor does not pay the costs, while the creditor is not financially able to pay for them. The Supreme Court, referring to Article 13 of the Law on Enforcement Procedure, had stated that the expenses of the procedure related to the appointment and execution of the enforcement are paid in advance by the creditor, namely the Applicant in this case. Finally, the Basic Court based mainly on the legal opinion of the Supreme Court obliged the Applicant to pay the enforcement expenses in advance, stating that if she does not pay them then the Basic Court will suspend the proceedings in this case. This Decision of the Basic Court was upheld and considered fair by the Court of Appeals.

The Applicant, before the Court, challenges the last two decisions, the decision of the Basic Court and that of the Court of Appeals, respectively, which resulted in the suspension of the enforcement procedure.

The Applicant alleges that her constitutional rights guaranteed by Article 22 [Direct applicability of International Agreements and Instruments]; Article 24 [Equality before the Law]; Article 31 [Right to Fair and Impartial Trial]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo as well as the relevant articles of the European Convention on Human Rights, Article 6 paragraph 1 [Right to a fair trial]; Article 13 [Right to an effective remedy]; Article 1 of Protocol no. 1 of the ECHR [Protection of property]; Article 14 [Prohibition of discrimination], as well as the relevant articles of the Universal Declaration of Human Rights, namely Article 2, Article 8, Article 10 and Article 17, have been violated. The Applicant requested that her identity not be disclosed, without giving any specific reason for this request.

The Applicant, in essence, alleges that in relation to this case there is a final decision, namely Judgment P.nr.462/10 of the Basic Court in Prizren, of 21 December 2011, which became final on 19 May. 2012, and which has not yet been enforced despite ongoing efforts.

Regarding Article 46 of the Constitution, the Applicant alleges that the abandonment was due to the force majeure (vis major), and not by her voluntary actions. From that moment on, she has been objectively obstructed

from using her property, and after more than 19 years, she has been denied access to the property in question. According to her, due to the ineffective and inefficient work firstly of the Housing and Property Claims Commission, and thereafter of the regular courts, harmful consequences were created which the complainant as a property owner is suffering. By this, the institutional mechanisms for the protection of the inviolable right to property, guaranteed by the existing framework of legislation, are powerless to enable her access to property and protection of the peaceful enjoyment of property.

The Court in this case found that there are two final decisions, namely the decision of the Housing and Property Claims Commission, of 30 April 2005, regarding the right to use the property that is the subject matter of the dispute as well as Judgment P.br.462/10 of the Municipal Court, of 21 December 2011, which became final on 19 May 2012, whereby it ordered respondent B.M. to vacate the usurped property and restore it to previous condition by removing all works he performed on the property in question.

The Court found that the non-enforcement of the Decision of the Housing and Property Claims Commission, of 30 April 2005, and Judgment P. br. 462/10 of the Municipal Court, of 21 December 2011, as well as the suspension of the latter in enforcement proceedings by the Basic Court in Prizren by closing the enforcement procedure, in the case of the Applicant, constitutes a violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR.

The Court also concluded that the inability to take further legal action to enforce the Decision of the Housing and Property Claims Commission, of 30 April 2005, and Judgment P. br. 462/10 of the Municipal Court, of 21 December 2011, also constitutes violation of Articles 32 and 54 of the Constitution and Article 13 of the ECHR.

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

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

The Court rejected the request of the Applicant for non-disclosure of identity because the Applicant did not specify the reason regarding this request.

JUDGMENT

in

Case No. KI86/18

Applicant

Slavica Đordević

Constitutional review of Decision CA. No. 2093/2017 of the Court of Appeals, of 29 January 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Slavica Đordević (hereinafter: the Applicant), residing in Novi Sad, Serbia.

Challenged decision

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

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

Subject matter

4. The subject matter is the constitutional review of the Decision [CA. No. 2093/2017] of the Court of Appeals, of 29 January 2018, whereby the Applicant alleges that her constitutional rights guaranteed by Article

22 [Direct applicability of International Agreements and Instruments]; Article 24 [Equality before the Law]; Article 31 [Right to Fair and Impartial Trial]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution); as well as the relevant articles of the European Convention on Human Rights (hereinafter: ECHR), Article 6 paragraph 1 [Right to a fair trial]; Article 13 [Right to an effective remedy]; Article 1 of Protocol no. 1 of the ECHR [Protection of property]; Article 14 [Prohibition of discrimination], as well as the relevant articles of the Universal Declaration of Human Rights (hereinafter: UDHR), respectively Article 2, Article 8, Article 10 and Article 17, have been violated.

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

Legal basis

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

Proceedings before the Constitutional Court

7. On 18 June 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 16 August 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur. On the same day, the President of the Court appointed the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani (members).

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

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

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

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

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

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

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

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

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

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

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

Summary of facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

determination of the factual situation and erroneous application of the substantive law.

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

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

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

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

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

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

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

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

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

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

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

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

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

ungrounded, while it approved the claim for exemption from court expenses - court fees as grounded, due to the fact that the creditor is a pensioner and does not own real estate".

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

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

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

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

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

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

52. Unable to enforce the Judgments in her favour, due to F.M.'s refusal to satisfy his obligations deriving from the regular court decisions elaborated above, the Applicant filed another motion with the Basic

Court, whereby she had requested that F.M. be ordered to declare his movable and immovable property before the court.

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

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

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

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

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

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

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

60. On 6 April 2017, F.M. filed an appeal with the Court of Appeals against Decision I.br.1241/12 of the Basic Court in Prizren alleging fundamental violations of the provisions of the enforcement procedure and erroneous and incomplete determination of the factual situation.

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

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

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

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

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

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

65. On 29 January 2018, the Court of Appeals, by Decision [CA.nr.2093/2017] rejected the appeal as ungrounded and upheld the Decision [I.br.1241/12] of 27 February 2017 of the Basic Court. This Decision adds that: "the *creditor* [the Applicant] *has been exempted from the payment of court fees, while the* [Applicant's] *request for exemption from all procedural expenses under paragraph I of the relevant decision has been rejected as ungrounded* […] The creditor did not prove, *until the conclusion of this case in the first instance court nor in the proceedings of the appeal, that the preliminary obligations of the procedural expenses for the implementation of the*

enforcement in this enforcement case if the enforcement debtor has to pay, different from the legal basis of Article 13 of the LEP and the legal opinion of the Supreme Court of Kosovo that the relevant expenses in this enforcement case must be borne by the creditor, and after the completion of the enforcement, based on the legal basis of paragraph 4 of Article 13 of the same law, the debtor is obliged to compensate the creditor".

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

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

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

Applicant's allegations

69. The Applicant alleges that her rights guaranteed by Article 22 [Direct applicability of International Agreements and Instruments]; Article 24 [Equality before the Law]; Article 31 [Right to Fair and Impartial Trial]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property] of the Constitution, in conjunction with the relevant articles of the ECHR, namely Article 6 paragraph 1 [Right to a fair trial]; Article

13 [Right to an effective remedy]; Article 1 of Protocol no. 1 of the ECHR [Protection of property]; Article 14 [Prohibition of discrimination], as well as Articles 2, 8, 19 and 17 of the UDHR, have been violated by the decisions of the regular courts.

70. Regarding the violation of Article 31 of the Constitution, the Applicant states that in this case there is a final decision, namely Judgment P.br.462/10 of the Municipal Court in Prizren, of 21 December 2011, which became final on 19 May. 2012, and which has not yet been enforced despite ongoing efforts.

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

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

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

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

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

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

77. To substantiate her allegations regarding the violation of Article 31 of the Constitution, the Applicant refers to a number of decisions of the European Court of Human Rights, namely the case of *Pecev v. Former Yugoslav Republic of Macedonia*, Judgment of 6 November 2008, *Cvjetić v. Croatia*, Judgment of 26 February 2004; *Hiro Balani v. Spain*, of 9 December 1994; *Ziegler v. Switzerland*, Judgment of 21 February 2003; and *Teteriny v. Russia*, Judgment of 26 September 1994.

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

79. Regarding Article 46 of the Constitution, the Applicant alleges that, "*The abandonment was due to a serious violation of security, namely, the force majeure* (*vis major*), *and not by her voluntary actions. From*

that moment on, she has been objectively obstructed from using her property, and after more than 19 years, she has been denied access to the property in question. This fact was confirmed by the enforcement debtor himself during the statement at the Court that he has been using the property in question since 1999. Due to the ineffective and inefficient work of the HPD first, and then of the regular courts, harmful consequences were created which the complainant as a property owner is suffering. By this, the institutional mechanisms for the protection of the inviolable right to property, guaranteed by the existing framework of legislation, are powerless to enable her access to property and protection of the peaceful enjoyment of property".

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

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

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

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

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

84. Initially in his comments, the temporary representative states that in the land books, the Municipality of Prizren appears as the owner of the

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

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

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

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

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

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

Relevant legal provisions

LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE

Article 13
The costs of enforcement

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

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

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

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

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

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

Article 15

Fines in enforcement procedure

1. Fines provided by this article may be imposed through a court

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

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

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

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

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

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

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

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

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

10. The fine may be also sentenced and enforced against the

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

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

Article 16

Fines for delaying the enforcement

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

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

Article 292

Obligation for action which may be performed by anyone

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

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

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

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

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

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

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

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

2. If the debtor within deadline assigned by the enforcement body does not fulfill the obligation, the court upon proposal from

enforcement requester will act further according to the provisions of Article 15 and 16of this law.

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

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

Admissibility of the Referral

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

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

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[…]
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

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

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision…".

Rule 39
Admissibility Criteria

(1) The Court may consider a referral as admissible if:

(a) the referral is filed by an authorized party,
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,
(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant, and
(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

[…]

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

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

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

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

Merits of the Referral

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

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

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

99. In this regard, the Court recalls the fact that through the Decision of the HPCC was confirmed that the Applicant: (i) enjoys the right to use the property that is the main subject matter of the dispute in this case; and that (ii) the property in question must be restituted into her possession within 30 days after the Decision of the HPCC becomes final. As the property in question had not been vacated by the person who had usurped it, the Applicant addressed the Municipal Court in Prizren with a claim that the property in question be returned to her into repossession. The Municipal Court in Prizren, by Judgment [P.br.462/10] had approved the claim, a Judgment which was upheld by the District Court and the Supreme Court. Following the completion of the above mentioned proceedings for confirmation of ownership before the regular courts, the Applicant filed a request for enforcement of Judgment [P.br.462/10] of the Municipal Court, of 21 December 2011, a request that was approved by the Basic Court and the Court of Appeals. Regarding the enforcement of the Judgment of the Municipal Court, a construction company was appointed, which had set an amount of 19,495.42 Euros for the demolition of the floors that B.M. had built on the Applicant's property, after usurping it in 1999. The Applicant had requested to be exempted from the payment of enforcement expenses, referring to her difficult financial situation and inability to pay the amount of 19,495.42 Euros. The Basic Court in Prizren rejected such a request on the grounds that since the debtor, B.M., had not deposited the necessary amount required for the execution of works related to the demolition of the building, on the grounds that it is a rule to pay in advance those expenses by the creditor, namely the Applicant in the circumstances of the present case. The Basic Court had requested a legal opinion from the Supreme Court as to how to act in the situation when the debtor does not pay the costs, while the creditor is not financially able to pay for them. The Supreme Court, referring to Article 13 of the LEP, had stated that the expenses of the procedure related to the appointment and execution of the enforcement are paid in advance by the creditor, namely the Applicant in this case. Finally, the Basic Court based mainly on the legal opinion of the Supreme Court obliged the Applicant to pay the enforcement expenses in advance, stating that if she does not pay them then the Basic Court will suspend the proceedings in this case. This Decision of the Basic Court was upheld and considered fair by the Court of Appeals. The Applicant, before the Court, challenges the last two decisions, the decision of the Basic Court and that of the Court of Appeals,

respectively, which resulted in the suspension of the enforcement procedure.

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

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

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

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

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

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

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

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

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

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

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

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

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

110. The Court recalls that Judgment P. br.462/10 of the Municipal Court in Prizren, of 21 December 2011, whereby it ordered respondent B.M. to vacate the usurped property and restore it to its previous condition, by removing all the works he performed on the property in question, became final on 19 May 2012, after the District Court in Prizren through Judgment Ac.nr.114/12 rejected the appeal of B.M. and upheld the Judgment of the Municipal Court. Against these two Judgments, B.M. had filed a revision, which the Supreme Court had rejected as ungrounded.

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

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

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

114. The Court further states that it is the right of the dissatisfied party to initiate judicial proceedings in case of failure to realize an acquired right guaranteed by Article 31 of the Constitution, and Article 6 of the ECHR. It would be meaningless if the legal system of the Republic of Kosovo would allow a final court decision remain ineffective to the detriment of one party. Ineffectiveness of proceedings and non-

enforcement of decisions produce effects which bring us to situations that are not in accordance with the rule of law principle, a principle which the institutions of the Republic of Kosovo are obliged to respect (see *mutatis mutandis* , the case of the Court, KI 04/12, Applicant *Esat Kelmendi*, Judgment of 11 July 2012; case KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020, paragraph 126).

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

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

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

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

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

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

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

Article 32 [Right to Legal Remedies]

"Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law."

Article 54 [Judicial Protection of Rights]

"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated."

Article 13 of ECHR [Right to an effective remedy]
"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

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

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

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

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

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

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

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

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

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

129. Related to this, the Court refers to the case law of the ECtHR, which in case Klass v. Germany stated that "*where an individual considers*

himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 must be interpreted as guaranteeing an effective remedy before a national authority to everyone who claims that his rights and freedoms under the Convention have been violated" (See ECtHR, *Klass v. Germany*, Judgment of 6 September 1978, paragraph 64).

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

131. This position is in line with the practice of the Court, which in this case KI 94/13 stated that "*the inexistence of legal remedies or of other effective mechanisms for the execution of the Decision of [Municipal] Directorate affects the right to an effective legal remedy, as guaranteed by Articles 32 [Right to Legal Remedies], 54 [Judicial Protection of Rights] of the Constitution, and Article 13 of the ECHR. According to these provisions, each person has the right to use legal remedies against the judicial and administrative decisions, which violate his rights or interests as provided by law*" (see decision of the Constitutional Court: KI94/13, Applicants *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 16 April 2014, paragraph 90; see *mutatis mutandis, Voytenko v. Ukraine*, No. 18966/02, Judgment of 29 June 2004, paragraphs 46-48).

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

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

134. The Court therefore considers that it is intolerable that the Applicant – despite her efforts for more than twenty years – has not enjoyed the

rights recognized to her by the HPCC Decision of 30 April 2005 and Judgment P.br.462/10 of the Municipal Court, of 21 December 2011.

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

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

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

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

> "1. The right to own property is guaranteed.
>
> *2. Use of property is regulated by law in accordance with the public interest.*
>
> *3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*
>
> *[...]"*

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

> *1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the*

conditions provided for by law and by the general principles of international law

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

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

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

140. Whereas, regarding the rights guaranteed and protected by Article 1 of Protocol No. 1 of the Convention, the Court notes that the ECtHR has found that the right to property comprises of three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph (see, *mutatis mutandis* , ECtHR Judgment of 23 September 1982, *Sporrong and Lonnrot v. Sweden*, no. 7151/75; 7152/75, para. 61).

141. The three rules mentioned above are not, nevertheless, "distinct" in terms of being unrelated. Rules two and three deal with special cases of interference with the right to the peaceful enjoyment of property and

should therefore be interpreted in the light of the general principle laid down in the first rule (see, *mutatis mutandis* , ECtHR Judgment of 21 February 1986, *James and Others v. The United Kingdom*, no. 8793/79, paragraph 37).

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

143. The Court recalls that the ECtHR in this regard considers that, "*Genuine, effective exercise of the right protected by that provision does not depend merely on the State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions*." (see ECtHR Judgment of 30 November 2004, *Oneryildiz v. Turkey* , no. 48039/99, para. 134).

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

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

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

146. The Applicant alleges that from the time of the HPCC decisions which established that the Applicant enjoys the right to use the disputed

property, and then the decisions of the regular courts which were in her favour, she could not peacefully enjoy her property.

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

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

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

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

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

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

and will not apply the enforcement action described as in the enacting clause I of this decision".

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

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

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

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

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

158. The Court does not notice that the authorities have tried to find a solution for the Applicant, for example by allowing her access to her

property – even during the time when her property has not yet been restored to the previous condition.

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

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

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

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

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

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

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

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

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

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

Request of the Applicant for non-disclosure of identity

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

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

> *"(6) Parties to a referral who do not wish their identity to be disclosed to the public shall so indicate and shall state the reasons justifying such a departure from the rule of public access to information in the proceedings before the Court. The Court by majority vote authorizes non-disclosure of identity or grants it without a request from a party. When non-disclosure of identity is granted by the Court, the party should be identified only through initials or abbreviations or a single letter."*

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

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

Conclusion

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

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

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

FOR THESE REASONS

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

DECIDES

I. TO DECLARE the referral admissible;

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

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

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

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

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

VII. TO NOTIFY this Decision to the parties;

VIII. TO PUBLISH this Decision in the Official Gazette in accordance with

Article 20.4 of the Law;

IX. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI104/20, Applicant, Ejup Koci, Constitutional review of the proceedings before the Basic Court in Mitrovica – Branch in Skenderaj, regarding case C. No. 256/2018

KI104/20, Judgment of 22 March 2021

Keywords: individual referral, violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights

This case concerns the Applicant's lawsuit for confirmation of the boundary of the immovable property and confirmation of ownership as an occupied part. The Applicant alleged that the Basic Court was not taking any concrete action to resolve the case.
The Court considers that the Basic Court communicated constantly with the Applicant: (i) notifying him about the current status of his case, (ii) requesting the Applicant to specify the claim and pay the court fee; (iii) deciding that the opposing party be summoned to the hearing and finally (iv) exempting the Applicant from the court fee.
The Court notes that the review of the Applicant's case in the Basic Court was continuously accompanied by notification and procedural actions by the Basic Court. Based on the facts of the case, the Court notes that the last procedural action of the Basic Court in the present case was the Decision [C. No. 256/2018] of 28 September 2020, by which the Applicant was exempted from the court fee.
In these circumstances, the Court found that the Basic Court was not passive in relation to the Applicant's case.
Consequently, the Court concludes that the Applicant has not substantiated the allegation that the flow of the procedure on decision regarding his case resulted in the delay and non-resolution of the case within a reasonable time, guaranteed by Article 31.2 of the Constitution and Article 6.1 of the ECHR.
Therefore, the Referral was declared manifestly ill-founded on constitutional basis and was declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI104/20

Applicant

Ejup Koci

Constitutional review of proceedings in the Basic Court of Mitrovica- Branch in Skenderaj, with respect to the case C.no.256/2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Ejup Koci (hereinafter: the Applicant), residing in Skenderaj.

Challenged decision

2. The Applicant does not challenge any specific act of the public authorities. He challenges the length of the proceedings with respect to the trial of case C. no. 256/2018, which is ongoing in the Basic Court in Mitrovica – Branch in Skenderaj (hereinafter: the Basic Court).

Subject matter

3. The subject matter of the Referral is the constitutional review of the length of proceedings with respect to the trial of the case C.nr. 256/2018.

Legal basis

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

Proceedings before the Constitutional Court

5. On 30 June 2020, the Applicant submitted the Referral to the Court.

6. On 27 August 2020, the Applicant submitted an additional document.

7. On 6 July 2020, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur. On the same day, the President appointed the Review Panel composed of Judges: Arta Rama Hajrizi (presiding), Bekim Sejdiu and Selvete Gërxhaliu Krasniqi.

8. On 21 July 2020, the Court notified the Applicant about the registration of the Referral and sent a copy thereof to the Basic Court.

9. On 1 October 2020, the Applicant submitted to the Court several additional documents.

10. On 10 February 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. The Applicant is submitting a Referral to the Court for the fourth time.

12. In connection to the first Referral, on 8 September 2017, the Applicant filed the Referral KI109/17 with the Court, whereby he challenged the excessive length of the proceedings, namely the prolongation of the proceedings for deciding in the civil case [C.no.0355/2011], which related to the expropriation of immovable properties due to the construction of the inter-municipal road Skenderaj-Vushtrri. The Applicant, in that case, alleged that the regular courts violated his constitutional rights guaranteed by Articles: 22[Direct Applicability of International Agreements and Instruments], 23[Human Dignity] and 46 [Protection of Property] of the Constitution, as well as Article 6 [Right to a fair trial], in conjunction with Article 13 [Right to an effective remedy] of the ECHR. On 30 May 2018, the Court issued a Resolution on Inadmissibility no. KI109/17, whereby it concluded that the Applicant did not sufficiently prove his allegation for a violation of the fundamental rights guaranteed by the Constitution and the ECHR (namely the right to a fair trial, within reasonable time).

13. In connection to the second Referral, on 22 October 2018, the Applicant submitted the Referral no. Kl161/18 with the Court, whereby he challenged the Decision [Rev. No. 105/2018] of the Supreme Court alleging that his right of access to court was not respected, because the Court of Appeals and the Supreme Court did not take into consideration the evidence presented by him. In that case, the Applicant alleged that the regular courts violated his constitutional rights guaranteed by Articles: 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46[Protection of Property], 54 [Judicial Protection of Rights], 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, as well as Article 6 [Right to a fair trial] and Article 1 of Protocol no. 1, of the ECHR. On 23 July 2019, the Court declared the Referral inadmissible since the Referral was not submitted within the legal deadline.

14. In connection to the third Referral, on 17 April 2019, the Applicant submitted the Referral no.KI64/19, whereby he challenged the Decision [Cno. 204/2015] of the Basic Court. On 26 July 2019, the Applicant filed a request for withdrawal of Referral no. KI64/19. The Court, in this case, by referring to its case law, assessed that there are no convincing reason to proceed with the review of the Referral for constitutional review of the challenged Decision, despite the Applicant's request for withdrawal his Referral. On 25 September 2019, the Court approved the request for withdrawal of the Referral no. KI64 / 19.

Case facts in relation to the current Referral KI104/20

15. Based on the documents contained in the Referral, it results that on 7 July 2015, the Applicant filed a claim with the Basic Court for confirmation of the boundary (borderline) of the immovable property as well as confirmation of ownership as a usurped part.

16. On 17 January 2017, the Basic Court by Decision [Cno. 204/2015] returned the claim to the Applicant for supplementation and correction.

17. On 27 January 2017, the Applicant responded to the request of the Basic Court for supplementing the claim.

18. On 12 April 2017, the Applicant submitted an additional document to the Basic Court and requested expedition of proceedings for reviewing his case.

19. On 27 April 2017, the Basic Court by Decision [Cno.204/2015] suspended the contested procedure of the Applicant and instructed the latter to initiate the procedure for review of the inheritance because in the challenged property, in addition to the Applicant there were also other owners. Among other things, the Basic Court stated that once the owners of the disputed property are known, there can be initiated the legal proceedings according to the rules of the contested procedure.

20. On 17 May 2018, the Applicant addressed the Basic Court seeking resumption of the suspended procedure by Decision [Cno. 204/2015] of 27 April 2017, on the grounds that the Basic Court by Decision [Tc.no.33/18] of 27 April 2018 had announced the heirs in the disputable property.

21. On 17 May 2018, the Applicant submitted an additional document to the Basic Court requesting the resumption of the suspended procedure, a request which he had repeated several times, on: 4 June 2018; 14 August 2018; and on 7 February 2019,

22. On 25 February 2019, the Basic Court informed the Applicant that the case [C.no.204/2015] is in the procedure and that from now on it is identified with a new number [C.no. 256/2018].

23. On 4 April 2019, the Applicant requested from the Basic Court to review his case [C.no.256/2018].

24. On 21 June 2019, the Applicant requested from the Basic Court to review his case [C.no.256/2018].

25. On 9 July 2019, the Basic Court requested from the Applicant to provide the correct address of the opposing party H.K. within a term of 15 days, in order to send the summons for the next hearing to it.

26. On 15 July 2019, the Applicant requested from the Basic Court to have issued a court certificate in order to obtain the correct address of the opposing party H.K.

27. On 29 October 2019, the Applicant requested from the Basic Court to inform him regarding the current status of his case.

28. On 11 November 2019, the Applicant again requested from the Basic Court to inform him about the current status of his case.

29. On 23 January 2020, the Basic Court informed the Applicant that his case was being considered as a matter of priority and that a hearing would be scheduled soon.

30. On 4 February 2020, the Basic Court issued a decision requesting from the Applicant to specify/supplement the claim in the subjective sense and decided that the opposing party H.K., be summoned to the next hearing.

31. On 6 March 2020, the Applicant filed a complaint with the Basic Court regarding the excessive length of review of his case and requested the exclusion of the supervising judge in his case.

32. On 22 June 2020, the Basic Court summoned the Applicant to appear before the Basic Court and pay the court fee in the amount of 20 Euros, on behalf of the request for exclusion of the judge. The Basic Court also informed the Applicant that in case of failure to pay the court fee the submitted request will be considered to have been withdrawn.

33. On 28 September 2020, the Basic Court by Decision [C.no. 256/2018] decided to exempt the Applicant from the court fee.

Applicant's allegations

34. The Applicant alleges that "*Due to the inactions of the BCM-Branch in Skenderaj , my right of access to Court guaranteed by the Constitution of the Republic of Kosovo and International Conventions has been made impossible. I was deprived of equality before the law (Article 3.2 of the CRK). I have been deprived of the protection of property (Article 46), trial within a reasonable time, and have been treated differently from others - discrimination (Article 24), disrespect for human rights (Article 21.3 of the Constitution).*"

35. The Applicant requests from the Court to *"[...] request from the Constitutional Court to issue a judgment whereby it would find that there are violations of human rights such as: - the right of access to courts, of legal protection of property, right to fair and impartial trial, judicial protection of rights (Article 54) trial within a reasonable time, prohibition of discrimination (treatment differently from others)"*

Assessment of the admissibility of Referral

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

37. The Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, which establish:

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

38. The Court also refers to the admissibility criteria, as provided by Law. In this respect, the Court first refers to Article 47 [Individual Requests], which establishes:

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."

(...)".

39. In addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement for the Referral not to be manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

40. The Court notes that the Applicant alleges that his case is being prolonged by the Basic Court. In essence, the Applicant alleges a constitutional violation as a result of the inaction and length of the proceedings with respect to the review of his case by the Basic Court.

41. In this connection, the Court refers to Article 31 of the Constitution and Article 6 of the ECHR:

Article 31.2 [Right to Fair and Impartial Trial]
of the Constitution

"[...]
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law [...]".

Article 6.1 (Right to a fair trial) of the ECHR

"1. Everyone is entitled to a fair and public hearing within a reasonable time..."

42. For verifying the groundedness of the Applicant's allegations with respect to the violations of constitutional rights and freedoms relating to decision-making within a reasonable time, the Court will deal with: i) establishing the duration of the proceedings before the competent institutions as a whole, ii) relevant principles relating to the length of the proceedings, and iii) the reasonableness of the length of the proceedings before the Basic Court.

i) The time period that will be taken into consideration

43. In the present case, the Court notes that in July 2017, the Applicant has filed a claim with the Basic Court for confirmation of the boundary (borderline) of the immovable property as well as confirmation of ownership in relation to the disputable parcels.

44. In this respect, the Court, when determining the time period to be taken into consideration, will consider the initiation of the proceedings, namely July 2017, which is the date when the Applicant filed a claim with the Basic Court as well as 30 June 2020, when the Applicant filed the Referral with the Court.

45. Therefore, the Court notes that the period to be taken into consideration in relation to the Applicant's allegation for a violation of the right to fair trial, pursuant to Article 31.2 of the Constitution in conjunction with Article 6.1 of the ECHR, consists of 4 (four) years 11 (eleven) months and 26 (twenty six) days.

ii) Relevant principles

46. First of all, the Court notes that, according to the consistent case law of the European Court of Human Rights (hereinafter: the ECtHR), the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case, having regard to the criteria laid down in the ECtHR case law, specifically : (a) the complexity of the case; (b) the conduct of the parties to the proceedings; (c)the conduct of the competent court or other public authorities; and (d) the importance of what is at stake for the Applicant in the litigation (see, the ECtHR Judgment of 7 February 2002, *Mikulić v. Croatia*, no. 53176/99, paragraph 38; see also the case of the Constitutional Court KI23/16, Applicant *Qazim Bytyqi*

and others, Resolution on Inadmissibility of 5 May 2017, paragraph 58).

iii) The analysis of the reasonableness of the length of the proceedings

47. The Court notes that this case relates to the Applicant's claim for confirmation of the boundary (borderline) of the immovable property and confirmation of ownership as a usurped part.

48. As to the complexity of the case, the Court refers to the case law of the ECtHR that clarified that the complexity of the case may relate to factual and legal issues, but may also be related to the involvement of certain parties to the proceedings or a certain number of evidence that are to be considered by the regular courts (see, *mutatis mutandis*, the ECtHR Judgment of 19 September 1994, *Katte Klitsche de la Grange v. Italy*, no.21/1993/416/495, paragraph 55; ECtHR Judgment of 7 February 2002, *H. v. the United Kingdom*, no. 9580/81, paragraph 72; ECtHR Judgment of 15 October 1999, *Humen v. Poland*, no. 26614/95, paragraph 63.)

49. In this respect, for determining whether the length of the proceedings was reasonable, the Court must take into account factors such as: the complexity of the case, the conduct of the Applicant and the conduct of the relevant judicial authorities. (See, the case *Konig v. Germany*, ECtHR, Application no. 6232/73, Judgment of 28 June 1978, paragraph 99).

50. The complexity of the case may derive, for example, from the number of claims, the number of parties involved in the proceedings, such as defendants and witnesses, or the international extent of the case (See, the case *Neumeister v. Austria*, ECtHR, Application no.1936/63, Judgment of 27 June 1968, paragraph 20).

51. In the present case, the Court notes that the Applicant's case also concerned other parties, as well. Consequently, his case was subject to two sets of proceedings, the procedure for reviewing the inheritance over the disputable property because in the disputable property, in addition to the Applicant, there were also other owners and then the court proceedings for confirmation of the ownership.

52. The Court notes that on 17 May 2018, the Applicant requested from the Basic Court to resume the proceedings suspended by Decision [C.no. 204/2015] of 27 April 2017, on the grounds that the Basic

Court by Decision [Tc.no.33/ 18] of 27 April 2018 had already declared the heirs in the disputable property.

53. The Court also notes that the Basic Court had constantly communicated with the Applicant by: (i) informing him of the current status of his case, (ii) requesting from the Applicant to specify the claim and pay the court fee; (iii) deciding that the opposing party be summoned to the hearing and finally (iv) exempting the Applicant from the court fee.

54. The Court notes that the review of Applicant's case in the Basic Court was consistently accompanied by notifying and procedural actions by the Basic Court. On the basis of the case facts, the Court notes that the last procedural action of the Basic Court in the present case was the Decision [C.no.256/ 2018] of 28 September 2020, whereby the Applicant was exempted from the court fee.

55. In these circumstances, the Court finds that the Basic Court has not been passive in the Applicant's case.

56. Article 31 of the Constitution and Article 6.1 of the Convention do not oblige applicants to actively cooperate with the judicial authorities. They can also not be blamed for the full use of legal remedies made available by applicable law. Their conduct, however, constitutes an objective fact which cannot be attributed to the public authorities and which must be taken into consideration when determining whether or not the proceedings lasted longer than the reasonable time stipulated in Article 6.1 of the Convention (See, the ECtHR case *Eckle v. Germany*, Application no.8130/78, Judgment of 15 July 1982, paragraph 82).

57. Article 31 of the Constitution and Article 6.1 of the Convention oblige the competent authorities to organize the legal systems in such a way that their courts meet all the criteria established in the said Article (See, the ECtHR case *Abdoella v. The Netherlands*, Application no.12728/87, Judgment of 25 November 1992, paragraph 24).

58. Even though the cases may be complex, the Court may, nevertheless, consider as “reasonable” lengthy periods of judicial inactivity. (See, the ECtHR case *Adiletta v. Italy*, Application no.20/1990/211/271-273, Judgment of 24 January 1991, paragraph 17).

59. In fact, the Court notes that the Basic Court was active; it did not remain silent and undertook notifying and procedural actions in the Applicant's case.

60. The Court wishes to clarify that it is not aware whether the Basic Court has issued or is expected to issue a decision on merits in relation to the Applicant's submissions.

61. Moreover, the Court notes that the proceedings are still ongoing and that there is no final decision.

62. The Court notes that the regular courts have taken into consideration the constitutional and legal obligation to finalize cases within reasonable time, so as not to cause confusion and uncertainty. Regular courts cannot allow the case to be indefinitely transferred from one court instance to another. Otherwise, the public confidence in the entire legal order would be undermined.

63. Consequently, the Court concludes that the Applicant has not proved the allegation that the course of the proceedings in his case resulted in excessive length and lack of resolution of the case within reasonable time, as guaranteed by Article 31.2 of the Constitution and Article 6.1 of the ECHR.

64. Therefore, the Referral is manifestly ill-founded on constitutional basis and must be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 39(2) of the Rules of Procedure, on 10 February 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI45/20 and KI46/20, Applicant: Tinka Kurti and Drita Millaku, Constitutional Review of the Decisions of the Supreme Court of Kosovo, AA.nr. 4/2020, of 19 February 2020 and AA.nr.3 / 2020, of 19 February 2020

Keywords: *individual claim, gender discrimination, gender quota, passive suffrage*

The subject matter of the Referral was the assessment of the constitutionality of the Decisions of the Supreme Court of Kosovo [AA.nr. 4/2020], dated 19 February 2020 and [AA.nr.3 / 2020], dated 19 February 2020. The Applicants alleged that the challenged decisions violated their fundamental rights and freedoms guaranteed by Articles : 7 [Values], 24 [Equality before the Law], 45 [Electoral and Participation Rights], 53 [Interpretation of the Provisions on Human Rights] and 55 [Restriction of Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo, in conjunction with Article 14 (Prohibition of Discrimination) and Article 3 (Right to Free Elections) of Protocol no. 1 of the European Convention on Human Rights.

The Referral was based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing the Referral] and 47 [Individual Referral] of Law no. 03 / L-121 on the Constitutional Court, and Rule 32 [Submission of Referrals and Responses] of the Rules of Procedure of the Constitutional Court.

Conclusions:

The joined cases KI45/20 and KI46/20 are two cases concerning the disputes over the elections of 6 October 2019. The Referrals were submitted by two candidates (Tinka Kurti and Drita Millaku) for deputy coming from the Political Entity of VETËVENDOSJE (SELF-DETERMINATION) Movement! (hereinafter: the LVV) - who alleged that the CEC, ECAP and the Supreme Court had applied the manner of replacement of deputies defined by Article 112.2 a) of the Law on General Elections in an unconstitutional manner.

The Court recalls that some deputies of the Political Entity LVV, who were elected to Government/municipal positions, vacated some positions of deputies which had to be replaced by legitimate candidates in the queue for deputies. Thus, from the deputies who vacated their seats, the following replacements were made: the candidate Enver Haliti with 7,777 votes replaced the deputy Albin Kurti; the candidate Alban Hyseni with 7,767 votes replaced the deputy Glauk Konjufca; the candidate Arta Bajralia with 7,674 votes replaced the deputy Albulena Haxhiu; the candidate Fitim Haziri with 7,542 votes replaced the deputy Arben Vitia; the candidate Eman Rrahmani

with 7,044 votes replaced the deputy Haki Abazi. Later, the candidate Taulant Kryeziu with 6968 votes replaced the deputy Shpejtim Bulliqi.

The necessity of replacing the deputies automatically activated the legal provisions defined by article 112.2 a) of the Law on General Elections - an article that specifies the manner of replacing the deputies, with the following text:

> *"112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:*
>
> *a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election; [...]"*

The Court notes that, according to the interpretation of this article made by the CEC, ECAP, and the Supreme Court, all replacements were made based on the criterion of "gender" and irrespective of the result achieved by the candidates for deputy after the achievement of the legally required quota of 30% of underrepresented gender or minority gender. This manner of replacement provided by law, according to the Supreme Court, could not be avoided by either the CEC, the ECAP or the Supreme Court because there is an assumption that the laws are compatible with the Constitution and that they should be applied as they are "*until the Court Constitutional would find that a law or any of its legal provisions is contrary to the Constitution"*.

Having disagreed with this interpretation, the Applicants submitted their Referrals to the Constitutional Court, under the key allegation that the CEC, ECAP and the Supreme Court have applied the manner of replacing the deputies provided by Article 112.2 a) of the Law on General Elections, in an unconstitutional manner. In essence, they alleged that despite reaching and exceeding of the quota of 30% by women candidates for deputy from LVV - replacements for deputies were not made based on the election result but based on gender. According to them, this has caused inequality in treatment and violation of their right to be elected.

The Court recalls that, on the basis of the replacement manner by the CEC, ECAP and the Supreme Court, men deputies were replaced by men candidates for deputy and women deputies were replaced by women candidates for deputy - despite the fact that the Applicants received more votes that some of the male candidates who managed to get elected to the Assembly. The first Applicant, Tinka Kurti had collected 7655 votes while the second Applicant, Drita Millaku had collected 7063 votes.

The Court clarified that it is not assessing *in abstracto* whether Article 112.2.a of the Law on General Elections is or is not incompatible with the Constitution. This is due to the fact that, neither before this Court nor before the preliminary public institutions that have addressed this issue, the Applicants have never claimed that the article in question is unconstitutional. On the contrary, the Applicants have only alleged that this article was applied in unconstitutional manner by the CEC, ECAP and the Supreme Court.

Taking into consideration the above facts and the allegations raised in this case, the Court in this **individual constitutional complaint** treated the fact: Whether the Article 112.2.a of the Law on General Elections has been implemented by the CEC, the ECAP and the Supreme Court, in accordance with the guarantees, values and principles proclaimed by Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol no. 1 of the ECHR?

The Constitutional Court found that the interpretation of this Article by the CEC, the ECAP and the Supreme Court is not an accurate and constitutional interpretation for some of the following reasons - which are extensively elaborated in the Judgment.

First, the Court found that the CEC, the ECAP, and the Supreme Court have interpreted Article 112.2 a) of the Law on General Elections in a rigid and textual manner and separated from all other legal norms set forth by the Law on General Elections and the Law on Gender Equality, as well as the principles, values, and the spirit of the letter of the Constitution. This type of interpretation has abstracted the context, purpose, and reason for setting the quota of 30% as a special measure to help achieve equal representation between the two genders in the Assembly of the Republic.

Secondly, the Court noted that the *ratio legis* of the Law on General Elections in the context of gender representation in the Assembly consists in providing - in any case - representation of at least 30% of the underrepresented or minority gender (whatever it may be). However, obviously, 30% represents only the minimum limit of gender representation of the minority gender, but not the highest limit of representation of one gender. Consequently, the Court considers that, once a minimum representation of 30% is ensured for the underrepresented gender, all future replacements must be made on the basis of the ranking of candidates for deputy, which is determined by the election result. On this basis, the gender quota is applied only until the purpose for which it has been set is achieved, namely to ensure the mandatory minimum representation of the minority gender in the quota of 30%, although the constitutional ideal and spirit of the Constitution reflected in Article 7 aim to achieve factual equality of 50% to 50% between the two genders.

Thirdly, the Court pointed out that the interpretation of Article 112.2 a) of the Law on General Elections pursuant to the way of interpretation by the CEC, ECAP and the Supreme Court would make sense only in the situation when non-replacements gender-for-gender(woman-for-woman or man-for-man) could risk non-compliance with the legal quota of 30% of representation for the underrepresented gender. However, the interpretation of this article in the way as it was done, knowing that in the elections of 6 October 2019, women candidates of the political entity LVV had managed to get meritorious votes beyond the legal quota percentage of 30%, is an erroneous interpretation of this norm and inconsistent with the very purpose of the legal quotas stipulated in Article 27 of the Law on General Elections.

Fourthly, the Court emphasized that the purpose of setting quotas relates to the need to advance gender equality within society until when the factual equality is reached and quotas become unnecessary. Article 112.2 a) of the Law on General Elections exists for a single reason: to introduce the manner of the replacement of deputies – by always preserving the purpose of mandatory legal representation of at least 30% of the minority (underrepresented) gender. If, after meeting the 30% threshold, minority candidates manage to become members of parliament on their own, by achieving better results than members of the majority, they should not be denied the right to be elected deputy of the Assembly.

The Court found that the Applicant Tinka Kurti was discriminated against based on gender in relation to her right to be elected, at the moment when despite the minimum quota of 30% being reached within the political entity LVV through the election result, at the moment when the opportunity for the replacement of deputies emerged, even though she had more votes than the men candidates for deputies Fitim Haziri and Eman Rrahmani, she was not enabled to become a deputy.

Further, the Court also found that the Applicant Drita Millaku was discriminated against based on gender in relation to her right to be elected, at the moment when despite the minimum quota of 30% being reached within the political entity LVV through the election result, at the moment when was created the possibility for future replacements of deputies, namely when deputy Shpejtim Bulliqi resigned, in his stead, based on the determination for replacement within the same gender, on 18 December 2020, the mandate of the deputy was taken by the candidate Taulant Kryeziu with 6968 votes.

Consequently, the Court found that: Decision [AA. no. 4/2020] of the Supreme Court, of 19 February 2020; Decision [AA. no. 3/2020] of the Supreme Court, of 19 February 2020; ECAP Decision, [Anr.35/2020] of 13

February 2020; ECAP Decision, [Anr.36/2020] of 13 February 2020; as well as point 5 of the CEC Decision, [no. 102/A-2020] of 7 February 2020, are in contradiction with Article 24 [Equality before the Law] and 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 14 (Prohibition of Discrimination) and Article 3 (Right to free elections) of Protocol no. 1 of the ECHR.

The effect of the Judgment

The Court noted that, for objective reasons and in the interest of legal certainty, this Judgment cannot produce retroactive legal effect in respect to the mandate of the deputies. In this regard, the Court clarified that this Judgment does not have a retroactive effect and based on the principle of legal certainty it does not affect rights acquired by third parties based on the decisions annulled by this Judgment. However, this does not mean that this Judgment is merely declaratory and without any effect.

The first effect of this Judgment is the repealing of the challenged decisions of the Supreme Court, the ECAP and the CEC, as being incompatible with the Constitution and the ECHR in terms of interpretation of Article 112.2 a) of the Law on General Elections. Through the repealing of these decisions, this Judgment clarifies for the future that, based on an accurate and contextual reading of Article 112.2.a of the Law on General Elections, the replacement of candidates for deputies should be done in such a way that: *firstly*, to ensure a minimum representation of 30% of the underrepresented gender (minority gender), which cannot be put into question at any time; and *secondly*, in cases where the gender quota of 30% has been met based on the election result (as in the concrete case), then the replacement of candidates for deputy should be done based on the election result, without being limited in terms of replacement based on the same gender, as long as the minimum representation of the underrepresented gender is not endangered.

The second effect that this Judgment produces concerns the right that emerges for the Applicants or other parties that may be affected by this Judgment, from the moment of its entry into force. There emerged the right of these parties have to use other legal remedies available for the further realization of their rights in accordance with the findings of this Judgment and the case law of the ECHR cited in the present Judgment.

JUDGMENT

in

cases KI45/20 and KI46/20

Applicant

Tinka Kurti and Drita Millaku

Constitutional review of Decisions AA. No. 4/2020 of 19 February 2020 and AA. No. 3/2020, of 19 February 2020 of the Supreme Court of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. Referral KI45/20 was submitted by Tinka Kurti, in a capacity of a candidate of the VETËVENDOSJE Movement! (hereinafter: LVV) for the elections of 6 October 2019, residing in the Municipality of Prishtina (hereinafter: the first Applicant).
2. Referral KI46/20 was submitted by Drita Millaku, in a capacity of LVV candidate for the elections of 6 October 2019, residing in the Municipality of Prizren (hereinafter: the second Applicant).

Challenged decisions

3. Applicant KI45/20 - Tinka Kurti challenges the Decision [AA . No. 4/2020] of 19 February 2020, of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

4. Applicant KI46/20 - Drita Millaku challenges the Decision [AA. No. 3/2020] of 19 February 2020 of the Supreme Court.

Subject matter

5. The subject matter of the two Referrals in question is the constitutional review of the challenged decisions of the Supreme Court, which allegedly violate the Applicants' fundamental rights and freedoms guaranteed by Articles 7 [Values], 24 [Equality Before the Law] 45 [Freedom of Election and Participation], 53 [Interpretation of Human Rights Provisions] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

7. On 3 March 2020, the Applicants submitted their Referrals to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 19 May 2020, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

9. On 19 May 2020, based on Rule 40 of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI45/20 and KI46/20.

10. On 3 June 2020, the Court notified the Applicants about the registration and joinder of Referrals KI45/20 and KI46/20.

11. On 3 June 2020, the Court notified the Supreme Court about the registration and joinder of Referrals KI45/20 and KI46/20 and sent it a copy of the Referral.

12. On 3 July 2020, the Ombudsperson presented before the Court *"Legal Opinion of the Ombudsperson of the Republic of Kosovo in the capacity of a friend of the Court (Amicus Curiae) for the Constitutional Court of Kosovo, [A. No. 193/2020], Tinka Kurti regarding the referral for Decision AA. No. 4/2020 of Mrs. Tinka Kurti v. the Supreme Court of Kosovo"*.

13. On 14 January 2021, pursuant to paragraph (1) of Rule 55 [*Amicus Curiae*] of the Rules of Procedure, the Judge Rapporteur consulted the Review Panel regarding the approval of the Ombudsperson's request to appear as *Amicus Curiae* regarding case KI45/20.

14. On 15 January 2021, after consulting the Review Panel, the Judge Rapporteur approved the Ombudsperson's request to appear as *Amicus Curiae*, thus accepting the Legal Opinion submitted as an integral part of the case file. On the same date, the Judge Rapporteur notified all the judges of the Court about the decision to allow the participation of the Ombudsperson in his capacity as *Amicus Curiae* in Case KI45/20.

15. On 18 February 2021 as well as on 24 February 2021, the Review Panel considered the case and decided to postpone the case for review in one of the next sessions, with a request that it be completed.

16. On 26 March 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral.

17. On the same date, the Court unanimously decided that there has been a violation of Article 24 [Equality Before the Law] and Article 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) in conjunction with Article 3 (Right to free elections) of Protocol No. 1 of the ECHR. Consequently, the Court declared invalid the following: (i) Decisions [AA. No. 3/2020 and AA. No. 4/2020] of the Supreme Court of the Republic of Kosovo, of 19 February 2020; (ii) Decisions [Anr. 35/2020 and Anr. 36/2020] of the Election Complaints and Appeals

Panel, of 13 February 2020; and item 5 of Decision [No. 102/A-2020] of the Central Election Commission, of 7 February 2020.

18. On 29 March 2021, the Court published the Judgment on this case.

Summary of facts

19. On 6 October 2019, the early elections were held for the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

20. On 27 November 2019, the Central Election Commission (hereinafter: the CEC) certified the final result of the early elections for the Assembly.

21. On 5 February 2020, the President of the Republic of Kosovo (hereinafter: the President), by the request [No. 102/2020], requested from the CEC the recommendation of the next eligible candidates, who follow according to the respective political entities for the replacement of the deputies of the Assembly, based on the certified results of the elections of 6 October 2019, as a number of deputies were elected to government positions, consequently, the latter had to be replaced.

22. On 7 February 2020, the CEC, by the Decision [No. Prot. 102/A-2020], sent to the President *"Recommendation for the next candidates for deputies of the Assembly of Kosovo",* on which occasion he recommended the next candidates for deputies of the Assembly in the list of the entity LVV, as follows: candidate Enver Haliti to replace the deputy Albin Kurti - because he was elected Prime Minister of the Republic of Kosovo; candidate Alban Hyseni to replace deputy Glauk Konjufca, because he was elected Minister of Foreign Affairs and Diaspora; candidate Arta Bajralia to replace deputy Albulena Haxhiu, because she was elected Minister of Justice; candidate Fitim Haziri to replace deputy Arben Vitia, because he was elected Minister of Health and; candidate Eman Rrahmani to replace deputy Haki Abazi, because he was elected the second Deputy Prime Minister [...].

23. According to the CEC, this replacement was made based on point a of paragraph 2 of Article 112 [Replacement of Assembly Members], of Law No. 03/L-073 on General Elections in the Republic of Kosovo (hereinafter: the Law on General Elections or the LGE), which stipulates that the deputy is replaced *"by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election"*. Acting in this way, the replaced candidates from the list certified by the CEC, on 27 November 2019, for the elections of 6 October 2019, who became deputies were: Enver

Haliti with ordinal number 71, with 7,777 votes; Alban Hyseni with ordinal number 57, with 7,767 votes; Arta Baraliu with ordinal number 69, with 7,674 votes; Fitim Haziri with ordinal number 94, with 7,542 votes; Eman Rrahmani with ordinal number 109, with 7,044 votes.

24. According to this legal interpretation of the above-mentioned provision made by the CEC, which stipulates that for the replacement comes "*the next eligible candidate of the same gender"*, the female candidate for replacement, Tinka Kurti, with ordinal number 30, with 7,655 votes and the other female candidate Drita Millaku, with ordinal number 36, with 7,063 votes, who in the list certified by the CEC on 27 November 2019, have more votes than the candidate Eman Rrahmani with ordinal number 109, with 7,044 votes.

25. On 11 February 2020, the Applicants (Tinka Kurti and Drita Millaku), candidates for deputies from the ranks of LVV, separately filed an appeal with the Election Complaints and Appeals Panel (hereinafter: ECAP), against the decision of the CEC [Prot. No. 102/A-2020 of 7 February 2020], emphasizing that the selection of candidates to replace the departed deputies is a completely erroneous, unconstitutional and unlawful legal interpretation.

26. On 13 February 2020, the ECAP by Decisions [Anr. 35/2020] and [Anr. 36/2020], rejected as ungrounded the appeals of the first Applicant (Tinka Kurti) and the second Applicant (Drita Millaku), with the following reasoning:

> *"The ECAP finds that the allegations submitted in the appeal are ungrounded, and as such I reject them due to the fact that the decision of the CEC, with Prot. No. 102/A-2020 of 07.02.2020, is fair and based on law, since the replacements for members of the Assembly of the Republic of Kosovo are made by taking into account the next candidate of the same gender and the same political entity, as it is acted in the present case as well. Therefore, any allegation in the complaint regarding violation of the law is ungrounded".*

27. Against the above-mentioned decisions of the ECAP, the Applicants filed the respective individual appeals with the Supreme Court, proposing that the decisions of the ECAP be modified, so that the CEC could reconsider the relevant decision regarding their non-appointment as deputies of the Assembly.

28. On 18 February 2020, the ECAP filed two responses with the Supreme Court to the appeal in which it rejected in its entirety the above-

mentioned Applicants' appeals, proposing that they be rejected as ungrounded, and that the above-mentioned ECAP decisions be upheld as lawful.

29. On 19 February 2020, the Supreme Court rendered two decisions regarding the Applicants' appeals. By the Decision [AA. No. 4/2020] rejected as ungrounded the appeal of the first Applicant (Tinka Kurti) filed against the ECAP Decision [A. No. 35/2020] of 13 February 2020; meanwhile, by the Decision [AA. No. 3/2020] the appeal of the second Applicant (Drita Millaku) filed against the ECAP Decision [A. No. 36/2020] of 13 February 2020 was rejected as ungrounded.

30. Among other things, the Supreme Court, in the two above-mentioned Decisions which are identical in the reasoning part, stated the following:

> *"The Supreme Court fully accepts as grounded the legal position of the ECAP regarding the rejection of the appeal of* [Tinka Kurti/Drita Milakut] *as ungrounded, as a candidate for deputy from the political entity Vetevendosje Movement, since the challenged decision of the ECAP is entirely based on the provisions of the Law on General Elections in the Republic of Kosovo.*
>
> *However, the Supreme Court of Kosovo, once again reviewed all allegations of appeal filed against the ECAP decision claiming that the ECAP decision is completely erroneous, discriminatory, unlawful and unconstitutional, and found that such allegations are ungrounded, due to the fact that the challenged decision of the ECAP, even according to the conviction of the Supreme Court, is not erroneous, discriminatory, unlawful and unconstitutional, because in the above-mentioned legal provision under Article 112.2 item a , of the Law on General Elections in the Republic of Kosovo, in fact, the formula for replacing the deputies, whose mandate has ended with taking positions in the Government of the Republic of Kosovo, is provided, so in this provision is provided the clause respectively the way of replacement of these deputies with other deputies from the same political entity and the same gender, so this legal solution, and this formula provided by law, could not be avoided neither by the CEC, nor the ECAP, nor the Supreme Court of Kosovo for the time being. Otherwise, it is assumed that the laws are in accordance with the Constitution of the Republic of Kosovo, so it should be implemented as they are until the Constitutional Court finds that a law or any of its legal*

provisions is contrary to the Constitution, so it cannot be said that the legal solution provided by Article 112.2 item a of the Law on General Elections in the Republic of Kosovo is unconstitutional. According to this legal solution, so far, the deputies of the same gender have always been replaced, and not according to the number of votes regardless of gender, as the appellant claims, so this is a legal practice built by of the CEC, based on the Law on General Elections of the Republic of Kosovo, and accepted so far by all political entities and candidates for deputies in the Parliament of the Republic of Kosovo, so we cannot even talk about the decision of the CEC and the ECAP as a discriminatory, unlawful and unconstitutional decision".

31. Following the decision of the Supreme Court, the replacement of deputies for the Assembly was made based on the decision-making of the CEC and the ECAP, as confirmed by the Supreme Court.

32. By Referrals KI45/20 and KI46/20, the Applicants challenge before this Court the constitutionality of the abovementioned two Decisions of the Supreme Court.

Applicant's allegations

33. The Applicants allege that the Decisions of the Supreme Court [AA. No. 4/2020 and AA. No. 3/2020] of 19 February 2019, were issued in violation of their fundamental rights and freedoms guaranteed by Articles 7 [Values], 24 [Equality before the Law], 45 [Freedom of Election and Participation], 53 [Interpretation of Human Rights Provisions] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol No. 1 of the ECHR.

34. With regard to the allegation of violation of Article 24, in conjunction with Article 7 and Article 55 of the Constitution, the Applicants build the case on the allegation of gender discrimination of the candidates for deputies. They allege that the interpretation of Article 112.2 (a) of the Law on General Elections is contrary to (i) Law No. 05/L-020 on Gender Equality; and (ii) Law No. 05/L-021 on Protection from Discrimination, which are norms of a *lex specialis* nature in relation to gender equality and discrimination.

35. The Applicants state that the challenged decisions are unconstitutional because they violate the two main constitutional principles, the principle of non-discrimination and the principle of

proportionality. Consequently, the Applicants state that the decision of the CEC clearly violates the principle of non-discrimination within the meaning of paragraph 2 of Article 24 of the Constitution, which stipulates that "*No one may be discriminated against on the grounds of [...] gender, [...] or other personal status*". According to the Applicants, we are dealing with a classic case of discrimination on the basis of gender, of candidates for deputies.

36. Interpretation of Article 112.2 (a) of the Law on General Elections, which stipulates that the next for replacement is "*next eligible candidate of the same-gender"*, is erroneous because it is only textual interpretation, reduced only to the circumstance of the cause *"of the same gender",* which necessarily bring certain consequences, which are expressed in the violation of the guaranteed constitutional right in accordance with Article 24.2 of the Constitution *"No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status"*. Such linguistic interpretation, as a way of narrow or restrictive interpretation, is completely wrong in this case, because it is in full contradiction with the spirit and purpose of law in the Republic of Kosovo and international norms regarding vote, democracy and gender equality.

37. The Applicants allege that the interpretation of the aforementioned provision of the Law on General Elections is contrary to (i) Law no. 05/L-020 on Gender Equality and (ii) Law 05/L-021 on the Protection from Discrimination, which are norms of a *lex specialis* nature, in relation to gender equality and discrimination.

38. With regard to the non-compliance of the abovementioned provision with (i) the Law on Gender Equality, according to the Applicants, the legislator has not only explicitly defined the measures for the prevention of gender discrimination, but with the request *'"for equal representation of women and men"* with a view to *"achieving gender equality",* at the same time it has defined just as clearly and without any ambiguity, specifying in a quantitative and legal way the special measures for the achievement of the major goal: *"minimum representation of fifty percent (50%) for each gender*", (Article 6, paragraph 8). Consequently, paragraph 2 of Article 5 [General Measures to Prevent Gender Discrimination and Ensure Gender Equality] provides that: *"Any provision which is in contradiction to the principle of equal treatment under this Law shall be repealed"*.

39. The Applicants also put emphasis on Article 6 [Other justified treatment] of the Law on the Protection from Discrimination, according to which no provision, criterion or practice *"is not deemed a discrimination a distinction in treatment [...]" if one "[...] is justified by a legitimate purpose and there is a reasonable relationship of proportionality between the means used and the targeted aim"*. In this regard, in order to achieve the major goal of gender equality, even by justifying the different treatment that is not considered discrimination, Article 6 [Special measures] of the Law on Gender Equality, has defined *"temporary special measures "* which should be taken by public institutions *"in order to accelerate the realization of actual equality between women and men in areas where inequities exist"*. Consequently, such special measures may include *"quotas to achieve equal representation of women and men;"* (Article 6, paragraph 2, item 2.1.), which the legislator has expressly clearly codified as *"Equal gender representation in all legislative, executive and judiciary bodies and other public institutions [...]"* including their governing and decision-making bodies," (Article 6, paragraph 8) which is achieved when and only it is provided *"[...] minimum representation of fifty percent (50%) for each gender*".

40. According to the Applicants, the CEC Decision [No. 102/A-2020], of 7 February 2020, related to other challenged decisions, represents an erroneous interpretation of a legal norm, depriving it of its normative essence. They also point out that paragraph 1 of Article 27 (Gender Requirement), of the Law on General Elections, despite the language gaps, clearly states that: "*In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female*"; The quantified legal expression "[...] at least thirty (30%) percent represents a minimum limit of gender representation in public institutions (gender quotas), including the Assembly. This means the legal obligation that the minimum gender representation, whether of women or men, even in the Assembly, cannot be below thirty (30%) percent. So, clearly, 30% represents the minimum limit of gender representation, but not the highest limit of representation. Consequently, the decision of the CEC [No. 102/A-2020] of 7 February 2020, on the Recommendation for the replacement of deputies, in the present case of female deputies (Tinka Kurti and Drita Millaku), does exactly the opposite of the norm, interpreting it as the maximum limit of gender representation - women in the Assembly, and by eliminating in this case two women candidates with the largest number of votes in the list of candidates of LVV, in favor of "*the next eligible candidate of the same gender*". Therefore, this is a discriminatory interpretation of a legal norm and

at the same time an erroneous interpretation of the constitutional concept of discrimination.

41. The Applicants, referring to Article 53 of the Constitution, also refer to the case law of the European Court of Human Rights (hereinafter: the ECHR), citing the case of *Thimmenos v. Greece*, application no. 34369/97, of 6 April 2000, paragraph 44, where it states *"[t]he right [...] not to be discriminated... is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification"*.

42. The Applicants state that in order for such a justification to be *" objective and reasonable"*, it must meet two further requirements: (1) it must have a "*legitimate aim*" for the inequality in question and (2) it must have *"a reasonable relationship of proportionality between the means employed and the aim sought to be realized"* (see the case of the ECtHR: "*Case concerning certain aspects of the laws on the use of languages in education in Belgium v. Belgium*, Cases Nos. 63, 2126/64, Judgment of 23 July 1968, paragraph 10; see also Case *X and Others v. Austria*, Application No. 19010/07, ECtHR, Judgment of 19 February 2013, paragraph 98).

43. Finally, the Applicants state that the constitutionality of its exceeding should be assessed according to certain analytical steps, where they propose to be assessed on the basis of the proportionality test of Article 55 defined in case KO131/12, Applicant *Dr. Shaip Muja and 11 deputies of the Assembly of the Republic of Kosovo*, Judgment of 15 April 2013, paragraph 127. The Applicants state that Article 55, paragraph 4 of the Constitution, stipulates that: *"In cases of limitations of human rights or the interpretation of those limitations; all public authorities [...] shall pay special attention to the [...] relation between the limitation and the purpose to be achieved "*. Also, paragraph 2 of Article 55 stipulates that: *"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"*.

44. Also, this decision of the CEC, and other challenged decisions, clearly violate the principle of proportionality within the meaning of paragraph 2 of Article 55 [Limitations on Fundamental Rights and Freedoms], of the Constitution, which clearly states that *"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"*. However, even in the event of any eventual restriction, "*only by law*"

(ibid., paragraph 1), in the last instance, regardless of the circumstances, any *"limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right"* (ibid, paragraph 5). According to the Applicants, the CEC, by its Decision, in addition to having made a disproportionate restriction, without having any legitimate purpose for which the restriction was made, the restriction also denies the essence of the guaranteed right, the right to vote.

45. Finally, according to the Applicants, the only correct interpretation, in relation to Article 112 paragraph 2.a of the Law on General Elections, based on all constitutional, legal norms and international human rights instruments referred to in paragraphs above of this referral: *"next eligible candidate of the same gender"*, is only the candidate who belongs to the underrepresented gender according to the minimum gender quota of 30%. This is a constitutional and legal obligation for any state institution, including the Assembly. In this case, according to Article 112 paragraph 2 of the Law on General Elections, both genders have reached the legal quota of minimum representation of 30%. Therefore, the replacement in this case is done only according to the ranking in the list of candidates based on the votes received in the elections of 6 October 2019, certified on 27 November 2019 by the CEC. Therefore, in the waiting list of candidates for replacement from the list of the political entity Vetëvendosje Movement, according to the votes are Tinka Kurti with ordinal number 30, with 7,655 votes and Drita Millaku, with ordinal number 36, with 7,063 votes, before the candidate Eman Rrahmani with ordinal number 109, with 7,044 votes.

46. On the other hand, with regard to the allegation of violation of Article 7 of the Constitution, the Applicants build the case on the allegation that this decision of the CEC to replace the deputy/ies with the next candidate/s which has a defining basis the gender of the candidates, excluding namely restricting the right acquired through the free expression of political will – the vote, certain candidates in the waiting queue, is in complete contradiction, direct and undeniable with paragraph 2 of Article 7, of the Constitution, which guarantees that: *"The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life"*. This violation of one of the "*fundamental values for the democratic development of society*" is a serious violation of the Constitution.

47. With regard to the allegation of violation of Article 45 of the Constitution, the Applicants base their case on the allegation that the interpretation of paragraph 2 of Article 112 of Law no. 03/L-073 on General Elections, which stipulates that the next in line is the "*eligible candidate of the same gender*", is erroneous because by reducing the textual interpretation only in the context of the cause of "*same gender*", violates the constitutionally guaranteed right under paragraph 1 of Article 45 [Freedom of Election and Participation] which guarantees that: " *every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision".* Such an interpretation of Article 112.2 (a) of the Law on General Elections is completely erroneous in this case, because it is completely contrary to the spirit and purpose of the guaranteed constitutional right of citizens in the Republic of Kosovo to enjoy "*the right to elect and be elected*", through the arbitrary distortion of the will expressed through the right to elect - vote, equally arbitrarily denying the citizen the right to be elected, without restricting this right by court decision. None of the decision-making instances in this case (Supreme Court, ECAP, CEC), has provided any judicial act that restricts this right to Tinka Kurti and Drita Millaku.

48. The Applicants also state that the challenged Decisions in the context of the interpretation of Article 112.2 (a) are also contrary to the position of the Supreme Court itself which in Decision [AA. no. 34/2017], of 17 November 2017 finds that: *"the compliance with gender quota entails representation of minimum 30% of females and since the representation is 50% in this specific case, it does not mean that it is in contradiction with LGE"*, (Case of the Court no. KI142/17, Applicant *Mentor Jashari*, Resolution on Inadmissibility of 10 April 2018, paragraph 38). The Applicants consider this interpretation of the Supreme Court to be a fair and sufficient legal justification.

49. Finally, the Applicants request the Court to repeal the challenged Decisions of the Supreme Court because they: (i) constitute a violation of paragraph 2 of Article 7 [Values] of the Constitution; (ii) violate the principle of proportionality within the meaning of Article 55 [Limitations on Fundamental Rights and Freedoms]; (iii) violate the principle of non-discrimination referred to in paragraph 2 of Article 24 [Equality Before the Law]; and (iv) were rendered in violation of Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

Legal Opinion of the Ombudsperson in the capacity of a friend of the Court (Amicus Curiae) for the Constitutional Court of

Kosovo, [A. No. 193/2020], Tinka Kurti regarding the referral for Decision AA. No. 4/2020 of Mrs. Tinka Kurti v. Supreme Court of Kosovo

50. The Ombudsperson submitted to the Court a Legal Opinion in his capacity as a friend of the Court (*Amicus Curiae*), who seeks to provide his views on the issues raised in Referral KI46/20 relating to equality and protection against discrimination in the event of the replacement of the next candidates for the deputies of the Assembly. As explained in the proceedings before the Court, this Legal Opinion was accepted by the Court and has become an integral part of the case file KI45/20 and KI46/20.

51. The Ombudsperson states that in accordance with paragraph 1 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution, paragraph 9 of Article 16 [Powers] of Law No. 05/L-019 on Ombudsperson, sub-paragraph 13, paragraph 2, of Article 9 [Ombudsperson] of Law No. 05/L-021 on the Protection from Discrimination and Article 13 [Ombudsperson] of Law No. 05/L-020 on Gender Equality, authorize the Ombudsperson to act as a friend of the Court.

52. The Ombudsperson considers that one of the examples of the application of the interpretative principles of the law has to do with the relationship between (i) No. 05/L-020 on Gender Equality and (ii) Law No. 03/L-073 on General Elections in the Republic of Kosovo, regarding their respective requests for gender representation among elected representatives.

53. In this regard, the Ombudsperson refers to paragraph 1 of Article 27 of (ii) the Law on General Elections which stipulates that: *"In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female, with one candidate from each gender included at least once in each group of three candidates, counting from the first candidate in the list"*. However, paragraphs 7 and 8 of Article 6 of the Law on Gender Equality present a stricter requirement: *"Legislative bodies (..) shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved."*; emphasizing that: *"Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies"*.

54. Furthermore, the Ombudsperson considers that according to the *lex specialis* principle, the stricter requirement of the Law on Gender Equality enjoys precedence over the less stringent one of the Law on General Elections. Also, the *lex posterior* principle is relevant in this case, as the Law on Gender Equality was adopted by the Assembly on 28 May 2015, while the Law on General Elections was adopted on 5 June 2008. Based on this, we consider that the requirement set out in the Law on Gender Equality reflects more accurately the will of the people's representatives on this issue, and should therefore take precedence over the Law on General Elections.

55. According to the Ombudsperson, the provision defined in item a) of paragraph 2 of Article 112 of the Law on General Elections, implies that the replacement should be made only with the same-gender candidate, regardless of whether the other candidate of the other gender has the largest number of votes. Consequently, the Ombudsperson notes that this provision is not in accordance with the provision of Article 45 of the Constitution.

56. The first reason, according to the Ombudsperson, is that the replacement with the eligible candidate of the same gender violates the right of a person to be elected, because in the present case, the replacement of candidates under Article 112, paragraph 2 of the Law on elections resulted in winning the right of the candidate who has less votes than the candidates Tinka Kurti with 7655 votes and Drita Millaku with 7063 votes (consequently the candidate Eman Rrahmani has 611 votes less than Mrs. Tinka Kurti and 19 votes less see Mrs. Drita Millaku). Thus, according to this rule, the two female candidates (the Applicants) have not managed to gain the right to be elected a member of the Assembly of Kosovo, despite the fact that they have a larger number of votes than the candidate who was replaced under Article 112, paragraph 2 of the Law on Elections. The Ombudsperson considers that such a wording gives priority only to the gender of the candidate, which contradicts the rule according to which the candidate who has the largest number of votes, gains the right to become a member of the Assembly of Kosovo.

57. The second reason emphasized by the Ombudsperson is that the replacement of the eligible candidate according to the same gender violates the right to vote, as 611 votes of the candidate Tinka Kurti were not taken into account, which means that 611 votes of the citizens of Kosovo were not taken into account. Furthermore, the Ombudsperson notes that the next candidate according to the number of votes could not enjoy the right to become a member of the Assembly of Kosovo,

although she has more votes than the candidate who was replaced under Article 112, paragraph 2 of the Law on Elections (Drita Millaku, 19 votes more than the candidate Eman Rrahmani).

58. The Ombudsperson emphasizes that the current content of Article 112, paragraph 2 of the Law on Elections may appear in principle as a guarantee of the existence of the less represented gender (gender quota). However, regarding the gender quota, the Ombudsperson considers that the quota is a legal guarantee, which cannot be questioned in any case, because regardless of the replacement of candidates, the condition must be met that at least 30 % of seats is provided to be allocated to under-represented gender candidates. The Ombudsperson bases this assessment on the provisions of the Law on Elections, namely Article 111 [Distribution of Seats], paragraph 6, according to which *"If, after the allocation of seats as set out in paragraph 5 of this Article, the candidates of the minority gender within a Political Entity have not been allocated at least 30% of the total seats for that Political Entity, the last elected candidate of the majority gender will be replaced by the next candidate of the opposite gender on the reordered candidate list until the total number of seats allocated to the minority gender is at least 30%"*.

59. Furthermore, the Ombudsperson notes that in cases where the 30% quota has been met, then the ranking of candidates, including their replacement, should be done in accordance with Article 111 [Distribution of seats], paragraph 4, of the Law on Elections, according to which "*... The candidate lists shall then be reordered in descending order based on the number of votes received by each candidate*". Therefore, according to this definition, in the moments when the gender quota is met, the ranking and rearrangement of candidates (regardless of gender) should be done according to the number of votes they have won, and any other ranking results in violation of the constitutional right to elect, and to be elected.

60. Also, according to the Ombudsperson, there are discrepancies within the articles of the Law on Elections, namely, between Article 111, paragraph 4, Article 112, paragraph 2 (items a and b), and such discrepancies cause confusion to the implementing bodies of this law, which may result in the issuance of decisions that violate human rights.

61. The Ombudsperson considers that the Supreme Court when rendering Decision AA No. 4/2020 of 19 February 2020 used a narrow approach, focusing only on the application of Article 112, paragraph 2 (item a), disregarding the constitutional guarantees of equality before the law

set out in Article 24 of the Constitution, and for freedom of election and participation, defined by Article 45 of the Constitution.

62. Finally, the Ombudsperson considers that the purpose of Article 112, paragraph 2 (item a) seems to be to maintain a 30% gender quota *status quo* for the minority gender in the Assembly, once it is achieved. This provision, given the 30% gender quota, is an obstacle to achieving equal representation of women and men, which according to the Law on Gender Equality: *"Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent* (50%) *for each gender, including their governing and decision-making bodies"* (Article 6, paragraph 2, sub-paragraph 8). Furthermore, the Ombudsperson considers that Article 112, paragraph 2 (item a) would only make sense if the gender quota is 50% for each gender.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 7 [Values]

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

2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.

Article 24 [Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property,

economic and social condition, sexual orientation, birth, disability or other personal status.

3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

Article 45 [Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

2. The vote is personal, equal, free and secret.

3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.

Article 55 [Limitations on Fundamental Rights and Freedoms]

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.

Law No.03 / L-073 on General Elections in the Republic of Kosovo

Article 27
Gender Requirement

27.1 In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female, with one candidate from each gender included at least once in each group of three candidates, counting from the first candidate in the list.

27.2 This article has no application to lists consisting of one or two candidates.

Article 111
Distribution of seats

[…]

111.4 All votes received by the candidates appearing on the open list of each Political Entity shall be counted separately. A vote cast for a Political Entity shall be considered as a vote received by the candidate ranking first on the Poltical Entity's candidate list. The candidate lists shall then be reordered in descending order based on the number of votes received by each candidate.

111.5 The seats allocated to a Political Entity in paragraph 2 of this Article shall be distributed to the candidates on the Political Entity's candidate list as reordered in paragraph 4 of this Article, starting from the first candidate on the list in descending order, until the number of seats allocated to the Political Entity is exhausted. Additional seats allocated to Political Entities representing the Kosovo Serb community and other non majority communities as in paragraph 3 of this Article shall be distributed to the subsequent candidates on the Political Entity's candidate list reordered as in paragraph 4 of this Article.

111.6 If, after the allocation of seats as set out in paragraph 5 of this Article, the candidates of the minority gender within a Political Entity have not been allocated at least 30% of the total

seats for that Political Entity, the last elected candidate of the majority gender will be replaced by the next candidate of the opposite gender on the reordered candidate list until the total number of seats allocated to the minority gender is at least 30%."

Article 112
Replacement of Assembly Members

112.1 Seats allocated in accordance with the present Law are held personally by the elected candidate and not by the Political Entity. A member's mandate may not be altered or terminated before the expiry of the mandate except by reason of:

a)) the conviction of the member of a criminal offence for which he or she is sentenced to prison term as provided by the article 69.3 (6) of the Constitution;

b) the failure of the member to attend for six (6) consecutive months a session of the Assembly or the Committee(s) of which he or she is a member, unless convincing cause is shown as per Assembly Rules;

c) the member's forfeiture of his or her mandate under article 29 of this Law;

d) the death of the member;

e) mental or physical incapacity as determined by final Court decision; or

f) the resignation of the member.

112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:

a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election;

b) if there is no other eligible candidate of the same gender on the candidate list, by the next eligible candidate who won the highest number of votes from the candidate list;

Law No. 03/L-256 on Amending and Supplementing the Law No. 03/L-073 on General Elections in the Republic of Kosovo

Article 8

2. . Article 111 of the law in force paragraph 4. is reworded as following:

111.6 . If, after the allocation of seats to candidates on the list of a Political Entity, as set out in paragraph 5 of this Article, the candidates of the minority gender have not been allocated at least 30% of the total seats allocated to that Political Entity, the last elected candidate of the majority gender will be replaced by the next candidate of the minority gender on the reordered candidate list until the total number of seats allocated to the minority gender is at least 30%. This paragraph does not apply to allocation of seats from a list consisting of one (1) or two (2) candidates.

Law No. 05/L -02 on Gender Equality

Article 5
General measures to prevent gender discrimination and ensure gender equality

[...]

2. Any provision which is in contradiction to the principle of equal treatment under this Law shall be repealed.

Article 6
Special measures

1. Public institutions shall take temporary special measures in order to accelerate the realization of actual equality between women and men in areas where inequities exist.

2. Special measures could include:

2.1. quotas to achieve equal representation of women and men;

[...]

8. Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) *for each gender, including their governing and decision-making bodies.*

Article 13
Ombudsperson

Ombudsperson is an equality institution that handles cases related to gender discrimination, in accordance with procedures established by the Law on Ombudsperson.

Law No. 05/L-021 on the Protection from Discrimination

Article 6
Other justified treatments

Notwithstanding Articles 3 and 4 of this law it is not deemed a discrimination a distinction in treatment which is based on differences provided on grounds of Article 1 of this Law, but which as such represents real and determinant characteristic upon employment, either because of the nature of professional activities or of the context in which such professional works are conducted, if that provision, criterion or practice is justified by a legitimate purpose and there is a reasonable relationship of proportionality between the means employed and the targeted aim.

Article 9
Ombudsperson

[…]

2. The Ombudsperson has the following competences:

2.13. Ombudsperson may be presented in the quality of a friend of the court (amicus curiae) in proceedings related to issues of equality and protection from discrimination;

Admissibility of the Referral

63. The Court first examines whether the admissibility requirements established by the Constitution, foreseen by the Law and further specified by the Rules of Procedure have been met.

64. 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.*

65. In addition, the Court also examines whether the Applicants fulfilled the admissibility requirements as provided by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of the Referral]

> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".*

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".

66. With regard to the fulfillment of these criteria, the Court notes that the Applicants have fulfilled the criteria set out in paragraph 7 of Article 113 of the Constitution, as they are authorized parties, challenge acts of a public authority, namely the Decision [Aa. No. 4/2020] of 19 February 2020 of the Supreme Court and the Decision [Aa. No. 3/2020] of 19 February 2020 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicants also clarified the fundamental rights and freedoms that they claim to have been violated, in accordance with Article 48 of the Law, and submitted the Referral within the time limit set out in Article 49 of the Law.

67. Accordingly, based on the above, the Court declares the Referral admissible and will consider its merits in the following.

Merits of the Referral

68. The Court recalls that the Applicants allege that their rights protected by Articles 7 [Values], 24 [Equality Before the Law], 45 [Freedom of Election and Participation], 53 [Interpretation of Human Rights Provisions] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol No. 1 of the ECHR.

69. In sum, the Court recalls that the Applicants, in essence, allege that the decision-making of the CEC, the ECAP and of the Supreme Court is unconstitutional due to the fact that:

(i) the interpretation of Article 112.2 (a) of the Law on General Elections by the three previous institutions (CEC, ECAP and Supreme Court), clearly violates the principle of non-discrimination within the meaning of paragraph 2 of Article 24 of the Constitution and that an interpretation that it has been made to that legal provision is also contrary to the Constitution, Law No. 05/L-020 on Gender Equality and Law No. 05/L-021 on the Protection from Discrimination;

(ii) the challenged decisions according to the interpretation of Article 112.2 (a) of the Law on General Elections violate the principle of proportionality within the meaning of paragraph 2 of Article 55 of the Constitution, a restriction which denies the

essence of a guaranteed right; namely the right to be elected guaranteed by Article 45 of the Constitution;

(iii) the challenged decisions for the replacement of the deputy/ies with the next candidate/s which determining basis is the "*gender*" of the candidate/s, excluding the right gained through the free expression of the political will - vote, of certain candidates in a waiting row, is contrary to paragraph 2 of Article 7 of the Constitution and Article 45 of the Constitution.

70. In this regard, the Court notes that the substance of the case raised by the Applicants refers to the aspect of "*equality before the law*" and of "*the right to be elected*" in the process of implementing the Law on General Elections in the case of replacement of the deputies of the Assembly of the Republic of Kosovo.

71. It follows that the constitutional complaint in this case concerns the fact: Has Article 112.2 (a) of the Law on General Elections been applied by the CEC, the ECAP and the Supreme Court, in accordance with the guarantees, the values and principles proclaimed by Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol No. 1 of the ECHR?

72. To give a concrete answer to this constitutional complaint, in the following Court will present (i) the general principles of the Constitution and the ECHR regarding equality before the law and the right to be elected; (ii) summaries of the opinions and reports of the Venice Commission on gender equality, in particular gender quotas as special measures to address the factual gender inequality in political representation; and, subsequently, will (iii) apply all of these principles to the circumstances of the present case in order to provide the final answer in the present case.

General principles deriving from the Constitution and the ECHR regarding equality before the law and the right to be elected

73. The Republic of Kosovo is determined for a constitutional order in which gender equality is one of the fundamental values. This value has a direct impact on the democratic development of society and the realization of equal opportunities for women and men in political, economic, social, cultural and other areas of social life (see Article 7 of the Constitution).

74. The need to create equal opportunities creates for the state positive obligations for the use of various instruments and measures, including legal norms, in order to eliminate *factual inequalities* between women

and men. In the context of ensuring gender equality, the Law on General Elections defines the gender quota of under-represented gender representation in the 30% quota. The issue of under-represented gender in the applicable legislation is called "*minority gender*", without specifying which gender it is specifically, due to the fact that at different times the minority gender may be one or the other (read in this context Article 24 of the Constitution and Article 27 of the Law on General Elections).

75. According to the Constitution, it is expressly provided that the principles of equal protection do not prevent the imposition of necessary measures for the protection and advancement of the rights of individuals and groups who are in an unequal position (see Article 24.3 of the Constitution). Such special measures are instruments by which the state, namely the Republic of Kosovo, develops the policy of equal opportunities, as well as mitigates or eliminates *factual inequality*. Such measures can be implemented indefinitely, but only until the realization of the purpose for which they are set.

76. On the other hand, with regard to Article 45 of the Constitution, the Court notes that this constitutional norm guarantees the right to elect (the active aspect of the vote) as well as the right to be elected (the passive aspect of the vote) (see, for more on these two aspects, the cases of the Constitutional Court where various issues related to Article 45 of the Constitution have been addressed: KI01/18, with Applicants *Gani Dreshaj and the Alliance for the Future of Kosovo (AAK),* Judgment of 4 February 2019 ; KI48/18, Applicants *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 4 February 2019). More specifically, the passive aspect of the vote that is reflected in the right to be elected, represents a specific right relevant in the present case, it belongs to the candidates as individuals, namely as natural persons, who run in the elections, at local or central level, as well as political entities, respectively legal entities running in elections, at local or central level.

77. The rights guaranteed by Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR are fundamental rights towards establishing and maintaining the foundations of an effective and valid democracy governed by the rule of law. However, these rights are not absolute. Both the Constitution and the ECHR allow a space for "*implicit restrictions*" in which field the state has a wide margin of appreciation (see the case of the Constitutional Court, KI207/19, Applicant *NISMA Social Democratic, New Kosovo Alliance and the Justice Party*, Judgment of 10 December 2020, paragraphs 148-153, and references cited therein: the case of the ECHR, *Yumak and Sadak*

v. Turkey, Judgment of 8 July 2008, paragraph 109 and references cited therein).

78. The ECtHR has clarified that as an article with special features, Article 3 of Protocol No. 1 of the ECHR does not contain a list of legitimate aims which would justify the restriction of the exercise of the right guaranteed by this article. It also does not refer to the "legitimate aims" which are exhaustively set out in Articles 8 to 11 of the ECHR. As a result, the ECtHR has emphasized that states are free to invoke their "*specific purposes*" when restricting the exercise of this right provided that such purposes are: (i) in accordance with the rule of law; and (ii) the general objectives of the Convention (see the case of Court KI207/19, cited above, paragraphs 148-153 and the references cited therein).

79. Furthermore, regarding the interpretation of the guarantees embodied in Articles 24 and 45 of the Constitution, the Court refers to the case law of the ECtHR (with particular emphasis on the case *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009), in the context of the application of the equivalent articles, namely Article 14 (Prohibition of discrimination) in conjunction with Article 3 (Right to free elections) of Protocol No. 1 of the ECHR.

80. Article 14 of the ECHR complements the other essential provisions of the Convention and its Protocols. This article does not act independently as it has effect only in relation to the "enjoyment of rights and freedoms" protected by other provisions. Although the application of Article 14 does not presuppose a violation of those provisions - and to this extent is autonomous, there can be no room for its application unless the facts in question fall "*within the scope*" of one or more of the latter (see, cases of the ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009, paragraph 39; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, paragraph 71; *Petrovic v. Austria*, Judgment of 27 March 1998, paragraph 22; and *Sahin v. Germany*, Judgment of 8 July 2003, paragraph 85). The prohibition of discrimination in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and its Protocols require each State to guarantee. This article also applies to those additional rights that fall within the general scope of each article of the ECHR, which the state has decided to provide voluntarily. This principle is well based on the case law of the ECtHR (see case *"case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (merits), Judgment of 23 July 1968, paragraph

9*; Stec and Others v. The United Kingdom (December*), para. 40; and *EB v. France, Judgment of 22 January 2008,* paragraph 48).

81. According to the case law of the ECtHR, for the purposes of Article 14 of the Convention, the treatment is discriminatory if "*there is no objective and reasonable justification*", namely if it does not pursue a "*legitimate aim*" or if there is no "*reasonable relationship of proportionality between the means employed and the aim sought to be achieved*" (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, Series A No. 94, pp. 35-36, p. 72). The ECtHR noted that the Contracting States enjoy a certain margin of appreciation as to whether and to what extent differences in similar situations justify a different treatment (see ECtHR case *Willis v. the United Kingdom*, Judgment of 11 June 2002, paragraph 39).

82. The ECtHR has also emphasized that Article 14 of the Convention does not exist independently, but plays an important role in complementing the other provisions of the Convention and its Protocols, as it protects individuals, placed in similar situations, from any discrimination in enjoyment of the rights defined by other provisions. When there are allegations of a violation of an essential provision of the Convention on which it is based, both in itself and in relation to Article 14, and a particular violation of substantive Article has been found, it is not generally necessary for the Court to examine the case under Article 14 as well, although the position is different if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see ECtHR case: *Dudgeon v. the United Kingdom*, Judgment of 22 October 1981, Series A No. 45, p. 26, paragraph 67, and *Chassagnou and Others v. France*, No. 25088/94, Claim No. 28331/95 and application no. 28443/95, paragraph 89, ECHR 1999-III).

83. The ECtHR has often underlined that Article 14 merely complements the other essential provisions of the Convention and its Protocols (see the ECtHR cases: *Molla Sali v. Greece*, Application No. 20452/14, Judgment of 19 December 2018, paragraph 123 *Carson and Others v. the United Kingdom*, Application No. 42184/05, Judgment of 16 March 2010, paragraph 63; *EB v. France*, Application No. 43546/02, Judgment of 22 January 2008, paragraph 47; *Marckx v. Belgium*, Application No. 6833/74, Judgment of 13 June 1979, paragraph 32). This means that Article 14 does not prohibit discrimination as such, but only discrimination in the enjoyment of "the rights and freedoms set forth in the Convention". In other words, the guarantee provided for in Article 14 does not exist independently (Case "*Relating to certain aspects of the laws on the use of languages in education in*

Belgium" v. Belgium ("Belgian language case"), applications no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968, paragraph 9 in Part "Law"; *Carson and Others v. the United Kingdom* paragraph 63; *EB v. France*, cited above, paragraph 47) and that this article forms an integral part of each of the articles defining rights and freedoms (*Belgian language issue*, cited above, paragraph 9 of the "Law" section; *Marckx v. Belgium*, cited above, paragraph 32; *Inze v. Austria*, application no. 8695/79, Judgment of 28 October 1987, paragraph 36). In practice, the ECtHR always examines Article 14 in conjunction with another essential provision of the Convention.

84. Finally, not all differences in treatment - or failure to treat persons differently in relatively different situations - constitute discrimination, but only those without "*an objective and reasonable justification*" (see ECtHR cases: *Molla Sali v. Greece*, application no. 20452/14, Judgment of 19 December 2018, paragraph 135; *Fabris v. France*, application no. 16574/08, Judgment of 7 February 2013, paragraph 56; *D.H. and Others v. Czech Republic*, application no. 57325/00, Judgment of 13 November 2007, paragraph 175; *Hoogendijk v. the Netherlands*, application no. 58641/00, Decision on Inadmissibility of 1 June 2005).

85. In deciding the discrimination issues, the ECtHR applies the following test:

> 1. Has there been a difference in the treatment of persons in analogous or relatively similar situations - or a failure to treat persons in relatively different situations differently?
> 2. If so, is such a difference objectively justified - or the absence of such a change in treatment? In particular: a. Does it pursue a legitimate aim? b. Are the remedies used reasonably proportionate to the aim pursued?

Summary of Opinions and Reports of the Venice Commission for Gender Equality [CDL-PI(2016)007], OSCE/ODIHR and others

86. International practice shows that special measures imposed on different systems to address factual inequalities in gender representation - are legal arrangements that require a minimum percentage of minority gender representation. As such and in so far as they serve such a purpose, these special measures shall not be regarded as contrary to the principle of equal voting.

87. Some national legislations and practices of some European parties have gone a step further in introducing quotas with the aim of improving gender balance or, more directly, achieving equal representation of women and men in the elected body. While these practices are specific to countries and political parties, the introduction of gender equality measures is gradually becoming the dominant trend. Otherwise, persistent and recurring situations of gender unequal representation can in no way be considered evidence of good practice.

88. On this basis, gender quotas aim to improve gender balance in politics. Among other things, they specify the minimum percentages of women candidates for election, usually in the party lists. Furthermore, there may be provisions for the order of ranking in the list.

89. Gender quotas can be legally set ("*legal quota*" or "*mandatory quota*"), or they can be approved voluntarily by political parties ("*voluntary quota*" or "*party quota*"). Legal quotas are mandatory for all parties nominating candidates for parliament, while party quotas are only self-binding for the respective party. Both types of quotas can play an important role in the electoral process.

90. According to the Venice Commission and the Committee of Ministers of the Council of Europe, gender electoral quotas can be considered as "*an appropriate and legitimate measure to increase women's parliamentary representation*". The 2009 Declaration of the Committee of Ministers "Making Gender Equality a Reality" urges member states to allow positive actions or specific measures to be adopted in order to achieve balanced representation in political and public decision-making.

91. Similarly, in accordance with OSCE Decision no. 7/09 on the Participation of Women in Political and Public Life, the Council of Ministers calls on the participating States to *"Consider possible legislative measures, which would facilitate a more balanced participation of women and men in political and public life and especially in decision-making"*, and *"Encourage all political actors to promote equal participation of women and men in political parties, with a view to achieving better gender-balanced representation in elected public offices at all levels of decision-making"*. Consequently, the Court notes that all such steps are considered good practice.

92. The Council of Europe and the OSCE recognize that legislative measures are effective mechanisms for promoting women's participation in political and public life. On the other hand, Article 4

of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) makes it clear that "*adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination…"*. As such, and in light of the historical inequalities suffered by women across the OSCE region and globally, states may issue specific legal requirements or impose other measures aimed at ensuring equal participation of women in political life and as candidates.

93. The guidelines for the regulation of political parties acknowledge that *"the small number of women in politics remains a critical issue that undermines the full functioning of the democratic process"*. Therefore, *"electoral gender quotas can be considered an appropriate and legitimate measure to increase women's parliamentary representation"*.

94. There are various socio-economic, cultural and political factors that may hinder women's access to the political arena. Structural barriers in society that limit women's political representation are not easy to remove and fundamental change requires a lot of time and effort. Thus, for example, changing the electoral system by introducing quota rules may provide a practical alternative to increase women's representation. The Venice Commission, in *its Code of Good Practice in Electoral Matters*, considered that legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered contrary to the principle of equal suffrage if they have a constitutional basis.

95. The analysis of electoral systems of gender quota and their implementation in Europe shows that one type of gender electoral quota for public elections is in use in 35 countries. Thirteen countries (Albania, Belgium, Bosnia and Herzegovina, France, Greece, Ireland, Montenegro, Poland, Portugal, Serbia, Slovenia, Spain and Northern Macedonia) have incorporated legal quotas that are mandatory for all political parties. Voluntary quotas of the parties have been implemented in 22 countries, meaning that at least one of the political parties represented in parliament has included gender electoral quotas in its statutes. In six countries, no gender quota is in use for national elections.

96. However, it should be noted that in the European experience, although gender quotas are an effective means of increasing the presence of women in political bodies, they do not automatically result in equal

representation of women and men. Quotas should include rules regarding ranking and relevant sanctions for non-compliance. […]".

97. The Venice Commission and the OSCE/ODIHR have on several occasions stated that "*the small number of women in politics remains a critical issue that undermines the full functioning of democratic processes*". In accordance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Report on the Method of Nomination of Candidates within Political Parties considers electoral quotas as interim special measures that may act as an "*appropriate and legitimate measure to increase women's parliamentary representation"* It is up to each state to decide how to improve the gender equality. However, the Venice Commission considers that, if legal quotas are set, they "*should provide for at least 30 percent of women on the lists" of parties, while 40 or 50 are preferable*", in order to be effective.

98. In addition, the Court notes that the relevant parts of Resolution 1706 (2010) on increasing the representation of women in politics through the electoral system adopted by the Parliamentary Assembly on 27 January 2010, establish the following:

> *"4 […] Changing the electoral system to one more favourable to women's representation in politics, in particular by adopting gender quotas, can lead to more gender-balanced, and thus more legitimate, political and public decision making.*
>
> *6. The Assembly considers that the lack of equal representation of women and men in political and public decision making is a threat to the legitimacy of democracies and a violation of the basic human right of gender equality, and thus recommends that member states rectify this situation as a priority by:*
>
> *6.3. reforming their electoral system to one more favourable to women's representation in parliament:*
>
> *6.3.1. in countries with a proportional representation list system, consider introducing a legal quota which provides not only for a high proportion of female candidates (ideally at least 40%), but also for a strict rank-order rule (for example, a "zipper" system of alternating male and female candidates), and effective sanctions (preferably not financial, but rather the non-*

acceptance of candidacies/candidate lists) for non-compliance […];"

99. The relevant parts *of Resolution 2111 (2016) on the impact assessment of measures to improve the political representation of women*, adopted by the Parliamentary Assembly on 21 April 2016, define as follows:

"2 Electoral quotas are the most effective means of achieving significant, rapid progress, provided that they are correctly designed and consistently implemented. Quotas should be adapted to the electoral system in force, set ambitious targets and be coupled with stringent sanctions for non-compliance".

100. The Preamble of *Recommendation Rec (2003) 3 on the balanced participation of women and men in political and public decision-making*, adopted by the Committee of Ministers on 12 March 2003, provides that:

"[…] balanced participation of women and men in political and public decision-making is a matter of the full enjoyment of human rights, of social justice and a necessary condition for the better functioning of a democratic society".

Application of the abovementioned Principles in the present case

101. The Court first recalls that the Applicants, in the elections of 6 October 2019, in the capacity of candidates for deputies from the ranks of the political entity LVV had achieved the following election result: the first Applicant, Mrs. Tinka Kurti - 7655 votes; and, the second Applicant, Mrs. Drita Millaku - 7063 votes. Meanwhile, on the other hand, the candidate Eman Rrahmani achieved an election result according to which he had won 611 votes less than the first Applicant and 19 votes less than the second Applicant.

102. On this basis, the Court notes that on the occasion of the formation of the Government of the Republic of Kosovo, the deputies of the political entity LVV, who were elected to government positions, vacated 5 positions of deputies. Therefore, the candidate Enver Haliti with 7,777 votes replaced the deputy Albin Kurti; candidate Alban Hyseni with 7,767 votes replaced the deputy Glauk Konjufca; candidate Arta Bajralia with 7,674 votes replaced the deputy Albulena Haxhiu; candidate Fitim Haziri with 7,542 votes replaced the deputy Arben

Vitia; candidate Eman Rrahmani with 7,044 votes replaced the deputy Haki Abazi. Later, the candidate Taulant Kryeziu with 6968 votes replaced the deputy Shpejtim Bulliqi.

103. The abovementioned facts and the challenged decisions prove that all the replacements in the previous legislature of the Assembly were made on the basis of the replacement within the same gender (man-man and woman-woman), referring to the direct application of Article 112.2 (a) of the Law on General Elections. These replacements were made without taking into account the election result scored by the candidates for deputies after fulfilling the legal quota of 30% set out in Article 27 of the Law on General Elections.

104. In this respect, as defined above, the Court reiterates that the main aspect of this constitutional complaint concerns the fact that: *Has Article 112.2 (a) of the Law on General Elections been applied by the CEC, the ECAP and the Supreme Court, in accordance with the guarantees, the values and principles proclaimed by Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol No. 1 of the ECHR?*

105. In this regard, the Court recalls that the above-mentioned replacements of former deputies with new deputies were necessary as a total of 6 LVV deputies were appointed to government or municipal positions. This necessity of replacing the deputies has automatically activated the legal provisions established in Article 112.2 (a) of the Law on General Elections.

106. This special article - which is a key article in this case - specifies the manner of replacement of deputies. Specifically, the article in question reads as follows:

> *"112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:*
>
> *a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the Political Entity on whose behalf the member contested the last election; […]."*

107. Following complaints by the two Applicants that they were being unfairly and discriminatory denied the right to be elected, the CEC, the ECAP and the Supreme Court had to interpret this specific article and apply it in the circumstances of the present case. The Applicants essentially alleged that despite the completion and exceeding of the

quota of 30% by the female candidates for deputies from LVV - the replacements for deputies were made not based on the election result but based on gender. According to them, this has caused inequality in treatment and violation of their right to be elected.

108. The CEC implemented this article so that all replacements of deputies were recommended to be made with the next candidate of the same gender, regardless of whether the quota of 30% of the underrepresented gender was met or not. Thus, the CEC recommended that the candidate Eman Rrahmani with 7,044 votes becomes a deputy - surpassing the female candidate from line for the replacement, Tinka Kurti with 7,655 votes and the other female candidate Drita Millaku, with 7,063 votes. The two women candidates in question - the Applicants before this Court - had more votes than the male candidate, Eman Rrahmani. However, based on the CEC interpretation of Article 112.2 (a) of the Law on General Elections, the replacements were made only and exclusively within the same gender.

109. The ECAP further confirmed the way as to how the CEC interpreted Article 112.2 (a) of the Law on General Elections in the Applicants' circumstances. ECAP clarified that pursuant to the same article, the replacement was made in such a way that male deputies were replaced with the next male candidates, while female deputies were replaced with the next female candidates. Consequently, according to the ECAP, the CEC decision was "*fair and based on law, since the replacements for members of the Assembly of the Republic of Kosovo are made by taking into account the next candidate of the same gender and the same political entity, as it is acted in the present case*".

110. This logic of interpretation and this rationale for implementation was also supported by the Supreme Court when it fully confirmed the legal decisions at the level of the ECAP and the CEC. According to the Supreme Court, Article 112.2 (a) of the Law on General Elections has provided for the manner of replacement of deputies so that the replacement is made with new deputies from the same political entity and according to the same gender. This way of replacement provided by law, according to the Supreme Court, could not be avoided by either the CEC, the ECAP or the Supreme Court because there is an assumption that the laws are in compliance with the Constitution and that they should be implemented as they are "*until by the Constitutional Court is found that a law or any of its legal provisions is contrary to the Constitution*". Therefore, according to the Supreme Court, the legal solution provided by Article 112.2 (a) of the Law on General Elections cannot be said to be unconstitutional.

111. However, the Constitutional Court does not agree that the interpretation of this Article by the CEC, the ECAP and the Supreme Court is an accurate and constitutional interpretation, for the reasons that will be extensively stated in the following reasoning of this Judgment.

112. As a preliminary issue it should be clarified that the Court is not assessing *in abstracto* whether or not Article 112.2 (a) of the Law on General Elections is in compliance with the Constitution. This is due to the fact that, neither before this Court nor before the previous public institutions that have addressed this issue, the Applicants have never alleged that the article in question is unconstitutional. On the contrary, they only claimed that this article was unconstitutionally implemented by the CEC, ECAP and the Supreme Court.

Consequently, the Court's assessment in this case is a concrete assessment which is limited to reviewing the constitutionality of the challenged decisions of the Supreme Court and whether these decisions are in compliance with Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol No. 1 of the ECHR.

113. Having said that, the Court is of the opinion that both the CEC, but also the ECAP and the Supreme Court, have interpreted Article 112.2 (a) of the Law on General Elections in a rigid and textual manner and in isolation from all other legal norms provided by the Law on General Elections and the Law on Gender Equality as well as the principles, values and spirit of the letter of the Constitution. This type of interpretation has abstracted the context, purpose and reason for setting the 30% quota, as a special measure to help in achieving equal representation between the two genders in the Assembly of the Republic.

114. According to such an interpretation of the legal norm, the replacement of LVV deputies at that time was made by the next LVV candidates for deputies of the "*same gender*", so that male deputies were replaced by male deputies - without taking into account the effect of the election result achieved by women candidates for deputies after meeting the quota of 30% representation of the under-represented gender (in this case female gender).

115. The textual interpretation of the key concept of this case that the replacement be made exclusively and only by the same gender, regardless of the relevant factual circumstances in terms of the application of gender quotas and their purpose, has led to a decision

where the CEC has avoided implementation of the result of the voting of candidates for deputies in favor of the *in blanco* application of Article 112.2 (a) of the Law on General Elections which provides that the replacement is made by the "*next eligible candidate of the same gender*". This interpretation of the CEC, subsequently approved by the ECAP and the Supreme Court, in practice has resulted in the winning of mandates by male candidates, despite the fact that female candidates (the Applicants) had won more votes in a situation **after meeting the legal quota of 30%** for representation of the minority gender.

116. The reasoning of the Supreme Court regarding the legal determination provided by Article 112.2 (a) of the Law on General Elections cannot be avoided either by the CEC, the ECAP or the Supreme Court. *"until the Constitutional Court finds that a law or any of its legal provisions is contrary to the Constitution"*- requires a separate answer for at least the following two reasons.

117. The first concerns the fact that this Court considers it extremely important to emphasize the competence and constitutional obligation of the regular courts and of all public authorities to decide cases before them not only on the basis of law but also on the basis of the Constitution. More specifically, the Court has already stated that based on Articles 102.3 and 112.1 of the Constitution, all regular courts, "*including the Supreme Court as the highest judicial instance at the level of the Republic, are obliged to interpret laws in accordance with the Constitution*". The Court further noted that: *"the Constitution recognizes the authority to interpret the Constitution as well as the authority to interpret laws in accordance with the Constitution to all courts and other public authorities in the Republic of Kosovo. However, the Constitutional Court is the only authority in the Republic of Kosovo with exclusive constitutional authority to repeal a law or legal norm as well as to make the final interpretation of the Constitution and the compatibility of laws with it"* (see, more, regarding the competencies and obligations of the regular courts regarding the application of constitutional norms, the case of Court KI207/19, cited above, paragraphs 112-130).

118. The second concerns the fact that in this particular case the constitutionality of Article 112.2 (a) of the Law on General Elections was never subject to review. In this case, the issue coincides with the interpretation of this legal norm in relation to the general constitutional principles as well as in relation to other relevant legal norms from the Law on General Elections and the Law on Gender Equality that had to be taken into account to clearly define what is the

correct way of replacing deputies in the phase after the fulfillment of the legal quota of 30%. In such circumstances, the task of the CEC, the ECAP and the Supreme Court was to take into account all legal and constitutional norms related to quotas and their purpose and not to make an interpretation based on a single article.

119. Interpretation of Article 112.2 (a) of the Law on General Elections according to the interpretation by the CEC, ECAP and the Supreme Court would only make sense in the situation where it may occur that gender-for-gender (woman-for-woman or man-for-man) non-replacement could risk not meeting the legal quota of 30% of under-represented gender representation. However, the interpretation of this article, as it is done, when it is known that in the elections of 6 October 2019 women candidates of the political entity LVV managed to get meritorious votes beyond the legal quota of 30%, is an erroneous interpretation of this norm and inconsistent with the very purpose of the legal quotas set forth in Article 27 of the Law on General Elections.

120. The Court notes that the interpretation of this legal norm in the manner set out in this Judgment may present situations where in the phase after meeting the 30% gender quota, the deputies of minority gender could be replaced by deputies of majority gender, based on the election results. For example, it may happen that a woman holding a government post will be replaced by a man who, in terms of the votes won after meeting the 30% quota, is in line as a candidate to become a deputy. But, the opposite can also happen, that a man who takes a government post will be replaced by a woman who, in terms of the votes won after meeting the 30% quota, is in the line as a candidate to become a deputy, as should have happened with the cases of the Applicants of this case. The only situation that can never happen based on the legislation in force and the final interpretation given by this Judgment is the risk of representation in the quota of 30%.

121. The purpose of setting quotas, as further analysis will show, is related to the need to advance gender equality within a society until factual equality is achieved when quotas become unnecessary. Article 112.2 (a) of the Law on General Elections exists for a single reason: to present the manner of replacement of deputies - always preserving the purpose of legally binding representation of at least 30% of the minority gender. If, after meeting the 30% norm, the candidates from minority gender manage to become deputies on their own, achieving a better result than members of the majority gender, they should not be denied the right to be elected deputies to the Assembly.

122. In relation to the requirements deriving from Article 24 of the Constitution and Article 14 of the ECHR as well as Article 45 of the Constitution and Article 3 of Protocol no. 1 of the ECHR, the Court notes that the preliminary issue to be defined is whether there was a difference in treatment between the Applicants and the deputies of the Assembly who were elected from the list of replacing candidates for candidates for deputies.

123. While in the present case the difference in treatment is based on the gender of the candidates, the concept of reasonable and objective justification must be strictly interpreted. Having said that, it is also worth mentioning that Article 24 of the Constitution and Article 14 of the ECHR do not prohibit the different treatment of groups in order to correct "*factual inequality*" between them. In fact in certain cases failure to correct inequalities through different treatment may, without a reasonable and objective justification, constitute a violation of that article (see ECtHR cases: Case "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, cited above, paragraph 10; *Thlimmenos v. Greece*, Judgment of 6 April 2000, paragraph 44; and *D.H. and Others v. Czech Republic*, Judgment of 13 November 2007, paragraph 175; *Sejdić and Finci v. Bosnia and Herzegovina*, Judgment of 22 December 2009, paragraph 44).

124. Returning to the present case, underlining the abovementioned results of the general elections for the Assembly, the Court notes that it is evident that within the political entity LVV, based on the election results of the general elections of 6 October 2019, it turns out that the latter as a political entity had won 29 seats of deputies. The Court also notes that all deputies were elected on the basis of the election result, where out of 29 deputies, 10 deputies were women, while 19 were male deputies. So, this result consists in the conclusion that women candidates within the political entity LVV, won over 34% of the seats of the political entity LVV. Consequently, the difference in treatment between the Applicants and the deputies of the Assembly who were elected from the list of replacing candidates for candidates for deputies, regarding the replacement of members of the Assembly, was *determined by law*, namely by Article 112.2 (a) (Replacement of Assembly Members) of the Law on General Elections.

125. The Court will further assess whether the challenged Decision meets the requirements for *pursuing a legitimate aim* and is in accordance with the *principle of proportionality*.

126. In the circumstances of the present case, the Court notes that based on the assessment of the CEC, the ECAP and the Supreme Court, in order for the candidate to be eligible to replace the deputies, the primary criterion was gender of the candidate, while the second criterion was the election result for candidates of the list of candidates of the political entity LVV. So, the election result achieved by the candidates for deputies based on the first assessment is affirmed (as it is primary to replace deputies with candidates for deputies of the same gender), while the election result comes into play only in determining the ranking of candidates within the same gender.

127. On this basis, the Court notes that the concept of gender quota, as well as the promotion of gender equality, remains a key objective in the member states of the Council of Europe. Also, the institutions of this organization consider that the lack of gender equality in policy-making poses a threat to democratic legitimacy and a violation of gender equality (see paragraphs 86-100 of this Judgment which reflect these principles in more detail). A similar approach is contained in the Law on General Elections, which contains the obligation to represent the under-represented gender in the 30% gender quota (see Article 27 of the Law on General Elections).

128. The Court notes that the Law on General Elections contains the obligation of a gender quota as a form of representation in the Assembly, at *a minimum of 30% for the under-represented gender*. Thus, the allocation of seats works in such a way that after the allocation of seats for political entities, if the minority gender candidates are not allocated at least 30% of the total number of seats of the political entity, the last elected candidate of the majority gender, is replaced by another candidate of the opposite gender in the rearranged list of candidates, until the total number of seats allocated for the minority gender is at least 30% (see Article 111.6 of the Law on General Elections, based on the amendments made with the Law on Supplementing and Amending the LGE - these articles are quoted in the part of constitutional and legal provisions).

129. In the context of the gender quota set out in the Law on General Elections, the Court also recalls paragraph 3 of Article 24 of the Constitution which stipulates that:

> *Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.*

130. Therefore, similar to Article 24 of the Constitution, Article 14 of the ECHR also does not prohibit the member states the different treatment of groups in order to correct "*factual inequality*" between them. In fact in certain cases failure to correct inequalities through different treatment may, without a reasonable and objective justification, constitute a violation of that article (see ECtHR cases: Case "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, cited above, paragraph 10; *Thlimmenos v. Greece*, cited above, paragraph 44; and *D.H. and Others v. Czech Republic*, cited above, paragraph 175; *Sejdić and Finci v. Bosnia and Herzegovina*, cited above, paragraph 44).

131. The Court considers that the meaning of equality intended in the present case has another dimension, namely positive discrimination or the determination of a gender quota for the representation of women in the capacity of the underrepresented gender, which is considered to be in line with the spirit of constitutional ideals and the constitutional identity of the Republic of Kosovo. Consequently, the constitutional principles of gender equality and non-discrimination remain crucial and that the issue of gender quotas, for historical and cultural reasons, as well as the elimination of *factual inequalities* between women and men, is in line with the spirit of the constitutional normative system. Finally, the concept of gender equality and non-discrimination is dynamic and evolves towards meeting the sublime ideal of equality in representation of women and men in the 50% to 50% ratio.

132. The Court therefore notes that the purpose of the Law on General Elections in the context of gender representation within the Assembly is to provide for representation of the underrepresented gender (minority gender), which may not be less than 30%. However, clearly, 30% represents the minimum limit of gender representation of the minority gender, but not the highest limit of representation of the underrepresented gender.

133. In the same spirit is Article 112 of the Law on General Elections, which serves to show the manner of replacement of deputies, in which case candidates of the same gender are replaced as a way to maintain the minimum threshold of representation of the underrepresented gender in the quota of 30%. However, in the case of the Applicants, it happened that in the case of the replacement of deputies as a result of the above circumstances (election of deputies in government positions), at the moment when they were replaced by candidates of the same gender, it resulted that deputies Fitim Haziri and Eman

Rrahmani to have less votes than the Applicant Tinka Kurti, while in the case of the Applicant Drita Millaku, only the candidate Eman Rrahmani had less votes.

134. The Court considers that this measure set out in the Law on General Elections, namely the determination of the minimum representation of the minority gender to a minimum of 30%, as such is necessary in order to enable the representation of the under-represented gender in the Assembly, namely women. As such, this definition of the law on gender quotas, in principle, does not constitute a violation of the voting rights. However, in the circumstances of the present case, while the minimum quota of representation within the political entity LVV has been achieved entirely based on the election result of the elections of 6 October 2019, there is no need to apply a gender quota of 30%. Consequently, the female candidates within the political entity LVV had won 10 out of 29 seats, or over 34% of the seats within the total number 29. Therefore, as a result of the election result, the use of the gender quota has been consumed, as the legitimate aim for which it exists has already been met and exceeded through the election result.

135. Therefore, at the moment of replacement of the candidates for deputies, in which case Fitim Haziri and Eman Rrahmani were elected as deputies, based on the replacement of the same gender, it turned out that *the essence of the election result* for the Applicant Tinka Kurti was violated, while for the Applicant Drita Millaku, the essence of the election result was violated only in relation to the candidate Eman Rrahmani. Thus, such a measure (gender quota 30%) set to eliminate factual inequalities between women and men, in this case has continued to be implemented, despite the fact that the goal for which it was set has already been achieved through the election result by the women candidates within the LVV.

136. This is due to the fact that once a minimum representation of 30% is ensured for the underrepresented gender, all future replacements must be made on the basis of the ranking of candidates for deputies, which is determined by the election result. On this basis, the gender quota is applied only until the goal for which it has been set is achieved, namely to ensure the mandatory minimum representation of the minority gender in the 30% quota.

137. At the moment when this minimum gender quota is achieved or exceeded through the election result of the candidates for deputies, the goal that is intended to be achieved through the norm remains without effect. If it were otherwise, the gender quota of 30% would mean that it stands to ensure a *status quo*, as it does not affirm representation

beyond the 30% quota for the underrepresented gender, in cases when the deputies of the Assembly are replaced. Such an isolated and rigid interpretation of the legal norm that regulates the manner of replacement of deputies is contrary to the very *ratio legis* of the Law on General Elections, which aims to advance representation of women in the Assembly, as an underrepresented or minority gender in the current political and historical circumstances.

138. Therefore, on these premises, and as long as the minimum representation of 30% has been achieved, namely exceeded based on the election result of the elections of 6 October 2019, this ranking of candidates for deputies who replace deputies should consist, as in following: Applicant (1) Tinka Kurti has 7,655 votes, followed by (2) Fitim Haziri with 7,542 votes, followed by Applicant (3) Drita Millaku with 7,063 votes and (4) Eman Rrahmani with 7,044 votes.

139. Therefore, the Court considers that in the present case the Applicant Tinka Kurti has been discriminated against on the basis of gender, at the moment when despite fulfilling the minimum quota of 30% through the election result within the political entity LVV, at the moment when the opportunity of replacement of the deputies arose, the latter even though she had more votes than the candidates for deputies Fitim Haziri and Eman Rrahmani, was not enabled to be elected a deputy. Therefore, the Court finds that against the Applicant Tinka Kurti, by Decision [AA. No. 4/2020] of 19 February 2020, of the Supreme Court there has been a violation of Articles 24 and 45 of the Constitution in conjunction with Article 14 and Article 3 of Protocol no. 1 of the ECHR.

140. With regard to the Applicant Drita Millaku based on the same circumstances mentioned above, she was discriminated against on the basis of gender in relation to her right to be elected, when despite meeting the minimum quota of 30% through the election result within the political entity LVV, at the moment when the opportunity for future replacements of deputies was created, namely when the deputy Shpejtim Bulliqi resigned, in his place, based on the determination for replacement within the same gender, on 18 December 2020, the deputy Taulant Kryeziu took over the deputy mandate with 6968 votes.

141. Therefore, the Court finds that against the Applicant Drita Millaku by Decision [AA. No. 3/2020] of 19 February 2020, of the Supreme Court there has been a violation of Articles 24 and 45 of the Constitution in conjunction with Article 14 and Article 3 of Protocol no. 1 of the ECHR.

142. Finally, the Court also clarifies the fact that although Article 6.8 of the Law on Gender Equality provides that: "*Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent* (50%) *for each gender, including their governing and decision-making bodies;*". The Assembly as a legislator has not formulated this percentage as a mandatory legal quota, but has formulated it more in the form of a constitutional, legal and factual ideal that the democratic society of the Republic of Kosovo must achieve and that only after its achievement true factual equality is ensured. Thus, the 50% regulated in Article 6.8 of the Law on Gender Equality is not a legal quota for mandatory representation as is the 30% regulated in Article 27 of the Law on General Elections which specifically presents the obligation: "*In each Political Entity's candidate list, at least thirty (30%) percent shall be male and at least thirty (30%) percent shall be female [...]*".

143. Although the constitutional ideal and spirit of the Constitution reflected in Article 7 aim at achieving 50% to 50% de facto equality between the two genders, the Constitutional Court is aware that it is not within its competence to set new public policies, nor to assess whether a public policy to date is good or appropriate. It is also not up to the Court to re-establish new legal quotas or increase the percentage of legal gender representation quotas in favor of either gender. The legislators of the Republic of Kosovo are the ones who have set the 30% quota as the only applicable legal quota, which should be maintained in any circumstance until the competent authorities decide to make legal changes in this regard, if they deem it necessary. It is also the legislators who have set 50% as the constitutional ideal of equal gender representation, emphasizing that equal gender representation is achieved only when 50-50 representation is provided for each gender.

144. However, all these important discussions fall into the domain of public policy-making issues, a domain that belongs to the Government and the Assembly on how they consider it to be the best way to achieve the ideal of 50-50 representation. For example, the Venice Commission states that if states decide to adopt legal quotas, then they "*should provide for at least 30 percent of women on party lists, while 40 or 50 are preferable*" in order for quotas to be effective.

145. The Court also deems it necessary to emphasize the obligation of the CEC, as a permanent body that prepares, supervises, directs and verifies all actions related to the electoral process, including the process of electing deputies and their replacement take into account the fact that within each political entity, at the moment when through

the election result is achieved or exceeded the fulfillment of the gender quota in the amount of 30% of the under-represented gender, (as was the case where women candidates have won more that 34% of seats), then whenever the need arises to replace candidates for deputies of the Assembly, the election result is valid, if the latter does not question the minimum representation of 30%. So, at the moment when the minimum representation of 30% is met based on the election result, then the deputies are replaced by the candidates for deputies who are ranked higher through the election result, as long as the minimum representation of 30% is maintained or not violated.

146. Finally, based on the abovementioned analysis, the Court concludes that: Decision [AA. No. 4/2020] of 19 February 2020, of the Supreme Court; Decision [AA. No. 3/2020] of 19 February 2020, of the Supreme Court; Decision of the Election Complaints and Appeals Panel (ECAP), [Anr. 35/2020], of 13 February 2020; Decision of the Election Complaints and Appeals Panel, [Anr. 36/2020], of 13 February 2020; as well as item 5 of the Decision of the Central Election Commission (CEC), [No. 102 /A-2020], of 7 February 2020, are in violation of Articles 24 [Equality Before the Law] and 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol no. 1 of the ECHR.

Effects of the Judgment of the Constitutional Court

147. As stated above, both the challenged decisions of the Supreme Court, but also the decisions of the ECAP and the CEC, are not in compliance with Articles 24 and 45 of the Constitution in conjunction with Article 14 and Article 3 of Protocol no. 1 of the ECHR.

148. From the practical point of view of the implementation of the decisions of the Constitutional Court, the latter reiterates the fact that in all cases when a violation of human rights and freedoms is found, which cannot be completely repaired nor returned to zero point when the violation did not exist, the question arises as to the effect of the Judgment finding the violation in question.

149. The Court recalls that in its case-law, similar questions about the effect of the decision have been raised in several different cases, including the cases of the election issues (see in this respect the case of Court KI207/19, Applicant *Social Democratic Initiative, New Kosovo Alliance and the Justice Party*, Judgment of 5 January 2021, paragraph 240; see also Judgment of the Court in case KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020, paragraphs 149-

151 where, among other references, cites the case of the ECtHR, *Kingsley v. the United Kingdom*, Judgment of 28 May 2002, paragraph 40; KI10/18, Applicant *Fahri Deqani*, Judgment of 8 October 2019, paragraphs 116-120; KI108/18, Applicant *Blerta Morina*, Resolution on Inadmissibility of 1 October 2019, paragraph 196).

150. The Court notes that, for objective reasons and in the interest of legal certainty, this Judgment cannot produce retroactive legal effect in relation to the mandates of deputies. In this regard, the Court clarifies that based on the principle of legal certainty, this Judgment has no retroactive effect and does not affect the rights of third parties acquired on the basis of decisions annulled by this Judgment. However, this Judgment is not merely declarative and without effect.

151. The Court reiterates the fact that although it does not have the legal authority to award compensation of damage in cases where it finds a violation of the respective constitutional provisions, such an aspect does not mean that the Applicants are not entitled to seek compensation from the public authorities in case of violation of their rights and freedoms based on the Constitution and applicable laws in the Republic of Kosovo.

152. The first effect of this Judgment is the repeal of the challenged decisions of the Supreme Court, the ECAP and the CEC, as incompatible with the Constitution and the ECHR in terms of interpretation of Article 112.2 (a) of the Law on General Elections. Through the repeal of these preliminary decisions, this Judgment clarifies for the future that, based on a correct and contextual reading of Article 112.2 (a) of the Law on General Elections, the replacement of candidates for deputies should be done in such a way that: *first*, a minimum representation of 30% of the underrepresented gender (minority gender) is ensured, which cannot be questioned at any time; and *secondly*, in cases where the gender quota of 30% has been met based on the election result (as it was the case), then the replacements of candidates for deputies should be made on the basis of the election result, without being limited in terms of replacement based on of the same gender, as long as the minimum representation of the underrepresented gender is not endangered.

153. The second effect that this Judgment provides has to do with the right that for the Applicants or other parties that may be affected by this Judgment, from the moment of its entry into force. These parties have the right to use other legal remedies available for the further exercise of their rights in accordance with the findings of this Judgment. This

right with respect to the Applicants arises from the moment when they should have become deputies, if Article 112.1.a of the Law on General Elections were to be interpreted in accordance with the reasoning of this Judgment (see, *mutatis mutandis*, Judgment of the European Court of Human Rights in case of *Paunović and Milivojević v. Serbia*, of 24 May 2016, application no. 41683/06 - case where the ECtHR found a violation of Article 3 of Protocol No. 1 to the ECHR on the grounds that "*the termination of the applicant's mandate* [elected deputy of the Assembly] *was in breach of the* the *Election of Members of Parliament Act*", paragraphs 61-66 and paragraph 80).

Conclusions

154. The joined cases KI45/20 and KI46/20 are two cases concerning the disputes over the elections of 6 October 2019. The Referrals were submitted by two candidates (Tinka Kurti and Drita Millaku) for deputy coming from the Political Entity of VETËVENDOSJE Movement! (LVV) – who alleged that the CEC, ECAP and the Supreme Court had applied the manner of replacement of deputies defined by Article 112.2 a) of the Law on General Elections in an unconstitutional way.

155. The Court recalls that some deputies of the political entity LVV, who were elected to Government/municipal positions, vacated some positions of deputies which had to be replaced by eligible candidates in the queue for deputies. Thus, from the deputies who vacated their seats, the following replacements were made: the candidate Enver Haliti with 7,777 votes replaced the deputy Albin Kurti; the candidate Alban Hyseni with 7,767 votes replaced the deputy Glauk Konjufca; the candidate Arta Bajralia with 7,674 votes replaced the deputy Albulena Haxhiu; the candidate Fitim Haziri with 7,542 votes replaced the deputy Arben Vitia; the candidate Eman Rrahmani with 7,044 votes replaced the deputy Haki Abazi. Later, the candidate Taulant Kryeziu with 6968 votes replaced the deputy Shpejtim Bulliqi.

156. The necessity of replacing the deputies automatically activated the legal provisions established in Article 112.2 a) of the Law on General Elections – an article that specifies the manner of replacing the deputies, with the following text:

> *"112.2 A member of the Kosovo Assembly the term of which ceases pursuant to article 112.1 shall be replaced as follows:*
> *a) by the next eligible candidate of the same gender who won the greatest number of votes of the reordered candidate list of the*

Political Entity on whose behalf the member contested the last election; […]".

157. The Court notes that, according to the interpretation of this article made by the CEC, ECAP, and the Supreme Court, all replacements were made based on the criterion of "*gender*" and irrespective of the result achieved by the candidates for deputy after the achievement of the legally required quota of 30% of underrepresented gender or minority gender. This manner of replacement provided by law, according to the Supreme Court, could not be avoided by either the CEC, the ECAP or the Supreme Court because there is an assumption that the laws are compatible with the Constitution and that they should be applied as they are "*until the Constitutional Court finds that a law or any of its legal provisions is contrary to the Constitution".*

158. Having disagreed with this interpretation, the Applicants submitted their Referrals to the Constitutional Court, under the key allegation that the CEC, ECAP and the Supreme Court have applied the manner of replacing the deputies provided by Article 112.2 a) of the Law on General Elections, in an unconstitutional manner. In essence, they alleged that despite reaching and exceeding of the quota of 30% by women candidates for deputy from LVV – replacements for deputies were not made based on the election result but based on gender. According to them, this has caused inequality in treatment and violation of their right to be elected.

159. The Court recalls that, on the basis of the replacement manner by the CEC, ECAP and the Supreme Court, men deputies were replaced by men candidates for deputy and women deputies were replaced by women candidates for deputy – despite the fact that the Applicants received more votes that some of the male candidates who managed to get elected to the Assembly. The first Applicant, Tinka Kurti had collected 7655 votes while the second Applicant Drita Millaku had collected 7063 votes.

160. The Court clarified that it is not assessing *in abstracto* whether Article 112.2.a of the Law on General Elections is or is not compatible with the Constitution. This is due to the fact that, neither before this Court nor before the previous public institutions that have addressed this issue, the Applicants have never claimed that the article in question is unconstitutional. On the contrary, the Applicants have only alleged that this article was applied in unconstitutional manner by the CEC, ECAP and the Supreme Court.

161. Taking into consideration the above facts and the allegations raised in this case, the Court in this constitutional complaint dealt with the fact: Whether the Article 112.2.a of the Law on General Elections has been implemented by the CEC, the ECAP and the Supreme Court, in accordance with the guarantees, values and principles proclaimed by Articles 24 and 45 of the Constitution in conjunction with Article 14 of the ECHR and Article 3 of Protocol no. 1 of the ECHR?

162. The Constitutional Court found that the interpretation of this Article by the CEC, the ECAP and the Supreme Court is not an accurate and constitutional interpretation for some of the following reasons – which are extensively elaborated in the Judgment.

163. First, the Court found that the CEC, the ECAP, and the Supreme Court have interpreted Article 112.2 a) of the Law on General Elections in a rigid and textual manner and separated from all other legal norms set forth by the Law on General Elections and the Law on Gender Equality, as well as the principles, values, and the spirit of the letter of the Constitution. This type of interpretation has abstracted the context, purpose, and reason for setting the quota of 30% as a special measure to help achieve equal representation between the two genders in the Assembly of the Republic.

164. Secondly, the Court noted that the *ratio legis* of the Law on General Elections in the context of gender representation in the Assembly consists in providing – in any circumstance – representation of at least 30% of the underrepresented or minority gender (whatever it may be). However, obviously, 30% represents only the minimum limit of gender representation of the minority gender, but not the highest limit of representation of one gender. Consequently, the Court considers that, once a minimum representation of 30% is ensured for the underrepresented gender, all future replacements must be made on the basis of the ranking of candidates for deputy, which is determined by the election result. On this basis, the gender quota is applied only until the purpose for which it has been set is achieved, namely to ensure the mandatory minimum representation of the minority gender in the quota of 30%, although the constitutional ideal and spirit of the Constitution reflected in Article 7 aim to achieve factual equality of 50% to 50% between the two genders.

165. Thirdly, the Court pointed out that the interpretation of Article 112.2 (a) of the Law on General Elections according to the manner of interpretation by the CEC, ECAP and the Supreme Court would make sense only in the situation when non-replacements gender-for-gender (woman-for-woman or man-for-man) could risk non-compliance with

the legal quota of 30% of representation for the underrepresented gender. However, the interpretation of this article in the way as it was done, knowing that in the elections of 6 October 2019, women candidates of the political entity LVV had managed to get meritorious votes beyond the legal quota percentage of 30%, is an erroneous interpretation of this norm and inconsistent with the very purpose of the legal quotas stipulated in Article 27 of the Law on General Elections.

166. Fourthly, the Court emphasized that the purpose of setting quotas relates to the need to advance gender equality within society until when the factual equality is reached and quotas become unnecessary. Article 112.2 a) of the Law on General Elections exists for a single reason: to introduce the manner of the replacement of deputies – by always preserving the purpose of mandatory legal representation of at least 30% of the minority gender. If, after meeting the 30% norm, minority (underrepresented) candidates manage to become deputies on their own, by achieving better results than members of the majority gender, they should not be denied the right to be elected deputy of the Assembly.

167. The Court found that the Applicant Tinka Kurti was discriminated against based on gender in relation to her right to be elected, at the moment when despite the minimum quota of 30% being reached within the political entity LVV through the election result, at the moment when the opportunity for the replacement of deputies emerged, even though she had more votes than the men candidates for deputies Fitim Haziri and Eman Rrahmani, she was not enabled to become a deputy.

168. Further, the Court also found that the Applicant Drita Millaku was discriminated against based on gender in relation to her right to be elected, at the moment when despite the minimum quota of 30% being reached within the political entity LVV through the election result, at the moment when the possibility for future replacements of deputies was created, namely when deputy Shpejtim Bulliqi resigned, in his stead, based on the determination for replacement within the same gender, on 18 December 2020, the mandate of the deputy was taken by the candidate Taulant Kryeziu with 6968 votes.

169. Consequently, the Court found that: Decision [AA. No. 4/2020] of the Supreme Court, of 19 February 2020; Decision [AA. No. 3/2020] of the Supreme Court, of 19 February 2020; ECAP Decision, [Anr. 35/2020] of 13 February 2020; ECAP Decision, [Anr. 36/2020] of 13 February 2020; as well as point 5 of the CEC Decision, [No. 102/A-

2020] of 7 February 2020, are in contradiction with Article 24 [Equality Before the Law] and 45 [Freedom of Election and Participation] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) and Article 3 (Right to free elections) of Protocol no. 1 of the ECHR.

170. Regarding the effect of Judgment, the Court for objective reasons and in the interest of legal certainty, this Judgment cannot produce retroactive legal effect in respect to the mandate of the deputies. In this regard, the Court clarified that this Judgment does not have a retroactive effect and based on the principle of legal certainty it does not affect rights acquired by third parties based on the decisions annulled by this Judgment. However, this does not mean that this Judgment is merely declaratory and without any effect.

171. The first effect of this Judgment is the repeal of the challenged decisions of the Supreme Court, the ECAP and the CEC, as being incompatible with the Constitution and the ECHR in terms of interpretation of Article 112.2 (a) of the Law on General Elections. Through the repealing of these decisions, this Judgment clarifies for the future that, based on an accurate and contextual reading of Article 112.2 (a) of the Law on General Elections, the replacement of candidates for deputies should be done in such a way that: *firstly*, to ensure a minimum representation of 30% of the underrepresented gender (minority gender), which cannot be put into question at any time; and *secondly*, in cases where the gender quota of 30% has been met based on the election result (as in the present case), then the replacement of candidates for deputy should be done based on the election result, without being limited in terms of replacement based on the same gender, as long as the minimum representation of the underrepresented gender is not endangered.

172. The second effect that this Judgment produces concerns the right that emerges for the Applicants or other parties that may be affected by this Judgment, from the moment of its entry into force. The right of these parties is created to use other legal remedies available for the further exercise of their rights in accordance with the findings of this Judgment and the case law of the ECtHR cited in the present Judgment.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 26 March 2021, unanimously:

DECIDES

I. TO DECLARE the Referrals admissible;

II. TO HOLD that there has been a violation of Article 24 [Equality Before the Law] and Article 45 [Freedom of Election and Participation] of the Constitution of the Republic of Kosovo in conjunction with Article 14 (Prohibition of discrimination) in conjunction with Article 3 (Right to free elections) of Protocol no. 1 of the European Convention on Human Rights;

III. TO DECLARE invalid:

(i) Decisions [AA. No. 3/2020 and AA. No. 4/2020] of the Supreme Court of the Republic of Kosovo, of 19 February 2020;
(ii) Decisions [Anr. 35/2020 and Anr. 36/2020] of the Election Complaints and Appeals Panel, of 13 February 2020;
(iii) Item 5 of Decision [No. 102/A-2020] of the Central Election Commission, of 7 February 2020.

IV. TO HOLD that that this Judgment has no retroactive effect and that according to the principle of legal certainty does not affect the rights of third parties acquired on the basis of the annulled decisions;

V. TO OBLIGE all public authorities of the Republic of Kosovo to interpret Article 112.2 (a) of the Law on General Elections in accordance with the findings of this Judgment;

VI. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VII. TO DECLARE that this Judgment is effective on the date of its publication and it service to the parties.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI220/19, KI221/19, KI223/19 and KI234/19, Applicant: Sadete Koca Lila and others; Constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 29 August 2019

KI220/19, KI221/19, KI223/19 and KI234/19, Judgment of 25 March 2021, published on 8 April 2021

Key words: individual referral; absence of hearing; violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights

The circumstances of the present case relate to the privatization of the socially-owned enterprise SOE "Agimi" in Gjakova and the rights of the respective employees to be recognized as employees with legitimate rights to participate in the twenty percent (20%) income from this privatization, as defined in Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to the Law on Special Chamber of the Supreme Court, and paragraph 4 of Section 10 (Rights of Employees) of Regulation no. 2003/13 as amended by Regulation no. 2004/45.

The Applicants were not included in the Provisional List of employees eligible to a share of proceeds of the twenty percent (20%) from the privatization of the SOE "Agimi". The latter filed individually complaints with the Privatization Agency of Kosovo. These complaints were rejected. As a consequence, the Applicants initiated a claim with the Specialized Panel of the Special Chamber of the Supreme Court, challenging the Decision of the Privatization Agency of Kosovo regarding the determination of facts and interpretation of law, also alleging that there were discriminated against. All Applicants requested to hold a hearing before the Specialized Panel.

The Specialized Panel rejected the request for a hearing on the grounds that *"the facts and evidence submitted are quite clear"*, giving the right to the Applicants, except for two of them, and concluding that they had been discriminated against, therefore they should be included in the Final List of the Privatization Agency of Kosovo. Acting on the basis of the appeal of the Privatization Agency of Kosovo against this Judgment, in August 2019, the Appellate Panel rendered the challenged Judgment, whereby it approved the appeal of the Privatization Agency of Kosovo and modified the Judgment of the Specialized Panel, removing *from "the list of beneficiaries of the 20% from the privatization process of SOE "Agimi" Gjakova"* all the Applicants. The Applicants challenge this Judgment before the Court, alleging that it was issued in violation of Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and

Articles 6 (Right to a fair trial) and 1 (Protection of Property) of Protocol no. 1 of the European Convention on Human Rights. With regard to the violations of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, the Applicants allege that the Appellate Panel modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time limit.

In assessing the allegations of the Applicants, the Court focused on those allegations related to the absence of a hearing before the Special Chamber of the Supreme Court, and in this context, (i) the Court first elaborated the general principles regarding the right to a hearing as guaranteed by the Constitution and the European Convention on Human Rights; and thereafter, (ii) applied the latter to the circumstances of the present case. The Court, based inter alia, on the Judgment of the Grand Chamber of the European Court of Human Rights, *Ramos Nunes de Carvalho and Sá v. Portugal,* clarified the key principles relating to (i) the right to a hearing in courts of first instance; (ii) the right to a hearing in courts of second and third instance; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of a hearing in the first instance can be corrected through a hearing on a higher instance and the relevant criteria to make this assessment. Furthermore, the Court specifically examined and applied the case law of the European Court of Human Rights on the basis of which it is assessed whether the absence of a request for a hearing can be considered as an implicit waiver of such a right by the parties.

After applying these principles, the Court found that the challenged Judgment, namely the Judgment [AC-I-13-0181-A0008] of the Appellate Panel of the Special Chamber of the Supreme Court, of 29 August 2019, was issued contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, as regards the right to a hearing, inter alia, because (i) the fact that the Applicants did not request a hearing before the Appellate Panel, does not imply their waiver of this right, nor does it relieve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the Special Chamber of the Supreme Court; (iii) the Appellate Panel had not dealt with "*exclusively legal or highly technical matter"*, based on which "*extraordinary circumstances that could justify the absence of a hearing"* could have existed; (iv) The Appellate Panel, in fact, had reviewed matters of "*fact and law*", the review of which, in principle, requires a hearing; and (v) the Appellate *Panel did not justify "waiving the oral hearing*".

Consequently, the Court found that the above mentioned Judgment of the Supreme Court must be declared invalid, and remanded for retrial to the Appellate Panel of the Special Chamber of the Supreme Court. The Court also emphasized the fact that its finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, in the circumstances of the present case, relates exclusively to the absence of a hearing, and in no way prejudices the outcome of the merits of the case.

Whereas regarding the Referrals of Applicants of Referrals KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka), the Court rejected these Referrals as manifestly ill-founded as specified in Rule 39 (2) of the Rules of Procedure, because they did not provide any evidence that their complaints have been excluded from the assessment procedure at the SCSC.

JUDGMENT

in

cases no. KI220/19, KI221/19, KI223/19 and KI234/19

Applicants

Sadete Koca Lila and others

Constitutional review of the Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 29 August 2019

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. Referral KI220/19 was submitted by Sadete Koca Lila, residing in Gjakova; Referral KI221/19 was submitted by Muhamet Domi, residing in Gjakova; Referral KI223/19 was submitted by Afrim Meka, residing in Gjakova; Referral KI234/19 was submitted by Fikrije Nuka residing in Gjakova; (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC Appellate Panel).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicants' rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial), as well as Article 1 of Protocol no. 1 (Protection of property) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 22 [Processing Referrals] and Article 47 [Individual Requests] of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure No. 01/2018 of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 6 December 2019, the Applicants Sadete Koca Lila and Muhamet Domi submitted their Referrals by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 December 2019, the Applicant Afrim Meka submitted his Referral by mail to the Court.

7. On 20 December 2019, the Applicant Fikrije Nuka submitted her Referral by mail to the Court.

8. On 20 December 2019, the President of the Court appointed for case KI220/19 Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

9. On 23 December 2019, pursuant to paragraph (1) of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI221/19 and KI223/19 with Referral KI220/19.

10. On 30 December 2019, the President of the Court ordered the joinder of Referral KI234/19 with Referrals KI220/19, KI221/19 and KI223/19.

11. On 21 January 2020, the Court notified the Applicants, as well as the SCSC, of the registration of the Referrals and their joinder.

12. On 10 June 2020, the Court requested from the Applicants Muhamet Domi and Fikrije Nuka to submit to the Court all copies of the Claims/Appeals addressed to the Special Chamber of the Supreme Court of the Republic of Kosovo.

13. On 19 June 2020, the Applicant Fikrije Nuka submitted additional documents to the Court.

14. On 23 June 2020, the Applicant Muhamet Domi submitted additional documents to the Court.

15. On 2 September 2020, the Court reviewed the case and decided to adjourn the decision to another hearing in accordance with the requested supplements.

16. On 25 March 2021, the Court by a majority found that (i) Referrals no. KI220/19 and KI223/19, are admissible; (ii) for Referrals no. KI220/19, KI223/19, there had been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights; and, (iii) declared void the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC.

17. On the same day, the Court declared inadmissible Referrals no. KI221/19 with Applicant Muhamet Domi and KI234/19 with Applicant Fikrije Nuka.

Summary of facts

18. On 15 September 2010, the Privatization Agency of Kosovo (hereinafter: PAK) privatized the socially-owned enterprise SOE "Agimi" in Gjakova. All Applicants had been employees of the enterprise at certain time intervals.

19. On 22 December 2011, through the media: (i) the Final List of employees with legitimate rights to participate in the 20% income

from the privatization of SOE "Agimi", Gjakova was published (hereinafter: Final List), and (ii) 14 January 2012 was set as the deadline for submitting claims to the SCSC in objection to the Final List.

20. Between 28 December 2011 and 13 January 2012, the Applicants individually filed a claim with the Specialized Panel of the SCSC for non-inclusion in the Final List.

21. Between 1 March 2012 and 18 April 2012, the PAK filed a response to the Applicants' individual claims, mainly for: (i) failure to provide sufficient evidence to establish the continuity of the employment relationship and that (ii) at the time of privatization of the enterprise, the Applicants were not registered as employees in SOE "Agimi".

22. Between 3 April 2012 and 3 May 2012, some of the Applicants submitted letters with additional information regarding the status of the employee in SOE "Agimi".

23. On 4 September 2013, the Specialized Panel of the SCSC rendered Judgment [SCEL-11-0075] whereby: [...]; "II. *The appeals of the appellants referred to in point II should be included in the Final List of employees with a legitimate right to participate in the income of 20% from the privatization of SOE "Agimi", Gjakova*; [...], 32. Sadete Koci Lila (C 0022-05), 53. Afrim Meka (C0023-12), [...]; III. *The appeals of the appellants mentioned in point III are rejected as ungrounded".*

24. On 13 September 2013, the Specialized Panel of the SCSC rendered Resolution [SCEL-11-0075] amending Judgment [SCEL-11-0075] of 4 September 2013, since when forwarding a copy of the Judgment in the English version, instead of the final judgment being served on the parties, the preliminary judgment was served on them, while the Albanian language version remained unchanged.

25. Regarding the Applicants from point II of the Judgment [SCEL-11-0075], respectively the Applicants: KI220/19, and KI223/19, the Specialized Panel of the SCSC clarified that during the 90s their relationship was terminated and they were fired by being replaced by Serbian employees which is a "world-renowned event" and consequently they were discriminated. Therefore, the same had to be included in the final list to get the right of 20% each separately.

26. The appeals of the other employees in point III of the Judgment [SCEL-11-0075] were rejected as ungrounded because they had not submitted any evidence for review and administration as provided by paragraph 4 of Section 10 (employees' rights) of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45, which stipulates that employees who are considered eligible to participate in the 20% gain of the privatization of socially-owned enterprises must prove that: (i) they are employees of registered at the relevant socially-owned enterprise at the time of privatization; and, (ii) that they have been on the payroll of the socially-owned enterprise for not less than three (3) years.

27. On 30 September 2013, the PAK filed an appeal against point II of Judgment [SCEL-11-0075] of 4 September 2013, of the Specialized Panel of the SCSC, due to (i) erroneous determination of the factual situation and (ii) erroneous application of substantive law, with the proposal to annul point II of the aforementioned Judgment. According to the PAK no appellant who with the impugned judgment is included in the final list of employees with legitimate rights to receive a part of the proceeds from the privatization of SOE "Agimi" has not presented relevant facts on the basis of which there was for them proving the fact of unequal treatment and the justification for direct or indirect discrimination in accordance with paragraph 1 of Article 8 (Burden of Proof) of the Anti-Discrimination Law.

28. On August 29, 2019, the Appellate Panel of the SCSC rendered Judgment [AC-I-13-0181-A0008], whereby it decided [...] "*2. The appeals of the appellants*, [...] *are rejected as ungrounded. 3. PAK appeal A002 is approved as grounded regarding employees:* [...], C-0022-05-Sadete Koci Lila, [...], C-0023-12-Afrim Meka, [...], *the same are removed from the list of beneficiaries of 20% from the privatization process of SOE "Agimi" Gjakova. [...] 5. No court fee is set for the appeal procedure".*

29. The Applicants' appeals which were rejected as ungrounded in paragraph 2 of Judgment [AC-I-13-0181-A0008] of the SCSC Appellate Panel, consisted of the same reasons given by the SCSC Specialized Panel. Thus, the above-mentioned Applicants had not submitted evidence to prove their claims in order to be recognized the right to be included in the final list of 20% of SOE "Agimi", review and administration of which is provided by paragraph 4 of Section 10. (Employee Rights) of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45. This Regulation stipulated that employees who are considered eligible to participate in the 20% benefit from the privatization of socially-owned enterprises must

prove that: (i) they are registered employees of the relevant socially-owned enterprise at the time of privatization; and, (ii) that they had been on the payroll of the socially-owned enterprise for not less than three (3) years.

30. Regarding the approval of the appeal of the PAK as grounded, in which case the Applicants KI220/19 and KI223/19 are removed from the list of beneficiaries, the Appellate Panel of the SCSC states that it does not agree with the approach followed by the Specialized Panel of the SCSC on the interpretation of discrimination, which it treated as incompatible with 'case law'. According to them, the case law of the SCSC (ASC-11-0069, AC-I-12-0012) stipulates that the following can be considered as discriminated: a) employees of Albanian ethnicity, or belonging to the Ashkali, Roma, Egyptian, Gorani and Turkish minorities, who had fled for reasons of discrimination in the so-called "Serbian Provisional Measures" period (ranging from 1989 to 1999), or who were also discriminated against at various times, due to their ethnicity, political and religious beliefs, etc.; b) employees of Serbian ethnicity who due to lack of security after 1999, did not show up for work and the same were not found in the final lists of employees.

Applicants' allegations

31. The Applicants allege that by the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, their rights guaranteed by Article 24 [Equality Before the Law], Article 31 [The Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution and Article 6 (Right to a due process), as well as Article 1 of Protocol No. 1. (Protection of property) of the ECHR.

32. Regarding the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants initially state that all had been employees of SOE "Agimi", and that this is confirmed through the letter of the PAK which was addressed to them on 15 September 2010, through which they were informed that as a result of the privatization of the enterprise in question, all relevant employment relationships had been terminated, and that consequently the same, meet the criteria set out in paragraph 4 of Section 10 of the Regulation 2003/03 to benefit from twenty percent (20%) of the privatization of the respective enterprise. Furthermore, the Applicants state that they have submitted the available evidence, but that "*relevant evidence had been available to the Personnel Office of J.S.C. "Agimi" in Gjakova and then the staff appointed by the PAK, employee of the former J.S.C. or SOE "Agimi" Gjakova*".

33. The same, in essence, allege that the challenged Judgment was rendered contrary to the procedural guarantees set forth in the above articles because it (i) amended the Judgment of the Specialized Panel and which was in favour of the Applicants, without a hearing, not allowing them to comment on the disputed facts, stating that "*it is true that the Special Chamber has the opportunity to hold a trial even without the presence of the parties, but it is also true that it has the right to schedule a public hearing and it would give the Court and the parties the opportunity to confront submissions and evidence, to make an open, fair and transparent trial that would argue the relevant facts*"; (ii) in contrast to the Judgment of the Specialized Panel, it contains an arbitrary interpretation regarding discrimination because the burden of proving the allegations of discrimination under Article 8 of the Anti-Discrimination Law falls on the PAK; (iii) is not justified; and (iv) has violated their rights to a trial within a reasonable time period.

34. Regarding the alleged violations of Article 24 of the Constitution, the Applicants state that they have not been treated equally with other employees of SOE "Agimi", "*legal and factual situation*" of whom is identical to the Applicants, while the challenged Judgment of the Appellate Panel has treated their allegations in terms of ethnic discrimination, referring to the "*case law*".

35. Regarding the Applicants KI221/19 and KI234/19, respectively Muhamet Domi and Fikrije Nuka, in addition to the above allegations they claim that although they have filed an appeal with the SCSC, they "*were erroneously not included in the proceedings and their appeal was neither rejected nor accepted*".

36. Finally, the Applicants request the Court to: (i) declare the Referrals admissible; (ii) find that there has been a violation of Articles 24, 31 and 46 of the Constitution in conjunction with Article 6 and Article 1 of Protocol no. 1 of the ECHR; (iii) declare void the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, and remand the same for retrial in accordance with the Judgment of this 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 power.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

Article 24
[Equality Before the Law]

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

European Convention on Human Rights

Article 6
(Right to a due process)

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

LAW No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo

Article 10
Judgments, Decisions and Appeals

[…]
11. When the appellate panel has accepted and is deciding on an appeal, the following rules shall be strictly observed: 11.1. the appellate panel shall not modify, annul, reverse or otherwise change, in any manner, any finding of fact made by a court, specialized panel, sub-panel or single judge unless the appellate panel determines that such finding of fact is clearly erroneous. A finding of fact shall not be determined to be clearly erroneous if such finding of fact is supported by any reasonable interpretation of the record of the trial proceedings and the evidence submitted during such proceedings; and 11.2. the appellate panel shall conduct a de novo review of each issue of law raised by the appellant or a respondent in their written submissions.
[…]

Annex to Law no. 04/L-033 on Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo

Rules of Procedure of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo

Article 36
General Rules on Evidence

[…]
3. A party alleging a fact or an event shall be given a reasonable opportunity to submit or produce material evidence in support of such allegation. If such party fails to submit or produce any such evidence, the party shall be determined to have not discharged its burden of proof with respect to that allegation.

Article 68
Complaints Related to a List of Eligible Employees

1. The procedure for cases based on complaints falling within the scope of paragraph 1.6 of Article 4 of the Special Chamber Law shall, except as specifically provided in this Article 68, generally follow the other procedural rules set forth in this Annex, which

the Special Chamber shall apply mutatis mutandis as the Special Chamber deems necessary and in the interest of justice.
2. Upon receiving a list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such a list, the Agency shall publish such list together with a notice to the public of the right of any person to file a complaint with the Agency within twenty (20) days after the date of publication requesting inclusion in such list and/or challenging the inclusion of one or more other persons in such list. The person filing any such request or challenge shall include therein a statement of the facts and the legal arguments supporting such request or challenge; such person shall have the burden of proving all facts alleged in the request and/or challenge.
[…]
6. The Agency shall publish its final list of eligible employees established pursuant to paragraph 5 of this Article in conformity with Section 10.6 of UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such list, together with a notice to the public of the right of any person to file a complaint with the Special Chamber within twenty (20) days after the date of publication challenging such list and/or the Agency's distribution of escrow funds to the persons identified therein. The complainant(s) filing any such complaint shall include therein a statement of the facts and the legal arguments supporting such complaint; the complainant(s) shall have the burden of proving all facts alleged in the complaint.
[…]
11. The concerned Specialized Panel, acting on its own initiative or pursuant to a written request of the complainant(s) or the Agency, may decide to hold one or more oral hearings on the matter. If an oral hearing is to be held, the Specialized Panel shall cause the Registrar to serve on the parties, at least five (5) days in advance of such hearing, a written notice of the time and date of such hearing.
[…]
14. The Appellate Panel shall dispose of all such appeals as a matter of urgency.

Article 64
Oral Appellate Proceedings

1. The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal. The Appellate Panel shall

take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application must be filed prior to the closing of written appellate procedures.
[…]

Article 65
Submission of New Evidence

In exceptional circumstances and for good cause shown, the Appellate panel may permit a party to present to the Appellate Panel new evidence that was not available to the party during the evidentiary portion of the first instance proceedings. A written application for such permission must first be submitted to the Appellate Panel and served on the other parties not less than fifteen (15) days before the date of the hearing where such evidence is proposed to be presented. The Appellate Panel may authorize the presentation of such new evidence if it considers it to be in the interests of justice.

Regulation no. 2003/13 on the Transformation of the Right to Use Real Estate into Socially Owned Property

Section 10
Employee Rights

[…]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-owned Enterprise at the time of privatisation or initiation of the liquidation procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[…]

Regulation no. 2004/45 on Amending Regulation no. 2003/13 on the Transformation of the Right to Use Real Estate into Socially Owned Property

Article 1
Amendments

As of the date of entry into force of the present Regulation,
[…]
B. Sections 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13 shall be amended to read:
[…]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-owned Enterprise at the time of privatisation or initiation of the liquidation procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[…]

Law no. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo

Article 69
Oral Appellate Proceedings

1. The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on one or more hearing sessions on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application shall be filed prior to the closing of written appellate procedures.
[…]

Law no. 2004/3 The Anti-Discrimination Law

Article 8
Burden of Proof

8.1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

8.2. Paragraph 8.1 shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a complainant may establish or defend their case of discrimination by any means, including on the basis of statistical evidence.

Admissibility of the Referral

37. **The court initially examines whether the claims have met the admissibility criteria set out in the Constitution and further specified in the Law and set out in the Rules of Procedure.**

38. **In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulate:**

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

39. The Court also assesses whether the Applicants have met the admissibility criteria, as further specified in the Law. In this connection, the Court first refers to Articles 47 (Individual Requests) and 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48

(Accuracy of the Referral)

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
(Deadlines)

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision ... ".

40. **The Court also refers to Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which specifies:**

"[...]

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

41. **Regarding the Referral KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) who allege to have filed an appeal with the SCSC, but they "*were erroneously not included in the proceedings and their appeal was neither rejected nor accepted*".**

42. **The Court recalls that, by letter of 10 June 2020, it had requested the Applicants KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) to submit all copies of the appeals addressed to the SCSC in order to substantiate their claim that the latter had excluded their appeals from the review. Applicants KI 221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) submitted additional documents to the court but which did not address the requests of the court.**

43. **The Court notes that Applicants KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) failed to prove before the Court that they filed an appeal/claim with the SCSC and that the latter excluded the appellants appeals from the review procedure. The Court also notes that the above Applicants did not manage to submit to the Court either the copies of**

the alleged appeals, which according to them were addressed/submitted to the SCSC.

44. **Consequently, the Court considers that the Applicants' Referral KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) must be rejected as manifestly ill-founded as specified in Rule 39 (2) of the Rules of Procedure.**

45. Regarding the fulfilment of these requirements by the other Applicants, the Court finds that the Applicants are authorized parties, who challenge an act of a public authority, namely the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, after having exhausted all legal remedies prescribed by law. The Applicants have also clarified the rights and freedoms that they allege to have been violated, in accordance with the criteria of Article 48 of the Law and have submitted the Referrals in accordance with the deadlines set out in Article 49 of the Law.

46. The Court also finds that the Applicants' Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the conditions set out in paragraph (3) of Rule 39 of the Rules of Procedure. Furthermore, and finally, the Court considers that this Referral is not manifestly ill-founded as set out in paragraph (2) of Rule 39 of the Rules of Procedure and, consequently, it must be declared admissible and its merits examined.

Merits

47. The Court recalls that the circumstances of the present case relate to the privatization of the socially-owned enterprise SOE "Agimi" in Gjakova, and the rights of the respective employees to be recognized as employees with legitimate rights to participate in the twenty percent (20%) income from this privatization, as defined in Article 68 of the Annex to the Law on SCSC, and paragraph 4 of Section 10 of Regulation no. 2003/13 and amended by Regulation no. 2004/45. Based on the case file, it results that the above-mentioned socially-owned enterprise was privatized on 15 September 2010, a date on which the applicants were also notified by individual letters that "*the consequence of selling the key assets is the termination of your employment"* and that the same employment "*ends immediately*". The Applicants subsequently contested their non-inclusion in the PAK Provisional List of employees with legitimate rights to participate in

twenty percent income (20%) from the privatization of SOE "Agimi". These appeals were rejected. Subsequently, the Applicants had initiated a claim with the Specialized Panel, challenging the Decision of the PAK, both regarding the establishment of facts and the interpretation of the law. They had allegedly been discriminated against and all had requested a hearing before the Specialized Panel. The latter, had rejected the request for a hearing on the grounds that *"the facts and evidence submitted are quite clear"*, and had given the right to the Applicants. The Specialized Panel, among others, stated that in the absence of discrimination, the Applicants would have met the criteria set out in paragraph 4 of Section 10 of Regulation No. 2003/13, as employees with legitimate rights to participate in the twenty percent (20%) income from the privatization of SOE "Agimi".

48. Following the rendering of this Judgment, an appeal to the Appellate Panel was filed by the PAK requesting the annulment of the Judgment of the Specialized Panel. The PAK did not request a hearing. In August 2019, the Appellate Panel rendered the challenged Judgment, amending the Judgment of the Specialized Panel and consequently, removing "*from the list of beneficiaries of 20% from the privatization process of SOE "Agimi" Gjakova",* all Applicants. The Appellate Panel had initially stated that it had decided to *"waive the part of the oral hearing",* referring to paragraph 1 of Article 69 (Oral Appellate Proceedings) of Law no. 06/L-086 on the SCSC. Whereas, regarding the merits of the case, (i) had found that the evidence presented by the respective parties does not prove that they meet the legal requirements set out in paragraph 4 of Section 10 of Regulation no. 2003/13 to recognize the relevant rights; and (ii) stated that the interpretation of discrimination by the Specialized Panel is contrary to "*case law*" of the SCSC. These findings of the Appellate Panel are challenged by the Applicants before the Court, alleging a violation of their rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Articles 6 (Right to due process) and 1 (Protection of Property) of Protocol no. 1 of the ECHR. With regard to violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants, as explained above, allege that the Appellate Panel amended the Judgment of the Specialized Panel, (i) without a hearing; (ii) without sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

49. These categories of claims will be examined by the Court based on the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, pursuant to Article 53

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

50. In this regard, the Court will initially examine the Applicants' allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the lack of a hearing at the level of the Appellate Panel. To this end, the Court will first (i) elaborate on the general principles regarding the right to a hearing as guaranteed by the aforementioned Articles of the Constitution and the ECHR; and subsequently, (ii) apply the same to the circumstances of the present case.

(iv) General principles regarding the right to a hearing

51. The public nature of proceedings before judicial bodies referred to in Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, protects litigants from the administration of justice in secret, in the absence of a public hearing. Publicity of court proceedings is also one of the main mechanisms through which trust in justice is maintained. Such a principle, moreover, contributes to the achievement of the goals of Article 31 of the Constitution and Article 6 of the ECHR, for a fair trial, the guarantee of which is one of the fundamental principles of any democratic society embodied in the Constitution and ECHR (see ECtHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraphs 381 to 404 and references used therein).

52. In principle, litigants are entitled to a public hearing, but such an obligation is not absolute. As relevant to the present circumstances, the case law of the ECtHR has developed key principles concerning (i) the right to a hearing in the courts of first instance; (ii) the right to a hearing in the courts of second and third instance; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether hearing loss in the first instance can be corrected through a hearing in a higher instance and the relevant criteria for making this assessment. However, in all circumstances, the absence of a hearing must be reasoned by the relevant court.

53. With regard to the first case, namely the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in proceedings before a court of first and single instance, the right to a hearing is guaranteed through paragraph 1 of Article 6 of the ECHR (see, inter alia, the ECtHR cases, *Fredin v. Sweden (no. 2)*, Judgment

of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden (no. 2)*, Judgment of 19 February 1998, paragraph 46; *Göç v. Turkey*, Judgment of 11 July 2002, paragraph 47; and *Selmani and others v. the former Yugoslav Republic of Macedonia*, Judgment of 9 February 2017, paragraphs 37-39). Exceptions to this general principle are cases in which "*there are exceptional circumstances that would justify the absence of a hearing*" in the first and only instance (see, in this respect, the ECtHR cases, *Hesse-Anger and Anger v. Germany*, Decision of 17 May 2001; and *Mirovni Inštitut v. Slovenia*, Judgment of 13 March 2018, paragraph 36; see also ECtHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraphs 382 and references used therein). The nature of such exceptional circumstances stems from the nature of the cases involved, for example, cases dealing exclusively with legal matters or of a very technical nature (see the ECtHR case, *Koottummel v. Austria*, Judgment of 10 December 2009, paragraphs 19 and 20).

54. With regard to the second case, namely the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified based on the specific characteristics of the case, provided that a hearing has been held in the first instance (see, in this context, the case of the ECtHR, *Salomonsson v. Sweden*, Judgment of 12 November 2002, paragraph 36). Therefore, proceedings before the courts of appeal, which involve only matters of law and not matters of fact, may be considered to be in accordance with the guarantees embodied in Article 6 of the ECHR, even if in the second instance there has not been a hearing (see the ECtHR case, *Miller v. Sweden,* Judgment of 8 February 2005, paragraph 30; and see also ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraph 383 and references used therein). That said, and in principle, the absence of a hearing can only be justified through "*the existence of extraordinary circumstances*", as defined by the case law of the ECtHR, otherwise it is guaranteed to the parties at least in one level of jurisdiction, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see Guideline of the ECtHR of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraph 386 and references used therein).

55. With regard to the third issue, namely the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to Judgment of 6 November 2018 of the ECtHR: *Ramos Nunes de Carvalho and Sá v. Portugal*, in which the Grand Chamber of the

ECtHR set out the principles on the basis of which the necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) involves merely legal matters of a limited nature (see ECtHR cases, *Allan Jacobsson v. Sweden (no. 2)*, cited above, paragraph 49; and *Valová, Slezák and Slezák v. Slovakia*, Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see the ECtHR case, *Varela Assalino v. Portugal,* Decision of 25 April 2002); (ii) it involves highly technical issues, which are better addressed in writing than through oral arguments in a hearing; and (iii) it does not involve issues of credibility of the parties or of the impugned facts and the courts may decide fairly and reasonably on the basis of the parties' submissions and other written materials (see ECtHR cases; *Döry v. Sweden*, Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria*, Judgment of 18 December 2008, paragraph 73).

56. On the contrary, based on the aforementioned Judgment, a hearing is necessary if the relevant case (i) involves the need to consider matters of law and fact, including in cases where it is necessary to assess whether the lower authorities have assessed facts accurately (see, inter alia, ECtHR cases, *Malhous v. Czech Republic*, Judgment of 12 July 2001, paragraph 60; and *Fischer v. Austria*, Judgment of 26 April 1995, paragraph 44); and (ii) request that the relevant court obtain a personal impression of the parties concerned, and allow them to clarify their personal situation, in person or through a representative. Examples of this situation are cases where the court must hear evidence from the parties regarding personal suffering in order to determine the appropriate level of compensation (see ECtHR cases, *Göç v. Turkey,* cited above, paragraph 51; and *Lorenzetti v. Italy*, Judgment of 10 April 2012, paragraph 33) or must provide information about the character, conduct and dangerousness of a party (see the ECtHR case, *De Tommaso v. Italy*, Judgment of 23 February 2017, paragraph 167).

57. With regard to the fourth issue, namely the possibility of a second instance correction of the absence of a hearing in the first instance and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on the competencies of the higher court. If the latter has full jurisdiction to examine the merits of the case at hand, including the assessment of the facts, then the correction of the absence of a first-instance hearing can be made in the second-instance (see the ECtHR case, *Ramos Nunes de Carvalho and Sá v. Portugal*, cited above, paragraph 192 and references used therein; and see also ECtHR Guideline of 30 April 2020 on Article 6

of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraph 384 and references used therein).

58. Finally, according to the case law of the ECtHR, the fact that the parties did not request a hearing does not mean that they waived the right to hold one (moreover, regarding the waiver of the right to a hearing, see ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraphs 401 and 402 and references used therein). Based on the case law of the ECtHR, such a case depends on the characteristics of the domestic law and the circumstances of each case separately (see the ECtHR case, *Göç v. Turkey*, cited above, paragraph 48; and see also ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraph 403 and references used therein).

(v) Application of the principles elaborated above in the circumstances of the present case

59. The Court initially recalls that based on the case law of the ECtHR, Article 6 of the ECHR, in principle, guarantees that a hearing be held on at least one level of decision-making. Such is, in principle, mandatory (i) if the court of first instance has sole jurisdiction to decide matters of fact and law; (ii) not mandatory in the second instance if a hearing is held in the first instance, despite the fact that such a determination depends on the characteristics of the case at hand, for example, if the second instance decides on both fact and law; and (iii) mandatory in the second instance if one has not been held in the first instance, in cases where the second instance has full competence to assess the decision of the first instance, also with regard to matters of fact and law. Exceptions to these cases, in principle, are made only if *"there are extraordinary circumstances that would justify the absence of a hearing"*, and which the ECtHR, as explained above, through its case law has defined as cases that deal exclusively with legal matters or are of a high technical nature.

60. Based on the principles elaborated above, the following Court must first assess whether in the circumstances of the present case, the fact that the Applicants did not request a hearing at the Appellate Panel may result in the finding that they have waived their right to a hearing in an implied way. If the answer to this question turns out to be negative, then the Court, based on the case law of the ECtHR, must assess whether in the circumstances of the present case *"there are extraordinary circumstances that would justify the absence of a hearing"* at both decision-making levels, before the Specialized Panel

and the Appellate Panel, respectively. The Court will make this assessment based on the principles established by the Judgment of the Grand Chamber in the case of *Ramos Nunes de Carvalho and Sá v. Portugal.*

a) Whether the Applicants have waived the right to a hearing

61. In this regard, the Court initially recalls that through individual appeals filed with the Specialized Panel, all the Applicants had requested a hearing. The Specialized Panel refused to hold the same, stating that based on paragraph 11 of Article 68 of the Annex to the Law on the SCSC, a hearing was not necessary because "*the facts and evidence submitted are quite clear*". As already clarified, the Specialized Panel, based on these *"facts and evidence"*, ruled that the Applicants had been discriminated against also deciding that they should be included in the PAK Final List as employees with legitimate rights to participate in the twenty percent (20%) income of the privatization of the enterprise SOE "Agimi".

62. The PAK appealed to the Appellate Panel. The Appellate Panel ruled in favour of the PAK, amending the Judgment of the Specialized Panel and rejecting the appeals of all Applicants regarding non-inclusion in the PAK Final List as a result of discrimination. As explained above, the Appellate Panel had decided to *"waive the part of the oral hearing",* referring to paragraph 1 of Article 69 of Law no. 06/L-086 on the SCSC. The Applicants, who had submitted additional documents in response to the PAK's appeal against the Specialized Panel Judgment, had not requested a hearing.

63. However, as explained above, the fact that the Applicants did not request a hearing does not necessarily mean that they implicitly waived such a request, and also the absence of such a request does not obligatorily release the relevant court from the obligation to hold such a hearing.

64. More precisely, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, the ECtHR, inter alia, assesses whether the absence of such a request can be considered as an implied waiver of an Applicant from the right to a hearing. Having said that, the lack of a request for a hearing, based on the case law of the ECtHR, is never the only factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing relieves a court of the obligation to hold a hearing depends on (i) the specifics of the

applicable law; and (ii) the circumstances of a case (see ECtHR Guideline of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil Part, IV. Procedural Criteria; B. Public Hearing, paragraphs 401 to 404 and references used therein). In the following, the Court will assess these two categories of issues.

65. First, with regard to the specifics of the applicable law, namely the Law and the Annex to the Law on the SCSC, the Court recalls that pursuant to Article 64 (Oral Appellate Proceedings) of the same law, "*The Appellate Panel decides whether or not to hold more oral hearings on the respective appeal*", based on its initiative or even on a written request from a party. Article 69 (Oral Appellate Proceedings,) of Law no. 06/L-086 on the SCSC, has the same content. Based on these provisions, consequently, the holding of a hearing at the appeal level does not necessarily depend on the request of the party. It is also the task of the respective Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held. Furthermore, based on Article 60 (Content of Appeal) and Article 65 (Submission of New Evidence) of the Appendix to the Law on the SCSC, the Appellate Panel has the competence to assess both matters of law and fact, and consequently, is endowed with full competence to assess how the lowest authority, namely the Specialized Panel, has assessed the facts. In the circumstances of the present case, the Appellate Panel assessed the facts and allegations of the Applicants and amended the Judgment of the Specialized Panel regarding the assessment of the facts and the interpretation of the law, to the detriment of the Applicants. In such circumstances, having regard to the legal provisions, the Court cannot conclude that the absence of a hearing before the Appellate Panel is justified only as a result of the absence of a Referral by the parties to the proceedings, especially given the fact that the Applicants have not appealed against the Specialized Panel Judgment, which was in their favour. As explained above, based on Article 64 of the Annex to the Law on SCSC and Article 69 of Law no. 06/L-086 for the SCSC, it is the obligation of the Appellate Panel, even on its own initiative, to assess whether the holding of a hearing is mandatory, and if not, to justify not holding the same.

66. Second, with regard to the circumstances of a case, the Court recalls that the case law of the ECtHR states that the absence of a request for a hearing, and the assessment of whether this fact may result in the finding that the party implicitly waived the right to a hearing should be assessed in the light of the specifics of a procedure, and not as a single argument, to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR.

67. More specifically, in cases where a party concerned has not made a request for a hearing, the ECtHR has assessed whether the absence of such a request can be considered as an implied waiver of a hearing, always in the light of applicable law and circumstances of a case. For example, (i) in the case *Miller v. Sweden* (Judgment of 6 May 2005), in which the Applicant did not request a hearing at the appellate level, but requested a hearing at the first instance, resulted in the finding of the ECtHR that the request for a hearing was made at the stage of "*the most appropriate procedures"* and consequently, the ECtHR stated that it could not be concluded that the party had implicitly waived the request for a hearing. Furthermore, in combination with the finding that at the appeal level both fact and law cases had been examined, and consequently the nature of the cases under review was neither exclusively legal nor technical, the ECtHR found that there were no exceptional circumstances that would justify the absence of a hearing, finding a violation of Article 6 of the ECHR (see the ECtHR case, *Miller v. Sweden*, cited above, paragraphs 28-37); also (ii) in the case *Salomonsson v. Switzerland* (Judgment of 12 February 2003), in which the Applicant did not request a hearing in either of the instances, although the ECtHR found that the Applicant could be considered to have implicitly waived the right to a hearing (see paragraph 35 of the case *Salomonsson v. Switzerland*), however, found a violation of Article 6 of the ECHR due to the absence of a hearing, because it concluded that in the circumstances of the present case, there were no exceptional circumstances that would justify the absence of a hearing, especially given the fact that the appellate level also considered factual matters and not just the law (see the ECtHR case *Salomonsson v. Switzerland*, cited above, paragraphs 36-40).

68. On the other hand, in the case *Goç v. Turkey*, the ECtHR also found a violation of Article 6 of the ECHR due to the absence of a hearing, rejecting the Turkish Government's allegations that (i) the case was simple and that it could be dealt with promptly only on the basis of the case file, especially because the concerned applicant through the appeal did not request the bringing of any new evidence; and that (ii) the concerned applicant did not request a hearing (for the facts of the case, see paragraphs 11 to 26 of the ECtHR case *Goç v. Turkey*). In its examination of the present case, and after assessing whether there were any exceptional circumstances in its circumstances that would justify the absence of a hearing, the ECtHR found a violation of paragraph 1 of Article 6 of the ECHR, stating, inter alia, that (i) despite the fact that the applicant in question had not requested a hearing, it does not appear from the circumstances of the case that such a request would have any prospect of success; furthermore that (ii) it cannot be considered that the concerned applicant has waived his right to a

hearing by not seeking one before the Court of Appeal as the latter did not have full jurisdiction to determine the amount of compensation; (iii) the applicant was not given the opportunity to be heard even before the lower instance and who had jurisdiction to assess both the facts and the law; and (iv) the essential question, in the circumstances of this case, was whether the applicant should be provided a hearing before a court which was responsible for establishing the facts of the case (for the reasoning of the case in question, see paragraphs 43 to 52 of case *Goç v. Turkey*).

69. In contrast, in other cases, the ECtHR found that the fact that an applicant did not request a hearing could be considered as an implied waiver of this right, but always together with the assessment of whether, in the circumstances of a case, exist extraordinary circumstances which would justify the absence of a hearing. For example, in cases *Schuler-Zgraggen v. Switzerland* (Judgment of 24 June 1993) and *Dory v. Sweden* (Judgment of 12 February 2003), in which the applicants did not request a hearing, the ECtHR found that they had implicitly waived the right to a hearing. However, this finding was reached by the ECtHR, only in connection with the finding that the circumstances of the case were of "*technical nature*", and consequently there were extraordinary circumstances that justify the absence of a hearing, not finding a violation of Article 6 of the ECHR (see the ECtHR case, *Miller v. Sweden*, cited above, paragraphs 28-37; *Dory v. Sweden,* cited above, paragraphs 36-45). Similarly, the ECtHR had acted in the case *Vilho Eskelinen and others v. Finland* (Judgment of 19 April 2007), in which it found no violation of Article 6 of the ECHR (for reasons relating to the hearing, see paragraphs 73 to 75 in the case *Vilho Eskelinen and others v. Finland*).

70. The Court also, based on the case law of the ECtHR, states that the fact that the practice of conducting a written procedure without hearings has prevailed before the respective courts has not been considered by the ECtHR as the only fact on the basis of which a hearing, regardless of the specific circumstances of a case, can be avoided. For example, in the case *Madamus v. Germany* (Judgment of 9 June 2016), the ECtHR had also examined allegations based on which, the applicable law provided for the holding of hearings as an exception and not as a rule, moreover that based on the relevant practice, the court whose decision was challenged before the ECtHR had never held a hearing. Despite this fact, the ECtHR found a violation of Article 6 of the ECHR, as it assessed and found that in the circumstances of this case there were no exceptional circumstances which would justify the absence of a hearing (see paragraphs 25 to 33 of the case *Madamus v. Germany*).

71. The Court recalls that in the circumstances of the present case, (i) the Applicants were not given the opportunity to be heard before the Specialized Panel, with jurisdiction to assess the facts and the law, despite their request; (ii) the Applicants had not appealed to the Appellate Panel because the decision of the Specialized Panel was in their favour; (iii) the proceedings before the Appellate Panel were initiated through an appeal by the PAK; (iv) The Appellate Panel, had *"waived on the hearing"*, referring to Article 69 of the Law 06/L-086 on the SCSC, an article identical to Article 64 of the Annex to the Law on the SCSC, which simply stipulates that "*The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on one or more hearing sessions on the concerned appeal.*"; and (v) the Appellate Panel, had considered all the facts of the case, including the Applicants' appeals submitted in the first instance, stating that it disagreed with the assessment of the facts and with the interpretation of the law by the lower instance court, and had completely amended the Judgment of the Specialized Panel, removing all Applicants from the List of Employees with legitimate rights to benefit from twenty percent (20%) of the privatization of the enterprise SOE "Agimi".

72. In such circumstances, the Court cannot find that the Applicants' lack of a request to hold a hearing at the level of the Appellate Panel can be considered as their implied waiver of the right to a hearing. The Court recalls that in all the cases in which the ECtHR had reached such a finding, it had made it in connection with the fact that the circumstances of the cases were related to matters of an exclusively legal or technical nature, and consequently "*there were extraordinary circumstances that would justify the absence of a hearing*". Consequently, the Court must assess whether in the circumstances of the present case, "*there are exceptional circumstances that would justify the absence of a hearing",* respectively, whether the nature of the cases before the Appellate Panel can be classified as "*exclusively legal or of a highly technical nature*".

b) Whether in the circumstances of the present case, there are extraordinary circumstances which would justify the absence of a hearing

73. The Court reiterates that based on the case law of the ECtHR, the parties are entitled to a hearing in at least one instance. This instance is mainly the first instance, and the one which has the jurisdiction to decide on both factual and legal matters. In this context, regarding the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be

justified based on the specific characteristics of the case, provided that a hearing be held in the first instance. In principle, if a hearing is held in the first instance, proceedings before the courts of appeal, and which involve only matters of law, and not matters of fact, may be considered to be in accordance with the guarantees enshrined in Article 6 of the ECHR, even if in the second instance no hearing was held. Having said that, the exception to the right to a hearing are only those cases in which it is determined that "*there are extraordinary circumstances that would justify the absence of a hearing*". These circumstances, as explained above, the case law of the ECtHR has classified as cases which relate to "*exclusively legal matters or of highly technical nature*".

74. For example, on matters related to social insurance, the ECtHR, has mainly classified them as matters of a technical nature, in which a hearing is not necessarily necessary. Of course, there are exceptions to this rule. In each case, the concrete circumstances of a case are examined. For example, the ECtHR found no violations in the cases *Schuler-Zgraggen v. Switzerland* and *Dory v. Sweden*, but had found violations in the case *Miller v. Sweden* and *Salomonsson v. Switzerland*, although all related to social insurance matters.

75. Similarly, the ECtHR also operates in those cases in which matters before the relevant Court are exclusively legal, and do not involve the assessment of the disputed facts. For example, in the case *Saccoccia v. Austria* (Judgment of 18 December 2008), the ECtHR did not find a violation of Article 6 of the ECHR due to the absence of a hearing as it found that the matters appealed by the applicant did not involve factual matters, but only limited matters of a legal nature (*Saccoccia v. Austria*, cited above, paragraph 78), while in the case *Allan Jacobsson v. Sweden* (no. 2) (Judgment of 19 February 1998), the ECtHR also found no violation of Article 6 of the ECHR due to the absence of a hearing, as it found that the matters appealed by the respective applicant did not involve either legal or factual matters (see the ECtHR case, *Allan Jacobsson v. Sweden (no. 2)*, cited above, paragraph 49).

76. On the contrary, in other cases in which the ECtHR found that cases before the respective courts involved both factual and legal matters, it did not find that there were extraordinary circumstances that would justify the absence of a hearing. For example, in cases *Malhous v. Czech Republic* (Judgment of 12 July 2001), the ECtHR found a violation of Article 6 of the ECHR due to the absence of a hearing, as it determined that the matters appealed by the concerned applicant were not only matters of law but also of fact, namely the assessment of

whether the lowest authority had assessed the facts fairly (see the ECtHR case *Malhous v. Czech Republic*, cited above, paragraph 60). In the same way, in the case *Koottummel v. Austria* (Judgment of 10 December 2009), the ECtHR found a violation of Article 6 of the ECHR for lack of a hearing, as it found that the cases before it could not qualify as matters of an exclusively legal or technical nature, which could consist of extraordinary circumstances which would justify the absence of a hearing (see the ECtHR case, *Koottummel v. Austria*, cited above, paragraphs 20 and 21).

77. In the circumstances of the present case, the Court initially recalls that the Appellate Panel has jurisdiction over both fact and legal matters. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Matters Relating to the Privatization Agency of Kosovo (hereinafter: the Law on the SCSC) and paragraph 4 of Article 64 (Oral Appellate Proceedings) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the parties have, inter alia, the opportunity to file complaints with the Appellate Panel regarding both matters of law and facts, including the possibility of presenting new evidence.

78. Furthermore, in the circumstances of the present case, the Appellate Panel had reviewed all the facts submitted through the PAK appeal to the Appellate Panel and the relevant responses to the Applicants' appeal. Despite the fact that the Specialized Panel had assessed that the evidence *"is clear"* giving the right to the Applicants, the Appellate Panel found the opposite based on the same evidence.

79. The Court also recalls that pursuant to paragraph 11 of Article 10 of the Law on the SCSC, the Appellate Panel is limited to changing the assessment of the factual situation made by the Specialized Panel, unless it determines that the factual findings of the lower court are "*clearly wrong"*, the rule which according to the same article must be "*strongly respected"*. Such a reasoning is not found in the Judgment of the Appellate Panel. The latter simply disagreed with the assessment of the evidence by the Specialized Panel, and also found that the interpretation which the Specialized Panel had made of the allegations of discrimination was inconsistent with *"case law"*.

80. The Court further notes that pursuant to Article 68 of the Annex to the Law on the SCSC, in the event of appeals concerning the list of employees with legitimate rights, the burden of proof falls on the Applicants before the Specialized Panel. Also, the burden of proving

for the opponent of such a request falls on the opponent, respectively the PAK, in the circumstances of the present case. Before the Appellate Panel, the burden of proof also falls on the appellant concerned. But the circumstances of the present case are also, in essence, related to allegations of discrimination. In case of such allegations, the burden of proof, based on Article 8 (Burden of Proof) of the Anti-Discrimination Law, falls on the respondent party, namely the PAK, and not the Applicants.

81. In such circumstances, in which (i) the Appellate Panel has considered both factual and legal matters; (ii) in which with regard to the facts, the burden of proving that they meet the criteria of paragraph 4 of Section 10 of Regulation no. 2003/13, in principle falls on the Applicants, while the burden of proving discrimination falls on the PAK; and (iii) the Appellate Panel interprets the same facts presented by the parties differently from the way the Specialized Panel has interpreted them, amending the Judgment to the detriment of the parties, despite the fact that such a possibility based on paragraph 11 of Article 10 of Law no. 04/L-033 on the SCSC was recognized only as an exception, provided that it argued that the lowest authority, namely the Specialized Panel, had interpreted *"clearly erroneously"*, the Court considers that it is indisputable that the case before the Appellate Panel is not (i) an exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel involved important factual and legal matters. Consequently, the Court must find that in the circumstances of the present case, there are no circumstances which would justify the absence of a hearing.

82. In support of this finding, the Court recalls that through the Judgment of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, it was specifically determined that a hearing was necessary in circumstances involving the need to consider matters of law and fact, including in cases where it is necessary to assess whether the lower authorities have assessed the facts correctly. This is especially true in circumstances in which a hearing has not been held even before the lower instance, as is the case in the present case.

83. In fact, in some cases the ECtHR found a violation of Article 6 of the ECHR when a hearing was not held in a court of appellate jurisdiction, even when a hearing was held in the lower instance, despite the fact that the assessment of the necessity of the hearing at the appeal level is less rigorous when a hearing is held in the first instance. For example, in the Judgment *Helmers v. Sweden*, the ECtHR reviewed a case in which the respective applicant was granted a hearing in the first instance, but not at the appellate level, which had the power to

assess both the law and the facts in the circumstances of the respective case. In this case, the ECtHR reiterated that (i) the guarantees enshrined in Article 6 of the ECHR do not necessarily guarantee a hearing at the appellate level, if one was held in the first instance; and (ii) in making this decision, the relevant court must also consider the need for expeditious handling of cases as well as the right to a trial within a reasonable time. However, emphasizing that such a determination depends on the nature of the cases involved and the need for extraordinary circumstances in order to justify the absence of a hearing, the ECtHR found a violation of Article 6 of the ECHR (for the relevant reasoning of the case, see paragraphs 31 to 39 of the case *Helmers v. Sweden*).

84. Finally, the Court also notes the fact that the Appellate Panel did not reason *"waiving of the hearing"*, but was satisfied only with the reference to Article 69 of Law 06/L-086 on the SCSC. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on the holding of the hearing on its own initiative or at the request of the party. The relevant judgment does not contain any additional clarification regarding the decision of the Appellate Panel on *"waving of the hearing"*. In this context, the Court notes that based on the case law of the ECtHR, in assessing allegations relating to the absence of a hearing, it should also be considered whether the refusal to hold such a hearing is justified. For example, in the case of the ECtHR *Pönkä v. Estonia*, (Judgment of 8 November 2016), which was related to conducting a simplified procedure (reserved for small lawsuits), the ECtHR had found a violation of Article 6 of the ECHR, because the relevant court had not justified the absence of a hearing (see the ECtHR case, *Pönkä v. Estonia*, cited above, paragraphs 37-40). Also, in the case of the ECtHR, *Mirovni Inštitut v. Slovenia*, cited above, the ECtHR found a violation of Article 6 of the ECHR, inter alia even though the relevant court had not given an explanation for not holding a hearing (see the ECtHR case, *Mirovni Inštitut v. Slovenia*, cited above, paragraph 44). In the context of the lack of reasoning for not holding a hearing, the ECtHR, through its case law, has consistently, inter alia, emphasized that the lack of reasoning about the necessity of holding a hearing makes it impossible for the highest court, to assess whether such a possibility has simply been neglected, or what are the arguments on the basis of which the court has avoided such a possibility in relation to the circumstances raised by a particular case (see ECtHR case, *Mirovni Inštitut v. Slovenia,* paragraph 44 and references used therein).

85. Therefore, and in conclusion, the Court, given that (i) the fact that the Applicants did not expressly request a hearing at the level of the

Appellate Panel, does not imply that they implicitly waived this right, especially considering that they have not initiated an appeal before the Appellate Panel and also that the absence of this request does not release the Appellate Panel from the obligation to assess the necessity of a hearing; (ii) despite the Applicants' specific request for a hearing before the Specialized Panel, one was not held and, consequently, the standards applicable to the necessity of holding a hearing before the Appellate Panel are more stringent because, in principle, the parties are entitled to a hearing at least before a court instance; (iii) the cases before the Appellate Panel can be qualified neither as exclusively legal matters nor as matters of a technical nature, but rather as matters of fact and law; (iv) the Appellate Panel assessed how the lower instance, namely the Specialized Panel, had assessed the facts, amending its Judgment to the detriment of the Applicants; and (v) the Appellate Panel had not reasoned "*waiving of the hearing*", and finds that in this case "*there were no extraordinary circumstances to justify the absence of a hearing*", and consequently, the challenged Judgment of the Appellate Panel, namely the Judgment [AC-I-13-0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

86. The Court also concludes that, having already found that the challenged Judgment of the Appellate Panel is not in accordance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the absence of a hearing considers that it is not necessary to examine the Applicants' other allegations. The respective allegations of the Applicants should be reviewed by the Appellate Panel, in accordance with the findings of this Judgment. Furthermore, given that the Appellate Panel has full jurisdiction to review contested decisions of the Specialized Panel based on the applicable laws of the SCSC, it has the possibility of second-degree correction of the absence of a hearing in the first instance.

87. The finding of the Court for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the absence of a hearing, as explained in this Judgment, and in no way relates to or does not prejudice the outcome of case merits.

Conclusion

88. The Court, in the circumstances of this case, has assessed the allegations of the Applicants, regarding the absence of a hearing, a right guaranteed, according to the clarifications of this Judgment, through Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

89. In assessing the relevant allegations, the Court first elaborated on the general principles deriving from its case law and that of the ECtHR, regarding the right to a hearing, clarifying the circumstances in which such is necessary, based, inter alia, on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*. The Court has clarified, inter alia, that (i) the absence of a party's request for a hearing does not necessarily mean the waiver of such a right and that the assessment of the impact of the absence of such a request depends on the specifics of the law and the special circumstances of a case; and (ii) in principle, the parties are entitled to a hearing on at least one level of jurisdiction, unless "*there are extraordinary circumstances that would justify the absence of a hearing* ", which based on the case law of the ECtHR, in principle relate to cases in which are considered "*matters of exclusively legal or highly technical nature*".

90. In the circumstances of the present case, the Court finds that (i) the fact that the Applicants have not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it relieve the Appellate Panel of the obligation to its initiative, to address the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the SCSC; (iii) the Appellate Panel did not address "*matters of exclusively legal or highly technical nature*", matters based on which could have existed *"extraordinary circumstances that would justify the absence of a hearing*"; (iv) the Appellate Panel had considered cases of "*fact and law"*. Moreover, it had amended the Judgment of the Specialized Panel to the detriment of the Applicants; and (v) the Appellate Panel did not reason "*waiving of the oral hearing*". Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely Judgment [AC-I-13-0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

91. The Court also noted that (i) under the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, has the possibility of correcting the absence of the hearing at the level of the lower court, respectively, the Specialized Panel; (ii) it is not necessary to deal with the Applicants' other allegations because they must be examined by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

92. The Court also found that the Applicants' Referral KI221/19 (Muhamet Domi) and KI234/19 (Fikrije Nuka) should be rejected as manifestly ill-founded as specified in Rule 39 (2) of the Rules of Procedure, because they did not provide any evidence that their complaints have been excluded from the assessment procedure at the SCSC.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in its session held on 25 March 2021, by a majority of votes:

DECIDES:

I. TO DECLARE the Referrals KI220/19 and KI223/19 admissible;

II. TO FIND that for the Referrals KI220/19 and KI223/19, there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE void the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court;

IV. TO REMAND the case for retrial to the Appellate Panel of the Special Chamber of the Supreme Court, in accordance with the findings of this Judgment;

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, pursuant to Rule 66 (5) of the Rules of Procedure, of the measures taken to implement the Judgment of the Court by 14 June 2021;

VI. TO DECLARE inadmissible, the Referrals with no. KI221/19 and KI234/19 submitted by Applicants Muhamet Domi and Fikrije Nuka;

VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Arta Rama-Hajrizi

KI87/20, Applicant: Suva Rechtsabteilung, Constitutional review of Decision [E.Rev.no.68/2019] of the Supreme Court of the Republic of Kosovo, of 27 January 2020

KI87/20, resolution on inadmissibility, adopted on 26 March 2021, published on 13 April 2021

Keywords: *individual referral, reasoning of the court decision, divergence in the case law, manifestly ill-founded referral, inadmissible referral.*

The circumstances of the present case relate to an accident that occurred in 2012, which was caused by the insured person of the "Siguria" Company, while the Applicant's insured person B.I., had suffered material damage. 8 December 2015 the Applicant had filed with the Basic Court a claim for compensation of material damage under his right to subrogation. The claim for compensation of material damage was approved by the Basic Court, and a penalty interest rate of 12% was set starting from 20 September 2013 until the definitive payment. The Court of Appeals by Judgment [Ae.no.130/2018] of 3 September 2019, partially approved the appeal of the "Siguria" Company by modifying the Judgment [III.Ek.no.561/2015] of the Basic Court, of 5 April 2018, only in the part concerning the amount of penalty interest, thus obliging the "Siguria" Company to pay the penalty interest to the claimant at the annual rate of 8% per annum, after having found that the Basic Court in this point had erroneously applied the substantive law, respectively that Article 26, paragraph 6 of the Law on Compulsory Insurance is not applicable in the cases of claims under the right of subrogation, and that it is Article 382 of the LOR that applies in this case. Consequently, the Applicant filed a revision with the Supreme Court, challenging the Judgment of the Court of Appeals only as regards the part of its decision concerning the penalty interest. In this case, the Supreme Court, by Decision [E.Rev.no.28/2019] of 27 January 2020 dismissed the Applicant's revision as inadmissible because according to Article 30 paragraph 2 of the LCP, penalty interest as an accessory claim is not taken into consideration if it does not constitute the main claim, which in the present case is the claim for compensation on the basis of the right of subrogation.

The Applicant challenges the abovementioned findings of the Supreme Court, by alleging (i) a violation of his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Court recalls that regarding his allegation for a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Applicant alleges: (i) non-reasoning of the court decision; (ii) denial of his right of access to court; and (iii) divergence in the case law as a result of contradictory decisions of the Supreme Court. And (ii) violation of his right

to property, guaranteed by Article 46 of the Constitution, in conjunction with Article 1 of Protocol No.1 of the ECHR.

Having assessed the Applicant's allegations, the Court, by also applying the standards of the case law of the European Court of Human Rights, found that the Referral is inadmissible because the allegations for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and Article 46 of the Constitution are manifestly ill-founded on constitutional basis as provided for by Rule 39 (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI87/20

Applicant

"SUVA" Rechtsabteilung

Constitutional review of Decision E. Rev. no. 68/2019 of the Supreme Court, of 27 January 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the insurance company "SUVA Rechtsabteilung" having its seat in Lucerne, Switzerland, represented by ICS Assistance LLC, through Visar Morina and Besnik Z. Nikqi, lawyers in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Decision [E.Rev.no.68/2019] of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), of 27 January 2020. The Applicant has received the challenged Decision on 10 February 2020.

Subject matter

3. The subject matter of the Referral is the constitutional review of the above-mentioned Decision of the Supreme Court, which as alleged by

the Applicant has violated its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR) and Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of Property) of Protocol no. 1 of the ECHR.

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No.03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 8 June 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 June 2020, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 17 June 2020, the Court notified the Applicant about the registration of the Referral and sent a copy thereof to the Supreme Court. On the same date, the Court sent a request to the Basic Court in Prishtina, Department for Commercial Matters (hereinafter: the Basic Court) asking them to submit the acknowledgment of receipt which proves the time when the challenged Decision of the Supreme Court was served on the Applicant.

8. On 3 July 2020, the Basic Court in Prishtina submitted the requested acknowledgment of receipt, which shows that the Applicant has received the challenged Decision on 10 February 2020.

9. On 26 March 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On the basis of the case file, on 25 December 2012, the person B.I. who was insured at the Company submitting the Referral had suffered a traffic accident caused by the insured person of the "Siguria" Company in Prishtina. The Apllicant's insured person received medical treatment for a certain period in the Swiss Confederation, which had been paid for by the Applicant.

11. On 20 September 2013, the Applicant initiated a claim for debt regression in extrajudicial proceedings. According to the case file, as a result of the failure to reach an indemnity agreement in the extrajudicial proceedings, it results that on 8 December 2015, the Applicant filed a claim with the Basic Court based on the right of subrogation.

12. On 5 April 2018, the Basic Court by Judgment [III.Ek.no. 561/2015]: (i) approved the Applicant's statement of claim in its entirety; (ii) obliged the Insurance Company "Siguria" to pay to the Applicant the amount of compensation of 69,371.63 Euros, along with the interest of 12% per annum starting from 20 September 2013 until the definitive payment; and (iii) obliged the "Siguria" Company to pay the costs of the proceedings.

13. The Basic Court, by its Judgment, justified the determination of the penalty interest of 12% by basing upon Article 26 of the Law No.04/ L-018 on Compulsory Motor Liability Insurance (hereinafter: the Law on Compulsory Insurance).

14. On an unspecified date, the Company "Siguria" filed an appeal with the Court of Appeals against the above Judgment of the Basic Court, alleging violation of the provisions of the contested procedure, erroneous application of substantive law, and erroneous and incomplete determination of the factual situation by proposing to have the challenged Judgment rejected as ungrounded. The Applicant submitted a response to the appeal and proposed that the appeal of the "Siguria" Company be declared ungrounded while the Judgment [III.Ek.no. 561/2015] of the Basic Court, of 5 April 2018, be confirmed.

15. On 3 September 2019, the Court of Appeals, by Judgment [Ae.no.130/ 2018] partially approved the appeal of the "Siguria" Company by modifying the Judgment [III.Ek.no.561/2015] of the Basic Court, of 5 April 2018, only in the part concerning the amount of penalty interest, thus obliging the "Siguria" Company to pay the penalty interest to the claimant at the annual rate of 8% per annum.

16. In the context of the latter, the Court of Appeals found that the Judgment of the Basic Court as regards the part concerning the payment of penalty interest was involved in an erroneous application of substantive law. The Court of Appeals found that *"[...] the interest approved by the court of the first instance is not legally applied in disputes for debt regression but only in addressing the claims of injured persons for compensation of damages in extrajudicial proceedings as provided for by Article 26 of the Law on Compulsory Motor Liability Insurance, the provisions which the court of the first instance calls upon. [...] Paragraph 7, of Article 26 of the Law on Compulsory Motor Liability Insurance, excludes the application of interest of 12% for debt regression, this interest is foreseen only for non-treatment and the delay in handling the claims for compensation of the injured persons. It results that the claimant is entitled only to the penalty interest provided for in Article 382 of the LOR [Law on Obligational Relationships], but not to the qualified interest according to the provisions applied by the court of the first instance."*

17. On 30 October 2019, the Applicant filed a revision with the Supreme Court against the Judgment [Ae.no.130/2018]of the Court of Appeals, of 3 September 2018, alleging violations of the provisions of the contested procedure and erroneous application of the substantive law, by suggesting that in this case should be applied Article 26, paragraph 6 of the Law on Compulsory Insurance, respectively the annual interest rate of 12%.

18. On 27 January 2020, the Supreme Court, by Decision [E.Rev.no.28/2019] rejected as inadmissible the Applicant's revision submitted against the Judgment [Ae.nr.130/ 2018] of the Court of Appeals, of 3 September.

19. In relation to its finding, the Supreme Court reasoned that:

> *"On the basis of the revision of the claimant's authorized representative, it results that the Judgment of the court of the second instance was challenged only in relation to the decision regarding the adjudicated interest. In the sense of Article 30.2 of the LCP [Law on Contested Procedure], interest, procedural costs, contracted penalties and other accessory claims are not taken into consideration if they do not constitute the main claim, while in the present case the main claim is debt regression in the amount of 69,371, 63 Euros, the interest is accessory, so in the sense of paragraph 1 of this article only the value of the main*

claim is taken into considerations as the value of the subject of the dispute. Article 211.2 of the LCP provides that revision is not permitted in legal property disputes in which the claim concerns monetary claims, handing over of the item or fulfilment of any other promise if the value of the subject of the dispute in the challenged part of the judgment does not exceed 3,000 Euros. Hence, the revision of the claimant's authorized representative is inadmissible."

Applicant's allegations

20. The Applicant alleges that the Decision [E.Rev.no.28/2019] of the Supreme Court, of 27 January 2020, was issued in violation of its fundamental rights and freedoms guaranteed through Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, and Article 46 [Protection of Property], in conjunction with Article 1 of Protocol no. 1 of the ECHR.

I. In relation to the allegation for violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR

21. The Applicant alleges a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of a violation of the right to (i) a reasoned court decision; (ii) access to court; and (iii) inconsistency or divergence in the case law of the Supreme Court.

(i) In relation to the non-reasoning of the judicial decision

22. The Applicant first states that the challenged Decision of the Supreme Court, *"[…] is not supported by a concrete legal provision, which would explicitly exclude the possibility of processing a statement of claim concerning the penalty interest rate, while in fact, the Law on Contested Procedure does not contain such a provision (where revision in relation to penalty interest is explicitly not permitted), but the limitation on whether or not the revision is permitted is based upon the value of legal property disputes."*

23. The Applicant further specifies that: *"[…] the limitation on whether or not the revision is permitted is based upon the value of legal property disputes. Otherwise, in the present case, the legal property claim relates to "trade disputes" (in respect of which revision is permitted in disputes having the value over 10,000.00 Euros/Article 508 of the LCP) and not as; stated in the reasoning of the Decision of the*

Supreme Court the value of 3,000.00 euros (for which it results that the Supreme Court has not correctly referred to the respective provision concerning the value of the dispute in the concrete case as "trade dispute")."

24. While the Applicant has elaborated the basic principles of the right to a reasoned court decision as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and in support of these arguments, the Applicant has referred also to cases KI35/18, Applicant *Bayerische Rechstverbrand*, Judgment of 11 December 2019; KI87/18, Applicant *IF Skadeforsikring*, Judgment, of 27 February 2019, KI72/12, Applicant *Veton Berisha and Ilfete Haziri*, Judgment, of 17 December 2012; KI22/16, Applicant *Naser Husaj*, Judgment, of 9 June 2017; KI97/16 Applicant *IKK Classic*, Judgment of 4 December 2017; KI143/15, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility, of 13 June 2018; KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019, as well as the case law of the European Court of Human Rights (hereinafter: the ECtHR) *Hadjianastassou v. Greece*, Judgment, of 16 December 1992; *Van de Hurk v. The Netherlands*, Judgment, of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Garcia Ruiz v. Spain*, Judgment, of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment, of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment, of 22 February 2007.

25. The Applicant considers that the challenged Ruling of the Supreme Court lacks adequate reasoning because paragraph 2 of Article 30 of the Law on Contested Procedure (hereinafter: the LCP) has been erroneously interpreted. Consequently, according to the Applicant, he was denied the right to the main hearing on his statement of claim in its entirety, respectively it was made impossible for him *"[...] to have the allegation for erroneous application of the substantive law in the part of the claim concerning the penalty interest treated by the use of revision."*

26. In this respect, the Applicant specifies that *"[...] Article 30 of the LCP is only in the function of determining the value of the subject of the dispute in general, but in no way in cases where the statement of claim related to interest is the sole (independent) subject of the main hearing (as in the present case by the revision)."*

27. The Applicant continues by highlighting that *"On the contrary, such a position respectively grammatical interpretation of the provision of*

Article 30.2 of the LCP by the Supreme Court of Kosovo results to be illogical by the conclusion that the dispute relating to the statement of claim for interest is completely worthless." In the context of this allegation, the Applicant refers to the claim of 8 December 2015, where according to him *"[...] the penalty interest was included in the claim together with the request for subrogation which was also treated as such by the judgments of the courts of lower instances."*

28. The Applicant further highlights that his reasoning *"[...] relies on the well-known concept of civil law that "the interest shares the same fate as the principal debt", therefore the denial of the right to the main hearing by the use of revision in the present case results to be contrary to this concept and as such would result in the conclusion that the claim for penalty interest cannot be subject to review by revision respectively in a court process."*

29. In this connection, the Applicant reiterates that "*The Court has failed to provide adequate reasoning for the decision, to interpret and correctly apply Article 30 of the LCP in the disputable case, is also argued in a doctrinal aspect. According to the Commentary on the Law on Civil Procedure (Iset Morina and Selim Nikqi, "Commentary on the Law on Contested Procedure" (2012). "provision of para.2 of Article 30 of the LCP explicitly stipulates that other accessory claims (interest) should not be calculated for determining the value of the subject of the dispute."* This definition in respect of the determination of the value of the dispute is a logical consequence of the application of the principle that "accessory claims (interest) share the fate of the main claim". Consequently, the Applicant reiterates that *"[...] the interest is not taken into consideration for determining the value of the subject of the dispute, except in the case when interest is the sole subject of the statement of claim." In the context of the latter, the Applicant states that: "[...] for the statement of claim relating to the interest as a subject of revision respectively as an independent claim in the main trial, in the sense of Article 30.1 and 30.2 of the LCP its amount is taken into consideration for determining the value of the dispute. Otherwise, a different stance and interpretation of this provision, results in the conclusion that the statement of claim for the payment of penalty interest is worthless and as such makes it impossible to have the case treated by revision - as inadmissible, as decided by the Supreme Court in the challenged Decision."*

30. In the context of what is stated above, the Applicant refers to the case law and the constitutional practice of the region, by stating that *"[...] the penalty interest may be the only review by revision including the respective practice on calculation of the value of the dispute where*

the penalty interest is the sole subject of the revision." In support of this allegation, the Applicant refers to a presentation of *"Dr. Ivo Grbin: Vrhovni Sud Hrvatske II Rev 65/00 dt. 30.09.2003 Stav. Teacher Suda RH Odluka Br. U-III-2646/2007 & Delimicno BiH: Vrhovni Sud BiH Br. 57 0 PS 004906 16 rev 2 dt. 11.08.2016."*

31. The Applicant reiterates that "*the Supreme Court of Kosovo has thus made it impossible to review the claimant's allegations on the trade dispute, respectively to review the allegation on the manner of calculation of the penalty interest in the present case and the application of the annual rate of 12% instead of 8 % as determined by the decision of the Court of Appeals. Based on the case file it is clearly seen that the value of the disputable statement of claim on interest, which was subject to revision (difference between the annual rate of 8% and 12%) consists of the amount of 16,956.45 Euros. Therefore, the decision of the Supreme Court for not allowing the Applicant's Revision based on the criterion of the amount of the statement of claim according to the Law on Contested Procedure clearly shows that the reasoning of the Supreme Court decision is not only deficient but also represents an erroneous interpretation of applicable legislation."*

32. Finally and in the context of the lack of reasoning of the court decision, the Applicant states that *"The lack of reasoning of the challenged decision is also proved by the fact that in the part of the reasoning the Supreme Court did not even specify the value of the statement of claim relating to the accessory claim, namely the penalty interest. For the Supreme Court, a short paragraph was sufficient as the reasoning of the Decision that "in this case, the main claim is the debt regression of 69,371.63 Euros while the interest is an accessory claim, hence in the sense of para.1 of this Article only the value of the main claim is taken into consideration as a subject of the dispute", without providing even a single further explanation as to the monetary value of the accessory claim in this court case and whether such a decision is contrary to the well-known principle in the civil law that " the interest shares the same fate as the principal debt."*

(ii) In relation to the allegation for denial of the right of access to court

33. The Applicant states that the Decision of the Supreme Court has denied his right of access to court and the right to be heard.

34. The Applicant specifies that: *"Since the Applicant has used all regular legal remedies to exercise the right to indemnity by the claim for*

subrogation in the first and second instance, such a decision of the Supreme Court with serious shortcomings in part of the reasoning is a denial of access to justice and constitutes a lack of proper administration of justice in the present case".

(iii) In relation to the allegation for a divergence in the case law of the Supreme Court

35. In this connection, the Applicant clarifies that *"[...] there are dozens of cases of the Supreme Court of Kosovo wherein in the revision procedure it was decided regarding the allegations for erroneous application of the substantive law in respect of the interest, respectively that in this case, is to be applied the interest of 12% per annum (according to "lex specialis") [...]"* and consequently according to the Applicant, in the absence of a review of its revision by the Supreme Court, the Judgment of the Court of *Appeals "[...] by the erroneous application of substantive law (annual interest rate 8%) which is contrary to the practice of the Supreme Court of Kosovo."* In the context of the latter, the Applicant refers to and has submitted the Judgments of the Supreme Court, respectively the Decision [E.Rev.43/2014] of 22 September 2014; and Judgments [E. Rev. 25/2014, of 13 May 2014; [E. Rev. 23/2017] of 14 December 2017, and [E. Rev. 27/2018] of 24 September 2018. Subsequently, the Applicant has also submitted a Judgment [C.no.745/2013] of the Basic Court in Prishtina, of 28 September 2016 and Judgment [Ae.no. 247/2016] of the Court of Appeals, of 6 June 2018.

II. In relation to the allegation for violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR

36. The Applicant also alleges that *"[...] the failure of the Supreme Court of Kosovo to render reasoned decisions (and in the present case the arbitrary refusal of the submitted revision)"* by him, has also violated the right to property guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

37. In the context of this allegation, the Applicant states "[...] that he has had legitimate expectations that he would enjoy a compensation in the above amount under the right of subrogation which means the right to reimbursement of the damage caused by the responsible person or his liability insurer on the basis of the annual interest determined by law." In this respect, the Applicant refers to the case of the Court KI58/09, KI59/09, KI60/09, KI64 /09, KI66/09, KI69/09, KI70/09, KI72/09, KI75/09, KI76/09, KI77/09, KI78 /09, KI79/09, KI03/10, KI05/10, KI13/10, *Gani Prokshi and 15 other former employees of the Kosovo Energy Corporation*, Judgment, of 18 October 2010, paragraph 59

stating that: *"[...] such a legitimate expectation is guaranteed by Article 1 of Protocol No. 1 to the Convention, its nature is concrete, and not a mere hope."*

38. Subsequently, the Applicant specified that *"this legitimate expectation [of his] is based on the Compulsory Motor Liability Insurance System (Article 2, paragraph 4 of the CBK Rule No. 3 on Compulsory Motor Liability Insurance - 2008 [...]"*. In this case, the Applicant also refers to the case of Court KI40/ 09, Applicant *Imer Ibrahimi and 48 other former employees of the Kosovo Energy Corporation*, Judgment of 23 June 2010, and the case of the ECtHR, *Gratzingerova v. the Czech Republic*, Application No. 39794/98, Decision on Admissibility, 10 July 2002.

39. Consequently, the Applicant concludes that the denial of his right *"[...] of subrogation and payment of penalty interest according to the applicable legislation as a result of a non-reasoned decision constitutes a clear interference with the enjoyment of the right to property in the sense of Article 46 of the Constitution and Article 1 of Protocol 1 to the European Convention on Human Rights."*

40. Finally, the Applicant requests from the Court to: declare his Referral admissible; to find that the challenged Decision [E. Rev. no.68 / 2019] of the Supreme Court, of 27 January 2020, was issued in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as well as Article 46 of the Constitution, in conjunction with Article 1 of Protocol No. 1 of the ECHR; as well as to declare the challenged Decision of the Supreme Court invalid, by remanding the case for reconsideration.

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.

3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger

public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

[...]

European Convention on Human Rights

Article 6 (Right to a fair trial)

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

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

ARTICLE 1
Protection of property

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of

property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Law No. 03/L-006 on Contested Procedure

4. Determination of the value of the disputable facility

Article 30

30.1 The claimant is obliged, in the legal disputes over property, to determine the value of the disputed facility. Only the value of the disputed facility included in the main claim is taken into consideration.
30.2 If not included in the main claim, the interest, procedural expenditure, contracted penalties and other claims are not taken into consideration.

CHAPTER XIV EXTRAORDINARY MEANS OF STRIKE (ADDRESSING)

Article 211

211.1 Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought.
211.2 Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, handing items or fulfillment of a proposal if the value of the object of contest in the attacked part of the decision does not exceed 3, 000 €.
211.3 Revision is not permitted in the property-judicial contests, in which the charge request doesn't involve money requests, handing items or fulfillment of other proposal, if the value of the object of contest shown in the charge doesn't exceed 3,000 €.
211.4 Excluding, when dealt with the charge claim from the paragraph 2 and 3 of this article, the revision is always permitted:
a) food contests;
b) contests for damage claim for food lost due to the death of the donator of fond;
c) contests in work relations initiated by the employee against the decision for break of work contract.

Article 508

Revision in trade disputes is not allowed if the value of the disputed subject dispute does not exceed 10.000 Euro.

LAW 04/L-077 ON OBLIGATIONAL RELATIONSHIPS [published in the Official Gazette on 19 June 2012. Accordingt to Article 1059 of the Law, the Law entered into force six (6) months after its publication in the Official Gazette]

Article 281
Subrogation by law

If an obligation is performed by a person that has any legal interest therein the creditor's claim with all the accessory rights shall be transferred thereto upon performance by law alone.

SUB-CHAPTER 3
DELAY IN PERFORMANCE OF PECUNIARY OBLIGATIONS
PENALTY INTERES

Article 382
Penalty interes

1. A debtor that is in delay in performing a pecuniary obligation shall owe penalty interest in addition to the principal.

2. The interest rate for penalty interest shall amount to eight percent (8%) per annum, unless stipulated otherwise by a separate act of law.

SUB-CHAPTER 6
TRANSFER OF INSURED PERSON'S RIGHTS AGAINST LIABLE PERSON TO INSURANCE AGENCY (SUBROGIMI)

Article 960
Subrogation

1. *Upon the payment of compensation from insurance all the insured person's rights against a person that is in any way liable for the damage up to the amount of the insurance payout made shall be transferred by law alone to the insurance agency.*

2. *If through the fault of the insured person such a transfer of rights to the insurance agency is partly or wholly made impossible the insurance agency shall to an appropriate extent be free of its obligations towards the insured person.*

3. *The transfer of rights from the insured person to the insurance agency may not be to the detriment of the insured person; if the insurance payout obtained from the insurance agency is for any reason lower than the damage incurred the insured person shall have the right to obtain a payment from the liable person's assets for the remaining compensation before the payment of the insurance agency's claim deriving from the rights transferred thereto.*

4. *Irrespective of the rule on the transfer of the insured person's rights to the insurance agency, the rights shall not be transferred thereto if the damage was inflicted by a person who is a direct relative of the insured person, a person for whose action the insured person is liable or who lives in the same household, or a person who works for the insured person, unless any of these inflicted the damage intentionally.*

5. *If any of those specified in the previous paragraph was insured against liability the insurance agency may demand that his/her*

insurance agency reimburse the amount paid to the insured person.

LAW NO. 04/L-018 ON COMPULSORY MOTOR LIABILITY INSURANCE

Article 26
Compensation claims procedure

1. The insurer shall be obliged to process, for damages to persons latest within a period of 60 (sixty) days, while for damages to property within a period of 15 (fifteen) days from the day of submission of the compensation claim, the claim shall be processed and the injured party shall be notified in writing of:
1.1. compensation offer with relevant explanations;
1.2. decision and legal reasons for rejecting the compensation claim, when the liability and the damage degree are disputable.

2. If the submitted claim is not completed by evidence and documentation necessary to render a decision on compensation, the insurer shall be obliged, latest within a period of 3 (three) days from the date of the receipt of compensation claim, to notify the injured party in writing, indicating the evidence and documentation required to supplement the claim. Time limits from paragraph 1 of this Article on insurer's obligation to process the compensation claims shall apply as of the day of receipt or the completion of claim documentation, respectively.

3. CBK will issue sub-legal act to establish the compensation procedure, including such determination when a claim is considered completed by evidence and documentation necessary to render a decision on compensation.

4. Being unable to establish the damage, or to have the compensation claim fully processed respectively, the liable insurer shall be obliged to pay to the injured party the undisputable share of damage as an advance payment, within the time limit set out in paragraph 1 of this Article.

5. If the liable insurer fails to reply to the injured party within the time limits established under paragraph 1 of this Article, the injured party shall have the right to file a lawsuit to the competent Court.

6. In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim.

7. Provisions from paragraph 1, 2, 4 and 5 of this Article shall respectively apply in cases of compensation claims processing which shall bind the Bureau to damages based on border insurance and the Compensation Fund liabilities.

8. Special procedures and time limits under the Crete Agreement shall apply to compensation claims from the International Motor Insurance Card system.

Assessment of the admissibility of Referral

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

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

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

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

44. In addition, the Court will examine whether the Applicant has fulfilled the admissibility criteria, as provided by Law. In this respect, the Court

refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

45. In this regard, the Court initially notes that the Applicant is entitled to submit a constitutional complaint, by calling upon alleged violations of his fundamental rights and freedoms, which are valid for individuals as well as for legal persons (see the case of the Constitutional Court No. KI41/09, Applicant AAB-RIINVEST University L.L.C., Resolution on Inadmissibility of 3 February 2010, paragraph 14).

46. As to the fulfillment of the other admissibility criteria established in the Constitution and the Law and elaborated above, the Court finds that the Applicant is an authorized party who is challenging an act of a public authority, namely the Decision [E. Rev. no.68/2019] of the Supreme Court, of 27 January 2020, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which it alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

47. In addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure stipulates that:

> *"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."*

48. The Court recalls that the accident occurred in 2012. It was caused by the insured person of the "Siguria" Company, while the Applicant's insured person B.I. suffered material damage. The Court also notes that according to the Applicant, on 20 September 2013, the relevant reimbursement was sought from the "Siguria" Company, and taking into consideration that no agreement was reached, on 8 December 2015 the Applicant filed a claim with the Basic Court. The claim for compensation of material damage was approved by the Basic Court, and there was determined a penalty interest rate of 12% starting from 20 September 2013 until the definitive payment. In this context, the Court recalls that the Basic Court by Judgment [III.Ek.no.561/2015] of 5 April 2018 reasoned the determination of penalty interest of 12% by basing upon Article 26 of the Law No. 04/L-018 on Compulsory Insurance in conjunction with Article 382 paragraph 2 of the LOR.

49. The Court of Appeals by Judgment [Ae.no.130/2018], of 3 September 2019 partially approved the appeal of the "Siguria" Company and modified the Judgment [III.Ek.no. 561/2015] of the Basic Court, of 5 April 2018 only as regards the part referring to the amount of penalty interest, by obliging the "Siguria" Company to pay to the claimant the penalty interest at the annual rate of 8% per annum, after finding that the Basic Court on this point has erroneously applied the substantive law, respectively Article 26, paragraph 6 of the Law on Compulsory Insurance is not applicable in cases of claims based on the right of subrogation, and that it is Article 382 of the LOR that applies in this case. Consequently, the Applicant filed a revision with the Supreme Court, by challenging the Judgment of the Court of Appeals only as regards the part of its decision concerning the penalty interest. In this case, the Supreme Court, by Decision [E.Rev.no.28/2019] of 27 January 2020, dismissed the Applicant's revision as inadmissible. The Supreme Court found that the Applicant has filed a revision only in relation to the issue of penalty interest, and referring to Article 30 paragraph 2 of the LCP, penalty interest is not taken into consideration as an accessory claim if it does not constitute the main claim, which in this case is the claim for compensation in the amount of 69,371, 63 Euros, based on the right of subrogation,. Consequently, the Supreme

Court having applied paragraph 2 of Article 211 of the LCP found that "*the value of the subject of the dispute in the challenged part of the judgment does not exceed 3,000 Euros*".

50. The Applicant challenges the above findings of the Supreme Court, by specifying that the challenged Decision contains violations of his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Court recalls that regarding his allegation for a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Applicant alleges: (i) non-reasoning of the court decision; (ii) denial of his right of access to court; and (iii) divergence in the case law as a result of contradictory decisions of the Supreme Court.

51. The Court recalls that the Applicant also alleges a violation of his right to property, guaranteed by Article 46 of the Constitution, in conjunction with Article 1 of Protocol No. 1. 1 of the ECHR.

52. These two categories of allegations, namely the violation of the right to a fair and impartial trial and the violation of the right to property, will be examined by the Court on the basis of the case law of the ECtHR, in accordance with which, and pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. In the following, the Court will examine the Applicant's allegations relating to the violation of the right to a fair and impartial trial, and then proceed with the examination of the allegations related to the right to property.

I. Allegations for violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

(i) In relation to the non-reasoning of the court decision

53. The Court recalls that the Applicant in the context of his allegation for lack of reasoning of the court decision considers that the challenged Decision of the Supreme Court lacks adequate reasoning because paragraph 2 of Article 30 of the LCP was interpreted in an erroneous manner. The Applicant further emphasizes that its reasoning "[...] *relies on the well-known concept of civil law that "the interest shares the same fate as the principal debt", therefore the denial of the right to the main hearing by the use of revision in the present case results to be contrary to this concept and as such would result in the conclusion that the claim for penalty interest cannot be subject to review by revision respectively in a court process*." Following this allegation, the

Applicant specifies that *"the interest, be it as an accessory claim (sharing the fate of the main claim - in the amount of 69,371.63 Euros) as well as an independent claim (which is subject to review also by revision in the amount of 16, 956.45 Euros) results in a value of the dispute over the amount of 10, 0000.000 Euros (in conformity with the provision of article 50 [9] of LCP) and as such meets the procedural conditions to be subject to review by revision."*

54. Consequently, the Applicant specifies that *"[...] the value of the disputable statement of claim for interest, which was subject to revision (difference between the annual rate of 8% and 12%), is in the amount of 16,956.45 Euros. Therefore, the decision of the Supreme Court not to allow the Applicant's Revision based on the criterion of the value of the statement of claim according to the Law on Contested Procedure clearly shows that the reasoning of the decision of the Supreme Court is not only incomplete but also represents an erroneous interpretation of applicable legislation."*

55. Therefore, based on the Applicant's allegations, the Court notes that the Applicant, even though he raises the issue of non-reasoning of the decision, in essence, the Applicant alleges an erroneous interpretation and application of the Law by the Supreme Court in relation to the provisions of Article 30 of the LCP.

56. Therefore, based on the content of the Applicant's allegations, the Court will assess whether the allegations for erroneous application of the law fall within the domain of legality or constitutionality.

57. In this respect, the Court notes that as a general rule, the allegations for erroneous interpretation of the law allegedly committed by the regular courts relate to the scope of legality and as such do not fall within the jurisdiction of the Court and therefore, in principle, cannot be considered by the Court (see, the Cases No. KI06/17, Applicant *LG and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 36; KI75/17, Applicant *X*, Resolution on Inadmissibility of 6 December 2017, paragraph 55 and KI122/16, Applicant *Riza Dembogaj*, Judgment of 30 May 2018, paragraph 56).

58. The Court has consistently reiterated that it is not its role to deal with errors of facts or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality).lt cannot itself assess the law that lead a regular court to render one decision rather than another. If it were otherwise, the Court would act as a court of *"fourth instance",* which would result in exceeding the limitats

imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (see, the case *Garcia Ruiz v. Spain,* ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also the cases of Court: Kl70/11*,* Applicants: *Faik Hima, Magbule Hima and Besart Hima,* Resolution on Inadmissibility of 16 December 2011; and the abovementioned cases Kl06/17*,* Applicant *L. G. and five others,* paragraph 37, and KI122/16, Applicant *Riza Dembogaj*, paragraph 57).

59. This stance has been consistently held by the Court, based on the case law of the ECHR, which clearly maintained that it is not the role of this Court to review the conclusions of the regular courts in respect of the factual situation and the application of the substantive law(see, the ECtHR case, *Pronina v. Russia*, Application no. 65167/01, Decision on admissibility of 30 June 2005, and the Court cases cited above KI06/17, Applicant *LG and five others*, paragraph 38 and KI122/16, Applicant *Riza Dembogaj*, paragraph 57).

60. In this sense, and in accordance with the case law of the ECHR, the Court has emphasized that even though the role of the Court is limited in terms of assessing the interpretation of the law, it must ensure and take measures where it observes that a court has *"applied the law manifestly erroneously"* in a particular case or so as to reach *"arbitrary conclusions"* or "*manifestly unreasonable"* for the Applicant in question. (see, the cases of the ECtHR, *Anheuser-Busch Inc.*, Judgment, paragraph 83; *Kuznetsov and Others v. Russia*, no.184/02, paragraphs 70-74 and 84; *Păduraru v. Romania*, no.63252/00, paragraph 98; *Sovtransavto Holding v. Ukraine,* Application no. 48553/99, paragraphs 79, 97 and 98*; Beyeler v. Italy [GC],* Application no. 33202/96*,* paragraph 108*; Koshoglu v. Bulgaria,* Judgment of 10 May 2007*,* paragraph 50*;* see also the case of the Court cited above KI122/16, Applicant *Riza Dembogaj,* paragraph 57 and KI154/17 and KI05/18, Applicant *Basri Deva, Aferdita Deva and Limited Liability Company "BARBAS",* paragraphs 60 to 65 and references used therein).

61. In the circumstances of the present case, the Court recalls that the Supreme Court had found that the Applicant had filed his request for revision against Judgment [Ae.no.130/2018]of the Court of Appeals, of 3 September 2019 concerning the issue of the amount of penalty interest. The Court also recalls that in his request for revision the Applicant alleged erroneous interpretation and application of the substantive law by the Court of Appeals when determining the amount of penalty interest, respectively when deciding that Article 26 paragraph 6 of the Law on Compulsory Insurance is not applicable and that it is Article 382 of the LOR that applies in this case.

62. The Court notes that the Supreme Court dismissed the Applicant's revision as inadmissible, by finding as follows:

> *"In the sense of Article 30.2 of the LCP, interest, procedural costs, contracted penalties and other accessory claims are not taken into consideration if they do not constitute the main claim, while in the present case the main claim is debt regression in the amount of 69,371, 63 Euros, the interest is accessory, so in the sense of paragraph 1 of this article only the value of the main claim is taken into consideration as the value of the subject of the dispute."*

63. In the context of the reasoning of the Supreme Court, the Court refers to Article 30 of the LCP, which stipulates:

> *"30.1 The claimant is obliged, in the legal disputes over property, to determine the value of the disputed facility. Only the value of the disputed facility included in the main claim is taken into consideration.*
>
> *30.2 If not included in the main claim, the interest, procedural expenditure, contracted penalties and other claims are not taken into consideration."*

64. The Supreme Court having referred to paragraph 2 of Article 211 of the LCP by its Decision found that: *"Article 211. 2 of the LCP, provides that revision is not permitted in legal property disputes in which the claim concerns monetary claims, handing over of the item or fulfilment of any other promise if the value of the subject of the dispute in the challenged part of the judgment does not exceed 3,000 Euros. Hence, the revision of the claimant's authorized representative is inadmissible".*

65. In this regard, the Court recalls that the Applicant alleges that "[...] *in the present case and based on the state of facts it is evident that the interest, be it as an accessory claim (sharing the fate of the main claim - in the amount of 69,371.63 Euros) as well as an independent claim (which is subject to review also by revision in the amount of 16, 956.45 Euros) results in a value of the dispute over the amount of 10, 0000.000 Euros (in conformity with the provision of article 50 [9] of LCP) and as such meets the procedural conditions to be subject of review by revision".*

66. Based on the foregoing, the Court reiterates that the Constitutional Court can assess the legal interpretations of the regular courts exceptionally and only if those interpretations are arbitrary or manifestly unreasonable (see the case-law cited above, KI75/17, Applicant X, paragraph 59).

67. However, based on the above elaboration, as well as the interpretation and reasoning provided by the Supreme Court, in the present case, it has not been proven that there is arbitrariness in the interpretation provided by the Supreme Court when rejecting the Applicant's revision as inadmissible.

68. The Court also notes that the Applicant in his Referral also specifies that *"[...] the limitation on whether or not the revision is permitted is based upon the value of legal property disputes. Otherwise, in the present case, the legal property claim relates to "trade disputes" (in respect of which revision is permitted in disputes having the value over 10,000.00 Euros/Article 508 of the LCP) and not as; stated in the reasoning of the Decision of the Supreme Court the value of 3,000.00 Euros (for which it results that the Supreme Court has not correctly referred to the respective provision concerning the value of the dispute in the concrete case as "trade dispute")."*

69. In this respect, the Court notes that in trade disputes, Article 508 of the LCP stipulates that *"Revision in tradel disputes is not allowed if the value of the subject of the dispute in the challenged part of the final judgment does not exceed 10,000. Euro."* However, the Court recalls that the Supreme Court has based its reasoning dismissing the revision specifically upon Article 30, paragraph 2 of the LCP, which provision stipulates that "*interest, procedural costs, contracted penalties and other accessory claims are not taken into consideration if they do not constitute the main claim."*

70. Therefore, in the circumstances of the present case, the Court reiterates that the Applicant, beyond the allegation for a violation of Article 31 of the Constitution, as a result of non-reasoning the decision of the Supreme Court, which relates to the issue of interpretation and application of Article 30, paragraph 2 of the LCP, does not sufficiently support or argue before the Court how this interpretation of the *"legal provisions"* by the Supreme Court may have been *"manifestly erroneous "*, resulting in *"arbitrary conclusions"* or *"manifestly unreasonable"* for the Applicant, or how the proceedings before the Supreme Court may have not been fair or even arbitrary.

71. In conclusion, the Court finds that the Applicant in his Referral has failed to prove and substantiate his allegation that the Supreme Court during the interpretation and application of substantive law, respectively the provisions of the LCP has violated his right guaranteed by Article 31 of the Constitution, and consequently, this allegation is manifestly ill founded on constitutional basis, as provided by paragraph (2) of Rule 39 of the Rules of Procedure.

(ii) In relation to the allegation for denial of the Applicant's right of access to court

72. The Court recalls that the ECtHR found that Article 6 paragraph 1 of the ECHR guarantees the "right to a court", of which "the right of access", that is, the right to institute proceedings before a court in civil matters, constitutes one aspect of it, as an essential part of the right to a fair trial. However, this right is not absolute, but may be subject to limitations; these limitations are permitted since the "right of access" by its very nature calls for individual regulation by the states. In this respect, the states enjoy a certain margin of appreciation, although the final decision as to the observance of the requirements of the right to a fair trial rests with the Court (see, *mutatis mutandis*, ECtHR case *Osman v. The United Kingdom*, no. 87/1997/871/1083, Judgment of 28 October 1998, para.147; see the ECtHR case, *Prince Hans-Adam II of Liechtenstein v. Germany*, no. 42527/98, Judgment of 12 July 2001, paragraph 44.).

73. In the Applicant's case, the Court recalls that the Applicant states that *"Since the Applicant has used all regular legal remedies to exercise the right to indemnity by the claim for subrogation in the first and second instance, such a decision of the Supreme Court with serious shortcomings in part of the reasoning is a denial of access to justice and constitutes a lack of proper administration of justice in the present case."* In this regard, the Applicant essentially alleges that as a result of the dismissal of his revision as inadmissible by the challenged Decision of the Supreme Court, his request for review of the merits of the case concerning the penalty interest has failed to be addressed and reviewed by the latter based on the merits.

74. In the context of this allegation, the Court recalls that after the Judgment of the Court of Appeals, whereby the Judgment of the Basic Court was partially amended, specifically only with regard to the issue of penalty interest, the Applicant filed a revision with the Supreme Court alleging erroneous application of substantive law by the Court of Appeals, which had decided regarding the amount of the 8% penalty

interest rate based on Article 382, paragraph 2 of the LOR. Consequently, the Supreme Court dismissed the Applicant's revision as inadmissible by having referred to Article 30, paragraph 2 and Article 211 of the LCP, and consequently found that *"the value of the subject of the dispute in the challenged part of the Judgment does not exceed 3,000 Euros."*

75. The Court, referring to the case law of the ECtHR, which has maintained that although everyone has the right to use legal remedies against administrative and judicial decisions, the ECHR does not guarantee the right to appeal if it is not provided for by domestic law (see, *mutatis mutandis*, the ECtHR case *Darnay v. Hungary*, Application no.36524/97, Decision of 16 April 1998). In this context, the Court finds that the Applicant has used the available legal remedies, whilst regarding his request for revision, which concerns the issue of penalty interest, the Supreme Court based on the relevant provisions of the LCP has found that it was not permitted.

76. Terefore, and based on the above clarifications, the Court considers that the Applicant does not sufficiently prove and substantiate his allegation regarding the denial of his right of access to court, and consequently, this allegation is manifestly ill founded on constitutional basis, as provided by paragraph (2) of Rule 39 of the Rules of Procedure.

(iii) In relation to his allegation for a divergence in the case law of the Supreme Court

77. In regard to his allegation for a divergence in the case law of the Supreme Court, the Applicant clarifies that *"[...] there are dozens of cases of the Supreme Court of Kosovo wherein in the revision procedure it was decided regarding the allegations for erroneous application of the substantive law in respect of the interest, respectively that in this case, is to be applied the interest of 12% per annum (according to "lex specialis") [...]"*

78. For clarification purposes, the Court emphasizes that it has established general principles regarding the lack of consistency, namely the divergence in the case law in the context of the procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, through Judgments KI35/18, Applicant, *Bayerische Versicherungsverbrand*, Judgment of 6 January 2020 and KI87/18, Applicant, *IF Skadeforsikring*, Judgment, of 27 February 2019.

79. The Court, referring to its case law, states that in such cases, namely allegations for constitutional violations of fundamental rights and freedoms as a result of divergences in the case law, the Applicants must submit to the Court relevant arguments concerning the factual and legal similarity of the cases for which they allege to have been resolved differently by the regular courts, thus resulting in contradictory decisions in the case law and which may have resulted in a violation of their constitutional rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see, the case cited above KI35/18, Applicant *Bayerische Versicherungsverbrand*, paragraph 76).

80. In the circumstances of the present case, the Court recalls that the Applicant alleges that in his case, the Supreme Court decided differently, by finding that his request for revision must be rejected as inadmissible. In support of his allegation, the Applicant refers to and has submitted four (4) decisions of the Supreme Court, respectively the Decision [E. Rev. 43/2014] of 22 September 2014; and Judgments [E. Rev.25/2014, of 13 May 2014; [E. Rev. 23/2017] of 14 December 2017; and [E. Rev.27/2018] of 24 September 2018.

81. With respect to the above Judgments of the Supreme Court [E. Rev. 25/2014] of 13 May 2014; [E. Rev. 23/2017] of 14 December 2017; and [E. Rev. 27/2018] of 24 September 2018, the Court notes that these judgments specifically refer to the request for revision against the Judgments of the lower courts, claims that have been filed by insurance companies, and in addition to the issue of penalty interest as an accessory claim, also refer to the main claim filed in the claim, namely the claim regarding compensation as a result of the right of subrogation and the claim relating to the determination of the amount of penalty interest. While the Decision [E. Rev. 43/2014] of 22 September 2014 of the Supreme Court refers to the finding of the latter on dismissal as inadmissible of the revision filed by the Insurance Company against the judgments of the lower courts because the value of the main claim adjudicated by the lower court did not meet the requirement of submitting the revision under Article 508 of the LCP. By this Decision, the Supreme Court had ascertained that *"[...] the value of the dispute in the claimant's claim submitted to the court on 22.9.2011, and specified with the submission of 13.9.2013 amounts to 7.143,71 Euros, while as per the final judgment challenged by revision the value of the dispute is set in the amount of 6.952, 88 Euros ".*

82. However, the Court considers that these four (4) decisions of the Supreme Court, submitted by the Applicant, do not contain factual and procedural similarities, as in the Applicant's case because in the three

(3) decisions referred to by the Applicant, the subject of review by revisions was not only the issue of penalty interest but also the issue of the main claim.

83. Consequently, the Court finds that the Applicant, in the circumstances of the present case, has not fulfilled the obligation to submit to the Court the relevant arguments concerning the factual and legal similarity of the cases for which he claims to have been resolved differently by the regular courts, thus resulting in contradictory decisions in the case law and which may have resulted in a violation of his constitutional rights and freedoms.

84. In conclusion, the Court finds that the Applicant in his Referral has failed to prove and substantiate his allegation for a divergence in the case law of the Supreme Court, and consequently, this allegation is manifestly ill-founded on constitutional basis, as provided by paragraph (2) of Rule 39 of the Rules of Procedure.

II. Allegation for a violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR

85. The Court recalls that the Applicant alleges that *"[...] the failure of the Supreme Court of Kosovo to issue reasoned decisions (and in this case the arbitrary refusal of the revision submitted by him" also* violated the right to property guaranteed by Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR. Specifically, the Applicant states that in his case there were legitimate expectations that he would enjoy compensation in the above amount under the right of subrogation, respectively *"the right to reimbursement of the damage caused by the liable person or his liability insurer based on the annual interest provided for by law".*

86. In this context, the Court notes that the Applicant relates his allegation for a violation of Article 46 of the Constitution, in conjunction with Article 1 of Protocol No. 1. 1 of the ECHR specifically to his allegation for a violation of his right to a fair and impartial trial, as a result of the failure to reason the judgment of the Supreme Court. In this sense, the Court recalls that as regards the Applicant's allegations for violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, which specifically refer to allegations for non-reasoning of the decision, violation of his right of access to court and divergence in the case law of the Supreme Court has found that the latter are manifestly ill founded on constitutional basis.

87. The Court considers that the Applicant's allegation for violation of his right to property, guaranteed by Article 46 of the Constitution, in conjunction with Article 1 of Protocol No. 1 of the ECHR is manifestly ill-founded on constitutional basis, and consequently inadmissible as provided by paragraph (2) of Rule 39 of the Rules of Procedure.

88. In conclusion, the Court finds that the Applicant's Referral is inadmissible, because:

I. Allegations for violation of Article 31 of the Constitution, relating to allegations about (i) non-reasoning of the court decision; (ii) violation of his right of access to court; and (iii) violation of the principle of legal certainty as a result of divergence in the case law of the Supreme Court are inadmissible because they are manifestly ill-founded on constitutional basis, as provided for by Article 47 of the Law and paragraph (2) of Rule 39 of the Rules of Procedure; and

II. Allegation for violation of his right to property, guaranteed by Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR is inadmissible as manifestly ill-founded on constitutional basis, as provided for by Article 47 of the Law and paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 21.4 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 26 March 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI177/19, Applicant: NNT "Sokoli", Constitutional review of Decision Ac. No. 2386/2018 of the Court of Appeals of Kosovo of 17 May 2019

KI177/19, Judgment of 29 March 2021, published on 19 April 2021

Keywords: *Individual referral, right to fair and impartial trial, admissible referral, violation of constitutional rights*

The Applicant challenged before the Court Decision Ac. No. 2386/2018 of the Court of Appeals of Kosovo, of 17 May 2019, in conjunction with Decision Cp. No. 200/2016 of the Basic Court in Prishtina, of 13 April 2018.

From the case file it resulted that the Applicant entered into a Contract with the Company "Kujtesa Net" l.l.c., according to which the Applicant had to build the optical and coaxial cable network in the territory of the Republic of Kosovo, for the needs of the Company "Kujtesa Net" L.l.c., and which would pay for the services performed. Since "Kujtesa Net" l.l.c. had not fulfilled the obligations arising from this contract, the Applicant initiated enforcement proceedings against "Kujtesa Net" l.l.c., which was approved by the Basic Court in Prishtina. The company "Kujtesa Net" l.l.c. filed an objection against the Decision of the Basic Court in Prishtina and the Basic Court rejected the objection as ungrounded. After the complaint of the Company "Kujtesa Net" l.l.c.. against the Decision of the Basic Court in Prishtina, the Court of Appeals approved the appeal and remanded the case for retrial to the Basic Court in Prishtina. The Basic Court, acting on the retrial, approved as grounded the objection of the Company "Kujtesa Net" l.l.c. and completely repealed the decisions of the Basic Court in Prishtina, which allowed enforcement. This decision of the Basic Court was mainly based on the findings made by the Court of Appeals. Following the Applicant's appeal to the Court of Appeals against the Decision of the Basic Court, the Applicant also submitted a request for recusal of Judge H.Sh. from the review of the Applicant's case. The Court of Appeals, by Decision Ac. No. 2368/2018, of 17 May 2019, rejected as ungrounded the Applicant's appeal. The Court of Appeals did not deal at all with the Applicant's request for recusal of Judge H.Sh. from the review of the case. In both cases when the Applicant's case was adjudicated in the Court of Appeals Judge H.Sh. tried as the sole judge.

The Applicant alleged before the Court that his constitutional rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 of the ECHR, have been violated. According to the Applicant, by the challenged decision three principles have been violated which are guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, namely: (i) the decision was rendered by a partial

court; (ii) that decision does not address the Applicant's substantive allegations; and (iii) the enforcement proceedings in this case have been delayed.

The Court considered that the Applicant's first allegation, regarding the violation of the principle of impartiality of the court, is closely related to the allegation of lack of reasoning of the decision of the Court of Appeals. Therefore, the Court dealt with the first two allegations together, in order to proceed with the next allegation regarding the length of the proceedings.

Regarding the allegation of violation of the principle of impartiality of the court which is closely related to the allegation of lack of reasoning of the decision of the Court of Appeals, the Court found that failure to address the Applicant's request for recusal of Judge H.Sh. from decision-making procedure before this court, as well as the lack of reasoning of the decision by the Court of Appeals regarding his allegation of impartiality of Judge H.Sh., raised by him in his appeal, constitutes an insurmountable flaw of the judgment – within the meaning of Article 31 of the Constitution, in conjunction with Article 6 of the European Convention on Human Rights.

The Court found that the Decision of the Court of Appeals contains violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, as a result of the lack of judicial reasoning by the Court of Appeals.

With regard to the Applicant's allegation of delay of the proceedings, the Court found that regarding the Applicant's allegation of delay of the proceedings, the Applicant has not sufficiently substantiated his allegation of violation of the right to a trial within a reasonable time, because the facts presented by him do not substantiate that the regular courts have denied him this constitutional right.

The Court found that the Decision Ac.no.2386/2018 of the Court of Appeals of Kosovo, of 17 May 2019, is invalid and must be remanded for retrial

JUDGMENT

In

Case No. KI177/19

Applicant

NNT "Sokoli"

Constitutional review of Decision Ac.no.2386/2018 of the Court of Appeals of Kosovo, of 17 May 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was filed by NNT "Sokoli", having its seat in Prishtina (hereinafter: the Applicant), which is represented by Fehmi Shala, a lawyer in Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decision Ac.no.2386/2018 of the Court of Appeals of Kosovo, of 17 May 2019, in conjunction with Decision Cp.no.200/2016 of the Basic Court in Prishtina, of 13 April 2018.

3. The Applicant has received the Decision Ac.no.2386/2018 of the Court of Appeals, of 17 May 2019, on 14 June 2019.

Subject matter

4. The subject matter of the Referral is the constitutional review of the above-mentioned decisions, which as alleged by the Applicant alleges have violated its rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on Articles 21.4[General Principles] and 113.7 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47[Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law) and Rule 32[Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 2 October 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 4 October 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (presiding), Bajram Ljatifi and Radomir Laban (members).

8. On 11 October 2019, the Court notified the Applicant about the registration of the Referral and sent a copy thereof to the Court of Appeals. On the same date, the Court notified also the company "Kujtesa Net" L.L.C., in the capacity of the interested party and sent a copy of the Referral to it.

9. On 25 October 2019, the Company "Kujtesa Net" L.L.C., represented by the Law Firm "Sejdiu & Qerkini", submitted its comments regarding the Applicant's Referral.

10. On 29 November 2019, the Court notified the Applicant regarding the comments received from the Company "Kujtesa Net" L.LC.

11. On 6 October 2020, the Court requested from the Court of Appeals to notify it whether the Court of Appeals had received the document which, together with the case file, had been submitted to the Court by the Applicant and which concerned its request to the Court of Appeals for the exclusion of Judge H. Sh., from the review of its case.

12. On 15 October 2020, the Court of Appeals submitted the requested answer to the Court.

13. On 29 March 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 day, the Court unanimously found that (i) the Referral is admissible; and that (ii) the Decision Ac.no.2386/2018 of the Court of Appeals of Kosovo, of 17 May 2019, is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

15. Based on the case file, it results that on 12 September 2006 the Applicant had concluded a business contract with the Company "Kujtesa Net" L.L.C, according to which the Applicant would have to build an optical and coaxial cable network in the territory of the Republic of Kosovo, for the needs of the Company "Kujtesa Net" L.L.C., and the latter would pay for the services performed. According to this contract, which was concluded for an indefinite term, it was provided that it can be supplemented, terminated or modified only upon the mutual consent of the parties.

16. Further, it results that because the Company "Kujtesa Net" L.L.C. was late with the performance of payments, on 30 October 2012, the contracting parties had signed a record entitled "*Minutes on the work performed by 'NNT Sokoli' for the benefit of the Company "Kujtesa Net" L.L.C. until 30 October 2010"*. This record specified that the Applicant could not invoice other works for the time period up to 30 October 2010, except for the works included in the specification of these minutes.

17. On 5 December 2012, the Applicant and the Company "Kujtesa Net" L.L.C. had signed a new agreement, with no. 949, wherein it was foreseen that the Company "Kujtesa Net" L.L.C. had to pay a total debt in the amount of 529,393.39 Euros, in 16 instalments and that the deadline for the final payment was set to be 16 February 2014.

18. On an unspecified date, the Applicant, according to the aforementioned agreement, sends some invoices to the Company "Kujtesa Net" L.L.C. On 7 March 2014, the Company "Kujtesa Net" L.L.C. returns a letter to the Applicant entitled “REFUSAL”, stating: *“we refuse to accept these invoices, as we are not aware of these invoices received in the envelope.”* The Applicant, again, continued to send new invoices to the address of the Company “Kujtesa Net’ L.L.C. and on 11 April 2014 again these invoices are sent back to the address of the Applicant, by the Company “Kujtesa Net” L.L.C., which refused to accept them with the same reasoning.

19. On 4 April 2014, the Applicant submitted a proposal for enforcement to the Basic Court in Prishtina- Department for Commercial Matters, whereby it requested from the above-mentioned court the scheduling of the enforcement based on an authentic document/invoices (with no. 001/14, 002/14, 003/14, 004/14, 027 / 12,028 / 12,029 / 12,030 / 12,031 / 12,035 / 12, 036/12, 037/12, 038/12, 039/12 and 040/12 all of them of 1 March 2014), in the amount of 261,324.12 euros (two hundred sixty one thousand and three hundred and twenty-four euros and twelve cents).

20. On 17 April 2014, the Basic Court in Prishtina- Department for Commercial Matters, by Decision E.no.567/14, assigned the enforcement against the Company “Kujtesa Net” L.L.C., for the payment of the debt in the amount of 261,324.12 Euros (two hundred sixty-one thousand and three hundred twenty-four euros and twelve cents).

21. On 14 May 2014, the Applicant submitted the second proposal for assigning the enforcement to the Basic Court in Prishtina-Department for Commercial Matters, requesting the payment of debts from the Company “Kujtesa Net” L.L.C., based on invoices (with no. 007/12, 016/12, 018/12, 019/12, 021/12, 022/12, 023/12, 024/12, 025/12, 026/12, 005/14, 006/14, 007/14, 008/14, 009/14 and 010/14, all of them of 7 April 2014), in the amount of 297,968.31 euros (two hundred ninety seven thousand and nine hundred sixty eight euros and thirty one cents).

22. On 13 June 2014, the Company “Kujtesa Net” L.L.C. had filed an objection against the Decision E.no.567/14 of the Basic Court in Prishtina-Department for Commercial Matters, of 17 April 2014.

23. On 24 July 2014, the Applicant requested from the Basic Court in Prishtina that its case be *"transferred to the private enforcement agent E. M. for further enforcement proceedings"*

24. On 22 October 2014, the Basic Court in Prishtina-Department for Commercial Matters, by Decision E.no.719/14, assigned the enforcement against the Company "Kujtesa Net" L.L.C., for the payment of the debt in the amount of 297,968.31 euros (two hundred ninety seven thousand and nine hundred sixty eight euros and thirty one cents).

25. On 28 April 2015, the Basic Court in Prishtina- Department for Commercial Matters held a court hearing. In this session, at the proposal of the authorized person of the Company "Kujtesa Net" L.L.C. (debtor), who had requested the joinder of enforcement cases (respectively case no. E.no.567/14, in the value of 261,324.12 euros and case E.no.719/14 in the value of 297,968.31 euros), this Court decided to join the cases, by registering them under a new number, Cp.nr.200/16. The Applicant's authorized representative (creditor) had not objected to the joinder of these cases.

26. On an unspecified date, the Company "Kujtesa Net" L.L.C. had filed an objection against the decisions E.no.567/14 and E.no.719/14 of the Basic Court in Prishtina-Department for Commercial Matter, allowing the enforcement, alleging that the Applicant did not perform the work as it claimed and that for such a thing the following conditions had to be met cumulatively: i) Technical acceptance of the works by the creditor, ii) absence of creditor's remarks about the performed works, iii) elimination of eventual remarks that the creditor would have for the works performed by the debtor.

27. The Applicant, through a response to the objection, had stated that there has been no technical acceptance for the performed and unpaid works, but neither the previous works which were paid by the Company "Kujtesa Net" L.L.C. have had a technical acceptance. The Applicant further argued that the Company "Kujtesa Net" L.L.C. has never received a complaint about the Applicant's work or compliance with the deadlines.

28. On 30 December 2015, the Applicant addressed a letter to the President of the Basic Court in Prishtina, requesting an expedited hearing of the case.

29. On 9 February 2016, the Basic Court in Prishtina-Department for Commercial Matters, with the Accompanying Document no. E.no.567,

719 / 2014, sent the case file to the Basic Court in Prishtina-General Civil Department, considering that the Basic Court in Prishtina-Department for Commercial Matters is not competent to decide on this enforcement matter, concerning the rejection of these two enforcement cases.

30. On 20 July 2016, the Applicant addressed a letter to the Kosovo Judicial Council, the Office of the Disciplinary Prosecutor, requesting "*Performance Evaluation of the Judge of the Basic Court in Prishtina [A.K] and other responsible officials in the management of the cases of this Court "II.E.567 / 14 and II.E.nr. 719/14".*

31. On 2 June 2017, the Applicant again had sent a letter to the Basic Court in Prishtina, requesting the expedition of its case.

32. On 13 July 2017, the Applicant has addressed a letter to the Basic Court in Prishtina, *"Notification on violation of legal deadlines"*, alleging that due to the delays the Applicant was being caused irreparable damages.

33. On 23 October 2017, the Basic Court in Prishtina-General Department, through Decision Cp.no.200/2016, rejected as ungrounded the objection of the Company "Kujtesa Net" L.L.C. In its reasoning, the Basic Court had stated that the allegations of the Company "Kujtesa Net" Sh.p.k. were inconsistent, as no evidence had been provided in their support.

34. On 27 October 2017, the Company "Kujtesa Net" L.L.C, had filed an appeal with the Court of Appeals, against the Decision Cp.no.200/2016, of the Basic Court in Prishtina, alleging violations of the provisions of the enforcement procedure, "because the invoices do not have features of enforceability, they are not accepted and signed by the debtor and the debtor has no obligation towards the creditor".

35. On 15 February 2018, the Court of Appeals, by Decision Ac.no.5040/17, approved as grounded the appeal of the Company "Kujtesa Net" L.L.C. and annulled the Decision of the Basic Court in Prishtina-General Department, Cp.nr.200/2016, of 23 October 2017, by remanding the case for retrial. The Court of Appeals in its reasoning stated as follows:

> *"The court of the first instance has committed an essential violation of the enforcement procedure when rejecting the objection of the debtor because according to article 40 of the LEP, the proposal for enforcement based on an authentic document*

must contain the request for enforcement from paragraph 1, article 38 of the LEP, wherein it is provided that: "enforcement proposal should contain the request for enforcement which shows the original enforcement document, or a copy certified by law, or authentic document based on which the enforcement is requested ...", in the present case the authentic document does not meet the conditions for enforcement because the invoices are not accepted by the debtor and for them it cannot be verified if they are signed by the debtor itself because, with the submission of 07.03.2014, the debtor has refused to accept the invoices since it was not aware of the invoices received by the envelope. Taking into consideration the Administrative Instruction No.15/2010, on implementation of Law on Tax Administration and Procedures, where in Section 20, paragraph 1.1.17 thereof, it is stipulated that: 'At a minimum, an invoice must be signed by the seller; if the customer or purchaser is available to sign, that person should also sign the tax invoice ', in the concrete case we have invoices not accepted by the debtor [...] Pursuant to Article 38, paragraph 2 of the LEP it is stipulated that: "if the proposal for enforcement under paragraph 1 of this article does not contain requested data and PIN or business registration number of the debtor, enforcement body shall act pursuant to provisions of Article 102 of the Law on Contested Procedure ", in the present case the enforcement body did not act in conformity with the law, since in the case of submission of the proposal allowing enforcement, the enforcement body should have returned the proposal for enforcement to the creditor for supplementation in conformity with the provision of Article 38, paragraph 2 of the LEP [...] In the re-proceedings the court of the first instance should take into consideration the abovementioned remarks, schedule a public hearing to realize the validity of the objection as regards the authentic document-invoices, in such a way that the creditor and the debtor can present their evidence in respect of the appeal claims, so that thereupon it is able to render a fair and lawful decision in conformity with the provisions of the LEP".

36. On 13 April 2018, the Basic Court in Prishtina-General Department, deciding in the retrial, issued the Decision Cp.no.200/2016, whereby it fully upheld as grounded the objection of "Kujtesa Net" L.L.C. and repealed in its entirety the Decision E.no.567/14 and E.no.719/14, of the Basic Court in Prishtina allowing enforcement. In its reasoning, the Basic Court emphasized that in the Decision of the Court of Appeals [Ac.nr.5040 / 17], of 15 February 2018, it is clearly stated that "*In the re-proceedings the court of the first instance should take into consideration the abovementioned remarks, schedule a public*

hearing to realize the validity of the objection as regards the authentic document-invoices, in such a way that the Creditor can present its evidence in respect of the appeal claims."

37. On 30 April 2018, the Applicant submitted an appeal to the Court of Appeals against the Decision Cp.nr.200/2016 of the Basic Court, of 13 April 2018 alleging violation of the provisions of the contested procedure, violation of the provisions of the enforcement procedure and violation of the substantive law.

38. On 30 May 2018, the Applicant addressed a special request to the Court of Appeals whereby it requested the exclusion of Judge H. Sh. from the case review, by expressing doubts regarding the impartiality of the said judge, who had once made a decision regarding its case. Moreover, the Applicant alleged that the judge in question favours the opposing party in this case.

39. Based on the case file it results that the Court of Appeals did not respond to the Applicant regarding the above mentioned request.

40. On 17 May 2019, the Court of Appeals, deciding through the individual judge H.Sh. by Decision Ac.no.2386/2018, rejected as ungrounded the Applicant's appeal and confirmed the Decision Cp.no.200/2016 of the Basic Court, of 13 April 2018. In the reasoning of this Decision, the Court of Appeals stated that the challenged decision was fair and lawful and that it does not contain violations of the provisions of the contested procedure and the enforcement procedure, and the factual situation was correctly determined. Further, in its reasoning the Court of Appeals stated:

> *"This Court considers that the court of the first instance has correctly approved the objection of the debtor and has repealed the decisions allowing the enforcement of E.nr.567 / 2014 and E.nr. 719/2014, allowed by the Basic Court in Prishtina, because the invoices described in the proposal for enforcement of 04.04.2014, which are requested to be enforced, do not meet the conditions to be considered eligible for enforcement. Taking into consideration Section 20, paragraph 1.1.17 of the Administrative Instruction No.15/2010, on the implementation of Law on Tax Administration and Procedures, it is stipulated that: "At a minimum, an invoice must be signed by the seller; if the customer or purchaser is available to sign, that person should also sign the tax invoice", so in the present case, based on the evidence contained in the case file, it can be seen that the authentic document - the invoices on the basis of which the enforcement is*

allowed are not signed by the enforcement debtor. The signing of the invoice by the parties in the obligation relationship, is not just a formality, but such an action implies acknowledging the works performed by the creditor and asserting that there is a debt of the debtor towards the creditor in accordance with the invoices, and given that in the present case the debtor has not acknowledged those invoices as its own, consequently they do not meet the conditions to be eligible for enforcement pursuant to the provisions of applicable laws."

Taking into consideration the other appeal claims made against the appealed decision, the court of the second instance considers that these allegations are ungrounded because we are not dealing with essential violations of the provisions of the Law on Contested Procedure, which this Court observes ex officio pursuant to Article 194 of the LCP, nor of the Law on Enforcement Procedure"

41. On 9 July 2019, the Applicant submitted, to the Office of the Chief State Prosecutor, a Proposal for submitting a Request for Protection of Legality, against the Decision Ac.no.2386/2018 of the Court of Appeals, of 17 May 2019. In the request for protection of legality, the Applicant, among other things, had stated that *"on 01 June 2018, in the Court of Appeals of Kosovo, it had submitted a request for the exclusion of Judge [H. Sh.], from the adjudication of the case which concerned the appeal submitted by the authorized representative of the creditor against the decision Cp.no 200/16, of 13.04.2018, due to the doubt about his impartiality, and according to the statement of the claimant " it does not expect a fair decision from this judge, as it is deeply convinced that he is influenced by the ruling structure." [...] Up to the day of the decision Ac.no. 2386/2018 of 17 May 2019 being rendered, the creditor has not received any notification from the Court of Appeals of Kosovo, that a decision has been taken with respect to the request of the legal representative of the creditor, for the exclusion of the judge-president of the Court of Appeals of Kosovo, from the adjudication of this enforcement matter."*

42. On 13 August 2019, the Office of the Chief State Prosecutor, through Notification, KML.no.118/2019, informed the Applicant that its proposal was not approved as there is not a sufficient legal basis for the protection of legality.

Applicant's allegations

43. The Applicant alleges that the Decision of the Court of Appeals, Ac.no.2386/ 2018, of 17 May 2019, in conjunction with the Decision

Cp.no.200/2016, of the Basic Court in Prishtina, of 13 April 2018, have violated its rights guaranteed by Article 31 [Right to a Fair and Impartial Trial] of the Constitution have been violated, in conjunction with Article 6 (Right to a fair trial) of the ECHR.

44. In essence, the Applicant alleges that the challenged decision has violated three principles which are guaranteed by the right to a fair and impartial trial: (i) the right to a trial by an impartial court; (ii) the right to a reasoned decision; (iii) the right to trial within a reasonable time.

45. The Court notes that the first two allegations - relate to the right to a fair trial and the right to a reasoned decision - are linked and based on the same reasoning. As such, the Court will treat them together. Whilst as regards the allegation on the right to trial within reasonable time it will be presented separately by the Court.

i) The right to a trial by an impartial tribunal in conjunction with the right to a reasoned decision

46. In regard to this allegation, the Applicant states that: "*In all court decisions taken with regard to this enforcement procedure, with the exception of the decision Cp.no. 200/2016 of 23.10.2017, based on the manner of decision-making the claimant - creditor [Applicant], considers that the court has shown bias towards the debtor, for the fact that, despite the evidence that were in his favour, the case has been decided in favour of the debtor, and this favouring is manifested by the approval of the request for return to the previous situation, where the real legal reasons were missing, as well as by the unreasonable postponement of the decision on this matter, which were openly expressed by the decisions of the Court of Appeals of Kosovo, Ac. No.5040/17 and Ac.no. 2386/2018 of 17 May 2019, which decisions were taken by the President of the Court of Appeals, H. Sh., in the capacity of the individual judge, himself.*"

47. The Applicant alleges that due to the doubts that the President of the Court of Appeals (H. Sh.) in this case favours the opposing party, he had submitted a request for his exclusion, but has never received any response to this request of his and the same has not been addressed at all.

48. The Applicant further adds *that "this judge has shown open bias in the addressing of the present case, especially when the decision taken does not represent even the legal minimum of a reasoned decision."*

49. The Applicant states that: *"Acting contrary to the provision of Article 71 of the LCP, the Judge-President of the Court of Appeals of Kosovo, [H. Sh.], by deciding on the creditor's appeal, submitted against the decision of the court of the first instance, when there was a request for his exclusion, he has committed an essential violation of the provision of Article 182 paragraph 2, item c) of the Law on Contested Procedure. Essential violations of the procedural provisions of Article 182 paragraph 2 are of absolute importance, and consequently cause the annulment of the decision taken."*

50. The Applicant also states that "*The Court of Appeals in its decision had to answer to all allegations from the creditor's appeal, which concerned the fact that the debtor bears the responsibility for sending the invoices back knowing that they relate to a work performed by the creditor and the debtor has taken into use [...] The essential function of a reasoned decision by the court of the second instance, is that by decision it must show to the party that its appeal claim has been read, and the court has understood his appeal, and by answering to the appellant's allegations, to convince the party about the reasons for which an appeal claim has been or has not been considered. The decision of the second instance is rendered since this has been requested by the appeal of a party, and it is the essential function of the court of the second instance to convince the party by arguments whether those allegations from the appeal are founded or not."*

ii) The right to trial within a reasonable time

51. In this regard, the Applicant alleges that pursuant to Article 6 of the Law on Enforcement Procedure, it is provided that the enforcement body has the duty to act urgently, based on the time limits provided by the Law on Enforcement Procedure. In its case, the Applicant alleges that: *"The enforcement procedure, for which two proposals for enforcement were submitted, in April 2014, was concluded with a final decision after five (5) years, from the moment when objectively it could have been carried out for 5-6 months. It is more than obvious that this is a trial beyond a reasonable time, which openly speaks about a court that is not independent, but is under the influence of the debtor."*

52. Finally, the Applicant requests from the Court to annul the Decision Ac.no.2386/2018 of the Court of Appeals of Kosovo, of 17 May 2019, and remand the case for retrial.

Comments submitted by the Court of Appeals

53. In its response to the Constitutional Court upon the request of the latter, concerning the confirmation by the Court of Appeals whether they had received the Applicant's letter regarding the exclusion of Judge H. Sh. from the review of the Applicant's case, the Court of Appeals, among other things, stated the following:

> "*Seeing that there had remained unresolved enforcement cases of 2018, the president of the court collects them to have them resolved as soon as possible, on 11.03.2019, 25 cases are assigned, and among them is also the case AC.no.2386/18. When the request for exclusion was received by the Court of Appeals on 01.07.2018, when it reached the court, the case was with the other judge, and since the case was with Judge G.A, he did not decide on the request for exclusion.*"

Comments submitted by the Company "Kujtesa Net" L.L.C.

54. Having been notified by the Court, about the opportunity to give its comments, in its response to the Court, the Company "Kujtesa Net" L.L.C. , stated that none of the issues raised by the Applicant in his Referral stand.

55. Regarding the first allegation of Applicant, the Company "Kujtesa Net" L.L.C. states that *"With the above allegation, the Applicant only expresses dissatisfaction with the manner of assessment of evidence, but does not indicate what are the circumstances envisaged by the provisions of the Law on Contested Procedure, which justify the findings on the impartiality of the court*. Further, as regards the Applicant's claim for the exclusion of Judge H. Sh., from the adjudication of the case, the Company "Kujtesa Net" L.L.C. refers to the relevant articles of the Law on Contested Procedure, which stipulate that the Court may reject a request for exclusion when it is not reasoned.

56. Concerning the Applicant's allegation for prolongation of the procedure, the Company "Kujtesa Net" L.L.C., states that: *"The adjudication of the case within a reasonable time may be an inherent violation and exceeding the reasonable deadlines to give the final epilogue to the legal case is not about the impartiality of the court. If the case is not adjudicated within a reasonable time this does not mean that the court was (not) impartial. The adjudication of the case within a reasonable time is not only in the interest of the creditor but*

also for the debtor because it also has the interest to clarify its position regarding the creditor's claims within a reasonable time. Therefore, this argument which the Applicant uses to prove the impartiality of the court is inadmissible."

57. In connection with the Applicant's allegation for non-reasoning of the decision, the company "Kujtesa Net" L.L.C. states that the challenged decision is sufficiently reasoned.

Relevant constitutional and legal provisions

Article 31 [Right to Fair and Impartial Trial]

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

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

(...)

Law No. 03/L-006 on Contested Procedure

Article 63

If the competent court can not proceed due to disqualification of judges or any other reason, then it will inform the court of a higher level to designate one of the courts with subject matter jurisdiction to conduct proceedings.

Article 67

Exclusion of the Judge from the Case:

a) if he or she is itself a party, a legal representative or authorized representative or is a co-creditor or codebtor or obliged for repay or if in the same issue he or she has been examined as a witness or as an expert;

[...]

g) if there are other circumstances that challenge his or her impartiality.

Article 71

71.1 When a judge learns that a petition has been filed for his or her disqualification, or as soon as has learned that any of the conditions for disqualification according to the article 67 exist, he or she shall be obliged to suspend with the proceeding and must immediately inform the president of the court.

71.2 Exclusion from paragraph 1 of this Article, when the petition for exclusion is based in Article 67 point g, the judge notifies the president of the court and may continue with the proceeding of the petition on the exclusion, only on such mattered that are endangered of postponement

71.3 The president of the court, if his exclusion is required, then he or she appoints his or her replacement from the rank of the judges of the subject matter, and if this is not possible, then he or she acts according to the article 63 of this law.

Article 182

182.1 Basic violation of provisions of contested procedures exists in case when the court during the procedure didn't apply or wrong application of any of the provisions of this law, while this has or will impact a rightful legal decision.

182.2 Basic violation of provisions of contested procedures exists always:

a) when the court is not made based on provisions or when during the issuance of the verdict was done by the judge who didn't participate in the main hearing;

b) when it is decided on a request which isn't a part of the legal jurisdiction;

c) when the in the issuance of the decision participated the judge who according to the law should be dismissed, respectively the judge was already dismissed by a court decision or in the cases when a person not qualifies as a judge participated in the issuance of the verdict;

[...]

Law No. 04/L-139 on Enforcement Procedure
Article *77*

Appeals against the decision on the objection

1. Against the decision on objection parties have the right on appeal.

2. The appeal against the decision on objection shall be filed through the first instance court for the second instance court within seven (7) days from the day of acceptance.

3. Copy of the appeal shall be submitted to opposing party and other participants who may present response to the appeal within three (3) days.

4. Following receiving the response to appeal or following the deadline for response, the case with all submissions shall be sent to the second instance court within three (3) days. Regarding the appeal, the second instance court shall decide within fifteen (15) days.

ADMINISTRATIVE INSTRUCTION No. 15/2010 ON IMPLEMENTATION OF LAW NUMBER No.03/L-222 ON TAX ADMINISTRATION AND PROCEDURES

Section 20
Invoices and Cash Register Receipts

> *1. Invoice Requirements for Transactions between Taxable Persons: An invoice with VAT, also known as tax invoice, is required to be issued by all taxpayers who are liable to pay VAT for each transaction in which a supply of goods or services to another taxable person (a person who is registered for VAT, or is required to be registered for VAT) is involved, whether that other taxable person is a business that will pass the service or good to another person or is the final consumer. The invoice should be issued in at least in two authentic copies, one for the seller and one for the customer or purchase.*
>
> *1.1. The Tax Invoice should contain the following elements:*
> *[...]*
> *1.1.17. At a minimum, an invoice must be signed by the seller; if the customer or purchaser is available to sign, that person should also sign the tax invoice.*

Assessment of the admissibility of Referral

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

59. 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."*

60. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which states:

"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

61. In this respect, the Court notes that the Applicant is entitled to submit a constitutional complaint, by calling upon alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as for legal persons to the extend applicable (see, the case of the Constitutional Court No. KI41/ 09, Applicant AAB RIINVEST University L.L.C., Resolution on Inadmissibility of 3 February 2010, paragraph 14).

62. In addition, the Court will examine whether the Applicant has fulfilled the admissibility criteria, as provided by Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

Rule 39
Admissibility Criteria

(1) The Court may consider a referral as admissible if:

(a) the referral is filed by an authorized party,
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,
(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant, and
(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim
[...]

63. As to the fulfilment of these criteria, the Court finds that the Applicant is an authorized party, which has exhausted all legal remedies provided by law, pursuant to Articles 21(4) and 113(7) of the Constitution and has submitted the Referral in accordance with the deadline provided in Article 49 of the Law. The Applicant has also accurately clarified the rights and freedoms which it alleges to have been violated and the acts of the public authorities which it is challenging, in accordance with the criteria of Article 48 of the Law.

64. In the light of the facts and arguments presented in this Referral, the Court considers that the Referral raises serious constitutional issues, which require examination of the merits of the Referral. Moreover, the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 39 of the Rules of Procedure and there is no other basis for declaring it inadmissible.

65. Therefore, the Court finds that the Referral must be declared admissible and its merits must be assessed.

Merits of the case

66. The Court initially recalls that the Applicant had concluded a contract with the Company "Kujtesa Net" L.L.C, according to which the Applicant would have to build an optical and coaxial cable network in the territory of the Republic of Kosovo, for the needs of the Company "Kujtesa Net" L.L.C., and the latter would pay for the services performed. Since "Kujtesa Net" L.L.C. had failed to fulfil the obligations stemming from this contract, the Applicant had initiated enforcement proceedings against "Kujtesa Net" L.L.C., which had been approved by the Basic Court in Prishtina. The Company "Kujtesa Net" L.L.C. had filed an objection against the Decision of the Basic Court in Prishtina and the Basic Court rejected the objection as ungrounded. Following the appeal by the Company "Kujtesa Net" Sh.p.k. against the Decision of the Basic Court in Prishtina, the Court of Appeals approved the appeal and remanded the case for retrial to the Basic Court in Prishtina. The Basic Court, acting in the retrial, had upheld as grounded the objection of the Company "Kujtesa Net" L.L.C. and had repealed in their entirety the decisions of the Basic Court in Prishtina, allowing the enforcement. This decision of the Basic Court was mainly based on the findings reached by the Court of Appeals. In parallel with the appeal submitted to the Court of Appeals against the Decision of the Basic Court, the Applicant had also submitted a request for exclusion of Judge H. Sh. from the review of the Applicant's case. The Court of Appeals, by Decision Ac.no.2368/2018, of 17 May 2019, had rejected as ungrounded the Applicant's appeal. The Court of Appeals did not address at all the Applicant's request for exclusion of Judge H.Sh. from the review of the case. Both cases of the Applicant when being adjudicated, in the Court of Appeals, were adjudicated by Judge H. Sh., as a single judge.

67. As regards the latter, namely the Judgment Ac.no.2368/2018 of the Court of Appeals, of 17 May 2019, the Court recalls that the Applicant alleges that it is in contradiction with Article 31[Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 of the ECHR. According to the Applicant, the challenged decision has violated three principles that are guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, namely: (i) the decision has been rendered by a biased court; (ii) that decision does not provide an answer to the Applicant's essential allegations; and (iii) the enforcement proceedings, in this case, have been prolonged.

68. Next, the Court will examine the Applicant's allegations separately, in so far as they can be addressed separately. The Court reiterates that the Applicant's first allegation, regarding the violation of the principle of impartiality of the court, is closely related to the allegation for the lack of reasoning of the decision of the Court of Appeals. Consequently, the Court will treat these first two allegations together, before moving to the next allegation regarding the prolongation of the proceedings.

69. In this respect, the above allegations will be addressed by the Court by referring to the case law of the European Court of Human Rights (hereinafter: the ECtHR), on the basis of which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

(i) In relation to the allegation that the decision was rendered by a biased court and that the challenged decision does not provide an answer to the Applicant's essential allegations

70. The Court recalls once again the allegation of the Applicant, who states that "*In all court decisions taken with regard to this enforcement procedure, with the exception of the decision Cp.no. 200/2016 of 23.10.2017, based on the manner of decision-making the claimant - creditor [Applicant], considers that the court has shown bias towards the debtor, for the fact that, despite the evidence that were in his favour, the case has been decided in favour of the debtor, and this favouring is manifested by the approval of the request for return to the previous situation, where the real legal reasons were missing, as well as by the unreasonable postponement of the decision on this matter, which were openly expressed by the decisions of the Court of Appeals of Kosovo, Ac. No.5040/17 and Ac.no. 2386/2018 of 17 May 2019, which decisions were taken by the President of the Court of Appeals, H. Sh., in the capacity of the individual judge, himself.*"

71. In relation to the foregoing, the Applicant alleges that he has had information that the President of the Court of Appeals, Judge (H. Sh.) in this case favours the opposing party.

72. The Applicant in his Referral states that "*this judge has shown open bias in addressing the present case, especially when the decision taken does not represent even the legal minimum of a reasoned decision*".

73. The Applicant has related the doubt about impartiality and the issue of (non) exclusion of Judge H. Sh. to the allegation for non-reasoning of the court decision. Thus, the Applicant in his Referral before the Court specifies that in this case the Court of Appeals, by failing to respond to his request for the exclusion of Judge H. Sh., has violated the principle of impartiality of the court, and by not addressing at all his request, has violated the principle of a reasoned decision. In this respect, the Applicant alleges that the challenged decision of the Court of Appeals has failed to provide answer to all his allegations.

74. In connection with this, the Court recalls the Applicant's allegations that *the Creditor [the Applicant] does not receive any response to his request for the exclusion of the Judge-President of the Court from the adjudication of his case according to the appeal filed [...] The President of the Court, Judge Mr. [H. Sh.] as an expert of law, despite being aware of the consequences and the responsibility for not reporting the request for exclusion, took a decision in the case from which he is requested to be excluded, and thereby showed his persistence in handling the matter, and showed the fact that the creditor's request for his exclusion was grounded. Clearly, this judge, when dealing with the concrete case, has shown open bias, especially when the decision taken does not represent even the legal minimum of a reasoned decision [...] The Court of Appeals in its decision had to answer to all allegations from the creditor's appeal, which concerned the fact that the debtor bears the responsibility for sending the invoices back knowing that they relate to a work performed by the creditor and the debtor has taken into use".*

75. In light of these arguments of the Applicant, the Court first recalls that the Applicant had filed an appeal with the Court of Appeals, against the Decision Cp.no.200/2016 of the Basic Court, and at the same time he had filed a separate request for the exclusion of Judge H. Sh. from the adjudication of his case, by presenting the reasons why he is requesting the exclusion of the judge (who had also decided based on the appeal of "Kujtesa Net" L.L.C. filed against the Decision Cp.no.200/16 of the Basic Court in Prishtina, of 23 October 2017 by upholding the same and remanding the case for retrial).

76. The Court of Appeals, by Decision Ac.no.2368/2018, of 17 May 2019, had rejected as ungrounded the Applicant's appeal and confirmed the Decision Cp.no.200/2016, of the Basic Court.

77. The Court notes that the Applicant in his request for protection of legality, submitted to the Office of the Chief State Prosecutor, against the Decision of the Court of Appeals, had stated that despite his

request for the exclusion of Judge H. Sh., from the review of his case, the Applicant had never received a response regarding this allegation. The Court recalls that on 13 August 2019, the Office of the Chief State Prosecutor, by Notification, KML.no. 118/2019 notified the Applicant that his proposal was not approved as there is not a sufficient legal basis for protection of legality.

78. Based on the case file the Court notes that the Applicant had never received a response to the request for the exclusion of the judge, submitted to the Court of Appeals, neither by a special submission nor by an intermediate decision.

79. Moreover, the said judge, whose exclusion was requested by the Applicant, had decided as a single judge, on the occasion of the challenged decision Ac.no.2368/018 of the Court of Appeals being rendered.

80. The Court notes that the Decision Ac.no.2386 / 2018 of the Court of Appeals, of 17 May 2019, does not refer in any point to the Applicant's allegation on the impartiality of Judge H. Sh. nor to his request seeking the exclusion of that judge from the adjudication of the case.

81. Moreover, this is confirmed by the response of the Court of Appeals to the Constitutional Court itself, where it is noticed that the Court of Appeals had never decided on the Applicant's request for the exclusion of Judge H. Sh.

82. In light of this, the Court emphasizes the fact that the Applicant's allegations relate to the procedural guarantees provided by Article 31 of the Constitution (respectively, the right to a fair and impartial trial), in conjunction with Article 6 of the ECHR. The Court first considers it necessary to point out that the guarantees of Article 31 of the Constitution and Article 6 of the ECHR extend throughout the proceedings when deciding on the rights and obligations of the parties. The ECtHR has emphasized that the decision-making in respect of a right implies not only the determination of its existence but also the scope (extent) and the manner of its exercise (see, *mutatis mutandis*, the ECtHR decision in case *Torri v. Italy,* Judgment of 23 January 1996; *Buj v. Croatia*, Judgment of 1 September 2009, paragraph 19).

83. In the present case, the Court points out the essence of the Applicant's allegations concerning the non-reasoning of the Decision of the Court of Appeals. The Court refers to the consistent stance of the ECtHR and of the Constitutional Court that the right to a fair trial includes the

right to a reasoned decision. This means that the courts must "indicate with sufficient clarity the grounds on which they based their decisions" (see, inter alia, the case of ECtHR *Hadjianastassiou v. Greece*, Judgment of 16 December 1992, paragraph 33; see case of Court KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018) According to the case law of the ECtHR and the Constitutional Court, this obligation of the courts cannot be understood as a requirement for a detailed answer to any argument or allegation of applicants. The extent to which the obligation to give reasons applies may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. However, the essential allegations and arguments of the applicants must be addressed and the reasons provided must be based upon the applicable law (see *mutatis mutandis* the case of Court KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018, paragraph 54; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 17 May 2018, paragraph 54, see also the case of the ECtHR, *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61, *Buzescu v. Romania*, Judgment of 24 May 2005 and *Pronina v. Ukraine*, Judgment of 18 July 2006).

84. In the present case, the Court points out that the Court of Appeals, in its Decision, did not take into consideration at all the Applicant's allegations for the participation of Judge H. Sh., as the single judge in the adjudication of the Applicant's case in the Court of the Appeals, even though the Applicant, in parallel with the appeal, had submitted to the Court of Appeals a special request that the judge in question be excluded from the adjudication of the case, by expressing doubts regarding his impartiality.

85. The Court would like to clarify that, even though the Applicant raises allegations about the impartiality of the court (judge), the essence of the arguments submitted by him relate to the complete disregard by the Court of Appeals of his request for the exclusion of Judge H. Sh. from decision-making in his case.

86. In this connection, the Court considers it important to clarify, *obiter dictum*, that according to the case law of the ECtHR, "impartiality" denotes the absence of prejudice or bias by the courts when adjudicating concrete cases (see, *mutatis mutandis*, the case of the ECtHR, *Hauschild v. Denmark*, Judgment of 24 May 1989). Further, the ECtHR has clarified that when it comes to a judge's personal impartiality, the judge is presumed impartial until there is a proof to the contrary (see, the ECtHR case, *Kyprianou v. Greece*, Judgment of 15 December 2005). When such an allegation is brought before the

ECtHR, it applies the so-called subjective test, which means that it must be proved by facts whether the member of the court has shown a "personal bias" against the Applicant (see the decision of the ECtHR in the *case Hauschild v. Denmark*, Judgment of 24 May 1989).

87. However, in the present case, without prejudice to the truthfulness of the Applicant's allegations about the lack of impartiality of the Judge in question, the Court cannot ignore the fact that the Court of Appeals has remained completely silent on the Applicant's request for the exclusion of that judge from the decision-making process in his case.

88. The Court considers that, had the Court of Appeals addressed in its Decision the Applicant's repeated allegations regarding the impartiality of Judge H. Sh. - regardless of the response that would have been given to the request and its allegations (namely, whether these allegations would have been accepted or not) - then the requirement of the "heard party" and proper administration of justice would have been met. It is not the Constitutional Court's role to examine the extent to which the applicants' allegations in the proceedings before the regular courts are reasonable. However, procedural fairness requires that the essential allegations raised by the parties in the regular courts be properly addressed - particularly if they relate to important issues such as the impartiality of the courts. (see, in an analogous manner, the decision of the Constitutional Court in case KI22/16, Applicant Naser Husaj, Judgment of 2 May 2017, paragraph 47)

89. Therefore, based on the foregoing, the Court considers that the issue of addressing the Applicant's Referral and allegations for exclusion of the judge is of essential significance to the case because its clarification would avoid the Applicant's objective fear regarding the impartiality of the court in the adjudication of his case and would strengthen the conviction that the Applicant's allegations were properly heard (see, in an analogous manner, the decision of the Constitutional Court in case KI22/16, Applicant *Naser Husaj*, Judgment of 2 May 2017, paragraph 46; KI 135/14, Applicant *IKK Classic*, Judgment of 10 November 2015).

90. The Court notes that the appearance of the impartiality of the courts is important, in the light of the legal postulate that "justice must not only be done, but it must also be seen to be done". This is an essential element of the confidence that the courts in a democratic society must inspire in the public (see, *Volkov v. Ukraine*, paragraph 106, ECtHR Judgment of 2013 and *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86, see also the case of the Court KI22/16, Applicant

Naser Husaj, Judgment of 2 May 2017, paragraph 49; KI 24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019, paragraph 47).

91. In conclusion, the Court finds that the failure to address the Applicant's request for the exclusion of Judge H.Sh., in the decision-making proceedings before this court, as well as the lack of reasoning of the decision by the Court of Appeals concerning his allegation about the impartiality of Judge H. Sh., raised in his appeal, constitutes an insurmountable deficiency of the judgment - within the meaning of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

92. Therefore, the Court finds that the Decision of the Court of Appeals contains a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of the lack of legal reasoning by the Court of Appeals.

(ii) The right to trial within a reasonable time

93. In addressing this allegation, the Court first recalls once again this allegation of the Applicant who, among other things, states that the nature of the enforcement procedure is urgent and in his case, all the deadlines provided by the law on enforcement procedure have been exceeded.

94. In this connection, the Applicant states *"The enforcement procedure, for which two proposals for enforcement were submitted, in April 2014, was concluded with a final decision after five (5) years, from the moment when objectively it could have been carried out for 5-6 months. It is more than obvious that this is a trial beyond a reasonable time, which openly speaks about a court that is not independent, but is under the influence of the debtor."*

95. The Court draws attention that the Applicant has raised the issue of prolongation also in the regular courts, alleging that in his case the prolongation is occurring on purpose and emphasizing that the latter have ignored the fact that the enforcement procedure is of an urgent nature.

96. As regards the allegation for prolongation of the proceedings, the Court first points out the principled position of the ECtHR that Article 6 (1) of the ECHR that it is for the Contracting States to organize their legal systems in such a way that the courts cam meet the requirements of the article in question, including the obligation to hear cases within

a reasonable time, (See, the Judgment of the ECtHR, in the case *Luli and Others v. Albania*, Judgment of 1 April 2014, paragraph 91).

97. As regards the length of the proceedings, the Court takes into consideration the criteria of the ECtHR established in the Judgment in case *Tomazič v. Slovenia* (Judgment of 2 June 2008, paragraph 54), which reads as follows: *"As to the reasonableness of the length of the proceedings, the [ECtHR] reiterates that it must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute".*

98. The Court, referring to the case law of the ECtHR and its case law, assessed that the calculation of the process, the reasonable length of the proceedings, begins at the moment when the competent court starts the proceedings at the request of the parties for the establishment of a right or a legitimate claimed interest (see, the ECtHR case, *Erkner and Hofauer v. Austria*, of 23 April 1987, paragraph 64; see also the ECtHR case *Poiss v. Austria*, of 23 April 1987, paragraph 50, and the cases of the Constitutional Court No. KI27/15, *Mile Vasovic*, Resolution on Inadmissibility of 15 June 2015, paragraph 43; KI 81/16, Applicant *Valdet Nikqi*, Judgment of 31 May 2017, KI19/17, Resolution on Inadmissibility of 21 February 2018, paragraph 50). This process is considered completed with the issuance of a final decision by a competent court of the last instance (see, the ECtHR case *Eckle v. the Federal Republic of Germany*, of 15 July 1982, paragraph 74).

99. In the present case, the Court notes that we are speaking about an enforcement procedure, which was initiated by the Applicant on 4 April 2014 and concluded with the challenged decision, on 17 May 2019.

100. Based on the foregoing, the Court notes that the period which must be considered in relation to the Applicant's allegations for violation of Article 31.2 of the Constitution in conjunction with Article 6.1 of the ECHR is 5 (five) years.

101. As to the complexity of the case, the Court notes that when considering the parties' allegation concerning the length of the proceedings, the complexity of a proceeding must be considered within the factual and legal aspect of the dispute in question (see, the case of Court, KI19/17, Applicant *Fatos Dervishaj*, Resolution on Inadmissibility of 21 February 2018, paragraph 56)

102. The Court notes that on the basis of the facts elaborated above, the Applicant's case can be considered complex, in view of the factual and legal situation. In this connection, the Court emphasizes that the essential issue that complicates the implementation of the enforcement procedure in this case is precisely the dispute concerning the fact whether this enforcement procedure should be implemented, based on the challenged enforcement document (invoices).

103. As regards the actions of the parties to the proceedings, the Court notes that, in the light of its case-law and that of the ECtHR, the length of the proceedings is also assessed based on the actions of the parties participating in the proceedings (see, mutatis mutandis, the ECtHR case *Eckle v. Germany*, Judgment of 15 July 1982, paragraph 82; see also the case of the Court, KI 19/17, Applicant *Fatos Dervishaj*, Resolution on Inadmissibility of 21 February 2018, paragraph 62)

104. Regarding the actions of the Applicant, the Court notes that the Applicant has been active in undertaking many procedural actions, namely following all the procedural steps made available by the applicable laws. Also, the opposing party in the procedure, the company "Kujtesa Net" L.L.C., has undertaken numerous procedural actions (especially through the objections against enforcement decisions).

105. With regard to the actions of the competent bodies in the above-mentioned procedure, the Court notes that the regular courts from the moment of initiation of proceedings have been active in adjudicating the case, where nine judicial decisions were rendered throughout the procedure. In light of the complex circumstances of this case, the Court by taking into consideration the complex legal basis, the numerous actions of the procedural parties, their legitimate interests and the legal remedies used by the parties, as well as the fact that the courts have issued a total of nine judicial decisions in in this case, came to the conclusion that the regular courts, from the moment of initiation of proceedings in this case, have not been passive. Hence, based on the case file and in the light of the circumstances of the case, the Court finds that the regular courts from the moment of the initiation of proceedings have been active in adjudicating the case and, consequently, did not cause any unreasonable prolongation of proceedings.

106. In view of the foregoing, the Court finds that as regards the Applicant's allegation for prolongation of the proceedings, the Applicant has not sufficiently proved his allegation for violation of the right to trial

within a reasonable time, because the facts presented by him do not prove that the regular courts have denied him this constitutional right.

Conclusion

107. In conclusion, the Court finds that in relation to the Applicant's allegation for the violation of the right to a reasoned court decision by the Court of Appeals, in conjunction with the allegation about the impartiality of the Court, the Court finds that it is grounded.

108. In this point, by not responding to the Applicant's request for exclusion of Judge H. Sh., and to the allegations about lack of impartiality of this judge, the Court of Appeals has violated the Applicant's right to a fair and impartial trial guaranteed by Article 31 of the Constitution, in conjunction with Article 6, paragraph 1, of the ECHR.

109. In regard to the Applicant's allegation for prolongation of the proceedings, in light of the criteria established by the case law of the ECtHR and applied also by the Constitutional Court, in relation to trial within a reasonable time, the Court finds that this Applicant's allegation is ungrounded. Therefore, the Court considers that there is no violation of the principle of trial within a reasonable time.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, pursuant to Articles 21.4 and 113(7) of the Constitution, Article 20 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 29 March 2021, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights;

III. TO HOLD that the Decision Ac.no.2386/2018 of the Court of Appeals of Kosovo, of 17 May 2019, is invalid and must be remanded for retrial;

IV. TO ORDER the Court of Appeals to inform the Court as soon as possible, but no later than after 6(six) months, respectively on 12 September 2021 about the measures taken to enforce the Judgment of this Court, pursuant to Rule 63 of the Rules of Procedure;

V. TO REMAIN seized of the matter pending compliance with this order;

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. TO DECLARE that this Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Bekim Sejdiu Arta Rama-Hajrizi

KI195/20, Applicant: Aigars Kesengfelds, owner of the non-bank financial institution "Monego", Constitutional review of Judgment ARJ-UZVP. No. 42/2020 of the Supreme Court of 25 June 2020

KI195/20, Judgment, rendered on 29 March 2021

Keywords: *individual referral, legal person, non-bank financial institution, manifestly erroneous or arbitrary application of the law, reasoned court decision, admissible referral, in accordance with Article 31 of the Constitution*

The circumstances of the present case are related to the revocation of the Applicant's license as a non-bank financial institution, by the Central Bank of Kosovo (CBK) by Decision [No. 77-32/2019] of 6 December 2019. Revocation of the license by the CBK relied on the reasoning that the Applicant applied effective interest rates for loans significantly higher than the effective rate presented in the business plan submitted to the CBK.

Against the Decision of the CBK, the Applicant in the administrative procedure filed a statement of claim for annulment of the decision and at the same time based on paragraphs 2 and 6 of Article 22 of the Law on Administrative Conflicts (LAC) submitted a request for postponement of execution of the Decision of the CBK. The Basic Court rejected his request for postponement of the execution of the Decision by applying the criteria of paragraphs 2 and 6 of Article 22 of the LAC, in which case it found that the Applicant had not proved that (i) the execution of the Decision until the merits of the case are decided before the courts would bring him great and irreparable harm and that (ii) postponement of the execution of the Decision would not be contrary to the public interest. As a result of his appeal against the second Decision A. No. 3029/2019, of 3 February 2020 of the Basic Court, the Court of Appeals upheld the finding of the Basic Court regarding the non-fulfillment of the criteria of Article 22 of the LAC for postponing the execution of the CBK Decision, and by adding the application of Article 76 of the Law on the CBK rejected the Applicant's appeal as ungrounded. Finally, following the Applicant's request for extraordinary review of the court decision, namely the Decision of the Court of Appeals, submitted to the Supreme Court, the latter rejected his request as ungrounded and upheld the finding of the Court of Appeals.

The Applicant challenges the findings of the Supreme Court alleging a violation of Article 31, in conjunction with Article 6 of the ECHR; Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 (Right to an effective remedy)

of the ECHR; as well as Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of property) of Protocol no. 1 of the ECHR; and Articles 7, 8 and 10 of the UDHR. In essence, as to the allegation of violation of his right to fair and impartial trial, the Applicant complains about the applicability of Article 76 of the Law on the CBK, by the regular courts stating that the latter (i) have applied Article 76 of the Law on the CBK in a clearly erroneous manner; and (ii) have not reasoned their decisions.

When assessing the admissibility of the Referral, the Court found that the Applicant (i) is an authorized party, because he submitted the Referral in the capacity of a legal person in order to protect the rights guaranteed by the Constitution; (ii) has specified the fundamental rights and freedoms guaranteed by the Constitution which it alleges to have been violated; (iii) has submitted his referral within the time limit; (iv) taking into account the fact that the subject matter of the case is an assessment of the decisions of the regular courts, rendered in the pre-trial procedure, the Court applying the criteria established through its case law, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR) found that Article 31 of the Constitution in conjunction with Article 6 of the ECHR is applicable in its case; and consequently concluded that (v) that the Applicant's Referral also meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure.

The Court, after assessing the Applicant's allegations, applying the standards of case law of the Court and that of the ECtHR, concluded as follows:

Regarding the Applicant's allegation of violation of his right to fair and impartial trial, as a result of erroneous interpretation of the law by the regular courts, stated that the basis for reviewing the request for postponement of the execution of the CBK Decision, before the Basic Court was Article 22 of the LAC, paragraphs 2 and 6. Consequently, the Court considered that the findings and conclusions of the regular courts are not arbitrary because in this preliminary procedure they rely primarily on their assessment of meeting the criteria, established in Article 22, paragraphs 2 and 6 of the LAC and consequently the referral of Article 76 of the Law on the CBK by the Court of Appeals, has not prevented this court and then the Supreme Court to find that they have not met the criteria established in Article 22 of the LAC for postponing the execution of the Decision.

Secondly, with regard to the Applicant's allegation of violation of his right to fair and impartial trial, as a result of the non-reasoning of the court decision, the Court stated that based on the circumstances of the present case, the review or approval of the allegation of the Applicant of erroneous application of Article 76 of the Law on the CBK as grounded, would not change the result in his case due to the fact that the subject matter of the Applicant's Referral in the pre-trial proceedings before the regular courts was the postponement

of the execution of the CBK Decision and the assessment by the latter whether the criteria set out in Article 22 of the LAC were met.

In conclusion, the Court, with respect to the allegation of a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR (i) due to erroneous application of the law and (ii) lack of reasoning of the court decision, the Court finds that challenged Judgment ARJ-UZVP. No. 42/2020, of 25 June 2020, of the Supreme Court does not constitute a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

Whereas, regarding the allegations of violation of Article 32 of the Constitution, Article 54 of the Constitution, in conjunction with Article 13 of the ECHR; and Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR, as well as Articles 7, 8 and 10 of the UDHR, the Court considered that the Applicant relates the latter to the allegations of violation of Article 31 of the Constitution, consequently the Court found the latter as ungrounded on Constitutional basis as defined in Article 39 (2) of the Rules of Procedure.

JUDGMENT

in

Case No. KI195/20

Applicant

Aigars Kesengfelds,
owner of non-bank financial institution "Monego"

Constitutional review of Judgment ARJ-UZVP.no.42/2020 of the Supreme Court, of 25 June 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Aigars Kesengfelds, owner of the non-bank financial institution "Monego" having its seat in Prishtina (hereinafter: the Applicant), represented by lawyers Arianit Koci and Granit Vokshi, from the Law Firm "Koci & Vokshi", Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment ARJ-UZVP.no. 42/2020 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), of 25 June 2020.

3. The Applicant has received the challenged decision on 6 October 2020.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Judgment, which llegedly has violated the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR); Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the ECHR; as well as Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of Property) of Protocol no. 1 of the ECHR, as well as Articles 7, 8 and 10 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 30 December 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 8 January 2021, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 12 January 2021, the Applicant was notified about the registration of the Referral, and the Court requested from him to sign the Referral Form, and to attach Decision No. 77-32/2019 of the Central Bank of the Republic of Kosovo (hereinafter: the CBK). On the same day, a copy of the Referral was sent to the Supreme Court and the CBK. The latter was given the opportunity to submit its comments on the Referral, if any. The Court also notified the Basic Court in Prishtina, Department for Administrative Matters (hereinafter: the Basic Court) about the registration of the Referral and requested from the latter

submit to the Court the acknowledgment of receipt which proves the time when the Applicant had received the challenged Judgment of the Supreme Court.

9. On 14 January 2021, the Basic Court submitted the acknowledgment of receipt to the Court, which proves that the Applicant has received the challenged Judgment of the Supreme Court on 6 October 2020.

10. On 22 January 2021, the Applicant submitted the requested documentation to the Court.

11. On 25 January 2021, the CBK submitted to the Court its comments regarding the case. The Applicant was also notified about these comments.

12. On 29 March 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. On the same date, the Court unanimously found that (i) the Applicant's Referral is admissible; and that (ii) the Judgment ARJ-UZVP.no. 42/2020, of the Supreme Court, of 25 June 2020 is in accordance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

13. On February 26, 2018, the CBK by its license [no. 07-04/2018] registered the Applicant as a non-bank financial institution to exercise the financial activity of lending.

14. On 6 December 2019, the CBK by Decision No. 77-32 / 2019 (hereinafter: the Decision of the CBK) having found that the Applicant *"since the beginning of operation, NBFI Monego has applied effective interest rates on loans significantly higher than the effective rate presented in the business plan submitted to the CBK, according to which it is registered as a non-bank financial institution. [...]"* decided: (i) to revoke the license [no. 07 - 04/2018] on the registration of the Applicant as a non-bank financial institution; (ii) to commence liquidation proceedings based on the Law No.04/L-093 on Banks, Microfinance Institutions and Non-Bank Financial Institutions (hereinafter: the Law on Banks); and (iii) appointed V.Z. as a liquidator.

15. The CBK reasoned its decision to revoke the Applicant's license for operating as a non-bank financial institution as follows:

[...]

"Overseeing the implementation of decision no. 16 - (07/2019) a focused examination was performed in this institution. Based on this examination at NBFI Monego it was found that the NBFI Monego has made a partial reduction of interest rates compared to the business plan submitted to the CBK at the time of registration wherein it had planned for the effective interest rate to be 26.8%. Based on the sample selected for examination, it was confirmed that the loan with the lowest effective rate, with exception of those without interest is 81.05%, while the highest is 332.97%, including the fee for the disbursement of cash loans, which as a service is optional and as such should not be included in the calculation of the effective interest rate. Upon recalculations of the effective interest rate where the fee for the disbursement of cash loans was excluded, it was concluded that the loan with the lowest effective interest rate, excluding those without interest, is 81.05% while the highest is 236.20%.

Implementing the Regulation of the CBK on Procedures for Imposing Administrative Penalties related to the examination conducted from 05 to 09 September 2019, the CBK on 27 September 2019 sent to the NBFI Monego the Notification on the Purpose of Imposition of Administrative Penalties, where through advice has it been informed of its right to file a request for review to the Review Division of the CBK, within 15 days from the date of receipt of the Notification. On 15 October 2019, NBFI Monego submitted a request for review of the Notification on the Purpose of Imposition of Administrative Punitive Measures to the Review Division at the CBK.

The Review Division having reviewed the request in accordance with the Regulation on Procedures for Imposing Administrative Penalties and after administering all the available evidence found that the violations identified during the examination remain and as such these violations are properly addressed in the Notification on the Purpose of Imposition of Administrative Penalties, therefore on this basis the request for reconsideration of NBFI Monego has been assessed as ungrounded."

16. On 17 December 2019, the Applicant filed a claim with the Basic Court seeking the annulment of the Decision of the CBK. Based on the case file, it results that the Applicant's request for annulment of the Decision of the CBK is still in the procedure of review before the regular courts.

17. Also on 17 December 2019, the Applicant filed a request with the Basic Court with seeking the postponement of the execution of the Decision of the CBK No. 77-32/2019.

18. The Applicant submitted his request for postponement of the execution of the Decision of the CBK pursuant to Article 22, paragraphs 2 and 6 of the Law No. 03/ L-202 on Administrative Conflicts (hereinafter: the LAC). In the context of fulfilment of the criteria under paragraph 2, article 22 of the LAC, he stressed that he will *"incur great and irreparable damage if the Court does not take a decision to postpone the execution of Decision no.77-32 / 2019 of the Central Bank of Kosovo."* In this regard, the Applicant, referring to Article 71 and Article 73 of the Law on the CBK, which provisions refer to the liquidation procedure, reasoned that *"The liquidator takes over all Monego operations and deprives the shareholder of all his rights."* In this context, the Applicant reasoned that *"As defined by the Law on Banks, the liquidation is expected to be completed within a period of approximately one year, [...] and Monego will cease to exist"*.

19. In his request for postponement of the execution of the Decision of the CBK, the Applicant, having referred to Article 22, paragraphs 2 and 6 of the LAC, stated that the decision of the CBK is causing him: (i) great and irreparable damage; and that (ii) the postponement of execution is not contrary to the public interest. In relation to point (i), namelythe issue of great and irreparable damage, the Applicant, among other things, stated that in addition to the real damage, he will also suffer damage due to lost profit. At this point, the Applicant, in his request for postponement of the execution of the decision, also referred to the Judgment of the Court in case KI122/17 with Applicant *Česká Exportní Banka A.S.* [Judgment of 18 April 2018], stating, inter alia, that the interim measures based on Article 6 of the ECHR are constitutional categories, and if the court does not decide to postpone the execution of the decision, his right to property will be violated. In relation to point (ii) that the postponement of the execution is not contrary to the public interest, the Applicant stated that his company had served more than 80,000 people, a fact which according to him means that citizens need the services provided by him. The Applicant also stated that his participation in the credit market does not pose a form of risk to the country's financial stability and that the public interest would be further violated if the CBK Decision remains in force. The latter is justified by the Applicant with the fact that two hundred and fifty (250) employees, employed in this institution with immediate effect will be out of work.

20. On 20 December 2019, the Basic Court, by Decision A.nr. 3029/2019 rejected the Applicant's request for postponement of the execution of the Decision of the CBK as ungrounded. The Basic Court, having referred to Article 22, paragraphs 2 and 6 of the LAC, assessed that: (i) the Applicant has not made credible with the evidence contained in the case file that the Decision of the CBK will cause damage which would be difficult to be repaired; and (ii) that postponing the execution of the said Decision is not in the public interest.

21. On 30 December 2019, the Applicant filed an appeal with the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) against the Decision A.no. 3029/2019 of the Basic Court, of 20 December 2019 alleging (i) violation of the provisions of the contested procedure on the grounds that the Basic Court has not analysed the evidence and the reasoning of the decision is in contradiction with the content of the case file. In this respect, the Applicant refers to Article 106 of the Law no. 03 L/-006 on Contested Procedure (hereinafter: the LCP) which according to him determines what should contain a Decision; and (ii) erroneous determination of the factual situation, due to erroneous assessment of the evidence. The Applicant in his complaint again stated that he will be caused great and irreparable damage, due to the initiation of the liquidation procedure, on which occasion the Applicant "*is deprived of all his rights"*. The Applicant, in his appeal, also refers to the case law regarding the imposition of interim measures, namely the case of the European Court of Human Rights (hereinafter: the ECHR), Micallef v. Malta, and in this context states that since the Basic Court is in charge, and his case is not expected to be resolved for at least three (3) years, he would suffer irreparable damage because "Monego would cease to exist21. On 30 December 2019, the Applicant against the Decision A.nr. 3029/2019, of 20 December 2019 of the Basic Court filed an appeal with the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) alleging (i) violation of the provisions of the contested procedure on the grounds that the Basic Court has not analyzing the evidence and reasoning the decision is inconsistent with the content of the case file. In this regard, the Applicant refers to Article 106 of Law no. 03 L / -006 on Contested Procedure (hereinafter: the LCP) which according to him determines what should contain a Decision; and (ii) erroneous determination of the factual situation, due to erroneous assessment of the evidence. The Applicant in his complaint again stated that he will be caused great and irreparable damage, due to the opening of the liquidation procedure, in which case the Applicant *"is deprived of all his rights"*. The Applicant, in his appeal also refers to the case law concerning the imposition of interim measures, namely the case of the European Court of Human Rights (hereinafter: the

ECtHR), *Micallef v. Malta*, and in this context states that given that the Basic Court is assigned, and his case is not expected to be resolved for at least for three (3) years, he would suffer irreparable damage because *"Monego would cease to exist"*.

22. On 24 January 2020, the Court of Appeal by Decision AA.No.48/2020, approved the Applicant's appeal as grounded, and annulled the Decision of the Basic Court A.no.3029/2019, of 20 December 2019 by remanding the case for reconsideration.

23. The Court of Appeals reasoned that the Decision of the Basic Court A.no. 3029/2019, of 20 December 2019, contains essential violations of the provisions of the LCP, namely *"from article 182 para.2, subpara.n) and from article 183 of the LCP, applicable according to article 63 of the LCA"* because it is legally unclear, contradictory, and the factual situation was not determined completely. The Court of Appeals further reasoned that *"Due to the erroneous legal position and non-reasoning of the appealed decision, the proposed interim measure must not include the claim; the court of the first instance has failed to assess the claimant's allegations whether the conditions for the approval of the proposed interim measures have been met cumulatively."* Also, the Court of Appeals stated that *"the court of the first instance must act pursuant to Article 305 para.1 and 2 of the LCP, applicable with Article 63 of the LAC, so that the request for postponement of the execution of the challenged decision is sent together with the case file to the respondent along with a notification that it can submit a response within the legal deadline, which is a prerequisite."* Finally, the Court of Appeals emphasized that the court of first instance should confine itself to ascertaining the merits of the request for postponement of the execution of the decision, within the meaning of Article 22 paragraph 2 of the LAC, and whether the conditions have been met ina cumulative manner.

24. On 3 February 2020, the Basic Court, in the retrial procedure, by Decision A.nr. 3029/2019 rejected the Applicant's request for postponement of the execution of the Decision of the CBK as ungrounded. As for the issue of the applicability of the LCP, the Basic Court emphasized that the said law cannot be applied, due to the fact that according to Article 63 of the LAC, Article 305 of the LCP can be applied only if it does not contain provisions for the procedures on administrative conflict. The Basic Court having referred to Article 22, paragraphs 2 and 6 of the LAC reasoned that the Applicant has not made credible with the evidence contained in the case file, that the Decision of the CBK (i) will cause damage to him which would be difficult to repair and that (ii) the postponement is not in the public

interest or that the postponement would not cause any harm to the opposing party.

25. On 12 February 2020, the Applicant filed an appeal with the Court of Appeals. In his appeal, the Applicant initially stated that the LAC does not provide a specific provision regarding the procedure for rendering or appealing decisions whereby the requests for postponement of the execution of decisions are rejected or approved. Consequently, the Applicant in his complaint states *"in the absence of specific provisions regulating this issue, the LAC in Article 63 provides that if this law does not contain provisions for the procedures on administrative conflicts, the provisions of the law on contested procedure will be applied accordingly."* In this respect, the Applicant as regards the allegations for violation of the provisions of the contested procedure, referred to Article 182, paragraph 1 of the LCP in conjunction with Article 8, paragraph 2 and Article 160, paragraphs 4 and 5 of the LCP- and Article 182 paragraph 2 point n) with the claim that *"the court has not carried out the analysis of evidence at all [...]."* Further, according to the Applicant, even though the LAC does not envisage any specific provision which determines what should be contained in the decision whereby the requests for postponement of the execution of decisions are accepted or rejected, Article 63 of the LAC is applicable in his case.

26. On 26 February 2020, the Court of Appeals by Decision AA. No.164/2020 rejected the Applicant's appeal as ungrounded and confirmed the Decision of the Basic Court.

27. The Court of Appeals initially found that *"the court of the first instance, after reviewing the claimant's proposal to postpone the execution of the Decision of the CBK No. 77-32/2019, of 06.12.2019, found that such proposal is ungrounded because the claimant has not made credible with any single evidence his allegation that by the execution of the decision of the respondent, it would bring him damage which would be difficult to be repaired and that the postponement is not in contradiction with the public interest, neither that the postponement would not cause any major damage to the opposing party, namely the interested person, a legal condition which must be proved by the claimant, in order for the court afterwards to postpone the execution of the challenged decision. Therefore, when assessing the claimant's proposal to postpone the execution of the challenged decision, the court has referred to the legal provisions of Article 22 para.2 and 6 of the Law on Administrative Conflicts".*

28. Further, the Court of Appeals by its Judgment *"assessed that the [Applicant's] appeal is entirely ungrounded. All this because the Law no. 03/L-209 on Central Bank of the Republic of Kosovo has determined immunity to the imposition of an interim court measure on the respondent because Article 76 of the same law stipulates that "1. No attachment or execution shall be issued against the Central Bank or its property, including gold, special drawing rights, currency, credits, deposits or securities, and any proceeds thereof, before the issuance of a final judgment in any legal action brought before the courts of Kosovo. 2. The Central Bank may, in whole or in part, waive this protection, explicitly and in writing, except with respect to its gold and the Special Drawing Rights held in the account of Kosovo in the International Monetary Fund."* In this context, the Court of Appeals found that *"In the concrete case the proposer-claimant by the filed appeal requests the postponement of the execution of decision No. 77-32 / 2019 of the Central Bank of Kosovo, of 06.12.2019 on Revokation of the Registration of the Banking Financial Institution "Monego" pending a court decision by the court. Therefore, based on the aforementioned provision in the court proceedings against the respondent [Central Bank], no interim measures can be imposed in relation to the activity mentioned in the above provision".*

29. The Court of Appeals further stated that "*On the basis of this state of facts the panel finds that the Basic Court in Prishtina-Department for Administrative Matters has correctly determined the factual situation by having correctly applied the procedural and substantive provisions, when rejecting the claimant's request, whereby he has requested the postponement of the execution of the Decision of the CBK, but to support this legal position of the first instance, this factual situation is also based on Article 76 of the Law No. 03/L-209 on Central Bank of the Republic of Kosovo, and that the law has not been infringed to the detriment of the claimant on the occasion of rejection of the proposal for postponement of the execution of the challenged decision. Therefore, the appeal claims that the court of the first instance when issuing the decision has not correctly assessed the evidence submitted, and that it did not ascertain at all the important facts for the resolution of the case, are ungrounded and unsustained. Because, according to the assessment of the panel of this court, the challenged ruling of the court of the first instance, although it lacked the reasoning and concrete substantive legal provisions mentioned above, this did not have a bearing so as to have a different decision rendered in this case, therefore the appealed ruling is clear and comprehensible, while in its reasoning are provided reasons for the decisive facts which are accepted by this court as well. Therefore, the*

appeal as such is rejected, whilst the appealed ruling is confirmed as being fair and lawful".

30. On 19 March 2020, the Applicant filed a request with the Supreme Court for extraordinary review of the court decision, respectively Decision AA.No. 164/2020 of the Court of Appeals. In his request for extraordinary review of the Decision, the Applicant alleged (i) erroneous application of substantive law; (ii) that the execution of the Decision of the CBK would cause great and irreparable damage to him; and that (iii) postponing the execution of the CBK Decision is not contrary to the public interest.

31. First, in relation to his allegation for erroneous application of substantive law, the Applicant specified that the Court of Appeals has erroneously applied Article 76 of the Law on CBK by stating that *"Such an interpretation of this provision is completely erroneous and does not comply neither with the spirit of the Law on CBK as a whole, nor with the content of the provision in question in particular"* by further reading this provision *"*[...] *attachments and executions in question cannot be issued against the CBK and its assets, whilst in the present case the request for postponement of the execution of the decision is proposed to be issued against the liquidation process of Monego, namaley this process to be suspended pending a final decision."* In this respect, the Applicant further specified that by the Decision of the Court of Appeals the subject matter of the case has been confused, namely according to him *"Article 76 of the Law on CBK is considered in cases when against the Republic of Kosovo or the CBK- exist claims by third parties and an interim measure is proposed to be imposed on the assets of the latter."* The Applicant further argues that the application of Article 76 of the Law on CBK, according to him, means that the Decisions of the CBK can not be subject to judicial review, which is contrary to Article 54 of the Constitution.

32. Secondly, the Applicant in his request has also reasoned that the Decision of the CBK would cause him great and irreparable damage, namely he would incur great damage in terms of material damage, but also loss in terms of lost profit. In this context, the Applicant alleged a violation of his right to property.

33. Thirdly, the Applicant reasoned that the postponement of the execution of the Decision of the CBK is not contrary to the public interest. In the context of the latter, the Applicant specifies that (i) his financial institution has served to more than 80,000 persons; (ii) persons who do not have an account in Kosovo are given access to funds; (iii) its participation in the financial market *"does not pose any*

form of risk to the country's financial stability"; (iii) because this institution can not keep deposits for the loans granted in this way, citizens' money is not used and is jeopardized as it is done by classical banks; and (iv) keeping in force the CBK Decision would cause more than two hundred and fifty employees employed in this institution lose their jobs.

34. On 25 June 2020, the Supreme Court by Judgment ARJ-UZVP.42/2020 rejected as ungrounded the Applicant's request for extraordinary review of Decision AA.No. 164/2020 of the Court of Appeals, of 19 March 2020.

35. The Supreme Court, in its Judgment, first referring to paragraphs 2 and 6 of Article 22 of the LAC, stated that "*this provision stipulates that the postponement can be made at the request of the claimant, the body , whose act is being executed, respectively the competent body for execution can postpone the execution pending the final legal decision, if the execution of the administrative act would cause damage the claimant, which would be difficult to be repaired, and the postponement is not in contradiction with the public interest nor the postponement would bring any damage to the opposing party respectively to the interested person. Whereas by the provision of Article 22.6 of the same law it is stipulated that the claimant can claim from the court the postponement of the execution of the administrative act until the court decision is taken, according to the conditions foreseen by Article 22 para.2 of the LAC."*

36. Secondly, the Supreme Court stated that *"In addition to this, Article 76 of the Law No.03 / L-209 on Central Bank of Kosovo determines immunity from the imposition of an interim court measure, namely no attachment or execution may be issued against the Central Bank or its property."*

37. Finally, the Supreme Court found that *"[...] the court of the second instance has acted correctly when rejecting as ungrounded the claimant's appeal and confirming the decision of the first instance whereby the claimant's proposal was rejected. This Court assesses that the court of the second instance has fully and correctly applied the provisions of the Law, the provisions of the administrative procedure, and those of the Law on Administrative Conflicts. The claimant's statements regarding the violations are ungrounded because the challenged decision is clear and comprehensible. The reasoning of the challenged decision contains sufficient reasons and decisive facts on rendering lawful decisions. This Court also*

considers that the substantive law has been correctly applied and the law has not been violated to the detriment of the claimant."

Applicant's allegations

38. The Applicant alleges that the Judgment of the Supreme Court, has violated his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR; Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the ECHR; as well as Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of property) of Protocol no. 1 of the ECHR; and Articles 7, 8 and 10 of the UDHR.

In relation to allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

39. As regards the applicability of Article 31 of the Constitution in conjunction with Article 6, the Applicant having referred to the Judgment of the ECHR in the case *Micallef v. Malta* (Judgment of 30 April 2018) considers that this Article is applicable in his case. In this respect, and as to the fulfillment of the criteria established in the Judgment of the ECHR in the case *Micallef*, the Applicant clarifies that *"The license which [he] has possessed constitutes a civil right" in the form of an authorization to undertake certain actions within the scope of financial institutions - for the very fact that the license - which constitutes a right - can be revoked."* In the following, in respect of the "civil character" of the infringed, the Applicant right specifies that *"[...] the revocation of the license as well as the initiation of liquidation proceedings has had a clear and decisive impact on the [his] right to manage his financial affairs as well as to administer his property."*

40. The Applicant concludes that *"The fact that financial institutions are legal entities and the fact that the banking industry is an in detail - regulated industry - due to its vital importance - is not a sufficient reason to conclude that the proceedings which include financial institutions - do not fall within the scope of Article 32 of the Constitution and Article 6 of the ECHR (see, mutatis mutandis, Judgment of the European Court of Human Rights of 24 February 2006, Capital Bank AD v. Bulgaria, No. 49429/99, paragraphs 86-87).* Consequently, the Applicant considers that *"Article 31 of the Constitution and Article 6 of the ECHR are to be applied in the present case."*

41. The Applicant states that the LAC provides legal opportunities for challening administrative decisions by claims for administrative conflict, appeals against administrative acts and objections in cases determined by law. At this point, the Applicant refers to Article 22, paragraphs 2 and 6 of the LAC, by emphasizing that the main function of the request for postponement of the execution of the decision is to prevent causing damage to the person submitting the request.

42. The Applicant specifies that *"In the present case, the Supreme Court having relied on the Law No.03/L-209 on Central Bank [...] has erroneously interpreted the provision of Article 76 of this law - by applying it in arbitrary manner"*.

43. In this connection, the Applicant specifies that *"The erroneous application of substantive law by the Supreme Court consists of two aspects: (a) the addressing of the request for postponement of the execution of the decision from Article 22, paragraph 6 of the Law on Administrative Disputes and Interim Measures under Article 76 of the Law on Central Bank - as being identical or replaceable; and (b) erroneous conclusion for the entity to whom the request for postponement of the execution of the decision is addressed. Initially, it should be noted that the Supreme Court - by reading the text of the title of the provision of Article 76 of the Law on Central Bank – equates in respect of the effect as well as the legal charactersits both the request for postponement of the execution of the decision from Article 22, paragraph 6 of the Law on Administrative Disputes as well as the Interim Measure from Article 76 of the Law on the Central Bank - a measure, which viewed on its grounds, can relate only to the interim measures from Article 306 of the Law No. 03/L-006 on Contested Procedure"*.

44. Further, the Applicant alleges that these two legal remedies differ in their essence because according to him the LAC provides the conditions for approval of the request for postponement of the execution of the decision but does not provide the notion of the interim measures. The Applicant specifies that *"the interim measure referred to in the Law on Central Bank is not and cannot be considered the same or similar to the Request for postponement of the execution of the decision - but only with the interim measure according to the Law on Contested Procedure"*.

45. The Applicant states that Article 76 of the Law on CBK does not grant immunity to the latter against the request for postponement of the execution of the decision, but only against the interim measures, and according to the Applicant "attachments" and "executions" referred to

in Article 76 are attributed to the CBK and its property and as such belong to the contested and enforcement field, and in no way to the administrative field. In regard to this point, the Applicant argues that "attachments" refer to Articles 297, 299, 300, 301 and 306 of the LCP, while "execution" implies the initiation of enforcement proceedings, according to Article 4 of the Law No.04/L- 139 on Enforcement Procedure (hereinafter: the LEP). The Applicant further alleges that the Supreme Court has violated the substantive law because the finding of the latter was attributed to the erroneous entity for the fact that Article 76 is attributed to the CBK, and not to the Applicant.

46. The Applicant further alleges that the Judgment of the Supreme Court did not meet the criteria of Article 31 of the Constitution and Article 6 of the ECHR, for the fact that is an unreasoned decision and because it has not addressed the Applicant's allegations and arguments. In the context of his allegation for non-reasoning of the court decision, the Applicant reiterates that since the LAC does not envisage what should be contained in the Judgment rejecting or approving the requests for postponement of the execution of decisions, in the absence of such provisions Article 63 the LAC is to be applied, and consequently there should apply the Article 160 of the LCP which determines what should be contained in the Judgment.

47. The Applicant further also specifies that: *"Consequently, the Supreme Court has at no time taken the opportunity to provide arguments on the decisive facts – but it has limited itself to a weak legal reasoning*. In this respect, the Applicant refers to and cites the case of the ECtHR *Oleynikov v. Russia,* in which case it was stated that *"Furthermore, it t would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6, paragraph 1 of the ECHR – that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons* [Application no. 36703/04, paragraph 65] ". In the following, the Applicant also refers and cites the case *Fayed v. The United Kingdom,* in which case the ECtHR stated that*: "Thus, in cases where the application of the provisions of state immunity restricts the exercise of the right of access to court - the court must determine whether the circumstances of the case justify such a restriction"* [Application no. 17101/90, paragraph 59]. In the following, the Applicant alleges that *"However, the Supreme Court has not addressed the principle of proportionality at all whether the circumstances of the case justify such a restriction. "*.

48. In the context of the allegation for non-reasoning of the court decision, the Applicant also refers to the case KI72/12 of the Court with Applicant *Veton Berisha* [Judgment of 17 December 2012].

49. The Applicant reiterates that until a meritorious decision is rendered by the regular courts, this decision will be void because, in his view, *"the damage would by now be irreparable - because Monego would cease to exist. Therefore, the decision on the request for postponement of the execution of the decision of the CBK is crucial for the protection of the rights of [the Applicant]."*

In relation to the allegation for violation of Article 32 of the Constitution, in conjunction with Article 13 of the ECHR

50. The Applicant, by referring to the case of the ECtHR *Aksoy v. Turkey* [Judgment of 31 October 2006], alleges that the legal remedy in his case is ineffective due to the failure to have the merits of the case addressed. Consequently, the Applicant states that the applicable legislation has provided for the request to postpone the execution of the decision as an accessible remedy by law, which according to him has been proven to be ineffective in practice, as a result of flagrant interpretation by the Supreme Court.

In relation to allegation for violation of Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR

51. In regard to this allegation, the Applicant states that on the basis of the case law of the ECHR, in his case there is a legitimate expectation because according to him *"by obtaining a license-to exercise this economic activity pursuant to the defined legal requirements (according to the criteria provided by the relevant legislation on Banks) constitutes an asset in sense of possession deriving from the exercise of economic activity in the financial sector [...]." In this context*, the Applicant refers to the ECtHR case *Tre Traktorer AB [Judgment of 7 July 1989] emphasizing that the economic interests stemming from running a business represent possession or asset.*

52. The Applicant further states that the ECtHR in the case *Lonnroth v. Sweden* [Judgment of 13 September 1982], has established three distinc rules: *"(i) the general principle of the unihindered exercise of the property right; (ii) the rule that any deprivation of the right to possessions must be subjected to certain conditions [...] (iii) the principle that the state can control the use of property in accordance with the general interest by enforcing such laws as they deem necessary for the purpose[...]."* Therefore, the Applicant states that

the three basic principles in cases of restriction are in (i) The Principle of legality; (ii) The principle of the existence of a legitimate aim in the protection of the public interest; and (iii) The Principle of Proportionality.

53. The Applicant also cites the case of the ECtHR *Capital Bank AD v. Bulgaria* [Judgment of 24 November 2005] and alleges that the principle of legality presupposes that domestic law must provide a mechanism for protection against arbitrary interference by the public authorities. In this respect, the Applicant states that he could not present his case before the regular courts because the Supreme Court interpreted Article 76 of the Law on the CBK in an erroneous manner.

54. Consequently, the Applicant alleges that the interference with his property rights *"was not accompanied by sufficient safeguards against arbitrariness, and consequently was not in accordance with Article 1 of Protocol 1 to the ECHR."*

55. Finally, the Applicant requests from the Court to declare his Referral admissible and to find: (i) violations of Articles 31, 32, 46 and 54 of the Constitution and Articles 6, 13 of the ECHR, as well as Article 1 of Protocol no. 1 of the ECHR, and (iii) remand the Judgment of the Supreme Court for reconsideration.

CBK comments

56. The CBK submitted its comments on the Applicant's allegations, and in this context in respect of the applicability of Article 76 of the Law on CBK stated the following::

> *"The allegations of the Applicant are ungrounded also in respect of Article 76 of Law no. 03/L-209 on CBK. The Court has correctly assessed that according to this article, Immunity has been determined against the imposition of an interim court measure against the CBK [...] In the present case, the proposer-claimant by the filed appeal requests to postpone the execution of Decision No.77-32/2019 of the CBK, of 06.12.2019, on Revokation of the registration of the Non-Bank Financial Institution "Monego" L.L.C. until a court decision is made. Therefore, based on the above provision in the court proceedings against the respondent no interim measures can be issued in relation to the activity as mentioned in the above provision".*

57. The CBK further states that *"The Supreme Court by Judgment no. ARJ-UZVP.no.42/2020 has assessed that the court of the second instance has implemented in a complete and correct manner the provisions of the Law, the provisions of the administrative procedure, and those of the Law on Administrative Conflicts. Whereas, the allegations of the Applicant concerning the violations are ungrounded because the challenged decision is clear and comprehensible".*

58. Further, the CBK argues that *"the Central Bank as a supervisory body and authorized by applicable law to monitor the conduct of the financial system in Kosovo has acted correctly when revoking the license of NBFI "Monego" L.L.C. due to the violations found and taking into consideration the public interest and the damage it can cause to financial consumers by applying high interest rates, and thus endangering financial stability in the country. The CBK revoked the license of this institution due to systematic violations of legislative requirements. The said institution, by failing to implement the regulatory-legal requirements, continued to apply interest rates significantly higher than what was envisaged in the business plan, on the basis of which it had obtained a work permit".*

59. In its comments, the CBK also refers to Article 77, paragraph 4 of Law No. 03/L-209 on CBK, stating that "*Furthermore, given the importance of maintaining financial stability in the country, Article 77 (4) of Law No.03/L-209 on CBK, has itself provided that "in any court or arbitration proceedings against the Central Bank, the court or arbitration panel shall not stay, suspend, suspend or set aside the actions of the Central Bank."*

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.

Article 32

[Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

[...]

Article 46
[Mbrojtja e Pronës]

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

Article 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)

2. 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.

[...]

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.

Protocol No. 1 to the European Convention on Human Rights
Article 1
(Protection of property)

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

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

[...]

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

LAW No. 03/L-202 ON ADMINISTRATIVE CONFLICTS

Article 22

1. *The indictment does not prohibit the execution of an administrative act, against which the indictment has been submitted, unless otherwise provided for by the law.*
2. By the plaintiff request, the body whose act is being executed, respectively the competent body for execution can postpone the execution until the final legal decision, if the execution shall damage the plaintiff, whereas postponing is not in contradiction with public interest and postponing would not bring any huge damage to the contested party, respectively the interested person.
3. Together with the postponing request, proves that show the indictment has been submitted should be presented.
4. For postponement of execution, the competent body shall issue decision not later than three (3) days from the date of receiving the request for postponement.
5. The body under paragraph 2 of this Article may postpone the execution of contested act also for other reasonable reasons until the final legal decision, if it is not in contradiction with public interest.
6. The plaintiff can claim from the court to postpone the execution of administrative act until the court decision is taken, according to the conditions foreseen by the paragraph 2 of this Article.
7. The court decides within three (3) days upon receiving the claim.
[...]

Article 63
Other procedure provisions

If this law does not contain provisions for the procedures on administrative conflicts, the law provisions on civil proecedures shall be used.

LAW NO. 03/L-006 ON CONTESTED PROCEDURE

Article 160

160.1 A verdict compiled in written should have: summary, disposition, justification and guide on the right to file a complaint against the verdict.
160.2 The summary of the verdict should have: the name of the court, the name of the judge, the names of the parties and their address, the names of their legal representatives, brief narrative of the contesting issue and the amount, the ending day of the main hearing, the narrative of the parties and their legal

representatives and with proxy that were present in the session of the kind as well as the day when the verdict was issued.
160.3 The verdict disposition consists of: decision which approves or rejects special requests dealing with issue at stake and accessing requests, decision for existence or non-existence of the proposed requests to compensate it with statement of claim as well as the decision on procedural expenses.
160.4 Justification of the verdict consists of: requests of parties, facts submitted and proposed proofs, which of the facts are validated, why and how they were validated, if they were validated according to the proof which proofs were used and how they were validated.
160.5 The court specifically should show which provisions of the material right are applied in the case of deciding upon the requests from the parties. If necessary, the court will pronounce on the standing of the parties regarding the judicial basis for the contests, as well as for their proposals and turndowns, for which the court hasn't justified decisions issued earlier in the process.
160.6 In the contumacy verdict, verdict on the basis of pleading guilty, verdict on the basis of withdrawing the charges, or the verdict due to the lack of attendance, the justification consists of only the reasons for issuing the verdict of the kind.

[...]

Article 306

306.1 The court can set temporary measures of insurance without a notification or a preliminary hearing of the objector of insurance based on the proposal for the insurance presented, if the proposed insurance shows plausible pretence that measures of insurance is based and urgent, and if acted otherwise it will loose the aim of the insurance measures.
306.2 The verdict from the paragraph 1 of this article is sent by the court to the objector of the insurance immediately. The objector of insurance in his reply within a period of 3 days can contest the causes for setting temporary measures, and after that the court can set a hearing after three days. The answer of the objector should contain a justification part.
306.3 After the hearing from the paragraph 2 of this article, the court by a special verdict annuls the verdict that sets temporary measures or replaces it with a new verdict for setting measures in accordance to the article 307 of this law. An appeal against the verdict setting measures of insurance is allowed.

LAW NO. 03/L-209 ON CENTRAL BANK OF THE REPUBLIC OF KOSOVO

Article 76
Immunity from prejudgment attachment

1. No attachment or execution shall be issued against the Central Bank or its property, including gold, special drawing rights, currency, credits, deposits or securities, and any proceeds thereof, before the issuance of a final judgment in any legal action brought before the courts of Kosovo.
2. The Central Bank may, in whole or in part, waive this protection, explicitly and in writing, except with respect to its gold and the Special Drawing Rights held in the account of Kosovo in the International Monetary Fund.

Article 77
Judicial review

1. In any court or arbitration proceeding against the Central Bank, a member of the Central Bank's decision-making bodies or its staff, or an agent of the Central Bank in carrying out their duties to the Bank:
[...]

and 1.4. the court or arbitration panel shall be authorized, in appropriate cases, to award monetary damages to injured parties, but shall not enjoin, stay, suspend or set aside the actions of the Central Bank.

LAW No. 04/L-093 ON BANKS, MICROFINANCE INSTITUTIONS AND NON BANK FINANCIAL INSTITUTIONS

Article 3
Definitions

Non Bank Financial Institution (NBFI) - a legal entity that is not a bank and not a microfinance institution that is licensed by the CBK under this Law to be engaged in one or more of the 3 following activities: to extend credit, enter into loans and leases contracts financial-leasing, underwrite, trade in or distribute securities; act as an investment company, or as an investment advisor; or provide other financial services such as foreign exchange and money changing; credit cards; factoring; or

guarantees; or provide other financial advisory, training or transactional services as determined by CBK;
[...]

Article 4
Përgjegjësia e BQK-së për dhënien e licencave

1. *The CBK shall have sole responsibility for the issuance of licenses to all banks and registration of all Microfinance Institutions and NBFIs and for the issuance of permits to foreign banks with respect to the establishment of representative offices.*
2. A central register shall be kept by the CBK for inspection by the public that shall record for all Financial Institutions the name, the head office and branch office addresses, and current copies of its charter or equivalent establishing documentation and by-laws. A list of all Financial Institutions the licenses or registration of which have been revoked, shall also be maintained in the register, but their chartering documentation and by-laws shall be removed.

[...]

PART XXII VOLUNTARY LIQUIDATION, MANDATORY RECEIVERSHIP AND OFFICIAL ADMINISTRATION

[...]
Article 108
Mandatory receivership

If the CBK determines that a Microfinance Institution or NBFI is insolvent or that it may reasonably be expected to become insolvent, the CBK may revoke the registration of that Microfinance Institution or NBFI and shall forthwith take possession and control of that Microfinance Institution or NBFI through a Receiver appointed by the CBK. This proceeding shall be known as Receivership and the provisions of this Law particularly Part XI shall apply.

Assessment of the admissibility of Referral

60. 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.

61. 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."*

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

63. In this connection, the Court notes that the Applicant, in his capacity as the owner of the non-bank financial institution, is entitled to submit a constitutional complaint, by calling upon alleged violations of his fundamental rights and freedoms, which are valid for individuals as well as for legal persons (see, the case of Court KI41/09, Applicant *University AAB-RIINVEST L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

64. In the following, the Court also examines whether the Applicant has fulfilled the admissibility criteria as provided for by Law. In this regard, the Court first refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
[Individual Requests]

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

65. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, who is challenging an act of a public authority, namely the Judgment, ARJ-UZVP.no.42/2020 of The Supreme Court, of 25 June 2020, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which he alleges to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

66. In this respect, the Court recalls that the Applicant, in his Referral, alleges a violation of his fundamental rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR; Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the ECHR; as well as Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of Property) of Protocol no. 1 of the ECHR, as well as Articles 7, 8 and 10 of the UDHR.

67. On the basis of the foregoing, the Court notes that the Applicant alleges a violation of his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR for (i) due to erroneous interpretation of the law by the regular courts, respectively the Supreme Court and (ii) lack of reasoning of the court decision.

68. However, in the circumstances of the present case, the Court first refers to point (b) of paragraph (3) of Rule 39 of the Rules of

Procedure, according to which the Court may consider a Referral inadmissible if it is incompatible *ratione materiae* with the Constitution.

69. Therefore, in the context of the latter, the assessment of this criterion in the circumstances of the case is important because the proceedings conducted before the regular courts, namely the challenged Judgment of the Supreme Court are relates to the request for postponement of the execution of the Decision of the CBK in the sense of Article 22, paragraphs 2 and 6 of the LAC whilst the statement of claim for annulment of this Decision is in the procedure of review of merits, and consequently falls within the scope of "preliminary proceedings". Consequently, the Court will assess whether Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is applicable in the circumstances of the Applicant's case.

70. In this specific context, the Court notes that the question of the applicability of Article 6 of the ECHR to preliminary proceedings has been interpreted by the ECtHR through its case-law, in accordance with which the Court, pursuant to Article 53 [Interpretation of Provisions for Human Rights] of the Constitution, is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution.

71. The Court also points out that the criteria in respect of the applicability of Article 31 of the Constitution concerning pre-trial procedures are also set out in the cases of this Court, including but not limited to cases KI122/17, Applicant *Česká Exportní Banka AS*, Judgment of 30 April 2018; KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 31 December 2018; KI81/19, Applicant *Skender Podrimqaku*, Resolution on Inadmissibility of 9 November 2019; KI107/19, Applicant *Gafurr Bytyqi*, Resolution on Inadmissibility, of 11 March 2020. The general principles established through these above-mentioned Court decisions are based on the ECtHR case, *Micallef v. Malta*, Judgment of 15 October 2009.

72. Consequently, in order to determine whether the Applicant's Referral is compatible rationae materiae with the Constitution, the Court will first refer to the general principles established through the case law of the ECHR and that of the Court as regards the applicability of procedural guarantees of Article 31 of the Constitution, in conjunction

with Article 6 of the ECHR in the circumstances of the present case, and which relate to the Applicant's request for postponement of the execution of the Decision of the CBK, and then it will apply the same to the circumstances of the present case.

(i) General principles on the applicability of Article 31 of the Constitution and Article 6 of the ECHR to preliminary proceedings

73. The Court first points out that Article 31 of the Constitution and Article 6 of the ECHR, in the civil limb, apply to proceedings determining civil rights or obligations (see, the ECtHR case: *Ringeisen v. Austria*, Judgment of 22 June 1972, and see the case of the Court, KI122/17, Applicant *Česká Exportní Banka AS*, cited above, paragraph 125). In this context, the Court further notes that, in principle, based on the case law of the ECtHR, "preliminary proceedings", like those concerned with the granting of an interim measure/injunctive relief, are not considered to determine "civil rights and obligations" and therefore, in principle, do not fall within the ambit of such protection of Article 6 of the ECHR(see, the ECtHR case *Micallef v. Malta*, cited above, paragraph 75 and references therein, see the case KI122/17, Applicant *Česká Exportní Banka AS*, paragraph 126).

74. However, through Judgment *Micallef v. Malta*, the ECtHR altered and consolidated its previous approach regarding the non-applicability of the procedural guarantees of Article 6 of the ECHR to the "preliminary proceedings."

75. Through this Judgment, the ECtHR assessed as follows:

> *"79. The exclusion of interim measures from the ambit of Article* 6 *has* so*far been justified by the fact that they do not* in *principle determine civil rights and obligations. However, in circumstances where many Contracting States face considerable backlogs in their overburdened justice systems leading to excessively long proceedings, a judge's decision on an injunction will often be tantamount to* a *decision on the merits of the claim for* a *substantial period of time, even permanently* in *exceptional cases. It follows that, frequently interim and main proceedings decide the same civil rights or obligations and have the same resulting long-lasting or permanent effects."* (see, the ECtHR

case: *Micallefv.Malta,* application no. 17056/06, Judgment [GC], 15October 2009, para.79).”

76. Based on this Judgment of the ECtHR, the Court notes that not all injunctive relief/interim measures determine civil rights or obligations and in order for Article 6 of the ECHR to be applicable, the ECtHR determined the criteria on the basis of which the applicability of Article 6 of the ECHR to the “preliminary proceedings” should be assessed (see, the ECtHR case, *Micallef v. Malta*, cited above, paragraphs 83-86).

77. According to the criteria determined in the case *Micallef v. Malta*, which have been accepted also by this Court through case law, firstly, the right at stake should be “civil” in both the main trial and in the injunction proceedings, within the autonomous meaning of this notion under Article 6 of the ECHR (see, in this context, the ECtHR case, *Micallef v. Malta*, cited above, paragraph 84, and references cited therein, as well as see the cases of Court KI122/17, Applicant *Česká Exportní Banka AS*, cited above, paragraph 130; KI81/19, Applicant *Skender Podrimqaku*, cited above, paragraph 47; and KI107/19, Applicant *Gafurr Bytyqi*, cited above, paragraph 53). Secondly, this procedure must effectively determine the relevant civil law (see the ECtHR case, *Micallef v. Malta*, cited above, 85 and references cited therein, as well as the Court cases, KI122/17, Applicant *Česká Exportní Banka AS*, cited above, paragraph 131 and KI81/19, Applicant *Skender Podrimqaku*, cited above, paragraph 48 and KI107/19, Applicant *Gafurr Bytyqi*, cited above, paragraph 53).

78. Consequently, the Court must further assess whether these two criteria are fulfilled in the circumstances of the present case, by consequently enabling the applicability of the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

(ii) Application of the above referred principles to the Applicant's circumstances

79. The Court recalls that the circumstances of the Applicant's case refer to the Decision of the CBK revoking the license [no. 07 - 04/2018] issued to the Applicant, and through which Decision it was decided to revoke his registration of 26 February 2018 as a non-bank financial institution and to initiate the liquidation proceedings against him on the basis of the Law on Banks.

80. The possibility of initiating court proceedings in respect of the Decision of the CBK, as an administrative decision is also determined by the cited laws and rules, respectively the provisions of the LAC that regulate the procedure of administrative conflict. The legal remedies determined by the provisions of the LAC enable the Applicant to challenge the Decision of the CBK regarding the revocation of the license to operate as a financial institution, thus resulting in the existence of a civil right.

81. Consequently, the purpose of the request for postponement of the execution of the Decision of the CBK in the present case is to ensure at least for a certain period of time the same right that is being challenged in the administrative proceedings regarding the merits of the case. In this context, paragraph 6 of Article 22 of the LAC stipulates that *"The plaintiff can claim from the court to postpone the execution of administrative act until the court decision is taken, according to the conditions foreseen by the paragraph 2 of this Article."*

82. Therefore, based on the above, the Court finds that the first criterion for the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the relevant preliminary proceedings is fulfilled.

83. The Court further notes that in the Applicant's circumstances, the request for postponement of the execution of the Decision of the CBK is determinative of this right because it is the only possible mechanism for the Applicant to suspend the prohibition of exercising the activity as a financial institution and the liquidation procedure. Consequently, the Court finds that also the second criterion for the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the relevant preliminary proceedings, is fulfilled.

84. Therefore, the Court finds that in the Applicant's circumstances, on the basis of its case law and that of the ECHR, the criteria for the applicability of the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been fulfiled.

85. Consequently, the Court finds that the Applicant's Referral is compatible *rationae materie* with the Constitution.

86. As regards the fulfillment of other admissibility criteria set out in the Constitution and the Law and elaborated above, the Court finds that the Applicant is an authorized party who ic challenging an act of a

public authority, namely the Judgment ARJ-UZVP.no.42/2020 of the Supreme Court, of 25 June 2020, and has exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms for which he alleges to have been violated, pursuant to the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

87. The Court finds that the Applicant's Referral also meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the conditions established in paragraph (3) of Rule 39 of the Rules of Procedure.

Merits of the Referral

88. The Court initially recalls that the subject matter of the Referral are the preliminary proceedings, initiated by the Applicant in the Basic Court based on Article 22, paragraphs 2 and 6 of the LAC, in which procedure was requested the postponement of the execution of the Decision of the CBK pending the review of his statement of claim for the annulment of the said decision.

89. The Court recalls that the Applicant was registered as a non-bank financial institution for lending by the license of the CBK. As a result of the Decision of the CBK [No.77-32/ 2019], on 6 December 2019, the Applicant's license was revoked on the grounds that the Applicant had applied effective interest rates on loans significantly higher than the effective rate presented in the business plan submitted to the CBK. Against the Decision of the CBK, the Applicant had filed a claim in the administrative proceedings for the annulment of the decision and at the same time based on paragraphs 2 and 6 of Article 22 of the LAC he had submitted a request for postponement of the execution of the Decision of the CBK. The Basic Court had rejected his request for postponement of the execution of the Decision by having applied the criteria of paragraphs 2 and 6 of Article 22 of the LAC, on which occasion it found that the Applicant had not proved that (i) the execution of the Decision pending the decision on the merits of the case before the courts would bring great and irreparable damage to him and that (ii) the postponement of the execution of the Decision would not be contrary to the public interest. As a result of his appeal against the second Decision A.no. 3029/2019 of the Basic Court, of 3 February 2020, the Court of Appeals had confirmed the finding of the Basic Court in respect of the non-fulfilment of the criteria of Article 22 of the LAC for the postponement of the execution of the Decision of

the CBK, and having applied Article 76 of the Law on the CBK rejected the Applicant's appeal as ungrounded. Finally, following the Applicant's request for extraordinary review of the court decision, namely the Decision of the Court of Appeals, filed with the Supreme Court, the latter rejected his request as ungrounded and confirmed the finding of the Court of Appeals.

90. The Applicant challenges the findings of the Supreme Court by alleging a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the ECHR; as well as Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 (Protection of Property) of Protocol no. 1 of the ECHR, as well as Articles 7, 8 and 10 of the UDHR.

I. In relation to the allegation for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

91. The Court initially recalls that the Applicant alleges a violation of his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of (i) "erroneous application of the law" and (ii) non-reasoning of the court decision. In the context of his allegation of "erroneous application of the law", the Applicant specifies that the Supreme Court has erroneously applied Article 76 of the Law on the CBK, arguing that this provision is not applicable in the present case.

92. In this respect, the Court first notes that the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and its application has been widely interpreted by the ECtHR through its case law.

93. Consequently, as regards the interpretation of the allegations for violation of the right to a fair and impartial trial as a result of the "manifestly erroneous application and interpretation of the law" and the failure to reason the judgment, the Court will refer to the case-law of the ECHR. To this end, the Court will first (i) elaborate on the general principles regarding the "*manifestly erroneous application and interpretation of the law"* through the aforementioned articles of the Constitution and the ECHR; and thereafter, (ii) will apply the same to the circumstances of the present case, before proceeding with the review and elaboration of his claim for non-reasoning of the court decision.

(i) General principles regarding the manifestly erroneous or arbitrary application of the law

94. The Court notes that with respect to the interpretation of the allegations for violation of the right to a fair and impartial trial as a result of *"manifestly erroneous interpretation and application of the law"*, it will refer to its case-law and that of the ECtHR.

95. In connection to the allegations in the present case, the Court first notes that, as a general rule, the allegations for erronesous interpretation of the law allegedly made by the regular courts relate to the field of legality and, as such, are not within the jurisdiction of the Court, and therefore, in principle, the Court cannot consider them. (see, the cases of the Court: KI06/17, Applicant *LG and five others*, Resolution on Inadmissibility, of 25 October 2016, paragraph 36; KI122/16, Applicant *Riza Dembogaj*, Judgment of 30 May 2018, paragraph 56; KI75/17, Applicant *X*, Resolution on Inadmissibility, of 6 December 2017; KI154/17 and KI05/18, Applicants, *Basri Deva, Afërdita Deva and the Limited Liability Company "Barbas"*, Resolution on Inadmissibility of 28 August 2019, paragraph 60; KI119/19, Applicant: *Privatization Agency of Kosovo (PAK)* Resolution on Inadmissibility of 2 September 2020, paragraph 58).

96. The Court, however, emphasizes that the case-law of the ECtHR and of the Court also provide for the circumstances under which exceptions from this position can be made. The ECtHR has reiterated that while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of legislation, the role ofthe Court is to verify whether the effects of such interpretation are compatible with the Convention (see the case of the ECtHR, *Miragall Escolano and Others v. Spain*, Judgment of 25 May 2000, paragraphs 33-39; as well as see the case of Court KI119/19, Applicant: Privatization Agency of Kosovo (PAK) Resolution on Inadmissibility of 2 September 2020, paragraph 61). Consequently, the Court has emphasized that it is primarily the role of the regular courts to deal with the issue of interpretation of the law, whilst the role of the Constitutional Court is to verify whether the consequences of such an interpretation are in accordance with the Constitution (see the case cited above KI75/17, Applicant *X*, paragraph 58).

97. In this sense, the Court pursuant to the case law of the ECtHR has emphasized that even though the role of the Court is limited in terms of assessing the interpretation of law, it must ensure and take measures when it observes that a court has "applied the law manifestly erroneously" in a particular case or so as to reach *"arbitrary*

conclusions" or *"manifestly unreasonable"* for the Applicant concerned (see the cases of the ECtHR, *Anheuser-Busch Inc.*, Judgment, paragraph 83, *Kuznetsov and Others v. Russia*, no. 184/02, paragraphs 70-74 and 84; *Păduraru v. Romania*, no. 63252/00, paragraph 98; *Sovtransavto Holding v. Ukraine*, no. 48553/99, no. 79, 97 amd 98; *Beyeler v. Italy* [GC], application no. 33202/96, paragraph 108; *Koshoglu v. Bulgaria*, Judgment of 10 May 2007, paragraph 50; see also the above-mentioned case KI122/16, Applicant *Riza Dembogaj*, paragraph 57; cases KI154/17 and 05/18, Applicants, *Basri Deva, Afërdita Deva and the Limited Liability Company "BARBAS"*, paragraphs 60 to 65; as well as case KI121/19, Applicant *Ipko Telecomunications*, Resolution on Inadmissibility of 29 July 2020, paragraph 58, and the references used therein).

98. Further, the ECtHR in its case law in the context of Article 6 of the ECHR, namely in the case *Barać and Others v. Montenegro* found a violation because the decision on the right to compensation for the Applicant in this case was issued by the courts based on in the law which was no longer in force, and which had been previously declared unconstitutional (see the case of the ECtHR *Barać and Others v. Montenegro*, no. 47974/06, Judgment of 13 December 2011, paragraphs 30 to 34). On the other hand, in the case *Anđelković v. Serbia*, the ECHR found a violation because, given that legislation on the employment right had clearly determined the cases in which an employee is entitled to claim compensation in the name of holiday pay, the court of the second instance had arbitrarily modified the decision of the first instance court and denied this right of the Applicant, by a reasoning without any legal basis (see, the ECtHR case, *Anđelković v. Serbia*, no. 1401/08, Judgment of 9 April 2013, paragraphs 24-29, and references therein).

(ii) Application of these principles to the Applicant's circumstances

99. In applying the principles established by the ECtHR and accepted by the Court through its case law with respect to the manifestly erroneous application or interpretation of the law, the Court first recalls that the Applicant alleges that the Court of Appeals and the Supreme Court have applied Article 76 [Immunity from prejudgment attachment] of the Law on the CBK in an erroneous manner, thus resulting in a violation of his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

100. The Applicant specifically alleges that the Supreme Court has dealt with the request for postponement of the execution of the decision as

defined by paragraph 6 of Article 22 of the LAC and the "Immunity from prejudgment attachment" defined in Article 76 of the Law on CBK as being the same or replaceable. Subsequently, the Applicant emphasizes that the "attachments" are attributed to the provisions of the LCP, whilst the "executions" are attributed to the provisions of the LEP and consequently, also the Supreme Court has reached an erroneous finding regarding the subject matter addressed to it.

101. In this respect, the Court again recalls the procedure conducted before the regular courts, which preliminary procedure was initiated at the request of the Applicant to postpone the execution of the Decision of the CBK, as an administrative decision based on Article 22 of the LAC.

102. In this context, the Court considers that the basis for reviewing the request for postponement of the execution of the Decision of the CBK, in the Basic Court was Article 22 of the LAC, paragraphs 2 and 6, a provision which determines the criteria to be met in in order for the court to allow the postponement of the execution of an administrative decision, as is the case with the CBK Decision.

103. Subsequently and in this contexts, paragraphs 2 and 6 of Article 22 of the LAC stipulate that:

> *[...]*
> *1. By the plaintiff request, the body whose act is being executed, respectively the competent body for execution can postpone the execution until the final legal decision, if the execution shall damage the plaintiff, whereas postponing is not in contradiction with public interest and postponing would not bring any huge damage to the contested party, respectively the interested person.*
> *[...]*
>
> *6. The plaintiff can claim from the court to postpone the execution of administrative act until the court decision is taken, according to the conditions foreseen by the paragraph 2 of this Article.*

104. In the present case, the Basic Court by its second Decision A.no. 3029/2019, of 3 February 2020, by referring to Article 22, paragraphs 2 and 6 of the LAC in the retrial procedure reasoned that the Applicant has not made credible with the evidence contained in the case file, that the Decision of the CBK: (i) will cause damage to him which would be difficult to repair and that (ii) the postponement is not in the public interest or that the postponement would not cause any harm to the opposing party.

105. The Court further recalls that the Court of Appeals, by Judgment AA.No. 164/2020 rejected the Applicant's appeal as ungrounded and confirmed the Decision of the Basic Court. In this case, the Court of Appeals specified that the Basic Court based its finding on the rejection of the request for postponement of the CBK Decision on the non-fulfillment of the criteria established in paragraph 2 of Article 22 of the LAC. Further, the Court of Appeals, in its Decision refers to Article 76 of the Law on CBK, finding that the Applicant's appeal is ungrounded *"All this because the Law no. 03/L-209 on Central Bank of the Republic of Kosovo has determined immunity to the imposition of an interim court measure on the respondent because Article 76 of the same law stipulates that "1. No attachment or execution shall be issued against the Central Bank or its property, including gold, special drawing rights, currency, credits, deposits or securities, and any proceeds thereof, before the issuance of a final judgment in any legal action brought before the courts of Kosovo. 2. The Central Bank may, in whole or in part, waive this protection, explicitly and in writing, except with respect to its gold and the Special Drawing Rights held in the account of Kosovo in the International Monetary Fund."* Consequently, the Court of Appeals concluded that "*Therefore, based on the aforementioned provision in the court proceedings against the respondent [Central Bank], no interim measures can be imposed in relation to the activity mentioned in the above provision".*

106. In the context of the reasoning of the Court of Appeals, the Court recalls the conclusion provided in this Decision, whereby it was concluded that the Basic Court has correctly applied the procedural and substantive provisions when rejecting the Referral, and further added that *"[...]to support this legal position of the first instance, this factual situation is also based on Article 76 of the Law No. 03/L-209 on Central Bank of the Republic of Kosovo, and that the law has not been infringed to the detriment of the claimant on the occasion of rejection of the proposal for postponement of the execution of the challenged decision."*

107. The Court further recalls that the Applicant in his request for review of the court decision submitted to the Supreme Court, among other things, had raised also the issue of application of Article 76 of the Law on CBK by the Court of Appeals in its ruling. In this context, the Applicant specified that the Court of Appeals has erroneously applied Article 76 of the Law on CBK stating that *"Such an interpretation of this provision is completely erroneous and does not comply neither with the spirit of the Law on CBK as a whole, nor with the content of the provision in question in particular"* by further reading this

provision *"*[...] *attachments and executions in question cannot be issued against the CBK and its assets, whilst in the present case the request for postponement of the execution of the decision is proposed to be issued against the liquidation process of Monego, namaley this process to be suspended pending a final decision."* In this respect, the Applicant further specified that by the Decision of the Court of Appeals the subject matter of the case has been confused, namely according to him *"Article 76 of the Law on CBK is considered in cases when against the Republic of Kosovo or the CBK- exist claims by third parties and an interim measure is proposed to be imposed on the assets of the latter".*

108. In the following. the Court also refers to the challenged Judgment of the Supreme Court, whereby the latter had applied Article 22, paragraphs 2 and 6 of the LAC and having referred to Article 76 of the Law on CBK had confirmed that:

> *"[...] the court of the second instance has acted correctly when rejecting as ungrounded the claimant's appeal and confirming the decision of the first instance whereby the claimant's proposal was rejected. This Court assesses that the court of the second instance has fully and correctly applied the provisions of the Law, the provisions of the administrative procedure, and those of the Law on Administrative Conflicts."*

109. On the basis of the above, the Court notes that Article 22 of the LAC respectively paragraphs 2 and 6, were the basis for the review and decision-making of the Basic Court. The provisions of Article 22 of the LAC, respectively paragraphs 2 and 6, were also implemented through decisions of the Court of Appeals and the Supreme Court. Consequently, the Court of Appeals and finally the Supreme Court, respectively, had confirmed the findings of the Basic Court regarding the interpretation and application of Article 22 of the LAC in the preliminary procedure in the Applicant's case.

110. The Court reiterates that in cases of issuing administrative decisions under Article 22 of the LAC, the parties may file a request for postponement of the execution of the decision by fulfiling the criteria established in paragraphs 2 and 6. Based on these provisions, the burden of proof in these cases falls on the party which is requesting the postponement of the execution of the decision. Consequently, and in the present case, the Applicant should have fulfiled the conditions cumulatively in order for such a request to be approved.

111. The Court recalls that the Applicant, in essence, alleges erroneous application of Article 76 of the Law on the CBK, due to (i) the content of this Article and (ii) the entity to which it is addressed. Regarding the first, the Applicant states that the "attachments" and "executions" apply to interim measures according to the contested procedure, and the executions refer to the enforcement procedure, while as regards the second, states that Article 76 of the Law on CBK refers to the CBK, and not to the Applicant.

112. The Court also recalls the comments of the CBK, which states that the Applicant is requesting "*to postpone the execution of Decision No.77-32/2019of the CBK, of 06.12.2019, on Revokation of the registration of the Non-Bank Financial Institution "Monego" L.L.C. until a court decision is made*". Consequently, according to the CBK, based on Article 76 of the Law on the CBK, no interim measures can be issued against it in court proceedings. Further, the CBK, in its comments also refers to Article 77, paragraph 4 of the Law on the CBK, emphasizing that "*Furthermore, given the importance of maintaining financial stability in the country, Article 77 (4) of Law No.03/L-209 on CBK, has itself provided that "in any court or arbitration proceedings against the Central Bank, the court or arbitration panel shall not stay, suspend, suspend or set aside the actions of the Central Bank".*

113. However, based on the above elaboration, the Court considers that the primary issue, in this case, is the finding of the regular courts whether the Applicant has fulfiled the criteria established in paragraphs 2 and 6 of Article 22 of the LAC in order for the courts to decide on the postponement of the execution of the Decision of the CBK. Therefore, with respect to the Applicant's allegation regarding Article 76 of the Law on CBK, the Court considers that the fact that the Court of Appeals and the Supreme Court in this preliminary procedure in addition to the application of Article 22 of the LAC have referred also to Article 76 of the Law on the CBK, only the reference to Article 76 of the CBK has not resulted in arbitrary conclusions.

114. Consequently, the Court reiterates that the decision and the finding of the regular courts to reject the postponement of the execution of the Decision of the CBK was based primarily on the assessment of the criteria of Article 22 of the LAC, and consequently the reference to Article 76 of the Law on CBK by the Court of Appeals, did not prevent this court and later the Supreme Court to find that the criteria set out in Article 22 of the LAC for postponing the execution of the Decision have not been fulfiled.

115. Finally, based on the above elaboration and by applying the principles of the case law of the Court and of the ECtHR in respect of the manifestly erroneous interpretation and application of the law, the Court considers that the interpretation and application of the relevant legal provisions stipulated in the LAC in this case, and the reference as support to Article 76 of the Law on CBK, could have not resulted in "arbitrary conclusions" or "manifestly unreasonable" for the Applicant. This for the reason that because the Court considers that the findings and conclusions of the regular courts in this preliminary procedure and which specifically refer to the Applicant's request for postponement of the execution of the Decision of the CBK are based primarily upon their assessment on the fulfillment of the criteria provided in Article 22, paragraphs 2 and 6 of the LAC.

116. In light of the foregoing, the Court considers that there has not been proved that there is arbitrariness in the interpretation provided by the regular courts in this preliminary procedure, including also the Supreme Court when rejecting the Applicant's request for review of the court decision.

117. Consequently, the Court finds that Judgment ARJ-UZVP.no.42/2020 of the Supreme Court, of 25 June 2020, concerning the interpretation and application of the law, does not constitute a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

118. In the following, the Court will consider the Applicant's allegations about non-reasoning of the court decision.

In relation to the allegation for non-reasoning of the court decision

119. The Court recalls that the Applicant in his Referral alleges a lack of reasoning in the Judgment of the Supreme Court, specifying that the latter did not answer to his specific allegations concerning the application of Article 76 of the Law on CBK.Therefore, during the examination and elaboration of this claim, the Court will first elaborate on the general principles in respect of the right to reasoned court decision, before moving to the application of these principles to the circumstances of the concrete case.

(i) General principles regarding the reasoning of court decisions

120. With respect to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case law. This case law is build based on the case law of the ECtHR (including

but not limited to the cases of *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. Moreover, the basic principles concerning the right to a reasoned court decision have been elaborated also in the cases of this Court, including but not limited to KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019, KI35/18, Applicant *Bayerische Versicherungsverbrand*, Judgment, 11 December 2019; as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 135).

121. In principle, the Court notes that the guarantees embodied in Article 6 of the ECHR include the obligation of the courts to provide sufficient reasons for their decisions (see, the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53, as well as see the case of Court KI230/19, Applicant *Albert Rakipi*, cited above, paragraph 139 and case KI87/18, Applicant *IF Skadiforsikring*, paragraph 44).

122. The Court also notes that based on its case law when assessing the principle which refers to the proper administration of justice, court decisions must contain the reasons on which they are based. The extent to which the duty to give reasons applies may vary depending on the nature of the decision and must be determined in the light of the circumstances of the particular case. It is the essential arguments of the Applicants that need to be addressed and the reasons given must be based on the applicable law (see, analogically, the cases of the ECtHR *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, Judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42; see also the case of Court KI97/16, Applicant IKK Classic, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). By not requiring a detailed response to each complaint raised by the Applicant, this duty implies that the parties to the proceedings may expect to receive a specific and explicit response to their allegations that are crucial to the

outcome of the proceedings conducted (see, the case *Morerira Ferreira v. Portugal*, Judgment of 5 July 2011 paragraph 84 and all references used therein, as well as the case of Court KI230/19, Applicant Albert Rakipi, Judgment of 9 December 2020, paragraph 137).

123. In addition, the Court refers to its case-law where it is established that the reasoning of the decision must state the relationship between the merit findings and the examination of evidence on the one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic*, Judgment of 8 December 2017; see the cases of Court KI87/18 Applicant *"IF Skadeforsikring"*, Judgment of 27 February 2019, paragraph 44; KI138/19 Applicant *Ibish Raci*, cited above, paragraph 45, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 138).

(ii) Application of these principles to the circumstances of the present case

124. The Court initially recalls that the Applicant in his request for extraordinary review of the court decision, filed with the Supreme Court, argued that (i) the substantive law had been erroneously applied; (ii) the execution of the CBK Decision would cause great and irreparable damage to him; and that (iii) postponing the execution of the CBK Decision is not contrary to the public interest. With respect to his allegation for erroneous application of substantive law, namely Article 76 of the Law on CBK, the Court recalls that the Applicant has specified before the Supreme Court that *"Such an interpretation of this provision is completely erroneous and does not comply neither with the spirit of the Law on CBK as a whole, nor with the content of the provision in question in particular"* by further reading this provision *"*[...] *attachments and executions in question cannot be issued against the CBK and its assets, whilst in the present case the request for postponement of the execution of the decision is proposed to be issued against the liquidation process of Monego, namaley this process to be suspended pending a final decision"*.

125. Whereas in his Referral before the Court, the Applicant alleges a violation of his right to the reasoning of a court decision, a right

guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, specifying that the Supreme Court did not answer to the Applicant's arguments, namely the Supreme Court did not answer to his allegation for the application of substantive law, namely the application of Article 76 of the Law on CBK. In the context of non-reasoning of the court decision, the Applicant also refers to Article 63 of the LAC which stipulates that if this law does not contain provisions for the procedure in administrative conflicts, the provisions of the law on contested procedure will be applied accordingly, and in this case the Supreme Court should have applied Article 160 of the LCP in respect of the elements that should be contained in the Judgment.

126. The Court, having referred also to its case law and that of the ECHR, and based on the circumstances and the reasoning of the regular courts given through their decisions in the Applicant's case, considers that the following criteria are to be applied and assessed whether the Supreme Court by its Judgment has violated his right to a reasoned court decision, respectively whether (i) the Applicant has raised his allegation for erroneous application of Article 76 of the Law on CBK before the Supreme Court; and (ii) whether his claim was decisive and determinant for the outcome of the case. In the context of these two criteria, the Court will also assess whether the approval of his claim raised before the Supreme Court would change the outcome of the case.

127. In this respect, as regards the first criterion, the Court reiterates that the Applicant before the Supreme Court, namely in his request for extraordinary review of the court decision, had raised the issue of erroneous application of Article 76 of the Law on CBK, and throughout his allegations, he had also alleged the issue of the applicability of the conditions established in Article 22 paragraphs 2 and 6 of the LAC, respectively on issues that (i) the execution of the decision of the CBK would bring damage to him that would be difficult to repair; (ii) the postponement of the execution is not contrary to the public interest and that (iii) the postponement of the execution would not be to the detriment of the opposing party.

128. As regards the second criterion, namely whether the allegation raised by the Applicant was decisive and determinant, the Court initially reiterates that the preliminary procedure in the Applicant's case was initiated through Article 22, paragraphs 2 and 6 of the LAC, and consequently, the basis for the review and assessment of his request by the regular courts was the fulfillment of the criteria set out in the above provisions of the LAC.

129. Given that the proceedings were initiated pursuant to Article 22 of the LAC, as the main legal basis for determining the conditions for postponing the execution of decisions, in the present case, the Court notes that the Court of Appeals had also found that the Applicant did not meet the criteria set out in paragraph 2 of Article 22 of the LAC.

130. The Court recalls that as regards the Article 22 paragraph 2 and 6 of the LAC, the Court of Appeals by Decision AA.No.164/2020, of 26 February 2020, the Basic Court has found that the Applicant's proposal for the postponement of the execution of the decision is ungrounded because the Applicant has not made credible with any evidence his allegation and concluded that the Basic Court "*has correctly determined the factual situation by having correctly applied the procedural and substantive provisions, when rejecting the claimant's request",* and moreover to support the legal stance of the Basic Cout, the Court of Appeals had stated that the factual situation is based also upon Article 76 of the Law on CBK.

131. In this regard, the Court first recalls that the Court of Appeals in Decision AA.UZH.no.164 / 2020, of 26 February 2020 had also referred to Article 76 of the Law on CBK, and stated "*although it lacked the reasoning and concrete substantive legal provisions mentioned above, this did not have a bearing so as to have a different decision rendered in this case".*

132. In this connection, the Court recalls Article 76 (Immunity from prejudgment attachment) of the Law on CBK which stipulates:

> *1. No attachment or execution shall be issued against the Central Bank or its property, including gold, special drawing rights, currency, credits, deposits or securities, and any proceeds thereof, before the issuance of a final judgment in any legal action brought before the courts of Kosovo.*
>
> *2. The Central Bank may, in whole or in part, waive this protection, explicitly and in writing, except with respect to its gold and the Special Drawing Rights held in the account of Kosovo in the International Monetary Fund."*

133. In this respect, the Court recalls that the Supreme Court in its Judgment, by initially referring to paragraphs 2 and 6 of Article 22 of the LAC, stated that "*this provision stipulates that the postponement can be made at the request of the claimant, the body , whose act is being executed, respectively the competent body for execution can postpone the execution pending the final legal decision, if the*

execution of the administrative act would cause damage the claimant, which would be difficult to be repaired, and the postponement is not in contradiction with the public interest nor the postponement would bring any da,age to the opposing party respectively to the interested person. Whereas by the provision of Article 22.6 of the same law it is stipulated that the claimant can claim from the court the postponement of the execution of the administrative act until the court decision is taken, according to the conditions foreseen by Article 22 para.2 of the LAC."

134. In relation to the application of Article 76 of the CBK, the Supreme Court had stated that *"In addition, Article 76 of Law No.03/L-209 on Central Bank determines immunity against the issuance of interim court measures, namely no attachment of execution can be issued against the Central Bank or its property."*

135. Consequently, the Court considers that the Applicant's allegation, raised in the Supreme Court, and referring to the erroneous application of Article 76 of the Law on CBK, was not decisive and determinant for the outcome of his request for extraordinary review of judicial decision (see, the Judgment of the ECtHR, *Ruiz Torija v. Spain*, no. 18390/91, Judgment of 9 December 1994, paragraph 30).

136. Finally, as to whether the addressing of the Applicant's allegation would change the outcome of the case, the Court notes that the Court of Appeals in its Decision had initially addedd, namely in its reasoning for rejecting his request for postponing the execution of the decision had relied also on the provision of Article 76 of the Law on CBK. Whereas, the Applicant in his request for extraordinary review had alleged erroneous application of the substantive law, as a result of the application of Article 76 of the Law on CBK, at the same time had asserted that in his case the criteria under paragraph 2 of article 22 of the LAC had been fulfiled.

137. In the context of the latter, the Court recalls that the Supreme Court found that *"[...] the court of the second instance has acted correctly when rejecting as ungrounded the claimant's appeal and confirming the decision of the first instance whereby the claimant's proposal was rejected. This Court assesses that the court of the second instance has fully and correctly applied the provisions of the Law, the provisions of the administrative procedure, and those of the Law on Administrative Conflicts. The claimant's statements regarding the violations are ungrounded because the challenged decision is clear and comprehensible. The reasoning of the challenged decision*

contains sufficient reasons and decisive facts on rendering lawful decisions. This Court also considers that the substantive law has been correctly applied and the law has not been violated to the detriment of the claimant."

138. Finally, and referring to the Applicant's allegation for erroneous application of the substantive law, the Supreme Court concluded that: *"This Court also considers that the substantive law has been correctly applied and the law has not been violated to the detriment of the claimant."*

139. The Court considers that in cases where the regular courts give their reasoning in a case, the extent to which this duty to give reasons applies may vary depending on the nature of the decision (see the case of the ECtHR, *Ruiz Torija v. Spain*, no. 18390/91, Judgment of 9 December 1994, paragraph 29).

140. Consequently, based on the foregoing, and based on the circumstances of the present case, the Court considers that the examination or approval of the Applicant's allegation for erroneous application of Article 76 of the Law on CBK as grounded will not to change the outcome in his case (see, *mutatis mutandis*, the case of the ECtHR, *Ankerl v. Switzerland*, no. 17748/91, Judgment of 23 October 1996, paragraph 38). This is due to the fact that as elaborated above, the subject matter of review of the Applicant's request in the preliminary proceedings before the regular courts was the postponement of the execution of the Decision of the CBK and assessment by the latter whether the criteria set out in paragraph Article 22 of the LAC have been fulfiled.

141. Moreover, the Court also recalls that in cases where a court of the third instance, such as in the Applicant's case, the Supreme Court, confirms the decisions taken by the lower courts - its obligation to reason the decision making differs from cases where a court modifies the decision-making of lower courts. In the present case, the Supreme Court did not modify the decision of the Court of Appeals nor that of the Basic Court whereby the request for postponement of the execution of the Decision of the CBK was rejected but had only confirmed their legality, given that, according to the Court Supreme, there were no essential violations of the administrative procedure and erroneous application of the substantive law in this preliminary procedure (see, analogically, the cases of Court KI194/18, Applicant Kadri *Muriqi and Zenun Muriqi*, Resolution on Inadmissibility of 5 February 2020 , paragraph 106; and KI122/19, Applicant *FM*, Resolution on Inadmissibility, of 9 July 2020, paragraph 100).

142. In view of what is stated above, the Court considers that in the present case, the Applicant has been given procedural opportunities to address his allegations and that in essence, the Applicant has received a response to his substantive allegations in the request for extraordinary review of the court decision in the Supreme Court.

143. Therefore, on the basis of the above, the Court finds that Judgment ARJ-UZVP.no. 42/2020 of the Supreme Court of 25 June 2020 in relation to the right to a reasoned court decision does not constitute a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

144. Consequently, in the following, the Court will consider the Applicant's allegations for violation of Article 32 of the Constitution, in conjunction with Article 13 of the ECHR and Article 46 of the Constitution, in conjunction with Article 1 of Protocol No. 1. of the ECHR.

II. In relation to the allegations concerning the violation of Article 32 of the Constitution, Article 54 of the Constitution, in conjunction with Article 13 of the ECHR; and Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR, as well as Articles 7, 8 and 10 of the UDHR

145. The Court first recalls that the Applicant alleges a violation of Article 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 13 (Right to an effective remedy) of the ECHR specifying that the legal remedy in his case is ineffective due to the failure to have the merits of the case addressed, even though the applicable legislation has provided for the request to postpone the execution of the decision as a remedy accessible by law.

146. Secondly, the Court recalls that the Applicant also alleges that his rights guaranteed by Article 46 [Protection of Property] of the Constitution, in conjunction with Article 1 (Protection of Property) of Protocol No. 1 of the ECHR, have been violated, arguing that being equipped with a license constitutes an asset in the sense of possession, and consequently alleges that in his case there has been an interference with his property rights as a consequence of erroneous interpretation of Article 76 of the Law on CBK. In addition, the Applicant alleges a violation of Articles 7, 8 and 10 of the UDHR.

147. On the basis of the foregoing, the Court notes that the Applicant relates his above allegations in respect of Article 32 of the Constitution, in

conjunction with Article 13 of the ECHR and Article 46 of the Constitution, and in conjunction with Article 1 of Protocol No.1 of the ECHR to the allegation for erroneous interpretation and application of the law, namely the application of Article 76 of the Law on CBK by the Court of Appeals and the Supreme Court, which allegation the Court upon its review and elaboration has found that the challenged Judgment of the Supreme Court, has not been issued in violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

148. Consequently, the Court, based on its findings regarding the relating to violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, will not proceed with the examination and assessment of the Applicant's allegations with repsect to Articles 32 and 45 of the Constitution, in conjunction with Article 13 of the ECHR and Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR, as well as Articles 7, 8 and 10 of the UDHR and as such declares them inadmissible as established in paragraph (2) of Rule 39 of the Rules of Procedure.

Conclusion

149. In conclusion, the Court finds that the Applicant's Referral is admissible and that:

I. As regards the allegation for a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR due to (i) erroneous application of the law and (ii) lack of reasoning of the court decision, the Court finds that the challenged Judgment ARJ-UZVP.no.42/2020 of the Supreme Court, of 25 June 2020, does not constitute a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. Whereas, as regards:

II. The alleged violations of Articles 32 and 54 of the Constitution, in conjunction with Article 13 of the ECHR and Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 of the ECHR, and Articles 7, 8 and 10 of the UDHR, the Court finds that they are inadmissible as established in paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the sesion held on 29 March 2021, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that the Judgment, ARJ-UZVP.no.42/2020 of the Supreme Court , of 25 June 2020, is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights

III. TO NOTIFY this Decision to the Parties;

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

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KI20/21 Applicant: Violeta Todorović, Constitutional review of Decision No. AC-I-16-0122 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters of 1 October 2020

KI20/21 – Judgment of 13 April 2021, published on 30 April 2021
Keywords: *Individual referral, admissible referral, right to appeal, access to justice*

The Applicant had been employed in the SOE "Yumco" since 1990. As the latter was privatized, the PAK published in the media the final list of employees with legitimate rights in SOE "Yumco" in which list, the Applicant was not included. Therefore, the Applicant filed a complaint with the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters (SCSC) regarding the final list of employees of SOE "Yumco" requesting that her name be included in the list of employees entitled to payment of 20% of revenues. On 24 May 2016, the Specialized Panel of the SCSC by Judgment [C-II-13-0444] rejected the Applicant's appeal as ungrounded, On 15 June 2016, against the above-mentioned Judgment of the Specialized Panel, the Applicant filed an appeal with the Appellate Panel, alleging that she was part of the S.O.E. "Yumco" even after 1997. On 4 October 2019, the Appellate Panel, by Judgment [Ac-I-16-0122], dismissed the Applicant's appeal as out of time, stating that the Judgment [C-II-13-0444] of 24 May 2016, of the Specialized Panel was served on the Applicant on 3 March 2016 and according to the legal remedy of the same Decision, it is provided that an appeal can be filed within 21 days. However, the complaint was filed on 15 June 2016, indicating that it was filed out of the legal deadline established by law.

On 21 October 2019, the Applicant filed a request with the Appellate Panel to rectify the clear technical error of Judgment [Ac-I-16-0122] of the Appellate Panel of 4 October 2019, alleging that Judgment [C -II-13-0444] of the Specialized Panel, of 24 May 2016 was served on her on 3 June 2016, while the appeal against this Judgment was filed with the Appellate Panel on 15 June 2016, within a period of 21 days. On 1 October 2020, the Appellate Panel by Decision [Ac-I-16-0122], dismissed the Applicant's request as inadmissible, adding that the Judgment [AC-I-16- 0122] of the Appellate Panel of 4 October 2019, is final, although it concluded that the Applicant's statements that the Judgment of the Specialized Panel was served on the Applicant on 3 March 2016, were correct.

The Applicant alleged that the challenged decision violated her fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54

[Judicial Protection of Rights] of the Constitution and Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the ECHR.

The Court initially examined the Applicant's allegations concerning the right of "access to court", as one of the principles of a fair trial in accordance with Article 31 of the Constitution and Article 6 of the ECHR.

After having addressed the Applicant's allegations, the Court found that in Decision [No. AC-I-16-0122] of 1 October 2020, the Appellate Panel despite the fact that it found that the Applicant's allegations were correct, and consequently that her complaint was filed according to the deadlines set out in Article 10, paragraph 6 of the Law No. 04/L-033, the latter rejected the Applicant's request for correction of the error of the Appellate Panel by the Judgment of 4 October 2019, considering her request as a request for reconsideration of the court decision.

Therefore, the decisions of the Appellate Panel resulted in the impossibility that the Applicant's appeal against the Judgment of the Specialized Panel be considered on merits. In this way, the Appellate Panel limited to the Applicant the access to the court, as one of main principles of a fair trial. Therefore, the Court finds that there has been a violation of Article 31.1 of the Constitution, in conjunction with Article 6.1 of the ECHR.

JUDGMENT

in

Case No. KI20/21

Applicant

Violeta Todorović

Constitutional review of Decision No. AC-I-16-0122 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters of 1 October 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral is submitted by Violeta Todorović, from Graçanica, who is represented by Vlastimir Petrović, a lawyer from Graçanica (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision [No. AC-I-16-0122] of 1 October 2020 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) in conjunction with the Judgment [No. AC-I-16-0122] of 4 October 2019 of the Appellate Panel.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which allegedly violates the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 26 January 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 1 February 2021, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi, (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

7. On 2 February 2021, the Court notified the Applicant and the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC) about the registration of the Referral.

8. On 23 February 2021, the Court notified the PAK about the registration of the Referral and notified the latter that it may submit comments, if any, regarding the Applicant's Referral.

9. On 23 February 2021, the Court requested from the SCSC the complete case file.

10. On 1 March 2021, the Court received the full case file from the SCSC.

11. On 13 April 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

12. On the same date, the Court voted, unanimously, that the Referral is admissible and that: *i)* there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the European Convention on Human Rights; *ii)* declared invalid, in relation to the Applicant, the Decision [No. AC-I-16-0122] of 1 October 2020 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, and Judgment [No. AC-I-16-0122] of 4 October 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo; and *iii)* remanded the Decision [No. AC-I-16-0122] of 1 October 2020 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, and Judgment [No. AC-I-16-0122] of 4 October 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, for reconsideration in accordance with the Judgment of this Court.

Summary of facts

13. From the facts of the case it results that the Applicant from 1990, was employed in the socially owned enterprise "Yumco" in Fushë-Kosovë (hereinafter: SOE "Yumco").

14. On 16 November 2006, S.O.E. "Yumco" was privatized.

15. On 7, 8 and 9 November 2013, the Privatization Agency of Kosovo (hereinafter: PAK) published in the media the final list of employees with legitimate rights in S.O.E. "Yumco". The Applicant was not included in this list.

16. On 29 November 2013, the Applicant filed a complaint with the SCSC regarding the final list of employees of S.O.E. "Yumco", requesting that its name be included in the list of employees entitled to payment of 20% of income from S.O.E. "Yumco".

17. On 24 May 2016, the Specialized Panel of the SCSC (hereinafter: the Specialized Panel) by Judgment [C-II-13-0444] rejected the Applicant's appeal as ungrounded, as it concluded that she was

employed in S.O.E. "Yumco" from 1 September 1990 until 1 November 1997, when the employment relationship with S.O.E. "Yumco" was terminated by Decision [M.202] of 1 November 1997. Therefore, the Specialized Panel reasoned that since the complainant had not submitted the booklet, the Specialized Panel was not able to fully determination of the factual situation, namely, whether the complainant was employed in S.O.E. "Yumco" after 1997.

18. On 15 June 2016, against the above-mentioned Judgment of the Specialized Panel, the Applicant filed an appeal with the Appellate Panel, alleging violation of the contested procedure, erroneous determination of the factual situation and violation of the substantive law. The Applicant alleged that she was part of the S.O.E. "Yumco" even after 1997, emphasizing that on 16 August 1998, based on the change of status, was registered in the register of *"HK KP Yumco Vranje",* under number [M. 18022], but despite the statutory changes made with the merger of the enterprises, the complainant continued to work in the same working place, in the same sewing machine on the premises of the "Yumco" factory building in Fushë Kosovë.

19. On 4 October 2019, the Appellate Panel, by Judgment [Ac-I-16-0122], dismissed the Applicant's appeal as out of time. In this regard, the Appellate Panel reasoned that ***"****From the case file, namely, from the acknowledgment of receipt by which the challenged judgment was received, the Appellate Panel confirms the fact that the judgment [C-II-13-0444] of the SCSC was served on the appellant on 3 March 2016 and according to the legal remedy of the same decision, it is provided that an appeal can be filed within 21 days. In the present case, the appellant had the right to file an appeal until 24 March 2016, while the appeal was filed on 15 June 2016, which shows that it was filed out of the deadline set by law, therefore, the Appellate Panel, dismissed the appellant's appeal as submitted after the deadline".*

20. On 21 October 2019, the Applicant filed a request with the Appellate Panel to rectify the clear technical error of Judgment [Ac-I-16-0122] of the Appellate Panel of 4 October 2019, alleging that Judgment [C - II-13-0444] of the Specialized Panel, of 24 May 2016 was served on her on 3 June 2016, while the appeal against this Judgment was filed with the Appellate Panel on 15 June 2016, within a period of 21 days. Therefore, the Appellate Panel in the Judgment [Ac-I-16-0122] of 4 October 2019, has erroneously found that the Applicant was served with the Judgment [C-II-13-0444] of the Specialized Panel, on 3 March 2019 as in this date, the abovementioned Judgment of the Specialized Panel was not rendered. Therefore, she requested the

Appellate Panel to correct this error and approve the request, as well as to be included in the list of beneficiaries of 20% from the privatization of the S.O.E. "Yumco".

21. On 1 October 2020, the Appellate Panel by Decision [Ac-I-16-0122], dismissed the Applicant's Referral as inadmissible. In this regard, the Appellate Panel reasoned in Judgment [AC-I-16- 0122] of 4 October 2019, it is stated that the date of service of the Judgment [C-II-13-0444] of the Specialized Panel on the Applicant is 3 March 2016. In this regard, the Appellate Panel, by Decision [Ac-I- 16-0122] of 1 October 2020, stated that this has been impossible since the Judgment of the Specialized Panel [C-II-13-0444] was rendered on 24 May 2016. Therefore, the Appellate Panel by Decision [Ac-I- 16-0122] of 1 October 2020, concludes that the Applicant's statements that the Judgment of the Specialized Panel was received by the Applicant on 3 June 2016, are correct. But, nevertheless, the Appellate Panel by Decision [Ac-I- 16-0122] of 1 October 2020, stated that the Judgment of the Appellate Panel [AC-I-16-0122] of 4 October 2019, is final. Therefore, according to the case law of the SCSC, the decisions rendered by the Appellate Panel are final and cannot be reviewed by the Appellate Panel.

Applicant's allegations

22. The Applicant alleges that the challenged decision violated her fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution and Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the ECHR.

23. The Applicant alleges that as she was not satisfied with the Judgment of the Specialized Panel [C-II-13-0444] of 24 May 2016, *" on 15 June 2016, filed a timely appeal with the Special Chamber of the Supreme Court - Appellate Panel to include her in the final list of employees of SOE "Yumko" to gain the right to a 20% share of the privatization. The Appellate Panel rendered Judgment [AC-I-16-0122] of 4 October 2019, by which in paragraph IV of the enacting clause of the Judgment, the appeal of Violeta Todorović (A0004) was rejected as out of time, until in the reasoning of the same judgment on page 12, it is stated that Violeta Todorovoć's appeal is rejected as ungrounded".*

24. As a consequence, the Applicant states that she filed *"the request for correction of the cardinal error in the final judgment C-II-13-0444 which Violeta Todorović received, as stated on 3 March 2016, which is impossible because the judgment was rendered on 24 May, 2016, namely 2 months later, namely it is illogical for the judgment to be first served and then rendered. This judgment was served on the the party on 3 June 2016"*. However, she states that the Appellate Panel, by the Decision of 1 October 2020, has rejected her request as inadmissible. Therefore, these actions according to the Applicant have violated the provisions of the contested procedure and the constitutional provisions of Articles 24, 31, 32 and 54 of the Constitution and Article 6 of the ECHR.

25. In this regard, the Applicant alleges that *"The lower courts, in their judgments, have not taken care ex officio in their obligations and duties, so it has come to a clear cardinal error when it has not assessed the appeal even though it has been clear that it does not [is] possible to file appeal against the judgment before the judgment itself has been rendered"*.

26. Therefore, the Applicant requests the Court to: (i) declare her Referral admissible; (ii) decide that there has been a violation of *"Article 24 which describes that everyone is equal before the law, Article 31 which describes that everyone has the right to a fair and impartial trial in a given period, Article 32 which describes the right to a legal remedy and Article 54, which describes the right to judicial protection,* and (iii) declare invalid the Decision of the Special Chamber of the Supreme Court [AC-I-16-0122] of 1 October 2020, and remand the case for reconsideration to the SCSC.

Admissibility of the Referral

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

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

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

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

29. In addition, the Court also refers to the admissibility requirements as provided by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]".

30. With regard to the fulfillment of the admissibility criteria, as mentioned above, the Court finds that the Applicant is an authorized party, who challenges an act of public authority, namely Decision [No. AC-I-16-0122] of 1 October 2020 of the Appellate Panel, after having exhausted the legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms that he claims to have been violated, in accordance with Article 48 of the Law, and submitted the Referral within the time limit set out in Article 49 of the Law.

31. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure and that it cannot be declared inadmissible on the basis of the requirements set out 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 considered.

Relevant legal provisions

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

Article 10
Judgments, Decisions and Appeals

[...]
"6. A party shall have the right to appeal any Judgment or Decision of a single judge, sub-panel or specialized panel - or of a court having jurisdiction over a claim, matter, proceeding or case under paragraph 4. of Article 4 of the present law - to the appellate panel by submitting to the appellate panel and serving on the other parties its appeal within twenty-one (21) days. The appeal shall also be submitted to the court, specialized panel, sub-panel or judge that issued the concerned Decision or Judgment within such twenty-one (21) day period. The prescribed time limit shall begin to run at midnight on the day the single judge, sub-panel, specialized panel or court has provided the concerned Decision or Judgment to the parties in writing. The appellate panel shall reject the appeal if the party fails to file within the prescribed time period".

Merits

32. The Court recalls that the Applicant from 1990 was employed in S.O.E. "Yumco". After the latter was privatized, the PAK published in the media the final list of employees with legitimate rights in S.O.E. "Yumco" in which list, the Applicant was not included. Therefore, the Applicant filed a complaint with the SCSC regarding the final list of employees of S.O.E. "Yumco" requesting that her name be included in the list of employees entitled to payment of 20% of revenues. On 24 May 2016, the Specialized Panel by Judgment [C-II-13-0444] rejected the Applicant's complaint as ungrounded, as it was concluded that she had been employed in S.O.E. "Yumco" from 1 September 1990 until 1

November 1997, when her employment relationship was terminated. On 15 June 2016, against the abovementioned Judgment of the Specialized Panel, the Applicant filed an appeal with the Appellate Panel, claiming that she was part of S.O.E. "Yumco" even after 1997. On 4 October 2019, the Appellate Panel by the Judgment [AC-I-16-0122], rejected the Applicant's appeal as out of time, stating that Judgment the [C-II-13 -0444] of 24 May 2016, of the Specialized Panel received by the Applicant on 3 March 2016 and according to the legal remedy of the same Decision, it is provided that an appeal can be filed within 21 days. However, the complaint was filed on 15 June 2016, indicating that it was filed out of the deadline established by law.

33. On 21 October 2019, the Applicant, filed with the Appellate Panel, a request for correction of the clear technical error of Judgment [Ac-I-16-0122] of the Appellate Panel, of 4 October 2019, claiming that it rendered Judgment [C-II-13-0444] of the Specialized Panel of 24 May 2016 on 3 June 2016, while the appeal against this Judgment of the Appellate Panel on 15 June 2016, within a period of 21 days. On 1 October 2020, the Appellate Panel by Decision [Ac-I-16-0122], rejected the Applicant's request as inadmissible, adding that the Judgment of the Appellate Panel [AC-I-16-0122] of 4 October 2019, is final, although it was concluded that the Applicant's statements that the Judgment of the Specialized Panel was served on the Applicant, on 3 June 2016, were correct.

34. Therefore, the Applicant alleges before the Court that the Appellate Panel had a legal obligation to deal with the Applicant's appeal against the Judgment of the Specialized Panel as it was filed within the legal time limit, taking into account that the Judgment of the Specialized Panel was served on him on 3 June 2016, while the complaint was submitted on 15 June 2016, namely within the 21-day deadline set out by law. However, the Appellate Panel by Judgment [Ac-I-16-0122], rejected the Applicant's appeal as out of time and after the request for correction of a clear technical error of Judgment [Ac-I-16-0122] of the Appellate Panel, of 4 October 2019, the Appellate Panel by the Judgment [AC-I-16-0122] of 4 October 2019, although it was concluded that the Applicant's statements that the Judgment of the Specialized Panel was served on the Applicant on 3 June 2016, were correct, decided that it could not correct a final decision of the Appellate Panel. Such a position, in the opinion of the Applicant, is contrary to the obligations of the court that its case be reviewed on its merits by the Appellate Panel and thus led to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

35. The Court notes that based on the facts above and the allegations made by the Applicant, the substance of the Applicant's allegations is rightly related to the "access to court" as an integral part of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

36. The Court refers to the relevant provisions of the Constitution and the ECHR:

Article 31 [Right to Fair and Impartial Trial]:

"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law".

Article 6 (Right to a fair trial) of the ECHR:

"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 has the following minimum rights:

[...]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for

legal assistance, to be given it free when the interests of justice so require".

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

38. In this regard, the Court first notes that the case law of the ECtHR and of the Court has consistently considered that the fairness of the proceedings is assessed based on the proceedings as a whole (see case of the Court KI62/17, Applicant: *Emine Simnica*, Judgment of 29 May 2018; see also, ECtHR Judgment, *Barbera, Messeque and Jabardo v. Spain*, No. 146, paragraph 68). Therefore, in the procedure of assessing the grounds of the Applicant's allegations, the Court will adhere to these principles.

39. Accordingly, the Court will consider the Applicant's allegations regarding the right of "access to court" as one of the principles of a fair trial under Article 31 of the Constitution and Article 6 of the ECHR.

General principles regarding "access to the court"

40. First of all, the Court recalls that in the case KI62/17, cited above, and the ECtHR case *Golder v. United Kingdom*,, they found that: "*the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1. Article 6 para. 1secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only"* (see cases of Court KI62/17, cited above, paragraph 50, and case K224/19, Applicant *Islam Krasniqi*, Judgment of 10 December 2020, paragraph 34. See also the case of the ECtHR *Golder v. the United Kingdom*, Judgment of 21 February, 1975, paragraphs 28-36).

41. The Court in this regard notes that "the right to a court", as an integral part of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, provides that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see case K224/19, cited above, paragraph 35; see also, cases of the ECtHR, *Běleš and Others v.*

the Czech Republic, Judgment of 12 November 2002, paragraph 49; and *Naït-Liman v. Switzerland*, Judgment of 15 March 2018, paragraph 112).

42. Furthermore, in case *Kreuz v. Poland*, the ECtHR stated that the right to a fair trial "*secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, that provision embodies the "right to a court", the right of access, as a principle that makes in fact possible to benefit from the further guarantees laid down in paragraph 10f Article 6.* (see ECtHR judgment: *Kreuz v. Poland*, Application No. 2824/95 of 20 April 1998 paragraph 52).

43. Moreover, the ECHR does not aim at guaranteeing the rights that are "*theoretical and false*", but the rights that are "*practical and effective"* (see case KI224/19, cited above, paragraph 39). Therefore, in accordance with the case lawof the Court and that of the ECtHR, the right of access to a court means not only the right to initiate proceedings before a court, but, in order for the right of access to a court to be effective, the individual must also have a clear and real possibility of challenging the decision which violates his/her rights. In other words, the right of access to a court is not exhausted only in the right to institute proceedings before the court, but its meaning is much wider as it includes the right to "resolution" of the dispute by the competent court (see case KI62/17, cited above, paragraph 55).

44. The Court further states the right of access to a court is not absolute, but it can be subject to limitations, since by its very nature it calls for regulation by the state, which enjoys a certain margin of appreciation in this regard.

45. However, any limitations on the right of access to a court must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the "right to a court" is impaired. Such limitations will not be compatible if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see case of the Court KI62/17, cited above, paragraph 58, and the ECtHR cases: *Sotiris and Nikos Koutras, ATTEE v. Greece* (2000), paragraph 15; *Běleš and Others v. the Czech Republic,* Judgment of 12 November 2002, paragraph, 61).

46. Therefore, the Court considers that the limitations will not comply with the right to a fair trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR if: a) they do not pursue a legitimate aim; and b) if there is not a reasonable relationship of proportionality between the means employed and the aim sought (see case of the Court KI62/17, cited above, paragraph 59).

Application of these principles and guarantees in the present case

47. The Court notes that the Applicant in the present case had access to the court, namely the Specialized Panel and the Appellate Panel, but only until the filing of an appeal against Judgment [C-II-13-0444] of the Specialized Panel, of 24 May 2016.

48. This is because the mere fact that the Applicant had the legal opportunity to submit this request to the Specialized Panel does not necessarily lead to the fulfillment of the right of access to a court deriving from Article 31 of the Constitution and Article 6 of the ECHR. Therefore, it remains to be determined whether the Decision [No. AC-I-16-0122] of 1 October 2020 of the Appellate Panel declaring the Applicant's appeal as out of time, in conjunction with Judgment [No. AC-I-16-0122] of 4 October 2019 of the Appellate Panel declaring the request for correction of the clear error of the Appellate Panel as inadmissible, effectively denied the Applicant "*the right of access to a court*" from the point of view of the principle of the rule of law in a democratic society, as well as the guarantees provided by Article 31 of the Constitution and Article 6 of the ECHR.

49. In this respect, the Court emphasizes that "the right to appeal" is not defined or implied in Article 6 of the ECHR, but if the appeal was allowed by law and if it was filed, and the court in that case, in this case the Appellate Panel, was informed about this, and it was called upon to determine the facts that are essential to the continuation of proceedings in a procedural aspect, then according to the ECtHR case law, the first paragraph of Article 6 of the ECHR is applicable (see ECtHR *Delcourt v. Belgium*, of 17 January 1970, Series A p. 11-14).

50. The Court notes that the main reason for the rejection of the Applicant's appeal by the Appellate Panel by Judgment [Ac-I-16-0122] of 24 May 2019, was because the latter had considered that the Applicant's appeal against the Judgment of the Specialized Panel was out of time.

51. In this regard, the Court notes that the Applicant's representative after receiving the Judgment [Ac-I-16-0122] of 24 May 2019 of the Appellate Panel, has submitted a request for correction of the error to the Appellate Panel, where facts and evidence were presented that she submitted her appeal within the deadline provided by law within 21 days of receiving the decision. However, the Appellate Panel by the Judgment [AC-I-16-0122] of 1 October 2020, even though it concluded that the Applicant's statements that the Judgment of the Specialized Panel was received by the Applicant on 3 June 2016, were correct, and that the appeal was filed within the legal time limit, the latter decided that it could not modify a final decision of the Appellate Panel.

52. However, the Court notes that, in response to the Applicant's request for correction of clear technical error regarding the deadline for filing an appeal against the Judgment of the Specialized Panel, the Appellate Panel in Decision [No. AC-I-16-0122] of 1 October 2020, stated:

> *"The Appellate Panel confirms that according to the acknowledgment of receipt, the date of receipt of the challenged judgment is 03.03.2016, it is certainly a technical error and the court has followed this error by calculating the deadline for appeal of 21 days from the previously mentioned day 03.03.2016 that the final dates would be as mentioned in the Judgment of the Appellate Panel of 4 October 2019. This has been impossible since the appealed Judgment C-II-13-0444 was rendered on 24 May 2016.*
> *The Appellate Panel concludes that the Applicant's statements that the appealed Judgment was received on 3 June 2016, are correct.*
> *But the judgment of the Appellate Panel AC-I-16-0122 of 4 October 2019 is final. Therefore, according to the case law of the SCSC, the judgments, the decision rendered by the Appellate Panel are final. Legal systems in general that refer to the principle of legal certainty also have this kind of approach.*
> *[...]*
> *Even the Constitutional Court of Kosovo, deciding on the assessment of the constitutionality of the Judgment of the SCSC, ASC-11-0056-A0001 of 7 June 2012, in case no. KI103/12, in point 23 of the resolution on inadmissibility received on 22 March 2013, arguing the point regarding the assessment of the admissibility of the referral filed before this court, clearly expresses its legal opinion. In this regard, the Court notes that in accordance with Article 113.7 of the Constitution and in accordance with Article*

47.2 of the Law, the Applicant has exhausted all legal remedies provided by law.
[...]
Therefore, the court decisions of the Appellate Panel as the second instance of the Special Chamber of the Supreme Court, with any procedural provision of the LCP, cannot be reconsidered even by any Panel of the Supreme Court of Kosovo, since the final decision taken in the second instance by the Special Chamber as part of the Supreme Court is final and based on law, any other legal body, to conduct its further review.
The Appellate Panel notes that in the present case, AC-I-16-0122, has already been decided by the Appellate Panel by the judgment of 4 October 2019, which is final.
Therefore, any appeal filed against the final judgment of the Appellate Panel, as already decided by its case law (ASC-09-0106, ASC-11-0063, ASC-11-0107, AC-I — 12-0145), must be rejected as inadmissible.
The parties, except the Constitutional Court pursuant to Article 9.15 of the LCP, do not have at their disposal, as mentioned above, any legal remedy to challenge the final decision of the Appellate Panel. The provisions of the LCP as a special law have the advantage of implementation in the LCP, as a general procedural law".

53. In this regard, the Court recalls that Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters (hereinafter: Law No. 04/L-033), Article 10, paragraph 6 (applicable at the time of filing a complaint) provides:

[...]
"6. A party shall have the right to appeal any Judgment or Decision of a single judge, sub-panel or specialized panel - or of a court having jurisdiction over a claim, matter, proceeding or case under paragraph 4. of Article 4 of the present law - to the appellate panel by submitting to the appellate panel and serving on the other parties its appeal within twenty-one (21) days. The appeal shall also be submitted to the court, specialized panel, sub-panel or judge that issued the concerned Decision or Judgment within such twenty-one (21) day period. The prescribed time limit shall begin to run at midnight on the day the single judge, sub-panel, specialized panel or court has provided the concerned Decision or Judgment to the parties in writing. The appellate panel shall reject the appeal if the party fails to file within the prescribed time period".

54. The Court considers that the procedural rules governing the steps to be taken in filing a complaint are intended to ensure the proper administration of justice. The parties to the proceedings must expect that the procedural rules will apply. Such procedural rules, or their application, should not prevent the person to whom they apply from the benefits of the legal remedy (see, *mutatis mutandis*, case of the ECtHR: *Sotiris and Nikos Koutras ATTEE v. Greece*, *Judgment of 16 November 2000,* paragraph 18). Furthermore, the Applicants cannot bear the responsibility and consequences for the errors that do not belong to them but to the relevant institutions.

55. In this regard, the Court notes that in Decision [No. AC-I-16-0122] of 1 October 2020, the Appellate Panel despite the fact that it found that the Applicant's allegations were correct, and consequently that her complaint was filed according to the deadlines set out in Article 10, paragraph 6 of Law No. 04/L-033, the latter rejected the Applicant's request for correction of the error of the Appellate Panel by the Judgment of 4 October 2019, considering her request as a request for reconsideration of the court decision.

56. Therefore, both decisions of the Appellate Panel resulted in the impossibility that the Applicant's appeal against the Judgment of the Specialized Panel be considered on merits. In this way, the Appellate Panel limited its two decisions to the Applicant's access to court.

57. The Court has clearly stated above that the right of access to the Court may be restricted if the restrictions *a)* pursue a legitimate aim; and *b)* whether there is a reasonable relationship of proportionality between the means employed and the aim pursued. However, the Court notes that, in the present case, such views of the Appellate Panel by Decision [No. AC-I-16-0122] of 1 October 2020 in conjunction with Judgment [No. AC-I-16-0122] of 4 October 2019 of the Appellate Panel, in relation to the Applicant could not lead to a legitimate aim that would allow the restriction of the right of access to a court. From this it also results that there is no relationship pf proportionality between the means used by the Appellate Panel and the aim pursued, which would lead to the decisions of the Appellate Panel regarding the dispute, given that the Applicant had filed her appeal against the Judgment of the Specialized Panel, within the time limit provided by law. In this respect, by not addressing the Applicant's appeal against the Judgment of the Specialized Panel, which was filed within the legal deadline, the Appellate Panel violated the essence of her "right of access to court".

58. In this respect, the Court considers that it is the right of the Appellate Panel to render a decision in accordance with its jurisdiction, on approval or rejection of the Applicant's appeal, but only after her appeal against Judgment [C-II-13-0444] of the Specialized Panel is considered on merits, in accordance with the applicable provisions.

59. The Court therefore considers that in such circumstances, the Applicant has been deprived of her right of access to a court, as a principle of a fair and impartial trial in accordance with Article 31 of the Constitution and Article 6 of the ECHR.

60. Therefore, the Court finds that there has been a violation of Article 31.1 of the Constitution, in conjunction with Article 6.1 of the ECHR.

61. Given that the Court has found a violation of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, it does not consider it necessary to examine separately the allegations of violation of the rights guaranteed by Article 24, 32 and 54 of the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 13 April 2021, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, and Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE invalid, in relation to the Applicant, the Decision [No. AC-I-16-0122] of 1 October 2020 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, and Judgment [No. AC-I-16-0122] of 4 October 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo.

IV. TO REMAND Decision [No. AC-I-16-0122] of 1 October 2020 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, and Judgment [No. AC-I-16-0122] of 4 October 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, for reconsideration in accordance with the Judgment of this Court;

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court, not later than 18 October 2021;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO NOTIFY this Decision to the Parties, and, in accordance with Article 20 (4) of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

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

KI240/19, Applicant: Enver Latifi, Constitutional review of Decision AC. No. 4367/18 of the Court of Appeals of 12 December 2018

Key words: individual referral, right to a fair trial, out of time, resolution on inadmissibility

The Applicant initiated before the regular courts the proceedings regarding the interference with the possession of immovable property, namely the cadastral parcel owned by him. The Basic Court confirmed the ownership of the Applicant on the disputed parcel and ordered that it be returned to the Applicant's possession.

Based on the judgment of the Basic Court, the Applicant initiated enforcement proceedings requesting the enforcement of the judgment of the Basic Court.

The courts rejected the Applicant's enforcement request because it was not filed in accordance with the law. The Applicant filed a request for revision against this decision, which was rejected due to inadmissibility.

In this regard, the Applicant alleged before the Court that the rejection of the request for execution violated his rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 34 [Right not to be Tried Twice for the Same Criminal Act], of the Constitution of the Republic of Kosovo.

Before analyzing the Applicant's allegations, the Court examined whether the Applicant met all the formal requirements for submitting the Referral to the Court, the Court determined that the Applicant was an authorized party, that he exhausted all available legal remedies and that he specified the act of the public authority, which constitutionality he challenges before the Court. However, the Court concluded that the last decision in this case was in fact the Decision [Ac. No. 4637/18] of the Court of Appeals of 12 December 2018, and that the time limit starts to run from the date of receipt of the abovementioned decision by the Applicant's representative or the Applicant personally and that it cannot take into account the Decision [Rev. No. 59/2019] of the Supreme Court, because such a request is not allowed in the enforcement proceedings.

Based on the above, the Court concluded that the Referral was not filed within the legal time limit prescribed by Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure and must be declared inadmissible, because it was out of time.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI240/19

Applicant

Enver Latifi

Constitutional review of Decision AC. No. 4367/18 of the Court of Appeals of 12 December 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Enver Latifi, (hereinafter: the Applicant) from Berlin-Germany, who is represented by lawyer Gëzim Brahimaj from Gjakova.

Challenged decision

2. The Applicant challenges Decision Ac. No. 4637/18 of the Court of Appeals of 12 December 2018, which was served on him on 16 January 2019.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which allegedly violates the Applicant's fundamental rights

and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

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

Proceedings before the Constitutional Court

5. On 26 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 30 December 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 15 January 2020, the Court notified the Applicant about the registration of the Referral. By this notification, the Court requested the Applicant to submit to the Court the power of attorney for the legal representative.

8. On 23 January 2020, the Applicant submitted to the Court the requested power of attorney.

9. On 7 June 2020, the Court sent a copy of the Referral to the Supreme Court and the Court of Appeals and requested a copy of the acknowledgment of receipt from the Basic Court with the date on which the Applicant was served with Decision AC. No. 436/18 of the Court of Appeals of 12 December 2018.

10. On 28 July 2020, the Basic Court notified the Court that the case PPP. No. 924/2017 with all case files (including Decision AC. No. 436/18 of the Court of Appeals of 12 December 2018), based on the data in the

register of submission of court cases, on 18.04.2019 was submitted to the private enforcement agent Isak Islami.

11. On 11 December 2020, the Court requested a copy of the acknowledgement of receipt from the private enforcement agent Isak Islami with the date on which the Applicant was served with Decision AC. No. 4367/18 of the Court of Appeals of 12 December 2018.

12. On 17 December 2020, the private enforcement agent Isak Islami submitted to the Court the receipt stating that Decision AC. No. 4367/18 of the Court of Appeals was submitted on the Applicant on 16 January 2019.

13. On 1 February 2021, the Court requested the private enforcement agent Isak Islami to submit to the Court the complete case file.

14. On 18 February 2021, the private enforcement agent Isak Islami submitted to the Court the complete case file of the disputed case.

15. On 26 March 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of Referral, because it was out of time.

Summary of facts

In relation to the case before us, two sets of proceedings were conducted.

Contested procedure

16. On an unspecified date, the Applicant filed a lawsuit with the Basic Court in Prishtina against S.S. for obstruction of possession and usurpation, requesting: to return to possession a part of the immovable property which is registered as cadastral parcel no. 3058/13, possession list number 5668 in the place called "Old Road", with a surface area of 31 square meters (hereinafter: the contested parcel).

17. On 18 October 2007, the Basic Court in Prishtina by Judgment [C. No. 1821/2004] approved the Applicant's statement of claim and decided that S.S. return to the Applicant the disputed parcel from the day the judgment becomes final under the threat of forced execution. This judgment became final on 28 October 2011.

Enforcement procedure

18. On 18 January 2012, the Applicant filed a proposal with the Basic Court in Prishtina against the executive debtor for the execution of the Judgment [C. No. 1821/2004] of the Basic Court in Prishtina of 18 October 2007.

19. On 29 May 2013, the Basic Court in Prishtina, by Decision [E. No. 70/2012] allowed the execution of Judgment C. No. 1821/2004 of the Municipal Court in Prishtina of 18 October 2007.

20. On an unspecified date, S.S. against the decision to allow execution [number P. No. 70/17] filed an objection with the Basic Court in Prishtina.

21. On 7 November 2013, the Basic Court in Prishtina, by Decision [E. No. 70/2012] rejected the objection of the executive debtor as ungrounded and upheld the decision of the Basic Court in Prishtina of 29 May 2013. Against this decision the enforcement debtor filed an objection with the proposal to postpone the execution procedure.

22. On 29 September 2014, the Court of Appeals, deciding on the appeal of the executive debtor, rejected his appeal as ungrounded and upheld the decision of the Basic Court in Prishtina of 7 November 2013 and the Decision of the Basic Court in Prishtina of 29 May 2013.

23. On 25 August 2016, the Basic Court in Prishtina, in its conclusion [E. No. 70/2012] set the date of execution of the final decision [E. No. 70/2012] of 29 May 2013. In the reasoning of the conclusion, the Basic Court states, *"The court, in terms of carrying out the execution in this execution case, on 22 September 2016, starting at 10.00 will return to the possession of the creditor, as owner, a part of the immovable property which is registered as PK¬- (... the number is not seen ...), FP-5668, in the place called "Old Road", in a surface area of 31 square meters, which in the northeast in length of 3.38 meters, in the north in length of 1.37 + 11.86 = 13.23 meters , in the east in the length of 1.79 meters and in the southwest in the length of 8.28 + 4.94 meters = 13.21 meters, at the address Street Vëllezërit Fazliu No. 38, will be handed over in possession and free use to the execution creditor. Expert of Geodesy, Qemajl Hoda, is obliged to be present at the scene of the event, on the day of execution, on 22.09.2016 at 10.00 in order to clarify the expertise. The execution creditor is obliged (... part of the text is not seen...) in accordance with Article 284, paragraph 4 of the LEP, on the above day and hour".*

24. On 4 October 2017, the private enforcement agent Isak Islami issued the order to allow the execution number P. No. 70/17, based on which allowed the execution of the judgment of the Municipal Court in Prishtina, number C. No. 1821/2004, of 3 December 2007, which is final from 28.10.2011, and which is enforceable from 10.1.2012.

25. On an unspecified date, S.S. against the order for permitting execution [number P. No. 70/17] of the private enforcement agent Isak Islami filed an objection with the Basic Court in Prishtina, stating that the execution order was not clear and that it could not be understood in accordance with Judgment C. No. 1821/2004 of 3 December 2007, what the creditor seeks. The same request was submitted for execution to the Basic Court in Prishtina E. No. 70/12, but the execution procedure was completely suspended due to legal obstacles, both for the execution of the immovable property and for the costs of the court proceedings.

26. On 22 December 2017, the Basic Court in Prishtina, by Decision [PPP. No. 924/17], upheld the objection of S.S. filed against the order permitting execution, reasoning, *"for execution also at the Basic Court in Prishtina in case E. No. 70/12, but the execution procedure has been suspended in its entirety due to legal obstacles, both for the execution of the immovable property and for the costs of the court proceedings. He added that the execution could not be requested or repeated for the same reasons when the execution procedure was suspended and where the reasons for the suspension still exist [...] The court assessed the allegations of the debtor presented in the objection and came to the conclusion that the order on allowing the execution under number P. no. 70/17, of 04.1 0.20 17, allowed by the Enforcement Office-private enforcement agent Isak Islami from Prishtina is irregular as the execution proposal was prepared by the private enforcement agent himself and signed and then the same proposal for execution the same private enforcement has allowed the execution, and in this case the permission to execute was made without fulfilling the legal condition in terms of the provision of Article 3 paragraph 1 and Article 4 paragraph 1 of the Law on Enforcement Procedure, no. 0411-139, which means that the creditor or the creditor's authorized person must compile the proposal for execution and sign it, while the private enforcement agent for the proposal of the creditor who meets all the requirements in terms of the provisions of Articles 99.2 and 102 of the Law for the Contested Procedure, must issue an execution order, which in the present case the private enforcement agent did not act".*

27. On 9 January 2018, the Applicant filed an appeal with the Court of Appeals against the Decision [PPP. No. 924/17] of the Basic Court in Prishtina of 22 December 2017, due to, "*essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, as well as due to the violation of the substantive law*".

28. On 7 June 2018, the Court of Appeals, by Decision [Ac. No. 1909/18], rejected the Applicant's appeal, because it was filed out of legal time limit provided by law.

29. On an unspecified date, the Applicant filed a request for revision with the Basic Court in Prishtina, against the Decision [Ac. No. 1909/18] of the Court of Appeals and Decision [PPP. No. 924/17] of the Basic Court in Prishtina of 22 December 2017, on the grounds of, "*violation of the provisions of the contested procedure and erroneous application of the substantive law*".

30. On 14 September 2018, the Basic Court in Prishtina, by the Decision [PPP. No. 924/17], rejected as inadmissible the request for revision of the Applicant because it found that the revision was not allowed in the enforcement procedure.

31. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Decision [PPP. No. 924/17] of the Basic Court in Prishtina of 14 September 2018, on the grounds of, "*essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, as well as violation of the substantive law*".

32. On 12 December 2018, the Court of Appeals, by Decision [Ac. No. 4637/18], rejected the Applicant's appeal as ungrounded and upheld the Decision of the Basic Court, reasoning that, "*Based on Article 68 of the Law on Enforcement Procedure, it is determined that: "No repetition and revision of the procedure is allowed in enforcement procedure", since in the present case the revision is not allowed, the Court of Appeals considers that the first instance court acted correctly when dismissing the revision as ungrounded*".

33. On an unspecified date, the Applicant filed a request for revision with the Supreme Court against the Decision [Ac. No. 4637/18] of the Court of Appeals of 12 December 2018.

34. On 11 March 2019, the Supreme Court, by Decision [Rev. No. 59/2019], rejected as ungrounded the request for revision of the Applicant, reasoning that in the enforcement procedure the revision is not allowed.

Applicant's allegations

35. In his address to the Court, the Applicant alleges that the challenged decision violated his rights guaranteed by Articles 31 and 34 of the Constitution.

36. The Applicant reasons his Referral with the fact that the decisions of the Basic Court, the Court of Appeals and the Supreme Court, "*the above mentioned decisions of the Municipal Court in Prishtina have not been implemented and respected: Judgment C. No. 1821/2004 of the Municipal Court which has become final since 28.10.2011 and enforceable since 10.01.2012, Decision E. No. 70/2012 of the Basic Court, Decision CA. No 3710/2013 of the Court of Appeals, Conclusion E. No. 70/2012 by the debtor and also on the same enforcement issue it has been decided twice by the same Court, once the Municipal Court in Prishtina and the Court of Appeals in Prishtina then the Basic Court in Prishtina on the same issue (twice) that we are dealing with Res Judicata*". The same allegation was repeated by the Applicant on three occasions in his Referral.

37. Finally, the Applicant requests the Court to return the challenged decision to its previous situation and to retrial.

Admissibility of the Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed*

by the Constitution, but only after exhaustion of all legal remedies provided by law".

[...]

40. The Court further examines if the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests] and 48 [Accuracy of the Referral] 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".

41. With regard to the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party, that he has exhausted all available legal remedies and has specified the act of the public authority, which constitutionality he challenges before the Court.

42. However, the Court also takes into account Article 49 [Deadlines] of the Law, which stipulates:

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]."

43. In addition, the Court refers to Rule 39 (1) (c) of the Rules of Procedure, which provides:

"The Court may consider a referral as admissible if:

[…]
(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant, and […]".

44. In assessing whether the requirements of Article 49 of the Law in conjunction with Rule 39 (1) (c) of the Rules of Procedure have been met, the Court needs to consider whether the criterion for the 4 (four) month deadline prescribed by the Law was respected in relation to the "*final decision*" as a result of "*effective legal remedy*", as required by the admissibility criteria, established in the Rules of Procedure.

45. Accordingly, in assessing whether the admissibility criteria have been met, the Court must assess whether the challenged decision, namely Decision Rev. No. 54/2019 of the Supreme Court of 11 March 2019, was rendered as a result of the effective legal remedy, namely, if the appeal filed by the Applicant against the Decision AC. No. 4637/2018 of the Court of Appeals of 12 December 2018 was a legal remedy prescribed by law.

46. In this regard, the Court refers to Article 68 of the Law No. 04/L-139 on Enforcement Procedure, which stipulates:

"Article 68
Extra-ordinary legal remedies

1. No repetition and revision of the procedure is allowed in enforcement procedure.

2. Restitution into previous state shall be permitted only in case of disrespecting the deadline for filing an objection and appeal against the enforceable decision for compulsory enforcement".

47. In this regard, the Court notes that the Supreme Court, by Decision Rev. No. 54/2019, of 11 March 2019, dismissed as inadmissible the request for revision of the Applicant completed by Decision AC. No. 4637/2018 of the Court of Appeals of 12 December 2018, namely Decision P. No. 924/2017 of the Basic Court in Prishtina of 14 September 2018, reasoning:

"that according to Article 68 of the Law on Enforcement Procedure, the revision in enforcement proceedings is not allowed, therefore the decision of the first instance court on dismissing the creditor's revision is fair and based on law."

48. The Court recalls that in his case, after receiving the Decision [AC. No. 4637/2018] of the Court of Appeals of 12 December 2018, nothing prevented the Applicant from addressing the Constitutional Court. However, he used legal remedies, such as revision against the Decision [AC. No. 4637/2018], which was not provided by law.

49. Therefore, *"final decision",* within the meaning of Article 49 of the Law, is Decision [AC. No. 4637/2018] of the Court of Appeals of 12 December 2018, which rejected the Applicant's appeal against the Decision [PPP. No. 924/17] of the Basic Court of 14 September 2017, and which is final and against which no appeal can be filed (see, *mutatis mutandis, Paul and Audrey Edwards v. United Kingdom*, No. 46477/99, ECtHR, Decision of 14 March 2002).

50. It follows that the Applicant was served with Decision [AC. No. 4637/2018] of the Court of Appeals on 14 January 2019, which is confirmed by the acknowledgment of receipt submitted to the Court, while the Applicant submitted his Referral to the Court on 26 December 2019 (see, *inter alia*, Resolution on Inadmissibility of Constitutional Court KI201/13, Applicant: *Sofa Gjonbalaj*, of 17 April 2013, as well as Resolution KI143/19 *Agim Thaqi* of 16 January 2020 and Resolution KI218/19 *Shani Morina* of 6 March 2020).

51. Therefore, the Court concludes that the Applicant's Referral in relation to the Decision [AC. No. 4637/2018] of the Court of Appeals was submitted after the expiration of the legal deadline of 4 (four) months.

52. The Court recalls that the purpose of the 4 (four) months legal deadline under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedures, is to promote legal certainty by ensuring that cases raising constitutional matters are dealt within a reasonable time and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (See, *mutatis mutandis*, case *Sabri Güneş v. Turkey*, application no. 27396/06, Judgment of the ECtHR of 29 June 2012, paragraph 39; and case of the Constitutional Court No. KI140/13, *Ramadan Cakiqi*, Resolution on Inadmissibility of 17 March 2014, paragraph 24).

53. Therefore, for the reasons elaborated above, the Court finds that the Applicant's Referral was filed out of the legal time limit provided by Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure and, as such is inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, on 26 March 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI113/20, Applicant: IF Skadeforsikring, from Norway, constitutional review of Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020

KI113/20 Judgment of 28 April 2021, published on 25. May 2021

Keywords: *individual referral, civil dispute, right to a fair trial, admissible referral for consideration, no constitutional violations found*

The Applicant alleges that Judgment E. Rev. No. 62/2020 violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR. With regard to the allegation of violation of these concrete provisions, the Applicant states that the challenged Judgment of 6 April 2020 is again characterized by a lack of adequate reasoning, because the Supreme Court did not provide sufficient and adequate reasoning regarding the modification to Judgment Ae. No. 191/2017 of the Court of Appeals of 31 October 2017, regarding the penalty interest, thus violating the principle of prohibiting arbitrariness in decision-making. In addition, the Applicant alleges that the non-application of the jurisprudence of the Constitutional Court regarding the lack of reasoning constitutes a serious violation of Article 31 of the Constitution. In support of this allegation, the Applicant refers to cases KI55/09, KI135/14, KI97/16 and KI138/15 where the Court found a violation of Article 31 of the Constitution, due to lack of reasoning of the court decision.

In this case, the Court considered that all the remarks given by the Court in its Judgment of 27 February 2019 (case KI87/18), regarding the reasoning of item 2 (two) of the challenged Judgment, on what legal basis or law the Supreme Court based the modification of the Judgment of the Court of Appeals regarding the interest rate (penalty interest), have already been consumed because the challenged Judgment contains a logical reasoning and explains exactly why in the Applicant's case a rate of 12% may not be applied, noting that this interest rate applies only when claims for compensation are filed by injured persons, to which the obligation was not paid in accordance with the deadlines established in Article 26 of the Law on Compulsory Motor Third Party Liability Insurance. In addition, the Court notes that the allegation of inconsistency in decision-making has been consumed through the issuance of a legal opinion by the Supreme Court. Thus, the causes which have led to legal uncertainty due to the non-uniform application of case law on the same factual and legal issues have been eliminated.

In sum, with regard to the allegation of a violation of the right to a reasoned and reasonable court decision, the Court concluded that the Supreme Court: (i) provided the legal basis and clearly explained why in the Applicant's case

the interest rate of 12%; does not apply (ii) the challenged Judgment of the Supreme Court contains a logical connection between the legal basis, the reasoning and the conclusions drawn; (iii) as a logical consequence between the legal basis, the reasoning and the conclusions it has resulted that challenged Judgment E. Rev. 62/2020 of the Supreme Court meets the requirement of a reasoned and reasonable court decision. Furthermore, the latter is in line with the Legal Opinion of the Supreme Court of 2 December 2020. Therefore, the Court concludes that the Applicant, on constitutional basis, does not sufficiently support the allegation that in its case there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6.1 (Right to a fair trial) of the ECHR, for insufficiency of the court reasoning.

Therefore, the Court concludes that, in the circumstances of the present case, there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

JUDGMENT

in

Case No. KI113/20

Applicant

IF Skadeforsikring, from Norway

Constitutional review of Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Insurance Company IF Skadeforsikring, from Norway (hereinafter: the Applicant), represented by lawyers Visar Morina and Besnik Nikqi, from Prishtina.

Challenged decision

2. The Applicant challenges Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020, which was served on it on 18 May 2020.

3. The Applicant submits a Referral to the Court for the second time. It had previously filed Referral KI87/18, for which the Court rendered the Judgment on 27 February 2019, and found a violation of Article 31 of the Constitution.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4, of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 14 July 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 21 July 2020, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

8. On 3 August 2018, the Court notified the Applicant about the registration of the Referral. A copy of the Referral in accordance with the Law was sent to the Supreme Court.

9. On 22 October 2020, the Court requested a legal position from the Supreme Court regarding Referrals KI74/19, KI111/19, KI09/20 and KI113/20, in which the subject of the constitutional review are the judgments of the Supreme Court, by which it was decided on the right of debt subrogation and interest rate (penalty interest), for civil disputes initiated by insurance companies.

10. On 24 November 2020, the Court reiterated its request addressed to the Supreme Court on 22 October 2020.

11. On 2 December 2020, the Supreme Court submitted a legal opinion expressing its position on the unification of case law regarding the application of interest rates to all types of civil disputes.

12. On 28 April 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral and assessment on merits.

13. On the same date, the Court voted, unanimously, that the Referral is admissible; and by a majority of votes, 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 (1) [Right to a fair trial] of the European Convention on Human Rights.

Summary of facts

Facts of the case regarding first Referral KI87/18

14. On 26 July 2009, a car accident occurred involving two passenger vehicles, in which the "Mercedes" vehicle bearing registration plates of the Republic of Kosovo, insured in the insurance company "SIGMA", which caused damage to the passenger "Audi" vehicle, with Norwegian license plates and "casco" auto insurance "IF Skadeforsikring" from Norway.

15. On 19 October 2010, the Applicant sent a request to the insurance company "SIGMA" requesting the payment of damage based on compensation, which resulted from a traffic accident, to which "SIGMA" company did not respond.

16. On 9 July 2012, the Applicant filed an appeal against "SIGMA" company with the Basic Court, in which he requested that the amount of 23,609.24 C be paid in the name ofthe damage incurred, with a penalty interest rate of 12 %, from 19 October 2010.

17. On 23 November 2015, the Basic Court rendered Judgment I. C. No. 281/2012, which approved the Applicant's statement of claim in entirety. The reasoning of the judgment reads: *"Article 939, paragraph 1, of the LOR, defined that by paying the compensation from insurance pass on the insurer, based on the Law itself, until the amount of paid compensation, all the rights of the insurer against person who is responsible in any ground for the damage, whereas Article 3 of the Law on Compulsory Motor Liability Insurance defines that the insurer is responsible for the compensation of the damage caused to third persons from the use of the vehicle insured based on*

motor liability. From the above mentioned legal provisions, it follows that the claimant as insurer of the vehicle that took part in the accident based on motor casco insurance was obliged to compensate the damage caused to the insured vehicle, which he did and in the meantime it enjoys the right to regress the amount paid by the respondent as insurer of the vehicle "Audi A6" based on motor liability insurance for the damage caused to third persons. The Court approved the statement of claim regarding the requested penalty interest in the amount of 12 % per year, deciding in this way in accordance to Article 26.6 of the Law on Compulsory Motor Liability Insurance".

18. The Insurance company SIGMA filed an appeal with the Court of Appeals against the judgment of the Basic Court on the grounds of violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, the decision on the interest, the decision on the costs of the proceedings and erroneous application of the substantive law.

19. On 31 October 2017, the Court of Appeals rendered Judgment Ae. No. 191/2015, rejecting the appeal of SIGMA as ungrounded. The reasoning of the judgment reads: *"This Court assesses that the Court of the first instance correctly applied the substantive law, namely Article 939 of the Law on Compulsory Motor Liability Insurance (hereiansfter: LCI), because from the case files and examined evidence it results that the insured person of the respondent was responsible for the caused damage, the respondent paid to its insurer the compensation of the suffered damage and by paying the compensation, all the rights of the insurer passed to the claimant. For the Court of the second instance the appealing allegations of the respondent regarding the gravity of the interest and time period of calculation do not stand because the interest is calculated from the moment of submission of the claim to the Court which in the present case the calculation of the interest was calculated correctly based on Article 26, paragraph 6, of the LCI. The Court assessed the other allegations of the respondent, but found that they were ungrounded because the Court of the first instance completely confirmed the factual situation and correctly applied the substantive law while the allegations of the respondent are contrary to the evidence that are contained in the case files".*

20. SIGMA submitted a request for revision to the Supreme Court against the judgment of the Court of Appeals, on the grounds of erroneous determination of factual situation, erroneous application of the substantive law, the monetary amount, as well as the amount of interest and the time period of its calculation.

21. The Applicant also responded to the Applicant's request for revision, stating "*that the revision as inadmissible within the meaning of Article 214.2 of Law 04/L-118 (on amending and supplementing Law 04/L-006 on Contested Procedure), by the reasoning that the revision refers entirely and only to the erroneous determination of the factual situation, namely that the allegations of the respondent deriving from the revision do not deal with any violations of the provisions of LCP or erroneous application of the substantive law".*

22. On 24 January 2018, the Supreme Court rendered Judgment E. Rev. No. 27/2017, by which: *"I. The revision of the respondent submitted against Judgment Ae. No. 191/2015, of the Court of Appeals of Kosovo, of 31 October 2017, is rejected in the part that is related to the obligation of the respondent for paying to the claimant the amount of 23.609.24 Euros in the name of regress from the base of motor casco insurance, within a time limit of 7 days from the receipt of the Judgment. II. The revision of the respondent is approved, the challenged Judgment is modified regarding the interest so that the respondent is obliged to pay to the claimant the amount of 23.609.24 Euros with interest in the amount of saving deposits without term, which are paid by the business banks in Kosovo, without certain destination for more than one year, from the submission of the claim on 19 November 2010 until the complete payment".*

23. In the first paragraph of the enacting clause, regarding the rejection of the respondent's appeal, the Supreme Court stated: *"According to the assessment of the Supreme Court of Kosovo, the courts of lower instance have correctly applied the provisions of the contested procedure and substantive law, when they found that the statement of claim of the claimant is grounded. In their judgments, they gave sufficient reasons for the decisive facts recognized by this court of revision too".*

24. In the second paragraph of the enacting clause, regarding the approval of the respondent's revision and modification of the judgment, the Supreme Court stated: *"Regarding the determination of the interest, the judgments of the courts of lower instance have been rendered with erroneous application of the substantive law; therefore, as a consequence they were modified so that the respondent shall pay to the claimant the amount of 23.609.24 Euros with interest rate in the amount of saving deposits without term which are paid by the business banks in Kosovo, without certain destination for more than one year, from 19 November 2010 until the complete payment, this happens because Law on Compulsory Auto Liability Insurance*

entered in force in 2011 while the case happened in 2009 and as such, it is not applied in the present case".

25. On 27 February 2019, the Constitutional Court, deciding on Referral KI87/18 came to the conclusion and found that the Supreme Court as a court of last instance, taking a different position in the challenged Judgment in a case which is completely identical or similar to other cases, without giving a clear and sufficient reasoning for this, has violated the Applicant's right to a reasoned court decision. This also led to a violation of the principle of legal certainty, as one of the fundamental components of the rule of law, which is also an inseparable element of the right to a fair trial under Article 31 of the Constitution and Article 6, paragraph 1 of the ECHR. In point IV of the operative part, the Court decided: *"TO REMAND the Judgment of the Supreme Court for reconsideration in accordance with the Judgment of this Court".*

Facts of case regarding current referral KI113/20

26. On 6 April 2020, the Supreme Court, deciding in accordance with the order of the Constitutional Court, reconsidered the Applicant's request for revision and rendered Judgment E. Rev. No. 62/2020, by which:

> i. rejected as ungrounded the revision of the Applicant, filed against the Judgment Ae. No. 191/2015 of the Court of Appeals, of 31 October 2017, in the part related to the obligation of the respondent (SIGMA) that in the name of regress by auto-casco insurance base to pay to the Applicant the amount of 23,609.24 euro, within 7 days from the day of receiving the Judgment;
>
> ii. partially approved the revision of the Applicant, modifying Judgment Ae. No. 191/2015 of the Court of Appeals, of 31 October 2017 in part (II) of the enacting clause as well as Judgment EK. No. 281/2012 of the Basic Court in Prishtina, of 23 November 2015, in part (I) of the enacting clause, obliging the insurance company "SIGMA" to reimburse the Applicant the amount of 23,609.24 euro, with interest rate of term savings deposits which are paid by commercial banks in Kosovo, without a fixed destination over one year, starting from 19 October 2020, until the final fulfillment of the payment.

27. On 14 July 2020, dissatisfied with the challenged Judgment, the Applicant filed with the Court the Referral KI113/20, by which she requests the constitutional review of the latter, claiming a violation of

the right to a fair trial, which is guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

28. On 22 October and 24 November 2020, the Court, noting the growing number of referrals arising on the issue of debt subrogation and the application of interest rate (penalty interest) sought legal opinion from the Supreme Court, before deciding on Referrals KI74/19, KI111/19, KI09/20 and KI113/20.

29. On 2 December 2020, the Supreme Court submitted to the Court a legal opinion, through which it expresses its position on the unification of case law, for all claims where the subject of review is the application of the interest rate, based on the law applicable at the time of the establishment of the legal-civil relationship.

30. In the following, the relevant part indicating the purpose of the issuance of a legal opinion by the Supreme Court:

Reasoning of Legal Opinion

"The Supreme Court of Kosovo, in its case law when assessing the legality of the decisions of the lower instance courts has found a non-unique practice regarding the issue of interest claims. The non-unique practice of lower instance courts mainly concerns applicable law, interest rate and interest flow time.

The Supreme Court, from its practice, but also from the continuous requests it has received from the courts and judges, considers it important to standardize the case law, addressing the issue of interest through a legal opinion.

The jurisdiction of the Supreme Court of Kosovo, to issue a legal opinion in cases where there is a non-unique practice of application of law by regular courts, or challenges in the implementation and interpretation of legal provisions, is determined by the Law on Courts, Article 27 of the Law, the provisions of which determine the General Session of the Supreme Court, while the need to address this issue through legal opinion is derived as a proposal and conclusion of the Civil Branch of the Supreme Court, after reviewing, analyzing and assessing a significant number of court decisions on the issue of interest, as well as from requests, questions or suggestions from regular courts or judges.

The Supreme Court of Kosovo considers that the issuance of this legal opinion will contribute in the first place to the unification of judicial case law, the establishment of the standard of legality in judicial decision-making on the issue of interest, efficiency, performance of judges and public trust in the courts. This is

because the standardization of case law affects the legality of decision-making, efficiency and credibility of the public in the courts.

The subject of this legal opinion are almost all situations of interest claims in terms of applicable law, interest rate and time of interest flow with some exceptions relating to matters governed by specific laws.
The reasoning of this legal opinion follows the chronology of issues addressed according to the division into points.

Applicant's allegations

31. The Applicant alleges that Judgment E. Rev. No. 62/2020 violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR. The Applicant relates the allegation of violation of Article 31 of the Constitution and Article 6.1 of the ECHR to the reasons that the Supreme Court did not reason its decision, and that the latter did not decide according to the findings of the Constitutional Court and the case law of the ECtHR.

Regarding the insufficiency of the reasoning of the court decision

32. In this regard, the Applicant alleges that the challenged Judgment of 6 April 2020 is again characterized by a lack of adequate reasoning, because the Supreme Court did not provide sufficient and adequate reasoning regarding the modification to Judgment Ae. No. 191/2017 of the Court of Appeals of 31 October 2017, regarding the penalty interest, thus violating the principle of prohibiting arbitrariness in decision-making. The Applicant bases this allegation on the fact that the Supreme Court in the reasoning of the challenged Judgment only listed the remarks from Judgment KI87/18 of the Constitutional Court and did not adhere to its recommendations. In essence and consequently the Applicant alleges that the reasoning of challenged Judgment E. Rev. No. 62/2020 turns out to have the same flaws, because it contains insufficient reasoning, namely the lack of reasoning and objective explanations that justify this avoidance of consistency regarding the previous positions of this court, as to the institution of penalty interest on compulsory insurance.

33. In general, the Applicant states that the elaboration of the case as a whole, in Judgment E. Rev. No. 62/2020, of 6 April 2020 does not differ from the previous Judgment, namely this reasoning is included in the last four paragraphs of the Judgment. Thus, according to the

Applicant, it results that the Supreme Court, with this brief reasoning, bases the change of position and the inconsistency regarding the institution of penalty interest on compulsory insurance on the same argument, that there can be no retroactive action of Law no. 04/L-018 for this insured case. Further, the Applicant adds that, in the reasoning part, the contradictory positions of the Supreme Court are evident when referring to the same Law No. 04/L-018, namely the provision of its Article 26 with the conclusion: "*that in disputes for subrogation of damage legally the interest defined by Article 26.6 of the Law on Compulsory Motor Third Party Liability Insurance is not applied". According to the Applicant, this conclusion does not correspond at all to the content of the mentioned provision of the law, because it does not make any difference regarding the claim of insurance claims, whether they are direct or subrogation claims, and at least the injured party on the basis of subrogation, not to have the status of "injured person"*. As can be seen from the provision of the law (Article 26.6) we do not have such a definition which explicitly states that no penalty interest is applied for subrogation claims. This interpretation according to the Applicant can not be qualified other than a "*de lege ferenda*" position of this court.

34. In addition, the Applicant alleges that the non-application of the jurisprudence of the Constitutional Court regarding the lack of reasoning constitutes a serious violation of Article 31 of the Constitution. Supporting this allegation, the Applicant refers to cases KI55/09, KI135/14, KI97/16 and KI138/15 where the Court found a violation of Article 31 of the Constitution, due to lack of reasoning of the court decision.

35. Thus, the Applicant alleges that the Supreme Court has also violated the jurisprudence of the ECtHR, which has held that the notion of a fair trial requires, *inter alia*, the national courts of all instances to address all the essential issues of the case when pronouncing their court decisions. The Applicant further alleges that the decision-making of the Supreme Court is also contrary to the requirements of Article 53 of the Constitution, according to which the courts are obliged to interpret human rights in accordance with the case law of the ECtHR.

36. Furthermore, the Applicant alleges that the Supreme Court, by ignoring in entirety the issues regarding the legal basis of the institution of the penalty interest and otherwise determining the amount of the penalty interest rate by the challenged Judgment, E. Rev. No. 62/2020 has not meet the requirements stemming from

Article 31 of the Constitution and Article 6.1 of the ECHR regarding the sufficiency of the reasoning of the court decision.

37. It is further alleged that the above-mentioned legal flaws of the challenged Judgment of the Supreme Court seriously violate the Applicant's right to a fair trial, guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR. Therefore, the Applicant requests the Court that, after assessing its allegations, to annul Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020, because of violation of Article 31 of the Constitution and Article 6.1 of the ECHR, and to remand the latter for reconsideration.

38. In support of its allegations, the Applicant again submitted to the Court several Judgments of the Supreme Court to prove that the Supreme Court did not follow its case law, such as: E. Rev. No. 23/2017, 23 December 2017, E. rev. No. 48/2014, 13 May 2014, E. Rev. No. 62/2014, 21 January 2015, E. Rev. nr. 14/2016, 24 March 2016, E. Rev. No. 06/2015, 19 March 2015, E. Rev. No. 55/2014, 3 November 2014 and E. Rev. No. 20/2014, 14 April 2014.

Relevant legal provisions

LAW NO. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

Article 281
Subrogation by law

If an obligation is performed by a person that has any legal interest therein the creditor's claim with all the accessory rights shall be transferred thereto upon performance by law alone.

Article 382
Penalty interest

1. A debtor that is in delay in performing a pecuniary obligation shall owe penalty interest in addition to the principal.

2 The interest rate for penalty interest shall amount to eight percent (8%) per annum, unless stipulated otherwise by a separate act of law.

LAW NO. 04/L-018 ON COMPULSORY MOTOR LIABILITY INSURANCE

Article 26
Compensation claims procedure

1. The insurer shall be obliged to process, for damages to persons latest within a period of 60 (sixty) days, while for damages to property within a period of 15 (fifteen) days from the day of submission of the compensation claim, the claim shall be processed and the injured party shall be notified in writing of:
1.1. compensation offer with relevant explanations;
1.2. decision and legal reasons for rejecting the compensation claim, when the liability and the damage degree are disputable.

2. If the submitted claim is not completed by evidence and documentation necessary to render a decision on compensation, the insurer shall be obliged, latest within a period of 3 (three) days from the date of the receipt of compensation claim, to notify the injured party in writing, indicating the evidence and documentation required to supplement the claim. Time limits from paragraph 1 of this Article on insurer's obligation to process the compensation claims shall apply as of the day of receipt or the completion of claim documentation, respectively.

3. CBK will issue sub-legal act to establish the compensation procedure, including such determination when a claim is considered completed by evidence and documentation necessary to render a decision on compensation.

4. Being unable to establish the damage, or to have the compensation claim fully processed respectively, the liable insurer shall be obliged to pay to the injured party the undisputable share of damage as an advance payment, within the time limit set out in paragraph 1 of this Article.

5. If the liable insurer fails to reply to the injured party within the time limits established under paragraph 1 of this Article, the injured party shall have the right to file a lawsuit to the competent Court.

6. In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid

off by the liable insurer, starting from the date of submission of compensation claim.

7. Provisions from paragraph 1, 2, 4 and 5 of this Article shall respectively apply in cases of compensation claims processing which shall bind the Bureau to damages based on border insurance and the Compensation Fund liabilities.

8. Special procedures and time limits under the Crete Agreement shall apply to compensation claims from the International Motor Insurance Card system.

***RULE 3* On Amending the Rule On Compulsory Third Party Liability Motor Vehicle Insurance approved by the Governing Board of the Central Bank of the Republic of Kosovo, on September 25, 2008**

Article 5.1

Claim Settlement

Indemnity claims of third parties based on a CTPL Insurance in accordance with provisions of this Rule, including recourse from the Guarantee Fund have to be settled within the period of 10 days of the submission of necessary proofs and relevant documentation required by the insurance company or the Guarantee Fund referring to the claimed indemnity for death, bodily injury or property damage.

The Guarantee Fund or an insurance company that fails to make a settlement of a valid claim within a period of ten (10) days as prescribed above shall pay a late payment penalty equal to 20 % yearly interest calculated from the date when the claim was reported until the date when indemnity was paid or settled.

Law no. 06 / L-054 on Courts, which in Article 14 provides the mechanism for fair administration of justice and review of changes in case law

Article 14

Competences and Responsibilities of the President and Vice-President of the Court "[...]

2.10. the President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices".

Legal Opinion on Interest adopted at the General Meeting of the Supreme Court of the Republic of Kosovo, on 1 December 2020

FIRST PART: Applicable Law:

I. For the obligational relationship that have arisen before 20.12.2012, for interest apply the provisions of the Law on Obligations (Official Gazette of the SFRY), No. 29/78, 39/85, 57/89).

II. For the obligational relationship that have arisen after 19.12.2012, for interest apply the provisions of the Law on Obligations, No. 04/L-077, Official Gazette of the Republic of Kosovo, No. 19/19, of 19.06.2012.

III. For periodic claims which have arisen from the relationship of obligations before 20.12.2012, but which extend (reach for payment) in the period after 19.12.2012, while the court on the case under dispute according to the lawsuit decides after 19.12.2012, then the applicable law is:

- for periodic claims which have reached for payment by 20.12.2012, with regard to interest apply the provisions of the Law on Obligations (Official Gazette of the SFRY, no. 29/78, 39/85, 57/89);

- for periodic claims which reach for payment after 19.12.2012, with regard to interest apply the provisions of the Law on Obligations, Law no.04/L-077.

PART TWO: Amount/interest rate:

IV. For the obligational relationships that have arisen before 20.12.2012, the rate/amount of penalty interest is set as for assets deposited in the bank, over one year, without a specific destination.
[...]
VI. For the obligational relationships that have arisen after 19.12.2012, the rate/amount of the annual penalty interest for all claims will be set at 8%, unless otherwise provided by a special law.
[...]
XI. For cases of claims for compensation of damage or coverage of expenses for the insured case (insured case compensation) by

voluntary policy (voluntary insurance), the amount of interest is determined according to point IV (four) and VI (six) of this legal opinion, depending on which law is in force at the time the insured case is filed.

Exceptions to item IV (four), V (five), VI (six), VII (seven), VIII (eight), IX (nine) and X (ten) for the amount of interest.

XII. For third parties' claims to Insurance Companies, the interest rate of 12% of annual interest is calculated when the legal requirements are met, in cases of non-compliance with deadlines (Article 26, paragraph 1 and 2 of the Law on Compulsory Motor Liability Insurance, No. 04/L-018, published in the Official Gazette no. 4, of 14 July 2011, which entered into force on 30 July 2011) and non-fulfillment of the obligation (Article 26, paragraph 4, of the same law) by the responsible insurers (Insurance Companies) for each day of delay until the settlement of the obligation by the responsible insurer, starting from the date of filing the claim for compensation.

Situations when the annual interest rate of 12 % is applied:

- When claims filed with Insurance Companies for personal injury are not dealt with within 60 days;

- When claims filed with Insurance Companies for property damage are not dealt with within 15 days;

- In the impossibility of determining the damage, namely the treatment of the indemnity in full, the responsible insurer is obliged to pay to the injured party the non-disputed part of the damage in advance, within 60 days for damage to persons and 15 days for damage to property.

XIII. For late payments of debtors to creditors-financial institutions, lenders, penalty interest will be calculated in the procedure determined by sub-legal acts by the Central Bank of Kosovo (CBK), according to the rate/ amount determined by the terms and conditions of the relevant agreement of the credit instrument, to the relevant financial institution.

Reasoning for item I (one) of legal opinion *- It is a standard of civil law that the substantive law will apply at a certain time and territory. In this context, the application of the provisions of the Law on / for Obligations Relations is determined, taking as a basis the time of arising the civil legal relations. In practice it has been presented as a dilemma, and in some cases the provision of the law*

has been incorrectly applied which was not in force at the time of arising the civil legal relationship.
[...]
Reasoning for item IX (nine) of legal opinion - *In the case law, there are frequent cases of creditors for reimbursement of damages who have fulfilled their obligations in advance to third parties, which are mainly related to cases provided by local insurance companies with foreign companies. For this type of claims in the practice of the courts, there has been an interpretation and application of legal provisions in several forms regarding the rate/amount of penalty interest for cases of reimbursement claims. This happened because the creditors when filing claims for compensation of damage referring to Article 26 of the Law on Compulsory Motor Third Party Liability Insurance, no. 04/L-018, published in the Official Gazette no. 4, dated 14 July 2011, which entered into force on 30 July 2011, requested that the claim be reimbursed at an annual rate of 12%, but the Supreme Court of Kosovo in its General Session through this legal opinion has assessed that an annual interest rate/penalty interest of 12% cannot be applied in all cases. This is because creditors' claims for reimbursement of damages mainly refer to situations of legal-civil relations (non-contractual for the creditor and the debtor), therefore, in such a case according to the assessment of the Supreme Court of Kosovo, the annual penalty interest must be paid according to item IV (four) and VI (six) of this legal opinion. This means that in case the creditor has fulfilled the obligation to the third party, before 20.12.2012, the interest rate will be applied as for the funds deposited in the bank over one year without a specific destination, while in case the creditor has fulfilled the obligation to the third party after 19.12.2012, then the rate/amount of penalty interest will be applied at a rate of 8%.*

In addition to the above, the Supreme Court considers that the rate/amount of the annual penalty interest of 12%, cannot be applied due to the fact that according to the provisions of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, promulgated in Official Gazette No. 4, dated 14 July 2011, which entered into force on 30 July 2011, the annual interest rate of 12%, comes into expression due to negligence of insurance companies (which then appear as regressive creditors) , because if the regressive creditors had treated the claims of third parties in accordance with their legal responsibilities, the rate/amount of penalty interest of 12% could not be applied to them in court decisions, but the rate/amount would be applied as for funds deposited over a year without a specific destination, or the

rate/amount of 8%, depending on which law was in force at the time the obligation relationship arouse.

Admissibility of the Referral

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

40. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, in conjunction with paragraph 4, of Article 21 [General Principles] the Constitution, which establish:

Article 113
[Jurisdiction and Authorized Parties]

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

[...]

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

[...]

Article 21 [General Principles]

[...]
"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".

41. The Court further examines whether the Applicant has met the admissibility criteria, as specified by Law, namely Articles: 47, 48 and 49 of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced...".

42. In assessing the fulfillment of the admissibility criteria as set out above, the Court notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of his fundamental rights and freedoms applicable both to individuals and to legal persons (See, cases of the Court KI118/18, Applicant, *Eco Construction l.l.c.*, Resolution on Inadmissibility, of 10 September 2019, paragraph 29; No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14). Therefore, the Court finds that the Applicant is an authorized party challenging an act of public authority, namely Judgment Rev. No. 62/2020 of the Supreme Court, of 6 April 2020, after the exhaustion of all legal remedies provided by law.

43. The Court notes that Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020, was submitted to the Applicant on 18 May 2020, while the referral under review was submitted on 14 July 2020, namely within the legal deadline provided by Article 49 of the Law.

44. The Court also considers that the Applicant has accurately indicated what rights, guaranteed by the Constitution and the ECHR, he claims to have been violated to its detriment, in accordance with the criteria set out in Article 48 of the Law.

45. Therefore, the Court concludes that the Applicant is an authorized party; that he has exhausted all legal remedies; that he respected the requirement of submitting the referral within the legal deadline; has

accurately clarified the alleged violations of fundamental human rights and freedoms, and has shown what the challenged specific act of the public authority is.

46. In light of the allegations of the Referral and their argumentation, the Court considers that the Referral raises serious constitutional issues and their addressing depends on the consideration of the merits of the referral. Also, the referral cannot be considered as manifestly ill-founded, within the meaning of Rule 39 of the Rules of Procedure, and no other basis has been established to declare it inadmissible (see the Constitutional Court Case no. KI97/16, Applicant *IKK Classic*, Judgment of 4 December 2017).

47. Therefore, the Court declares the Referral admissible for review of its merits.

Merits of the Referral

48. The Court recalls that the Applicant alleges a violation of its rights guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR, because the challenged Judgment of the Supreme Court does not provide sufficient and adequate reasoning regarding the change of position as to the calculation of penalty interest, a position which, according to the Applicant, the Supreme Court had hitherto consistently applied in its practice. Furthermore, the Applicant alleges that the Supreme Court did not decide in accordance with the findings of the Constitutional Court under Judgment KI87/18, of 27 February 2019.

49. The Court considers that in the present case the allegations of non-reasoning of the court decision and non-application of the case law of the Constitutional Court and the ECtHR, due to the nature of the case and their interrelation, will deal within a single reasoning.

50. In light of these clarifications, the Court will further examine the Applicant's allegation of a violation of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

51. In this regard, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

> *"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law".

52. In addition, the Court also recalls the content of Article 6.1 (Right to a fair trial) of the ECHR, which stipulates:

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

53. The Court states that under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution in accordance with the ECtHR case law. Accordingly, as regards the interpretation of the allegations of violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, namely relating to the right to a reasoned and reasonable court decision, the Court will refer to ECtHR case law.

General principles on the right to a reasoned and reasonable court decision

54. The Court notes, first of all, that the guarantees contained in Article 6 paragraph 1 of the ECHR include the obligation of the courts to provide a reasoning for their decisions. The reasoned court decision shows to the parties, that their case has really been examined (see judgment of the ECtHR *H. v. Belgium*, application 8950/80, paragraph 53 of 30 November 1987).

55. The Court also states that, according to the ECtHR case law, Article 6 paragraph 1 obliges the courts to give reasons for their judgments, but this cannot be understood as requiring a detailed answer to every argument (see ECtHR cases *Van de Hurk v. Netherlands*, judgment of 19 April 1994; *Garcia Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, paragraph 26, *Jahnke and Lenoble v. France*, *Perez v. France* [GC], paragraph 81).

56. In this regard, the Court adds that the domestic court has a certain margin of appreciation when choosing arguments and admitting evidence in support of the parties' submissions, a domestic court is also obliged to justify its proceedings by giving reasons for its decisions

(see ECtHR judgment *Suominen v. Finland*, Application 37801/97, from 1 July 2003, paragraph 36).

57. The Court also states that, in accordance with the ECtHR case law, when examining whether the reasoning of a court decision meets the standards of the right to a fair trial, the circumstances of the particular case should be taken into account. The court decision cannot be without any reasoning, nor will the reasoning be unclear. This applies in particular to the reasoning of the court decision deciding upon the legal remedy in which the legal position presented in the lower instance court decision has been changed (see: case of ECtHR *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61).

58. The Court wishes to emphasize that the notion of a fair trial, according to the ECtHR case law, requires that a national court which has given sparse reasons for its decisions, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings (See ECtHR judgment *Helle v. Finland*, application 157/1996/776/977, of 19 December 1997, paragraph 60).

59. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic* Judgment of 8 December 2017).

Application of the abovementioned principles to the right to a reasoned and reasonable decision on the present case

60. The Court recalls that the Applicant challenges the constitutionality of Judgment E. Rev. No. 62/2020 of the Supreme Court, claiming that the latter *"is again characterized by a lack of adequate reasoning, because the Supreme Court did not provide sufficient and adequate reasoning regarding the modification to Judgment Ae. No. 191/2017 of the Court of Appeals of 31 October 2017, regarding the penalty*

interest, thus violating the principle of prohibiting arbitrariness in decision-making".

61. The Applicant further alleges that the Supreme Court in the reasoning of the challenged Judgment, only listed the remarks from Judgment KI87/18 of the Constitutional Court and did not comply with its recommendations. In essence and consequently, the Applicant alleges that the reasoning of the challenged Judgment results in the same flaws, because it contains insufficient reasoning, namely the lack of justification and objective explanations.

62. In essence, the Applicant challenges the constitutionality of the challenged Judgment, only in relation to item 2 (two) of the enacting clause, regarding the penalty interest, again linking it to the alleged violations of Article 31 of the Constitution and Article 6.1 of the ECHR, namely to the right to a reasoned and reasonable court decision.

63. Therefore, in view of the Applicant's main appealing allegation, the Court considers that it must be examined whether the Supreme Court has provided clear and sufficient reasons on which it based its decision on modification of the judgments of the lower instances, regarding the interest rate/penalty interest.

64. First, the Court recalls that in its case KI87/18, it found a violation of Article 31 of the Constitution and Article 6.1 of the ECHR due to insufficient reasoning of the court decision, as a result of the inconsistency of the Supreme Court in decision-making regarding the application of interest rates.

65. In addition, the Court refers to the relevant parts of the challenged Judgment to assess whether the Supreme Court has eliminated the causes that led to a violation of Article 31 of the Constitution and Article 6.1 of the ECHR. Consequently, the Court assesses whether the Supreme Court justifies the change of the Judgment of the Court of Appeals in item 2 (two) of the enacting clause and the Judgment of the Basic Court in Prishtina, in item 1 (one) of the enacting clause, regarding the change of the penalty interest.

66. The reasoning of the Supreme Court on this point, states: *"The Supreme Court has unified the case law in cases of determining the interest rate, in the dispute for subrogation of debt, concluding that in disputes for subrogation of damages the penalty interest defined by Article 26.6 of the Law on Compulsory Motor Third Party Liability Insurance is not applied (regardless of whether the law was in force). Therefore, based on the current state of the case, the Supreme Court finds that the courts of lower instance have erroneously applied the*

substantive law by accepting 12% interest, in disputes for debt subrogation, as is the case here. This is due to the fact that this interest rate is applied, but only to the claims of the injured parties for compensation of damage in the out-of-court procedure, as provided in Article 26 of the Law in question and Article 5.1 of the CBK Rule, no. 3 On the amendment of the Rule on Compulsory Motor Third Party Liability Insurance of 25 September 2008, in which provisions are invoked by the courts of lower instance.

67. The Supreme Court further notes that: *"The interest applied by the courts of lower instance is provided for the purpose of disciplining insurance companies in insurance reports on claims for compensation of injured persons, which insurance companies are obliged to deal urgently within the foreseen deadlines, in accordance with the above-mentioned provisions. Paragraph 7 of Article 26 of the Law on Compulsory Motor Third Party Liability excludes the application of 12% interest for debt subrogation, this interest is provided for non-dealing and delayed processing of claims of injured persons for compensation.*

68. In conclusion, the Supreme Court reasoned: *"It follows that the claimant (Applicant) is entitled only to penalty interest based on the amount paid by commercial banks in Kosovo, in deposited funds and without a definite destination over one year, in terms of the legal provision of Article 277 of LOR, and not qualified interest according to the provision applied by the courts of lower instance. Since the claimant with the submission of 19 October 2010, has requested subrogation of the debt from the respondent, it results that the respondent from this date has fallen into delay when it has not fulfilled the obligation within the deadline until the final payment".*

69. From the above, the Court considers that the Supreme Court, with the challenged Judgment, has given convincing and sufficient reasons by elaborating in detail the legal basis on which it has based the change of the interest rate (penalty interest rate) in item 2 (two) of the enacting clause, reasoning logically why in such circumstances the Applicant cannot be granted an interest rate of 12%, in accordance with Article 26.6 of the Law on Compulsory Motor Third Party Liability Insurance.

70. In this regard, the Supreme Court reasoned that Article 26.6 of the Law in question applies only in cases when the delay in payment of the obligation (compensation) is done at the request of the injured parties. Further, the Supreme Court reasoned that in the circumstances of the present case we are not dealing with a claim for compensation from

the injured party, for a claim for late payment of the obligation by the local insurance company SIGMA, to the Applicant, therefore in this regard, the Supreme Court reasoned that paragraph 6 of Article 26 of the Law on Compulsory Motor Third Party Liability Insurance does not apply to the Applicant but paragraph 7 of Article 26 of the same Law.

71. The Court recalls that the Applicant may still be dissatisfied with the reasoning and legal basis applied by the Supreme Court. However, the Court in its case law has consistently reiterated that the issues of fact and issues of interpretation and application of the law are within the scope of the regular courts and other public authorities, and as such are issues of legality, unless and insofar as such issues result in violation of fundamental human rights and freedoms or create an unconstitutional situation (see, *inter alia*, Constitutional Court Case No. KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2018, paragraph 91).

72. In addition, the Court finds that the decision-making of the Supreme Court, in the factual and legal circumstances of the present case, is in accordance with the legal opinion issued at the general meeting of the Supreme Court of 2 December 2020. In this regard, the Court recalls reasoning of the legal opinion in item nine (IX), where Supreme Court reasoned, as follows:

> ***Reasoning for item IX (nine) of legal opinion*** *- In the case law, there are frequent cases of creditors for reimbursement of damages who have fulfilled their obligations in advance to third parties, which are mainly related to cases provided by local insurance companies with foreign companies. For this type of claims in the practice of the courts, there has been an interpretation and application of legal provisions in several forms regarding the rate/amount of penalty interest for cases of reimbursement claims. This happened because the creditors when filing claims for compensation of damage referring to Article 26 of the Law on Compulsory Motor Third Party Liability Insurance, no. 04/L-018, published in the Official Gazette no. 4, dated 14 July 2011, which entered into force on 30 July 2011, requested that the claim be reimbursed at an annual rate of 12%, but the Supreme Court of Kosovo in its General Session through this legal opinion has assessed that an annual interest rate/penalty interest of 12% cannot be applied in all cases. This is because creditors' claims for reimbursement of damages mainly refer to situations of legal-civil relations (non-contractual for the creditor and the debtor), therefore, in such a case according to the*

assessment of the Supreme Court of Kosovo, the annual penalty interest must be paid according to item IV (four) and VI (six) of this legal opinion. This means that in case the creditor has fulfilled the obligation to the third party, before 20.12.2012, the interest rate will be applied as for the funds deposited in the bank over one year without a specific destination, while in case the creditor has fulfilled the obligation to the third party after 19.12.2012, then the rate/amount of penalty interest will be applied at a rate of 8%.

In addition to the above, the Supreme Court considers that the rate/amount of the annual penalty interest of 12%, cannot be applied due to the fact that according to the provisions of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, promulgated in Official Gazette No. 4, dated 14 July 2011, which entered into force on 30 July 2011, the annual interest rate of 12%, comes into expression due to negligence of insurance companies (which then appear as regressive creditors) , because if the regressive creditors had treated the claims of third parties in accordance with their legal responsibilities, the rate/amount of penalty interest of 12% could not be applied to them in court decisions, but the rate/amount would be applied as for funds deposited over a year without a specific destination, or the rate/amount of 8%, depending on which law was in force at the time the obligation relationship arouse.

73. In this regard, the Court notes the fact that the Supreme Court, as the highest instance of the regular judiciary, has fulfilled its legal and constitutional obligation, unifying the case law by issuing a principled act (legal opinion) which is required to be applied to all instances of the judiciary, including the Supreme Court. This legal act avoids the probability of violating the right to a fair trial, namely the principle of legal certainty.

74. In this regard, the Court considers that the Supreme Court, in accordance with the requirements of Article 14 of Law no. 06/L-054 on Courts, has established an effective mechanism, which avoids possible deviations from consistent case law, on the same factual and legal issues, deviations which according to the findings of the Constitutional Court have led to the violation of the principle of legal certainty, rule of law, good administration of justice and loss of public trust in the judiciary.

75. Therefore, this legal opinion of the Supreme Court is in accordance with the established criteria of the ECtHR, through which divergences

(contradictions) are identified in decision-making on the same factual and legal issues, such as: (i) profound and long-standing differences in case law, (ii) determining whether domestic law provides for a mechanism that overcomes these inconsistencies, and (iii) determining whether this mechanism has been implemented and, if so, to what extent, so that domestic court decision-making is in compliance with the requirements of a fair trial, as required by Article 31 of the Constitution and Article 6.1 of the ECHR.

76. The Court, from all the above mentioned considerations, in the circumstances of the present case, considers that the Applicant is merely dissatisfied with the outcome of the proceedings before the Supreme Court. However, its dissatisfaction cannot in itself raise an arguable claim of a violation of the fundamental rights and freedoms guaranteed by the Constitution (see, ECtHR case *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

77. Furthermore, the Court finds that all the remarks given by the Court in its Judgment of 27 February 2019 (case KI87/18), regarding the reasoning of item 2 (two) of the challenged Judgment, on what legal basis or law the Supreme Court based the modification of the Judgment of the Court of Appeals regarding the interest rate (penalty interest), have already been consumed because the challenged Judgment contains a logical reasoning and explains exactly why in the Applicant's case a rate of 12% may not be applied, noting that this interest rate applies only when claims for compensation are filed by injured persons, the claims which the insurance companies are obliged to deal with urgently within the time limits provided by the provisions of Article 26 of the Law on Compulsory Motor Third Party Liability Insurance. In addition, the Court notes that the allegation of inconsistency in decision-making has been consumed, through the issuance of a legal opinion by the Supreme Court. Thus, the causes which have led to legal uncertainty due to the non-uniform application of case law on the same factual and legal issues have been eliminated.

78. Therefore, the Court finds that in the Applicant's case there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

Conclusion

79. In sum, with regard to the allegation of a violation of the right to a reasoned and reasonable court decision, the Court concludes that the Supreme Court: (i) provided the legal basis and clearly explained why

in the Applicant's case the interest rate of 12%; does not apply (ii) the challenged Judgment of the Supreme Court contains a logical connection between the legal basis, the reasoning and the conclusions drawn; (iii) as a logical consequence between the legal basis, the reasoning and the conclusions it has resulted that challenged Judgment E. Rev. 62/2020 of the Supreme Court meets the requirement of a reasoned and reasonable court decision.

80. Therefore, the Court concludes that, in the circumstances of the present case, there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 21.4 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 28 April 2021,

DECIDES

I. TO DECLARE, unanimously the Referral admissible;

II. TO HOLD, by a majority of votes, that Judgment E. Rev. No. 62/2020 of the Supreme Court of the Republic of Kosovo, of 6 April 2020 is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6 (1) [Right to a fair trial] of the European Convention on Human Rights;

III. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

IV. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI186/19, KI187/19, KI200/19 and KI208/19, Applicant: Belkize Vula Shala and others, Constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 29 August 2019

KI186/19, KI187/19, KI200/19 and KI208/19, Judgment of 28 April 2021, published on 1 June 2021

Keywords: individual referral, lack of hearing, violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights

The circumstances of the present case are related to the privatization of the Enterprise S.O.E. "Agimi" in Gjakova and the respective rights of employees to be recognized the status of workers with legitimate rights to participate in the revenues of twenty percent (20%) from this privatization, as established in Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to the Law on the Special Chamber of the Supreme Court and paragraph 4 of Article 10 (Rights of Employees) of Regulation no. 2003/13 and amended by Regulation no. 2004/45.

The Applicants were not included in the Provisional List of Employees with legitimate rights to participate in the revenues of twenty percent (20%) from the privatization of SOE "Agimi". The latter filed complaints individually with the Privatization Agency of Kosovo. These complaints were rejected. Consequently, the Applicants filed a lawsuit with the Specialized Panel of the Special Chamber of the Supreme Court, challenging the Decision of the Privatization Agency of Kosovo regarding the determination of facts and interpretation of law, also alleging that they had been discriminated against. All the Applicants have requested a hearing before the Specialized Panel.

The Specialized Panel rejected the request for a hearing on the grounds that "the facts and evidence submitted are quite clear", entitling the Applicants, with the exception of two of them, and finding that they had been discriminated against, therefore they should be included in the Final List of the Privatization Agency of Kosovo. Acting on the basis of the appeal of the Privatization Agency of Kosovo against this Judgment, in August 2019, the Appellate Panel rendered the challenged Judgment, by which it approved the appeal of the Privatization Agency of Kosovo and modified the Judgment of the Specialized Panel, removing from the list of beneficiaries of 20% of the privatization process of SOE "Agimi" Gjakova" all the Applicants. The Applicants challenge this Judgment before the Court, claiming that it was rendered in violation of Articles 24 [Equality Before the Law], 31 [Right to

Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution, and Articles 6 (Right to a fair trial) and 1 (Protection of property) of Protocol no. 1 of the European Convention on Human Rights. With regard to the violations of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, the Applicants allege that the Appellate Panel modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

In assessing the Applicants' allegations, the Court focused on those related to the absence of a hearing before the Special Chamber of the Supreme Court, and in this context, (i) initially elaborated on the general principles regarding the right to a hearing, as guaranteed by the Constitution and the European Convention on Human Rights; and then, (ii) applied the latter to the circumstances of the present case. The Court, relying, *inter alia*, on the Judgment of the Grand Chamber of the European Court of Human Rights, *Ramos Nunes de Carvalho and Sá v. Portugal*, clarified the key principles relating to (i) the right to a hearing before the first instance courts; (ii) the right to a hearing before the second and third instance courts; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of hearing before the first instance can be corrected through a hearing before the higher instance and the relevant criteria for making that assessment. In addition, the Court specifically examined and applied the case law of the European Court of Human Rights on the basis of which it is assessed whether the absence of a request for a hearing can be considered as an implicit waiver of such a right by the parties.

Following the application of these principles, the Court found that the challenged Judgment, namely Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court, was rendered contrary to the guarantees embodied Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, as regards the right to a hearing, *inter alia*, because (i) the fact that the Applicants did not request a hearing before the Appellate Panel does not mean their waiver of this right, nor does it exempt the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the Special Chamber of the Supreme Court; (iii) the Appellate Panel did not deal with "exclusively legal or highly technical matters", on the basis of which "extraordinary circumstances that could justify the absence of a hearing" could have existed; (iv) The Appellate Panel, in fact, considered

the “fact and law” issues, which, in principle, require holding a hearing; and (v) the Appellate Panel did not reason “waiver of the oral hearing”.

Therefore, the Court found that the abovementioned Judgment of the Supreme Court should be declared invalid, and be remanded to the Appellate Panel of the Special Chamber of the Supreme Court for reconsideration. The Court also emphasized the fact that its finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, in the circumstances of the present case, relates exclusively to the absence of a hearing, and does not in any way prejudge the outcome of the merits of the case.

In relation to case KI208/19 where the Applicant was Ethem Bokshi, the Court did not examine that Referral, because the Court has already decided on this Applicant in case KI145/19.

JUDGMENT

in

cases no. KI186/19, KI187/19, KI200/19 and KI208/19

Applicant

Belkize Vula Shala and others

Constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 29 August 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. Referral KI186/19 was submitted by Belkize Vula Shala, residing in Gjakova; Referral KI187/19 was submitted by Agim Buza, residing in Gjakova; Referral KI200/19 was submitted by Shkendije Shehu, residing in Gjakova; Referral KI208/19 was submitted by Ethem Bokshi residing in Gjakova (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, whereby the Applicants allege a violation of their fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair Trial and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 6 (Right to a fair trial) and 1 (Protection of property) of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 14 October 2019, the Applicants Belkize Vula Shala and Agim Buza submitted their Referrals by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 7 November 2019, the Applicant Shkëndije Shehu submitted the Referral by mail service to the Court.

7. On 20 November 2019, the Applicant Ethem Bokshi submitted the Referral by mail service to the Court.

8. On 29 October 2019, the President of the Court appointed for case KI186/19 Judge Selvete Gërxhaliu Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi Peci and Nexhmi Rexhepi.
9. On 29 October 2019, in accordance with Rule 1 of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referral KI187/19 with Referral KI186/19.

10. On 5 November 2019, the Court notified Applicants of referrals KI186/19 and KI187/19 and the SCSC about their registration and joinder.

11. On 12 November 2019, the President of the Court ordered the joinder of Referral KI200/19 with Referrals KI186/19 and KI187/19.
12. On 19 November 2019, the Court notified the Applicant KI200/19 as well as the SCSC about the registration of the Referral and its joinder with Referrals KI186/19 and KI187/19.

13. On 19 December 2019, the Court requested clarification from the Applicant KI208/19, because he had only submitted an earlier Referral registered under No. KI145/19. However, he did not respond to the Court's request.

14. In relation to case KI208/19 where the Applicant is Ethem Bokshi, the Court will not consider this Referral, because the Court has already decided on this Applicant in case KI145/19.

15. On 28 April 2021, after having considered the report of the Judge Rapporteur, the Review Panel, by a majority, recommended to the Court the admissibility of the Referral.

16. On the same date, the Court by a majority found that (i) the Referral is admissible; and by a majority found that (ii) Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

17. On 15 September 2010, the Privatization Agency of Kosovo (hereinafter: the PAK) privatized the socially-owned enterprise SOE "Agimi" in Gjakova (hereinafter: SOE "Agimi"). On the same date, by letter [no. 1065], the Applicants were notified that "*the consequence of the sale of the main assets is the termination of your employment*" and that the latter "*is terminated immediately*". All Applicants were employees of the respective enterprise at regular intervals.

18. Based on the case file and taking into account that the Applicants were not part of the Provisional List of employees with legitimate rights to participate in the twenty percent (20%) revenues from the privatization of SOE "Agimi", the latter individually filed complaints with the PAK. The latter, on 13 December 2011, rejected the relevant complaints as ungrounded.

19. On 22 December 2011, by the media: (i) the Final List of employees with legitimate rights to participate in the twenty percent (20%) of the privatization proceeds of the SOE "Agimi" was published (hereinafter: the Final List); and (ii) 14 January 2012 was set as the deadline for submitting complaints to the Special Chamber of the Supreme Court (hereinafter: the SCSC) against the Final List.

20. Between 28 December 2011 and 13 January 2012, the Applicants individually filed a complaint with the Specialized Panel of the SCSC, due to non-inclusion in the Final List. In principle, all had claimed that they were not treated equally with the other employees included in the Final List, and consequently were discriminated against.

21. Between 1 March 2012 and 18 April 2012, the PAK responded to the Applicants' complaints, stating that the respective Applicants do not meet the criteria set out in paragraph 4 of Section 10 (Employee Rights) of UNMIK Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property (hereinafter: Regulation No. 2003/13), because (i) they have not provided evidence to prove the continuity of the employment relationship; (ii) at the time of privatization of the Enterprise, the respective Applicants were not registered as employees of SOE "Agimi"; and (iii) they have not substantiated allegations of discrimination.

22. Between 3 April 2012 and 3 May 2012, by the response to the complaint of the PAK, some of the Applicants submitted letters with additional information regarding the status of the employee in the SOE "Agimi", stating that (i) all "*documentation is at the disposal of company officials*"; and (ii) requested that a hearing be held.

23. On 4 September 2013, the Specialized Panel of the SCSC rendered the Judgment [SCEL-11-0075] by which (i) in point II of the enacting clause approved the complaints of the Applicants, Shkendije Shehu and Belkize Vula Shala, respectively, stipulating that the latter should be included in the Final List of employees with a legitimate right to participate in the twenty percent (20%) proceeds from the privatization of the SOE "Agimi"; while (ii) rejected as ungrounded the complaints of the complainants mentioned in point III, in this case the Applicant Agim Buza.

24. The Specialized Panel, by the abovementioned Judgment, initially determined that based on paragraph 11 of Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (hereinafter: Annex to the Law

on the SCSC), the hearing was not necessary because "*the facts and evidence adduced are quite clear*". Whereas, with respect to the Applicants, whose complaints were approved, the Specialized Panel noted that (i) the Applicants concerned, if they had not been discriminated against, would have met the criteria set out in paragraph 4 of Article 10 of Regulation. no. 2003/13, noting that "*to them the employment relationship was terminated during the 1990s and dismissed and replaced by Serb employees"*, and that this finding is a consequence of "*world-known events after 1990 and onwards*"; and (ii) in cases where discrimination is alleged, based on Article 8 (Burden of proof) of Anti- discrimination Law No. 2004/3 (hereinafter: the Anti-Discrimination Law), belongs to the respondent, namely PAK, prove that there has been no violation of the principle of equal treatment, evidence that has not been provided by PAK. Finally, regarding the rejection of the appeals of Agim Buza, respectively, through point III of the enacting clause of the respective Judgment, the Specialized Panel stated that they had not submitted evidence to prove the fulfillment of the criteria set out in paragraph 4 of Section 10 of UNMIK Regulation no. 2004/45 on Amending Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property (hereinafter: Regulation No. 2004/45).

25. On 26 September 2013, the Specialized Panel of the SCSC rendered the Decision [SCEL-11-0075] by which it corrected the abovementioned Judgment, as the submitted copy of the Judgment in English was the preliminary version and not the final one, while the Albanian language version remained unchanged.

26. On 24 and 30 September 2013, Applicant Agim Buza filed individual appeal against point III of the enacting clause of the Judgment of the Specialized Panel of the SCSC, alleging erroneous determination of factual situation and erroneous application of law, namely paragraph (j) of Article 4 (Implementation Scope) of the Anti-discrimination Law and paragraph 4 of Article 10 of Regulation No. 2003/13. The latter alleged that he was discriminated against by being treated unequally with other employees and who were included in the Final List. The PAK did not file a response to the complaint of Agim Buza.

27. On 30 September 2013, the PAK filed an appeal against point II of the Judgment of the Specialized Panel of the SCSC, by which the complaint of the Applicants Belkize Vula Shala and Shkëndije Shehu were approved, alleging erroneous determination of the factual situation and erroneous application of substantive law, with the proposal that point II of the enacting clause of this Judgment be

annulled. According to the PAK, no appellant who by the challenged Judgment is included in the Final List of employees with legitimate rights to participate in the revenues of twenty percent (20%) from the privatization of the SOE "Agimi" did not present relevant facts on the basis of which would prove the fact of unequal treatment and the justification for direct or indirect discrimination in accordance with paragraph 1 of Article 8 of the Anti-Discrimination Law.

28. On 29 August 2019, the Appellate Panel of the SCSC rendered Judgment [AC-I-13-0181-A0008], by which (i) referring to paragraph 1 of Article 69 (Oral Appeal Procedures) of Law No. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (hereinafter: Law no. 06/L-086 on the SCSC), the relevant Panel *"decided to waive part of the oral hearing"*; (ii) rejected as ungrounded the complaints of Agim Buza; while (ii) approved the PAK complaint as grounded, regarding the other Applicants, namely Belkize Vula Shala and Shkëndije Shehu, determining that "*the latter are removed from the list of beneficiaries of 20% from the privatization process of the SOE "Agimi" Gjakova*".

29. With regard to the Applicant Agim Buza, the Appellate Panel reasoned that (i) the latter did not submit evidence to prove his Referral; and (ii) the employment booklet shows that he was employed on 1 January 1990, while the termination of the employment relationship occurred on 30 September 1994, "*due to starting of work as an independent entrepreneur"*.

30. Regarding the approval of the PAK complaint as grounded, the Appellate Panel, *inter alia*, stated that the Applicants (i) do not prove by any evidence the fact that they were employed in the SOE "Agimi" or that have been on the payroll at the time of the privatization of the enterprise, the conditions that are required to be met based on paragraph 4 of Article 10 of Regulation no. 2003/13, to be recognized the right to be included in the final list of SOE "Agimi" for obtaining twenty percent (20%) of the sale of the enterprise; and (ii) does not agree with the finding of the Specialized Panel regarding discrimination of relevant employees *"because according to the practice established by the Special Chamber regarding the interpretation of discrimination, this employee as he is of Albanian nationality could not have been discriminated against after June 1999*".

31. With regard to allegations of discrimination, the Appellate Panel also noted that "*the case law*" of the SCSC, based on Judgments [ASC-11-0069] and [AC-I-12-0012], stipulates that discriminated against can

be counted: (i) "*the employees of Albanian ethnicity, or belonging to the Ashkali, Roma, Egyptian, Gorani and Turkish minorities, who had left for reasons of discrimination in the so-called period of "interim Serbian measures" (ranging from 1989 to 1999), or who were discriminated against in different periods, due to their ethnicity, political and religious beliefs, etc..*"; and (ii) "*Serb ethnic employees who, due to lack of security after 1999, did not show up for work and were not included in the final lists of employees*".

32. Furthermore, with regard to the Applicant (i) Belkize Vula Shala, it clarified that the latter submitted a copy of the work booklet as evidence, "*based on which the Court establishes the fact that the latter has started work at the SOE "Agimi" from 5 July 1983 and ended on 31 January 1995, also from the work booklet confirms the fact that the complainant from 1 February 1995 has established a new employment relationship in PP "Marash Petrol" and the latter is still open"* and that consequently, the rights claimed by the SOE "Agimi" [1] do not belong to her; (ii) Shkëndije Shehu, clarified that she did not attach any evidence to prove the alleged facts, and that "*the complainant does not prove by any evidence the fact that she has established or continued to work in SOE "Agimi", or that she was on the payroll at the time of privatization of the enterprise, conditions that are required to be met by the complainants under UNMIK Regulation no. 2003/13 namely Article 10 point 4 of the latter to be recognized the right to be included in the final list of SOE "Agimi" for the benefit of 20% from the sale of the enterprise".*

Applicant's allegations

33. The Applicants allege that by Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, their rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Article 6 (Right to a fair trial) and Article 1 (Protection of property) of Protocol no. 1 of the ECHR have been violated.

[1]In Judgment AC-I-13-0181-A0008 of 29 August 2019 of the Appellate Panel of the Special Chamber, it was decided for two Applicants of the same name Belkize Vula Shala, where for the complainant no. C-0024-02 Belkize Vula Shala, the Appellate Panel has decided that the complaint of the complainant is ungrounded, while for the complainant no. C-0035 Belkize Vula Shala, the Appellate Panel decided that the complainant's appeal is out of time. Based on what was presented in the Referral and in the Judgment of the Appellate Panel, we have concluded that the Referral before the court was filed by the Applicant Belkize Vula Shala No. C-0024-02.

34. With regard to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants initially state that all were employees of the SOE "Agimi", and that this is also confirmed by the letter of the PAK which was addressed to them on 15 September 2010, by which they were notified that as a result of the privatization of the enterprise in question, all relevant employment relationships have been terminated, and that consequently the latter, meet the criteria set out in paragraph 4 of Article 10 of Regulation 2003/03 to benefit from the twenty percent (20%) of the privatization of the respective enterprise. Furthermore, the Applicants state that they have submitted the available evidence, but that "*relevant evidence was available to the Personnel Office of J.S.C. "Agimi" in Gjakova and then the staff appointed by the PAK, the employees of former JSC or SOE "Agimi" Gjakova*".

35. The latter, in essence, allege that the challenged Judgment was rendered contrary to the procedural guarantees established in the abovementioned articles because the latter (i) modified the Judgment of the Specialized Panel and which was in favor of the Applicants, without a hearing, not allowing them to comment on the disputed facts, emphasizing that "*it is true that the Special Chamber has the opportunity to hold a trial even without the presence of the parties, but it is also true that it has the right to schedule a public hearing and it would give the Court and the parties the opportunity to confront submissions and evidence, to make an open, fair and transparent trial that would argue the relevant facts*"; (ii) unlike the Judgment of the Specialized Panel, it contains an arbitrary interpretation regarding discrimination because the burden of proof regarding the allegations of discrimination based on Article 8 of the Anti-Discrimination Law falls on the PAK; (iii) is not justified; and (iv) has violated their rights to a trial within a reasonable time.

36. With regard to the alleged violations of Article 24 of the Constitution, the Applicants state that they have not been treated equally with other employees of the SOE "Agimi", whose "*legal and factual situation*" is identical to the Applicants, while the challenged Judgment of the Appellate Panel has addressed their allegations in terms of ethnic discrimination, referring to the "*case law*".

37. Finally, the Applicants request the Court: (i) to declare the Referrals admissible; (ii) to find that there has been a violation of Articles 24, 31 and 46 of the Constitution in conjunction with Article 6 and Article 1 of Protocol no. 1 of the ECHR; (iii) to declare the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC

invalid, and remand the latter for retrial in accordance with the Judgment of this Court.

Admissibility of the Referral

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

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

> *"1The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

40. The Court also examines whether the Applicants have fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of the Referral]

> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".*

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision... ".

41. Regarding the fulfillment of these requirements, the Court notes that the Applicants are authorized parties, challenging an act of a public authority, namely the Judgment [AC-I-13-0181-A0008] of the Supreme Court of 29 August 2019, of the Appellate Panel of the SCSC after exhaustion of all legal remedies provided by law. The Applicants also clarified the rights and freedoms they claim to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines of Article 49 of the Law.

42. The Court also finds that the Applicants' Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. Furthermore, and finally, the Court considers that this Referral is not manifestly ill-founded as established in paragraph (2) of Rule 39 of the Rules of Procedure and, consequently, it must be declared admissible and its merits examined.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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

[...]

European Convention on Human Rights

Article 6

(Right to a fair trial)

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

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

Article 10
Judgments, Decisions and Appeals

[...]
11. When the appellate panel has accepted and is deciding on an appeal, the following rules shall be strictly observed: 11.1. the appellate panel shall not modify, annul, reverse or otherwise change, in any manner, any finding of fact made by a court, specialized panel, sub-panel or single judge unless the appellate panel determines that such finding of fact is clearly erroneous. A finding of fact shall not be determined to be clearly erroneous if such finding of fact is supported by any reasonable interpretation of the record of the trial proceedings and the evidence submitted during such proceedings; and 11.2. the appellate panel shall conduct a de novo review of each issue of law raised by the appellant or a respondent in their written submissions.
[...]

Annex of the Law no. 04/l-033 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters

Rules of Procedure of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters

Article 36
General Rules on Evidence

[…]

3. A party alleging a fact or an event shall be given a reasonable opportunity to submit or produce material evidence in support of such allegation. If such party fails to submit or produce any such evidence, the party shall be determined to have not discharged its burden of proof with respect to that allegation.

Article 68
Complaints Related to a List of Eligible Employees

1. The procedure for cases based on complaints falling within the scope of paragraph 1.6 of Article 4 of the Special Chamber Law shall, except as specifically provided in this Article 68, generally follow the other procedural rules set forth in this Annex, which the Special Chamber shall apply mutatis mutandis as the Special Chamber deems necessary and in the interest of justice.

2. Upon receiving a list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such a list, the Agency shall publish such list together with a notice to the public of the right of any person to file a complaint with the Agency within twenty (20) days after the date of publication requesting inclusion in such list and/or challenging the inclusion of one or more other persons in such list. The person filing any such request or challenge shall include therein a statement of the facts and the legal arguments supporting such request or challenge; such person shall have the burden of proving all facts alleged in the request and/or challenge.

[…]

6. The Agency shall publish its final list of eligible employees established pursuant to paragraph 5 of this Article in conformity with Section 10.6 of UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such list, together with a notice to the public of the right of any person to file a complaint with the Special Chamber within twenty (20) days after the date of publication challenging such list and/or the Agency's distribution of escrow funds to the persons identified therein. The complainant(s) filing any such complaint shall include therein a statement of the facts and the legal arguments

supporting such complaint; the complainant(s) shall have the burden of proving all facts alleged in the complaint.
[…]
11. The concerned Specialized Panel, acting on its own initiative or pursuant to a written request of the complainant(s) or the Agency, may decide to hold one or more oral hearings on the matter. If an oral hearing is to be held, the Specialized Panel shall cause the Registrar to serve on the parties, at least five (5) days in advance of such hearing, a written notice of the time and date of such hearing.
[…]
14. The Appellate Panel shall dispose of all such appeals as a matter of urgency.

Article 64
Oral Appellate Proceedings

1. The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application must be filed prior to the closing of written appellate procedures.
[…]

Article 65
Submission of New Evidence

In exceptional circumstances and for good cause shown, the Appellate panel may permit a party to present to the Appellate Panel new evidence that was not available to the party during the evidentiary portion of the first instance proceedings. A written application for such permission must first be submitted to the Appellate Panel and served on the other parties not less than fifteen (15) days before the date of the hearing where such evidence is proposed to be presented. The Appellate Panel may authorize the presentation of such new evidence if it considers it to be in the interests of justice.

Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property

Article 10
Rights of employees

[…]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatisation and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[…]

Regulation no. 2004/45 amending Regulation no. 2003/13 on the Transformation of the Right of Use to Socially-owned Immovable Property

Section 1
Amendments

As of the date of entry into force of the present Regulation,
[…]
B. Sections 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13 shall be amended to read:
[…]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Sociallyowned Enterprise at the time of privatisation or initiation of the liquidation procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[…]

Law no. 06/L–086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters

Article 69
Oral Appellate Proceedings

2. *The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on one or more hearing sessions on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application shall be filed prior to the closing of written appellate procedures.*
[…]

Anti-Discrimination Law No. 2004/3

Article 8
Burden of proof

8.1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment
8.2. Paragraph 8.1 shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a complainant may establish or defend their case of discrimination by any means, including on the basis of statistical evidence.

Merits of the case

43. The Court recalls that the circumstances of the present case relate to the privatization of the socially-owned enterprise SOE "Agimi" in Gjakova, and the rights of the respective employees to be recognized as employees with legitimate rights to participate in the twenty percent (20%) revenues from this privatization, as defined in Article 68 of the Annex to the Law on SCSC, and paragraph 4 of Article 10 of Regulation no. 2003/13 amended by Regulation no. 2004/45.

44. The Court notes that based on the case file, it results that the abovementioned socially-owned enterprise was privatized on 15 September 2010, the date on which the Applicants were also notified through individual documents that "*the consequence of the sale of the main assets is the termination of your employment*" and that the latter "*is terminated immediately*". The Applicants subsequently challenged their non-inclusion in the PAK Provisional List of Employees with legitimate rights to participate in twenty percent (20%) of the Privatization of SOE "Agimi". These complaints were rejected.

45. Initially, the Applicants initiated a lawsuit in the Specialized Panel, challenging the PAK Decision, both regarding the establishment of facts and the interpretation of the law. The latter had allegedly been discriminated against and all requested a hearing before the Specialized Panel.

46. The Supreme Court rejected the request for a hearing on the grounds that "*the facts and evidence submitted are quite clear*". The Specialized Panel gave the right to the Applicants, with the exception of the Applicant Agim Buza (KI187/19), stating that the latter were discriminated against. The Specialized Panel, stated that "*the complainants would have met the conditions within the meaning of Article 10.4 of Regulation 2003/13, if they had not been subject to discrimination, as they were terminated during the 1990s and dismissed and replaced by Serb workers*".

47. Following the issuance of this Judgment, initially appeal with the Appellate Panel was filed (i) Agim Buza (KI187/19), the only Applicant whose appeal was rejected by the Specialized Panel as ungrounded, filing an appeal with the Appellate Panel, additional documents; and (ii) the PAK. Neither the first nor the second requested a hearing.

48. The Court notes that in August 2019, the Appellate Panel rendered the challenged Judgment, by which it approved the appeal of the PAK and rejected the appeal of Agim Buza, modifying the Judgment of the Specialized Panel and consequently, removing "*from the list of beneficiaries of 20% from the privatization process of the SOE "Agimi "Gjakova*", all the Applicants.

49. The Appellate Panel initially stated that it had decided to "*waive part of the oral hearing*", referring to paragraph 1 of Article 69 (Oral Appellate Proceedings) of Law No. 06/L-086 on the SCSC. Whereas, regarding the merits of the case, (i) had found that the evidence presented by the respective parties does not prove that they meet the legal requirements set out in paragraph 4 of Article 10 of Regulation no. 2003/13 to recognize the relevant rights; and (ii) stated that the interpretation of discrimination by the Specialized Panel was contrary to the "*case law*" of the SCSC.

50. Consequently, these findings of the Appellate Panel are challenged by the Applicants before the Court, alleging a violation of their rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Articles 6 (Right to a fair trial) and 1 (Protection of

property) of Protocol no. 1 of the ECHR. With regard to violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants, as explained above, allege that the Appellate Panel modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without a sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

51. The Applicant's allegations will be examined by the Court on the basis of the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

52. In this regard, the Court will first examine the Applicants' allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the absence of a hearing at the level of the Appellate Panel.

General principles regarding the right to a hearing within the meaning of Article 6 of the ECHR

53. The Court first recalls that based on the case law of the ECtHR, Article 6 of the ECHR, in principle, guarantees that a hearing be held at least at one level of decision-making. Such is, in principle, (i) mandatory if the court of first instance has sole jurisdiction to decide matters of fact and law; (ii) not binding in the second instance if a hearing is held in the first instance, despite the fact that such a determination depends on the characteristics of the case at hand, for example, if the second instance decides on both fact and law; and (iii) mandatory in the second instance if one has not been held in the first instance, in cases where the second instance has full competence to assess the decision of the first instance, also in relation to matters of fact and law (see, *inter alia,* the ECtHR cases *Fredin v. Sweden* (no. 2), Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden* (no. 2), Judgment of 19 February 1998, paragraph 46). Exceptions to this general principle are cases in which "*there are extraordinary circumstances that would justify the absence of a hearing"*, and which the ECtHR, through its case law has defined as the cases dealing exclusively with legal matters or are of a very technical nature (See the case of the ECtHR, *Koottummel v. Austria*, Judgment of 10 December 2009, paragraphs 19 and 20).

54. With regard to the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in the proceedings before a sole and first instance court, the right to a hearing is guaranteed by paragraph 1 of Article 6 of the ECHR (see, *inter alia,* the ECtHR cases *Fredin v. Sweden* (no. 2), Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden* (no. 2), Judgment of 19 February 1998, paragraph 46; *Göç v. Turkey*, Judgment of 11 July 2002, paragraph 47).

55. With regard to the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified on the basis of the specific characteristics of the relevant case, provided that a hearing has been held in the first instance (see, in this context, the case of the ECtHR, *Salomonsson v. Sweden*, Judgment of 12 November 2002, paragraph 36). Therefore, the proceedings before the courts of appeal, which involve only matters of law and not matters of fact, may be considered to be in accordance with the guarantees embodied in Article 6 of the ECHR, even if in the second instance there has not been a hearing.

56. With regard to the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to the Judgment of 6 November 2018 of the ECtHR: *Ramos Nunes de Carvalho and Sá v. Portugal*, in which the Grand Chamber of the ECtHR established the principles on the basis of which the necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) involves merely legal matters of a limited nature (see ECtHR cases *Allan Jacobsson v. Sweden* (no. 2), cited above, para 49; and *Valová, Slezák and Slezák v. Slovakia*, Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see the case of the ECtHR, *Varela Assalino v. Portugal*, Decision of 25 April 2002); involves highly technical matter, which are better addressed in writing than through oral arguments in a hearing; and (iii) does not involve issues of credibility of the parties or disputed facts and the courts may decide fairly and reasonably on the basis of the parties' submissions and other written materials (See the cases of the ECtHR, *Döry v. Sweden*, Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria*, Judgment of 18 December 2008, paragraph 73).

57. With regard to the possibility of a second-instance correction of the absence of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on powers of the highest court. If the latter has full jurisdiction to examine the competencies of the case at hand,

including the assessment of the facts, then the correction of the absence of a hearing in the first instance may be made in the second instance (See the case of the ECtHR, *Ramos Nunes de Carvalho v. Portugal*, cited above, paragraph 192 and references used therein).

58. Finally, according to the case-law of the ECtHR, the fact that the parties did not request to hold a hearing does not mean that they waived their right to hold one. Based on the case law of the ECtHR, such a case depends on the characteristics of domestic law and the circumstances of each case separately (See the case of the ECtHR, *Göç v. Turkey*, cited above, paragraph 48).

(vi) Application of the principles elaborated above to the circumstances of the present case

59. In this regard, the Court first recalls that through individual complaints filed with the Specialized Panel as a first instance, all Applicants requested to hold a hearing. The Specialized Panel rejected to hold the latter, stating that based on paragraph 11 of Article 68 of the Annex to the Law on the SCSC, a hearing was not necessary because "*the facts and evidence submitted are quite clear*". As has already been clarified, the Specialized Panel, based on these "*facts and evidence*", had decided that the Applicants, with the exception of Applicant Agim Buza, were also discriminated against by deciding that they should be included in the Final List of PAK as employees with legitimate rights to participate in the twenty percent (20%) proceeds of the privatization of the SOE "Agimi".

60. Only the PAK and Agim Buza filed appeals with the Appellate Panel because their appeal was rejected by the Judgment of the Specialized Panel. The Appellate Panel decided in favor of the PAK, modifying the Judgment of the Specialized Panel and rejecting the appeals of all Applicants regarding non-inclusion in the PAK Final List as a result of discrimination. As explained above, the Appellate Panel decided to "*waive the right of the oral hearing*", referring to paragraph 1 of Article 69 of Law no. 06/L-086 on the SCSC. The Applicants, namely Agim Buza, the only Applicant who had appealed to the Appellate Panel due to the rejecting Judgment in the first instance, did not request to hold a hearing. Also, the other part of the Applicants, in this case Belkize Vula Shala and Shkëndije Shehu, who had submitted additional documents in response to the PAK appeal against the Judgment of the Specialized Panel, but did not request to hold a hearing.

61. However, as explained above, the fact that the Applicants did not request a hearing does not necessarily mean that they implicitly

waived such a request, and also the absence of such a request does not necessarily exempt the relevant court from the obligation to hold such a hearing.

62. More specifically, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, the ECtHR, *inter alia*, assesses whether the absence of such a request can be considered as an implicit waiver of an applicant from the right to a hearing. Having said that, the lack of a request for a hearing, based on the case law of the ECtHR, is never the only factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing exempts a court of the obligation to hold a hearing depends on (i) the specifics of the applicable law; and (ii) the circumstances of a case.

63. First, with regard to the specifics of the applicable law, namely the Law and the Annex to the Law on the SCSC, the Court recalls that pursuant to Article 64 (Oral Appellate Proceedings) of the same law, "*The Appellate Panel shall decide to whether or not to hold on or more oral hearings on the concerned appeal*", based on its initiative or even a written request from a party. Article 69 (Oral Appellate Proceedings) of Law no. 06/L-086 on the SCSC, has the same content. Based on these provisions, consequently, the holding of a hearing at the instance of appeal, does not necessarily depend on the request of the party. It is also the task of the respective Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held. Furthermore, based on Article 60 (Content of appeal) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the Appellate Panel has the competence to assess both issues of law and fact, and consequently, is equipped with full competence to assess how the lower authority, namely the Specialized Panel, has assessed the facts (see cases of the Constitutional Court No. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 Applicant *Et-hem Bokshi and others*, Judgment of 10 December 2020, paragraph 61).

64. In the circumstances of the present case, the Appellate Panel assessed the facts and allegations of the Applicants and modified the Judgment of the Specialized Panel regarding the assessment of the facts and the interpretation of the law, to the detriment of the Applicants. In such circumstances, taking into account the legal provisions, the Court cannot find that the absence of a hearing in the Appellate Panel is justified only as a result of the absence of a request by the parties to the proceedings. As explained above, based on Article 64 of the Annex

to the Law on SCSC it is the obligation of the Appellate Panel, even on its own initiative, to assess whether the holding of a hearing is mandatory, and if not, to justify the non-holding of the latter.

65. Secondly, with regard to (ii) the circumstances of a case, the Court recalls that the case law of the ECtHR states that the absence of a request for a hearing, and the assessment of whether this fact may result in the finding that the party concerned implicitly waived the right to a hearing, it should be assessed in the entirety of the specifics of a procedure, and not as a single argument, to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR (see cases: of the Constitutional Court No. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19 Applicant *Et-hem Bokshi and others*, Judgment of 10 December 2020, paragraph 62).

66. The Court recalls that in the circumstances of the present case, (i) the Applicants were not given the opportunity to be heard before a Specialized Panel with jurisdiction to assess the facts and the law, despite their request; (ii) the Applicants had not appealed to the Appellate Panel because the decision of the Specialized Panel was in their favor; (iii) the proceedings before the Appellate Panel were initiated through a complaint from the PAK; (iv) The Appellate Panel had "*waived the right from the hearing*", referring to Article 69 of Law 06/L-086 on the SCSC, an article identical to Article 64 of the Annex to the Law on the SCSC, which simply determine that "*The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal*"; and (v) the Appellate Panel, based on the PAK appeal and the appeal of the Applicant Agim Buza considered all the facts of the case, including the Applicants' appeals submitted to the first instance, and stated that it disagreed neither with the assessment of the facts nor with the interpretation of the law by the lower instance court, modified in entirety the Judgment of the Specialized Panel, removing all Applicants from the List of Employees with legitimate rights to benefit from the twenty percent (20%) of the privatization of the enterprise SOE "Agimi".

67. In such circumstances, the Court cannot find that the Applicants' absence of a request to hold a hearing at the level of the Appellate Panel can be considered as their implied waiver of the right to a hearing. The Court recalls that in all cases in which the ECtHR had reached such a finding, it made it in connection with the fact that the circumstances of the cases were related to the issues of an exclusively legal or technical nature, and consequently "*there were exceptional*

circumstances which would justify the absence of a hearing". Consequently and in the following, the Court must assess whether in the circumstances of the present case, "*there are exceptional circumstances that would justify the absence of a hearing*", namely whether the nature of the cases before the Appellate Panel can be classified as "*exclusively legal or of a highly technical nature*" (see cases of the Constitutional Court No. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI15l/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, K1157/19 and K1159/19 Applicant *Et-hem Bokshi and others*, cited above, paragraph 68).

68. In the circumstances of the present case, the Court first recalls that the Appellate Panel has jurisdiction over both fact and law issues. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Law on the SCSC) and paragraph 4 of Article 64 (Oral Appellate Proceedings) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the parties have, *inter alia*, the opportunity to raise complaints before the Appellate Panel regarding both matters of law and facts, including the opportunity of presenting new evidence.

69. Furthermore, in the circumstances of the present case, the Appellate Panel considered all the facts presented through (i) the Applicants' initial complaint to the Specialized Panel and responses to the PAK appeal; and (ii) the complaint of the PAK and of Agim Buza to the Appellate Panel and the relevant responses to the Applicants' appeal. Despite the fact that the Specialized Panel had assessed that the evidence "*is clear*" recognizing the right to the Applicants, the Appellate Panel found the opposite based on the same evidence.

70. The Court also recalls that pursuant to paragraph 11 of Article 10 of the Law on the SCSC, the Appellate Panel is limited to changing the assessment of the factual situation made by the Specialized Panel, unless it determines that the factual findings of the court are "*clearly erroneous*", a rule that according to the same article must be "*strictly observed*". Such reasoning is not found in the Judgment of the Appellate Panel. The latter simply disagreed with the assessment of the evidence by the Specialized Panel, and also found that the interpretation which the Specialized Panel had made of the allegations of discrimination was inconsistent with the *"case law"*.

71. The Court further notes that in accordance with Article 68 of the Annex to the Law on the SCSC, in the event of complaints concerning

the list of employees with legitimate rights, the burden of proof falls on the Applicants before the Specialized Panel. Also, the burden of proof for the opponent of such a request falls on the responding party, namely the PAK, in the circumstances of the present case. Before the Appellate Panel, the burden of proof also falls on the appellant concerned. But the circumstances of the present case are also, in essence, related to allegations of discrimination. In case of such allegations, the burden of proof, based on Article 8 (Burden of proof) of the Anti- Discrimination Law, falls on the respondent, namely the PAK, and not the Applicants (see cases of the Constitutional Court No. Kl145/19, Kl146/19, Kl147/19, Kl149/19, Kl150/19, KI151/19, KI152/19, Kl153/ 19, Kl154/19, KI155/19, Kl156/19, KI157/19 and Kl159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 76).

72. In such circumstances, in which (i) the Appellate Panel has considered issues both of fact and law; (ii) in which with regard to the facts, the burden of proof that they meet the criteria of paragraph 4 of Article 10 of Regulation no. 2003/13, in principle falls on the Applicants, while the burden of proof regarding discrimination falls on the PAK; and (iii) the Appellate Panel interprets the same facts presented by the parties differently from how the Specialized Panel has interpreted them, modifying the Judgment to the detriment of the parties, despite the fact that such a possibility based on paragraph 11 of Article 10 of Law no. 04/L-033 on the SCSC was recognized only as an exception, provided that it argued that the lower authority, namely the Specialized Panel, had made a "*clearly erroneous*" interpretation, the Court considers that it is indisputable that the issue under consideration before the Appellate Panel, is not (i) either an exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel contains important factual and legal issues. In such a situation, the importance for the parties to be offered an adversarial hearing before the body conducting the judicial review should not be underestimated. Consequently, the Court must find that in the circumstances of the present case, there are no circumstances which would justify the absence of a hearing (see cases of the Constitutional Court No. Kl145/19, Kl146/19, Kl147/19, Kl149/19, Kl150/19, KI151/19, KI152/19, Kl153/ 19, Kl154/19, KI155/19, Kl156/19, KI157/19 and Kl159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 77).

73. In support of this finding, the Court recalls that the ECtHR Judgment *Ramos Nunes de Carvalho and Sá v. Portugal* specifically stated that a hearing was necessary in circumstances involving the need to consider matters of law and fact, including cases in which it is

necessary to assess whether the lower authorities have assessed the facts correctly. This is especially true in circumstances in which a hearing has not been held even before the lower instance, as is the case in the circumstances of the present case.

74. Finally, the Court also notes the fact that the Appellate Panel did not justify its "*waiver of the hearing*", but merely referred to Article 69 of Law 06/L-086 on the SCSC. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on holding of a hearing on its own initiative or at the request of a party. The relevant judgment does not contain any additional explanation regarding the decision of the Appellate Panel to "*waive the hearing*". In this context, the Court notes that based on the case law of the ECtHR, in assessing allegations relating to the absence of a hearing, it should also be considered whether the refusal to hold such a hearing is justified (see case of the ECtHR *Pönkä v. Estonia*, Judgment of 8 November 2016, paragraphs 37-40; and *Mirovni Inštitut v. Slovenia*, paragraph 44). In the context of the lack of reasoning for not holding a hearing, the ECtHR, through its case law, has consistently, *inter alia*, emphasized that the lack of reasoning about the necessity of holding a hearing makes it impossible for the highest court to assess whether such a possibility has simply been neglected, or what are the arguments on the basis of which the court has ignored such a possibility in relation to the circumstances raised by a particular case (see cases of the Constitutional Court No. Kl145/19, Kl146/19, Kl147/19, Kl149/19, Kl150/19, KI151/19, KI152/19, Kl153/ 19, Kl154/19, KI155/19, Kl156/19, KI157/19 and Kl159/19, Applicant *Ethem Bokshi and others*, cited above, paragraph 80; and case of the ECtHR *Mirovni Inštitut v. Slovenia*, paragraph 44, and references used therein).

75. Therefore, and in conclusion, the Court, considering that (i) the fact that the Applicants did not expressly request a hearing at the level of the Appellate Panel, does not imply that they implicitly waived this right, especially considering that the latter have not filed an appeal before the Appellate Panel and also that the absence of this request does not release the Appellate Panel from the obligation to assess the necessity of a hearing; (ii) despite the Applicants' specific request for a hearing before the Specialized Panel, such a hearing was not held and, consequently, the standards applicable to the necessity of holding a hearing before the Appellate Panel are more stringent because, in principle, the parties are entitled to a hearing at least before a court instance; (iii) the cases before the Appellate Panel cannot be qualified either as exclusively legal matters or as matters of a technical nature, but rather as matters of fact and law; (iv) the Appellate Panel assessed

how the lower instance, namely the Specialized Panel made the assessment of the facts, modifying its Judgment to the detriment of the Applicants; and (v) the Appellate Panel did not justify the "*waiver of the hearing*", finds that in the present case there were no "*extraordinary circumstances to justify the absence of a hearing*", and consequently, the challenged Judgment of the Appellate Panel , namely Judgment [AC-I-13-0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

76. The Court also notes at the end that, given that it has already found that the challenged Judgment of the Appellate Panel is not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of extraordinary circumstances which could justify the absence of a hearing, considers that it is not necessary to consider the Applicants' other allegations. The respective allegations of the Applicants should be examined by the Appellate Panel, in accordance with the findings of this Judgment. Furthermore, given that the Appellate Panel has full jurisdiction to review the challenged decisions of the Specialized Panel based on the applicable laws of the SCSC, the latter has the possibility to correct at the second instance the absence of a hearing in the first instance.

77. The Court's finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the absence of a hearing, as explained in this Judgment, and does not in any way relate to nor does it prejudice the outcome of the merits of the case.

Conclusion

78. The Court assessed the Applicants' allegations regarding the absence of a hearing in the circumstances of their case, as one of the guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, applying this assessment to the case law of the ECtHR.

79. In the circumstances of the present case, the Court finds that (i) the fact that the Applicants have not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the SCSC; (iii) the Appellate Panel did not deal with "*exclusively legal or highly technical matters*", and consequently, "*exceptional circumstances that would justify the absence of a hearing do not exist*"; (iv) the Appellate Panel

considered issues of "*fact and law*" in addition to modifying the Judgment of the Specialized Panel to the detriment of the Applicants; and (v) the Appellate Panel did not reason the "*waiver of the oral hearing*". Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely Judgment [AC-I-13- 0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

80. Finally, the Court also notes that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the Applicants' other allegations because they must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 28 April 2021, by majority of votes:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court invalid;

IV. TO REMAND the case to the Appellate Panel of the Special Chamber of the Supreme Court for retrial, in accordance with the findings of this Judgment;

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court by 28 July 2021;

VI. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VII. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi

KI 11/21 Applicant, Sami Nuhaj, Request for constitutional review of Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020

KI 11/21, Resolution on inadmissibility of 25 March 2021, published on 1 June 2021

Keywords: natural person, criminal case, request for interim measure, request for holding a public hearing, resolution on inadmissibility

The Applicant founded a construction company and that during the execution of works on the construction site, one of the workers had an accident, as a result of which he died.

The Prosecution filed an indictment against the Applicant, as a responsible person, for a criminal offense "*in co-perpetration destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 and Article 31 of the Criminal Code of Kosovo*".

The Basic Court found the Applicant guilty, sentencing him to imprisonment. The Court of Appeals and the Supreme Court upheld the judgment of the Basic Court.

The Applicant addressed the Constitutional Court alleging, *inter alia*, violation of Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases], of the Constitution, as well as Articles 6 (Right to a fair Trial) and 7 (No punishment without law) of the European Convention on Human Rights, stating that the courts did not reason their decisions and that the analogy was applied in his case.

After analyzing the case file as well as the Applicant's allegations, the Court found that the regular courts adhered to the principles of Article 31 of the Constitution and Article 6 of the ECHR in relation to reasoned decisions, and that there was no use of analogy in his case.

Therefore, the Court rejected the Applicant's Referral as ungrounded.

RESOLUTION ON INADMISSIBILITY

in

case no. KI11/21

Applicant

Nuhaj Sami

Request for constitutional review of Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Nuhaj Sami from Ferizaj (hereinafter: the Applicant). The Applicant is represented by Artan Qerkini, a lawyer from Prishtina.

Challenged decision

2. The subject matter is the constitutional review of Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020, by which the request for protection of legality filed against Judgment PA1. No. 129/2020 of the Court of Appeals of 14 July 2020 and Judgment P. No. 298/2019 of the Basic Court in Ferizaj of 30 December 2020 was rejected.

Subject matter

3. The subject matter is the constitutional review of the Judgment of the Supreme Court, by which the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution of the Republic of Kosovo, as well as Articles 6 (Right to a fair trial) and 7 (No punishment without law) of the European Convention on Human Rights (hereinafter: the ECHR), have been violated.

4. The Applicant requests that a public hearing be held.

5. In addition, the Applicant requests the imposition of an interim measure, which would suspend the execution of final Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] 39 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

7. On 14 January 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 18 January 2021, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

9. On 3 February 2021, the Court notified the Applicant's legal representative about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

10. On 25 March 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. Based on the case file, it results that the Applicant is the owner of the construction company PGP "Vizioni – S" LLC in Ferizaj, which deals with the performance of the construction works.

12. On 29 November 2014, around 15:00 hrs, an accident occurred in the construction site, in the building where the construction works are carried out by the Applicant's company, where the person M.A. fell from the 8th floor of the building, suffering injuries from which he died.

13. On 3 December 2015, the Basic Prosecution in Ferizaj filed Indictment PP. No. 2986/2014, with the Basic Court, against the Applicant and the person L.N., due to the criminal offense "*in co-perpetration destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 and Article 31 of the Criminal Code of Kosovo* (hereinafter: the CCRK), as well as against the legal entity PGP „Vizioni - S" LLC, with the responsible person Sami Nuhaj, due to the criminal offense of *destruction, damage or removal of protective equipment and endangerment of safety in the workplace under Article 367 par. 2 in conjunction with par. 7 and 3 and in conjunction Article 40 of the CCRK".*

14. On 18 May 2018, the Basic Court in Ferizaj rendered Judgment P. No. 1525/2015, by which found the Applicant guilty of committing the criminal offense *"destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK,* and sentenced him to imprisonment for a term of 1 (one) year and 3 (three) months, while rejecting the indictment of the Basic Prosecution against the person L.N.

15. By the same Judgment, the Basic Court ordered that the legal entity PGP "Vizioni - S" LLC, pay the fine in the amount of 5,000 (five thousand) euro.

16. In the reasoning of Judgment P. No. 1525/2015, the Basic Court declared:

„Since the accused did not plead guilty for the criminal offense under this charge, the Court presented the evidence and after assessing them one by one and interconnecting them with each other, within the meaning of Article 361 par. 1 and 2 of the CPCK, determined the factual situation, described in detail in the enacting clause of this judgment with this material evidence".

From the evidence administered during the main trial in the place where the deceased was working, there were no adequate protective measures for the workplace such as skeletons, side shields, which if they existed would not lead to disaster, also from the autopsy report confirmed that the deceased M.A., died as a result of internal bleeding as a result of multiple bone fracture [...] as well as the report: official of the Labor Inspectorate in Ferizaj of 04.12.2014, confirms the fact that the defendant did not act in accordance with the provision of Article 5, 6 and 7 of the Law on Safety and Health at Work (04/L-161) and Article 42 of the Labor Law (03/L-313), for which the labor inspectorate on 17.12.2014, has imposed a fine in the amount of 10,000 euro.

"Also during the main trial it was confirmed that the company did not have a person responsible for safety at work, and no training was provided to workers for safety at work..."

The Court confirmed it from the opinion of the expert in the field of safety at work and protection at work who has confirmed on the one hand the omissions of the employer as: 1. The employer has not fulfilled the obligations to create safe conditions in the workplace, 2. Installation of styrofoam tiles on terraces [...] 3. Work has been impossible to start without securing the skeleton and and the balcony shield, 4. The employer is obliged to do training on safety and protection at work permanently, namely every year, 5. The deceased worker Mirsad Ajeti according to the data has never been trained in this field, 6. Has not provided the worker with (PPE), adequate personal protective equipment for work and work diary „7. The worker is not provided with a description of jobs and work duties as well as a work diary, and 8. The employer has not performed procedural obligations after the occurrence of the case, namely has not formed a professional commission which in its report would identify the causes of injury.

From the Official Report of Labor Inspectors No. Prot. 368/14 of 04.12.2014, in their opinion after the visit to the scene, analysis of material evidence and circumstances in which the accident was

caused at work, checking the documentation and their analysis and administration of other relevant evidence, have found that: the employer did not act according to the provision of Article 5, 6 and 7 of Law no. 04/L - 161 on safety and health at work as well as Article 42 of the Law on Labor no. 03/L - 212,
When imposing sentence, the court took into account mitigating and aggravating circumstances, as mitigating circumstances for the accused Sami Nuhaj…"

17. Against the Judgment of the Basic Court, within the legal deadline, the Applicant's defense counsel filed an appeal on the grounds of essential violations of the provisions of criminal procedure, erroneous and incorrect determination of the factual situation and violation of criminal law, proposing that the Court of Appeals approves as grounded and modify the appealed judgment so as to acquit the accused of the charge or to annul it and remand the criminal case for retrial and reconsideration.

18. On 18 October 2018, the Court of Appeals rendered Judgment PA1. No. 710/18, by which it approved the appeal of the Applicant's defense counsel, annulled Judgment P. No. 1525/15 of the Basic Court, and remanded the case to the latter for retrial and reconsideration.

19. In reasoning, the Court of Appeals stated: "*The criminal panel of this court ex officio assesses that the appealed judgment contains essential violations of the provisions of criminal procedure under Article 384 par. 1 Article par 1.12, in conjunction with Article 370 par. 1 in conjunction with Article 366 of the CPC, because the written judgment is not in accordance with the pronounced judgment, as provided by provision of Article 370 par. 1 of the CPC that "the written judgment must be in accordance with the pronounced judgment".*

"In the present case, there is no minutes on the presentation of the final word of the parties as provided by the abovmentioned provisions, and there is also no minutes on the announcement of the judgment, as provided by the provision of Article 359 par. 1 and par. 2 of the CPCK. Given that in this case the source judgment is missing, namely the minutes on the pronouncement of the judgment, this court consequently considers that the written judgment presented to the parties is not identical to the original judgment, therefore from all this it considers that the judgment of the first instance court contains essential violations of the provisions of criminal procedure under Article 384 par. 1

item 1.12 in conjunction with Article 370 par. 1 of the CPCK, for which reason it had to be annulled".

20. On 30 December 2019, the Basic Court in Ferizaj in the repeated procedure rendered Judgment P. No. 298/19, by which it found the Applicant guilty of the criminal offense he is charged with, sentencing him to 10 months imprisonment. Whereas, regarding the legal entity PGP "Vizioni - S" LLC, ordered to pay the fine in the amount of 4,000 (four thousand) euro.

21. In reasoning of the Judgment, the Basic Court stated; *"... acting in this criminal case and in accordance with the instructions of the Court of Appeals, held the main hearings according on these dates 06.06.2019, 23.08.2019, 05.11.2019 and 02.12.2019, in which the representative of the prosecution-state prosecutor, read the accusing act, while the judge after being satisfied that the defendant understood the charge, in accordance with Article 325 par. 1 of the CPCK, offered the defendant the opportunity to plead guilty or plead not guilty.*

The defendant Sami Nuhaj in the main trial stated that he does not admit guilt for any point of the criminal offense which he is charged with.

It is not disputed that on the critical day as a result of not taking protective measures by the accused Sami Nuhaj, during the works in the building which is located on the street "Astrit Bytyqi" in Ferizaj, on 29.11.2014 around 15:00 hrs, from 8th floor where the deceased Mirsad Ajeti was working, fell to the ground in which case he lost his life, his factual condition was confirmed by the hearing of the abovemenioned witness who in the main trial of 05.11.2019 stated that the building where the latter have been working for a long time despite the fact that there should have been placed side-scaffolding shields on all sides of the building in this case on one side exactly in the place where the deceased was working, there were no scaffolding at all, therefore it came to the disaster, from the heard witnesses it was proved that the side-scaffolding shields had to be provided by the owner of the company, the defendant Sami Nuhaj, who according to the witness Abedin Haxhijaj was informed about this fact but did not provide them.

The factual situation as in the enacting clause of the indictment was also confirmed by the expert for protection and safety at work Hysen Hysenaj, who stated on the basis of the law on safety at work, protection of the health of employees and the environment at work

04/L-161 , Article 5 point 1,3,4 and Article 6 point 1,2,3 the primary and main responsibility regarding the case falls on the enterprise NPN "Vizioni-S" l.l.c., while on the basis of the same law Article 21 point 1 and 2 to point 2.5 and points 3 and 4 the secondary responsibility falls on the employee. While from the completion of the clarified expertise regarding the defense claims, the expert has confirmed that the scaffolding should have been placed in the entire facility where there is a risk to the life and health of workers, while in terms of work that should have been performed on the critical day this could not have been known as there was no work plan for that day.

That the defendant did not act in accordance with the law on safety at work and health is confirmed by the official report of the inspectorate in Ferizaj dated 04.12.2014, which concluded that the accident at work resulting in the death of the employee happened because it was allowed by the employer to work on the installation of styrofoam tiles on the outdoor terrace without placing scaffolding and other protective measures and the worker was not equipped with a protective rope as a result of not taking these measures his fatal death occurred".

22. Against Judgment P. No. 298/19 of the Basic Court within the legal deadline, the appeal was filed by the Applicant's defense counsel on the grounds of violation of procedural provisions, erroneous and incomplete determination of the factual situation and violation of criminal law, with the proposal that the Court of Appeals modify the challenged judgment and find the accused not guilty and remand the case for retrial and reconsideration.

23. On 14 July 2020, the Court of Appeals rendered Judgment PA1. No. 129/2020, rejecting the appeal of the Applicant's defense counsel as ungrounded.

24. In reasoning the judgment, the Court of Appeals stated:

a) Regarding the allegations of the Applicant's defense counsel that the challenged Judgment contained essential violation of the provisions of the criminal procedure, adding that the Judgment does not contain reasons for the decisive facts…*",* the Court of Appeals found *"the abovementioned allegations are not grounded. The challenged Judgment does not contain essential violations of the provisions of the criminal procedure which are alleged in the appeal of the defense counsel of the accused, nor other violations which this court notes every time ex officio in accordance with the provision of*

Article 394 of the CPCK. The appealed judgment is concrete and clear, in the reasoning of the challenged judgment, the court of first instance has correctly described the factual situation which it has determined. The first instance court assessed the evidence in accordance with the provisions of Article 370 par. 6 and 7 of the CPCK, presenting in full what facts and for what reason it considers them to be proven or unproven".

b) With regard to the allegations of erroneous and incomplete determination of the factual situation, as well as the manner of assessment of evidence presented at the main trial, as well as the findings of the expert H. H., the Court of Appeals concluded, "*that the defense counsel's appealing allegations do not stand. According to the case file and the appealed judgment, the factual situation has been correctly and fully determined by the first instance court and that the criminal panel of this court considers that in this regard no fact has been left in doubt as unjustly alleged in the appeal filed against the first instance judgment. The first instance court, in accordance with the provision of Article 365 of the CPC, has found the accused Sami Nuhaj guilty, due to the criminal offense of destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK".*

c) *With regard to the appealing allegations of the Applicant's defense counsel of violation of the Criminal Code, namely that the court of first instance erred in applying the provisions of the Criminal Code, applying the analogy contrary to Article 2 paragraph 3 of the CCK, and that incorrectly applied the provisions of Article 367 of the CCK, the Court of Appeals concluded that, "The appealing allegations of the defense counsel of the accused that the court found the accused guilty by analogy and flagrantly violating the principle of legality does not stand. In accordance with Article 367 par. 2 of the CCK, it is established that "Whoever is responsible for workplace safety and health in any workplace and who fails to install safety equipment, fails to maintain such equipment in working condition, fails to ensure its use when necessary or fails to comply with provisions or technical rules on workplace safety measures and thereby endangers human life or causes considerable damage to property shall be punished by imprisonment of six (6) months to five (5) years. According to this provision, the perpetrator of this criminal offense is defined as anyone who is responsible for safety and health in the workplace, which responsible person is provided under Law no. 04/L-161 on Safety and Health at Work specifically Article 10, according to which article in its paragraph 1 is defined "Employer employing up to fifty*

(50) employees, if competent, can personally take over the responsibility for implementing measures determined in paragraph 1 of Article 9 of this Law, with the conditions to meet conditions and criteria as per paragraph 5 of Article 9 of this Law", therefore according to this provision the conclusion of the court of first instance is fair first when the accused Sami Nuhaj was found guilty and responsible for the criminal offense which he is charged with".

25. Against Judgment PA1. No. 129/2020 of the Court of Appeals, a request for protection of legality was filed by the Applicant's defense counsel on the grounds of violation of criminal law with a proposal that the request be approved and the challenged judgments be annulled, as well as to remand the case for retrial to the of first instance court, as well as acquit the accused of the charge.

26. On 16 December 2020, the Supreme Court rendered Judgment PML. No. 325/2020, by which it rejected the request for protection of legality of the Applicant as ungrounded.

27. In the reasoning of the judgment PML. No. 325/2020, the Supreme Court stated:

i) Regarding the allegation of the Applicant's defense counsel that both judgments were rendered in violation of the criminal law, and that the violation consists in the fact that Sami Nuhaj was erroneously convicted as a person responsible for safety at work, the Supreme Court concluded *"As it results from the case file, the convict Sami Nuhaj is the owner and responsible person in the Enterprise "Vizioni-S", of the Law on Safety and Health at Work, Article 5 paragraph 1 of this law, establishes that the employer is responsible for creating the safe and health conditions at work in all aspects of work. In this case the employer is the convict Sami Nuhaj who according to the definitions from Article 3 of the Law on Safety and Health at Work is a natural or legal person who provides work for one or more employees, pays the employees for the work or services performed and is responsible for the working entity. Thus, according to these provisions, the convict as an employer was also a person responsible for safety and health in the enterprise of which he was the owner.*

The Supreme Court of Kosovo finds that from the above the convict is an employer and at the same time the responsible person, because the latter in accordance with Article 10 paragraph 1 of the above law, has employed up to 50 workers, which is not disputed, because even on the critical day at the construction site there were 30 workers and the latter could take responsibility for the implementation of the

measures set out in paragraph 1 of Article 9, so he was responsible for the implementation of safety and health measures at the construction site....”

ii) Regarding the allegation of the Applicant’s defense counsel that the Law on Safety and Health at Work sets administrative sanctions for companies employing up to 50 employees and there is no person responsible for safety at work, and that this shortcoming is sanctioned only by administrative measures and not criminal liability, the Supreme Court finds, *„that the imposition of fines as an administrative measure are a measure for the responsibility of the legal person, while the convict bears criminal liability for the consequences caused as a responsible person of the enterprise. Also, this court finds that the criminal law was correctly applied when he was found guilty due to the criminal offense of destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK, because from his actions and especially from the fact that the same despite being aware of the danger at work for his employees and as a responsible person, by negligence had not undertaken anything that according to the technical rules for safety at work to provide employees and even more so based on the fact that in the facility – construction site even though there were scaffolding placed but not in the entire facility, has allowed employees to work in the part which did not have technical conditions (scaffolding placed) for that kind of work. So, this court finds that the convict had not applied the technical rules of safety and health of employees at work as a responsible person and as a result of not following these rules came the loss of life of the now deceased which determines also the causal link between his actions-inactions and the consequence caused”.*

Applicant's allegations

28. The Applicant alleges that in the criminal proceedings the Supreme Court violated the principle of judicial procedure and applied the law arbitrarily, violating his individual rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution, as well as Articles 6 (Right to a fair trial) and 7 (No punishment without law) of the ECHR.

29. With regard to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant mentions two allegations, namely the erroneous interpretation of the law, and the unreasoned Judgment of the Supreme Court.

30. More specifically, the Applicant adds that the Supreme Court of Kosovo has arbitrarily applied Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work which provide "*Employer is responsible to provide safe and healthy working conditions at all aspects of work*".

31. In addition, with regard to the unreasoned Judgment, the Applicant alleges that Article 370, paragraph 1 of the Criminal Procedure Code clearly provides for the obligation for judicial authorities to reason decisions, but that the Supreme Court of Kosovo in applying arbitrarily the provisions of the Criminal Code has brought to the situation that Judgment PML. No. 325/2020 is not reasoned.

32. In support of the allegation of an unreasoned judgment, the Applicant also cites two paragraphs of the Judgments of the Court in cases KI93/16 and KI 87/18.

33. The Applicant adds that the Supreme Court in the Judgment does not provide valid reasons for "characterization of Mr. Sami Nuhaj as a person responsible for safety at work, but in his case the analogy was applied. Law on Safety and Health at Work No. 04/L - 166, Article 3, point 1. 10 provides that the person responsible for safety at work is defined as follows: *„ Individual in charge of safety and health at work – a professional employed with employer and appointed to carry out tasks closely linked to safety and health at work". So, for a person to have the status of a person responsible for safety at work must be a) professional; b) Employee: c) be assigned to perform tasks related to safety at work. By not a single piece of evidence administered in the main trial it was established that Mr. Sami Nuhaj as the owner of the Company to have the qualities required to gain the epithet of the person responsible for safety at work".*

34. As a second allegation, the Applicant alleges a violation of Article 33 of the Constitution and Article 7 of the ECHR, stating that no one can be found guilty or convicted of a criminal offense which, at the time of its commission was not defined by law as a criminal offense, therefore it is clear that the Constitution of the Republic of Kosovo affirms the principle *„Nullum crimen, nulla poena sine lege qerta"*, and this means that the elements of the crime and punishment in question must be clearly defined by law. Whereas according to Article 7 of the ECHR, *the elements of the crime and the corresponding punishment must be clearly defined in law. This requirement is met when the wording of the relevant provision, and if there is a need for interpretation by the court, the individual has the opportunity to know what actions or omissions will make him criminally liable".*

35. In the abovementioned context, the Applicant adds that in the absence of the establishing the person responsible for safety at work, the courts applied the analogy contrary to Article 2, paragraph 3 of the Criminal Code, according to which: "*The definition of a criminal offense shall be strictly construed and interpretation by analogy shall not be permitted*" (Law No. 04/L-082) and consequently charged the owner of the company "Vizioni – S" with criminal liability without any factual and legal basis.

36. The Applicant requests that a public hearing be held.

37. The Applicant also requests the Court to impose an interim measure in order to suspend the execution of the judgment of the Supreme Court, and in support of this claim he adds:

> *„This Referral fulfills all the conditions to be reviewed and approved by the Court as it is in writing, based on proven facts of the case, provides supporting legal arguments and indicates the irreparable consequences that the Applicant would suffer without imposing an interim measure".*
>
> *"In similar cases, where repairable damage would be caused without the interim measure, this honorable Court has issued decisions for the interim measure. See e.g. Tomë Krasniqi v. RTK and KEK, KI 11109 (16 October 2009); Fadil Hoxha and 59 others v. Municipal Assembly of Prizren, KI 56/09 (15 December 2009); Bajrush Xhemajli KI 78/12. Therefore, the Constitutional Court has also accepted that such cases deserve substantive review before a judgment is executed that would cause irreparable damage to the Applicants..."*

38. The Applicant addresses the Court with a request "*To find a violation of the Applicant's individual rights guaranteed by Articles 31 and 33 of the Constitution of the Republic of Kosovo, Article 10 of the Universal Declaration, and Articles 6 and 7 of the European Convention, as a result of violations by the Supreme Court of a number of rights guaranteed to the Applicant with these instruments and the Criminal Procedure Code of Kosovo".*

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***.**

[…]

Article 33
[The Principle of Legality and Proportionality in Criminal Cases]

1. "No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law..

2. No punishment for a criminal act shall exceed the penalty provided by law at the time the criminal act was committed. 3. The degree of punishment cannot be disproportional to the criminal offense. 4. Punishments shall be administered in accordance with the law in force at the time a criminal act was committed, unless the penalties in a subsequent applicable law are more favorable to the perpetrator."

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.

Article 7
(No punishment without law)

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations".

Relevant legal provisions

LAW NO. 04/L-161 ON SAFETY AND HEALTH AT WORK

Article 3
Definitions

1. Terms used in the Law shall have the following meaning:

1.1. Employer – a natural or legal person that provides jobs for one or more employees, pays the salary to employee/s for the work or services rendered and is responsible for the working entity;

1.2. Employee - a natural person who carries out work or services with payment for employer and has employment relations with the employer;

1.3. Safety and health at work - an integral part of the work process organization, by taking prevention measures that aim at improving work conditions, employees' health protection, improvement of working environment, protection of physical and psychic health of employees and others who participate in the work process;

1.4. Hazard - possibility that employees suffer injuries, illnesses or health difficulties, immediate or consequent, as a result of exposure to work environment containing hazardous physical, chemical and biological elements, exposure to working tools or machinery without protection equipment and unsafe to use, wrong way of using working tools and machinery and wrong way of work organization;

1.5. Potential and serious hazard – an identifiable activity, which shows hazard, and which in a short-term period may cause material and human damages;

1.6. Occupational illness – any illness caused by the exposure to damaging and hazardous chemical, physical and biological elements at working environment during carrying out the work activity;

1.7. Preventive measures – all actions taken and planned at all work processes within the company to avoid or minimize hazards caused by exercising the work activity;

1.8. Working places – include all places and spaces under direct and indirect supervision of employers, where employees should carry out work activities and stay during the work process;

1.9. Risk assessment document – a document which describes characteristics of the work, identification of the risk source, determining who may be at risk, what is at risk and how, assessment of risk to health and safety at work and determining required and necessary actions to improve such measures according to periodical assessments;

1.10. Individual in charge of safety and health at work – a professional employed with employer and appointed to carry out tasks closely linked to safety and health at work;

1.11. Specialized people or services – natural or legal persons, outside the company, which are qualified and licensed to carry out activities related to safety and health at work in accordance with the present Law;

1.12. Work or work-related accident – any unexpected occurrence during the work process, which causes immediate damage to employees' body, damage causing temporary

disability, permanent disability and any other health damage related directly to the exercising of work activity;

1.13. Labour Inspectorate – an executive body of the MLSW that supervises the implementation of labour legislation, including this Law.

1.14. Ministry – the Ministry of Labour and Social Welfare.

Chapter II
Employer's duties

Article 5
General principles for employers

1. Employer is responsible to provide safe and healthy working conditions at all aspects of work.

Article 10
Employees in charge for safety and health at work

1. *Employer employing up to fifty (50) employees, if competent, can personally take over the responsibility for implementing measures determined in paragraph 1 of Article 9 of this Law, with the conditions to meet conditions and criteria as per paragraph 5 of Article 9 of this Law.*

2. Employer employing over fifty (50) employees and less than two hundred and fifty (250) employees, is obliged to appoint an expert, for carrying out tasks related to safety and health at work.

3. Employer employing over two hundred and fifty (250) employees should engage one (1) or more experts to carry out activities related to safety and health at work.

CODE NO. 04/L-082 Criminal Code

Article 367

Destroying, damaging or removing safety equipment and endangering work place safety […]

2. Whoever is responsible for workplace safety and health in any workplace and who fails to install safety equipment, fails to maintain such equipment in working condition, fails to ensure its

use when necessary or fails to comply with provisions or technical rules on workplace safety measures and thereby endangers human life or causes considerable damage to property shall be punished by imprisonment of six (6) months to five (5) years.

3. When the offense provided for in paragraph 1 or 2 of this Article is committed by negligence, the perpetrator shall be punished by imprisonment of up to three (3) years.
[…]

7. When the offense provided for in paragraph 3 of this Article results in the death of one or more persons, the perpetrator shall be punished with imprisonment from one (1) to eight (8) years".

Admissibility of the Referral

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

40. 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."

41. In addition, the Court examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests] 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual

rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

„The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision…".

42. As regards the fulfillment of the abovementioned requirements, the Court finds that the Applicant is an authorized party, challenging the act of the public authority, namely Judgment PML. No. 325/2020 of the Supreme Court of 16 December 2020, after the exhaustion of all available legal remedies provided by Law. The Applicant also clarified the rights and freedoms he claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

43. In addition, the Court examines whether the Applicant has met the admissibility criteria established in Rule 39 (Admissibility Criteria) of the Rules of Procedure. Paragraph (2) of Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a Referral including the criterion that the referral is not manifestly ill-founded. Rule 39 (2) of the Rules of Procedure establishes that:

"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

44. The abovementioned rule, based on the case law of the ECtHR and of the Court, enables the latter to declare inadmissible referrals for reasons related to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after

assessing its merits, i.e. if it deems that the content of the referral is manifestly ill-founded on constitutional basis, as defined in paragraph 2 of Rule 39 of the Rules of Procedure.

45. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as "*manifestly ill-founded*" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as "*manifestly ill-founded claims*". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of "*fourth instance*"; (ii) claims that are categorized as "*clear or apparent absence of a violation*"; (iii) "*unsubstantiated or unsupported*" claims; and finally, (iv) "*confused or far-fetched*" claims. (See: more precisely, the concept of inadmissibility on the basis of a referral assessed as "*manifestly ill-founded*", and the specifics of the four above-mentioned categories of claims qualified as "*manifestly ill-founded*", The Practical Guide to the ECtHR on Admissibility Criteria of 31 August 2019; part III. Inadmissibility Based on Merit; A. Manifestly ill-founded applications, paragraphs 255 to 284).

46. In this context and below of the assessment of the admissibility of the referral, namely in the circumstances of this case, the assessment of whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the merits of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

47. Returning to the present case, the Court recalls that the substance of the case relates to the fact that, in accordance with the decisions of the regular courts, the Applicant as a responsible person, namely the owner of the construction company "Vizioni – S" LLC, has committed a criminal offence *destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK*, because he did not take all necessary safety measures as defined by the law on safety and health of workers, which resulted in the death of one of the workers in the workplace.

48. In this regard, the Applicant challenges the findings of the Supreme Court, alleging a violation of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 33 [The Principle of Legality and

Proportionality in Criminal Cases] of the Constitution and Articles 6 (Right to a fair trial) and 7 (No punishment without law) of the ECHR.

Allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

49. With regard to the violation of Article 31 of the Constitution and Article 6 of the ECHR, the Court notes that the Applicant considers that the Supreme Court **i)** has arbitrarily applied Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work, and **ii)** that the judgment of the Supreme Court was not reasoned in accordance with the requirement of Article 370, paragraph 1 of the Criminal Procedure Code in relation to his characterization as a person responsible for safety at work, as provided in Article 3 of the Law on Safety and Health at Work.

i) Allegations of arbitrary application of Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work

50. Regarding the allegations of the Applicant as to the erroneous determination of the factual situation and the erroneous application and interpretation of the substantive law, in the present case *Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work*, the Court wishes to emphasize its principled position that it is not the task of the Constitutional Court to deal with errors of fact of law (legality) allegedly committed by the Supreme Court or any other court of lower instances, unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution (constitutionality). The Court further reiterates that it is not its task under the Constitution to act as a court of "fourth instance", in respect of the decisions taken by the regular courts. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See: *mutatis mutandis*, case of the Constitutional Court: KI68/16, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility of 2 June 2017, paragraph 51 and 52, case KI70/11, Applicants: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, paragraph 29).

51. In view of this, the Court notes that the fact that the Supreme Court applied Article 5, paragraph 1 and Article 10 of the Law on Safety and Health at Work when determining its legal status as a responsible

person, is problematic for the Applicant, who should provide health and safety conditions for workers, which led to the conclusion that he should be punished for the crime he is charged with.

52. The Court first recalls that the Constitutional Court has no jurisdiction to decide whether or not the Applicant was guilty of committing a criminal offense. Nor does it have jurisdiction to assess whether the factual situation has been correctly determined or to assess whether the regular courts have had sufficient evidence to establish the Applicant's guilt. (See: the case of the Constitutional Court: KI68/16, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility, of 2 June 2017, paragraph 50).

53. The Constitutional Court can only consider whether the proceedings in the regular courts, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair and non-arbitrary trial (see: *mutatis mutandis*, cases of the Constitutional Court: KI68/16, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility of 2 June 2017, paragraph 54, and KI70/11, Applicants: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, paragraph 30).

54. Returning to the present case and the Applicant's appealing allegation, the Court finds that the Applicant was convicted by a final judgment as a responsible person who did not take all security measures at the construction site as provided for in Article 5 and Article 10 of the Law on Safety and Health at Work, where his company performed construction work, in which one of the workers lost his life. The Court recalls that the aforementioned articles of the law emphasize:

Article 5

"1. Employer is responsible to provide safe and healthy working conditions at all aspects of work".

Article 10 paragraph 1

"1. Employer employing up to fifty (50) employees, if competent, can personally take over the responsibility for implementing measures determined in paragraph 1 of Article 9 of this Law, with the conditions to meet conditions and criteria as per paragraph 5 of Article 9 of this Law".

55. Referring to the legal provision with the Applicant's allegations, the Court finds that the Applicant did not acquire the status of a responsible person before the Supreme Court as he stated in the Referral, but that such a conclusion was reached by the Basic Court in the determination procedure of his criminal liability, in which case the evidence was presented, the witnesses were heard, the court experts were engaged, and as a result of these actions, the Basic Court concluded *"that the law on safety at work stipulates that if a company has 50 or more employees, it must have a person responsible for safety at work, otherwise, when these are not assigned to an individual they are transferred to a responsible person . Sami Nuhaj was the director of the company, [...], the director of the company is not a direct person but it does not mean that he has no responsibility in safety and in the construction site"*.

56. In fact, the Court may conclude that on the basis of the above, the Basic Court characterized the Applicant as a responsible person who was obliged to create safety conditions on the construction site, which in itself means not only the provision of technical measures and equipment, but providing adequate training, in order to train workers for safety at work, which he did not do in accordance with the findings of the court, as well as on the basis of his own statement at trial *"that persons designated for safety at work have not had adequate qualifications other than work experience"*.

57. In view of this, the Basic Court decided that the Applicant, as a directly responsible person, in accordance with Article 5 and Article 10 of the Law on Safety and Health at Work, has committed the criminal offense in accordance with Article 367 of the CCK, for which he was sentenced to imprisonment.

58. The Court further notes that the Applicant filed the same allegations before the Court of Appeals challenging his status as a responsible person, stating the fact *"the legislator in article 367 has defined as the subject of committing this criminal offense the person responsible for safety at work, and not the owner, or the director of the company"*.

59. The Court notes that the Court of Appeals paid special attention to the Applicant's allegation regarding his status as a responsible person, concluding that the responsibility for safety and health at work lies with the employer - the owner, who should have created safety conditions, or to authorize an employee to carry out occupational safety and health activities, which he did not do in the present case, in fact, no evidence has established that the accused authorized someone to carry out activities of safety and health at work, as defined by Law

no. 04/L-161 on safety and health at work, and that therefore, *the appealing allegations in this regard, in the opinion of this panel, are ungrounded.*

60. With regard to the proceedings before the Supreme Court, the Court also finds that the Applicant has initiated two main appealing allegations, the first of which concerned the fact "*that the courts erred in applying Article 10 par. 1 of the Law on Safety at Work, because in the enterprise there were persons responsible for safety at work. Therefore, there were responsible persons in the enterprise, but even if there were no such persons, the very non-appointment of persons responsible for safety at work is not an element of the criminal offense for which the convict was found guilty"*. The other appealing allegations concerning the fact that the Law on Protection and Safety at Work provided for administrative rather than criminal sanctions, in case a company employing up to 50 workers did not have persons responsible for safety at work.

61. The Court cannot fail to notice that the Supreme Court dealt with both of the Applicant's appealing allegations in which it concluded ***i)*** that the convict was an employer and at the same time a responsible person, because the latter in accordance with Article 10, paragraph 1 of the abovementioned law, he employed up to 50 workers, which is not disputed, because on the critical day there were 30 workers on the construction site and he could take responsibility for the implementation of the measures set out in paragraph 1 of Article 9, therefore, he was responsible for enforcing safety and health measures at the construction site. As to the second appealing allegations regarding the fact that the law provides for administrative sanctions and not criminal liability, the position of the Supreme Court was „*that the imposition of fines as administrative measures are measures for the responsibility of the legal person, while in the present case, the Applicant bears criminal liability for the consequences caused as a responsible person of the enterprise"*.

62. In view of all the above, the Court rejects Applicant's allegations as allegations of fourth instance regarding the arbitrary application of Article 5 paragraph 1 and Article 10 paragraph 1 of the Law on Safety and Health at Work in relation to his status as a responsible person.

ii) Allegations that the judgment of the Supreme Court was not reasoned in accordance with the requirement of Article 370, paragraph 1 of the Criminal Procedure Code

63. The Court notes that the Applicant considers that the Judgment of the Supreme Court was not reasoned in accordance with Article 370, paragraph 1 of the Criminal Procedure Code, regarding his characterization as a person responsible for safety at work, as required by Article 3 of the Law on Safety and Health at Work.

64. The Court recalls that Article 370 paragraph 1 of the Criminal Procedure Code, which was invoked by the Applicant, regulates the form and content of a Judgment, which, according to the Applicant's allegations, did not occur when it comes to the Judgment of the Supreme Court, especially when it comes to the reasoning regarding his characterization as a person responsible for safety as defined in Article 3 of the Law on Safety and Health at Work.

65. The Court recalls that Article 370 paragraph 1 of the CPC in the relevant part states:

> Article 370 Content and Form of Written Judgment
>
> "*1. The judgment drawn up in writing shall be fully consistent with the judgment as it was announced. It shall have an introduction, the enacting clause and a statement of grounds*".

66. The Court adds that it already has a consolidated case law with regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. This case law was built based on the ECtHR case law, including, but not limited to cases: *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007.

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

68. In principle, the case law of the ECtHR and that of the Court emphasize that the right to a fair trial includes the right to a reasoned decision and that the courts must "*show with sufficient clarity the grounds on which they based their decision*". However, this obligation of the courts cannot be understood as a requirement for a detailed answer to any argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicants are to be addressed and the reasons given must be based on the applicable law.

69. Returning to the Applicant's specific appealing allegations, the Court notes that the Supreme Court in its Judgment found that „ *the convict Sami Nuhaj is the owner and responsible person in the Enterprise "Vizioni-S", of the Law on Safety and Health at Work, Article 5 paragraph 1 of this law, establishes that the employer is responsible for creating the safe and health conditions at work in all aspects of work. In this case the employer is the convict Sami Nuhaj who according to the definitions from Article 3 of the Law on Safety and Health at Work is a natural or legal person who provides work for one or more employees, pays the employees for the work or services performed and is responsible for the working entity. Thus, according to these provisions, the convict as an employer was also a person responsible for safety and health in the enterprise of which he was the owner ".*

70. The Court, bringing the Applicant's allegations in connection with its case law and the case law of the ECtHR, as well as with the requirements of Article 370, paragraph 1 of the CPC, is of the opinion that the Applicant's allegations in relation to the unreasoned judgment of the Supreme Court regarding his characterization as a person responsible for security are ungrounded. The Court reached such a conclusion, precisely with a detailed analysis of the Judgment of the Supreme Court in relation to the decisive facts on which the Supreme Court based its conclusion regarding the fulfillment of the conditions defining his status as a responsible person.

71. Based on the above, it follows that the Applicant's allegations of an unreasoned Judgment of the Supreme Court are manifestly ill-founded due to the fact that the regular courts have respected the principles and guarantees of Article 31 of the Constitution and Article 6 of the ECHR, regarding the issue of the reasoned court decision.

Allegations of violation of Article 33 of the Constitution, as well as Article 7 of the ECHR

72. With regard to the Applicant's allegations regarding the violation of Article 33 of the Constitution in conjunction with Article 7 of the ECHR, the Applicant first states that the Supreme Court in this case applied the analogy contrary to Article 33 of the Constitution and Article 2, paragraph 3 of the Criminal Code, because the provision of Article 367, paragraph 2, which deals with the person responsible for safety at work, interpreted by analogy for the responsible person of the company. Therefore, the Applicant alleges that no one can be found guilty or convicted of a criminal offense which, at the time of its commission, was not defined by law as a criminal offense *„Nullum crimen, nulla poena sine lege qerta"* as it was case with him.

73. According to the Applicant's allegations, the Court finds that in the light of the circumstances of the present case and the allegations, the constitutional review of the Applicant's allegations of a manifestly arbitrary interpretation and application of the law due to the application of the analogy by regular courts, which falls within the framework of the rights guaranteed by Article 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in conjunction with Article 7 (No punishment without law) of the ECHR and its implementation, widely interpreted in the case law of the ECtHR

74. The Court recalls that Article 33 of the Constitution guarantees a number of specific principles, the purpose of which is to ensure legal certainty in a sensitive area of criminal law.

75. In this regard, the Court notes that Article 33, paragraph 1 of the Constitution proclaims the principle of legality of offenses and punishments, namely sanctions that prohibit, in addition, the retroactive effect of criminal law and other criminal regulations. According to the principle of legality, *nullum crimen nulla poena sine lege* referred to by the Applicant, implies that there is no criminal offense or punishment without law. This means that no one can be found guilty of an offense which, before being committed, by law or other law-based regulation, was not provided for as punishable, nor can a sentence, which was not provided for that offense be imposed. The retroactive effect of criminal law is excluded, because the punishment is determined according to the regulation that was valid at the time the crime was committed, except in those cases when the subsequent regulation is more favorable for the perpetrator (Article 33 paragraph 4 of the Constitution).

76. The Court therefore finds that the Applicant's allegations must be examined on the basis of the above facts and evidence attached to the Referral, in order to respond to the Applicant's allegations concerning "*prohibition of analogy in criminal law*" (see, in a similar way, case KI145/18, Applicant *Shehide Muhadri, Murat Muhadri dhe Sylë Ibrahimi*, cited above, paragraph 36).

77. It is therefore necessary to assess the constitutionality of the Applicant's allegations of arbitrary interpretation and application of the law as a result of the use of analogy, with reference to the principles of *"principle of legality*" and "*prohibition of analogy in criminal justice*" embodied in Article 33 of the Constitution, Article 7 of the ECHR and the relevant case law of the ECtHR.

General principles in relation to Article 7 established by the case law of the ECtHR

78. The Court notes that the guarantee enshrined in Article 33 of the Constitution and Article 7 of the ECHR, which is an essential element of the rule of law, occupies a prominent place in the protection system of Convention, as it is underlined by the fact that no derogation from it is permissible under Article 15 of the ECHR in time of war or other public emergency. It should be construed and applied, as follows from its objective and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see Judgment *Korbely v. Hungary* [GC], Application no. 9174/02, dated 19 September 2008, paragraph 69).

79. Accordingly, Article 33 of the Constitution and Article 7 of the ECHR "*are not confined to prohibiting the retroactive application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable" (see Judgment Korbely v. Hungary, cited above, paragraph 70*).

80. In addition, when speaking of "law" Article 7 of the ECHR and Article 33 of the Constitution allude to the very same concept as that to which

the ECHR refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see case *EK v. Turkey*, application no. 28496/95, judgment of 7 February 2002, paragraph 51). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (see Judgment *Del Rio Prada v. Spain*, application no. 42750/09, of 21 October 2013, paragraph 91).

81. In addition, the Court adds that, in principle, it is not the task of the Constitutional Court to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention and the Constitution (see Judgment *Waite and Kennedy v. Germany*, application no. 26083/94, 18 February 1999, paragraph 54, see also Judgment *Korbely v. Hungary*, cited above, paragraph 72).

Application of the abovementioned principles to the Applicant's case

82. In the light of the aforementioned principles concerning the scope of its supervision, we recall that the Constitutional Court is not called upon to decide on the individual criminal liability of the Applicant, which is primarily a matter for the assessment of the regular courts. Also, the Court is not called upon to decide whether there is the figure of another criminal offense in the Applicant's actions, this is also o at the discretion of the regular courts (see Judgment *Streletz, Kessler and Krenz v. Germany*, Applications No. 34044/96, 35532/97 and 44801/98, of 22 March 2001, paragraph 51).

83. The function of the Court, from the point of view of Article 33 of the Constitution and Article 7 paragraph 1 of the ECHR, is to consider whether the criminal offense for which the Applicant was convicted constituted a criminal offense defined with sufficient accessibility and foreseeability and whether regular courts contrary to the principle of legality, applying the analogy broadly interpreted the criminal law to the detriment of the accused (see Judgment *Kokkinakis v. Greece*, Application no. 14307/88, of 25 May 1993, paragraph 52).

a) Accessibility

84. As regards the application of the principles established by the ECtHR, the Court considers that it must first be established whether the criminal law and the Law on Safety at Work were accessible to the Applicant at a time when their very accessibility was essential to the outcome of the procedure.

85. In this regard, based on the facts of the case and the case file, the Court notes that the Applicant was a director of a construction company performing construction work in the territory of Kosovo, and that due to the death of one of its employees, the Basic Prosecution in Ferizaj on 3 December 2015 filed an indictment against the Applicant for the criminal offense *destroying, damaging or removing safety equipment and endangering work place safety under Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK.*

86. The Court finds that the Applicant was found guilty by the regular courts of committing this criminal offense on the basis of "*Article 367 par. 2 in conjunction with par. 7 and 3 of the CCRK*, for which he was sentenced to imprisonment.

87. The Court finds that the courts rendered their judgments pursuant to CCK 04/L-082, which was published in the Official Gazette no. 19/2012, on 13 July 2012, and the Law on Safety and Health at Work of 31 May 2013, based on this, it can be concluded that the CCK which provided for a criminal offense and the Law on Safety and Health at Work, which provided for the obligation to comply with the requirements regarding safety at work were in force at the time the criminal offense was committed, and that they were at all times sufficiently accessible to the Applicant.

b) Foreseeability

88. The Court must further determine whether the CCK and the Law on Safety at Work were foreseeable and whether the regular courts, applying the analogy, interpreted them broadly and unpredictably to the detriment of the Applicant.

89. In this regard, the Court notes that the Applicant established his construction company and that consequently, as the owner, he had his rights and obligations, namely that in accordance with the applicable law on safety at work, he had to take all security measures in order to protect employees and other persons who may be harmed directly or indirectly by their non-undertaking. Furthermore, Article 10 (Employees in charge of safety and health at work) of the Law on Safety at Work, provided the obligation of the Applicant to hire

persons who would regularly provide all the necessary training and education for all employees in order to increase safety measures at work.

90. The Court is of the opinion that the Applicant was obliged and could have foreseen that such omission, namely the non-fulfillment of the conditions provided by the relevant provisions of the Law on Safety at Work, could lead to his criminal liability. for non-fulfillment of the latter, and thus of the criminal offense provided by the CCK in force.

91. In addition, the Court finds that the Court of Appeals also dealt with the issue of application of the analogy in the criminal proceedings, which, according to the Applicant, was to his detriment, and in this case concluded that "*The appealing allegations of the defense counsel of the accused that the court found the accused guilty by analogy and flagrantly violating the principle of legality does not stand. In accordance with Article 367 par. 2 of the CCK, it is established that "Whoever is responsible for workplace safety and health in any workplace and who fails to install safety equipment, fails to maintain such equipment in working condition, fails to ensure its use when necessary or fails to comply with provisions or technical rules on workplace safety measures and thereby endangers human life or causes considerable damage to property shall be punished by imprisonment of six (6) months to five (5) years". According to this provision, the perpetrator of this criminal offense is defined as anyone who is responsible for safety and health in the workplace, which responsible person is provided under Law no. 04/L-161 on Safety and Health at Work".*

92. Consequently, the Court considers that the regular courts throughout the entire proceedings had adhered to the principles of the CCK, and had acted exclusively in the spirit of the legal provision, and that the analogy invoked by the Applicant had not been applied.

93. Therefore, the Court concludes that there has been no violation of Article 33 of the Constitution in conjunction with Article 7 of the ECHR with regard to the Applicant's allegations of application of the analogy in criminal proceedings.

94. Having regard to the fact that it responded to all the allegations of the Applicant, the Court finds that nothing in the case filed by the Applicant indicates a violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, nor any violation of the principles of legality and

proportionality in criminal proceedings, guaranteed by Article 33 of the Constitution in conjunction with Article 7 of the ECHR.

95. The Court reiterates that it is the Applicant's obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see case of the Constitutional Court No. K119/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

96. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

Request for holding a hearing

97. The Court notes, among other allegations in the Referral, that the Applicant requested the Court to hold a public hearing in his case, without giving any specific reasoning, nor any reason why a public hearing would be necessary.

98. In this regard, the Court refers to Article 20 of the Law:

> *"1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files ".*

99. The Court notes that there is no reason invoked by the Applicant in support of this request.

100. The Court considers that the documents in the Referral are sufficient to decide this case in accordance with the wording of Article 20, paragraph 2 of the Law (see, *mutatis mutandis*, case of the Constitutional Court No. KI34/17, Applicant: *Valdete Daka*, Judgment of 12 June 2017, paragraphs 108-110).

101. Therefore, the Applicant's request to hold an oral hearing was rejected as ungrounded.

Request for interim measure

102. The Court recalls that the Applicant also requests the Court to impose an interim measure, which would suspend the execution of the final judgment of the Supreme Court..

103. However, the Court has just concluded that the Applicants' Referrals must be declared inadmissible on constitutional basis.

104. Therefore, in accordance with Article 27.1 of the Law and Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for interim measure is to be rejected, as the latter cannot be the subject of review, because the Referral is declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Articles 20 and 27.1 of the Law, and Rules 39 (2) and 57 (1) of the Rules of Procedure, in the session held on 25 March 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for holding a hearing;

III. TO REJECT the request for interim measure;

IV. TO NOTIFY this Decision to the parties;

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

VI. This Decision is effective immediately.

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

KI195/19, Applicant: Banka për Biznes, Constitutional review of Decision Ae. No. 287/18 of the Court of Appeals of 27 May 2019 and Decision I.EK. No. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019

KI195/19, Judgment of 7 April 2021, published on 2 June 2021

Keywords: *Individual referral, right to fair and impartial trial, res judicata, admissible referral, violation of constitutional rights*

The circumstances of the present case are related to a Loan Agreement and the subsequent Collateral Agreement, of 2003 based on which, "Nita Commerc" received a loan of 269,800.00 euro from the Applicant, namely the Bank, with a repayment period of twelve (12) months. Considering that the obligations of "Nita Commerc" to the Bank were not performed based on the agreement between the parties, in 2006, the court proceedings were initiated, which resulted in one criminal proceeding and three contested proceedings. Since the beginning of the court proceedings, the Bank claimed that "Nita Commerc" did not fulfill its obligations, requesting the confirmation of the debt in the amount of 150,000 euro and the respective interest. "Nita Commerc" challenged these allegations, stating, among other things, that the Bank's employees made unauthorized interference in its bank account, resulting in double payments in the amount of 74,000 euro. The District Commercial Court in Prishtina, by Judgment [VIII. C. No. 207/06] of 23 November 2006, approved the statement of claim of the Bank, obliging "Nita Commerc" to pay the main debt of 150,000 euro and the relevant interest. The latter, based on the relevant expertise, had also examined the allegations of "Nita Commerc" regarding the unauthorized interference of the Bank's employees in its bank accounts, rejecting them as ungrounded. The abovementioned Judgment of the District Commercial Court in Prishtina, was upheld twice by the Supreme Court, by Judgments [Ae. No. 2/2007] of 17 September 2009 and [Rev. E. nr. 20/2009] of 17 March 2010.

However, in December 2009, "Nita Commerc" initiated new court proceedings against the Bank. This time, "Nita Commerc" filed a lawsuit regarding the amount of 74,360.00 euro, which it claimed that the Bank had misappropriated as a result of unauthorized interference of its employees in its bank account. The District Commercial Court in Prishtina by the Decision [IV. C. No. 1/2010] of 12 May 2010 dismissed the lawsuit based on Article 391 of the Law on Contested Procedure, classifying it as *res judicata*.

In addition, in December 2009 and May 2010, respectively, "Nita Commerc" initiated two other court proceedings. The first was initiated through a

criminal report against the Bank, namely its director and employees A.Sh., M.B. and Sh.K., whom it accused of unauthorized interference in its bank account and misappropriation of the amount of 79,786.00 euro. Whereas, the second, was initiated by a lawsuit for "*not allowing the execution*" of the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court in Malisheva, which allowed the execution of the Judgment [C. No. 207/2006] of 23 November 2006 of the District Commercial Court in Prishtina.

Regarding the criminal proceedings, the criminal report of 17 May 2010 of "Nita Commerc" on 4 June 2013, had resulted in the Decision to initiate investigations against defendants A.Sh., M.B. and Sh.K., by the Serious Crimes Department of the Basic Prosecution, under suspicion of committing the criminal offense of misappropriation in office, as established in the Provisional Criminal Code of Kosovo. Also, based on the case file, it results that the Basic Prosecution in Ferizaj, filed the Indictment only against persons A.Sh. and M.B. The Indictment was filed against both, but the latter was modified by the State Prosecutor, withdrawing the Indictment with respect to the person M.B. On 31 March 2016, the Serious Crimes Department of the Basic Court, by the Judgment [PKR. No. 209/2015], acquitted the person A.Sh. of charges. This Judgment was subsequently upheld by the Court of Appeals. Whereas, regarding the lawsuit for "*not allowing the execution*" of 19 May 2010, "Nita Commerc", submitted another submission to the Basic Court in Gjakova, requesting the modification of this lawsuit to a lawsuit for compensation of damage, now in the amount of 98,019.43 euro . The Basic Court in Prishtina terminated the contested procedure until the criminal case was completed. Two additional financial expertise were subsequently conducted and it was confirmed that "*there has been no duplication of banking operations*". Therefore, the Basic Court in Prishtina, after reviewing the relevant evidence and expertise, by the Decision [I.EK. No. 424/14] of 2 November 2018, decided that the case under review was *res judicata*.

Following five decisions rendered in this contested procedure, two of which qualified the dispute between the parties as an "*adjudicated matter*" based on point d) of Article 391 of the Law on Contested Procedure, acting on the appeal of "Nita Commerc", the Court of Appeals, by the Decision [Ae. No. 287/18] of 27 May 2019, challenged in the circumstances of the present case, ordered the remand of the case for reconsideration on merits to the Basic Court, emphasizing that the relevant dispute cannot qualify as *res judicata*. The Applicant's request addressed to the State Prosecutor to initiate a request for protection of legality against this Decision was rejected. Based on the aforementioned Decision of the Court of Appeals, on 1 August 2019, by the Decision [I. EK. No. 330/19], the Basic Court, rejected the request of the Bank that the challenged issue be considered as an "*adjudicated matter*" and proceeded with the examination of the merits of the case.

The Applicant before the Court challenges these two Decisions, of the Court of Appeals and of the Basic Court, , claiming that they were rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights, stating that in the circumstances of his case the principle of legal certainty has been (i) violated; and (ii) the right to a reasoned court decision.

In assessing the relevant Applicant's allegations, the Court first elaborated on the general principles deriving from its case-law and that of the European Court of Human Rights, regarding the principle of legal certainty, namely, the principle of finality of final decisions, clarifying, *inter alia*, that (i) one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that once the courts have finally decided a case, their decision should not be called into question and become subject to further consideration; (ii) no party has the right to request a review of a final and binding court decision merely for the purpose of obtaining a rehearing and a fresh determination of the case, in particular through an "*appeal in disguise*"; and (iii) departures from such a principle are possible only if justified by the circumstances of a "*substantial and compelling character*".

Whereas, based on these principles and their application in the circumstances of the present case, the Court examined whether (i) there are already *res judicata* decisions regarding the dispute between the parties; (ii) the case under consideration before the Court of Appeals contained *ad personam* and material scope limitations; and (iii) the reopening of proceedings which may have already reached *res judicata* status by the Court of Appeals may be justified through the circumstances of a "*substantial and compelling character*".

The Court found that the challenged Decisions of the Court of Appeals and the Basic Court, reopened the proceedings which had already reached the status of *res judicata*, by the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court in Prishtina, as confirmed by two Judgments of the Supreme Court, Judgment [Ae. No. 2/2007] of 17 September 2009 and Judgment [Rev. E. No. 20/2009] of 17 March 2010; Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court; and Decision [I. EK. No. 424/14] of 2 November 2018 of the Basic Court. The Court emphasized that despite certain differences in the three contested proceedings, the case before the Court of Appeals had no *ad personam* and material scope limitations, namely all civil proceedings concerned exactly the same parties, the same legal relations and the same circumstances, which were essential to the settlement of the dispute.

The Court also found that in the circumstances of the present case, the reopening of these proceedings was not justified by circumstances of a "*substantial and compelling character*". In this context, the Court emphasized that the reasoning of the Court of Appeals, by the challenged Decision, that the conduct of a criminal procedure in parallel with the contested procedure prevented the qualification of the respective civil case as *res judicata*, emphasizing that "*so far the epilogue of this criminal procedure is not known*", is incorrect because until the moment when the Court of Appeals rendered the challenged Decision, the entire criminal procedure ended by two Judgments in criminal proceedings which had acquitted the accused, namely the Bank employees of criminal liability, which "Nita Commerc" and the relevant Prosecution claimed to be holding.

Therefore, taking into account the abovementioned remarks and the proceedings in entirety, the Court found that the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I. EK. No. 330/19] of 1 August 2019 of the Basic Court, are contrary to the principle of legal certainty embodied in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, because they have reopened court decisions that had the status of *res judicata*, without any justification of a "*substantial and compelling character*". As such, both are contrary to Article 31 of the Constitution and Article 6 of the European Convention on Human Rights and, therefore, invalid.

JUDGMENT

in

case no. KI195/19

Applicant

Banka për Biznes

Constitutional review of Decision Ae. No. 287/18 of the Court of Appeals of 27 May 2019 and Decision I.EK. No. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Banka për Biznes J.S.C. (hereinafter: the Bank), represented with power of attorney by Sahit Bajraktari (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) in conjunction with the Decision [I.EK. No. 330/2019] of 1 August 2019 of the Department for Commercial Matters of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals, was served on the Applicant on 25 June 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Decisions, which have allegedly been rendered in violation of fundamental rights and freedoms of the Applicant guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 24 October 2019, the Applicant submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 31 October 2019, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.

8. On 20 January 2020, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit the power of attorney to the Court.

9. On 28 January 2020, the Applicant's representative submitted to the Court the requested power of attorney.

10. On 29 January 2020, the Court notified the Court of Appeals as well as the interested party, namely, N.T.N. "Nita Commerc" with headquarters in the Municipality of Malisheva (hereinafter: "Nita Commerc") about the registration of the Referral. The latter was given the opportunity to comment on the Applicant's Referral. On the same

date, the Court notified the Basic Court about the registration of the Referral and requested it to submit to the Court the complete case file.

11. On 7 February 2020, "Nita Commerc" submitted to the Court the relevant comments regarding the case.

12. On 9 February 2021, the Court requested the Basic Court to inform the Court at what stage is the review of the Applicant's case before the Basic Court.

13. On 12 February 2020, the Basic Court submitted the complete case file to the Court.

14. On 16 February 2021, the Basic Court notified the Court that in relation to the case, it decided by Judgment [I.Ek. No. 330/2019] of 30 June 2020 and that the review of the latter is before the Court of Appeals according to the appeal of "Nita Commerc". The Basic Court in its response stated that for more information, the Court should address the Court of Appeals.

15. On 22 February 2021, the Court requested the Court of Appeals to inform the Court at what stage is the review of the case and to submit to the Court the Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court.

16. On 24 February 2021, the Court of Appeals submitted the answer to the Court, through which it notified that the case is pending before the Court of Appeals and is registered with the number [Ae. 146/2020]. Subsequently, regarding the specific request of the Court to submit the Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court, the Court of Appeals specified that this Judgment is attached to this response. However, based on the documentation submitted by the Court of Appeals, the aforementioned Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court did not appear to be attached to its response.

17. On 24 February 2021, the Court by e-mail requested the Court of Appeals to submit to the Court the Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court.

18. On 26 February 2021, the Court of Appeals submitted by e-mail to the Court the abovementioned Judgment, namely the Judgment [I. Ek. No. 330/19] of 30 June 2020 of the Basic Court.

19. On 12 April 2021, the Review Panel considered the report of the Judge Rapporteur and decided to postpone the decision on this case to another session.

20. On 5 May 2021, the Review Panel considered the Report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral.

21. On the same date, the Court unanimously found that (i) the Referral is admissible; and found that (ii) the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I. Ek. No. 330/19] of 1 August 2019 of the Basic Court are not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

22. It appears from the case file that the Applicant and "Nita Commerc" were litigating parties in three contested proceedings which the Court will present below.

(i) The first contested procedure related to the certification of debt, the second contested procedure and the enforcement procedure

23. On 2 July 2003, the Applicant and "Nita Commerc" entered into a Loan Agreement [no. 2/5 LI 582] (hereinafter: the Loan Agreement), in the amount of 269,800 euro, with an annual interest of fourteen percent (14%), with the obligation to return the loan within twelve (12) months. Based on the case file, the purpose of the loan was "*payment of customs duties and other payments*" set out in the aforementioned Contract.

24. On the same date, to secure the obligations arising from the Loan Agreement, the parties also signed the Collateral Agreement [no. 336/02] (hereinafter: the Collateral Agreement), based on which, "Nita Commerc" had mortgaged the immovable property registered in the abovementioned contract, in the amount of 597,000 euro.

25. On 14 July 2006, due to the non-payment of the loan debt in full, the Bank filed a lawsuit against "Nita Commerc" with the District Commercial Court in Prishtina (hereinafter: the Commercial District Court) for the remaining part of the debt, namely (i) debt in the amount of 150,000 euro; and (ii) the contracted interest in the amount of 1,993.73 euro and from that date until the final payment, the contracted annual interest in the amount of fourteen percent

(14%) on the principal debt base. The Bank also filed lawsuits against the companies N.T.N "Mazreku" and N.T.T "Global Petrol" from the Municipality of Malisheva, in the capacity of loan guarantors for the respective "Nita Commerc".

26. On 30 October 2006, the District Commercial Court was handed over the financial expertise prepared by the expert Sh.M., on the basis of which it was concluded that the debt of "Nita Commerc" to the Bank amounted to 199,230 euro.

27. On 23 November 2006, the Applicant, namely the Bank, addressed the District Commercial Court with a request to withdraw the lawsuit against the companies N.T.N "Mazreku" and N.T.T "Global Petrol", respectively.

28. On 23 November 2006, the District Commercial Court, by the Judgment [VIII. C. No. 207/06], approved the statement of claim of the Bank. By this Judgment, the above-mentioned court, among others, held that the respondent, namely "Nita Commerc" be obliged to pay (i) the main debt on behalf of the loan in the amount of 150,000 euro; (ii) the contracted interest in the amount of 1,993.73 euro until 28 July 2006, and from the same date until the final payment, the contracted interest on the principal debt in the amount of fourteen percent (14%) per year; and (iii) costs of the contested procedure in the amount of 1,500 euro. The abovementioned judgment also stated, *inter alia*, that (i) the allegations of "Nita Commerc" that it had paid the amount of 74,343.00 euro twice due to "*unauthorized interference with his account*" of the Bank employees, based on the evidence before the court and the financial expertise of 30 October 2006, are not grounded, and based on this expertise it was concluded that *" it is not about double payments but about a payment made continuously"*; and (ii) the statement of claim against other parties, namely N.T.N "Mazreku" and N.T.T "Global Petrol", is considered withdrawn.

29. On an unspecified date, "Nita Commerc" filed an appeal with the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) against the above-mentioned Judgment of the District Commercial Court, alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

30. On 17 September 2009, the Supreme Court by the Judgment [Ae. No. 2/2007] rejected as ungrounded the appeal of "Nita Commerc" and upheld the Judgment [VIII. C. No. 207 /06] of 23 November 2006 of the Commercial District Court.

31. On 30 October 2009, the Applicant submitted a proposal for enforcement under the Collateral Agreement against ""Nita Commerc". On 11 November 2009, the Municipal Court in Malisheva (hereinafter: the Municipal Court), by the Decision [E. No. 406/09], allowed the enforcement.

32. On an unspecified date, "Nita Commerc" also filed a revision with the Supreme Court against the Judgment [Ae. No. 2/2007] of 17 September 2009 of the Supreme Court, alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

33. On 31 December 2009, "Nita Commerc" also filed a new lawsuit with the District Commercial Court against the Applicant regarding the payment of the debt in the amount of 74,360 euro "*due to unfounded gain*", referring to Article 210 (Acquiring without ground) of the Law of Obligations of 1978 (hereinafter: the old LOR). On the other hand, the Applicant through the response to the lawsuit stated that this issue presents "*adjudicated matter",* based on the Judgment of the same court, namely the Judgment [VIII. C. Nr. 207/06] of 23 November 2006 of the District Commercial Court, and upheld in the meantime also by the Judgment [Ae. No. 2/2007] of 17 September 2009 of the Supreme Court.

34. On 17 March 2010, the Supreme Court by the Judgment [Rev. E. No. 20/2009] rejected as ungrounded the revision of "Nita Commerc" and upheld the Judgment [Ae. No. 2/2007] of 17 September 2009 of the Supreme Court in conjunction with the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court.

35. On 12 May 2010, the District Commercial Court, acting on the lawsuit of 31 December 2009 of "Nita Commerc", by the Decision [IV. C. No. 1/2010] dismissed the latter, based on Articles 391 [no title] and 393 [no title] of Law No. 03/L-006 on Contested Procedure (hereinafter: LCP). The first, namely Article 391, point d) thereof, stipulates that the lawsuit is dismissed as inadmissible when the case is an "*adjudicated matter*". The District Commercial Court in this Judgment, among others, also reasoned that by the Judgment [C. No. 207/2006] of 23 November 2006, it also examined the allegation "Nita Commerc" regarding "*the payment made twice in the amount of 74,360 euro*", rejecting the latter as ungrounded, a finding that was also upheld by the Supreme Court by its two Judgments, Judgment [Ae. No. 2/2007]

of 17 September 2009 and Judgment [Rev. E. No. 20/2009] of 17 March 2010.

36. On 26 July 2013, based on the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court by which the enforcement was allowed based on the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court and subsequently upheld by the Supreme Court by its two Judgments mentioned above, the execution of the enforcement procedure regarding the mortgage that was pledged for securing the loan by "Nita Commerc" was completed.

(i) Criminal proceedings and third contested proceedings

37. In May 2010, "Nita Commerc" initiated two further proceedings. Initially, on 17 May 2010, "Nita Commerc" filed a criminal report with the Basic Prosecution in Prishtina (hereinafter: the Basic Prosecution), against the Director of the Bank, namely I.Z., and the employees of the Bank, A.Sh., M.B., and Sh.K., , claiming that from the account of "Nita Commerc", without authorization have withdrawn the amount of 79,786,00 euro, and "*which they did not register but kept to themselves*". Whereas, on 19 May 2010, "Nita-Commerc", also filed a lawsuit with the Municipal Court, requesting "*not to allow the execution*" of the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court and which had allowed the enforcement regarding the first contested procedure, repeating the allegations presented in the criminal report and emphasizing the fact that the respective employees of the Bank, respectively A.Sh., M.B., and Sh.K., "*have unlawfully withdrawn the amount of 74,000 euro from his account*". On the other hand, the Applicant, namely the Bank, through the response to the lawsuit, challenged the lawsuit as ungrounded, reiterating the fact that the cases raised by "Nita Commerc", constitute "*adjudicated matter*", because it was already reviewed and decided by the final decisions of the regular courts.

38. On 4 June 2013, based on the above mentioned criminal report, the Department for Serious Crimes of the Basic Prosecution, by the Decision to initiate investigations, namely the Decision [PP. 567/2013], found that against the defendants A.Sh., M.B. and Sh.K., should initiate investigations, as "*there is a reasonable suspicion that they have committed a criminal offense*" of embezzlement during the exercise of duty, as established in paragraph 3 of Article 340 (Misappropriation in office) in conjunction with paragraph 1 of Article 23 (Co-perpetration) of the Provisional Criminal Code of Kosovo no. 2003/25 (hereinafter: PCCK).

39. Whereas, on 13 September 2013, "Nita Commerc" filed a submission with the Branch in Malisheva of the Basic Court in Gjakova, requesting the modification of the statement of claim of 19 May 2010. The latter, as explained above, was originally filed as lawsuit to "*not allow the execution*", while "Nita Commerc" requested that the latter be modified to a lawsuit for compensation of damage based on Article 259 [no title] of the LCP. Based on the case file, it results that the compensation of the damage requested by "Nita Commerc" is in the amount of 98,019.43 euro.

40. On 20 June 2014, the Branch in Malisheva of the Basic Court in Gjakova by the Decision [C. No. 62/10] was declared incompetent because of the lack of subject matter jurisdiction to decide on this issue and referred the case to the Basic Court in Prishtina.

41. On 14 July 2015, the Basic Court, by the Decision that is part of the minutes from the main trial session, decided to terminate the contested procedure related to this case, until the criminal case is decided [PP. I. 567/13].

42. On 5 December 2015, the Basic Prosecution in Ferizaj filed the Indictment [PP. l. No. 111/20 J 5], against the accused A.Sh. and M.B., on the grounded suspicion that they have committed the criminal offense of "*misappropriation in office*" as provided in paragraph 3 of Article 340 in conjunction with paragraph 1 of Article 23 of the PCCK. Based on the case file, in the hearings held during February and March 2016, the State Prosecutor, modified the Indictment, withdrawing from the Indictment the accused M.B.

43. On 31 March 2016, the Department for Serious Crimes of the Basic Court, by the Judgment [PKR. no. 209/2015] acquitted the person A.Sh. of charges, while in the realization of the legal property claim had instructed "Nita Commerc" to a civil dispute. Based on the case file, this Judgment was confirmed by the Judgment [PAKR. No. 392/16] of 15 March 2017 of the Court of Appeals.

44. On 14 September 2016, the Basic Court by the Decision, which is part of the minutes from the main trial session, decided to continue the contested procedure terminated by the Decision of 14 July 2015.

45. On 17 October 2016, the Basic Court, by the Decision [I. C. No. 424/2014], appointed expert F.K., to do the financial expertise to assess whether there was unauthorized interference by the Bank in the account of "Nita Commerc", in the amount of (i) 74,089.37 euros; and (ii) 23,930.06 euro as "*funds not included in the statement of*

accounts", and consequently at a total amount of 98,019.93 euro. The Bank demanded that lawsuit of "Nita Commerc" be dismissed as inadmissible, claiming again that in this case we are dealing with "*adjudicated matter*".

46. On 24 November 2016, the financial expert report finished by F.K. was submitted to the Basic Court, which found, among other things, that (i) " *payments made in the name of customs duties (8 transactions in the amount of 74,306 euro) did not affect the company "Nita Commerc" and there was no duplication of banking operations*"; and (ii) regarding the other allegation of the party that he was damaged in the amount of 23,930.06 euro, "*the amount of 1,610 euro relates to the provisions in the name of permitted loans, while the amount of 1,455 was initially registered to the detriment of the client, but later, the bank finished the proper reversal",* whereas "*the remaining amount of 20,837.90 euro represents the client's credit obligations to the bank and for that the court has rendered a decision*".

47. On 26 January 2017, based on the minutes of the Basic Court, the latter, by the Decision [I. C. No. 424/2014], approved the proposal for issuing another expertise, by a group of three experts from the Faculty of Economics of the University of Prishtina (hereinafter: the Faculty of Economics) regarding the disputed value of 74,000 euro. However, considering that the relevant expertise was not submitted, on 26 March 2018, the Basic Court by the Kosovo Police ordered the Faculty of Economics to return the case file. The relevant case file, consequently, was submitted to the Basic Court, but not the financial expertise, which according to the reasoning of the Faculty of Economics could not be worked because "*the parties did not respond to the submission of evidence*". Considering this, on 11 April 2018, the Basic Court by the Decision [I. EK. No. 424/14] imposed a fine on the group of three experts of the Faculty of Economics because (i) the respective group has kept the original case file for more than one (1) year despite the fact that the relevant court has set a deadline of thirty (30) days for the submission of the expertise report; moreover that (ii) the relevant group has not submitted the expertise report at all.

48. On 2 November 2018, the Basic Court, by the Decision [I.E.K. No. 424/14] dismissed the lawsuit of "Nita Commerc". In this Decision, among other things, it is stated that regardless of the amount of value claimed with the new lawsuit, (i) the subject of the statement of claim is the same; (ii) allegations for the amount claimed are based on the same facts and on the same basis; and (iii) the parties in the trial are the same, therefore the Basic Court, by the abovementioned Decision,

found that the request meets the requirements to be considered as an "*adjudicated matter*", based on Article 391 of the LCP.

49. On 22 November 2018, against the abovementioned Decision of the Basic Court, "Nita Commerc" filed an appeal with the Court of Appeals, alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law. On the other hand, the Applicant through the response to the appeal proposed that the appeal be rejected as ungrounded and the case be addressed as "*adjudicated matter*".

50. On 27 May 2019, the Court of Appeals by the Decision [Ae. No. 287/18], approved as grounded the appeal of "Nita Commerc", annulling the Decision [I. EK. No. 424/14] of 2 November 2018 of the Basic Court and remanded the case to the first instance for retrial. The Court of Appeals, in the reasoning of this finding, stated that the challenged Decision was rendered in violation of paragraph 1 of Article 182 [no title] in conjunction with point d) of paragraph 1 of Article 391 of the LCP, because (i) the position of the parties in the procedure is different, as is the legal basis and the value of the dispute; and (ii) the issue of debt payment has been adjudicated, and now the subject of the dispute is the compensation of the damage "i*t is alleged that the respondent, namely its officials, caused the damage to the claimant by misappropriating money from its bank account, in an unlawful manner and against whom criminal investigations have been initiated*".

51. On an unspecified date, against the above-mentioned Decision of the Court of Appeals, the Applicant submitted a letter to the Basic Court, requesting the dismissal of the lawsuit of "Nita Commerc", as this contested case is an "*adjudicated matter*".

52. On 1 August 2019, the Basic Court, by the Decision [I.EK. No. 330/19] rejected the Applicant's request that the disputed case be considered as an "*adjudicated matter*" and decided that based on the recommendations given by the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals, the procedure be continued with a review of the merits of the statement of claim. No appeal was allowed against this Decision.

53. On 23 September 2019, referring to point b) of paragraph 1 of Article 245 [no title] of the LCP, the Applicant addressed the Office of the State Prosecutor with a proposal to initiate a request for protection of

legality against the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals.

54. On 3 October 2019, the State Prosecutor's Office, by the Notification [KMLC. No. 158/2019] notified the Applicant that his Referral was not approved, because there is no sufficient legal basis based on points a) and b) of paragraph 1 of Article 247 [no title] of the LCP.

(i) The procedure after the Applicant has submitted his Referral to the Court requesting the constitutional review of the challenged Decisions

55. On 23 October 2019, the Basic Court, by the Decision [I.EK No. 424/2014] also appointed a financial super-expertise related to the dispute between the parties, namely the disputed amount of 74,000 euro, appointing three financial experts, namely R.A., A.Z. and M.M., for the preparation of super-expertise.

56. On 14 November 2019, the aforementioned financial experts submitted to the Basic Court "*super financial expertise*", which, *inter alia*, found that (i) the subject "Nita Commerc" was not harmed; (ii) "*there was no interference of bank employees in the bank account of the entity Nita Commerc" without power of attorney, but that all withdrawals and payments of their client's obligation to Kosovo Customs have been made in accordance with Article 4 of the Suzerain Loan No. 2/5-582 of 02.07.2003* [...]"; and (iii) it does not appear to have had double payments.

57. On 30 June 2020, the Basic Court, by the Judgment [I.EK. No. 330/19] rejected as ungrounded the statement of claim of "Nita Commerc". The Basic Court in its reasoning, *inter alia*, stated that based on Article 154 (Foundations of Liability) of the old LOR is stipulated that whoever causes injury to another shall be liable to reddres it, unless he proves that the damage was caused without his fault and in this case, none of the claims of "Nita Commerc" regarding the allegation that "*the respondent misused the claimant;s funds from his account by withdrawing funds from his account without authorization"*, has not been proved before the Basic Court.

58. Based on the case file, it appears that "Nita Commerc" filed an appeal against the above-mentioned Judgment of the Basic Court with the Court of Appeals. Based on the response of the Basic Court and that of the Court of Appeals submitted to the Court on 16 February 2021 and 24 February 2021, respectively, the above-mentioned appeal of "Nita Commerc" is pending before the Court of Appeals.

Applicant's allegations

59. The Applicant alleges that the challenged Decisions, namely the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, have been rendered in violation of its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant challenges the above-mentioned Decisions alleging violation of the above-mentioned Articles of the Constitution and the ECHR, due to (i) violation of the principle of legal certainty; and (ii) lack of reasoning of the court decision.

(i) Regarding allegations of violation of the principle of legal certainty

60. The Applicant, in this context, alleges that the Court of Appeals, by the challenged Decision, reopened a final decision, namely Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, contrary to the constitutional guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Applicant states that the principle of legal certainty is one of the main aspects of the rule of law, which, among other things, presupposes the observance of the principle *res judicata*, which is the principle of final form of court decisions. In the context of a violation of this principle, the Applicant states, *inter alia*, that (i) notwithstanding Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court; two Judgments of the Supreme Court, the Judgment [Ae. No. 2/2007] of 17 September 2009 and the Judgment [Rev E. No. 20/2009] of 17 March 2010; Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court; and Decision [I.EK. No. 424 / 14] of 2 November 2018 of the Basic Court, the Court of Appeals and then the Basic Court, by the challenged Decisions, more than (9) years later, have reopened a court process, considering that it is not an "*adjudicated matter*"; (ii) the appeal before the Court of Appeals, on the basis of which it has reopened a trial which was previously qualified by the regular courts as *res judicata*, relates to the same case, the same factual situation, the same parties and the same legal report which had already been decided by the regular courts; (iii) the allegation of "Nita Commerc", on the basis of which has filed a new lawsuit and on the basis of which the Court of Appeals, by the challenged Decision has reopened an "*adjudicated matter*", has been reviewed since the beginning of this trial, respectively in 2006, being dismissed by the District Commercial

Court, by the Judgment [VIII. C. No. 207/06] of 23 November 2006, as ungrounded, a finding which was subsequently confirmed twice more by the Supreme Court; (iv) in the opening of a case *res judicata*, the Court of Appeals is also contrary to the case law of the Supreme Court, reflected in the third volume of the Bulletin of Case Law of the Supreme Court of 2016, according to which, in order to be considered a *res judicata*, there must be an identity, namely the subjective identity of the parties, there must be an identity of the claim, there must be an identity of factual situation and the dispute has been developed and concluded in a contested procedure, the requirements which are met in the circumstances of the case; and (v) contrary to the constitutional guarantees and the case law of the Court, a court and final decision, namely Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, has remained ineffective, to the detriment of the Applicant, thus resulting in "*illusory*" constitutional rights for the latter.

61. In support of its allegations of violation of legal certainty, the Applicant refers to the case law of (i) the Court in the following cases: KI08/09, Applicant, *Independent Trade Union of Steel Pipe Factory Employees - IMK from Ferizaj*, Judgment of 17 December 2010 (hereinafter: the case of Court KI08/09); KI132/15, Applicant *Deçani Monastery*, Judgment of 20 May 2016 (hereinafter: the case of Court KI132/15); KI122/17, Applicant *Česká Exportni Banka A.S*, Judgment of 18 April 2018 (hereinafter: the case of Court KI122/17); KI87/18, Applicant *Insurance Company "IF Skadeforsikring",* Judgment of 27 February 2019 (hereinafter: the case of Court KI87/18); and (ii) the European Court of Human Rights (hereinafter: the ECtHR) in the case *Ponomaryov v. Ukraine*, Judgment of 3 April 2008.

(i) With respect to allegations of lack of reasoning of the court decision

62. The Applicant, in this context, alleges that the Basic Court and the Court of Appeals, by the challenged Decisions, failed to justify their decision-making and to address and justify the Applicant's substantive allegations, contrary to the constitutional guarantees, embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Applicant, referring to the case law of the Court in the context of a reasoned court decision, states that the regular courts are obliged to address the substantive allegations of the respective parties and to indicate with sufficient clarity the reasons on which they based their decision-making, while acting contrary to the constitutional guarantees of a reasoned court decision, if they provide no answer as to the substantive allegations of the parties.

63. The Applicant more specifically states that (i) Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals does not contain any reference or reasoning regarding its allegations that by the Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court, the lawsuit of "Nita Commerc" was dismissed as *res judicata*; whereas (ii) the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, also did not address any of its allegations, but for the reopening of a contested procedure contrary to the constitutional guarantees and those of the ECHR with regard to the principle of legal certainty, was satisfied with the finding that "*this is what the Court of Appeals has determined*".

64. In support of its allegations of violation of the right to a reasoned court decision, the Applicant refers to the case law of the Court, in the following cases: KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019 (hereinafter: the case of Court KI24/17); KI138/ 5, Applicant "*Sharr Beteiligungs GmbH*" L.L.C., Judgment of 4 September 2017 (hereinafter: the case of Court KI138/15); KI72/12, Applicants *Veton Berisha and Ilfete Haziri*, Judgment of 5 December 2012 (hereinafter: the case of Court KI72/12); and the case of the Court KI122/17.

65. Finally, the Applicant requests the Court to (i) declare the Referral admissible; (ii) find that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; (iii) find that the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court are invalid; and (iv) remand the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals for retrial before the Court of Appeals "*in accordance with the Judgment of the Constitutional Court*".

Comments of "Nita Commerc"

66. Through its response to the Court submitted on 7 February 2020, "Nita Commerc" challenged the Applicant's allegations. Initially, "Nita Commerc" stated that the Applicant has not exhausted the legal remedies provided by law. In this context, the latter stated that "*although by Decision I.EK. no. 330/19 of the Basic Court-Department for Commercial Matters of 1 August 2020 is not allowed a special appeal against this decision, the Applicant has the right to appeal for the same issue against the decision by which the proceedings of the case in the court of first instance ends, as in relation to the present case the contested procedure has not ended in the first instance before the competent court, this is also confirmed by point 2 of the enacting clause of this Decision [...]*".

67. As regards the merits of the case, "Nita-Commerc" (i) refers to Judgment [PKR. No. 209/2015] of 31 March 2016 of the Basic Court by which the latter for the realization of the property claim was instructed to a civil dispute; and (ii) states that the Court of Appeals has rightly found that we are not dealing with "*adjudicated matter",* because *"in the present case the position of the parties in the procedure is different (where in this case we are as claiming party) and the value of the dispute is different from that of Judgment VIII. C. No. 207/06 of the District Commercial Court in Prishtina of 23.11.2006"*.

Admissibility of the Referral

68. The Court first examines whether the admissibility requirements established by the Constitution, foreseen by the Law and further specified by the Rules of Procedure have been met.

69. 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".*

70. The Court also refer to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

> *"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

71. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms applicable both to individuals and to legal persons (See, *inter alia*, case of Court KI118/18, with Applicants, *Eco Construction l.l.c.*, Resolution on Inadmissibility, of 10 October 2019, paragraph 29 and the references used therein).

72. In addition, the Court also refers to the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

„The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]."

73. As regards the fulfillment of these requirements, the Court finds that the Applicant filed the Referral in the capacity of an authorized party, challenging two acts of the public authority, namely (i) Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals; and (ii) Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court. Regarding the two challenged decisions, the Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

74. However, in addition the Court will assess whether the Applicant has met the criterion of exhaustion of legal remedies provided by law, as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The Court will assess the fulfillment of this criterion separately in relation to the two

challenged acts, starting with the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals, to continue with the Decision [I.EK. nr. 330/19] of 1 August 2019 of the Basic Court.

75. The Court will make this assessment based on the general principles regarding the exhaustion of legal remedies, as elaborated through the case law of the ECtHR and the Court. The latter has elaborated on these principles in detail in a number of cases, including but not limited to cases Kll08/18, Applicant *Blerta Morina*, Resolution on Inadmissibility, of 30 September 2019, KI108/18); KI147/18, Applicant *Artan Hadri*, Resolution on Inadmissibility, of 11 October 2019, KI147/18); KI211/19, Applicants *Hashim Gashi, Selajdin Isufi, B.K., H.Z., M.H., R.S., R.E., S.O., S.H., H.I., N.S., S.l., and S.R*, Resolution on Inadmissibility, of 11 November 2020; KI43/20, Applicant *Fitore Sadikaj*, Resolution on Inadmissibility, of 31 August 2020, KI43/20); and KI42/20, Applicant *Armend Hamiti*, Resolution on Inadmissibility, of 31 August 2020.

(i) Regarding the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals

76. The Court recalls that the above-mentioned Decision of the Court of Appeals was rendered based on the appeal of "Nita Commerc" against the Decision [I.EK. No 424/14] of 2 November 2018 of the Basic Court, which rejected the lawsuit of the latter on the basis of point d) of paragraph 1 of Article 391 of the LCP, qualifying this case as *res judicata*. The Court of Appeals annulled this Decision of the Basic Court, considering that the case before it could not qualify as *res judicata* and remanding the case to the Basic Court for reconsideration regarding the merits of the case. Against the Decision of the Court of Appeals, the Applicant submitted a request for protection of legality to the State Prosecutor's Office, but the latter by the Notification [KMLC. No. 158/2019] of 3 October 2019, rejected the same.

77. The Court notes that based on the case law of the Court, the decisions of the Court of Appeals can be challenged before the Court, and the latter has consistently assessed that the legal remedies have been exhausted by the respective Applicants who have challenged the decisions of the Court of Appeals. This case law has been built by the Court based on the case law of the ECtHR, according to which, among others, the respective Applicants are unconditionally obliged to use extraordinary legal remedies. (See ECtHR Practical Guide on Admissibility Criteria of 30 April 2020; I. Procedural grounds for inadmissibility; A. Non-exhaustion of domestic remedies; 2.

Application of the rule; e) Existence and appropriateness, paragraph 89 and references used therein). Furthermore, based on the same case law, in the event of the existence of more than one effective legal remedy, it is sufficient for an Applicant to have used one of them. (See, ECtHR Practical Guide on Admissibility Criteria of 30 April 2020; I. Procedural grounds for inadmissibility; A. Non-exhaustion of domestic remedies; 2. Application of the rule; c) Existence of several remedies; paragraph 86 and references used therein). The Court recalls that in the circumstances of the present case, against the challenged Decision of the Court of Appeals, the Applicant submitted a request for protection of legality to the State Prosecutor's Office and which was rejected.

78. Consequently, based on the abovementioned explanations, the Court finds that the Applicant has exhausted the legal remedies regarding the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals, in accordance with paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

(i) Regarding Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court

79. The Court recalls that the above-mentioned Decision of the Basic Court was rendered as a result of the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals. The Decision of the Basic Court (i) in the relevant legal remedy stated that against this Decision "*no appeal is allowed*"; and (ii) had resumed the contested proceedings between the respective parties, namely the Applicant and "Nita Commerc", reasoning that "*The Court of Appeals of Kosovo in the appeal procedure, by Decision Ae. No. 287/18 of 27.05.2019 annulled the Decision on dismissing the lawsuit, I.EK. No. 424/14, of 2.11.2018, and has remanded the case for reconsideration and retrial, arguing that the claim from the lawsuit is not an adjudicated case and at the same time it was recommended to this court to conduct the trial in the first instance, namely to conduct the review of the claim on merits*. "Nita Commerc", in its comments submitted to the Court, has specifically claimed that there was a lack of exhaustion of legal remedies regarding the Decision of the Basic Court.

80. In this context, the Court first refers to Article 206 [no title] of the LCP, which, *inter alia*, stipulates that if the same law expressly provides that a separate appeal is not allowed, the first instance decision can be challenged only by an appeal filed against the decision terminating the proceedings of the case in the court of first instance.

Based on this provision, and according to the allegation of "Nita Commerc", the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, could be appealed to the Court of Appeals, only after the proceedings in the Basic Court have been completed.

81. However, in such cases, which relate to allegations of breach of legal certainty, namely the reopening of court proceedings which may have reached the status of *res judicata* decisions, the Court first recalls the case law of the ECtHR, which in such cases, applies a flexible approach to assessing the exhaustion of legal remedies. For example, in case *Brumarescu v. Romania* (Judgment of 28 October 1999), the ECtHR assessed the merits of the case despite the fact that the case was pending before the relevant domestic court, finding a violation of Article 6 of the ECHR, as a result of the reopening of the court proceedings and their remand to retrial, after the case concerned had been adjudicated once and reached *res judicata* status. (See the case of the ECtHR, *Brumarescu v. Romania*, cited above, paragraph 30 and paragraphs 51 to 55).

82. Based on this case law, the Court has also made exceptions in terms of the exhaustion of legal remedies provided for by law in cases in which preliminary court decisions may have reached *res judicata* status. More specifically, in cases (i) KI132/15, the Court found that the Applicant has exhausted all legal remedies provided by law despite the fact that by a decision of the Appellate Panel, the preliminary Judgments were annulled and which were alleged to have reached the status of *res judicata* decisions, and the case was remanded to the Basic Court in Peja (see, Case KI132/15, cited above, paragraphs 60 to 66); and (ii) KI122/17, the Court found that the respective Applicant has exhausted the legal remedies provided by law, despite the fact that the challenged Judgment of the Court of Appeals in conjunction with the relevant Judgment of the Basic Court, *inter alia*, found that the Applicant, "*has not used all administrative legal remedies*", a finding which was reached only after holding four court proceedings regarding a security measure, which according to the respective allegations, had reopened proceedings which had already reached the status of *res judicata* decisions. (See Case Court KI122/17, cited above, para 122).

83. Therefore, based on the abovementioned clarifications, the Court finds that the Applicant has also exhausted the legal remedies regarding the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, in accordance with paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

84. Finally, the Court finds that the Applicant's Referral meets the admissibility criteria established in paragraph 7 of Article 113 of the Constitution, Articles 47, 48 and 49 of the Law and paragraph (1) of Rule 39 of the Rules of Procedure. Furthermore, the latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. Whereas, the Court considers that this Referral is not manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure and, therefore, it must be declared admissible and must be assessed on its merits.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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

European Convention on Human Rights

Article 6
(Right to a fair trial)

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the

court in special circumstances where publicity would prejudice the interests of justice.
[...]

Law No. 03/L-006 on Contested Procedure

Article 182
[no title]

182.1 Basic violation of provisions of contested procedures exists in case when the court during the procedure didn't apply or wrong application of any of the provisions of this law, while this has or will impact a rightful legal decision.

Article 259
[no title]

If the plaintiff changes the claim by requesting something else on the same factual basis or sum of money, the charged party can reject the change if the change is a result of new created circumstances after the charges were raised.

Article 391
[no title]

After the pre examination the court can drop charges as unnecessary if it determines that:
a) it is not within court's jurisdiction;
b) parties have contractual agreement from the arbitral case settlement;
c)) for the charges raised exist court dependence (litispendence);
d) it has already been trialed (res iudicata);

Merits

85. The Court first recalls that the circumstances of the present case relate to a Loan Agreement and the subsequent Collateral Agreement of 2003, on the basis of which "Nita Commerc" received a loan of 269,800.00 euro from the Bank, with a payment period of twelve (12) months. Considering that the liabilities of "Nita Commerc" to the

Bank were not performed based on the agreement between the parties, since 2006 the legal proceedings had been initiated which resulted in one criminal proceeding and three contested proceedings.

86. From the outset of the court proceedings, the Bank alleged that "Nita Commerc" failed to fulfill its obligations to the Bank, seeking to prove a debt in the amount of 150,000 euro and respective interest, whereas "Nita Commerc" challenged these allegations, noting, *inter alia*, that the Bank's employees made unauthorized interference in its bank account, resulting in double payments in the amount 74,000 euro. The first decision in the court proceedings that followed as a result of this dispute is Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, by which, after reviewing the expertise of 30 October 2006, it had approved the statement of claim of the Bank, obliging "Nita Commerc" to pay the main debt of 150,000 euro and the relevant interest, and stating, among other things, that the allegations of "Nita Commerc" that the amount of 74,343.00 euro was paid twice due to the "*unauthorized interference in his account*" by the Bank employees, based on the evidence before the court and the financial expertise of 30 October 2006, are not grounded, and based on the same expertise, it was concluded that "*it is not a question of double payments but of a payment made continuously"*.

87. The Judgment of the District Commercial Court was confirmed twice by the Supreme Court, namely the Judgments [Ae. No. 2/2007] of 17 September 2009 and [Rev. E. No. 20/2009] of 17 March 2010. The proceedings regarding the enforcement of the Judgment of the District Commercial Court, were also approved by the regular courts, by the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court. Based on the case file, the execution of the enforcement procedure related to the mortgage that was pledged to secure the loan by "Nita Commerc", was completed on 26 July 2013.

88. However, in December 2009, "Nita Commerc" initiated new legal proceedings against the Bank. This time, "Nita Commerc" filed a lawsuit against the Bank, regarding the amount of 74,360.00 euro, which it claimed that the Bank had appropriated as a result of unauthorized interference of its employees in its bank account. The District Commercial Court by the Decision [IV. C. No. 1/2010] of 12 May 2010 rejected the lawsuit based on Article 391 of the LCP, considering the latter as *res judicata*, referring to three preliminary court decisions, namely the Judgment [C. No. 207/2006] of 23 November 2006 of the District Commercial Court and Judgments [Ae. No. 2/2007] of 17 September 2009 and [Rev. E. No. 20/2009] of 17 March 2010 of the Supreme Court.

89. Whereas, in December 2009 and May 2010, the owner of "Nita Commerc" initiated two other court proceedings. The first was initiated through a criminal report against the Bank, namely its director and employees A.Sh., M.B. and Sh.K., whom he accused of unauthorized interference in its bank account and misappropriation of the amount of 79,786.00 euro. Whereas, the second, started by a lawsuit for "*not allowing the execution*" of the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court, which allowed the enforcement of the Judgment [C. No. 207/2006] of 23 November 2006 of the District Commercial Court.

90. With regard to the criminal proceedings, based on the case file, the criminal report of 17 May 2010 of "Nita Commerc", on 4 June 2013, resulted in the Decision to initiate investigations against the defendants A.Sh., M.B. and Sh.K., by the Serious Crimes Department of the Basic Prosecution, under suspicion of committing the criminal offense of misappropriation in office, as defined in the relevant provisions of the PCCK. Also, based on the case file it results that the Basic Prosecution in Ferizaj, filed the Indictment [PP.l. No. 111/20 J 5] only against persons A.Sh. and M.B. The Indictment was filed against both, but the latter was modified by the State Prosecutor, withdrawing the Indictment with respect to the person M.B. On 31 March 2016, the Serious Crimes Department of the Basic Court, by Judgment [PKR. No. 209/2015] acquitted the person A.Sh of charges. This Judgment was subsequently upheld by the Court of Appeals, by Judgment [PAKR. No. 392/16] of 15 March 2017.

91. While, regarding the lawsuit for "*not allowing the execution*" of 19 May 2010, the Court recalls that three years later, namely on 13 September 2013, "Nita Commerc", submitted another submission to the Municipal Court, requesting the modification of this lawsuit in a claim for compensation of damages, already in the amount of 98,019.43 euro, in contrast to the initial value of 74,000 euro. In context of this contested procedure, the Basic Court in Gjakova by the relevant Decision declared itself incompetent from a substantive point of view, while in July of 2015, the Basic Court in Prishtina terminated the contested procedure until the criminal case was completed. Considering that the criminal proceedings ended in 2016, the Basic Court continued the contested procedure, assigning two additional expertise, namely the financial expertise done by the expert F.K., and another, which would be done by three experts of the Faculty of Economics of the University of Prishtina. The former confirmed that "*there was no duplication of banking operations*", explaining the method of payment of 74,306 euros and that of 23,930.06 euro, while

the second, namely, that of the Faculty of Economics, as explained in the summary of facts in this case was never submitted to the Basic Court. The Basic Court, after reviewing the relevant evidence and expertise, by the Decision [I.EK. No. 424/14] of 2 November 2018, decided that the case under review met the legal requirements to qualify as *res judicata*.

92. After five (5) decisions rendered in this contested procedure, namely (i) three decisions of the first group which decided on merits regarding the dispute between "Nita Commerc" and the Bank, such as Judgment [VIII.C. No. 207/06] of 23 November 2006 of the District Commercial Court, Judgment [Ae. No. 2/2007] of 17 September 2009 of the Supreme Court and Judgment [Rev E. No. 20/2009] of 17 March 2010 of the Supreme Court, and by which all allegations of "Nita Commerc" were rejected; and (ii) two (2) other decisions, which were rendered after "Nita Commerc" filed a new lawsuit for compensation of damage, namely Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court and Decision [I.EK. No. 424/14] of 2 November 2018 of the Basic Court, rendered after the completion of the criminal proceedings, which confirmed that the dispute between "Nita Commerc" and the Bank, is now an "*adjudicated matter*" based on point d) of article 391 of the LCP, in May 2019, acting upon the appeal of "Nita Commerc", the Court of Appeals, by the Decision [Ae. No. 287/18] of 27 May 2019, challenged in the circumstances of the present case, had ordered that the case be remanded to the Basic Court for reconsideration on merits, stating that the relevant civil dispute could not qualify as *res judicata*. The Applicant's request addressed to the State Prosecutor to initiate a request for protection of legality against this Decision was rejected.

93. Based on this Decision of the Court of Appeals, on 1 August 2019, the contested proceedings were resumed before the Basic Court, initially (i) by the Decision [I.EK. No. 330/19], also challenged in the circumstances of the present case, which rejected the Bank's request that the disputed matter be considered as an "*adjudicated matter*"; and (ii) a financial super-expertise was assigned, which, based on the case file, turns out to have concluded, *inter alia*, that "*there was no interference of bank employees in the account of the entity "Nita Commerc" without authorization*".

94. The Court recalls that the Applicant before the Court alleges these two Decisions, namely the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, have been rendered in violation of its fundamental rights and freedoms guaranteed by Article 31 [Right to

Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, emphasizing that in the circumstances of this case the principle of legal certainty has been (i) violated; and (ii) the right to a reasoned court decision. The Court will examine these allegations of the Applicant, based on the case law of the ECtHR, in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

95. Therefore, the Court will first examine the Applicant's allegations of violation of legal certainty, a review in which the Court will first (i) elaborate on the general principles; and then, (ii) will apply the latter to the circumstances of the present case.

(i) General principles regarding the right to legal certainty and respect of a final court decision

96. With regard to the principle of legal certainty, which presupposes respect for the principle of *res judicata*, namely, the principle of finality of final decisions, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it has already a consolidated case law. This case law is based on the case law of the ECtHR, including but not limited to cases*, Brumarescu v. Romania,* cited above; *Ryabykh v. Russia*, Judgment of 24 July 2003; *Pravednaya v. Russia,* Judgment of 18 November 2004; *Tregubenko v. Ukraine*, Judgment of 30 March 2005; *Kehaya and others v. Bulgaria*, Judgment of 12 January 2006; *Ponomaryov v. Ukraine*, Judgment of 3 April 2008; *Esertas v. Lithuania,* Judgment of 31 May 2012; *Trapeznikov and others v. Russia*, Judgment of 5 April 2016; and *Vardanyan and Nanushyan v. Armenia*, Judgment of 27 October 2016. Furthermore, the fundamental principles regarding the principle *res judicata* are also elaborated in the cases of this Court, including but not limited to cases KI132/15, cited above; KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 19 December 2018 (hereinafter: the case of Court KI150/16); KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility, of 4 January 2017 (hereinafter: the case of Court KI67/16); KI122/17, cited above; and KI87/18, cited above.

97. Based on the ECtHR case law, the right to a fair hearing before a tribunal as guaranteed by Article 6 of the ECHR must be interpreted in the light of its Preamble, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States.

One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question. (See, the ECtHR cases *Brumărescu v. Romania*, cited above, paragraph 61; and *Vardanyan and Nanushyan v. Armenia*, cited above, paragraph 66 and the references therein).

98. Furthermore, based on this case law, legal certainty presupposes respect for the principle of *res judicata*, that is the principle of the finality of court decisions. It means that no party is entitled to seek a review of a final and binding court decision merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination of a case, which has already become final. The review should not be treated as an "*appeal in disguise"*, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances "*of a substantial and compelling character*". (See, *inter alia,* case of the ECtHR *Ryabykh v. Russia*, no. 52854/99, paragraph 52).

99. Based on the ECtHR practice, in assessing whether the departures from this principle are justified through the circumstances "*of a substantial and compelling character*", the relevant considerations to be taken into account in this connection include, in particular, the effect of the reopening and any subsequent proceedings on the applicant's individual situation and whether the reopening resulted from the applicant's own request; the grounds on which the domestic authorities revoked the finality of the judgment in the applicant's case; the compliance of the procedure at issue with the requirements of domestic law; the existence and operation of procedural safeguards capable of preventing abuses of this procedure by the domestic authorities; and other pertinent circumstances of the case. In addition, the review must afford all the procedural safeguards of Article 6 of the ECHR and must ensure the overall fairness of the proceedings. (See, case of the ECtHR *Lenskaya v. Russia* paragraph 33 and references used therein).

100. The case law of the ECtHR includes cases in which it has found or not found a violation of Article 6 of the ECHR due to a violation of the principle *res judicata*. The ECtHR cases in which such a violation was found include but are not limited to cases *Brumarescu v. Romania*, *Ryabykh v. Russia, Pravednaya v. Russia, and Tregubenko v. Ukraine* (all cited above). In these cases and based on the specifics of each of them, the ECtHR, among others, noted that (i) one of the

fundamental aspects of the rule of law is the principle of legal certainty, which requires that where the courts have finally determined an issue, their ruling should not be called into question (See, the ECtHR cases *Brumărescu v. Romania*, cited above, paragraph 61); (ii) the subsequent court proceedings cannot annull an entire judicial process which had ended in a judicial decision that was "*irreversible*" and thus *res judicata* (See, the ECtHR case *Brumărescu v. Romania*, cited above, paragraph 62); and (iii the subsequent court proceedings reflected an "*appeal in disguise*" rather than a conscientious effort to correct judicial errors of a "*substantial and compelling character*" (see the case of the ECtHR, *Pravednaya v. Russia*, cited above, paragraph 25).

101. Insofar as it is relevant to the circumstances of the present case, the ECtHR case law, has also put emphasis on assessing the effects of the *res judicata* principle, namely limitations *ad personam* and those related to material scope (See, the ECtHR case *Esertas v. Lithuania,* cited above, paragraphs 22 to 31; also *Kehaya and others v. Bulgaria*, cited above, paragraph 66). For example, in case *Esertas v. Lithuania*, the ECtHR found violation of Article 6 of the ECHR, emphasizing among others, that although the two claims in the two sets of proceedings were not identical, both civil proceedings concerned exactly the same legal relations and the same circumstances, which were crucial for deciding the dispute and therefore, there were no *ad personam* or material scope limitations to determine the issue as *res judicata*. On the other hand, in the case of the Court, KI67 16, in elaborating the general principles relating to the principle *res judicata*, the Court referring to the cases *Esertas v. Lithuania* and *Kehaya and others v. Bulgaria*, also stressed the importance of assessing the effects of the principle *res judicata*, including *ad personam* (for a certain person) and in the material scope (certain issue). (See the case of Court KI67/16, cited above, paragraphs 85 to 88). The Court, in this case, had not found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as it had assessed that in the circumstances of the present case, the Applicant's allegations that the challenged decision was made *res judicata*, were not grounded because the latter had *ad personam* differences and a sense of material scope. (See, the case of Court KI67/16, cited above, paragraphs 95 to 99).

102. Consequently, and based on the case law of the Court and the ECtHR, in principle, a decision becomes final and reaches the status of *res judicata* if (i) the relevant decision is irrevocable because no further remedies are available; (ii) when the term for their use has expired; and (iii) when there are no *ad personam* limitations and in material

scope. As explained above, exceptions to this principle may be justifiable only as a result of the circumstances of a "*substantial and compelling character*". Therefore, in applying these principles to the circumstances of the present case, the Court will then first assess whether the circumstances of the case involve decisions in the form of *res judicata* and, if so, whether their reopening is justified on the basis of the circumstances of a "*substantial and compelling character*".

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

103. In applying the general principles elaborated above, the Court reiterates that in the circumstances of the present case three contested proceedings have been conducted, (i) involving the same parties, "Nita Commerc" and the Bank; respectively; and (ii) which relate, in essence, to the same issue, namely the dispute arising out of the Loan Agreement and the Collateral Agreement signed on 2 July 2003.

104. The Court recalls that in the first contested procedure, the District Commercial Court decided in favor of the Bank, by the Judgment [VIII. C. No. 207/06] of 23 November 2006. This Judgment also addressed the allegations of "Nita Commerc" regarding the unauthorized interference of the Bank employees in its account in the amount of 74,343.00 euro, rejecting the latter as unfounded. This Judgment of the District Commercial Court was also upheld by two Judgments of the Supreme Court, the Judgment [Ae. No. 2/2007] of 17 September 2009 and the Judgment [Rev. E. No. 2/2009] of 17 March 2010. Beyond the Judgments of the Supreme Court, there were no further legal remedies available, and consequently, the relevant Judgment of the District Commercial Court, had become final and enforceable. Based on the case file, the Bank's proposal for enforcement was allowed by the Decision [E. No. 406/09] of the Municipal Court, while, on 26 July 2013, the execution of the enforcement procedure regarding the mortgage for insurance of the loan by "Nita Commerc" was completed.

105. However, and as explained above, "Nita Commerc" initiated a new court proceeding through two new statement of claims. The first was submitted to the District Commercial Court on 31 December 2009, "*due to ungrounded profit*", alleging unauthorized interference by the Bank's employees in its bank account. While the second, was submitted to the Malisheva Branch of the Basic Court in Gjakova, on 13 September 2013, requesting the modification of the statement of claim of 19 May 2010, in the claim for compensation of damage as a result of unauthorized interference of Bank employees in its bank

account. The two respective courts, namely the District Commercial Court by the Decision [IV. C. No. 1/2010] of 12 May 2010 and the Basic Court in Prishtina by the Decision [I.EK. No. 424/14] of 2 November 2018, dismissed the respective statement of claims, based on Article 391 of the LCP, considering that the cases raised before them had already been adjudicated and consequently had the status of *res judicata*. Furthermore, the Basic Court in Prishtina reached this finding only after (i) initially terminating the contested procedure until the relevant criminal case related to the allegation of unauthorized interference of the Bank's employees in the bank account of "Nita Commerc" was completed; and (ii) after ordering two expertise and establishing that the allegations of "Nita Commerc" concerning "*unauthorized interference with its account*" by the Bank staff were ungrounded, furthermore that the latter were addressed by the first Judgment of the District Commercial Court, namely Judgment [VIII. C. No. 207/06] of 23 November 2006 regarding this contested issue and, consequently, constituted an "*adjudicated matter*" or *res judicata*.

106. The Court also recalls that until the issuance of the abovementioned Decision of the Basic Court, and which qualified the statement of claim of "Nita Commerc" as *res judicata*, the criminal proceedings which were initiated through the criminal report of "Nita Commerc" were completed on 17 May 2010. The Court recalls more specifically that (i) The decision to initiate an investigation was rendered against three employees of the Bank, A.Sh., M.B. and Sh.K., respectively; (ii) The indictment was filed only against two of them, A.Sh. and M.B.; (iii) The indictment had meanwhile been withdrawn in respect of person M.B .; and (iv) by the Judgment [PKR. No. 209/2015] of 31 March 2016 of the Serious Crimes Department of the Basic Court, the last person was acquitted of charges, namely A.Sh. Furthermore, based on the case file, this Judgment of the Basic Court was also upheld by the Court of Appeals, by the Judgment [PAKR. No. 392/16] on 15 March 2017, and consequently became final.

107. However, acting upon the appeal of "Nita Commerc", on 27 May 2019, the Court of Appeals by Decision [Ae. No. 287/18], remanded the case for reconsideration regarding the merits of the case. By this Decision, the Court of Appeals reasoned, *inter alia*, as follows:

> *"The conclusion and position of the first instance court is not fair and as such cannot be accepted, as the challenged decision contains violation of the provisions of the contested procedure provided by Article 182 par 1 in conjunction with Article 391 paragraph 1 point d) of the LCP* [...] *that the appeal of the*

claimant is grounded, because the first instance court did not correctly assess that in this civil dispute, the position of the parties in the proceedings is different as it is the legal basis and the value of the dispute are different, namely by the judgment of the District Commercial Court in Prishtina VIIIC. No. 207/06 of 23.11.2006, the issue of debt payment has been adjudicated, while now the subject of the dispute is the compensation of the damage, which allegedly the respondent, namely its officials, caused damage to the claimant by misappropriating money from its account unlawfully, and against whom criminal investigations have been initiated, but so far no epilogue of this criminal procedure is known. Therefore, in the present case the legal requirements to apply the legal provisions of Article 391 point d) of the LCP have not been met because the request of the lawsuit does not relate to a case which was previously decided by a final court decision. From the reasons above, the Court of Appeals found that the first instance court has violated the above-mentioned provisions, which in the re-procedure must be eliminated in such a way as to first prove the legal basis of the statement of claim and then if the legal basis is established then the court upon the proposal of the parties may issue material evidence to prove the amount of the statement of claim [...]".

108. Based on the aforementioned reasoning of the Court of Appeals, it turns out that the latter found that the legal requirements to apply point d) of Article 391 of the LCP were not met, and consequently the case had not reached the status of *res judicata*, because in relation to the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court (i) the position of the parties to the proceedings is different; and (ii) the legal basis and value of the dispute are different. Moreover, the Court of Appeals also stated that in the procedure conducted before the District Commercial Court "*the issue of debt payment was adjudicated*", while before it "*compensation for the damage allegedly caused by the respondent, namely it officials, by misappropriating money from its bank account in an unlawful manner"* was disputable and *"against whom criminal investigations have been initiated, but so far no epilogue of this criminal procedure is known*".

109. In the context of the reasoning of the Decision of the Court of Appeals, the Court first notes that, in the circumstances of the present case, it is not disputed that Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, confirmed twice by the Supreme Court, namely the Judgments [Ae. No. 2/2007] of 17

September 2009 and [Rev. E. No. 20/2009] of 17 March 2010, respectively, and moreover, which was executed based on the Decision [E. No. 406/09] of 11 November 2009 of the Municipal Court in Malisheva, is *res judicata*. However, as elaborated in the general principles regarding the principle of legal certainty, in order to ascertain whether by the challenged Decision, the Court of Appeals has reopened court proceedings which have achieved the status of *res judicata*, the Court must assess whether the case under consideration before Court of Appeals, reflects (i) *ad personam* limitations; or (ii) of the material scope.

110. In this respect, the Court initially notes that (i) the parties in all contested proceedings were identical, "Nita Commerc" and the Bank; (ii) the contested issue in all proceedings arises from the Loan Agreement and Collateral Agreement signed on 2 July 2003; (iii) the first contested procedure that was concluded by Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court and was also confirmed by two Judgments of the Supreme Court, Judgment [Ae. No. 2/2007] of 17 September 2009 and the Judgment [Rev. E. No. 20/2009] of 17 March 2010, assessed the allegations of "Nita Commerc" regarding the unauthorized interference of the Bank's employees in its account, rejecting this allegation as ungrounded based on the relevant expertise; and (iv) two Decisions, namely the Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court and the Decision [I. EK. No. 424/14] of 2 November 2018 of the Basic Court, which were rendered based on the new and subsequent lawsuits of "Nita Commerc", addressed its allegations regarding the unauthorized interference of the Bank's employees in the respective account, rejecting them as unfounded and qualifying the case as *res judicata* based on Article 391 of the LCP.

111. Therefore, based on the abovementioned explanations and specifically with regard to *ad personam* limitations, the Court notes that it is not disputed that in the circumstances of the present case, there are no such limitations, because throughout the three contested proceedings, the parties to the proceedings, the Bank and "Nita Commerc", were identical.

112. In addition, as regards the limitations in the material scope, the Court notes that it is correct that, unlike the initial lawsuit filed with the District Commercial Court on 14 July 2006, which was related to the confirmation of debt of "Nita Commerc" towards the Bank in its entirety deriving from the Loan and Collateral Agreement of 2 July 2003, the lawsuit under review before the Basic Court, which decision was challenged before the Court of Appeals, was related only to the

claim for compensation of damage as a result of the claim of "Nita Commerc" that there had been unauthorized interference in its bank account by the Bank's employees. It is also true that the disputed value has changed in the courts depending on the relevant lawsuits of "Nita Commerc". More specifically (i) in the first contested procedure before the District Commercial Court decided by the Judgment [VIII. C. No. 207/06] of 23 November 2006, the amount of 74,343.00 euro was contested and reviewed; (ii) in the next lawsuit filed before the District Commercial Court decided by Decision [IV. C. No. 1/2010] of 12 May 2010, the amount of 74,360.00 euro was contested and reviewed; while (iii) in the lawsuit for compensation of damage of 13 September 2013, "Nita Commerc" requested compensation of damage in the amount of 98,019.43 euro. The latter, based on the expertise of 24 November 2016, consisted of the value of 74,089.37 euro, which was related to the claim for unauthorized interference of the Bank's employees in the account of "Nita Commerc" and the amount of 23,930.06 euro "*as funds not included in account statements*". The same expertise regarding the first amount, concluded that "*payments made on behalf of customs duties (8 transactions in the amount of 74,306 euro) did not cause any damage to the company* "Nita Commerc" *and there was no doubling of banking operations*", while in relation to the second, had found that "*the amount of 1,610 euro refers to the provisions on behalf of the allowed loans, while the amount of 1,455 was initially registered to the detriment of the client, but later the bank made the necessary settlements", while the remaining amount of 20,837.90 euro represents the loan liabilities of the client to the bank and for this the court has made a decision*".

113. However, the Court notes that despite the changes in the value contested in the court proceedings, this disputed amount is related to the same allegation of "Nita Commerc", namely the allegation of unauthorized interference in the relevant bank account by the Bank employees, a claim which was (i) reviewed since the first contested procedure and was rejected by the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court upheld by the two Judgments of the Supreme Court, Judgment [Ae. No. 2/2007] of 17 September 2009 and the Judgment [Rev. E. No. 20/2009] of 17 March 2010 of the Supreme Court; (ii) reviewed and rejected by the Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court which addressed the case as *res judicata*; and (iii) reviewed and rejected by the Decision [I.EK. No. 424/14] of 2 November 2018 of the Basic Court, rendered after the completion of the relevant criminal proceedings and based on the relevant expertise, and which also addressed the issue as *res judicata*.

114. Furthermore, the Court also recalls that throughout the conduct of these contested proceedings for more than ten (10) years and up to the challenged Decision of the Court of Appeals, the regular courts ordered the conduct of three different expertises. The first was determined by the District Commercial Court and submitted on 30 October 2006. The second and third were assigned by the Basic Court after it had resumed the examination of the dispute between the parties. One was assigned to the expert F.K., while the other to the Faculty of Economics of the University of Prishtina. That of expert F.K. was submitted to the Basic Court on 24 November 2016, while that of the Faculty of Economics, was never submitted, resulting in a fine imposed by the Basic Court on the relevant professors appointed to complete this expertise. The relevant expertise, concluded, in principle, that the allegations of "Nita Commerc" that there has been unauthorized interference of the Bank's employees in its bank account had been reviewed since the first contested procedure, moreover that according to the latter, the allegations of such interference were ungrounded. Among other things and based on these expertise, the regular courts qualified the case as *res judicata*. Also, based on the case file, a fourth expertise was ordered by the Basic Court, as the Court of Appeals remanded the case for reconsideration on merits, rejecting to qualify this contested matter as *res judicata*. The last expertise, which was prepared by three (3) financial experts, was submitted to the Basic Court on 14 November 2019 and the findings of the latter confirm, in principle, those of the preliminary expertise.

115. Based on the above, in the circumstances of the present case, in the context of the limitations of the material scope, the Court reiterates that despite the differences in the respective contested value in the court proceedings, the latter relate to the same allegation of "Nita Commerc", namely the allegation that there was unauthorized interference of the Bank's employees in its account, and consequently, entails the same contested matter and which is essential for the settlement of the respective dispute. Therefore, the Court does not consider that the contested matter before the Court of Appeals contained limitations within its material scope.

116. Therefore, the Court notes that the case before the Court of Appeals by the challenged Decision (i) had no *ad personam* limitations; nor (ii) of the material scope. More specifically, despite the reasoning of the Court of Appeals, in the challenged Decision, namely the Decision [Ae. No. 287/18] of 27 May 2019, that (i) the position of the parties in the procedure is different; and (ii) the legal basis and value of the dispute are different, the issue before it, in fact, involved (i) the same parties; and (ii) the same matter which had already been resolved by

a final decision, namely Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, and which, as it was held also by the Basic Court by the Decision [I.EK. No. 424/14] of 2 November 2018, was *res judicata*.

117. In support of this finding, the Court refers to the case of the ECtHR, *Esertas v. Lithuania* (Judgment of 31 May 2012), which relates to a civil dispute between an Applicant and a heating services company. Two sets of proceedings took place between the same parties. Initially, the District Court of the respective city ruled in favor of the Applicant. The opposing party did not file the relevant complaint in a timely manner. However, subsequently, similar to the circumstances of the present case, the opposing party filed a new lawsuit against the respective Applicant. The District Court upheld the request, reasoning, *inter alia*, that the first decision of the court "*had no res judicata effect as the new request concerned a different period of time, and that this situation was not identical to that of the previously decided*". The Regional Court also upheld this decision. The ECtHR, in examining the relevant case, found a violation of Article 6 of the ECHR. The ECtHR, *inter alia*, reasoned that (i) although the allegations in both sets of proceedings were identical, both civil proceedings concerned exactly the same legal relationship and the same circumstances, which were essential to the settlement of the dispute; (ii) there was no justification for requiring the Applicant to testify again, in the second proceedings, the fact that he was not in a contractual relationship with the opposing party or that the relevant services were not provided because these circumstances were established in the first set of proceedings; (iii) the departure from the principle of legal certainty would be in line with the requirements of Article 6 of the ECHR only if justified by the need to rectify a defect of an essential importance to the judicial system, whereas in the circumstances of the present case this was not the case; (iv) the second group of proceedings merely interpreted and applied the law differently, which does not constitute a defect of substantial importance within the meaning of the case law of the ECtHR and cannot justify departure/deviation from the principle of legal certainty; and (v) depriving the final decision of 7 June 2004 of *res judicata* effect, the domestic courts acted in breach of the principle of legal certainty guaranteed by Article 6 of the ECHR.

118. Similar to the circumstances of the present case, (i) although the allegations in the three sets of proceedings were not identical, they all concerned exactly the same legal relationship and the same circumstances, which were essential to the settlement of the dispute; and (ii) the procedure that resulted in the challenged Decision of the

Court of Appeals, merely interpreted and applied the law differently, finding that in this case the requirements to apply point d) of Article 391 of the LCP, namely to qualift the disputed case as an "*adjudicated matter*" have not been met.

119. In this context, it is not disputed that the Court of Appeals, by the Decision [Ae. No. 287/18] of 27 May 2019, reopened the proceedings that had already reached the status of *res judicata*, but whether the reopening of these proceedings and the remand of the case before the Basic Court, entails circumstances of a "*substantial and compelling character*", which could be justified through the need to correct a flaw of substantial importance in the preliminary decision-making of the courts, which based on the case law of the Court and that of the ECtHR, as explained in the elaboration of the general principles above, could be in line with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

120. In assessing whether the reopening of proceedings which have reached *res judicata* status by the Court of Appeals, in the circumstances of the present case, can be justified by circumstances of a "*substantial and compelling character*", the Court notes that the Court of Appeals, although not clearly, seems to justify the remand of the case to the Basic Court, based on the fact that the criminal proceedings regarding the criminal report of "Nita Commerc"that the Bank's employees had interfered in its bank account in an unauthorized manner, had not yet been completed, stating that "*so far the epilogue of this criminal procedure is not known*. However, the Court recalls that (i) the relevant criminal report against defendants A.Sh., M.B. and Sh.K., was submitted on 17 May 2010; (ii) The decision to initiate the investigation was issued on 4 June 2013; (iii) The indictment was filed on 5 December 2015 only against persons A.Sh. and M.B., while it was subsequently withdrawn with respect to the person M.B .; (iv) by the Judgment [PKR. No. 209/2015] of 31 March 2016, the person A.Sh was acquitted of charges; and (v) The abovementioned acquittal Judgment was also upheld by the Court of Appeals, by the Judgment [PAKR. No. 392/16] of 15 March 2017. In addition, as already clarified, the Basic Court terminated the contested procedure by the relevant Decision until the acquittal Judgment was rendered in criminal proceedings, and then continued the latter, dismissing the relevant claim on the basis of *res judicata*.

121. Therefore, the Court notes that at the time when the Court of Appeals rendered the challenged Decision on 27 May 2019, the relevant criminal proceedings were completed by an acquittal Judgment of the Basic Court of 31 March 2016 and the Judgment of the Court of

Appeals, confirming the latter on 15 March 2017. Therefore, on 27 May 2019, namely the date of issuance of the challenged Decision of the Court of Appeals, its reasoning that "s*o far the epilogue of this criminal procedure is not known*", is ungrounded and is contrary to all the factual circumstances of the case. On the contrary, the relevant criminal proceedings had been completed and its "epilogue" was clear before the issuance of the Decision of the Basic Court challenged before the Court of Appeals. Based on the relevant Judgments of the regular courts in criminal proceedings, it was not established that there was unauthorized interference of the Bank's employees in the bank account of "Nita Commerc".

122. The Court must also find that the reopening of decisions which had acquired the status of *res judicata*, in the circumstances of the present case, cannot be justified by the need to correct a flaw of substantial importance in the preliminary decision-making of the courts. The regular courts, in a number of pre-trial proceedings, decided on all allegations of identical parties and on the same contested issues, and also the criminal proceedings had not resulted in any suspicion which could entail the need to reopen the relevant proceedings, in order to correct any flaw of substantial importance to justice. Consequently, the reopening of the court proceedings in the present case does not involve any circumstances of a "*substantial and compelling character*", which could justify the departure from the principle of legal certainty.

123. The Court further notes that the departure from the principle of legal certainty was unjustified in the third set of proceedings and also notes that the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals annulled an entire court proceeding, which ended in court decisions which were "*irreversible*" and consequently, *res judicata* and which, moreover, were executed. Depriving the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court of its effect *res judicata*, by the Decision [Ae. No. 287/18] of 27 May 2019, the Court of Appeals, consequently acted contrary to the principle of legal certainty guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. (See, for a similar finding, the case of the ECtHR, *Kehaya and Others v. Bulgaria*, cited above, paragraph 67).

124. The Court also recalls that after rendering the abovementioned Decision by the Court of Appeals, the Basic Court, on 1 August 2019, by the Decision [I.EK. No. 330/19] rejected the Applicant's request that the disputed case be considered as an "*adjudicated matter"* and decided that the proceedings should continue with a review of the

claim on merits. The Applicant also challenges this Decision of the Basic Court before the Court. Considering that the Court has already found that (i) Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court is *res judicata*; and (ii) the challenged Decision of the Court of Appeals, namely Decision [Ae. No. 287/18] of 27 May 2019, reopened a court proceeding that has reached a *res judicata* status without any reasoning of a "*substantial and compelling character*" to the detriment of the principle of legal certainty contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, must also find that the challenged Decision of the Basic Court, namely the Decision [I.EK. No. 330/19] of 1 August 2019, which rejected the qualification of the contested matter as *res judicata*, but had decided to proceed with the review of the merits of the case, is contrary to the principle of legal certainty and consequently, also with the abovementioned articles of the Constitution and the ECHR.

125. Finally, based on its case-law and that of the ECtHR, the Court notes that (i) although the allegations in the three sets of proceedings were not identical, all civil proceedings concerned exactly the same legal relationship; and the same circumstances, which were essential for the settlement of the dispute; (ii) there was no justification for requiring the parties to prove again, in the second and third proceedings, whether or not there has been an unauthorized interference by the Bank's employees in the bank accounts of "Nita Commerc"; (iii) moreover, the criminal proceedings initiated through the criminal report alleging that there had been unauthorized interference of the Bank employees in the bank account of "Nita Commerc" ended by the acquittal Judgment against the relevant employees of the Bank, before the challenged Decision of the Court of Appeals and the Basic Court, and which reopened the court proceedings which had become final and, moreover, had been executed; (iv) the departure from the principle of legal certainty would be in line with the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR only if it could be justified by the need to correct a flaw of substantial importance to the judicial system; while in the circumstances of the present case, this is not the case; (v) the third set of proceedings merely resulted in a different interpretation and application of the applicable law based on a "appeal in disguise" and does not reflect a a conscientious effort to correct judicial errors of a "*substantial and compelling character*"; namely a flaw of substantial importance within the meaning of the case law of the Court and the ECtHR and, consequently, such a procedure cannot justify the departure/deviation from the principle of legal certainty; and (vi) depriving Judgment [VIII. C. No. 207/06] of 23 November

2006 of the District Commercial Court of *res judicata* effect, the Court of Appeals, by Decision [Ae. nr. 287/18] of 27 May 2019 and the Basic Court, by the Decision [I.EK. No. 330/19] of 1 August 2019, acted in violation of the principle of legal certainty, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

126. Therefore, taking into account the abovementioned remarks and the procedure as a whole, the Court finds that the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court, are contrary to the principle of legal certainty embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because they have reopened final decisions of courts that had the status of *res judicata*, without any justification or circumstances of a "*substantial and compelling character*". As such, both are in contradiction with the Constitution, and, consequently, invalid.

127. Taking into account that the Court has already found that the challenged Decisions of the Court of Appeals and the Basic Court, are not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to a violation of principle of legal certainty, considers that it is not necessary to examine the other allegations of the Applicant, namely those related to the lack of a reasoned court decision.

128. The Court also notes that based on the case file, after the Applicant submitted his Referral to the Court, challenging the two abovementioned Decisions, the Basic Court in the meantime decided on the merits of the case by the Judgment [I. EK. No. 330/19] of 20 June 2020, rejecting all allegations of "Nita Commerc" as ungrounded, while based on the appeal of "Nita Commerc", the case is under consideration in the Court of Appeals. In this context, the Court notes that having regard to the declaration in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR of (i) Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals; and (ii) the Decision [I. EK. No. 330/19] of 1 August 2019 of the Basic Court, on the basis of which, it was proceeded with the review of the merits in the circumstances of the respective case, any further procedure regarding the present case, is also contrary to the abovementioned articles of the Constitution and the ECHR.

Conclusions

129. The Court, in the circumstances of this case, assessed the Applicant's allegations regarding the violation of legal certainty, a right

guaranteed, according to the clarifications of this Judgment, by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

130. More specifically, in the circumstances of the present case, the Court assessed the constitutionality of two Decisions, namely the Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and the Decision [I.E. No. 330/19] of 1 August 2019 of the Basic Court, and which according to the Applicant's allegations, had reopened a court proceedings which was concluded by the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court and subsequently upheld, by two Judgments of the Supreme Court.

131. In assessing the relevant allegations, the Court first elaborated on the general principles deriving from its case-law and that of the ECtHR, regarding the principle of legal certainty, namely, the principle of finality of final decisions, clarifying, *inter alia*, that (i) one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that once the courts have finally decided a case, their decision should not be called into question and become subject to further consideration; (ii) no party has the right to request a review of a final and binding court decision merely for the purpose of obtaining a rehearing and a fresh determination of the case, in particular through an "*appeal in disguise*"; and (iii) departures from such a principle are possible only if justified by the circumstances of a "*substantial and compelling character*".

132. In this context, the Court, applying the general principles of the case law of the Court and the ECtHR, with regard to the principle of legal certainty, initially assessed whether the two challenged Decisions reopened preliminary decisions that reached *res judicata* status, including whether the cases before them involved limitations on *ad personam* and/or material scope, and if this is the case, if their reopening was justified by circumstances of a "*substantial and compelling character*".

133. With regard to the first issue, the Court found that the challenged Decisions of the Court of Appeals and the Basic Court reopened the proceedings which had already reached the status of *res judicata*, by the Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, as confirmed by two Judgments of the Supreme Court, Judgment [Ae. No. 2/2007] of 17 September 2009 and Judgment [Rev. E. No. 20/2009] of 17 March 2010; Decision [IV. C. No. 1/2010] of 12 May 2010 of the District Commercial Court; and Decision [I. EK. No. 424/14] of 2 November 2018 of the Basic Court. The Court emphasized that despite certain differences in the three

contested proceedings, the case before the Court of Appeals had no *ad personam* or material scope limitations, namely that all civil proceedings concerned exactly the same legal relationship and the same circumstances, which were essential to the settlement of the relevant dispute. With regard to the second case, the Court also found that in the circumstances of the present case, the reopening of these proceedings was not justified by circumstances of a "*substantial and compelling character*". In this context, the Court emphasized that the reasoning of the Court of Appeals, by the challenged Decision, that the conduct of a criminal procedure in parallel with the contested procedure prevented the qualification of the respective civil case as *res judicata*, emphasizing that "*so far the epilogue of this criminal procedure is not known*", is incorrect because until the moment when the Court of Appeals rendered the challenged Decision, the entire criminal procedure ended by two Judgments in criminal proceedings which had acquitted the accused, namely the Bank employees of criminal liability, which "Nita Commerc" and the relevant Prosecution claimed to be holding.

134. Therefore and finally, the Court found that the reopening of the court proceedings which ended by final decisions and moreover were executed, in the circumstances of the present case, was not justified through the circumstances of a "*substantial and compelling character*" and consequently, in rendering the Decision [Ae. No. 287/18] of 27 May 2019 and the Decision [I.EK. No. 330/19] of 1 August 2019, the Court of Appeals and the Basic Court acted contrary to the principle of legal certainty embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and consequently the same Decisions were declared invalid.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Articles 20, 21 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 5 May 2021, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights;

III. TO HOLD that Judgment [VIII. C. No. 207/06] of 23 November 2006 of the District Commercial Court, is final and binding, and as such *res judicata;*

IV. TO HOLD that Decision [Ae. No. 287/18] of 27 May 2019 of the Court of Appeals and Decision [I.EK. No. 330/19] of 1 August 2019 of the Basic Court in Prishtina are invalid;

V. TO ORDER regular courts to terminate all proceedings in this contested matter in accordance with this Judgment;

VI. TO ORDER the Court of Appeals to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 5 August 2021, about the measures taken to implement the Judgment of the Court;

VII. TO REMAIN seized of the matter pending compliance with that order;

VIII. TO NOTIFY this Decision to the Parties, and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

IX. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI51/19, Applicant: Qamil Lupçi, Constitutional review of Judgment ARJ. UZVP. No. 37/2018, of the Supreme Court, of 5 December 2018

KI51/19**,** Judgment adopted on 28 April 2021, published on 7 June 2021

Keywords: *individual referral, right to fair and impartial trial, enforcement of final decision*

In the circumstances of the present case, the Applicant addressed the Appeals Committee of the MLSW and requested to be paid three salaries after retirement and one salary as a jubilee reward as provided in Article 52 and Article 53 of the General Collective Agreement of Kosovo of 18 March 2014. The Applicant alleged that as a claimant he met the conditions for retirement and has over ten years of uninterrupted work experience in the MLSW and that his request is founded. However, the Applicant did not receive any response from the MLSW Appeals Committee regarding his request. The Independent Oversight Board for Civil Service of Kosovo (IOBCSK) had stated that the MLSW Appeals Committee is obliged to review the Applicant's complaint and issue a meritorious decision in accordance with the civil service legislation. The second time, the MLSW Appeals Committee found that it has no substantive competence to review the Applicant's request. Meanwhile, the Applicant had filed an administrative claim for the realization of his request, however the regular courts had found that the Applicant's request should be resolved on merits but had not ordered the MLSW Appeals Committee to issue a meritorious decision regarding the Applicant's request.

The Court considered the Applicant's allegations regarding access to the court as one of the guarantees set out in Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR, supporting this assessment in the case law of the European Court of Human Rights (hereinafter: the ECtHR). The Court elaborated on the general principles deriving from the ECtHR and its case law regarding the right to enforcement of final decision.

The Court held: (i) the enforcement of a final and binding decision, within a reasonable time, is a right guaranteed by Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR; (ii) the Applicant's dispute with the MLSW Appeals Committee was not particularly complex, as the IOBCSK had ordered an issuance of a meritorious decision that would address the Applicant's allegations for the jubilee reward and payment of three (3) accompanying salaries, in accordance with applicable law; (iii) The decision of the IOBCSK has still remained unexecuted by the MLSW Appeals Committee to this day.

The Court concluded that it would be meaningless if the legal system of the Republic of Kosovo allowed a final decision in administrative and enforceable procedure to remain ineffective to the detriment of one party. Therefore, inefficiency of procedures and non-enforcement of decisions produce effects which bring forth situations that are inconsistent with the principle of rule of law (Article 7 of the Constitution) – a principle that all public authorities in Kosovo are obliged to respect.

The Court found that non-enforcement of the Decision of the IOBCSK by the MLSW Appeals Committee has resulted in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the ECHR.

JUDGMENT

in

Case no. KI51/19

Applicant

Qamil Lupçi

Constitutional review of non-enforcement of the Decision of the Independent Oversight Board for Civil Service in the Republic of Kosovo, [A/02/68/2016] of 12 April 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Qamil Lupçi, residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [ARJ. UZVP. no. 37/2018] of the Supreme Court, of 5 December 2018, in conjunction with Judgment [AA. no. 97/2018] of the Court of Appeals, of 10 October 2018, and Judgment [A. No. 724/16] of the Basic Court in Prishtina, of 6 September 2017 (hereinafter: the Basic Court).

3. The Applicant also challenges: (i) the constitutionality of the Decision no. 2379, of the Disputes and Grievances Appeals Committee of the Ministry of Labor and Social Welfare (hereinafter: the MLSW Appeals

Committee), of 5 May 2016, in which case the Applicant had requested the realization of the rights guaranteed by Articles 52 and 53 of the General Collective Agreement of 18 March 2014; and (ii) the Decision [A/02/68/2016] of the Independent Oversight Board for Civil Service of Kosovo (hereinafter: IOBCSK) of 12 April 2016, ordering the MLSW Appeals Committee to issue a meritorious decision regarding the Applicant's request.

Subject matter

4. The subject matter is the constitutional review of Decision of the MLSW Appeals Committee, Decision of the IOBCSK and the decisions of the regular courts, which allegedly violate Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 7 of the Universal Declaration of Human Rights.

Legal basis

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

Proceedings before the Court

6. On 27 March 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 2 April 2019, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban (members).

8. On 23 July 2019, the Court notified the Applicant about the registration of the Referral and a copy of it was sent to the Supreme Court of Kosovo.

9. On 25 September 2019, the Court requested the Applicant to clarify some aspects of his Referral.

10. On 25 September 2019, the Court requested the Ministry of Labor and Social Welfare (hereinafter: MLSW) to notify whether the Disputes and Grievances Appeals Committee within the MLSW has enforced the Decision of the IOBCSK. The MLSW did not respond to the request of the Court.

11. On 25 September 2019, the Court requested from the IOBCSK to be notified whether the MLSW Appeals Committee has enforced the Decision of the IOBCSK. The IOBCSK did not respond to the request of the Court.

12. On 4 October 2019, the Applicant submitted an additional document with the clarifications requested by the Court.

13. On 30 September 2020, the Court considered the case and decided to adjourn the decision-making to another hearing in accordance with the required supplementations.

14. On 6 October 2020, the MLSW was requested to submit additional documents regarding the allegations raised in the Referral no. KI51/19.

15. On 8 October 2020, the MLSW submitted additional documents in relation to the allegations raised in the Referral no. KI51/19. The MLSW submitted: (i) Decision no. 389, of the Office of the Secretary General, of 7 December 2015; (ii) Decision A 02/68/2016, of the IOBCSK, of 12 April 2016; (iii) Decision A/02/64/2016, of the IOBCSK, of 14 April 2016; (iv) Reference no. 2097, from the Office of the Secretary General of the MLSW, of 15 April 2016; (v) Decision no. 2379, of the MLSW Appeals Committee, of 5 May 2016.

16. On 25 March 2021, the Court reviewed the case and decided to adjourn the decision-making to another hearing in accordance with the required supplementations.

17. On 28 April 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral.

18. On the same date, the Court found that: (i) the Referral is admissible; (ii) there has been violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;

Summary of facts

19. From the documents included in the Referral, it results that the Applicant worked as a civil servant (position: labor inspector) at the MLSW.

20. On 7 December 2015, the Office of the Secretary General in the MLSW with a Decision protocoled with no. 389 decided: (i) the employment of the Applicant (Qamil Lupçi) in the position of Labor Inspector within the Executive Body of the Labor Inspectorate/MLSW, will terminate on 11 December 2015; (ii) the employee's employment relationship will terminate due to reaching of the retirement age of sixty-five (65) years. The Office of the Secretary General of MLSW reasoned that based on the documents of the personal file, the Applicant was born on 10 December 1950, and that according to the evidence he reached the mandatory retirement age on 10 December 2015, whereas in support of legal and sub-legal acts in force, his employment will terminate on 11 December 2015. The abovementioned decision contained legal advice defining: *"The dissatisfied party has the right to appeal against this decision, within 15 days from the date of receipt of the decision, addressing the Disputes and Grievances Appeal Committee of the MLSW."*

21. The abovementioned decision of the Office of the Secretary General of the MLSW is silent in regards to the right of the Applicant to be paid three salaries after retirement and one salary as a jubilee reward as provided for in Article 52 and Article 53 of the General Collective Agreement of Kosovo of 18 March 2014, even though the General Collective Agreement was in force at the time of issuance of the decision of the Office of the Secretary General of MLSW.

22. On 14 January 2016, the Applicant by the Referral no. 24 addressed the MLSW Appeals Committee and requested to be paid with three salaries after retirement and one salary as a jubilee reward as provided by Article 52 and Article 53 of the General Collective Agreement of

Kosovo of 18 March 2014. The Applicant claimed that as a claimant he has met the requirements for retirement and has over ten years of uninterrupted work experience in the MLSW and that his request is founded. However, the Applicant did not receive any response from the MLSW Appeals Committee in regards to his request.

23. On 24 February 2016, the Applicant submitted an appeal with the IOBCSK due to the administrative silence of the MLSW Appeals Committee regarding his request. Among other things, the Applicant claimed three salaries after the retirement and one salary as a jubilee reward.

24. On 12 April 2016, the IOBCSK by Decision [A/02/68/2016] obliged the Appeals Committee to review the Applicant's appeal as defined in Article 82 paragraph 1 and 2 of Law No. 03/L-149 on the Civil Service of the Republic of Kosovo.

25. Among other things, the IOBCSK has clarified as follows:

> *"The Panel for reviewing appeals on settlement of this matter, has reviewed all the submitted case files and has concluded that there is a legal basis to decide, obliging the employment body, respectively the Secretary General and the Disputes and Grievances Appeal Committee, to take all actions to decide regarding the appeal of the complainant, with number 24, of 14.01.2016. In accordance with the legislation on the civil service, employment bodies are obliged to establish the Disputes and Grievances Appeal Committees for reviewing any appeal submitted by civil servants and applicants for employment in the civil service, as provided for in Article 82 paragraph 1 and 2 of Law No. 03/L-149 on the Civil Service of the Republic of Kosovo, which stipulates that "Disputes and Grievances Appeal Committees shall be established in each institution of the central and municipal administrations that employ Civil Servants, as appellate bodies for disputes and grievances management. Decisions of the Disputes and Grievances Appeal Committees are binding for the institutions of the public administration and all concerned parties. Their decisions may be appealed in the Independent Oversight Board."*

26. The IOBCSK, in the aforementioned decision also stated that the MLSW Appeals Committee is obliged to review the appeal and issue **a meritorious decision** in accordance with the civil service legislation.

27. On 5 May 2016, the Appeals Committee in MLSW with Decision no. 2379 determined: (i) The Applicant's request for payment of the jubilee reward and compensation of the accompanying salary, in the total of 3 monthly salaries received for the last three months is rejected; (ii) It is recommended that the request be followed by the administrative procedure and addressed to the highest administrative authority of the employment body. The MLSW Appeals Committee reasoned: (i) The MLSW Appeals Committee based on the legislation in force assesses with **non-substantive competence** to decide on the Applicant's request; (ii) the Applicant does not challenge any decision alleging that his legal rights have been violated; (iii) the applicant has not addressed any request for compensation in question, to the employment body; (iv) the Applicant is recommended to follow the relevant administrative procedures for the realization of his legal rights.

28. In the aforementioned decision of the MLSW Appeals Committee is given the following legal advice which stipulates: *"The party has the right to file an appeal against this decision to the Independent Oversight Board for the Civil Service of Kosovo within 30 days from the date of receipt of this Decision."*

29. On an unspecified date, the Applicant filed a claim with the Basic Court requesting that (i) the MLSW be obliged to recognize the compensation of three accompanying monthly salaries for the retirement and a salary as a jubilee reward; as well as, (ii) the annulment of the decision [no.AO2/68/2016] of the IOBCSK, of 12 April 2016, since the latter did not rule on the merits of Applicant's appeal but it delegated the settlement of his appeal to the MLSW Appeal Committee.

30. On 6 September 2017, the Basic Court, by Judgment [A.no724/2016] rejected the Applicant's claim for annulment of the Decision [no.AO2/68/2016] of the IOBCSK, of 12 April 2016. As a reasoning for rejecting the statement of claim, the Basic Court, among others, stated that the IOBCSK acted correctly, when by the challenged Decision [noAO2/68/2016] of 12 April 2016, obliged the MLSW Appeals Committee that within 15 days to decide on the Applicant's appeal. The Basic Court did not confirm the Applicant's allegations for the salary compensation with the reasoning that the decision of the IOBCSK should be executed by the administrative body of the first instance.

31. In the aforementioned Judgment, the Basic Court had found:

> "*The Court finds that the respondent Independent Oversight Board for Civil Service of Kosovo has correctly applied the legal provisions and has acted correctly when with decision no. A02/68/2016, of 12.04.2016 has obliged the Disputes and Grievances Appeal Committee of the MLSW that within 15 days from the date of receipt of this decision, to review the appeal of the complainant, of 14.01.2016. The court accepts the findings mentioned in the reasoning of the contested decision when the employment body is informed that they are legally obliged to establish the Disputes and Grievances Appeal Committees to review any appeal submitted by civil servants and applicants for employment in the civil service, an obligation which is provided for in the provision of Article 82 of Law No.03/L149 on the Civil Service of Kosovo. The court did not approve the claimant's allegations, the request for compensation and payment of jubilee reward and accompanying payments for retirement, because at this stage of the administrative conflict procedure, the court considers that the contested decision of the Independent Oversight Board for Civil Service of Kosovo should be executed by the administrative body of the first instance according to the recommendations given in the decision N02/68/2016, of 12.04.2016 [...] The court did not approve the allegations of the claimant, the request for compensation and payment of the jubilee reward and accompanying payments for retirement, because at this stage of the administrative conflict, the court considers that the contested decision of the Independent Oversight Board for Civil Service of Kosovo, should be executed by the administrative body of the first instance according to the recommendations given in the decision A/02/68/2016, of 12.04.2016.*"

32. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court, due to erroneous determination of the factual situation and misapplication of the substantive law, in order to amend the challenged Judgment and to return the case for retrial. At the same time, the Applicant requested to oblige the MLSW to pay him the salaries after retirement.

33. On 10 October 2018, the Court of Appeals by Judgment [AA.no.97/2018] rejected the Applicant's appeal as unfounded and upheld the Judgment of the Basic Court [A.no724/2016], of 6 September 2017. The Court of Appeals reasoned that the Basic Court

had rejected as unfounded the Applicant's appeal in a fair manner and without substantial violation of the provisions of the Law on Administrative Conflicts.

34. In the abovementioned Judgment, the Court of Appeals had reasoned:

> *"Regarding the appealed allegations for erroneous and incomplete determination of the factual situation, that the first instance court in the case of deciding without any legal basis has concluded that the IOBCSK, with decision Al02/68/2016, of 12.04.2016, has acted correctly invoking on Article 82 of Law No.031L-149 on the Civil Service of Kosovo, as this legal provision was not required to be cited at all, because with the same is provided that employment bodies are obliged to establish the Disputes and Grievances Appeal Committees while in MLSW the committee existed when the request no. 24 of 14.01.2015 was submitted, and it still exists even today [...].*
>
> *The appealed allegations that the first instance court after having assessed that the employment body should be waited to decide with regard to the request [...] should have terminated until the request in question was decided as a preliminary matter applying the legal provision of Article 32 of Law No. 03/L020 on Administrative Conflicts, which stipulates that "When the decision of the court in the administrative conflict depends on the legal matter which constitutes an independent legal entity, and on which the other court or other body has not decided (preliminary case), the court who develops the administrative conflict procedure, may decide on that matter, unless otherwise provided by law, or may terminate the procedure until the issuance of a decision on the preliminary matter, by the competent body". These appealed allegations were not approved by this panel, because it assessed that they are unfounded and unsubstantiated, to approve the appeal. Because according to the assessment of this court, the first instance court has fairly decided when it rejected as unfounded the allegations of the claimant stated in the claim and in the main trial hearing, due to the fact that at this stage of the administrative conflict procedure, the disputed decision of the Independent Oversight Board for Civil Service of Kosovo, number A02/68/2016, of 12.04.2016, must be implemented by the administrative body of the first instance according to the recommendations given in them."*

35. Against the abovementioned Judgment of the Court of Appeals, the Applicant filed with the Supreme Court, a request for extraordinary reconsideration of the court decision, alleging violation of substantive law and violation of procedural provisions as well as annulment of the abovementioned decisions of the lower instance court, and to return the case for reconsideration.

36. On 5 December 2018, the Supreme Court by Judgment [ARJ.UZVP.NO.67/2018] rejected the Applicant's request for extraordinary reconsideration of the court decision as unfounded, filed against the Judgment AA.UZH.no.97/2018, of the Court of Appeals, of 10 October 2018.

37. In the abovementioned Judgment, the Supreme Court had explained:

> *"According to Article 82 of the Law no.03/L-149 on civil service, it is provided that the Disputes and Grievances Appeal Committees are established within each institution of the central and municipal administrations, as bodies for the resolution of disputes and receiving of appeals. Paragraph 2 of this Article states that the Decisions of the Disputes and Grievances Appeal Committees are binding for the institutions of the public administration and for all concerned parties. Their decisions may be appealed in the Independent Oversight Board. From the case file it results that the administrative body -the Disputes and Grievances Appeal Committee of the MLSW has not issued a legal decision according to the claimant's appeal no. 24, of 4.01.2016, and that the respondent IOBCSK has correctly applied the legal provisions, Article 82 par.1 and 2, and has acted correctly when with the decision it obliged the Committee to review the claimant's appeal no.24, of 14.01.2016. The administrative body- the Disputes and Grievances Appeal Committee of MLSW is legally obliged to act according to the decision of the IOBCSK, and then the right to file an appeal to the Independent Oversight Board."*

Applicant's allegations

38. The Applicant alleges that the Judgment of the Supreme Court [ARJ.UZVP.NO.67/2018] of 5 December 2018 and the Decision of the IOBCSK [A/02/68/2016] of 12 April 2016 violate his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 [Right to a fair trial] of the ECHR, Article

46 [Protection of Property], and Article 7 of the Universal Declaration on Human Rights.

39. The Applicant alleges that since the submission of the request to the MLSW Appeals Committee and after the expiration of the deadline of 15 days set by the IOBCSK, he has not received any response to his request from the MLSW Appeals Committee. According to him, since the time of retirement, the Applicant is taking legal action to realize his right, therefore he claims that there are legitimate expectations in the realization of his request.

40. At the same time, the Applicant alleges that the IOBCSK also failed to resolve his case. According to him, Article 12 of Law No. 03/l-192 on the Independent Oversight Board for Civil Service of Kosovo, entitles the IOBCSK to decide regarding the civil servant's appeals, if it reasonably believes that the employment body will fail the settlement of the appeal within 30 days.

41. The Applicant specifically alleges: *"The provision of Article 12, paragraph 3, sub-paragraph 3.1 1 of Law No. 03/L-192 on the Independent Oversight Board for Civil Service of Kosovo, gives the right to the Board in question to decide on the appeal of the civil servant, if it reasonably believes that the employment body will fail the settlement of the appeal within 30 days. Hence, despite the fact that the IOBCSK had convincing evidence that the employment body will never settle the appeal in question - thus it failed, with decision A/02/68/2016, of 12.04.2016, without any basis and reason has again returned the appeal in question to the same body. Decision of the IOBCSK A/02/68/2016, of 12.04.2016, has no effect because even though more than 3 years have passed, the claimant has not received any response for its implementation. While the IOBCSK has not taken any action to implement the decision in question".*

42. The Applicant alleges: "*If in the respective case the Disputes and Grievances Appeal Committee of the MLSW must be waited, the Court could have terminated it and given a deadline to the Disputes and Grievances Appeal Committee of the MLSW, but not to reject the claim in this way*".

43. The Applicant requests the Court to declare null and void the contested decisions of the regular courts and the decision of the IOBCSK and to hold a fair trial which would result as: *"The Ministry of Labor and Social Welfare, will pay me 1,700.00 euros on behalf of three monthly salaries in case of retirement and a salary of 569.00*

euros on behalf of the jubilee salary, which make a total of 2.276.00 euros, procedural expenses in the amount of 120.00 euros, with 8% interest calculated from 14.01.2016, pursuant to Articles 52 and 53 of the General Collective Agreement of Kosovo".

44. Finally, the Applicant "*expresses a desire to attend the court hearing*".

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.
(...)
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.
(...)

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 has the following minimum rights:

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;

PROTECTION OF PROPERTY ARTICLE 46
(…)

LAW No. 03/L-149 on the Civil Service of the Republic of Kosovo

Article 81
Bodies for Grievances and Appeals Settlement

1. *Specific bodies for the settlement of grievances and employment related disputes arising within the Civil Service are established in each institution of the central and municipal administrations that employ Civil Servants.*

2. The procedures for the settlement of grievances and appeals shall be ensured by the following bodies:

2.1. Disputes and Grievances Appeal Committees; and

2.2. Independent Oversight Board.

Article 82
The Disputes and Grievances Appeal Committees

1. Disputes and Grievances Appeal Committees shall be established in each institution of the central and municipal administrations that employ Civil Servants, as appellate bodies for disputes and grievances management.

2. Decisions of the Disputes and Grievances Appeal Committees are binding for the institutions of the public administration and all concerned parties. Their decisions may be appealed in the Independent Oversight Board.

3. The chairman and members of the Disputes and Grievances Appeal Committees shall be appointed from the ranks of Civil Servants with superior education, are appointed by the General Secretary or equivalent position of the relevant institution for a period of two (2) years with possibility of extension and must

reflect the diversity of the Kosovar society, including in particular gender diversity.

4. The chairman and members of the Disputes and Grievances Appeals Committees shall not serve as members of a disciplinary commission in the relevant institution.

5. The criteria of membership appointment, competencies and procedures of the committee for disputes and grievances settlement from work relationship, shall be defined with sub-legal act.

Law No. 03/L-192 on Independent Oversight Board for Civil Service of Kosovo

Article 12
Appeals

1. A civil servant who is unsatisfied by a decision of an employing authority in alleged breach of the rules and principles set out in Law on Civil Service in the Republic of Kosovo, shall have the right to appeal to the Board.

2. The appeals shall be reviewed and decided by a panel of three (3) Board members, on behalf of the Board.

3. The Board shall prescribe rules and procedures applicable to appeals. Such rules and procedures shall provide:

3.1. That before appealing to the Board, the civil servant or applicant who alleges to be damaged must exhaust the internal appeals procedures of the employing authority concerned, unless the Board excuses this requirement based on evidence of reasonable fear of retaliation, failure by the employing authority to resolve the appeal within thirty (30) days, or other good cause;

3.2. That the aggrieved party and the employing authority shall both have an opportunity to present their positions to the Board in writing, which shall be made available to the opposing party;

3.3. That, in cases involving disputes of material fact, both parties shall have the opportunity that together to be interrogated by the Board, at which they may present evidence

and witness for the direct and cross-examination and investigation,

3.4. That in each appeal brought before it, the Board shall within sixty (60) days of the end of the appeal proceedings issue a written decision setting forth its determination and the legal and factual basis therein.

3.5. In exclusion from sub-paragraph 3.4 of this paragraph, there can be cases of specific nature wherein the Board shall have to issue a decision and the deadline of sixty (60) days is extended by another thirty (30) days.

4. Where the Board is satisfied that through challenged decision there are breached the principles or rules set out in Civil Service of the Republic of Kosovo, it shall issue a written decision directed to the senior managing officer or the chief executive officer of the respective employing authority, who shall be responsible for implementation of Board's decision.

5. A member of the Board, who participated as a member of the panel concerning the appointment of a civil servant, shall not participate in appeal procedure against such decision.

Article 13
Decision of the Board

Decision of the Board shall represent a final administrative decision and shall be executed by the senior managing officer or the person responsible at the institution issuing the original decision against the party. Execution shall be effected within fifteen (15) days from the day of receipt of the decision.

Article 15
Procedure in case of non-implementation of the Board's decision

1. Non-implementation of the Board's decision by the person responsible at the institution shall represent a serious breach of work related duties as provided in Law on Civil Service in the Republic of Kosovo.

Law No.03/L-212 on Labour

Article 90

Collective Contract

1. Collective Contract may be concluded between:

1.1. Organization of employers and their representatives and

1.2. Organization of employees or, in cases where there are no such organisations, the agreement may be concluded by the representatives of employees;

2. Collective Contract may be concluded at:

2.1. the state level,

2.2. the branch level,

2.3. the enterprise level.

3. Collective Contract shall be concluded in a written form in official languages of Republic of Kosovo.

4. Collective Contract may be concluded for a certain period of time with a duration of maximum three (3) years.

5. Collective Contract shall be applicable to those employers and employees who commit themselves to the implementation of obligations deriving from such an agreement.

6. Collective Contract shall not include such provisions that limit the rights of employees and that are less favourable than the ones defined by this Law.

7. An employer shall make available to employees a copy of the Collective Contract.
8. Collective Contract shall be registered in the Ministry in compliance with terms and criteria determined by sub-legal act.

9. For the resolution of various disputes in a peaceful manner and the development of consultations on employment, social welfare and labour economic policies by the representatives of employers, employees28 and Government in the capacity of social partners, through a special legal-secondary legislation act, the Social-Economic Council shall be established.

10. Other issues of social dialogue shall be regulated through a legal or sub-legal act depending on the agreement reached by social partners.

The General Collective Agreement of 18 March 2014

Article 52
Jubilee rewards

1. Employee is entitled to jubilee rewards in following cases:

1.1. for 10 years of continuous experience at the last employer, equal to one monthly wage;

1.2. for 20 years of continuous experience, for the last employer, equal to two monthly wages;

1.3. for 30 years of continuous experience, for the last employer, equal to three monthly wages.

2. The last employer is the one who provides jubilee rewards.

3. Jubilee reward, is paid in a timeframe of one month, after meeting the conditions from the present paragraph.

Article 53
Retirement reimbursement

When retiring, employee is entitled to a reimbursement equal to three (3) monthly wages, he/she received during the last three (3) months.

Assessment of the admissibility of the Referral

45. The Court examines whether the Applicant has met the admissibility criteria set out in the Constitution and further specified in the Law and the Rules of Procedure.

46. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, which stipulate:

"(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."

47. In addition, the Court also examines whether the Applicant fulfilled the admissibility requirements as provided by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

1. "*Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*

2. *The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. [...]."

48. With regard to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, challenging an act of the public authority, namely Judgment [ARJ.UZVP.no.67/2018] of the Supreme Court, of 5 December 2018, after the exhaustion of all available legal remedies provided by Law. The Applicant also clarified the rights and

freedoms he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and have submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

49. Therefore, the Court, concludes that the Applicant is an authorized party; that he has exhausted all legal remedies; that he has met the condition of submitting the Referral within the legal deadline; has accurately clarified the alleged violations of fundamental human rights and freedoms, as well as has specified which concrete act of public authority is subject to challenge.

50. The Court considers that the Referral raises important constitutional issues and their determination depends on the examination of the merits of the Referral. In addition, the Referral cannot be considered as manifestly ill-founded as set out in Rule 39 (2) of the Rules of Procedure and no other grounds have been established to declare it inadmissible (see Constitutional Court, Case No. KI97/16, *Applicant IKK Classic*, Judgment of 4 December 2017).

51. Consequently, the Court declares the Referral admissible.

Merits of the Referral

52. The Court recalls that in substance the Applicant's main allegation is violation of rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, because the MLSW Appeals Committee had failed twice to respond to the Applicant's request regarding the payment of three retirement salaries and a jubilee reward salary as provided in Articles 52 and 53 of the General Collective Agreement in Kosovo, of 18 March 2014.

53. Furthermore, the Applicant, in essence, alleges that also the IOBCSK had failed to resolve his case because it did not decide on the merits but chose to force the MLSW Appeals Committee to respond to the Applicant's appeal.

54. The Court refers to the relevant provisions of the Constitution and the ECHR:

Article 31 [Right to Fair and Impartial Trial]

"Everyone shall be guaranteed equal protection of rights in the

proceedings before courts, other state authorities and holders of public powers.

Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law."

Article 6 (Right to a fair trial) of the ECHR:

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

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

56. In this regard, the Court first notes that the case law of the ECtHR consistently considers that the fairness of the proceedings is assessed based on the proceedings as a whole (see case of the ECtHR, *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6 December 1988, no. 146, paragraph 68). Therefore, in the procedure of assessing the grounds of the Applicant's allegations, the Court will adhere to these principles.

57. The Court notes that in its case law in many cases it has found that matters of fact and matters of interpretation and application of the law are within the scope of regular courts and other public authorities, in terms of Article 113.7 of the Constitution and as such are issues of legality, except and unless such issues result in violation of fundamental human rights and freedoms or create an unconstitutional situation (see, inter alia, Constitutional Court Case No. KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2018, paragraph 91).

58. Similarly, the role of the Court in the individual Referral submitted within Article 113.7 is of a subsidiary character against the MLSW Appeals Committee, the IOBCSK and the regular courts, but, the final decision on whether the restriction of right of Applicant's to access court is in accordance with the Constitution, the ECHR, is however taken by the Court.

59. The Court notes that the Applicant's main allegation is violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Applicant alleges that the MLSW Appeals Committee and the IOBCSK had a legal obligation to respond to and resolve the Applicant's appeals. The Applicant further alleges that the MLSW Appeals Committee and the IOBCSK by this failure to act have deprived him of the right to a fair trial.

60. The Court notes that the Applicant presented these allegations to the regular courts, which rejected his request as inadmissible. Whereas, the IOBCSK did not decide on the merits of the Applicant's appeal but obliged the MLSW Appeals Committee to review the merits of the Applicant's request. The Appeals Committee, following the decision of the IOBCSK, issued a procedural decision that did not substantially address the Applicant's request regarding the jubilee reward and the payment of three (3) accompanying salaries.

61. In the respective case, the Applicant considers that the Decision [A/02/68/2016] of the IOBCSK, of 12 April 2016 and the Judgments of the regular courts, specifically the Judgment [ARJ-UZVP.NO 66/2018] of the Supreme Court, of 5 December 2018, have violated the right to a fair trial, with the reasoning that *"Law No. 03/L-192 on the Independent Oversight Board for Civil Service of Kosovo entitles the IOBK to decide on the appeal of civil servant, if they reasonably believe that the employment body will fail to resolve the appeal within 30 days. Hence, despite the fact that the IOBK had convincing evidence that the employment body will never resolve the appeal in question, by decision [A/02/68/2016] of 12 April 2016, without any basis and reason of the same body has returned the appeal in question. The decision of the IOBK [A/02/68/2016] of 12 April 2016 did not achieve any effect, because although more than three years have passed, the claimant has not received any response concerning its implementation".*

62. In this regard, the Court recalls that the Applicant alleges that even after the decision of the IOBCSK to oblige the MLSW Appeals Committee to decide on his request, he did not receive a response from the latter regarding his appeal. The Court notes that, in essence, the Applicant alleges violation of his right to access the court, as he failed to receive a response from the MLSW Appeals Committee, the IOBCSK and the regular courts rejected his appeal without reviewing its essence.

63. The Court notes that the Applicant has not received a response on the merits to his allegations for the payment of three salaries for retirement and the jubilee reward, by the MLSW Appeals Committee and that in later stages in the proceedings conducted in the IOBCSK and the regular courts, the Applicant's position has remained unchanged, i.e., he has not received a response on the merit or the substance to his allegations.

64. The Court notes that the Applicant challenges the decision of the IOBCSK, the decisions of the MLSW Appeals Committee and all decisions of the regular courts. However, regardless of the allegations of the Applicant, the Court finds that in this case it is a matter of non-enforcement of the decision of the IOBCSK in favor of the Applicant, therefore, the following constitutional review addresses only the issue of non-enforcement of the final decision, namely the decision [A/02/68/2016] of the IOBCSK, of 12 April 2016, as confirmed by the decisions of the regular courts.

65. In this regard, the Court reiterates that being in possession of the characterization of the facts of the case, it does not consider itself bound by the characterization given by the Applicant. In the spirit of the *jury novit curia* principle, the Court may, on its own initiative, examine appeals on the basis of provisions or paragraphs to which the parties have not expressly referred. In this respect, according to the jurisprudence of the ECtHR, an appeal is characterized by the facts it contains and not only by the legal basis and arguments explicitly referred to by the parties (See the case of the Constitutional Court no. KI193/18, *Applicant Agron Vula*, Judgment of 22 April 2020, paragraph 116; and also see, *mutatis mutandis*, the case of the ECtHR *Talpis v. Italy,* Judgment of 18 September 2017, paragraph 77 and the references cited therein).

(i) Regarding the effect of the decisions of the IOBCSK

66. With regard to the legal nature of the decisions of the IOBCSK, the Court considers it important to refer to Article 101 [Civil Service] of the Constitution, which provides:

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

67. Taking into account these legal provisions, the Court emphasizes its principled position that the IOBCSK is an independent institution established by the Constitution, respectively, in accordance with Article 101. 2 of the Constitution. Therefore, all obligations arising from the decisions of this institution, regarding issues that are under its jurisdiction, produce legal effects for all relevant institutions, where the status of employees is regulated by the Law on the Civil Service of the Republic of Kosovo. In this respect, the IOBCSK has the features of a court, respectively, a tribunal for civil servants, in terms of Article 6 of the ECHR (see case no. KI193/18, *Applicant Agron Vula*, cited above, paragraph 100).

68. In this regard, the Court refers to the case law of the ECtHR, according to which *"'the Court' in the essential sense of the term is characterized by its judicial function, which means deciding cases within its jurisdiction on the basis of rules of law and after proceedings performed in the prescribed manner* (See, Judgment of 30 November 1987 in the Case *H v. Belgium*, Series A. no. 127, p. 34, § 50; see also the case of the ECtHR *Belilos v. Switzerland*, appeal no. 10328/83, Judgment of 29 April 1988, § 64).

69. In this respect, the Court emphasizes its consistent position in all cases decided by it, which were in relation to the decisions of the IOBCSK, from 2012 onwards. The Court has consistently pointed out that a decision of the IOBCSK produces legal effects for the parties and, therefore, such a decision is a final decision in administrative procedure and enforceable (See decisions of the Constitutional Court, in the cases, KI193/18, cited above; KI04/12 *Esat Kelmendi*, Judgment of 24 July 2012 and no. KI74/12, *Besa Qirezi*, Judgment of 4 April 2015 and references cited therein).

70. The Court recalls that among the first cases where it was found that the decisions of the IOBCSK are final and binding for execution is the Judgment of the Constitutional Court in case no. KI04/12, of 24 July 2012. In the judgment in question, the Court had addressed the effect of the decision of the IOBK, of 18 March 2011 – which means that after the entry into force of the Law No.03/L-192 on the IOBK, which was later, on 10 August 2018, was substituted and abolished by the Law No. 06/L-048 on the IOBCSK. Both laws in question have been adopted by the Assembly of the Republic of Kosovo (see case KI193/18, *Applicant Agron Vula*, cited above, paragraph 104).

71. The Court has consistently emphasized that the relevant constitutional and legal provisions, in addition to the substantive competence of the IOBCSK to resolve labor disputes for civil servants, constitute a legal obligation for the relevant institutions to respect and implement the decisions of the IOBCSK (see case KI193/18, *Applicant Agron Vula*, cited above, paragraph 105).

72. In the following, the Court also refers to its case law regarding the non-execution by the courts of administrative decisions – including decisions of the IOBCSK – which have not exclusively provided for a monetary obligation (See, inter alia, the decisions of the Constitutional Court in the cases: KI193/18, *Applicant Agron Vula*, cited above; KI94/13, *Applicant Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 16 April 2014; KI112/12, Applicant *Adem Meta*, Judgment of 2 August 2018 and KI04/12, *Applicant Esat Kelmendi*, cited above). In these cases, the Court concluded that "a decision issued by an administrative body, established by law, produces legal effects for the parties and, consequently, such a decision is a final and enforceable administrative decision".

73. In addition, based on the case file available, the Court emphasizes in particular the fact that the regular courts in their reasoning have determined that the Decision [A/02/68/2016] of the IOBCSK, of 12 April 2016 should to be implemented by the MLSW Appeals Committee.

74. The Court considers that the reasoning given by the regular courts in relation to the Decision [A/02/68/2016] of the IOBCSK, of 12 April 2016, determines that the decision in question has a binding character to be implemented by the MLSW Appeals Committee.

75. Consequently, the Court concludes that the decision of the IOBCSK in the respective case was final and binding for execution.

(ii) Regarding the right to fair and impartial trial

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

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

77. In addition, the Court refers to paragraph 1 of Article 6 [Right to a fair trial] of the ECHR, which provides:

> *"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".*

78. The Court also refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which provides:

> *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

79. In this context, the Court recalls that the Decision of the IOBCSK has ordered the MLSW Appeals Committee to issue a meritorious decision regarding the Applicant's allegations for the jubilee reward and the payment of three (3) accompanying salaries.

80. The Court notes the Applicant's main allegation regarding the violation of his right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. In this regard, the Court refers to its judgment in the case no. KI94/13, which stated that "the enforcement of a final and enforceable decision should be considered an integral part of the right to a fair trial, a right guaranteed by Article 31 of the Constitution

and Article 6 of the ECHR (see case no. KI94/13, *Applicant, Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj,* cited above).

81. The Court notes that such a stance is also based on the case law of the ECtHR, which states that the enforcement of a final decision should be seen as an integral part of the right to a fair trial. Moreover, in the case of *Hornsby v. Greece*, the ECtHR has noted that the enforcement of the final decision is of even greater importance within the administrative procedure in relation to a dispute, the outcome of which is of particular importance to the civil rights of the party in dispute (see the case of the ECtHR, *Hornsby v. Greece*, no. 18357/91, Judgment of 19 March 1997, paragraphs 40-41). In the present case, the ECtHR had determined that the Applicants should not have been deprived of the benefit of enforcing the final decision, which had been taken in their favor.

82. Therefore, the Court notes that the enforcement of a final and binding decision, within a reasonable time, is a right guaranteed by Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

83. In this regard, the Court notes that the ECtHR in its consolidated case law has found that by avoiding for more than 5 (five) years to take the necessary measures for enforcement of a final and binding decision, the state authorities had stripped the provisions of Article 6 of all their beneficial effect (see ECtHR case, *Hornsby v. Greece,* cited above, paragraph 45).

84. In the present case, the Court considers that the Applicant's dispute with the MLSW Appeals Committee was not particularly complex, as the IOBCSK had ordered the issuance of a meritorious decision to address the Applicant's allegations of jubilee reward and payment of three (3) accompanying salaries, in accordance with applicable law. The decision of the IOBCSK has still remained unimplemented by the MLSW Appeals Committee to this day.

85. In this regard, the Court notes that it would be meaningless if the legal system of the Republic of Kosovo allowed a final decision in administrative and enforceable proceedings to remain ineffective to the detriment of one party. Therefore, inefficiency of procedures and non-enforcement of decisions produce effects which bring forth situations that are inconsistent with the principle of rule of law (Article 7 of the Constitution) – a principle which all public authorities in Kosovo are obliged to respect (see, *mutatis mutandis*, Judgments of

the Constitutional Court in cases no. KI193/18 and KI04/12, cited above).

86. Consequently, the Court finds that the non-enforcement of the Decision [A/02/68/2016] of the IOBCSK, of 12 April 2016, by the MLSW Appeals Committee has resulted in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the ECHR.

Applicant's request for oral hearing

87. With regard to the "expressed desire" of the Applicant to "participate in the hearing", the Court refers to Article 20 [Decisions] of the Law which provides:

> "*1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files.*"

88. The Court considers that the documents included in the Referral are sufficient to decide in this case based on the provision of Article 20 paragraph 2 of the Law (see the case of the Constitutional Court no. KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110).

89. Therefore, the Applicant's request for an oral hearing is rejected.

Conclusion

90. The Constitutional Court notes its constitutional obligation to ensure that proceedings conducted before the public authorities must respect the fundamental human rights guaranteed by the Constitution.

91. In the present case, the Court finds that the non-execution of the decision of the IOBCSK by the MLSW Appeals Committee, especially after the decisions of the regular courts which confirmed the legality of the Decision of the IOBCSK, has resulted in violation of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR.

92. The Court reiterates that in accordance with the subsidiary character of this individual Referral it has not assessed the material aspect of the Applicant's Referral relating to jubilee reward and the payment of three (3) salaries because this matter must be resolved by the MLSW Appeals Committee, as also defined by Decision [A/02/68/2016] of the IOBCSK, of 12 April 2016. Nevertheless, the Court has assessed the procedural aspect of the Applicant's request related to the non-execution of the Decision [A/02/68/2016] of the IOBCSK, of 12 April 2016, the legality of which is confirmed by the regular courts.

93. The Court considers that the issue of non-enforcement of the Decision [A/02/68/2016] of the IOBCSK, of 12 April 2016, is a matter of procedural guarantees protected by Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR for which the Court has found that it has resulted in violation of fundamental human rights.

94. Consequently, regardless of the allegations of the Applicant, the Court has decided to return the case for effective resolution to the competent Commission of MLSW, in accordance with the Decision [A/02/68/2016] of the IOBCSK, of 12 April 2016, as confirmed by the decisions of regular courts.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 59 (1) and 66 (5) of the Rules of Procedure, in the session held on 28 April 2021, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO RETURN the case for effective settlement to the competent Committee of the Ministry of Labor and Social Welfare, in accordance with the Decision [A/02/68/2016] of the Independent Oversight Board for the Civil Service of Kosovo, of 12 April 2016 as confirmed by the decisions of regular courts;

IV. TO REQUEST the Ministry of Labor and Social Welfare, to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court, not later than 11 October 2021;

V. TO REJECT the request for holding a hearing;

VI. TO REMAIN seized of the matter pending compliance with that request;

VII. TO ORDER notification of this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. TO DECLARE this Judgment effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta-Rama-Hajrizi

KI188/20, Applicant: Insurance Company "SUVA Rechstabteillung", Constitutional review of Judgment Ae.nr.63 / 2019 of the Court of Appeals of Kosovo, of 15 October 2020.

KI188/20, Judgment adopted on 28 April 2021, published on 15 June 2021

Keywords: *individual referral, right to a fair and impartial trial, consistency of the case law, legal certainty, right to a reasoned decision*

The circumstances of the present case relate to an accident of 2013, in which, the Applicant's insured person, namely V.A., had suffered physical injuries. Liability for the accident belonged to R.K., insured with the KIB. The Applicant had compensated its insured person, namely V.A. in the amount of 138,734 CHF, in the name of the medical treatment and compensation due to incapacity for work. In relation to this amount, in 2014, the Applicant addressed the KIB with a claim for compensation on the basis of the right to subrogation determined through the LOR and in the absence of an agreement, it filed a claim with the Basic Court. The Basic Court decided that the Applicant was right and upheld the obligation of the KIB to compensate the Applicant in the amount of 114,477.59 Euros as well as the obligation to pay the interest of twelve percent (12%) per annum, as defined in Article 26 of the Law on Compulsory Insurance, starting from 25 March 2014 until the definitive payment. The Court of Appeals had also finally confirmed the Applicant's right to adequate compensation on the basis of subrogation, but changed the Judgment of the Basic Court, in respect of the penalty interest. The Court of Appeals had determined that the annual interest should be at the rate of eight percent (8%) per annum based on Article 382 of the LOR and not at the rate of twelve percent (12%) per annum, based on Article 26 of the Law on Compulsory Insurance, as determined by the lower instance court. This finding of the Court of Appeals, concerning the amount of penalty interest, is challenged by the Applicant before the Court, by alleging violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to (i) violation of the principle of legal certainty as a result of divergence in the relevant case law of the Court of Appeals; and (ii) lack of a reasoned court decision

The Court assessed the Applicant's allegations, regarding legal certainty and the right to a reasoned decision as one of the guarantees established in Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR, by basing this assessment upon the case law of the European Court of Human Rights (hereinafter: the ECtHR). The Court elaborated on the general principles deriving from the ECHR and its case law relating to the judicial consistency and the right to a reasoned decision.

In relation to the allegation for violation of the principle of legal certainty, the Court found: (i) that in the present case the existence of "deep and long-standing" differences regarding the consistency of the case-law of the Supreme Court has not been proved; (ii) that there exists a mechanism for fair administration of justice and for review of changes in the case law; (iii) on 1 December 2020, the Supreme Court has issued a "Legal Opinion on Interest related to the Applicable Law, Interest Rate and Calculation Period" based on Article 14. 2.10 of the Law on Courts; (iv) that the possibility of conflicting decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction; (v) the question as to which law is to be applied in the circumstances of the present case is the prerogative and duty of the Supreme Court; and, that (v) the role of the Supreme Court is precisely to resolve such conflicts.

In relation to the allegation for violation of the right to a reasoned decision, the Court has assessed that the Supreme Court (i) has provided the legal basis and explained why in the Applicant's case is applied the penalty interest at the rate of 8%; (ii) the challenged judgment of the Supreme Court contains a logical connection between the legal basis, the reasoning and the conclusions drawn; (iii) as a logical consequence between the legal basis, the reasoning and the conclusions there has resulted that the challenged judgment of the Supreme Court meets the requirements of a reasoned decision; and, that (iv) whether the Applicant is recognized the right to 12% or 8% of the penalty interest is a matter of application and interpretation of the law and of the discretion of the Supreme Court, and as such, in itself, they do not come into contradiction with the right to a fair and impartial trial.

Finally, the Court found that, in the circumstances of the present case, there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

JUDGMENT

in

Case No. KI188/20

Applicant

“Suva Rechtsabteillung”

Constitutional review of Judgment Ae.no.63/2019 of the Court of Appeals of Kosovo, of 15 October 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Insurance Company "Suva Rechtsabteillung", having its seat in Lucerne, Switzerland, represented by the Law Firm “ICS Assistance L.L.C.”, through Besnik Z. Nikqi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment [Ae.no.63/ 2019] of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) of 15 October 2020,

in conjunction with Judgment [IV.EK. no.535/ 2015] of the Department for Commercial Matters of the Basic Court in Prishtina (hereinafter: the Basic Court) of 3 January 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment of the Court of Appeals, which allegedly has violated the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles], and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 22 October and 24 November 2020, respectively, the Court had sent a submission to the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), regarding a number of cases submitted to the Court challenging the Judgments of the Supreme Court in respect of the determination of the penalty interest in cases of claims for compensation of damages under the right of subrogation as a result of traffic accidents caused in the Republic of Kosovo. Having clarified that the respective cases before the Court, among other things, challenge the infringement of legal certainty, as a result of conflicting decisions of the Supreme Court in similar cases, the Court sought clarification whether (i) the Supreme Court has issued a principled position regarding compensation of damages and

determination of the penalty interest in relation to claims under the right of subrogation; and if this is not the case (ii) to inform the Court regarding the case-law of the Supreme Court, namely in which cases does Article 382 of the LOR, and paragraph 6 of Article 26 of the Law on Compulsory Motor Liability Insurance (hereinafter: the Law on Compulsory Liability), respectively, apply.

6. On 1 December 2020, the Supreme Court (i) clarified before the Court the issues raised by the above submission; and (ii) submitted to the Court the Legal Opinion on Interest of the Supreme Court (hereinafter: the Legal Opinion of the Supreme Court) of 1 December 2020.

7. On 23 December 2020, the Applicant submitted the Referral to the Court.

8. On 30 December 2020, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (presiding), Safet Hoxha and Radomir Laban.

9. On 13 January 2021, the Court notified the Applicant about the registration of the Referral. On the same date, the Court notified the Court of Appeals about the registration of the Referral and sent a copy thereof to it.

10. On 23 February 2021, the Court (i) notified the Kosovo Insurance Bureau (hereinafter: the KIB) about the registration of the Referral by enabling it to submit its comments, if any, to the Court.

11. On 4 March 2021, the KIB submitted the respective comments to the Court.

12. On 28 April 2021, the Review Panel considered the report of Judge Rapporteur Gresa Caka-Nimani, and unanimously recommended to the Court the admissibility of the Referral and its review based on merits.

13. On the same day, the Court voted, unanimously, that the Referral is admissible; and by majority vote, it found 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(1) (Right to a fair trial) of the European Convention on Human Rights.

14. On the same date, the Judge Rapporteur, pursuant to Rule 58 (4) (Deliberations and Voting) of the Rules of Procedure, taking into account that she was not among the judges who ascertained as above, requested from the President of the Court to assign another judge, from the majority, to prepare the Judgment without constitutional violation.

15. On the same date, pursuant to the above rule, the President of the Court assigned Judge Safet Hoxha, as one of the judges of the Review Panel, to prepare the Judgment without constitutional violation.

16. On 2 June 2021, Judge Safet Hoxha presented the Judgment before the Court.

Summary of facts

17. On 19 December 2013, V.A., the Applicant's insured person, sustained injuries in a traffic accident caused by R.K., who was insured by KIB. The Applicant's insured person, namely V.A., was compensated in the amount of 138,734 CHF in the name of *"medical treatment and compensation due to incapacity for work."*

18. On 25 March 2014, the Applicant submitted a request for reimbursement to the KIB.

19. On 2 December 2015, given that the issue of subrogation had not been resolved through the above request, the Applicant filed a claim with the Basic Court against the KIB, seeking compensation of damages in the amount of 127,614.55 Euros. The KIB had filed a response to the claim, whereby it had proposed that the statement of claim should be rejected as unfounded.

20. On 3 January 2019, the Basic Court through Judgment [IV.EK.no.535/2015], (i) approved the Applicant's statement of claim; (ii) obliged the KIB, based on the relevant expertise of 22 June 2018, to pay to the Applicant the compensation in the amount of 114,477.59 Euros; (iii) obliged the KIB to pay to the Applicant the interest of twelve percent (12%) per annum, starting from 25 March 2014 until the definitive payment; and (iv) obliged the KIB to cover the costs of the proceedings. The Basic Court, by its Judgment, justified the imposition of a penalty interest of twelve percent (12%) per annum, by basing upon paragraph 6 of Article 26 of the Law on Compulsory Insurance.

21. On 25 January 2019, the KIB filed an appeal with the Court of Appeals against the above Judgment of the Basic Court, alleging essential violations of the provisions of the contested procedure, erroneous or incomplete determination of the factual situation and erroneous application of the substantive law, by proposing that the challenged Judgment be amended or quashed and the case be remanded for reconsideration. Whereas, on 7 February 2019, the Applicant submitted a response to the appeal and proposed that the appeal of the KIB be rejected as unfounded. The appeal and the response to the appeal, among others, argue and counter-argue issues that relate to the rate of the penalty interest, namely whether the provisions of the LOR or the Law on Compulsory Insurance are applicable. The Applicant, among other things, had stated that based on Article 382 of the LOR, the rate of the penalty interest is eight percent (8%) per annum, unless otherwise provided by special law, while, for issues relating to compulsory motor liability insurance, the special law is the Law on Compulsory Insurance, and based on Article 26 thereof, the rate of penalty interest is twelve percent (12%) per annum.

22. On 15 October 2020, the Court of Appeals, through Judgment [Ae.no.63/ 2019], partially upheld the Judgment of the Basic Court. It modified the same only in respect of the penalty interest, by obliging the KIB to pay the interest at the rate of eight percent (8%) from 25 March 2014 until the definitive

payment. In the context of the latter, the Court of Appeals, *inter alia*, reasoned that (i) paragraph 7 of Article 26 of the Law on Compulsory Insurance*, "excludes the application of interest of 12% for debt regression, this interest is provided only for non-processing and delays in processing the claims for compensation of injured persons"*; and consequently, (ii) the claimant, respectively the Applicant, is entitled only to the penalty interest of eight percent (8%) per annum, as stipulated by Article 382 of the LOR.

Applicant's allegations

23. The Applicant alleges that the Judgment [Ae.no.63/2019] of the Court of Appeals, of 15 October 2020, was issued in breach of its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair Trial and Impartial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant specifically alleges (i) a violation of the principle of legal certainty as a result of divergence in the relevant case law of the Court of Appeals; and (ii) violation of the right to a reasoned court decision.

24. First, the Applicant, referring to the Decision [E.Rev.no.68/2019] of the Supreme Court, of 27 January 2020, which, among other things, had determined that the revision is not allowed in cases where the subject matter of review are only the *"accessory claims"*, namely the penalty interest, alleges that there are no other legal remedies at his disposal to challenge the aforementioned Judgment of the Court of Appeals.

25. In relation to the allegations concerning the violation of legal certainty, namely the divergence in the case law in respect of the determination of the penalty interest in cases of compulsory motor liability insurance, the Applicant, among other things, states that (i) the Court of Appeals has consistently applied the annual interest of twelve percent (12%) per annum in cases relating to compulsory motor liability insurance, as defined by Article 26 of the Law on Compulsory Insurance, with the exception of the challenged Judgment; and (ii) moreover, the challenged Judgment is also contrary to the principles

elaborated in Judgments KI87/18, Applicant *"IF Skadeforsikring"*, Judgment of 15 April 2019 (hereinafter: the case of Court KI87/18) and KI35/18, Applicant *"Bayerische Versicherungsverbrand"*, Judgment of 6 January 2020 (hereinafter: the case of Court KI35/18), but also to the Legal Opinion of the Supreme Court itself, which *"endeavours to unify the case law"*. In the context of this allegation, the Applicant refers to the four Judgments of the Court of Appeals, as follows: (i) Judgment [Ae.no.215/2019] of 22 September 2020; (ii) Judgment [Ae.no.204/2019] of 5 August 2020; (iii) Judgment [Ae.no.282/ 2019] of 4 August 2017; and (iv) Judgment[Ae.no.127/2019] of 3 March 2020.

26. In relation to the allegations relating to the lack of a reasoned court decision, the Applicant states that the challenged Judgment of the Court of Appeals, (i) has not addressed its main allegation raised through the response to the appeal, whereby it was argued that interest of twelve percent (12%), as defined in Article 26 of the Law on Compulsory Insurance, should be applied as *"lex specialis"* and not the interest of eight percent (8%), as defined in Article 382 of the LOR, as *"lex generalis"*; (ii) the application of paragraph 2 of Article 382 of the LOR instead of paragraph 6 of Article 26 of the Law on Compulsory Insurance has not been justified; (iii) the reference in paragraph 7 of Article 26 of the Law on Compulsory Insurance is not justified, moreover, it fails to "*address the issue of penalty interest at all and any definition or exception to legitimacy in the right to penalty interest"*; (iv) contrary to Judgments KI87/18 and KI35/ 18 of the Constitutional Court, respectively, the deviation from its case law in breach of the principle of legal certainty was not justified; and (v) Article 12 (Requests of the regress of funds of health, pension and invalid insurance) of the Law on Compulsory Insurance defines the right to compensation of damage in motor liability insurance, whilst the exceptions are clearly defined in Article 11 (Exclusion from underwriting coverage) of the same law, which are not applicable in the circumstances of the specific case.

27. Through its allegations, the Applicant has elaborated on the basic principles of the right to reasoned court decision as guaranteed by Article 31 of the Constitution in conjunction with

Article 6 of the ECHR and in support of these arguments, the Applicant has also referred to the case law of (i) the Court in cases KI55/09, Applicant *NTSH Meteorit*, Judgment of 3 December 2010; KI135/14, Applicant *IKK Classic*, Judgment of 10 November 2015; KI97/16, Applicant *IKK Classic*, Judgment of 4 December 2017; KI87/18, cited above; and KI35/18, cited above; and of (ii) the European Court of Human Rights (hereinafter: the ECtHR) in the cases of *Hadjianastassiou v. Greece* (Judgment of 16 December 1992); *Van de Hurk v. the Netherlands* (Judgment of 9 April 1994); *Hiro Balani v. Spain* (Judgment of 9 December 1994); *Ruiz Torija v. Spain* (Judgment of 9 December 1994); *Helle v. the Netherlands* (Judgment of 19 December 1997); *Souminen v. Finland* (Judgment of 1 July 2003); *Tatishvili v. Russia* (Judgment of 22 February 2007); *Boldea v. Romania* (Judgment of 15 May 2007); and *Grădinar v. Moldova* (Judgment of 6 February 2008).

28. Finally, the Applicant requests from the Court to (i) declare its Referral admissible; and (ii) find that the challenged Judgment, namely the Judgment [Ae.no. 63/2019] of the Court of Appeals, of 15 October 2020, has been issued in breach of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, by declaring it invalid and remanding the case for reconsideration.

Comments submitted by the interested party KIB

29. On 4 March 2021, the KIB submitted to the Court its comments on the Applicant's Referral. According to the KIB, (i) the Applicant has not exhausted all legal remedies provided by law, because *"it has not initiated any revision at all as an extraordinary remedy before the Supreme Court"*; (ii) the penalty interest of twelve percent (12%) per annum, cannot be applied in the circumstances of the case, because the Applicant has not submitted the supplementation of the documentation required by the KIB, as determined in Article 26 of the Law on Compulsory Insurance and respective regulations of the Central Bank of Kosovo (hereinafter: the CBK); (iii) the Applicant's allegations involve issues relating to the erroneous and incomplete determination of the factual situation, whilst according to the case of Court KI72/16, the Court *"is not a court*

of fourth instance"; and (iv) any approach contrary to this *"would seriously violate the fundamental principles of the constitutional and legal order, namely the Law No.03/L-199 on Courts; Law No. 03/L-006 on Contested Procedure, Law No. 04/L-018 on Compulsory Motor Liability Insurance, and Rules of Procedure of the Constitutional Court of the Republic of Kosovo."*

Assessment of the admissibility of Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

32. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which stipulates:

> *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."*

33. In the following, the Court also examines whether the Applicant has fulfilled the admissibility criteria, as provided by Law. In this respect, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

34. In this respect, the Court first states that the Applicant is entitled to file a constitutional complaint, by calling upon alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as for legal persons (see, in this context, the case of Court KI118/18, Applicant *Eco Construction sh.p.k.*, Resolution on Inadmissibility of 10 October 2020, paragraph 29).

35. Whereas, as to the fulfilment of the admissibility criteria established in the Constitution and the Law and elaborated above, the Court finds that the Applicant is an authorized party, which is challenging an act of a public authority, namely the Judgment [Ae.no.63/2019] of the Court of Appeals, of 15 October 2020, after having exhausted all legal remedies

provided by law. The Court states that based on the case law of the Court, the decisions of the Court of Appeals can be challenged before the Court, and the latter has consistently assessed that the legal remedies have been exhausted by the applicants who have challenged the decisions of the Court of Appeals. This case law, has been built by the Court based upon the case law of the ECtHR, according to which, among other things, the Applicants are not-necessarily required to use also the extraordinary legal remedies (see the Guide on Admissibility Criteria, of 30 April 2020, I. Procedural grounds for inadmissibility; A. Non-exhaustion of domestic remedies; 2. Application of the rule; e) Existence and appropriateness, paragraph 89 and the references used therein).

36. The Applicant has also clarified the rights and freedoms which it alleges to have been violated, pursuant to the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

37. The Court also notes that the Applicant's Referral meets the admissibility criteria provided by paragraph (1) of Rule 39 of the Rules of Procedure. It cannot be declared inadmissible on the basis of the conditions established in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also states that the Referral cannot be declared inadmissible on any other grounds. Therefore, it must be declared admissible and have its merits assessed.

Merits

38. The Court initially recalls that the circumstances of the present case relate to an accident of 2013, in which, the Applicant's insured person, namely V.A., had sustained physical injuries. Liability for the accident had fallen on R.K., insured with the KIB. The Applicant had compensated its insured person, namely V.A. in the amount of 138,734 CHF, in the name of the medical treatment and compensation due to incapacity for work. In relation to this amount, in 2014, the Applicant had addressed the KIB with a claim for compensation on the basis of the right to subrogation determined through the LOR and in the absence of

an agreement; it filed a claim with the Basic Court. The Basic Court decided that the Applicant was right by upholding the obligation of the KIB to compensate the Applicant in the amount of 114,477.59 Euros as well as the obligation to pay the interest of twelve percent (12%) per annum, as defined in Article 26 of the Law on Compulsory Insurance, starting from 25 March 2014 until the definitive payment. The Court of Appeals had also finally upheld the Applicant's right to adequate compensation on the basis of subrogation, but had modified the Judgment of the Basic Court, in respect of the penalty interest. The Court of Appeals had determined that the annual interest rate should be eight percent (8%) per annum based on Article 382 of the LOR and not twelve percent (12%) per annum, based on Article 26 of the Law on Compulsory Insurance, as determined by the lower instance court. This finding of the Court of Appeals, in respect of the penalty interest rate, is challenged by the Applicant before the Court, by alleging violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to (i) violation of the principle of legal certainty as a result of divergence in the relevant case law of the Court of Appeals; and (ii) lack of a reasoned court decision (i). In the following, the Court will examine these two allegations of the Applicant, starting with those relating to the violation of legal certainty.

In relation to the violation of legal certainty

(i) General principles as developed by the case law of the ECtHR and the Court

39. The Court recalls that the Applicant alleges lack of consistency, namely a divergence in the case law of the Court of Appeals in respect of the determination of penalty interest in cases of compulsory motor liability insurance, by referring to four Judgments of the Court of Appeals, as follows: (i) Judgment [Ae.no.215/2019] of 22 September 2020; (ii) Judgment [Ae.no. 204/2019] of 5 August 2020; (iii) Judgment [Ae.no.282/2019] of 4 August 2020; and (iv) Judgment [Ae.no.127/2019] of 3 March 2020.

40. The Court notes that the four Judgments of the Court of Appeals referred to by the Applicant in the sense of allegations for a

divergence in the relevant case law, (i) relate to the cases of compulsory motor liability insurance; (ii) uphold the relevant Judgments of the Basic Court in respect of the application of interest of twelve percent (12%) per annum, as defined in Article 26 of the Law on Compulsory Insurance; and (iii) state that the allegations of the respective parties for erroneous application of substantive law by the court of the first instance do not stand because the said court has correctly applied the applicable law, by having applied Article 26 of the Law on Compulsory Insurance in the circumstances of the respective cases. Therefore, it is not disputable that the Court of Appeals did not act in the same way in the circumstances of the present case, namely in its challenged Judgment.

41. But, the Court points out the fact that on 1 December 2020, the Supreme Court has issued a Legal Opinion on Interest, but the challenged Judgment of the Court of Appeals was issued prior to the above Legal Opinion being adopted.

42. More exactly, the Court recalls that the finding concerning the divergence in the case law of the Supreme Court in respect of the application of penalty interest in cases of compulsory motor liability insurance was reached in the Court cases KI87/18 and KI35/18.

43. Through these Judgments, the Court had reviewed the constitutionality of two different Judgments of the Supreme Court, and which had modified the respective Judgments of the Court of Appeals, in respect of the application of penalty interest in cases of compulsory motor liability insurance. In both cases, the Court, (i) having elaborated on the general principles of the ECtHR relating to the assessment of divergence in the case law and applied them to the circumstances of the respective cases; and (ii) after analysing in case KI87/17, seven (7) different decisions, while in case KI35/18, nine (9) of them, found that in the relevant case law existed *"profound and long-standing differences"* in respect of the application of legal provisions relating to penalty interest rate applicable in cases of compulsory motor liability insurance, moreover, despite the fact that there were mechanisms determined by respective laws for ensuring consistency in the case law , this mechanism was not used by the

Supreme Court (see the case of the Court, KI87/18, cited above, paragraph 79; and the case of Court KI35/18, cited above, paragraph 103).

44. With respect to the principle of legal certainty as a result of the lack of consistency in the case-law, the ECtHR in its case-law has developed basic principles and established criteria whether an alleged divergence of judicial decisions constitutes a violation of Article 6 of the ECHR. The criteria established by the ECtHR were applied also by the Court in its case law when examining the Applicants' allegations for violation of the principle of legal certainty, as a result of conflicting decisions (see, inter alia, the above cases of the Court KI35/18 and KI87/18, where a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR was found by the Court, as a result of a divergence in the case law of the ECtHR).

45. The Court further points out that the case law of the ECtHR has resulted in four fundamental principles that characterize the analysis concerning the consistency of case law, as follows: (i) that one of the essential components of the rule of law is legal certainty, which, inter alia, guarantees certain stability in legal situations and contributes to public confidence in the courts (see, mutatis mutandis, *Ştefănică and others v. Romania*, application no. 38155/02, Judgment of 2 November 2010, paragraph 38; *Nejdet Şahin and Perihan Şahin v. Turkey*, Judgment of 20 October 2011, paragraph 56, see the case KI35/18, cited above, paragraph 64); (ii) that there is no acquired right to consistency of the case-law (see, the ECtHR case, cited above, *Nejdet Şahin and Perihan Şahin v. Turkey*, paragraph 56, see also the above cited case of the Court, KI35/18, Applicant *Bayerische Versicherungsverbrand*, paragraph 65, as well as the case KI42/17, Applicant *Kushtrim Ibraj*, Resolution on Inadmissibility of 25 January 2018, paragraph 33); (iii) that the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction, and such divergences may also arise within the same court; which divergence, in itself, cannot be considered self-contradictory (see, the case *Santos Pinto v. Portugal*, application no.390005/04, paragraph 41, Judgment of 20 May

2008, paragraph 41, see also the Case KI87/17 , Applicant *"IF Skadeforsikring"*, cited above, paragraph 66 and case KI35/18, Applicant *Bayerische Versicherungsverbrand*, paragraph 67); and (iv) except in cases of apparent arbitrariness, it is not its task to call into question the interpretation of domestic law by the domestic courts and in principle, it is not its function to compare different decisions of domestic courts, even if issued in apparently similar proceedings (see, for example, the cases of the ECtHR *Ādamsons v. Latvia*, Judgment of 24 June 2008, paragraph 118; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 50; and the case KI35/18 , cited above, paragraph 68).

46. However, the ECtHR, referring to the above principles, has established three basic criteria for determining whether an alleged divergence of court decisions constitutes a violation of Article 6 of the ECHR, as follows: (i) whether *"profound and long-standing"* differences exist in the case law; (ii) whether the domestic law determines mechanisms to overcome such divergences; and (iii) whether those mechanisms have been applied and ,if so, to what effect (in this context, see the cases of the ECtHR, *Beian v. Romania* (no. 1), Judgment of 6 December 2007, paragraphs 37-39; *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraphs 116 - 135; *Iordan Iordanov and Others v. Bulgaria*, Judgment of 2 July 2009, paragraphs 49-50; *Nejdet Şahin and Perihan Şahin v. Turkey*, cited above, paragraph 53; and see the case of the Court, Kl29/17, Applicant *Adem Zhegrova*, Resolution on Inadmissibility, of 5 September 2017, paragraph 51; and see also the cases of the Court cited above, KI42/17, Applicant *Kushtrim Ibraj*, paragraph 39; KI87/17 Applicant *IF Skadiforsikring*, paragraph 67; KI35/18, Applicant *Bayerische Versicherungsverband*, paragraph 70).

(ii) Application of these principles to the circumstances of the present case

47. In the following, the Court will apply the principles elaborated above to the circumstances of the present case, by applying the criteria on the basis of which the ECtHR deals with the cases of divergence in respect of the case law, by beginning with the

assessment whether in the circumstances of the present case, (i) the alleged contradictions in the case law are *"profound and long-standing"* and if this is the case, (ii) if there exist mechanisms capable of resolving the relevant divergence; and (iii) assessing whether these mechanisms have been applied in the circumstances of the present case and to what effect.

48. In this context, the Court must also reiterate that, based on the case law of the ECtHR, it is not its function to compare different decisions of the regular courts, even if taken in apparently similar proceedings. It must respect the independence of the courts. Moreover, in such cases, namely allegations for constitutional violations of fundamental rights and freedoms as a result of divergences in the case law, the applicants must submit to the Court relevant arguments concerning the factual and legal similarity of the cases for which they claim to have been resolved differently by the regular courts, thus resulting in a divergence in the case law and which may have resulted in a violation of their constitutional rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see, the case KI35/18, Applicant *"Bayerische Rechtsverbrand"*, cited above, paragraph 76).

49. The Court recalls that the Applicant alleges that in its case, the Court of Appeals decided differently regarding the penalty interest rate, thus acting contrary to its case law. In support of his arguments, the Applicant refers to the four Judgments of the Court of Appeals, as follows: (i) Judgment [Ae.no.215/ 2019] of 22 September 2020; (ii) Judgment [Ae.no.204/2019] of 5 August 2020; (iii) Judgment [Ae.no.282/2019] of 4 August 2020; and (iv) Judgment [Ae.no.127/2019] of 3 March 2020.

50. Before analysing whether (i) the challenged Judgment of the Court of Appeals, namely the Judgment [E.Rev.no.63/2019] of 15 October 2020 was rendered by the Court of Appeals contrary to its case law; and (ii) the alleged divergences in the case-law are "profound and long-standing", the Court initially recalls the reasoning of the challenged Judgment in respect of the penalty interest. The Court recalls that the Court of Appeals, by Judgment [Ae.no.63/2019], partially upheld the Judgment of the Basic Court and modified the same only in respect of penalty

interest, by obliging the KIB to pay the interest of eight percent (8%) from 25 March 2014 until the definitive payment. In the context of the latter, the Court of Appeals, among other things, reasoned that (i) paragraph 7 of Article 26 of the Law on Compulsory Insurance, *"excludes the application of interest of 12% for debt regression, this interest is provided only for non-processing and delays in processing the claims for compensation of injured persons"*; and consequently, (ii) the claimant, respectively the Applicant, is entitled only to the penalty interest of eight percent (8%) per annum, as defined by Article 382 of the LOR.

51. In this context, and with regard to the laws applicable in the circumstances of the present case, the Law on Obligational Relationships was adopted by the Assembly of the Republic of Kosovo on 10 May 2012, and was decreed by the President of the Republic of Kosovo on 30 May 2012, while on 19 June 2012 it was published in the Official Gazette of the Republic of Kosovo, and based on its Article 1059 (Entry into force), it has entered into force six (6) months after publication in the Official Gazette, namely on 19 December 2012, whereas the Law on Compulsory insurance was adopted by the Assembly of the Republic of Kosovo on 23 June 2011, was decreed by the President of the Republic of Kosovo on 5 July 2011, and was published in the Official Gazette of the Republic of Kosovo on 14 July 2011, and based on its Article 44 (Entry into force), it has entered into force fifteen (15) days after publication in the Official Gazette, namely on 29 July 2011. Moreover, this law, through its Article 43, has envisaged the repeal of the UNMIK Regulation 2001/25 which regulates the compulsory motor liability insurance and the respective sub-legal acts of the Central Bank of Kosovo (hereinafter: CBK), which are in contradiction with this law.

52. In the context of the Judgments of the Court of Appeals referred by the Applicant, the Court notes that all four of the above Judgments referred to by the Applicant in the sense of allegations for a divergence in the relevant case law, (i) relate to the cases of compulsory motor liability insurance; (ii) uphold the relevant Judgments of the Basic Court in respect of the application of interest of twelve percent (12%) per annum, as defined in Article 26 of the Law on Compulsory Insurance; and

(iii) state that the allegations of the respective parties for erroneous application of substantive law by the court of the first instance do not stand because the said court has correctly applied the applicable law, by having applied Article 26 of the Law on Compulsory Insurance in the circumstances of the respective cases.

53. In the circumstances of the present case, the Court recalls that the Basic Court had decided that the Applicant was right by confirming the obligation of the KIB to compensate the Applicant in the amount of 114,477.59 Euros as well as the obligation to pay the interest of twelve percent (12%) per annum, as defined in Article 26 of the Law on Compulsory Insurance, starting from 25 March 2014 until the definitive payment. The Court of Appeals had also finally upheld the Applicant's right to adequate compensation on the basis of subrogation, but had modified the Judgment of the Basic Court, in respect of the penalty interest.

54. The Court recalls that the Court of Appeals, when modifying the Judgment of the Basic Court in respect of the late interest, had determined that the annual interest should be eight percent (8%) per annum based on Article 382 of the LOR and not twelve percent (12%) per annum, based on Article 26 of the Law on Compulsory Insurance, as determined by the lower instance court.

55. The Court states that it assesses the consistency of the case law of the regular courts only in respect of the violations alleged by the Applicant. Consequently, the lack of consistency in the case law must have resulted in a violation of the fundamental rights and freedoms of the Applicant. In order to ascertain such a violation, and to find that the fundamental rights and freedoms of the Applicant have been violated as a result of *"profound and long-standing differences"* in the relevant case law, the factual and legal circumstances of the Applicant's case should coincide with those of the cases with which the contradiction is alleged.

56. In the context of the circumstances of the case, the Court and the ECtHR have also acknowledged that the contradictions in the case law are an integral part of any judicial system, and that the

divergences in the case law may also arise within the same court; such a thing, is not necessarily in contradiction with the Constituion and the ECHR (see, the case of ECtHR *Santos Pinto v. Portugal*, cited above, paragraph 41; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 51). Moreover, and as stated above, the ECtHR has consistently reiterated that requirements for legal certainty and legitimate protection of public confidence in the courts do not guarantee a right to consistent case law. The development of the case law is important to maintain the proper dynamic of the continuous improvement of the administration of justice (see the case of the ECtHR, *Atanasovski v. "Former Yugoslav Republic of Macedonia"*, Judgment of 14 January 2010, paragraph 38; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 58, see the case of Court KI35/18, Applicant *Bayerische Rechtsverbrand*, cited above, paragraph 98). An exception to these general principles is the apparent arbitrariness, and in terms of assessing the lack of judicial consistency, assessment whether there are *"profound and long-standing differences"* in the relevant case law and whether there is an effective mechanism to address them.

57. The Court, by referring to its case law, namely cases KI87/18 and KI35/18, recalls that it had found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to a violation of the principle of legal certainty as a result of the divergence of the case law, in case KI87/18 in the assessment of 3 (three) cases of the Supreme Court, issued within a period of 3 (three) years, and in case KI35/18 in the assessment of 9 (nine) cases of the Supreme Court issued over a period of 5 (five) years, after finding that (i) there were *"profound and long-standing differences"* ; (ii) the Supreme Court mechanism for harmonizing the case law existed; but (iii) the said mechanism was not used (see, the Cases of Court KI87/18, cited above, paragraph 79 and paragraphs 81 to 85, and case KI35/18, cited above, paragraph 70 and paragraphs 110-111).

58. On the other hand, solely the finding that there exist *"profound and long-standing differences"* in the case law regarding the penalty interest rate does not necessarily result in a violation of

Article 31 of the Constitution in conjunction with Article 6 of the ECHR. In order to ascertain such a thing, the Court must consider two other criteria of the ECtHR relating to the assessment of the lack of consistency in the case law, namely whether the applicable law provides for the mechanisms capable of resolving such divergences; and whether such a mechanism has been applied in the circumstances of a case and to what effect.

59. The Court emphasizes that the Supreme Court has a mechanism that enables the resolution of such contradictions, based on point 10 of paragraph 2 of Article 14 (Competencies and Responsibilities of the President and Vice-President of the Court) of the Law on Courts No.06/L-054 (hereinafter: the Law on Courts), the Presidents of Courts shall convene an annual meeting of all judges who have the obligation, *inter alia*, to review and propose changes to procedures and practices (see, the case of the Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 80 and Case KI35/18, Applicant *Bayerische Rechtsverbrand*, cited above, paragraph 107).

60. In the following, and for the purpose of clarifying whether such a mechanism for resolving contradictions, which was consistently alleged by the Applicants in such cases before the Court, the Court recalls that in its request of 22 October 2020, it also addressed the Supreme Court with the question whether *"The Supreme Court had issued a principled position regarding the compensation of damages and the determination of penalty interest in respect of claims under the right of subrogation."*

61. The Supreme Court in its answer to the above question had answered as follows:

> *The above described case law of the Supreme Court of Kosovo has been consolidated from the time when there were submitted claims for compensation of damages under the right of subrogation, but there should be distinguished the cases when the Supreme Court of Kosovo in the proceedings according to extraordinary legal remedies cannot modify the decisions of lower instances in cases*

when it would be considered a violation of the principle "reformatio in peius."

The provision of Article 203 of the Law on Contested Procedure stipulates that: "Second instance court can change the decision of the first instance to the prejudice of the complaining party, if only it complained and not the opposing party."

The cited principle prevents the Supreme Court from changing the decisions of the lower instance courts also in respect of the annual rate of the penalty interest if the revision is of the claimant, who has partially won the litigation but has filed a revision for the rejected part. In this case, the Supreme Court, even if it finds that the substantive legal provisions on penalty interest have been incorrectly applied, it cannot change the court's decision. Also, the Supreme Court, when the revision is submitted only in respect of the interest, cannot elaborate at all on the assessment of its groundedness and eventually change the judgments of the lower instance court, because in this situation according to Article 211 paragraph 2 of the LCP the revision is not allowed at all, since in the sense of Article 30 paragraph 1 of the LCP, for the values of the subject matter of the dispute is taken into account only the value of the main claim, and not the interest (Article 30 paragraph 2 of the LCP).

The Supreme Court of Kosovo, in reflection of the constant claims of the courts of lower instances, but also based on the findings in its case-law a few months ago in the civil branch, had initiated the idea of the need for a legal opinion on the issue of interest, for which idea researches were conducted in the domestic practice, there were conducted comparative analyses of legislation and practice in the region, there was assessed the need to maintain continuity, but also the need for progressive changes in the function of the standards for adequate judicial protection and after having held many meetings, this idea has been materialized in a legal opinion, initially in the civil branch of the Supreme Court and

thereupon in the General Session of the Supreme Court, held on 01 December 2020.

The legal opinion on the issue of interest has addressed, among other things, the situation of regression claims, point IX (nine) of the legal opinion. For the parts of this response relating to the requested information we appeal to you to consider the Legal Opinion on interest, a copy of which you will find attached."."

62. However, the Court through the present case also emphasizes that point 4 of paragraph 1 of Article 26 (Competencies of the Supreme Court) of the Law on Courts determines the exclusive competence of the Supreme Court itself to define principled attitudes, issue legal opinions and guidelines for unique application of laws by courts in the territory of the Republic of Kosovo. In the case involving the circumstances of the present case, namely the application of the penalty interest rate in relation to compulsory motor liability insurance, the Supreme Court had approved such a mechanism, namely a legal opinion on interest on 1 December 2020, respectively after that the Applicant had submitted his Referral to the Court and after the request of the Court, whereby the latter had sought clarification whether the Supreme Court had issued any unifying standpoint regarding its case law.

63. Consequently, referring to the four abovementioned cases of the Court of Appeals presented by the Applicant and the response of the Supreme Court, through its letter of 2 December 2020, the Court finds that in the circumstances of the present case, are not fulfilled the three criteria of the ECtHR regarding the assessment whether the lack of consistency, namely the divergences in the case law, have resulted in a violation of the rights and freedoms for a fair and impartial trial.

64. The Court first reiterates that in the circumstances of the present case it has not found *"profound and long-standing differences"* in the case law of the Court of Appeals regarding the application of the provisions governing the penalty interest rate in the context of compulsory motor liability insurance by submission of only four (4) decisions. Secondly, the Court considers that the

clarification provided by the Supreme Court through its letter in relation to the application of the provisions of the law in cases of claims referring to the determination of the penalty interest rate under the right of subrogation is clear. While, as regards the mechanism of the Supreme Court for harmonization of this practice, respectively the approval of the Legal Opinion regarding the Interest, the Court emphasizes that this mechanism was created and adopted after the submission to the Court of a number of cases which challenge the decisions of the regular courts in respect of determination of the penalty interest in the cases of claims for compensation under the right of subrogation.

65. Consequently, the Court finds that the challenged Judgment of the Court of Appeals does not contain a violation of the principle of legal certainty and a violation of the Applicant's right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in in conjunction with Article 6 of the ECHR.

In relation to the reasoned court decision

(i) General principles regarding the reasoning of court decisions

66. In regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case law. This case law is based upon the case law of the ECtHR (including but not limited to the cases of *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007). Moreover, the basic principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017;

KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019; KI35/18, cited above; and KI227/19, Applicant *N.T. "Spahia Petrol"*, Judgment of 31 December 2020.

67. In principle, the Court states that the guarantees embodied in Article 31 of the Constitution include the obligation of the courts to provide sufficient reasons for their decisions (see, the case of Court KI230/19, Applicant *Albert Rakipi*, cited above, paragraph 139).

68. The Court also emphasizes that, based on its case law, which relies upon the case law of the ECtHR, when assessing the principle, which refers to the proper administration of justice, court decisions must contain the reasoning on which they are based. The extent to which the obligation to provide reasons applies may vary depending on the nature of the decision and must be determined in the light of the circumstances of the particular case. These are the essential arguments of the Applicants that need to be addressed and the reasons provided must be based upon the applicable law (see, analogically, the cases of the ECtHR *Garcia Ruiz v. Spain*, application no.30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, Judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42, see also the case of Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). Having not required a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their allegations that are decisive to the outcome of the proceedings (see, the case *Moreira Ferreira v. Portugal*, Judgment of 5 July 2011 paragraph 84 and all references used therein, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 137).

69. In addition, the Court refers to its case law where it has established that the reasoning of the decision must state the

relationship between the merit findings and the examination of evidence on the one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision-making, if the reasoning provided fials to contain the established facts, the legal provisions and the logical relationship between them (see the cases of Court KI87/18 Applicant *"IF Skadeforsikring"*, Judgment of 27 February 2019, paragraph 44; KI138/19, Applicant *Ibish Raci*, cited above, paragraph 45; as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 138).

(ii) Application of the abovementioned principles to the circumstances of the present case

70. When applying the general principles elaborated above, in the circumstances of the present case, and in order to assess whether the challenged Judgment was issued in accordance with the constitutional guarantees of a reasoned court decision, the Court recalls that when issuing its challenged Judgment, the Court of Appeals had modified the Judgment of the Basic Court, in respect of the penalty interest. The latter, in the circumstances of the present case, had applied the interest at the rate of twelve percent (12%) per annum, by referring to Article 26 of the Law on Compulsory Insurance, whilst the Court of Appeals had determined that in the circumstances of the respective case, Article 26 of the Law on Motor Third Party Liability Insurance is not applicable, as there must be applied the interest at the rate of eight percent (8) %, by referring to Article 382 of the LOR.

71. In the context of the Applicant's allegations, the Court, in the following, recalls the reasoning of the Court of Appeals in Judgment [Ae.no.63/2019], where is stated the following in respect of the penalty interest:

> *"Erroneous application of substantive law consists in the facts that, the interest approved by the court of the first instance is not legally applied in debt regression disputes, but only in the claims for compensation of damage of the injured persons in the extrajudicial proceedings as provided for in Article 26 of the Law on Compulsory Insurance,*

provisions which the courts of the first instance has referred to. The interest rate applied by the court of the first instance is foreseen in order to discipline the insurance companies in the insurance relationships against the claims for compensation of the injured persons, which the insurance companies are obliged to handle on an urgent basis within the deadlines provided for by the above provisions.

Paragraph 7 of Article 26 of the Law on Compulsory Motor Liability Insurance, excludes the application of the interest rate of 12% for debt regression, this interest is provided only for non-processing and the delay in processing the claims for compensation of the injured persons. Based on this it results that the claimant is entitled only to the penalty interest provided for in Article 382 of the LOR and not to the qualified interest according to the provisions applied by the court of the first instance. Given that the claimant with the submission of 23.3.2014 has requested the debt regression from the respondent, it turns out that from this date the respondent has been in delay since it failed to fulfil the obligation within the deadline until the definitive payment."

72. Based on the above reasoning of the Court of Appeals, the Court notes that the said court , initially (i) finds that the interest of twelve percent (12%) per annum, is *"provided only for non-processing and delays in processing the claims for compensation of injured persons"*; (ii) excludes the application of this interest, in the circumstances of the present case, by basing upon paragraph 7 of Article 26 of the Law on Compulsory Insurance; and (iii) finds that in the circumstances of the respective case, another law is to be applied, namely Article 382 of the LOR, which provides for the penalty interest of eight percent (8%) per annum.

73. On the basis of the above reasoning of the Court of Appeals, the Court emphasizes the fact that the said court has excluded the application of the penalty interest of twelve percent (12%), as defined in paragraph 6 of Article 26 of the Law on Compulsory Insurance by consequently applying Article 382 of the LOR.

74. In this context, the Court refers to Article 382, paragraph 2 of the LOR, which stipulates that: "The interest rate for penalty interest shall amount to eight percent (8%) per annum, unless stipulated otherwise by a separate act of law."

75. Whereas paragraph 6 of Article 26 of the Law on Compulsory Insurance stipulates that: *"In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfilment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim."*

76. Based on the foregoing, the Court notes that in determining the penalty interest "at the rate of 8%" according to paragraph 2 of Article 382 of the LOR the Court of Appeals specified that in relation to the penalty interest rate in cases of claims under the right of subrogation, wherein is included also the Applicant's case, paragraph 6 of Article 26 of the Law on Compulsory Insurance is not applicable.

77. Moreover, the Court notes that as a reason for modifying the decision on the penalty interest rate, the Supreme Court justifies that the lower instance courts, namely the Basic Court and the Court of Appeals, respectively, have erroneously interpreted the substantive law when finding that paragraph 6 of Article 26 of the Law on Compulsory Insurance is applicable.

78. In the context of similar allegations relating to the penalty interest rate, on 22 October and 24 November 2020, respectively, the Court sent a submission to the Supreme Court concerning a number of cases submitted to the Court challenging the decisions of the regular court in respect of the determination of penalty interest in cases of claims for compensation of damages under the right of subrogation as a result of traffic accidents caused in the Republic of Kosovo. The

Court sought clarification as to whether (i) the Supreme Court has issued a principled position regarding compensation of damages and determination of the penalty interest in relation to claims under the right of subrogation; and if this is not the case (ii) to inform the Court regarding the case-law of the Supreme Court, namely in which cases does Article 382 of the LOR, and paragraph 6 of Article 26 of the Law on Compulsory Motor Liability Insurance (hereinafter: the Law on Compulsory Liability), respectively, apply.

79. To the aforementioned question of the Court, the Supreme Court had answered as follows::

> *"In this context, in principle in relation to the penalty interest for the relations of obligations that have arisen before 20.12.2012, there was applied the legal provision of Article 277 of the Law of Obligations (Official Gazette of the SFRY, no. 29/78, 39/85, 57/89), while for the relations of obligations that have arisen after 19.12.20 [12], there was applied the provision from article 382 of the Law on Obligational Relationships, no.04/L-077, Official Gazette of the Republic of Kosovo , no.19/19, of 19.06.2012, whilst for the claims of third parties to the Insurance Companies, in cases when the legal conditions are met following the entry into force (on 30 July 2011) of the Law on Compulsory Motor Insurance Liability, no.04/L-018, published in the Official Gazette no.4, of 14 July 2011, there were applied the provisions of this law.*
>
> *According to the Supreme Court "The cases of claims for compensation of damages under the right of subrogation according to the practice of the Supreme Court of Kosovo, and depending on the time of entering into the obligation are reviewed and decided in accordance with the provisions of the above cited laws, with relevant specifics […]"*

80. Whereas as regards the determination of the penalty interest rate of 12%, the Supreme Court had clarified that: "*The rate of 12% of the annual interest is applied/ calculated when there are met the legal conditions, in cases of non-compliance with time limits (Article 26 paragraph 1 and 2, of the Law on Compulsory*

Motor Liability Insurance, No. 04/L-018, published in the Gazette Official No. 4, on 14 July 2011) and non-fulfilment of the obligation (Article 26 paragraph 4, of the same Law) by the responsible insurers (Insurance Companies) for each day of delay until the performance of the obligation by the responsible insurer, starting from the date of submission of the claim for compensation. The situation described according to the provisions of Article 26 of the Law on Compulsory Motor Liability Insurance, No.04 / L-018, published in the Official Gazette no.4, on 14 July 2011, refers to the liability that Insurance Companies have towards third parties, therefore the annual interest rate of 12% in this case aims to encourage a kind of correct approach of Insurance Companies to third parties, so that the claims for compensation of damages are dealt with within the legal deadlines, otherwise Insurance Companies will have to pay the annual interest of 12%.

The annual interest rate of 12% in certain cases, according to the law should be considered as a kind of penalty to Insurance Companies, when they are not responsible towards the third parties, but cannot be considered as favouring the claim of the creditor having the right to regression towards the obligated debtor because the relationship between the creditor and the debtor in the payment of the regression is a special relationship of obligations and is not the relationship of the third party with the Insurance Company, therefore in certain cases in respect of a claim of the third party as an injured party in relation to the insurance company there can be adjudicated the annual interest rate of 12%, but not also for the reimbursement claim."

81. Based on the above, the Court considers that the response given by the Supreme Court regarding its interpretation as to which law is to be applied regarding the penalty interest rate is in accordance with its reasoning given in the Judgment challenged by the Applicant in the present case. Therefore, the Court considers that the interpretation and application of the relevant legal provisions in determining the penalty interest by the Court of Appeals in the Applicant's case falls within the scope of legality, which is within the jurisdiction of this Court. Having said that, the Court of Appeals, through its Judgment and the clarification/response of the Supreme Court to the Court's

question, has managed to explain the relationship between the facts presented and the application of the law to which it has referred, namely how they correlate with each other and how they have influenced the decision of the Supreme Court to modify the decisions of the lower instance courts in respect of the determination of the penalty interest rate.

82. Having done so, the Court reiterates that the Court of Appeals has fulfilled its constitutional obligation to provide a reasoned court decision, in accordance with the requirements of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR and the case law of the Court, and that of the ECtHR.

83. Therefore, based on the above, it finds that the Judgment [Rev. No. 63/2019], of the Supreme Court, of 15 October 2020, in relation to the allegation for non-reasoning of the court decision does not constitute a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Conclusions

84. The Court has addressed all the allegations of the Applicant, by applying this assessment based on the case law of the Court and the ECHR in respect of the reasoning of the judgment and legal certainty in terms of the consistency of the case law, that are the guarantees which, with certain exceptions, are embodied in Article 31 of the Constitution and Article 6 of the ECHR.

85. First, as regards the allegation relating to the lack of reasoning of the court decision, the Court has found that the Judgment [E.Rev.no.63/2019] of the Supreme Court, of 15 October 2020, does not contain violations of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, because it has sufficiently reasoned its decision.

86. Second, as regards the principle of legal certainty in the context of a lack of consistency, namely the divergence of the case law of the Court of Appeals, the Court, having elaborated on the fundamental principles and criteria of the ECtHR in this respect, and applying the same to the circumstances of the present case

found that in the case law of the Court of Appeals there are no *"profound and long-standing differences"* regarding the application of legal provisions which concern the applicable penalty interest rate in the cases of compulsory motor liability insurance, and consequently found that the principle of legal certainty was not infringed, and that the Judgment [E.Rev.no.63/2019] of 15 October 2020 was not issued in breach of the Applicant's fundamental rights and freedoms guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.7 and 21.4 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 28 April 2021,

DECIDES

I. TO DECLARE the Referral inadmissible in a unanimous manner;

II. TO HOLD, by majority vote, that the Judgment Ae.no.63/2019 of the Court of Appeals of the Republic of Kosovo, of 15 October 2020, is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO NOTIFY this decision to the Parties, and in accordance with Article 20.4 of the Law, to have the decision published in the Official Gazette;

IV. This Judgment is effective immediately.

The judge	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KI111/19, Applicant: Insurance Company "SUVA Rechstabteillung", Constitutional review of the Judgment E. Rev. no.1/2019 of the Supreme Court, of 27 February 2019

KI111/19, Judgment adopted on 28 April 2021, published on 16 June 2021

Keywords*: individual referral, right to a fair and impartial trial, consistency of the case law, legal certainty, right to a reasoned decision*

In the circumstances of the present case, the Applicant had filed a claim with the Basic Court in Prishtina-Department for Commercial Matters regarding the regression of the costs of medical treatment and disability compensation of the injured party S.B. suffered in the traffic accident of 1 May 2013. The Applicant had requested that the respondent - the Insurance Company "Elsig" be obliged to pay the general amount of funds in euros along with the annual interest rate of 12%. The lower instance courts upheld the regression amount and the interest at the rate of 12% claimed by the Applicant, however, after the revision of the respondent, the Supreme Court decided that the rate of interest to be granted to the Applicant is 8% and not at the rate of 12% as previously granted by the lower instance courts. The Applicant submitted a Referral to the Constitutional Court alleging, *inter alia*, a violation of Article 31 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (1) of the European Convention on Human Rights (hereinafter: the ECHR), regarding the legal certainty and the right to a reasoned decision.

The Court assessed the Applicant's allegations regarding legal certainty and the right to a reasoned decision as one of the guarantees established in Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR, by basing this assessment upon the case law of the European Court of Human Rights (hereinafter: the ECHR). The Court elaborated on the general principles deriving from the ECtHR and its case law regarding judicial consistency and the right to a reasoned decision.

In relation to the allegation for a violation of the principle of legal certainty, the Court found: (i) that in the present case the existence of "deep and long-standing" differences in respect of the consistency of the case law of the Supreme Court has not been proved; (ii) that there is a mechanism that provides for a fair administration of justice and review of changes in the case law; (iii) The Supreme Court on 1 December 2020 has issued a "Legal Opinion on Interest related to the Applicable Law, Interest Rate and Calculation Period" based on Article 14. 2.10 of the Law on Courts (iv) that the possibility of conflicting decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority

over the area of their territorial jurisdiction; (v) the question as to which law is to be applied in the circumstances of the present case is the prerogative and duty of the Supreme Court; and, that (v) the role of the Supreme Court is precisely to resolve such conflicts.

In relation to the allegation for violation of the right to a reasoned decision, the Court has assessed that the Supreme Court (i) has provided the legal basis and explained why in the Applicant's case is applied the penalty interest at the rate of 8%; (ii) the challenged judgment of the Supreme Court contains a logical connection between the legal basis, the reasoning and the conclusions drawn; (iii) as a logical consequence between the legal basis, the reasoning and the conclusions it has resulted that the challenged judgment of the Supreme Court meets the criteria of a reasoned decision; and, that (iv) whether the Applicant is recognized the right to 12% or 8% of the penalty interest is a matter of application and interpretation of the law and of the discretion of the Supreme Court, and as such, in itself, they do not come into contradiction with the right to a fair and impartial trial.

Finally, the Court found that, in the circumstances of the present case, there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

JUDGMENT

in

Case No. KI111/19

Applicant

Insurance Company "SUVA Rechstabteillung"

Constitutional review of Judgment E.Rev.no.1/2019 of the Supreme Court, of 27 February 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the Insurance Company *"SUVA Rechtsabteilung"* having its seat in Lucerne, Switzerland (hereinafter: the Applicant) represented by the Law Firm "ICS Assistance L.L.C." Prishtina, through Visar Morina and Besnik Z. Nikqi, lawyers from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment [E.Rev.no.1/2019] of the Supreme Court, of 27 February 2019.

3. The challenged Judgment of the Supreme Court was served on the Applicant on 14 March 2019.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Judgment of the Supreme Court, which has allegedly violated the Applicant's right and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles], and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 2 July 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 3 July 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Gresa Caka-Nimani and Safet Hoxha.

8. On 2 September 2019, the Applicant was notified about the registration of the Referral and a copy thereof was sent to the Supreme Court.

9. On 2 September 2019, a copy of the Referral was sent to the Basic Court in Prishtina along with a request for submission of the acknowledgment of receipt indicating the date of receipt of the challenged decision by the Applicant.

10. On 16 September 2019, the Basic Court submitted the aforementioned document to the Court.

11. On 22 October 2020, the Court requested from the Supreme Court to be notified about the case law regarding the application of penalty interest in debt subrogation disputes. The request addressed to the Supreme Court, apart from the case under review KI111/19, was also related to other cases of a similar nature KI74 /19, KI09/20 and KI113/20.

12. On 2 December 2020, the Supreme Court submitted the "Legal Opinion on Interest adopted at the general meeting of the Supreme Court of the Republic of Kosovo of 1 December 2020, based on Article 26 paragraph 1 point 1.4 of the Law on Courts". The relevant parts of the Legal Opinion of the Supreme Court are reflected in the below text of the present judgment.

13. On 28 April 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral and the assessment based on merits.

14. On the same day, the Court unanimously voted that the Referral is admissible; and by majority vote 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 (1) (Right to a fair trial) of the European Convention on Human Rights.

Summary of facts

15. Based on the submitted documents it results that on 1 May 2013, the Applicant's insured person S.B. while driving a vehicle "VE Polo" with license plates 05-867-BM was involved in a traffic accident with the passenger car with license plates E-310-EH driven by M.D., who was insured with the respondent, the Insurance Company "Elsig" in Pristina.

16. Meanwhile, in criminal proceedings, the Basic Court in Ferizaj by a final criminal Judgment (P.no. 1448/13, of 21.11.2013) had confirmed that the "exclusive" culprit for the accident of 1 May 2013 was M.D., the insured person of the respondent- the Insurance Company "Elsig" in Prishtina.

17. On 11 March 2014, the Applicant submitted a claim to the Insurance Company "Elsig" seeking compensation and setting of the penalty interest rate at 12% based on Article 26 point 6 of the Law No.04/L-018 on Compulsory Motor Liability Insurance (hereinafter: the Law on Motor Liability).

18. On an unspecified date, the Applicant filed a claim with the Basic Court in Prishtina-Department for Commercial Matters (hereinafter: the Basic Court) regarding the regression for the costs of medical treatment and disability compensation for the injured party S.B. involved in the traffic accident of 1 May 2013. The Applicant had requested that the respondent, the Insurance Company "Elsig" be obliged to pay the total amount of funds in the amount of 80,037.04 Euros along with the annual interest rate of 12%.

19. On 26 September 2016, the Basic Court in Prishtina-Department for Commercial Matters (Judgment III.C.no.150/2015) (i) approved the Applicant's statement of claim in its entirety; (ii) obliged the respondent, the Insurance Company "Elsig" based in Prishtina, to pay the total amount of funds in the sum of 80,037.04 Euros in the name of regression, along with the annual interest rate of 12%; and, (iii) obliged the respondent to compensate the Applicant for the costs of the proceedings.

20. On the basis of medical and traffic expertise the Court had established: (i) that the respondent's insured person M.D. is at fault for the damage caused in the accident of 1 May 2013; (ii) that the injured party S.B. had medical expenses as well as compensation for incapacity for work in the amount of 80,037.04 Euros; and, (iii) given that the accident was caused by the insured person of the respondent, the Basic Court based on Articles 281 and 960 of Law No. 04 /L-077 on Obligational Relationships (hereinafter: the LOR) decided to oblige the respondent to regress to the Applicant the amount of 80,037.04 Euros along with the annual interest rate of 12%.

21. In the relevant part of the judgment, the Basic Court had established: "*The Court has also assessed the respondent's allegations stating that the claimant could not base its statement of claim upon Article 72 of the Swiss Federal Social Security Law, as such a claim was rejected by the court as unfounded since the claimant has relied on the legal basis under Articles 281 and 960 of the LOR, while the said provisions deal with subrogation in insurance; there were also other claims of the respondent that were rejected by the court as unfounded because they were not relevant and had no bearing as to have a different decision issued in this civil legal issue, since also the claimant has deducted the granted amount paid according to the opinion and the findings of the medical expertise. The court obliged the respondent to pay to the claimant, the determined amounts of compensation along with the interest at the rate of 12%, in conformity with Article 26.6 of the Law 04/L-018 on Compulsory Motor Liability Insurance which was calculated from the date of the submission of the claim for*

reimbursement to the respondent on 11.03.2014 until the definitive payment."

22. On an unspecified date, the respondent- Insurance Company "Elsig" filed an appeal against the aforementioned judgment by alleging essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law. The respondent had also requested that the judgment of the Basic Court be quashed or remanded for reconsideration or amended by rejecting the statement of claim in its entirety in the absence of liability and failure to prove that there were incurred costs as a result of the accident.

23. On 5 November 2018, the Court of Appeals (Judgment Ae.no.240/2016) rejected the appeal of the respondent Insurance Company "Elsig" as unfounded by upholding the Judgment (III.C.no.150/2015) of the Basic Court in Prishtina, of 26 September 2016. The Court of Appeals found that the court of the first instance has correctly applied the substantive law, namely Articles 281 and 960 of the LOR, for the reason that on the basis of the case file and the statements of the respondent it results that the insured person of the respondent was liable for the damage caused. The Court of Appeals added that the Applicant has paid to its insured person compensation for the damage suffered and that upon the payment of compensation all the rights of the insured person have been transferred to the Applicant.

24. In the relevant part of the judgment, the Court of Appeals had established: *"This court considers that the court of the first instance has correctly applied the substantive law, namely Articles 281 and 960 of the LOR, because based on the case file and the statements of the respondent party it results that the respondent's insured person was liable for the damage caused. The claimant has paid to its insured person the compensation for the damage suffered and upon the payment of the compensation all the rights of the insured person have been transferred to the claimant. The appeal claim that the court should have applied Article 269 of the LOR is unfounded because this provision refers to other natures of insurance (life insurance, property insurance against disasters, etc.) and is therefore inapplicable in this case [. ..] The court also assessed the other respondent's allegations, related to the interest rate, but found that they are unfounded, because Article 26, point 6, of the Law on Compulsory Motor Liability Insurance, determines the interest rate of 12% from the date of the claim for compensation being submitted. In the concrete case, based on the case file it results that the claimant has submitted the claim for compensation to the respondent on 11.03.*

2014, thus according to the abovementioned provision the interest starts to run from this date, therefore, the court of the first instance has applied the substantive law in a correct manner".

25. On an unspecified date, the respondent party, the Insurance Company "Elsig" submitted a request for revision of the judgment of the Court of Appeals by alleging substantial violations of the provisions of the contested procedure and erroneous application of substantive law, by proposing to the Supreme Court to dismiss the said judgment and remand the case to the court of the first instance for retrial.

26. On 27 February 2019, the Supreme Court by Judgment E.Rev.1/19, decided:

> "*(I) the revision of the respondent, the Insurance Company "Elsig" in Prishtina, submitted against the Judgment Ae.No.57/2013 of the Court of Appeals of Kosovo, of 10.6.2014 is hereby REJECTED as unfounded;*
>
> *(II) The revision of the respondent is accepted only in respect of the decision on the approved interest, and the Judgment Ae.no.24/2016 of the Court of Appeals of Kosovo, of 05.11.2018, and Judgment III. C. No. 150/2015 of the Basic Court in Prishtina-Department for Commercial Matters, of 26.09.2016 are amended, so that the respondent is obliged to pay to the claimant the interest at the rate of 8% on the adjudicated amount of 80, 03704 Euros, starting from 11.03.2014 onwards until the complete payment of the debt".*

27. The Supreme Court found that the courts of the lower instance have erroneously applied the substantive right under Article 382 of the LOR in conjunction with Article 26.7 of the Law on Compulsory Motor Liability Insurance. The Supreme Court further reasoned that Article 26.7 of the Law on Compulsory Motor Liability Insurance excludes the application of the 12% interest rate for debt regression, which is foreseen only for non-processing and delays in the processing of the claims for compensation of the injured persons. The Supreme Court added that the Applicant is entitled only to the penalty interest under Article 382 of the LOR but not to the "qualified" interest under the provisions applied by the courts of the lower instance.

Applicant's allegations

28. The Applicant alleges that the Judgment [E.Rev.1/2019] of the Supreme Court, of 27 February 2019, has been issued in breach of its

fundamental rights and freedoms established in Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

29. In respect of the allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant adds: "*The Applicant considers that the Judgment [E.Rev.No.1/2019] of the Supreme Court, of 27.02.2019, is characterized by a lack of adequate reasoning as the Supreme Court did not provide sufficient and adequate legal reasoning when changing the Judgment [Ae.No.240/2016] of the Court of Appeals of Kosovo in respect of the manner of calculation of the penalty interest in the field of motor liability insurance (thus changing the position of the Supreme Court regarding the annual interest rate maintained in identical cases).*"

30. The Applicant alleges: *"The reasoning of the Judgment of the Supreme Court challenged by this Referral does not determine at all on what legal basis the Supreme Court has based its decision to change the penalty interest determined by the lower instance court. The Applicant considers that the reference to Article 26 para.7 of the Law No. 04/L018 is inadequate and consequently arbitrary as the above provision [Paragraph 7] does not even address this issue, nor does it correspond to the content cited in the reasoning of the Judgment [E.Rev.No. 1/2019, of 27.02.2019]."*

31. The Applicant alleges that the Supreme Court erroneously refers to paragraph 7 of Article 26 of the Law No.04/L-018 on Compulsory Motor Liability Insurance regarding the rate of the penalty interest, which, according to the Applicant, deals with something completely different compared to what the Supreme Court refers to.

32. The Applicant considers: *"Judgment [E.Rev.No.1/2019 of 27.02.2019 is not based upon certain legal norms for determining the amount of the annual rate. While the reasoning of the challenged Judgment deals with the institution of penalty interest, it does not provide legal grounds when determining the amount of the annual penalty interest rate. The Applicant draws the attention of the Constitutional Court that there is already a long-term practice of the Supreme Court of Kosovo that in principle the institution of penalty interest in the field of compulsory insurance is decided on the basis of the provisions of the Law No. 04/L-018 as a special law "lex specialis".*

33. The Applicant alleges: *"... in the position given in the challenged Judgment of the Supreme Court it did not specify on what legal basis it has relied when finding that "the interest approved by the courts of*

the lower instance, does not apply to the debt regression disputes but only to delays in processing the claims for compensation of damages of the injured persons in extrajudicial proceedings as provided for by Article 26 of the Law in question and Article 5.1 of the CBK Rule No. 3 on Compulsory Motor Liability Insurance of 25 September 2008."

34. In relation to the principle of legal certainty and consistency in decision-making, the Applicant alleges: *"The Applicant considers that this Judgment has violated the principle of legal certainty and consistency in decision-making. The demand for consistency is essential and contributes to the equal treatment of individuals who make the same or, in relevant aspects, similar demands before the Supreme Court of the Republic of Kosovo."*

35. The Applicant adds*: "The Judgment of the Supreme Court not only lacks legal reasoning but is also contrary to its case law because referring to its case law applied in the same situations it results that the Supreme Court on the occasion of addressing the issue of annual penalty interest rate has approved different decisions."*

36. In support of the allegations for violation of the right to a reasoned decision, the Applicant refers to cases from the jurisprudence of the ECHR such as *Souminen v. Finland, Tatishvili v. Russia, Van de Hurk v. The Netherlands*, etc. The Applicant also refers to the decisions of the Court, Case no. KI87/8, Applicant *IF Skadeforsikring*, Judgment of 15 April 2019; Case no. KI97 / 16, Applicant *IKK Classic*, Judgment of 11 January 2018.

37. In support of the allegationsfor consistency in decision-making and legal certainty, the Applicant refers to several decisions of the Supreme Court: (1) [E.Rev. No. 27/2018 of 24 September 2018]; (2) [E.Rev.No.23/2017 of 14 December 2017]; (3) [E.Rev.No.14/2016 of 24 March 2016]; (4) [E.Rev.No. 6/2015 of 19.03.2015]; (5) [E.Rev.No.62/2014 of 21 January 2015]; (6) [E.Rev.No. 20/2014 of 14 April 2014]; (7) [E.Rev.No-48/2014 of 13 May 2014], (8) [E.Rev.No.55/2014 of 3 November 2014].

38. In this respect, the Applicant adds: *"Based on the comparison of these Judgments of the Supreme Court, it results that this Court has continuosly and consistently applied the same legal position in respect of the determination of the legal basis regarding the application of the annual interest rate. Therefore the judgment [E.Rev.No.1/2019 dated 27.02.2019] of the Supreme Court in a completely opposite way deviates from the current case law, without providing a single line and any explanation as to why the Court*

deviates from the current legal interpretation regarding the same court matter that has been the subject of review in the Supreme Court of Kosovo. Therefore, this lack of consistency of the case law of the highest instance court in the Republic of Kosovo directly violates the principle of legal certainty of the Applicant."

39. The Applicant states: *"The Applicant considers that the failure of the Supreme Court of Kosovo to determine the legal basis regarding the determination of the annual interest rate in the field of motor liability insurance accompanied by a lack of legal reasoning related to the deviation from the practice of the Supreme Court so far in similar cases, clearly constitutes an interference with the exercise of the right to a fair trial under Article 31 of the Constitution of Kosovo and Article 6 para.1 of the ECHR regarding the reasoning of the court decision."*

40. Finally, the Applicant requests from the Court: "[...] *after the review and assessment of the Applicant's constitutional allegations, to annul the Judgment [E.Rev.No. 1/2019] of the Supreme Court, of 27.02.2019, due to a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with para.1 of Article 6(Right to a fair trial) of the European Convention on Human Rights whilst the Judgment of the Supreme Court [E.Rev.No.1/2019 of 27.02.2019] to be remanded for reconsideration."*

Relevant Legal Provisions

LAW ON OBLIGATIONAL RELATIONSHIPS NO.04/L-077

Article 281
Subrogation by law

If an obligation is performed by a person that has any legal interest therein the creditor's claim with all the accessory rights shall be transferred thereto upon performance by law alone.

SUB-CHAPTER 3

DELAY IN PERFORMANCE OF PECUNIARY OBLIGATIONS PENALTY INTEREST

Article 382
Penalty Interest

1. A debtor that is in delay in performing a pecuniary obligation shall owe penalty interest in addition to the principal.

2. The interest rate for penalty interest shall amount to eight percent (8%) per annum, unless stipulated otherwise by a separate act of law.

SUB-CHAPTER 6

TRANSFER OF INSURED PERSON'S RIGHTS AGAINST LIABLE PERSON TO INSURANCE AGENCY (SUBROGATION)

Article 960
Subrogation

1. Upon the payment of compensation from insurance all the insured person's rights against a person that is in any way liable for the damage up to the amount of the insurance payout made shall be transferred by law alone to the insurance agency.

2. If through the fault of the insured person such a transfer of rights to the insurance agency is partly or wholly made impossible the insurance agency shall to an appropriate extent be free of its obligations towards the insured person.

3. The transfer of rights from the insured person to the insurance agency may not be to the detriment of the insured person; if the insurance payout obtained from the insurance agency is for any reason lower than the damage incurred the insured person shall have the right to obtain a payment from the liable person's assets for the remaining compensation before the payment of the insurance agency's claim deriving from the rights transferred thereto.

4. Irrespective of the rule on the transfer of the insured person's rights to the insurance agency, the rights shall not be transferred thereto if the damage was inflicted by a person who is a direct relative of the insured person, a person for whose action the insured person is liable or who lives in the same household, or a person who works for the insured person, unless any of these inflicted the damage intentionally.

5. If any of those specified in the previous paragraph was insured against liability the insurance agency may demand that his/her insurance agency reimburse the amount paid to the insured person.

LAW ON COMPULSORY MOTOR LIABILITY INSURANCE
NO. 04/L-018

Article 26
Compensation claims procedure

1. The insurer shall be obliged to process, for damages to persons latest within a period of 60 (sixty) days, while for damages to property within a period of 15 (fifteen) days from the day of submission of the compensation claim, the claim shall be processed and the injured party shall be notified in writing of:

1.1. compensation offer with relevant explanations;

1.2. decision and legal reasons for rejecting the compensation claim, when the liability and the damage degree are disputable.

2. If the submitted claim is not completed by evidence and documentation necessary to render a decision on compensation, the insurer shall be obliged, latest within a period of 3 (three) days from the date of the receipt of compensation claim, to notify the injured party in writing, indicating the evidence and documentation required to supplement the claim. Time limits from paragraph 1 of this Article on insurer's obligation to process the compensation claims shall apply as of the day of receipt or the completion of claim documentation, respectively.

3. CBK will issue sub-legal act to establish the compensation procedure, including such determination when a claim is considered completed by evidence and documentation necessary to render a decision on compensation.

4. If the liable insurer fails to reply to the injured party within the time limits established under paragraph 1 of this Article, the injured party shall have the right to file a lawsuit to the competent Court.

5. If the liable insurer fails to reply to the injured party within the time limits established under paragraph 1 of this Article, the

injured party shall have the right to file a lawsuit to the competent Court.

6. In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim.

7. Provisions from paragraph 1, 2, 4 and 5 of this Article shall respectively apply in cases of compensation claims processing which shall bind the Bureau to damages based on border insurance and the Compensation Fund liabilities.

8. Special procedures and time limits under the Crete Agreement shall apply to compensation claims from the International Motor Insurance Card system.

Law on Courts No.06/L-054, which in Article 14 provides for the mechanism for fair administration of justice and review of changes in the case law.

Article 14
Competences and Reponsibilities of the President and Vide-President of the Court

"[...]

2.10. The President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices".

Rule 3 on Amending Rule on Compulsory Third Party Liability Motor Vehicle Insurance adopeted by the Governing Board of the Central Bank of the Republic of Kosovo on 25 September 2008

Section 5

Claim Settlement

5.1 Settlement

Indemnity claims of third parties based on a CTPL Insurance in accordance with provisions of this Rule, including recourse from the Guarantee Fund have to be settled within the period of 10 days of the submission of necessary proofs and relevant documentation required by the insurance company or the Guarantee Fund referring to the claimed indemnity for death, bodily injury or property damage.

The Guarantee Fund or an insurance company that fails to make a settlement of a valid claim within a period of ten (10) days as prescribed above shall pay a late payment penalty equal to 20 % yearly interest calculated from the date when the claim was reported until the date when indemnity was paid or settled.

Legal Opinion on Interest adopted at the General Meeting of the Supreme Court of the Republic of Kosovo of 1 December 2020, based on Article 26 paragraph 1 point 1.4 of the Law on Courts

FIRST PART
Applicable Law

I. *For obligational relationships that have arisen before 20.12.2012, the provisions of the Law of Obligations (Official Gazette of the SFRY, no. 29/78, 39 / 85, 57 / 89) shall apply in respect of the interest).*

II. *For obligational relationships that have arisen after 19.12.2012, the provisions of the Law on Obligational Relationships, No. 04 / L-077, Official Gazette of the Republic of Kosovo, no. 19/19, of 19.06.2012, shall apply in respect of the interest.*

SECOND PART

IV. *For obligational relationships that have arisen before 20.12.2012, the rate/amount of annual interest for all claims is set as for the funds deposited in the bank, for a period over one year, without a specific destination.*

V. *[...]*

VI. For obligational relationships that have arisen after 19.12.2012, the rate/amount of the annual interest for all claims will be set at 8%, unless otherwise provided by a special law.

IX. For creditors' claims for compensation of damage on all bases of liability when creditors are entitled to compensation of damage, the amount of interest is set according to point IV (four) and VI (six) of this legal opinion, depending on which law has been applicable (has been in force) at the time when the creditor in the capacity of debtor has performed the obligation to the third party.

Situations when the annual interest rate of 12% is applied:

- *When claims submitted to Insurance Companies, for damage to persons, are not processed within 60 days;*

- *When claims submitted to Insurance Companies, for damage to property, are not processed within 15 days;*

The reasoning of the Legal Opinion

Reasoning for point IX (nine) of the legal opinion - *In the case law, frequently appear cases of creditors for reimbursement of damages, who have fulfilled their obligations in advance to third parties, which are mainly related to insurance cases provided by local insurance companies with foreign companies. For this type of claims in the practice of the courts, there has been an interpretation and application of legal provisions in several forms regarding the degree/rate of penalty interest for cases of reimbursement claims. This has happened because the creditors when submitting claims for compensation of damage by referring to Article 26 of the Law on Compulsory Motor Liability Insurance, No.04/L-018, published in the Official Gazette no.4, on 14 July 2011, which entered into force on 30 July 2011, requested that the claim be reimbursed at an annual rate of 12%, but the Supreme Court of Kosovo in its General Session through this legal opinion has assessed that the annual rate/penalty interest f 12% cannot be applied in all cases. This is because creditors' claims for damages mainly refer to situations of civil-legal relations (non-contractual relationship for the creditor and the debtor), therefore, in such a case according to the assessment of the Supreme Court of Kosovo, the annual interest must be paid according to IV (four) and VI (six) of this legal opinion. This means that in case the creditor has performed the obligation to*

the third party, prior to 20.12.2012, the interest rate will be applied as for the funds deposited in the bank for a period over one year without a specific destination, while in case the creditor has performed the obligation to the third party after 19.12.2012, then the penalty interest shall be applied at a rate of 8%.

In addition to what is stated above, the Supreme Court considers that the rate/amount of the annual penalty interest of 12%, cannot be applied also due to the fact that according to the provisions of the Law on Compulsory Motor Liability Insurance, No.04/L-018, promulgated in the Official Gazette no. 4, on 14 July 2011, which entered into force on 30 July 2011, the annual interest rate is 12%, is taken into account due to the negligence of insurance companies (which thereupon appear as regressive creditors), because had the regressive creditors processed the claims of third parties in accordance with their legal responsibilities, the penalty interest rate of 12% could have not been applied against them in the court decisions, instead there would have been applied the degree/rate of 8% as applied for funds deposited for a period over a year without a specific destination, depending on which law has been in force at the time of the creation of the obligational relationship.

Admissibility of the Referral

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

42. In this respect, the Court refers to paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

Article 21
[General Principles]

"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

Article 113
[Jurisdiction and Authorized Parties]

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

[...]

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

43. The Court also refers to the admissibility criteria, as provided by Law. In this respect, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

44. In assessing the fulfillment of the admissibility criteria as stated above, the Court notes that the Applicant is entitled to file a constitutional complaint, by calling uponthe alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as for legal persons. (See, the cases of Court KI118/18, Applicant, *Eco Construction sh.pk*, Resolution on Inadmissibility, of 10 September

2019, paragraph 29; and KI41/09, Applicant, *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility, of 3 February 2010, paragraph 14). Consequently, the Court finds that the Applicant is an authorized party challenging an act of public authority, namely the Judgment [E.Rev. 1/19] of the Supreme Court, of 27 February 2019, after having exhausted all legal remedies provided by law.

45. The Court notes that the Judgment [E.Rev. 1/19] of the Supreme Court was served on the Applicant on 14 March 2019 whilst the Referral under review was submitted on 2 July 2019, namely within the legal deadline provided by Article 49 of the Law.

46. The Court also considers that the Applicant has clearly indicated which rights guaranteed by the Constitution and the ECHR have been violated to his detriment, pursuant to the criteria established in Article 48 of the Law.

47. Therefore, the Court comes to the conclusion that the Applicant is an authorized party; which has exhausted all legal remedies; it has respected the requirement of submitting the request within the legal deadline; has accurately clarified the alleged violations of fundamental human rights and freedoms, and specified which concrete act of the public authority is being challenged.

48. Taking into consideration the Applicant's allegations and its arguments, the Court considers that the Referral raises serious constitutional issues and their determination depends on review of the merits of the Referral. Also, the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 39 of the Rules of Procedure and no other grounds have been established to have the Referral declared inadmissible (see, the case of Constitutional Court No. KI97/ 16, Applicant *IKK Classic*, Judgment of 4 December 2017).

49. The Court declares the Referral admissible for review based on the merits.

Merits of the Referral

50. The Court recalls that the Applicant alleges a violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant alleges that the challenged Judgment of the Supreme Court violates his rights to a reasoned decision which has subsequently caused also the violation of the principle of legal certainty. According to the Applicant, these violations have occurred

because the Supreme Court in its Judgment did not provide sufficient and adequate reasoning for the change of position in respect of the calculation of penalty interest, a position which it has until then consistently applied in its practice.

51. The Applicant further alleges that the fact as to the legal basis on which the Supreme Court has based its judgment on the change of the interest rate adjudicated by the lower instance courts remains unclear and unreasoned.

52. The Applicant adds that the Judgment of the Supreme Court lacks the relevant reasoning on the new approach in this case, regarding the institution of penalty interest in the legal relationships of compulsory motor liability insurance, because in the practice so far the Supreme Court had decided differently in the same cases.

53. Taking into consideration the allegations raised in the Referral under review, the Court refers to Article 31 (1) and (2) [Right to Fair and Impartial Trial] of the Constitution, which provides that:

> *"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".*

54. The Court also refers to Article 6 (1) (Right to a fair trial) of the ECHR, which provides:

> *"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."*

55. The Court reiterates that on the basis of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution in accordance with the case law of the ECtHR. Consequently, in regard to the allegations raised for violation of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR, the Court will refer to the general principles established in the consolidated jurisprudence of the ECHR.

(i) General principles regarding the right to a reasoned court decision

56. The Court recalls, first of all, that the guarantees embodied in Article 6 paragraph 1 of the ECHR include the obligation of the courts to provide sufficient reasons for their decisions. A reasoned court decision shows to the parties that their case has indeed been examined (see the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph).

57. The Court also emphasizes that according to the case law of the ECtHR, Article 6 paragraph 1 obliges courts to reason their decisions, however, this cannot be interpreted in such a way as to require the courts to provide a detailed answer to each allegation (see, the cases of the ECtHR, *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994, paragraph 61; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 26; *Jahnke and Lenoble v. France*, Decision on Admissibility, of 29 August 2000).

58. In this regard, the ECtHR adds that even though the domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it also obliged to justify its actions by giving reasons for its decisions (see case of the ECtHR, *Suominen v. Finland*, Judgment of 1 July 2003, paragraph 36).

59. The Court also states that, in accordance with the ECtHR case law, when examining whether the reasoning of a court decision meets the standards of the right to a fair trial, the circumstances of the particular case should be taken into account. The court decision cannot be without any reasoning, nor can the reasoning be unclear. This applies in particular to the reasoning of the court decision when deciding upon the legal remedy in which the legal positions presented in the decisions of the lower instance court have been changed (see, *Van de Hurk v. the Netherlands,* cited above, paragraph 61).

60. The Court wishes to reiterate that the notion of a fair trial, in accordance with the case law of the ECtHR, requires that a national court which has given sparse reasons for its decisions, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings (see, the ECtHR case *Helle v. Finland*, Judgment of 19 December 1997, para. 60).

61. The Court also refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (see, the cases of Constitutional Court: no. KI72/12, Applicants *Veton Berisha dhe Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI 97/16, Applicant *IKK Classic*, Judgment of 11 January 2018).

(ii) General principles related to the legal certainty and consistency of the case law

62. The ECtHR in its case-law has established that it is not its function to deal with errors of fact or law allegedly committed by a domestic court, unless and in so far as such errors may have infringed the rights and freedoms protected by the ECHR (see *García Ruiz v. Spain*, cited above, paragraph 28). Nor is it its function to compare, except in cases of apparent arbitrariness, the different decisions of national courts, even if given in apparently similar proceedings, it must respect the independence of those courts (see, the case of ECtHR *Ādamsons v. Latvia*, Judgment of 24 June 2008, paragraph 118).

63. The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the ECHR (see ECHR cases *Santos Pinto v. Portugal*, Judgment of 20 May 2008, paragraph 41; and *Tudor Tudor v. Romania*, cited above, paragraph 29).

64. However, the ECtHR, in its case law has established the criteria which it uses to assess whether the contradictory decisions(deviations from the practice) of the national courts, adjudicating in the last instance, violate the requirement of a fair trial provided for by Article 6 paragraph 1 of the ECHR, and those criteria are: ***(i)*** *whether "profound and long-standing differences" exist in the case-law of the national courts;* ***(ii)*** *whether the domestic law provides for a mechanism to overcome these divergences, and* ***(iii)*** *whether that mechanism has been applied and, if so, to what extent* (see the cases of the ECtHR, *Iordan Iordanov and Others v. Bulgaria*, Judgment of

2 July 2009, paras. 49-50; *Beian v. Romania* (no.1), Judgment of 6 December 2007, paras.34-40; *Ştefan and Ştef v. Romania*, Judgment of 27 January 2009, paras. 33-36; *Schwarzkopf and Taussik v Czech Republic*, Decision on Admissibility, of 2 December 2008; *Tudor Tudor*, cited above, paragraph 31; and *Ştefănică and Others v. Romania*, Judgment of 2 November 2010, paragraph 36).

(iii) Application of general principles of a reasoned decision and legal certainty to the circumstances of the present case

65. The Court notes that the Applicant's main appellate allegation is that the Supreme Court did not provide clear and sufficient reasons on which it has based its decision to change the judgments of the lower courts, in respect of the calculation of the penalty interest rate in the Applicant's case and did not reason why it had issued a different decision compared to its previous practice, thus infringing the principle of legal certainty guaranteed by Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR.

66. The Court considers that in the present case the allegations for a reasoned decision and legal certainty, due to the nature of the case and their interrelationship, must be examined in the context of a single reasoning. The Court recalls that the Supreme Court (Judgment E.Rev. 1/19) accepted the respondent's revision only in respect of the decision on the approved interest and amended the Judgment (Ae. No. 240/2016) of the Court of Appeals, of 5 November 2018, and Judgment (III. C. no. 150/2015) of the Basic Court, of 26 September 2016.

67. In this regard the Supreme Court stated: "*("(I) the revision of the respondent, the Insurance Company "Elsig" in Prishtina, submitted against the Judgment Ae.No.57/2013 of the Court of Appeals of Kosovo, of 10.6.2014 is hereby REJECTED as unfounded; (II) The revision of the respondent is accepted only in respect of the decision on the approved interest, and the Judgment Ae.no.24/2016 of the Court of Appeals of Kosovo, of 05.11.2018, and Judgment III. C. No. 150/2015 of the Basic Court in Prishtina-Department for Commercial Matters, of 26.09.2016 are amended, so that the respondent is obliged to pay to the claimant the interest at the rate of 8% on the adjudicated amount of 80, 03704 Euros, starting from 11.03.2014 onwards until the complete payment of the debt".*

68. In this regard, the Court reiterates that the Applicant has submitted eight (8) decisions of the Supreme Court in similar cases dealing with debt regression and penalty interes in support of his allegation for

violation of the principle of legal certainty: (1) [E.Rev.No.27/2018 of 24 September 2018]; (2) [E.Rev.No.23 / 2017 of 14 December 2017], (3) [E.Rev.No.14/2016 of 24 March 2016]; (4) [E.Rev.No. 6/2015 of 19.03.2015], (5) [E.Rev.No.62/2014 of 21 January 2015], (6) [E.Rev.No.20/2014 of 14 April 2014]; (7) [E.Rev.No-48/2014 of 27 October 2014], (8) [E.Rev.No.55/2014 of 3 November 2014].

69. In the following, the Court will reproduce the relevant parts of some of the above decisions.

70. In the relevant part of the Judgment E.Rev.no. 20/2014 of 14 April 2014, the Supreme Court had reasoned: *"Even the revision claims of the respondent that the courts of lower instance have erroneously applied the substantive law when accepting the claimant's right to interest on the approved amount at the rate of 12% per annum are unfounded, because the courts of the lower instance have correctly applied the substantive law, specifically the provision of Article 277 of the LOR in conjunction with Article 26 point 6 of the Law on Compulsory Motor Liability Insurance No. 04 / L-018 whereby it is provided that in the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim*".

71. In the relevant part of the Judgment E. Rev. no. 62/2014 of 21 January 2015, the Supreme Court had reasoned: *"This Court assesses that the court of the second instance has correctly applied the substantive law when accepting the respondent's right to the interest on the amount of the main debt at the rate of 12% by calculating from 14.6.2010 until the definitive payment because according to the provision of article 277 of the LOR in conjunction with Article 26.6 of the Law on Compulsory Motor Liability Insurance No. 04/L-018, the envisaged interest at the rate of 12% per annum is calculated for each day of delay until the complete payment of compensation by the insurer, counting from the date of the claim for compensation being submitted."*

72. In the relevant part of the Judgment E.Rev. 23/2017 of 14 December 2017, the Supreme Court had reasoned: *"This interest rate was foreseen until the entry into force of the Law on Compulsory Motor*

Liability Insurance (No.04/L-018) which entered into force on 30.07.2011 and this date should be calculated interest of 12% based on Article 26, point 6. The court of the second instance has calculated the interest on the adjudicated amount at the rate as paid by the banks for the funds deposited for a period over one year without a certain destination as well as the interest on the basis of Rule 3 of the Central Bank of Kosovo (CBK) and the Law on Compulsory Motor Liability Insurance."

73. In the the relevant part of the Judgment E.Rev.No.55/2014 of 3 November 2014, the Supreme Court had reasoned: *"The Judgment Ae.nr.46/2013 of the Court of Appeals of Kosovo, of 10.05.2014 had rejected the respondent's appeal and upheld the Judgment C.no.282/2012 of the Commercial Court of the Prishtina District, of 09.10.2012, approving the claimants' statement of claim and obliging the respondent to pay the amount of 14,041.58 € in the name of regressive debt along with the annual interest at the rate of 12% [...] The Supreme Court of Kosovo, having reviewed the case file and the challenged judgment, pursuant to the provision of Article 215 of the LCP, assessed that: The revision is unfounded.".*

74. In the the relevant part of the Judgment E.Rev.no.48/2014 of 27 October 2014, the Supreme Court had reasoned: *"This Court considers that the courts of the lower instance have correctly applied the substantive law when accepting the claimant's right to interest on the amount of the main debt at the annual rate of 20% starting from 19.11.2010 until 28.07.2011 and at the interest rate of 12% starting from 29.07.2011 until the definitive payment because according to the provision 277 of LOR and Article 26.6 of the Law on Compulsory Motor Liability Insurance No. 04/L-018, it is provided that in the event of non-compliance with the time limits from paragraph 1 of this Article, and non-fulfillment of the obligation of the advance payment under paragraph 4 of this Article, the liable insurer shall be considered to be late in fulfilling the compensation obligation, hence it will be charged with an interest rate. This interest rate shall be paid at twelve (12%) percent of the annual interest rate and shall be counted for each day of delay until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim."*

75. In the relevant part of the Judgment E. Rev.no.6/2015, of 19 March 2015, the Supreme Court in had reasoned: *"By the Judgment Ae.no.162/2013 of the Court of Appeals of Kosovo, of 10.06.2014, the appeal of the respondent was rejected as ungrounded, whilst the Judgment C.no.339/2019 of the Basic Court in Prishtina-Department*

for Commercial Matters, of 16.07.2013 was upheld, whereby the claimant's statement of claim was approved as grounded, and the respondent was obliged to pay the amount of 17,924, 35 €, in the name of compensation for damage-casco regression relating to the repair of the damaged vehicle type "BMW 5" with license plates ES VS 2009, involved in the accident of 25.08.2009, whose owner was V.J. who had insured this vehicle with the respondent with casco insurance, along with a penalty interest of 12% starting from 22.07.2010 until the definitive payment and the costs of proceedings in the amount of 1,134.29 € [...] The Supreme Court of Kosovo, having reviewed the second instance judgment challenged by revision, pursuant to the Article of the Law on Contested Procedure (LCP), found that: The respondent's revision is unfounded."

76. In the relevant part of the Judgment E.Rev.no.14/2016 of 24 March 2016, the Supreme Court had reasoned: *"By the Judgment Ae.no.40/2015 of the Court of Appeals of Kosovo, of 11.12.2015, the appeal of the respondent was rejected as unfounded while the judgment C.no.544/2013 of the Basic Court in Prishtina-Department for Commercial Matters, of 23.12.2014 was upheld, which in its part I of the enacting clause had approved the claimant's statement of claim as grounded seeking to oblige the Insurance Company "Insig" having its seat in Prishtina, to compensate the claimant in the amount of 42,243.41 €, in the name of regression from motor liability insurance with an interest rate of 12% per annum, calculated from 14.1.2010 until the definitive payment, within a term of 7 days from the day of the service of this judgment [...] The Supreme Court of Kosovo, having reviewed the judgment challenged under Article 215 of the LCP, has found that: The revision is unfounded."*

77. In the relevant part of the Judgment E.Rev.no.27/2018 of 24 September 2018, the Supreme Court had reasoned*: "Whereas, the Supreme Court of Kosovo, considers that the judgment of the court of the second instance, in respect of the adjudicated interest, was issued by erroneous application of substantive law, therefore, it changed the same in this part, by upholding the judgment of the court of the first instance. This is for the reason that the court of the first instance has correctly applied the substantive law when accepting the claimant's right to interest at the rate of 20% starting from 24.11.2011, until 29.07.2011 and interest at the rate of 12% starting from 29.07.2011 until the definitive payment because according to the provision of Article 277 of the LOR and Article 26.6 of the Law on Compulsory Motor Liability Insurance, which provision provides that in the event of non-compliance with the time limits from paragraph 1 of this Article, and non-fulfillment of the obligation of the advance payment*

under paragraph 4 of this Article, the liable insurer shall be considered to be late in fulfilling the compensation obligation, hence it will be charged with an interest rate. This interest rate shall be paid at twelve (12%) percent of the annual interest rate and shall be counted for each day of delay until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim."

78. Based on above, the Court will use the test prescribed by the jurisprudence of the ECtHR which determines: (i) whether "profound and long-standing diferencës" exist in the case-law of the national courts; (ii) whether the domestic law provides for a mechanism to overcome these divergences, and (iii) whether that mechanism has been applied and, (iv) if the challenged decision of the Supreme Court meets the criteria of a reasoned decision in accordance with the jurisprudence of the ECtHR and of this Court.

79. The Court again refers to the Law on Courts No. 06/L-054, which in Article 14 provides for the mechanism for a fair administration of justice and review of changes in the case law.

> *Article 14*
> *Competences and Reponsibilities of the President and Vice-President of the Court*
>
> *"[...]*
> *2.10. the President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices*."

80. The Court reiterates that in its case law on many occasions it has held that questions of fact and questions of interpretation and application of law are within the domain of the regular courts and other public authorities within the meaning of Article 113.7 of the Constitution and as such are a matter of legality, unless and in so far, such questions result in a breach of fundamental human rights and freedoms or create an unconstitutional situation. (see, *inter alia*, the case of Constitutional Court No. KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2018, paragraph 91).

81. The Court considers that the Supreme Court is the last and highest instance of the regular judiciary, and as such, it should take care of the harmonization of the case law in the Republic of Kosovo as well as the fair administration of justice. It is the obligation of the Supreme Court

that in relevantly identical cases, to the extent possible, its decisions be predictable and characterized by the regularity of the results. The predictability and regularity of Supreme Court decisions would be equal to the benefit of the complainants and the lower instance courts.

82. The Court notes that the Supreme Court in the challenged Judgment has determined: (i) that the legal provisions relevant to the Applicant's case are Article 382 of the LOR in conjunction with Article 26.7 of the Law on Motor Liability; (ii) that the interest of 12% does not apply in cases of debt regression but only when addressing the claims for damages of the injured persons in extrajudicial proceedings; (iii) that the interest of 12% applies only to non-processing and delays in processing the claims for compensation of the injured persons and not for debt regression; and, that (iv) for these reasons, the Applicant is entitled to the penalty interest as provided for in Article 382 of the LOR (8%) and not to the "qualified" interest (12%).

83. In this respect, the Court refers to the relevant part of the judgment of the Supreme Court, which states: *"... the judgment of the court of the first and second instance concerning the part relating to the adjudicated interest contains an erroneous application of the substantive law from Article 382 of the LCT in conjunction with Article 26.7 of the Law on Compulsory Motor Liability Insurance [...] the erroneous application of the substantive law consists in the fact that as stated above, the claimant's statement of claim for damages as well as the claim was submitted at the time when the Law on Compulsory Motor Liability Insurance has entered into force. The interest approved by the courts of the lower instances is not legally applied in debt regression disputes, but only in the claims for compensation of damage of the injured persons in the extrajudicial proceedings as provided for in Article 26 of the said law and Article 5.1 of the CBK Rule No. 3 on Amending Rule on Compulsory Third Party Liability Motor Vehicle Insurance of 25 September 2008, provisions which the courts of the lower instance have referred to. Those interest rates which have been applied by the court of the first and second instance are foreseen in order to discipline the insurance companies in the insurance relationships against the claims for compensation of the injured persons, which the insurance companies are obliged to handle on an urgent basis within the deadlines provided for by the above provisions. Paragraph 7 of Article 26 of the Law on Compulsory Motor Liability Insurance, excludes the application of the interest rate of 12% for debt regression, this interest is provided only for non-processing and the delay in processing the claims for compensation of the injured persons. Based on this it*

results that the claimant is entitled only to the penalty interest provided for in Article 382 of the LOR and not to the "qualified" interest according to the provisions applied by the court of the first and the second instance. Given that the claimant with the submission of 11.3.2014 has requested the debt regression from the respondent, it turns out that from this date the respondent has been in delay since it failed to fulfil the obligation within the deadline until the definitive payment".

84. The question of whether the Applicant is entitled to 12% or 8% of the penalty interest is a matter of application and interpretation of the law and of the discretion of the Supreme Court, and as such, they do not come in itself, in contradiction with the right to a fair and impartial trial, unless there results to exist a flagrant breach of fundamental human rights and freedoms, which obviously has not occurred in the case under review.

85. Based on the foregoing, the Court considers that the Supreme Court has provided the legal basis and explained in which cases does the legal norm determining the penalty interest of 12% respectively of 8% apply and why in the Applicant's case is applied the norm that determines the penalty interest of 8%. In the challenged judgment of the Supreme Court, there is a logical connection between the legal basis, the reasoning and the conclusions drawn which means that the challenged judgment contains all the components of a reasoned decision.

86. In regard to the consistency of the case-law, based on the triple test established by the ECtHR, the Court finds: (i) that in the present case the existence of "deep and long-standing" differences regarding the consistency of the case-law of the Supreme Court has not been proved; (ii) that there is a mechanism for a fair administration of justice and for review of changes in the case law (see, the Law on Courts No.06/L-054, Article 14. 2.10); and that; (iii) on 1 December 2020, the Supreme Court has issued a "Legal Opinion on Interest related to the Applicable Law, Interest Rate and Calculation Period" based on Article 14. 2.10 of the Law on Courts.

87. In this regard, the Court underlines that Article 31 of the Constitution in connection with Article 6 (1) of the ECHR does not grant the acquired right to the consistency of the case law. The development of the case law, in itself, is not contrary to the fair administration of justice as the failure to maintain a dynamic and evolutionary approach would hinder the reform or improvement (see, the ECtHR cases *Nejdet Şahin and Perihan Şahin v. Turkey*, Judgment of 20 October 2010, paragraph 58; *Lupeni Greek Catholic Parish and Others v.*

Romania, Judgment of 29 November 2016, paragraph 116). Differences in the case law are, by nature, an inherent consequence of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. The role of the Supreme Court is precisely to resolve such conflicts (see the case of the ECHR, Beian v. Romania (no. 1), cited above, paragraph 37).

88. With regard to the decisions of the Supreme Court which were submitted by the Applicant in order to demonstrate the conflicting positions of the Supreme Court and to compare them with the challenged Judgment in the present case, the Court states that it is not its function to compare those decisions with the challenged judgment, except in cases of apparent arbitrariness, which did not occur in the circumstances of the present case, in particular, by taking into consideration the respect for the independence of the regular courts (see, *mutatis mutandis*, the case of the ECtHR, *Ādamsons v. Latvia*, cited above, paragraph 118).

89. In view of the above, the Court concludes that the challenged Judgment of the Supreme Court is in compliance with the right to a reasoned decision and the principle of legal certainty because: (i) it explains that the interest rate of 12% is applied only for non-processing and delays in processing the claims for compensation of the injured persons and not for debt regression; (ii) the Applicant is entitled to the interest envisaged under Article 382 of the LOR at the rate of 8% and not to the "qualified" interest at the rate of 12% and, that (iii) the Supreme Court on 1 December 2020 has issued the "Legal Opinion on Interest related to the Applicable Law, Interest Rate and Calculation Period" based on Article 14. 2.10 of the Law on Courts.

90. Consequently, the Court finds that there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

Conclusion

91. In relation to the allegation for violation of the right to a reasoned decision, the Court assessed that the Supreme Court (i) has provided the legal basis and explained why in the Applicant's case is applied the penalty interest at the rate of 8%; (ii) the challenged judgment of the Supreme Court contains a logical connection between the legal basis, the reasoning and the conclusions drawn; (iii) as a logical consequence between the legal basis, the reasoning and the conclusions it has resulted that the challenged judgment of the Supreme Court meets the condition of a reasoned decision; and, that (iv) whether the Applicant

is recognized the right to 12% or 8% of the penalty interest is a matter of application and interpretation of the law and of the discretion of the Supreme Court, and as such, in itself, they do not come into contradiction with the right to a fair and impartial trial.

92. In relation to the allegation for a violation of the principle of legal certainty, the Court found: (i) that in the present case the existence of "deep and long-standing" differences in respect of the consistency of the case law of the Supreme Court has not been proved; (ii) that there is a mechanism that provides for a fair administration of justice and review of changes in the case law (see, the Law on Courts No. 06/L-054, Article 14. 2.10); (iii) The Supreme Court on 1 December 2020 has issued a "Legal Opinion on Interest related to the Applicable Law, Interest Rate and Calculation Period" based on Article 14. 2.10 of the Law on Courts (iv) that the possibility of conflicting decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction; (v) the question as to which law is to be applied in the circumstances of the present case is the prerogative and duty of the Supreme Court; and, that (v) the role of the Supreme Court is precisely to resolve such conflicts.

93. Finally, the Court finds that, in the circumstances of the present case, there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 and 21.4 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the sesion held on 28 April 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible in a unanimous manner;

II. TO HOLD, by majority vote, that the Judgment E E. Rev. no. 1/2019 of the Supreme Court of the Republic of Kosovo, of 27 February 2019, is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of

Kosovo and Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO NOTIFY this decision to the Parties, and in accordance with Article 20.4 of the Law, to have the decision published in the Official Gazette;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Arta Rama-Hajrizi

KI235/19, Applicant: Insurance Company "Allianz Suisse Versicherungs- Gesellschaft AG" Constitutional review of Judgment [E. Rev. No. 32/2019] of the Supreme Court, of 31 July 2019

KI235/19, Judgment adopted on 28 April 2021, published on 16 June 2021

Keywords: *individual referral, right to fair and impartial trial, consistency of case law, legal certainty, right to a reasoned decision*

The circumstances of this case are related to an accident of 2009, in which, the Applicant's insured, namely Sh.Z., lost her life. Liability for the accident fell on H.K., a BKS insured, who was convicted of the criminal offense of endangering public traffic in 2010. The Applicant compensated the family of the deceased in the amount of 36,000.00 euro. Regarding this amount in 2015, the Applicant addressed the BKS with a request for compensation on the basis of the right to subrogation determined through the LOR, and in the absence of an agreement, addressed the Basic Court by a lawsuit. The Basic Court and the Court of Appeals recognized the right to the Applicant, confirming the obligation of the BKS to compensate the Applicant in the abovementioned amount and also the obligation to pay interest of twelve percent (12%) per year, starting from 5 June 2015 until the final payment. The Supreme Court had also finally confirmed the Applicant's right to respective compensation on the basis of subrogation, but modified the Judgment of the Basic Court and that of the Court of Appeals, regarding the default interest. The Supreme Court determined that the annual interest rate should be eight percent (8%) per year, based on Article 382 of the LOR and not twelve percent (12%) per year, based on Article 26 of the Law on Compulsory Insurance, as decided by the lower instance courts. This finding of the Supreme Court, regarding the amount of default interest, was challenged by the Applicant before the Court, alleging a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, on the grounds of (i) violation of the principle of legal certainty, as a result of divergence in the relevant case law of the Supreme Court; and (ii) lack of a reasoned court decision.

The Court assessed the Applicant's allegations regarding legal certainty and the right to a reasoned decision, as one of the guarantees established in Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, basing this assessment on the case law of the European Court of Human Rights (hereinafter: the ECtHR). The Court elaborated on the general principles deriving from the ECtHR and its case law regarding judicial consistency and the right to a reasoned decision.

With regard to the allegation of violation of the principle of legal certainty, the Court found: (i) that in the case under review the existence of "profound and long standing" differences regarding the consistency of the case law of the Supreme Court has not been proven; (ii) that there is a mechanism for the proper administration of justice and for reviewing changes in case law; (iii) the Supreme Court on 1 December 2020 issued a "Legal Opinion on Interest on the Applicable Law, Amount and Time Period of Calculation" based on Article 14, paragraph 2, point 10 of the Law on Courts; (iv) that the possibility of conflicting decisions is an inherent trait of any judicial system which is based on a network of basic and appeal courts with authority over the area of their territorial jurisdiction; (v) what law should be applied in the circumstances of the present case is the prerogative and duty of the Supreme Court; and, that (v) the role of the Supreme Court is precisely to resolve such disputes.

Regarding the allegation of violation of the right to a reasoned decision, the Court assessed that the Supreme Court (i) has provided the legal basis and has explained why in the Applicant's case the norm setting the default interest rate of 8% applies; (ii) the challenged judgment of the Supreme Court contains a logical connection between the legal basis, the reasoning and the conclusions drawn; (iii) as a logical consequence between the legal basis, the reasoning and the conclusions it has resulted that the challenged judgment of the Supreme Court meets the requirement of a reasoned decision; and, (iv) if the Applicant is recognized the right to 12% or 8% of the default interest is a matter of application and interpretation of law and at the Supreme Court's discretion, and as such, in itself, do not conflict with the right to a fair and impartial trial.

Finally, the Court found that, in the circumstances of the present case, there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6.1 (Right to a fair trial) of the ECHR.

JUDGMENT

in

Case No. KI235/19

Applicant

"Allianz Suisse Versicherungs- Gesellschaft AG"

Constitutional review of Judgment E. Rev. No. 32/2019 of the Supreme Court of Kosovo of 31 July 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the insurance company "*Allianz Suiss Versicherungs- Gesellschaft AG*" with its seat in Zurich of Switzerland, represented by ICS Assistance L.L.C., through Besnik Mr. Nikqi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges constitutionality of Judgment [E. Rev. No. 32/2019] of 31 July 2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ae. No. 289/2017] of 31 January 2019 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [I. C. No. 238/2015] of 31 October 2017 of the Department for the Commercial Matters of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The challenged Judgment of the Supreme Court was served on the Applicant on 21 August 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 20 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 30 December 2019, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban.

8. On 20 January 2020, the Court notified the Applicant about the registration of the Referral and requested him the power of attorney for representation.

9. On 3 February 2020, the Applicant submitted to the Court the power of attorney for representation.

10. On 4 February 2020, the Court notified the Supreme Court about the registration of the Referral and sent it a copy of the Referral.

11. On 22 October and 24 November 2020, respectively, the Court sent a letter to the Supreme Court, regarding a number of cases submitted to the Court challenging Judgments of the Supreme Court pertaining to the determination of default interest in cases of claims for compensation of damage based on the right to subrogation as a result of traffic accidents caused in the Republic of Kosovo. Clarifying that the respective cases before the Court, *inter alia*, challenge the violation of legal certainty, as a result of conflicting decisions of the Supreme Court in similar cases, the Court requested clarification whether (i) the Supreme Court has issued a principled position regarding compensation of damage and setting default interest in relation to claims under the right of subrogation; and if this is not the case (ii) to notify the Court regarding the case law of the Supreme Court, in what cases Article 382 (Penalty interest) of Law no. 04/L-077 on Obligational Relationships (hereinafter: the LOR) is applied and in what cases paragraph 6 of Article 26 (Compensation claims procedure) of Law no. 04/L-018 on Compulsory Motor Liability Insurance (hereinafter: the Law on Compulsory Insurance) is applied.

12. On 18 November 2020, the Court (i) requested from the Basic Court the complete case file; and (ii) notified the Kosovo Security Bureau (hereinafter: the KSB) about the registration of the Referral and enabled it to submit comments, if any, to the Court.

13. On 19 November 2020, the Basic Court submitted the complete case file to the Court.

14. On 1 December 2020, the Supreme Court (i) before the Court clarified the issues raised through the abovementioned letter; and (ii) submitted to the Court the Legal Opinion on the Interests of 1 December 2020 of the Supreme Court (hereinafter: the Legal Opinion of the Supreme Court).

15. On 28 April 2021, the Review Panel considered the report of Judge Rapporteur Gresa Caka-Nimani and, unanimously, recommended to the Court the admissibility of the Referral and the assessment of the case on merits.

16. On the same date, the Court unanimously voted that the Referral is admissible; but by a majority of votes, found 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 6.1 (Right to a fair trial) of the European Convention on Human Rights.

17. On the same date, the Judge Rapporteur in accordance with paragraph (4) of Rule 58 (Deliberations and Voting), of the Rules of Procedure considering that he was not among the judges that found as above, asked the President of the Court that another judge be appointed, by a majority, to prepare the Judgment without constitutional violation.

18. On the same date, in accordance with the abovementioned rule, the President of the Court appointed Judge Safet Hoxha, as one of the judges of the Review Panel, to prepare the Judgment without constitutional violation.

19. On xx xx xx, Judge Safet Hoxha presented the Judgment before the Court.

Summary of facts

20. On 16 September 2009, Sh.Z., who was insured by the Applicant, lost her life as a result of a traffic accident caused by H.K., who was insured by BKS. The family of Sh.Z. was compensated by the Applicant in the amount of 36,000.00 euro.

21. Based on the case file it also results that (i) BKS and the family of Sh.Z. had reached an out-of-court settlement for compensation of material and non-material damage related to the above mentioned accident in the amount of 27,000 euro; (ii) on 10 March 2015, the Applicant addressed the BKS, that on the basis of the right to subrogation defined by Article 280 (Performing with transferring the rights to perfomer (subrogation)) of the LOR, be reimbursed the amount of 36,000.00 euro; and (iii) considering that this request was not met, on 5 June 2015, the Applicant filed a lawsuit with the Basic Court.

22. On 31 October 2017, the Basic Court by the Judgment [I. C. No. 238/2015], (i) approved the Applicant's statement of claim; (ii) obliged the BKS, based on the relevant expertise, to pay to the Applicant the amount of compensation of 36.000.00 euro; (iii) obliged the BKS to pay to the Applicant the interest of twelve percent (12%) per year, starting from 5 June 2015 until the final payment; and (iv) obliged the BKS to pay the costs of the proceedings. The Basic Court, by its Judgment, justified the determination of a penalty interest of twelve percent (12%) per year, based on paragraph 6 of Article 26 of the Law on Compulsory Insurance.

23. The Basic Court, by the abovementioned Judgment, addressed, *inter alia*, (i) the allegations regarding the statute of limitations for the lawsuit filed before it by the BKS; and (ii) those relating to the

determination of the amount of default interest. With regard to the first case, the relevant Judgment clarifies that based on Article 377 (Claiming Damages for Injury or Loss Caused by a Criminal Offence) of the Law on Obligations of 1978 (hereinafter: the old LOR), considering that the damage was caused by a criminal offense, as confirmed by Judgment [P. No. 212/09] of 15 May 2010 of the District Court in Prizren, by which the person H.K. was convicted for the criminal offense of endangering public traffic defined by paragraph 5 of Article 297 (Endangering Public Traffic) of the Provisional Criminal Code of Kosovo, the statute of limitations set for the respective criminal offenses apply and consequently in the circumstances of the case, the claim does is not statute-barred. Regarding the second issue, the relevant Judgment clarifies that the default interest of twelve percent (12%) per year, is determined through paragraph 6 of Article 26 of the Law on Compulsory Insurance.

24. On 13 November 2017, the BKS filed an appeal with the Court of Appeals against the abovementioned Judgment of the Basic Court, alleging essential violation of the provisions of the contested procedure, erroneous or incomplete determination of factual situation and erroneous application of substantive law, proposing that the challenged Judgment be modified or quashed and that the matter be remanded for retrial. Whereas, on 17 November 2017, the Applicant responded to the complaint and proposed that the BKS complaint be rejected as ungrounded. The appeal and response to the appeal, *inter alia*, argue and counter-argue issues related to (i) the statute of limitations on the statement of claim; (ii) the active legitimacy of the claimant, namely the applicant; and (iii) erroneous determination of factual situation. Regarding the amount of default interest, the Applicant stated that based on Article 382 of the LOR, the amount of default interest is eight percent (8%) per year, unless otherwise provided by special law, while in matters related to Compulsory Motor Third Party Liability Insurance, a special law is the Law on Compulsory Insurance, based on Article 26 of which, the amount of default interest is twelve percent (12%) per year.

25. On 31 January 2019, the Court of Appeals, by Judgment [Ae. No. 289/2017], rejected as ungrounded the appeal of the BKS and upheld the Judgment of the Basic Court.

26. On 13 March 2019, the BKS filed an appeal against the Judgment of the Court of Appeals with the Supreme Court, alleging essential violation of the provisions of the contested procedure and erroneous application of substantive law, proposing that the revision be upheld as grounded and the Judgment of the lower courts be annulled and the

matter be remanded for retrial. The Applicant, on 2 April 2019, submitted a response to the revision and proposed that it be rejected as ungrounded.

27. On 31 July 2019, the Supreme Court by Judgment [E. Rev. No. 32/2019] of (i) rejected as ungrounded the revision of the BKS regarding the principal debt on the basis of subrogation; while (ii) accepted as grounded the revision regarding the default interest, obliging the BKS to pay the interest of eight percent (8%) from 5 June 2015 until the final payment. In the context of the latter, the Supreme Court reasoned, *inter alia,* that (i) paragraph 7 of Article 26 of the Law on Compulsory Insurance, "*excludes the application of 12% interest for debt repayment, this interest provided only for non-treatment and the delay in processing the claims of injured persons for compensation*"; and consequently, (ii) the claimant, namely the Applicant, is entitled only to the default interest of eight percent (8%) per year, provided by Article 382 of the LOR.

Applicant's allegations

28. The Applicant alleges that the Judgment [E. Rev. No. 32/2019] of 31 July 2019 of the Supreme Court was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant specifically alleges (i) a violation of the principle of legal certainty as a result of divergence in the relevant case law of the Supreme Court; and (ii) violation of the right to a reasoned court decision regarding the modification of the Judgments of the Basic Court and that of the Court of Appeals, as to the amount of the default interest.

29. Regarding the allegations related to the violation of legal certainty, namely the divergence in the case law of the Supreme Court regarding the determination of default interests in cases of compulsory motor third party liability insurance, the Applicant states that (i) by modifying the Judgments of lower instance courts the Supreme Court and the Court of Appeals, the Supreme Court acted contrary to its case law. In this context, the Applicant refers to the three Judgments of the Supreme Court, as follows: (i) Judgment [E. Rev. No. 22/2019] of 1 August 2019; (ii) Judgment [E. Rev. No. 27/2018] of 24 September 2018; and (iii) Judgment [E. Rev. 23/2017] of 14 December 2017. In support of his allegations of violation of the principle of legal certainty, the Applicant refers to the case of Court KI87/18, Applicant *IF Skadeforsikring*, Judgment of 26 February 2019 (hereinafter: the case of the Court KI87/18).

30. Regarding the allegations related to the lack of a reasoned court decision, the Applicant states that the challenged Judgment (i) modified the Judgment [Ae. nr. 289/2017] of 31 January 2019 of the Court of Appeals regarding the default interest, without beng based on the respective legal provisions; (ii) has not justified the departure from the case law of the Supreme Court regarding the amount of default interest "*in identical court cases*"; (iii) has not clarified the selective application of the Law on Compulsory Insurance, applying the same, namely paragraph 6 of its Article 26 when determining the moment of delay of the debtor, while applying the provisions of the LOR instead of Article 26 of the Law on Compulsory Insurance when determining the amount of default interest, and that consequently, the relevant reasoning is contrary to the principle "*lex specialis derogat legi generali*"; (iv) refers to "*simple interest*" and "*qualified interest*" without any basis on the Law on Compulsory Insurance; and (v) determines the difference between debt regress disputes and claims of injured parties for damages in out-of-court proceedings, without any legal basis because the provisions referred to by the Supreme Court, namely Article 26 of the Law on Compulsory Insurance and paragraph 1 Article 5 (Claims settlement) of Rule 3 on Amending the Rule on Compulsory Motor Liability Insurance (hereinafter: Rule 3), do not establish this distinction.

31. In his allegations, the Applicant has elaborated on the basic principles of the right to a reasoned court decision as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and in support of these arguments, the Applicant also referred to the case law (i) of the Court in cases KI55/09, Applicant *NTSH Meteorit*, Judgment of 3 December 2010; KI135/14, Applicant *IKK Classic*, Judgment of 10 November 2015; KI97/16, Applicant *IKK Classic*, Judgment of 4 December 2017; and KI87/18, cited above, and (ii) that of the European Court of Human Rights (hereinafter: the ECHR) in the cases of *Hadjianastassiou v. Greece* (Judgment of 16 December 1992); *Van de Hurk v. the Netherlands* (Judgment of 9 April 1994); *Hiro Balani v. Spain* (Judgment of 9 December 1994); *Ruiz Torija v. Spain* (Judgment of 9 December 1994); *Helle v. the Netherlands* (Judgment of 19 December 1997); *Souminen v. Finland* (Judgment of 1 July 2003); and *Tatishvili v. Russia* (Judgment of 22 February 2007).

32. Finally, the Applicant requests the Court to (i) declare his Referral admissible; and (ii) find that the challenged Judgment, namely [E. Rev. No. 32/2019] of 31 July 2019 of the Supreme Court was rendered in violation of Article 31 of the Constitution in conjunction with Article

6 of the ECHR, declaring the latter invalid and remanding the case for retrial.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 31
Right to Fair and Impartial Trial]

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

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
(Right to a fair trial)

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

LAW No. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

Article 382
Penalty interest

1. A debtor that is in delay in performing a pecuniary obligation shall owe penalty interest in addition to the principal.
2. The interest rate for penalty interest shall amount to eight percent (8%) per annum, unless stipulated otherwise by a separate act of law.

LAW NO. 04/L-018 ON COMPULSORY MOTOR LIABILITY INSURANCE

Article 26
Compensation claims procedure

1. The insurer shall be obliged to process, for damages to persons latest within a period of 60 (sixty) days, while for damages to property within a period of 15 (fifteen) days from the day of submission of the compensation claim, the claim shall be processed and the injured party shall be notified in writing of:
1.1. compensation offer with relevant explanations;
1.2. decision and legal reasons for rejecting the compensation claim, when the liability and the damage degree are disputable.
2. If the submitted claim is not completed by evidence and documentation necessary to render a decision on compensation, the insurer shall be obliged, latest within a period of 3 (three) days from the date of the receipt of compensation claim, to notify the injured party in writing, indicating the evidence and documentation required to supplement the claim. Time limits from paragraph 1 of this Article on insurer's obligation to process the compensation claims shall apply as of the day of receipt or the completion of claim documentation, respectively.
3. CBK will issue sub-legal act to establish the compensation procedure, including such determination when a claim is considered completed by evidence and documentation necessary to render a decision on compensation.
4. Being unable to establish the damage, or to have the compensation claim fully processed respectively, the liable insurer shall be obliged to pay to the injured party the undisputable share of damage as an advance payment, within the time limit set out in paragraph 1 of this Article.
5. If the liable insurer fails to reply to the injured party within the time limits established under paragraph 1 of this Article, the injured party shall have the right to file a lawsuit to the competent Court.
6. In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim.
7. Provisions from paragraph 1, 2, 4 and 5 of this Article shall respectively apply in cases of compensation claims processing

which shall bind the Bureau to damages based on border insurance and the Compensation Fund liabilities.
8. Special procedures and time limits under the Crete Agreement shall apply to compensation claims from the International Motor Insurance Card system.

RULE 3 ON AMENDING THE RULE ON COMPULSORY THIRD PARTY LIABILITY MOTOR VEHICLE INSURANCE

Article 5
Claim Settlement

5.1 Settlement

Indemnity claims of third parties based on a CTPL Insurance in accordance with provisions of this Rule, including recourse from the Guarantee Fund have to be settled within the period of 10 days of the submission of necessary proofs and relevant documentation required by the insurance company or the Guarantee Fund referring to the claimed indemnity for death, bodily injury or property damage.
The Guarantee Fund or an insurance company that fails to make a settlement of a valid claim within a period of ten (10) days as prescribed above shall pay a late payment penalty equal to 20 % yearly interest calculated from the date when the claim was reported until the date when indemnity was paid or settled".

Law No. 06/L-054 on Courts, which in Article 14 provides the mechanism for fair administration of justice and review of changes in case law

Article 14
Competences and Responsibilities of the President and Vice-President of the Court
"[...]
2.10. the President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices".

Rule 3 on Amending the Rule on Compulsory Third Party Liability Motor Vehicle Insurance approved by the Governing

Board of the Central Bank of the Republic of Kosovo, on 25 September 2008

Article 5
Claim Settlement

5.1 Settlement

Indemnity claims of third parties based on a CTPL Insurance in accordance with provisions of this Rule, including recourse from the Guarantee Fund have to be settled within the period of 10 days of the submission of necessary proofs and relevant documentation required by the insurance company or the Guarantee Fund referring to the claimed indemnity for death, bodily injury or property damage.

The Guarantee Fund or an insurance company that fails to make a settlement of a valid claim within a period of ten (10) days as prescribed above shall pay a late payment penalty equal to 20 % yearly interest calculated from the date when the claim was reported until the date when indemnity was paid or settled.

Legal Opinion on Interest adopted at the General Meeting of the Supreme Court of the Republic of Kosovo, on 1 December 2020, basen on Article 26 paragraph 1 item 1.4 of the Law on Courts

FIRST PART
Applicable law

I. For the obligational relationship that have arisen before 20.12.2012, for interest apply the provisions of the Law on Obligations (Official Gazette of the SFRY), No. 29/78, 39/85,57/89).

II. For the obligational relationship that have arisen after 19.12.2012, for interest apply the provisions of the Law on Obligations, No. 04/L-077, Official Gazette of the Republic of Kosovo, No. 19/19, dated 19.06.2012.

PART TWO

IV. For the obligational relationships that have arisen before 20.12.2012, the rate/amount of penalty interest is set as for assets deposited in the bank, over one year, without a specific destination.

V. […]

VI. For the obligational relationships that have arisen after 19.12.2012, the rate/amount of the annual penalty interest for all claims will be set at 8%, unless otherwise provided by a special law.

IX. For cases of claims for compensation of damage or coverage of expenses for the insured case (insured case compensation) by voluntary policy (voluntary insurance), the amount of interest is determined according to point IV (four) and VI (six) of this legal opinion, depending on which law is in force at the time the insured case is filed.

Situations when the annual interest rate of 12 % is applied:

- When claims filed with Insurance Companies for personal injury are not dealt with within 60 days;

- When claims filed with Insurance Companies for property damage are not dealt with within 15 days;

Reasoning of Legal Opinion

Reasoning for item IX (nine) of legal opinion - *In the case law, there are frequent cases of creditors for reimbursement of damages who have fulfilled their obligations in advance to third parties, which are mainly related to cases provided by local insurance companies with foreign companies. For this type of claims in the practice of the courts, there has been an interpretation and application of legal provisions in several forms regarding the rate/amount of penalty interest for cases of reimbursement claims. This happened because the creditors when filing claims for compensation of damage referring to Article 26 of the Law on Compulsory Motor Third Party Liability Insurance, no. 04/L-018, published in the Official Gazette no. 4, dated 14 July 2011, which entered into force on 30 July 2011, requested that the claim be reimbursed at an annual rate of 12%, but the Supreme Court of Kosovo in its General Session through this legal opinion has assessed that an annual interest rate/penalty interest of 12% cannot be applied in all cases. This is because creditors' claims for reimbursement of damages mainly refer to situations of legal-civil relations (non-contractual for the creditor and the debtor), therefore, in such a case according to the*

assessment of the Supreme Court of Kosovo, the annual penalty interest must be paid according to item IV (four) and VI (six) of this legal opinion. This means that in case the creditor has fulfilled the obligation to the third party, before 20.12.2012, the interest rate will be applied as for the funds deposited in the bank over one year without a specific destination, while in case the creditor has fulfilled the obligation to the third party after 19.12.2012, then the rate/amount of penalty interest will be applied at a rate of 8%.

In addition to the above, the Supreme Court considers that the rate/amount of the annual penalty interest of 12%, cannot be applied due to the fact that according to the provisions of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, promulgated in Official Gazette No. 4, dated 14 July 2011, which entered into force on 30 July 2011, the annual interest rate of 12%, comes into expression due to negligence of insurance companies (which then appear as regressive creditors) , because if the regressive creditors had treated the claims of third parties in accordance with their legal responsibilities, the rate/amount of penalty interest of 12% could not be applied to them in court decisions, but the rate/amount would be applied as for funds deposited over a year without a specific destination, or the rate/amount of 8%, depending on which law was in force at the time the obligation relationship arouse.

Admissibility of the Referral

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

34. 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".

35. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides:

> *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."*

36. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Article 47 [Individual Requests], Article 48 [Accuracy of the Referral] and Article 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...".*

37. In this regard, the Court initially notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of his fundamental rights and freedoms applicable both to individuals and to legal persons (see, in this context, the case of the Court KI118/18, Applicant, *Eco Construction l.l.c.*, Resolution on Inadmissibility, of 10 September 2019, paragraph 29). Whereas, as regards the fulfilment of the admissibility requirements, established by the Constitution and the Law referred above, the Court finds that the Applicant is an

authorized party challenging an act of public authority, namely Judgment Rev. No. 62/2020 of the Supreme Court of 6 April 2020 after the exhaustion of all legal remedies provided by law.

38. The Applicant has also clarified the rights and freedoms he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

39. The Court also finds that the Applicant's Referral also meets the admissibility criteria established in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also notes that the Referral cannot be declared inadmissible on any other grounds.

40. Therefore, the Referral must be declared admissible and its merits should be reviewed.

Merits

41. The Court first recalls that the circumstances of this case are related to an accident of 2009, in which, the Applicant's insured, namely Sh.Z., lost her life. Liability for the accident fell on H.K., a BKS insured, who was convicted of the criminal offense of endangering public traffic in 2010. The Applicant compensated the family of the deceased in the amount of 36,000.00 euro. Regarding this amount in 2015, the Applicant addressed the BKS with a request for compensation on the basis of the right to subrogation determined through the LOR, and in the absence of an agreement, addressed the Basic Court by a lawsuit. The Basic Court and the Court of Appeals recognized the right to the Applicant, confirming the obligation of the BKS to compensate the Applicant in the abovementioned amount and also the obligation to pay interest of twelve percent (12%) per year, starting from 5 June 2015 until the final payment. The Supreme Court had also finally confirmed the Applicant's right to respective compensation on the basis of subrogation, but modified the Judgment of the Basic Court and that of the Court of Appeals, regarding the default interest. The Supreme Court determined that the annual interest rate should be eight percent (8%) per year, based on Article 382 of the LOR and not twelve percent (12%) per year, based on Article 26 of the Law on Compulsory Insurance, as decided by the lower instance courts. This finding of the Supreme Court, regarding the amount of default interest, was challenged by the Applicant before the Court, alleging a violation of Article 31 of the Constitution in conjunction with Article 6

of the ECHR, on the grounds of (i) violation of the principle of legal certainty, as a result of divergence in the relevant case law of the Supreme Court; and (ii) lack of a reasoned court decision.

42. The Court recalls that the Applicant, in addition to alleging a violation of the principle of legal certainty as a result of divergence in the relevant case law, also alleges a lack of a reasoned court decision, stating, *inter alia* and as explained above, that the challenged Judgment (i) has modified the Judgment [Ae. No. 289/2017] of 31 January 2019 of the Court of Appeals regarding the default interest without support in the respective legal provision; (ii) has not justified the departure from the case law of the Supreme Court regarding the amount of default interest "*in identical court cases*"; (iii) has not clarified the selective application of the Law on Compulsory Insurance, applying the latter, namely paragraph 6 of its Article 26 when determining the moment of delay of the debtor, while applying the provisions of the LOR instead of Article 26 of the Law on Compulsory Insurance when determining the amount of default interest, and that consequently, the relevant reasoning is contrary to the principle "*lex specialis derogat legi gjenerali*"; (iv) refers to "*simple interest*" and "*qualified interest*" without any basis in the Law on Compulsory Insurance; and (v) determines the difference between debt regress disputes and claims of injured parties for damages in out-of-court proceedings, without any legal basis because the provisions referred to by the Supreme Court, namely Article 26 of the Law on Compulsory Insurance and paragraph 1 of Article 5 of Rule 3, do not determine this distinction.

43. This category of allegations, which relate to the lack of a reasoned court decision, will be examined by the Court on the basis of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, and in the following, in order to determine whether the challenged Judgment of the Supreme Court is in accordance with the guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the ECHR with respect to the reasoned court decision, the Court will initially recall the general principles of the ECtHR and the Court starting with those relating to the violation of legal certainty, and then apply the latter to the circumstances of the present case.

Regarding violation of legal certainty

(i) General principles as developed by the case law of the ECHR and of the Court

44. The Court recalls that the Applicant alleges inconsistency, namely divergence in the case law of the Supreme Court regarding the determination of default interest in cases of compulsory motor third party liability insurance, referring to the three Judgments of the Supreme Court, as follows: (i) Judgment [E. Rev. No. 22/2019] of 1 August 2019; (ii) Judgment [E. Rev. No. 27/2018] of 24 September 2018; and (iii) Judgment [E. Rev. 23/2017] of 14 December 2017.

45. With regard to the principle of legal certainty as a result of the lack of consistency in the case-law, the ECtHR in its case-law has developed basic principles and established the criteria whether an alleged divergence of court decisions constitutes a violation of Article 6 of the ECHR. The Court has also applied in its case law the criteria set by the ECtHR, during the review of the Applicants' allegations of violation of the principle of legal certainty, as a result of conflicting decisions (see, *inter alia*, the above cases of the Court KI35/18 and KI87/18, where the Court found a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of divergence in the case law of the ECtHR).

46. The Court further notes that the case law of the ECtHR has resulted in four basic principles that characterize the analysis regarding the consistency of the case law, as follows: (i) that one of the essential components of the rule of law is legal certainty, which, among other things, guarantees a certain certainty in legal situations and contributes to public confidence in the courts (see, *mutatis mutandis*, *Ştefănică and Others v. Romania*, application no. 38155/02, Judgment of 2 November 2010, paragraph 38, *Nejdet Sahin and Perihan Sahin v. Turkey*, Judgment of 20 October 2011, paragraph 56, see case KI35/18, cited above, paragraph 64); (ii) that there is no acquired right to the consistency of the case-law (see ECtHR, cited above, *Nejdet Şahin and Perihan Şahin v. Turkey*, para. 56, see also the case cited above, of the Court KI35/18, Applicant *Bayerische Versicherungsverbrand*, paragraph 65, and case KI42/17, Applicant *Kushtrim Ibraj*, Resolution on Inadmissibility of 25 January 2018, paragraph 33); (iii) the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction, and such divergences may also arise within the same court, which divergence cannot be considered contrary in itself (see case *Santos Pinto v. Portugal*, application no. 39005/04, paragraph

41, paragraph 41, Judgment of 20 May 2008, see also the case of the Court KI87/18, Applicant "*IF Skadeforsikring*", cited above, paragraph 66 and case KI35/18, Applicant *Bayerische Versicherungsverbrand*, paragraph 67); and (iv) except in cases of apparent arbitrariness, it is not its duty to question the interpretation of domestic law by local courts and in principle, it is not its function to compare different decisions of local courts, even if they are taken in apparently smilar proceedings (see, for example, ECtHR cases *Adamsons v. Latvia*, Judgment of 24 June 2008, paragraph 118; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 50; and case KI35/18, cited above, paragraph 68).

47. However, referring to the principles set out above, the ECtHR has established three basic criteria to determine whether an alleged divergence of the court decisions constitutes a violation of Article 6 of the ECHR, as follows:: (i) *whether "profound and long-standing differences" exist in the case-law*; (ii) whether the domestic law provides for a mechanism to overcome these divergences*, and* (iii) whether that mechanism has been applied and, if so, to what extent. (In this context, see ECtHR cases, *Beian v. Romania* (no. 1), Judgment of 6 December 2007, paragraphs 37-39; *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraphs 116-135; *Iordan Iordanov and Others v. Bulgaria*, Judgment of 2 July 2009, paragraphs 49-50; *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 53; and see the case of the Court, KI29/17, Applicant *Adem Zhegrova,* Resolution on Inadmissibility of 5 September 2017, paragraph 51 and see also the case of the Court, KI42/2017, Applicant *Kushtrim Ibraj*, paragraph 39, KI87/17 Applicant "*IF Skadiforsikring"*, paragraph 67, KI35/18 Applicant *Bayerische Versicherungsverband*, paragraph 70).

(ii) Application of such principles in the circumstances of the present case

48. In the following, the Court will apply the principles set out above in the circumstances of the present case, applying the criteria on the basis of which the ECtHR addresses divergence issues with regard to case law, starting with the assessment of whether, in the circumstances of the present case, (i) the alleged divergences in case law are "*profound and long-standing*" and, if this is the case, (ii) the existence of mechanisms capable of resolving the relevant divergence; and (iii) an assessment of whether these mechanisms have been implemented and with what effect in the circumstances of the present case.

49. In this regard, the Court should also reiterate that, based on the ECtHR case law, it is not its function to compare different decisions of regular courts, even if taken in apparently similar proceedings. It must respect the independence of the courts. Moreover, in such cases, namely allegations of constitutional violations of fundamental rights and freedoms as a result of divergences in the case law, the Applicants should submit to the Court relevant arguments concerning the factual and legal similarity of the cases alleging that they have been resolved differently than the regular courts, thus resulting in a divergence in case law and which may have resulted in a violation of their constitutional rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see case KI35/18, Applicant *"Bayerische Rechtsverband"*, cited above, paragraph 76).

50. The Court recalls that the Applicant alleges that in his case, the Supreme Court decided differently on the amount of default interest, acting contrary to its case law. In support of his arguments, the Applicant refers to the three Judgments of the Supreme Court, as follows: (i) Judgment [E. Rev. No. 22/2019] of 1 August 2019; (ii) Judgment [E. Rev. No. 27/2018] of 24 September 2018; and (iii) Judgment [E. Rev. 23/2017] of 14 December 2017.

51. Before analyzing whether (i) the challenged Judgment of the Supreme Court, namely Judgment [E. Rev. No. 32/2019] of 31 July 2019 was rendered by the Supreme Court contrary to its case law; and (ii) the alleged divergences in the case-law are "*profound and long-standing*", the Court first recalls the reasoning of the challenged Judgment in respect of default interest. The Court recalls that the Supreme Court in the circumstances of the present case, approved as grounded the revision regarding the default interest, obliging the BKS to pay interest of eight percent (8%) from 5 June 2015 until the final payment. In the context of the latter, the Supreme Court, *inter alia*, reasoned that (i) the default interest of 12% is provided only for non-processing and the delay in processing the claims of the injured persons for compensation"; and consequently, (ii) the claimant, namely the Applicant, is entitled only to the default interest of eight percent (8%) per year, determined by Article 382 of the LOR.

52. In this context, and with regard to the laws applicable in the circumstances of the present case, the Law on Obligations was adopted by the Assembly of the Republic of Kosovo on 10 May 2012, was decreed by the President of the Republic of Kosovo on 30 May 2012, is published in the Official Gazette of the Republic of Kosovo on 19 June 2012, and based on its Article 1059 (Entry into force), has entered into

force six (6) months after publication in the Official Gazette, namely on 19 December 2012, whereas, the Law on Compulsory Motor Liability Insurance was adopted by the Assembly of the Republic of Kosovo on 23 June 2011, was decreed by the President of the Republic of Kosovo on 5 July 2011, was published in the Official Gazette of the Republic of Kosovo on 14 July 2011, and based on Article 44 thereof (Entry into Force), entered into force fifteen (15) days after its publication in the Official Gazette, namely on 29 July 2011. Furthermore, this Law, by its Article 43, has established the repeal of UNMIK Regulation 2001/25 governing the compulsory motor insurance and the respective sub-legal acts of the Central Bank of Kosovo (hereinafter: the CBK), which are contrary to this law.

53. In the following, the Court will reproduce the relevant parts of some of the above-mentioned decisions, where the Applicant refers to them in support of his allegations.

54. In the first case, namely Judgment [E. Rev. 22/2019] of 1 August 2019, the circumstances of this case were related to an accident that occurred on 1 August 2011, in which accident the insured Sh. Sh. of the Company "Suva Rechtsabteilung" suffered injuries. The statement of claim for compensation of damage under the right of subrogation, filed by the Company "Suva Rechtsabteilung" was approved as grounded and the default interest was set according to the Law on Compulsory Insurance. As a result of the revision filed by the Insurance Company "Insing", the Supreme Court decided that "*the lower instance courts have correctly applied the provision of Article 26 item 6 of the Law on Compulsory Motor Liability Insurance (Law no. 04/4-018), which entered into force on 5 July 201,1 because the claimant on 27.4.2012 has initiated a request for debt regress in out-of-court proceedings, resulting that from this date the respondent is in delay within the meaning of Article 305 of LOR of the Republic of Kosovo, therefore the claimant is entitled to penalty interest provided by Article 26 of the aforementioned Law, of which this Court considered the claim of the respondent that the court of lower instance has erroneously applied the substantive law in the case of setting the interest, as ungrounded.*"

55. In the second case, namely the Judgment [E. Rev. No. 27/2018] of 24 September 2018, the circumstances of the case are related to an accident that occurred on 31 December 2010, in which case as a result of the statement of claim of the Company "Suva Rechtasabteilung" the Basic Court approved its claim in entirety by imposing penalty interest with 20% starting from 15 April 2011 until 29 July 2011, while the annual interest of 12% from 29 July 2011 until the final payment. The

Court of Appeals had partially modified the Judgment of the Basic Court only as regards the amount of default interest "*on the amount approved of 88,000 euro, the Applicant be paid the interest which the local banks pay as for funds deposited in the bank over a year without a specific destination with an additional penalty in the amount of 20% of the annual interest rate starting from 15.04.2011 as the date of reporting the damage until 29.07.2011, while from 30.07.2011 until the final payment, the interest in the amount of 88,000 euro will be calculated according to the annual rate of 12%.*" Finally, as a result of the revision filed by the Insurance Company "Illyria", the Supreme Court by its Judgment, [E. Rev. No. 27/2018] of 24 September 2018 approved the revision of the respondent only in terms of default interest, modifying the Judgment of the Court of Appeals in this part and upholding the Judgment of the Basic Court.

56. Whereas, in the case, namely the Judgment [E. Rev. 23/2017] of 14 December 2017 of the Supreme Court, the circumstances of this case are related to an accident that occurred on 28 September 2009, in which case as a result of the claim of the Insurance Company IF "Insurance" in Norway, the Basic Court had imposed penalty interest in the amount of 20% [in accordance with Article 5.1 of Rule 3 of the Central Bank on amending the Rule on Compulsory Motor Third Party Liability Insurance] starting from 15 April 2011 to 29 July 2011, while the annual interest rate of 12% from 29 July 2011 until the final payment. The Court of Appeals had partially modified the Judgment of the Basic Court only as regards the amount of default interest "*on the amount approved 24,030.00 euro, the Applicants pay the interest which the local banks pay as for funds deposited in the bank over one year without a definite destination with an additional penalty in the amount of 20% of the annual interest rate starting from 22.04.2010 as the date of reporting the damage until 29.07.2011, while from 30.07.2011 until the final payment, the interest on the adjudicated amount will be calculated according to the annual rate of 12%. "As a result of the revision submitted by the Insurance Company, the Supreme Court, had partially approved its revision and decided that "[...] regarding the interest rate, the challenged judgment of the Court of Appeals of Kosovo Ae. No. 53/2016 of 21.09.2017 is modified and the respondent is obliged to pay the claimant the interest in the amount of 20% of the approved amount of the claim starting from 22.04.2010 as the date of submitting the claim for compensation of damage until 29.07.2011, whereas from 30.07.2011 until the final payment the interest in the amount of 12% of the adjudicated amount".*

57. In the context of the Judgments of the Supreme Court referred by the Applicant, the Court notes that in all three (3) cases from the date of entry into force of the Law on Compulsory Insurance a default interest of 12% was applied based on Article 26, paragraph 6 of this law, namely the moment from which this default interest starts to be calculated was determined. In cases [E. Rev. 23/2017] of 14 December 2017 and [E. Rev. nr. 27/2018] of 24 September 2018, was set on 30 July 2011, as the date when the default interest would be reduced from 20% to 12%, thus applying Article 26 of the Law on Compulsory Insurance.

58. In the circumstances of the present case, the Court recalls that the Basic Court and the Court of Appeals had given the Applicant the right, by confirming the obligation of the BKS to compensate the Applicant in the abovementioned amount and also the obligation to pay the interest of twelve percent (12%) per year, starting from 5 June 2015 until the final payment, based on Article 26 of the Law on Compulsory Insurance.

59. The Court recalls that the Supreme Court in quashing the Judgments of the lower courts, regarding the default interest, had excluded the application of the Law on Compulsory Insurance, finding that the default interest of 12% is provided only for non-processing and the delay in processing of claims of injured persons for compensation"; and consequently, (ii) the claimant, namely the Applicant, is entitled only to the default interest of eight percent (8%) per year, established in Article 382 of the LOR.

60. The Court notes that it assesses the consistency of the case law of the regular courts only in relation to the alleged violations of the Applicant. Consequently, the lack of consistency in the case law must have resulted in a violation of the fundamental rights and freedoms of the Applicant. To find such a violation, and to find that the fundamental rights and freedoms of the Applicant have been violated as a result of "profound and long-standing differences" in the relevant case law, the factual and legal circumstances of the Applicant's case should coincide with those of the cases the contradiction with which is claimed.

61. In the context of the circumstances of the case, the Court recalls that the ECtHR has stated that the contradictions in the case law are an integral part of any judicial system and that divergence in the case law may also arise within the same court. That, in itself, is not necessarily contrary to the Constitution and the ECHR (See ECtHR cases, *Santo Pinto v. Portugal*, cited above, paragraph 41; and *Nejdet Sahin and*

Perihan Sahin v. Turkey, cited above, paragraph 51). Moreover, and as noted above, the ECtHR has consistently stated that the requirements for legal certainty and legitimate protection of public confidence in the courts do not guarantee a right to consistent case law. The development of case law is important to maintain the proper dynamic for the continuous improvement of the administration of justice. (See ECtHR case, *Atanasovski v. "the Former Yugoslav Republic of Macedonia*", Judgment of 14 January 2010, paragraph 38; and *Nejdet Sahin and Perihan Sahin*, cited above, paragraph 58, see the case of the Court KI35/18, Applicant *Bayerische Rechtsverband,* cited above, paragraph 98). An exception to these general principles, is an apparent arbitrariness, and in terms of assessing the lack of judicial consistency, assessing whether there are "*profound and long-standing differences*" in the relevant case law and if there is an effective mechanism to address the latter.

62. The Court, referring to its case law, namely cases KI87/18 and KI35/18, recalls that it found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to a violation of the principle of legal certainty as a result of the divergence of case law, in case KI87/18 in the assessment of 3 (three) cases of the Supreme Court, rendered in a period of 3 (three) years, and in case KI35/18 in the assessment of 9 (nine) cases of the Supreme Court issued over a period of 5 (five) years and after finding that (i) there were "profound and long-standing differences"; (ii) the mechanism of the Supreme Court for harmonizing the case law existed; but that (iii) the abovementioned mechanism was not used (see case of the Court KI87/18, cited above, paragraph 79 and paragraphs 81 to 85, and case KI35/18, cited above, paragraph 70 and paragraphs 110-111).

63. On the other hand, only the finding that there are "*profound and long-standing differences*" in the case law regarding the amount of default interest does not necessarily result in a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. To find this, the Court must also consider the other two ECtHR criteria that are relevant to assessing the lack of consistency of case law, namely whether the applicable law establishes mechanisms capable of resolving such divergence; and whether such a mechanism has been applied in the circumstances of a case and with what effect.

64. The Court notes that the Supreme Court has a mechanism that enables the resolution of such disputes, based on point 10 of paragraph 2 of Article 14 (Competences and Responsibilities of the President and Vice-President of the Court) of Law no. 06/L-054 on Courts (hereinafter: the Law on Courts). The presidents of the courts through

the annual meetings of all judges have the obligation, *inter alia*, to review and propose changes in procedures and practices (see the case of Court KI87/18 Applicant "*IF Skadeforsikring*", cited above, paragraph 80 and case KI35/18, Applicant *Bayerische Rechtsverband*, cited above, paragraph 107).

65. In the following, and for the purpose of clarifying whether such a mechanism for resolving the disputes, which were subsequently alleged by the Applicants in such cases before the Court, the Court recalls that in its request of 22 October 2020, also addressed the Supreme Court with the question whether: "*The Supreme Court had issued a principled position regarding the compensation of damage and determination of default interest in respect of claims under the right of subrogation*".

66. The Supreme Court in its response to the aforementioned question answered as follows:

"The case law described above, the Supreme Court of Kosovo has consolidated since the claims for compensation of damage under the right of subrogation were submitted, but it should note the cases when the Supreme Court of Kosovo in the procedure according to extraordinary legal remedies cannot change decisions of lower instance in cases where it would be considered a violation of the principle "reformatio in peius".

The provision of Article 203 of the Law on Contested Procedure stipulates that: "Second instance court can change the decision of the first instance court to the prejudice of the complaining party if only it complained and not the opposing party".

The cited principle prevents the Supreme Court from changing the decisions of the lower instances even with regard to the annual rate of default interest if the revision belongs to the claimant, which has partially won the court dispute but has filed a revision for the rejected part. In this case, the Supreme Court, even if it finds that the material legal provisions on default interest have been incorrectly applied, cannot change the court decision. Also, the Supreme Court, when the revision is filed only in relation to interest, cannot enter at all the assessment of its grounds and eventually change the judgments of the lower instance, because in this situation the revision is not allowed at all in accordance with Article 211. paragraph 2 of the LCP, since within the meaning of Article 30 paragraph 1 of the LCP, only the value of the main claim is taken

into account for the values of the subject of the dispute, and not the interest (Article 30 paragraph 2 of the LCP).

The Supreme Court of Kosovo, in reflection of the constant requests of the courts of lower instances, but also from the findings in its case law a few months ago in the civil branch, initiated the idea of the need for a legal opinion on the issue of interest, which ideas have been researched in domestic practice, comparative analyzes of legislation and practice in the region have been made, the need to maintain continuity has been assessed, but also the need for progressive changes in order to meet the standards for adequate judicial protection and after holding many meetings, this idea has been materialized in legal opinion, first in the civil branch of the Supreme Court and then in the General Session of the Supreme Court, held on 01 December 2020.

The legal opinion on the issue of interest has addressed, among others, the situation of regress of claims, point IX (nine) of the legal opinion. Part of this response to the requested information, please consider also the Legal Opinion on interest, a copy of which you may find attached."

67. However, the Court through the present case also notes that item 4 of paragraph 1 of Article 26 (Competencies of the Supreme Court) of the Law on Courts defines the exclusive competence of the Supreme Court to determine principled positions, issue legal opinions and guidelines for unique application of laws by courts in the territory of the Republic of Kosovo. In the case involving the circumstances of the present case, namely the application of the amount of default interest in relation to compulsory motor liability insurance, the Supreme Court approved such a mechanism, namely a legal opinion regarding interest on 1 December 2020, namely after the Applicant had submitted his Referral to the Court and following the request of the Court, through which it was sought to clarify whether the Supreme Court had issued any unifying position regarding its case law.

68. Accordingly, the Court, considering the elaboration of the aforementioned three cases of the Supreme Court and the response of the Supreme Court, through its letter of 2 December 2020, finds that in the circumstances of the present case all three criteria of the ECtHR regarding the assessment if the lack of consistency, namely divergences in the case law, have resulted in violation of the rights and freedoms to a fair and impartial trial, have not been met.

69. The Court first reiterates that in the circumstances of the present case it has not found "*profound and long-standing differences*" in the case law of the Supreme Court regarding the application of the provisions governing the amount of default interest in the context of compulsory motor third party liability insurance upon submission of only three (3) decisions. Second, the Court considers that the clarification given by the Supreme Court through its letter regarding the application of the provisions of the law in the cases of claims referring to the determination of the amount of default interest within the right of subrogation is clear. Regarding the mechanism of the Supreme Court for harmonization of this practice, namely the approval of the Legal Opinion regarding the Interest, the Court emphasizes that this mechanism was created and approved after submitting a number of cases to the Court which challenge the Judgments of the Supreme Court regarding the determination of default interest in cases of claims for compensation of damage under the right of subrogation.

70. Therefore, the Court finds that the challenged Judgment of the Supreme Court does not contain violation of the principle of legal certainty and violation of the Applicant's right to fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

As to a reasoned court decision

(i) General principles regarding the right to reasoned court decisions

71. As to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case-law. This case-law was build based on the case law of the ECtHR, including but not limited to the cases of *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. Moreover, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic",* Judgment of 9 January 2018; KI143/16,

Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019; KI35/18, cited above; and KI227/19, Applicant *N.T. "Spahia Petrol"*, Judgment of 31 December 2020.

72. In principle, the Court notes that the guarantees embodied in Article 31 of the Constitution include the obligation of courts to provide sufficient reasons for their decisions (see, case of the Court KI230/19, Applicant *Albert Rakipi*, cited above, paragraph 139).

73. The Court also notes that based on its case law, which is based on the case law of the ECtHR, when assessing the principle which refers to the proper administration of justice, the court decisions must contain the reasons on which they are based. The extent to which the duty to give reasons applies may vary depending on the nature of the decision and must be determined in the light of the circumstances of the particular case. It is the essential arguments of the Applicants that need to be addressed and the reasons given must be based on the applicable law (see, by analogy, the cases of the ECtHR *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, Judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42; see also the case of Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). By not requiring a detailed response to each complaint raised by the Applicant, this duty implies that the parties to the proceedings may expect to receive a specific and explicit response to their allegations that are crucial to the outcome of the proceedings conducted (see, case *Morerira Ferreira v. Portugal*, Judgment of 5 July 2011 paragraph 84 and all references used therein, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 137).

74. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and the examination of evidence on the one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (see the Constitutional Court, cases KI87/18 Applicant *"IF Skadeforsikring"*, Judgment of 27 February 2019, paragraph 44; KI138/19 Applicant *Ibish Raci*, cited above, paragraph 45, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 138).

(iii) Application of these principles to the circumstances of the present case

75. In applying the general principles elaborated above, in the circumstances of the present case, and in order to assess whether the challenged Judgment was rendered in accordance with the constitutional guarantees of a reasoned court decision, the Court recalls that in rendering its challenged Judgment, the Supreme Court had modified the Judgments of the lower courts, with respect to default interest. The latter, in the circumstances of the present case, applied the interest at the rate of twelve percent (12)% per year, referring to Article 26 of the Law on Compulsory Insurance, while the Supreme Court determined that in the circumstances of the present case, Article 26 of the Law on Motor Third Party Liability Insurance is not applicable, but interest at the rate of eight percent (8)% must be applied, referring to Article 382 of the LOR.

76. In the context of the Applicant's allegations, the Court refers to the relevant part of the Judgment [E. Rev. No. 32/2019] of the Supreme Court, where regarding the default interest, it is stated as follows:

"However, the judgment of the first and second instance courts regarding the part related to the adjudicated interest contains erroneous application of the substantive law under Article 382 of the LOR (no. 04/L-077), and in conjunction with Article 26.7 of the Law on compulsory motor liability insurance no (04/L-018 which entered into force on 30 July 2011).

The erroneous application of the substantive law lies in the facts that, as stated above, the claimant's statement of claim for compensation of damage and the lawsuit was filed at the time when the Law on Compulsory Motor Liability Insurance entered into force. The interest approved by the courts of lower instance is not legally applied in debt regress disputes but only in claims for processing claims of injured parties for damages in out-of-court proceedings as provided in Article 26 of the Law in question and Article 5.1 of the CBK Rule No. 3 on the amendment of the Rule on compulsory motor third party liability insurance of 25 September 2008, which provisions are referred to by the courts of lower instance. Those interest rates which have been applied by the court of first and second instance are foreseen in order to discipline the insurance companies in the insurance reports against the claims for compensation of the injured persons which claims the insurance

companies are obliged to treat urgently within the deadlines provided for in the abovementioned provisions.

Paragraph 7 of Article 26 of the Law on Compulsory Motor Liability Insurance, excludes the application of interest of 12% for debt regress, interest provided only for non-treatment and the delays in processing the claims of injured persons for compensation. It follows that the claimant is entitled only to default interest provided for in Article 382 of LOR and not "qualified" interest according to the provisions applied by the first and second instance courts."

77. The Court notes that the Supreme Court in the challenged Judgment has determined: (i) that the relevant legal provisions in the Applicant's case are Article 382 of the LOR in conjunction with Article 26.7 of the Law on Compulsory Insurance; (ii) that interest of 12% does not apply in cases of debt regress but only in claims for treatment of injured persons for damages in out-of-court proceedings; (iii) that 12% interest is applied only for non-processing and delayed processing of claims of injured persons for compensation and not for debt regress; and, that (iv) for these reasons, the Applicant is entitled to the default interest provided for in Article 382 of the LOR (8%) and not "qualified" interest (12%).

78. In this context, the Court refers to Article 382, paragraph 2 of the LOR, which stipulates that: "*The interest rate for penalty interest shall amount to eight percent (8%) per annum, unless stipulated otherwise by a separate act of law".*

79. Whereas paragraph 6 of Article 26 of the Law on Compulsory Insurance stipulates that: "*In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim".*

80. Based on the above, the Court notes that in determining the default interest "in the amount of 8%" according to paragraph 2 of Article 382 of the LOR, the Supreme Court specified that regarding the amount of default interest in cases of claims under the right to subrogation, in which case the Applicant's case is included, paragraph 6 of Article 26 of the Law on Compulsory Insurance is not applicable.

81. Furthermore, the Court notes that as a reason for modifying the decision on the amount of default interest, the Supreme Court reasons that the lower instance courts, namely the Basic Court and the Court of Appeals, respectively, have erroneously interpreted the substantive law when they found that paragraph 6 of Article 26 of the Law on Compulsory Insurance is applicable.

82. The Court, in the context of similar allegations related to the amount of default interest, on 22 October and 24 November 2020, namely, sent a letter to the Supreme Court regarding a number of cases submitted to the Court challenging Judgments of the Supreme Court, regarding the determination of default interest in cases of claims for compensation of damage under the right of subrogation as a result of traffic accidents caused in the Republic of Kosovo. The Court requested clarification as to whether (i) the Supreme Court has issued a principled position regarding the compensation of damage and the determination of default interest in respect of claims under the right of subrogation; and if this is not the case (ii) to notify the Court regarding the case law of the Supreme Court, in what cases Article 382 (Penalty interest) of Law No. 04/L-077 on Obligations is applied and in what cases paragraph 6 of Article 26 (Compensation claims procedure) of Law no. 04/L-018 on Compulsory Motor Third Party Liability Insurance is applied.

83. In the above-mentioned question of the Court, the Supreme Court answered as follows:

"In this context, in principle regarding the default interest for the obligational relationships that have arisen before 20.12.2012, for interest apply the legal provision under Article 277 of the Law on Obligations (Official Gazette of the SFRY), No. 29/78, 39/85,57/89), while for the obligational relationships that have arisen after 19.12.20 [12] the provision under Article 382 of the Law on Obligations no. 04/L-077 has been applied, Official Gazette of the Republic of Kosovo, no. 19/19, of 19.06.2012, and for the claims of third parties to the Insurance Companies, in cases when the legal requirements are met after the entry into force (on 30 July 2011) of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, published in the Official Gazette No. 4, on 14 July 2011, the provisions of this law have been applied.

According to the Supreme Court "Cases of claims for compensation of damage based on the right of subrogation in the practice of the Supreme Court of Kosovo, depending on the time of entering into the

obligation are reviewed and decided in accordance with the provisions of the laws cited above, with relevant specifics [...].”

84. As regards the determination of default interest at 12%, the Supreme Court clarified that:
“*Interest in the amount of 12% of the annual interest is applied/calculated when the legal conditions are met in cases of non-compliance with deadlines (Article 26 paragraph 1 and 2, of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, i published in the Official Gazette no. 4, on 14 July 2011) and non-fulfillment of the obligation (Article 26 paragraph 4, of the same Law) by the responsible insurers (Insurance Companies) for each day of delay until the settlement of the obligation by the liable insurer, starting from the date of filing the claim for compensation. The situation described according to the provisions of Article 26 of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, published in the Official Gazette no. 4, on 14 July 2011, refers to the liability that Insurance Companies have towards third parties, therefore the annual interest rate of 12% in this case aims to encourage a kind of correct approach of Insurance Companies to third parties, so that claims for damages are dealt with within the legal deadlines, otherwise Insurance Companies will also pay the annual interest of 12%.*

The annual interest rate of 12% in certain cases by law should be considered as a kind of penalty to Insurance Companies, when they are not liable to third parties, but cannot be considered as favoring the creditor’s claim entitled to regress to the debtor because the relationship between the creditor and the debtor in the payment of the regress is a special relationship of obligations and is not the relationship of the third party with the Insurance Company, therefore for the claim of the third party as the injured party in relation to The insurance company in certain cases annual interest rate of 12% can be adjudicated but not for the refund claim”.

85. Based on the above, the Court considers that the response given by the Supreme Court regarding its interpretation of what law will be applied regarding the amount of default interest is in accordance with its reasoning given in the Judgment challenged by the Applicant in the present case. Therefore, the Court considers that the interpretation and application of the relevant legal provisions in determining the default interest by the Supreme Court in the Applicant’s case falls within the scope of legality, which is within the jurisdiction of this court. Having said that, the Supreme Court, by its Judgment and the clarification given in its response to the Court's question, has managed

to explain the relationship between the facts presented and the application of the law to which it has invoked, namely how they correlate with each other and how they have influenced the decision of the Supreme Court to modify the decisions of the lower courts regarding the determination of the amount of default interest.

86. Based on the above, the Court reiterates that the Supreme Court by its challenged Judgment has addressed the Applicant's allegations presented in his Referral, and consequently considers that it does not appear that the proceedings conducted have resulted in "arbitrary conclusions" or "manifestly unreasonable "that would make their decision-making incompatible with the standards of a reasoned and reasonable court decision (see, *mutatis mutandis*, Constitutional Court in case no. KI55/19, Applicant *Ramadan Osmani*, Resolution on Inadmissibility, of 23 January 2020, paragraph 46).

87. In doing so, the Court reiterates that the Supreme Court has fulfilled its constitutional obligation to provide a reasoned court decision, as required by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR and the case law of the Court, and that of the ECtHR.

88. Therefore, based on the above, finds that the Judgment [Rev. no. 28/2019] of 1 August 2019, of the Supreme Court regarding the allegation of non-reasoning of the court decision does not constitute a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Conclusions

89. The Court has dealt with all the allegations of the Applicant, applying on this assessment the case law of the Court and of the ECtHR regarding the manifestly erroneous interpretation and application of the law and the principle of legal certainty in terms of consistency of case law, which guarantees, with certain exceptions, are embodied in Article 31 of the Constitution and Article 6 of the ECHR.

90. First, with regard to the allegation relating to the lack of reasoning of the court decision, the Court found that the Judgment [E. Rev. No. 32/2019] of 31 July 2019, of the Supreme Court does not contain violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR and has sufficiently reasoned its decision.

91. Second, as regards the principle of legal certainty in the context of a lack of consistency, namely the divergence of the case law of the Supreme Court, the Court, after elaborating on the basic principles

and criteria of the ECtHR in this respect, applied the latter to the circumstances of the present case, and found that in the case law of the Supreme Court there are no "profound and long-standing differences" regarding the application of legal provisions related to the amount of default interest applicable in cases of compulsory motor third party liability insurance, and consequently found that the principle of legal certainty has not been violated, and that the Judgment [E. Rev. No. 32/2019] of 31 July 2019 was not rendered in violation of the Applicant's fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 21.4 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 28 April 2021,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, by a majority of votes, that Judgment E. Rev. No. 32/2019 of the Supreme Court of the Republic of Kosovo, of 31 July 2019, is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6[Right to a fair trial] of the European Convention on Human Rights;

III. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

IV. This Judgment is effective immediately.

Judge **President of the Constitutional Court**

Safet Hoxha Arta Rama-Hajrizi

KI74/19, Applicant „Suva Rechtsabteilung", Constitutional review of Judgment E. Rev. No. 39/2018 of the Supreme Court of Kosovo of 8 January 2019

KI 74/19, Judgment of 28 April 2021, published on 22.06.2021

Keywords: *Individual referrals, legal person, admissible referral, challenged decision in accordance with constitutional provisions.*

As a consequence of the accident that was caused by the insured of the insurance company EUROSIG in 2010, the insured of the Applicant M.H. suffered material damage. The Applicant sent a request to EUROSIG, seeking compensation for damages based on regress, which occurred as a result of the above-mentioned traffic accident. At this request, the Applicant received an offer from EUROSIG which, according to the Applicant, did not cover the damage caused by the traffic accident which occurred through the fault of the EUROSIG insured. The Applicant filed a lawsuit against EUROSIG with the Basic Court in Prishtina, requesting that he be paid a certain amount of money, including the penalty interest of 20%, from the day the lawsuit was filed until 29 July 2011. while from 29 July 2011 until the final payment requested the penalty interest of 12%. The Basic Court in Prishtina rendered Judgment approving the Applicant's lawsuit in entirety. However, the Court of Appeals partially modified the judgment of the Basic Court only in the part concerning the penalty interest. The Supreme Court upheld in entirety the judgment of the Court of Appeals.

The Applicant claimed that the Judgment of the Court of Appeals as well as the Judgment of the Supreme Court were rendered in violation of its rights to a reasoned decision, which also caused a violation of the principle of legal certainty. According to the Applicant, these violations occurred due to the fact that the Supreme Court in its judgment did not provide a sufficient and adequate reasoning for the change of position regarding the calculation of penalty interest, which position it had consistently applied in its case law.

With regard to the allegations of violation of the principle of legal certainty, the Court found: (i) that in the present case the existence of "*profound and long-standing*" differences regarding the consistency of the case law of the Supreme Court has not been established; (ii) that there is a mechanism for the proper administration of justice and for reviewing differences in case law (see Law on Courts No. 06/L-054, Article 14. 2.10); (iii) that the Supreme Court, on 1 December 2020, issued a "Legal Opinion on interest in terms of applicable law, amount and calculation period" pursuant to Article 14.2.10 of the Law on Courts; (iv) that the possibility of contradictory decisions is an inherent trait of any judicial system based on a network of basic and appellate courts with powers within its territorial jurisdiction; (v) and what law should

be applied in the circumstances of the present case is the prerogative and duty of the Supreme Court; and (vi) that the role of the Supreme Court is precisely to resolve such disputes.

With regard to the allegations of violation of the right to a reasoned decision, the Court found that (i) the Supreme Court declared the legal basis and explained why in the Applicant's case the norm which determines the "simple" penalty interest paid for time savings funds for a period longer than one year without a specific destination is applied; (ii) that the challenged judgment of the Supreme Court contains the logical connection between the legal basis, the reasoning and the conclusions drawn; (iii) that, as a logical flow between the legal basis, reasoning and conclusions, it resulted that the challenged judgment of the Supreme Court meets the criteria of a reasoned decision; and (iv) the question whether the Applicant has been recognized the right to a "qualified" penalty interest of 12% or to a "simple" interest which is paid on deposited funds with a term longer than one year without a specific destination, is a matter of application and interpretation of the law and the discretion of the Supreme Court in the trial, which, as such, is not in itself contrary to the right to a fair and impartial trial.

The Court found that in the circumstances of the present case there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

AKTGJYKIM

në

rastin nr. KI74/19

Parashtrues

“SUVA Rechtsabteillung”

Vlerësim i kushtetutshmërisë së Aktgjykimit të Gjykatës Supreme të Kosovës, E. Rev. nr. 39/2018, të 8 janarit 2019

GJYKATA KUSHTETUESE E REPUBLLKËS SË KOSOVËS

e përbërë nga:

Arta Rama-Hajrizi, kryetare
Bajram Ljatifi, zëvendëskryetar
Bekim Sejdiu, gjyqtar
Selvete Gërxhaliu-Krasniqi, gjyqtare
Gresa Caka-Nimani, gjyqtare
Safet Hoxha, gjyqtar
Radomir Laban, gjyqtar
Remzije Istrefi-Peci, gjyqtare, dhe
Nexhmi Rexhepi, gjyqtar

Parashtruesi i kërkesës

1. Kërkesa është parashtruar nga Kompania e Sigurimeve “SUVA Rechtsabteillung” (në tekstin e mëtejmë: “SUVA Rechtsabteillung”) nga Zvicra (në tekstin e mëtejmë: parashtruesi i kërkesës), të cilën e përfaqësojnë Visar Morina nga Prishtina dhe avokati Besnik z. Nikqi nga Prishtina.

Vendimi i kontestuar

2. Parashtruesi i kërkesës konteston kushtetutshmërinë e Aktgjykimit [E. Rev. nr. 39/2018] të Gjykatës Supreme të Republikës së Kosovës (në tekstin e mëtejmë: Gjykata Supreme) të 8 janarit 2019, në lidhje me Aktgjykimin [Ae. nr. 91/2016] e Gjykatës së Apelit të 31 gushtit 2018, dhe Aktgjykimin [III. C. nr. 506/2012] e Gjykatës Themelore në Prishtinë (në tekstin e mëtejmë: Gjykata Themelore) të 8 shkurtit 2016.

Objekti i çështjes

3. Objekt i çështjes së kërkesës është vlerësimi i kushtetutshmërisë së Aktgjykimit të lartpërmendur të Gjykatës Supreme, me të cilin pretendohet se parashtruesit të kërkesës i janë shkelur të drejtat dhe liritë themelore të garantuara me nenin 31 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës së Republikës së Kosovës (në tekstin e mëtejmë: Kushtetuta) në lidhje me nenin 6 (E drejta për një proces të rregullt) të Konventës Evropiane për të Drejtat e Njeriut (në tekstin e mëtejmë: KEDNJ).

Baza juridike

4. Kërkesa bazohet në paragrafin 4 të nenit 21 [Parimet e Përgjithshme] dhe paragrafët 1 dhe 7 të nenit 113 [Juridiksioni dhe Palët e Autorizuara] të Kushtetutës, në nenet 22 [Procedimi i kërkesës] dhe 47 [Kërkesa individuale] të Ligjit për Gjykatën Kushtetuese të Republikës së Kosovës nr. 03/L-121 (në tekstin e mëtejmë: Ligji) dhe në rregullin 32 [Parashtrimi i kërkesave dhe përgjigjeve) të Rregullores së punës së Gjykatës (në tekstin e mëtejmë: Rregullorja e punës).

Procedura në Gjykatë

5. Më 7 maj 2019, parashtruesi i kërkesës e dorëzoi kërkesën në Gjykatën Kushtetuese të Republikës së Kosovës (në tekstin e mëtejmë: Gjykata).

6. Më 10 maj 2019, Kryetarja e Gjykatës caktoi gjyqtaren Selvete Gërxhaliu-Krasniqi gjyqtare raportuese dhe Kolegjin shqyrtues, të përbërë nga gjyqtarët: Arta Rama-Hajrizi (kryesuese), Nexhmi Rexhepi dhe Remzije Istrefi-Peci.

7. Më 30 maj 2019, Gjykata e njoftoi parashtruesin e kërkesës për regjistrimin e kërkesës dhe i dërgoi Gjykatës Supreme një kopje të kërkesës.

8. Më 22 tetor 2020, Gjykata kërkoi nga Gjykata Supreme që të njoftohet për praktikën gjyqësore lidhur me aplikimin e kamatëvonesës në kontestet e subrogimit të borxhit. Kërkesa drejtuar Gjykatës Supreme përveç rastit nën shqyrtim KI74/19 ndërlidhej edhe me rastet e tjera por të natyrës së ngjashme KI111/19, KI09/20 dhe KI113/20.

9. Më 2 dhjetor 2020, Gjykata Supreme dorëzoi "Mendim Juridik për Kamatën i miratuar në mbledhjen e përgjithshme të Gjykatës Supreme të Republikës së Kosovës të 1 dhjetorit 2020, bazuar në nenin 26 paragrafi 1 pika 1.4 të Ligjit për gjykatat". Pjesët relevante të Mendimit Juridik të Gjykatës Supreme janë paraqitur në tekstin e mëtejmë të këtij Aktgjykimi.

10. Më 28 prill 2021, Kolegji shqyrtues shqyrtoi raportin e gjyqtares raportuese dhe njëzëri i rekomandoi Gjykatës pranueshmërinë e kërkesës dhe vlerësimin e meritave.

11. Po të njëjtën ditë, Gjykata, njëzëri, deklaroi kërkesën si të pranueshme dhe, me shumicë votash konstatoi se nuk ka pasur shkelje të nenit 31 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës në lidhje me nenin 6.1 [E drejta për një proces të rregullt] të Konventës Evropiane për të Drejta të Njeriut.

Përmbledhja e fakteve

12. Më 26 korrik 2010, ka ndodhur një aksident i trafikut në të cilin ishin të përfshira dy automjete të pasagjerëve dhe me atë rast automjeti (në pronësi të O.D.) me tabela të regjistrimit të Kosovës dhe me sigurimin e automjeteve të Kompanisë së Sigurimeve EUROSIG (në tekstin e mëtejmë: EUROSIG) i shkaktoi dëme automjetit të pasagjerëve (në pronësi të M.H., të siguruarit të parashtruesit të kërkesës) me tabela të regjistrimit të Zvicrës dhe sigurimin e automjeteve të "SUVA Rechtsabteillung".

13. Më 16 maj 2011, parashtruesi i kërkesës i dërgoi një kërkesë kompanisë EUROSIG, me të cilën kërkoi kompensimin e dëmit mbi bazën e regresit, i cili është shkaktuar si rezultat i aksidentit të lartpërmendur të trafikut. Sipas kësaj kërkese, parashtruesi i kërkesës mori një ofertë nga kompania EUROSIG, e cila, sipas parashtruesit të kërkesës, nuk e mbulonte dëmin e shkaktuar nga aksidenti i trafikut i cili ndodhi me fajin e të siguruarit të kompanisë EUROSIG.

14. Më 21 nëntor 2012, parashtruesi i kërkesës paraqiti padi në Gjykatën Themelore në Prishtinë kundër kompanisë EUROSIG, në të cilën kërkoi që në emër të dëmit të shkaktuar t'i paguhet shuma prej 50,858.62 €, me kamatëvonesën prej 20% dhe atë duke filluar nga data 16 maj 2011, përkatësisht nga dita e paraqitjes së padisë e deri më 29 korrik 2011, ndërsa nga data 29 korrik 2011 e deri në pagesën definitive kërkoi kamatëvonesën prej 12 %.

15. Më 8 shkurt 2016, Gjykata Themelore në Prishtinë nxori Aktgjykimin III. C. nr.506/2012, me të cilin e aprovoi kërkesëpadinë e parashtruesit të kërkesës në tërësi. Në arsyetimin e Aktgjykimit thuhet:

> *"Meqenëse shkaktar i aksidentit ka qenë i siguruari i të padituri, duke ju referuar nenit 300 dhe nenit 939 të LMD-së, gjykata e detyroj që sipas të drejtës së subrogimit t'iaregresoi paditësit shumën e dëmit të cilin e shkaktoi i siguruari i tij.*
> *Andaj, gjykata duke u bazuar nga të cekurat më lartë ka gjetur se kërkesëpadia e paditësit është bazuar andaj të njëjtën e ka aprovuar dhe ka vendosur si në dispozitiv të aktgjykimit.*
> *Meqenëse i padituri ka rënë në vonesë lidhur me pagesën e dëmit të krijuar, duke u bazuar në nenin 277 të LMD-së, gjykata e detyroi padituri që t'ia paguaj paditësit shumat e gjykuara të kompensimit së bashku me normën e kamatës, në lartësi prej 20% e cila u llogarit nga data e paraqitjes së kërkesës për rimbursim tek e paditura 16.05.2011 e deri me datë 29.07.2011. Koha për të cilën është caktuar kjo kamatë për vonesë gjykata e ka llogaritur në përputhje me Nenin 5.1 të Rregullit 3 mbi ndryshimin e Rregullit për sigurimin e Detyrueshëm nga Autopërgjegjësia. Ndërsa nga data 29.07.2011 e deri në pagesën definitive do të llogaritet kamata vjetore prej 12% konformë nenit 26-6 të Ligjit 04/L-018 mbi Sigurimin e Detyrueshëm nga Autopërgjegjësia".*

16. Në një datë të pacaktuar, EUROSIG paraqiti ankesë në Gjykatën e Apelit ndaj Aktgjykimit të Gjykatës Themelore në Prishtinë, për shkak të shkeljes së dispozitave të procedurës kontestimore, vërtetimit të gabuar dhe jo të plotë të gjendjes faktike, vendimit për kamatën, vendimit për shpenzimet e procedurës dhe për shkak të zbatimit të gabuar të së drejtës materiale. Parashtruesi i kërkesës paraqiti përgjigjen e tij ndaj ankesës dhe propozoi që ankesa e kompanisë EUROSIG të shpallet e pabazuar.

17. Më 31 gusht 2018, Gjykata e Apelit përmes Aktgjykimit Ae. nr.91/2016, refuzoi, si të pabazuar, ankesën e kompanisë EUROSIG dhe vërtetoi Aktgjykimin e Gjykatës Themelore (i) lidhur me borxhin kryesor mbi bazën e subrogimit në shumë prej 50,858.62 euro dhe ndryshoi Aktgjykimin në fjalë (ii) sa i përket kamatëvonesës, duke e detyruar kompaninë EUROSIG që të paguajë kamatën "*të cilën e paguajnë bankat vendore si për mjetet e deponuar në bankë mbi një vit pa destinim të caktuar*" me një dënim shtesë në shumë prej 20% nga 16 maji 2011 e deri më 29 korrik 2011, ndërsa duke filluar prej 30 korrikut 2011 e deri në pagesën definitive, vetëm kamatëvonesën me normë vjetore prej 12%. Gjykata e Apelit shpjegoi se ulja e

kamatëvonesës nga 20% në 12% pas 30 korrikut 2011, është rezultat i hyrjes në fuqi të Ligjit nr. 04/L-018 për Sigurimin e Detyrueshëm nga Autopërgjegjësia (në tekstin e mëtejmë: Ligji për Sigurimin e Detyrueshëm).

18. Në një datë të pacaktuar, EUROSIG paraqiti kërkesën për revizion në Gjykatën Supreme kundër Aktgjykimit të Gjykatës së Apelit, për shkak të shkeljes së dispozitave të procedurës kontestimore, zbatimit të gabuar të së drejtës materiale dhe tejkalimit të kërkesëpadisë.

19. Më 8 janar 2019, Gjykata Supreme nxori Aktgjykimin E. Rev. nr. 39/2018, me të cilin:

> *"Refuzohet si i pabazuar revizioni i të paditurës, i paraqitur kundër aktgjykimit të Gjykatës së Apelit të Kosovës Ae. nr. 91/2016 datë 31.08.2018. [...] dhe ndryshohet aktgjykimi i Gjykatës së Apelit të Kosovës Ae. nr. 91/2016 datë 31.08.2018 dhe aktgjykimi i Gjykatës Themelore në Prishtinë-Departamenti për Çështje Ekonomike III. C. nr. 506/2012 datë 08.02.2016, ashtu që shumën e gjykuar me këto aktgjykime në lartësi prej 50.858,62 €, detyrohet e paditura që paditëses t'ia paguajë me kamatën të cilën e paguajnë bankat vendore si për mjetet e deponuara në kursim me afat mbi 1 vit e pa destinim të caktuar, duke filluar nga data 24.01.2012 e tutje deri në përmbushjen përfundimtare të këtij borxhi."*

20. Gjykata Supreme në paragrafin e dytë të dispozitivit, i cili ka të bëjë me ndryshimin e Aktgjykimit të gjykatave të shkallëve më të ulëta, theksoi:

> *"[...] aktgjykimi i gjykatës së shkallës së dytë në pjesën lidhur me kamatën e gjykuar përfshihet me zbatim të gabuar të së drejtës materiale nga neni 277 të LMD të vjetër në lidhje me nenin 26.7 të Ligjit për Sigurimin e detyrueshëm nga auto përgjegjësia, nr. 04/L-018, i shpallur në Gazetën Zyrtare nr. 4, me datën 14 korrik 2011, i cili ka hyrë në fuqi me datën 30 korrik 2011.*
> *Zbatimi i gabuar i së drejtës materiale, qëndron në faktet se, si është thënë më lartë, kërkesa e paditësit për kompensim si dhe padia është paraqitur në kohën kur ka hyrë në fuqi Ligji i lartpërmendur për sigurimin e detyrueshëm nga auto përgjegjësia. Andaj kamata e aprovuar nga gjykata e shkallës së dytë dhe gjykata e shkallës së parë, ligjërisht nuk aplikohet në kontestet për regresim borxhi, por vetëm për vonesa të trajtimit të kërkesave të personave të dëmtuar për shpërblimin e dëmit në procedurë jashtë gjyqësore ashtu siç parashihet në nenin 26 të*

Ligjit të lartpërmendur dhe nenin 5.1 të Rregullit të BQK-së nr. 3 mbi ndryshimin e rregullit për sigurimin e detyrueshëm të auto përgjegjësisë të datës 25 shtator 2008, në të cilat dispozita thirret gjykata e shkallës së dytë. Ato kamata të cilat i ka aplikuar gjykata e shkallës së parë dhe e dytë janë të parapara me qëllim të disiplinimit të kompanive siguruese në raportet e sigurimit ndaj kërkesave për dëmshpërblim të personave të dëmtuar, të cilat kërkesa kompanitë e sigurimeve janë të detyruara që t'i trajtojnë me urgjencë brenda afateve të parapara sipas dispozitave të lartpërmendura.
Paragrafi 7 i nenit 26 të Ligjit të lartpërmendur përjashton zbatimin e kamatës prej 12% edhe për regresim borxhi, kamatë kjo e paraparë vetëm për mos trajtimin dhe rënien në vonesë të trajtimit të kërkesave të personave të dëmtuar, për dëmshpërblim. Kështu që, pa dyshim rezulton se paditësi ka të drejtë vetëm në kamatën e thjeshtë, e jo edhe në kamatë "të kualifikuar" sipas dispozitave të cituara nga gjykata e shkallës së parë dhe të dytë."

Pretendimet e parashtruesit të kërkesës

21. Parashtruesi i kërkesës pretendon se me Aktgjykimin E. Rev. nr. 39/2018 është shkelur neni 31 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës në lidhje me nenin 6 (E drejta për një proces të rregullt) të KEDNJ-së.

22. Parashtruesi i kërkesës pretendon se neni 31 i Kushtetutës dhe neni 6 i KEDNJ-së janë shkelur për shkak të mungesës së arsyetimit të Aktgjykimit, përkatësisht se Gjykata Supreme nuk ka dhënë arsyetim të mjaftueshëm dhe adekuat përkitazi me ndryshimin e Aktgjykimit të Gjykatës së Apelit Ae. nr. 91/2016 lidhur me kamatëvonesën, dhe konsideron se me këtë është shkelur parimi i së drejtës për një vendim të arsyetuar gjyqësor.

23. Parashtruesi i kërkesës në veçanti thekson se nuk është e qartë se "*mbi cilën bazë juridike Gjykata Supreme konstaton se:*

"- gjykatat e instancave më të ulëta kanë gabuar në zbatimin e të drejtës materiale dhe arsyetimi përkatës lidhur me këtë, si dhe - të referuarit nga kjo Gjykatë në Paragrafin 7 të Nenit 26 të Ligjit 04/L-018 rezulton të jetë i dështuar me faktin se dispozita e përmendur (Paragrafi 7) as që trajton këtë çështje e më së paku korrespondon me përmbajtjen e cituar në arsyetimin e Aktgjykimit [E. Rev. nr. 39/2018 të datës 08.01.2019]. Për më tepër, ky qëndrim i Gjykatës Supreme është tërësisht ndryshe

nga vendimet e saja të mëparshme, duke përjashtuar Aktgjykimin [E. Rev. nr. 27/2017 të datës 24.01.2018], i cili për shkaqe të njëjta është anuluar me Aktgjykimin AGJ 1347/2019 (Rasti KI. 87/18) e datës 15.04.2019 nga Gjykata Kushtetuese e Republikës së Kosovës."

24. Për më tepër, parashtruesi i kërkesës më tej pretendon se *"aktgjykimi i Gjykatës Supreme të cilin e konteston është në kundërshtim edhe me praktikën e saj gjyqësore, pasi referuar praktikës së saj gjyqësore në situata të njëjta rezulton se Gjykata Supreme pa rezervë i referohet dhe zbaton rregullativen respektive „lex specialis" nga kjo lëmi (BQK Rregulli Nr. 3 mbi Sigurimin e Detyrueshëm të Autopërgjegjësisë) me rastin e trajtimit të institutit të kamatëvonesës".*

25. Në mbështetje të pretendimeve të tij, parashtruesi i kërkesës dorëzoi në Gjykatë disa aktgjykime të Gjykatës Supreme për të treguar se Gjykata Supreme nuk e kishte ndjekur praktikën e saj gjyqësore. Aktgjykimet e dorëzuara të Gjykatës Supreme janë: *„[E. Rev. Nr. 27/2017] i datës 24.01.2018, [E. Rev. Nr. 23/2017 i datës 23 Dhjetor 2017], [E. Rev. Nr. 48/2014 i datës 13 maj 2014], [E. Rev. Nr. 62/2014 i datës 21 janar 2015], [E. Rev. Nr. 14/2016 i datës 24 mars 2016], [E. Rev. Nr. 06/2015 idatës 19 mars 2015], [E. Rev. Nr. 55/2014 i datës 3 nëntor 2014] dhe [E. Rev. Nr. 20/2014 i datës 14 Prill 2014]".*

26. Kur bëhet fjalë për parimin e sigurisë juridike dhe konsistencës në vendimmarrje, parashtruesi i kërkesës deklaron: "*Gjykata Supreme nxori aktgjykime me arsyetime të ndryshme ligjore në çështje identike, duke ndikuar drejtpërdrejt në modifikimin e lartësisë së interesit të caktuar. (Shih aktgjykimet e shënuara më sipër dhe periudhën kohore të treguar). Këto hezitime në procedurën e marrjes së një vendimi gjyqësor të shkallës më të lartë të gjykatës rrezikojnë drejtpërdrejt parimin e sigurisë juridike".*

27. Parashtruesi i kërkesës kërkon nga Gjykata të anulojë Aktgjykimin e Gjykatës Supreme E. Rev. 39/2018, të 8 janarit 2019, për shkak të shkeljes së nenit 31 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës, në lidhje me paragrafin 1 të nenit 6 (E drejta për një proces të rregullt) të KEDNJ-së dhe ta kthejë çështjen në rishqyrtim.

Dispozitat relevante kushtetuese dhe ligjore

Kushtetuta e Republikës së Kosovës

Neni 31
[E Drejta për Gjykim të Drejtë dhe të Paanshëm]

1. Çdokujt i garantohet mbrojtje e barabartë e të drejtave në procedurë para gjykatave, organeve të tjera shtetërore dhe bartësve të kompetencave publike.

2.Çdokush gëzon të drejtën për shqyrtim publik të drejtë dhe të paanshëm lidhur me vendimet për të drejtat dhe obligimet ose për cilëndo akuzë penale që ngrihet kundër saj/tij brenda një afati të arsyeshëm, nga një gjykatë e pavarur dhe e paanshme, e themeluar me ligj.
[...]".

Konventa Evropiane për të Drejtat e Njeriut

Neni 6
(E drejta për një proces të rregullt)

1. Çdo person ka të drejtë që çështja e tij të dëgjohet drejtësisht, publikisht dhe brenda një afati të arsyeshëm nga një gjykatë e pavarur dhe e paanshme, e krijuar me ligj, e cila do të vendosë si për mosmarrëveshjet në lidhje me të drejtat dhe detyrimet e tij të natyrës civile, ashtu edhe për bazueshmërinë e çdo akuze penale në ngarkim të tij. Vendimi duhet të jepet publikisht, por prania në sallën e gjykatës mund t'i ndalohet shtypit dhe publikut gjatë tërë procesit ose gjatë një pjese të tij, në interes të moralit, të rendit publik ose sigurisë kombëtare në një shoqëri demokratike, kur kjo kërkohet nga interesat e të miturve ose mbrojtja e jetës private të palëve në proces ose në shkallën që çmohet tepër e nevojshme nga gjykata, kur në rrethana të veçanta publiciteti do të dëmtonte interesat e drejtësisë.
[...]".

LIGJI MBI MARRËDHËNIET E DETYRIMEVE *(Gazeta Zyrtare e RSFJ-së, nr. 29/78, 39/85, 57/89)*

„[...]

III. Kamatëvonesa

Kur ka debitim

Neni 277

(1) Debitori që vonon në përmbushjen e detyrimit në të holla debiton, përpos kryegjësë, edhe kamatën sipas shkallës së përcaktuar me ligjin federativ.

(2) Në qoftë se shkalla e kamatës kontraktuese është më e lartë nga shkalla e kamatëvonesës, ajo rrjedh edhe pas vonesës së debitorit.
[...]

Nënpjesa 2

Vonesa
Vonesa e debitorit

Kur debitori është në vonesë

Neni 324

(1) Debitori është në vonesë kur nuk e përmbush detyrimin brenda afatit të caktuar për përmbushje.

(2) Në qoftë se afati për përmbushje nuk është caktuar, debitori është në vonesë kur kreditori ta ftojë që ta plotësojë detyrimin e vet, verbalisht ose me shkrim, paralajmërim jashtëgjyqësor, ose duke filluar ndonjë procedurë, qëllimi i së cilës është realizimi i përmbushjes së detyrimit.

[...] "

LIGJI NR. 04/L-077 PËR MARRËDHËNIET E DETYRIMEVE i 19 korrikut 2012
PJESA XXX

DISPOZITAT KALIMTARE DHE PËRFUNDIMTARE

Neni 1057
Zbatimi i këtij ligji
Dispozitat e këtij ligji nuk zbatohen në marrëdhëniet e detyrimeve që kanë lindur para hyrjes në fuqi të këtij ligji.
[...] "

LIGJI NR. 04/L-018 PËR SIGURIMIN E DETYRUESHËM NGA AUTOPËRGJEGJËSIA

Neni 26
Procedura e kërkesave për dëmshpërblim

1. *Siguruesi është i detyruar që, për dëmet në persona, më së largu në afat prej gjashtëdhjetë (60) ditësh, ndërsa për dëme në pasuri, më së largu në afat prej pesëmbëdhjetë (15) ditësh nga dita e parashtrimit të kërkesës për dëmshpërblim, të trajtojë kërkesën dhe të njoftojë me shkrim palën e dëmtuar me:*

1.1. ofertën për dëmshpërblim me shpjegime përkatëse;

1.2. vendimin dhe arsyet ligjore të refuzimit të kërkesës për dëmshpërblim, kur janë kontestuese përgjegjësia dhe lartësia e dëmit.

2. Nëse kërkesa e parashtruar nuk është e kompletuar me prova dhe dokumentacion të nevojshëm për të vendosur për dëmshpërblimin, siguruesi është i detyruar që, më së largu në afat prej tri (3) ditësh nga dita e pranimit të kërkesës për dëmshpërblim, të njoftojë me shkrim të dëmtuarin duke precizuar me cilat nga provat dhe dokumentacioni duhet plotësuar kërkesën. Prej ditës së pranimit, respektivisht kompletimit të dokumentacionit të kërkesës, fillojnë të zbatohen afatet nga paragrafi 1. i këtij neni për detyrimin e siguruesit përkitazi me trajtimin e kërkesave për dëmshpërblim.

3. BQK-ja nxjerr akt nënligjor për përcaktimin e procedurave për dëmshpërblim, duke përfshirë edhe përcaktimin se kur konsiderohet e kompletuar kërkesa me prova dhe dokumentacionin e nevojshëm për të vendosur lidhur me dëmshpërblimin.

4. Në pamundësi të përcaktimit të dëmit, respektivisht trajtimit të dëmshpërblimit në tërësi, siguruesi përgjegjës është i detyruar t'i paguajë palës së dëmtuar pjesën jokontestuese të dëmit në formë paradhënie, brenda afatit nga paragrafi 1. i këtij neni.

5. Në rast se siguruesi përgjegjës nuk i përgjigjet palës së dëmtuar brenda afateve të përcaktuara në paragrafin 1. të këtij neni, i dëmtuari ka të drejtë të ushtrojë padi në Gjykatën Kompetente.

6. Në rast të mosrespektimit të afateve të përcaktuara në paragrafin 1. të këtij neni, dhe mospërmbushjes së detyrimit në pagesën e paradhënies nga paragrafi 4. i këtij neni, siguruesi përgjegjës konsiderohet të jetë në vonesë në përmbushjen e detyrimit për dëmshpërblim, duke u ngarkuar me pagesë të interesit për vonesë. Ky interes paguhet në lartësi prej 12 % të interesit vjetor dhe llogaritet për çdo ditë vonesë deri në shlyerjen e dëmshpërblimit nga siguruesi përgjegjës, duke filluar nga data e paraqitjes së kërkesës për dëmshpërblim.

7. Dispozitat nga paragrafi 1., 2., 4. dhe 5. të këtij neni, zbatohen në mënyrë përkatëse edhe në rastet e trajtimit të kërkesave për dëmshpërblim të cilat janë detyrim i byrosë për dëmet nga baza e sigurimit kufitar dhe detyrimet e Fondit të kompensimit.

8. Në kërkesat për dëmshpërblim nga sistemi i kartonit ndërkombëtar të sigurimit zbatohen procedura dhe afate të posaçme sipas Marrëveshjes së Kretës.

Ligji për Gjykatat nr. 06/L-054, i cili në nenin 14 parasheh një mekanizëm për menaxhimin e duhur të gjyqësorit dhe shqyrtimin e dallimeve në praktikën gjyqësore

Neni 14
Kompetencat dhe Përgjegjësitë e Kryetarit dhe nënkryetarit të Gjykatës

"[...]
2.10. Kryetari i gjykatës thërret takim vjetor të të gjithë gjyqtarëve për këshillim mbi Administrimin e Drejtësisë në atë gjykatë; për të analizuar organizimin e gjykatës; për të shqyrtuar dhe propozuar ndryshime në procedura dhe praktika".

Rregulla III e Bankës Qendrore të Kosovës mbi ndryshimin e Rregullit për Sigurimin e Detyrueshëm të Autopërgjegjësisë, e 25 shtatorit 2008

Neni5
Rregullimi i dëmeve

5.1 Rregullimi

Kërkesat për zhdëmtim të bazuara në sigurimin e detyrueshëm të autopërgjegjësisë në pajtim me dispozitat e kësaj rregulle,

përfshirë regresin nga fondi garantues duhet të zgjidhen në një periudhë kohore prej 10 ditësh prej ditës së parashtrimit të provave të nevojshme dhe dokumentacionit relevant që kërkohen nga kompania e sigurimit apo nga fondi garantues, duke iu referuar zhdëmtimit të dëmeve që kanë pasojë vdekjen, lëndime trupore apo humbjen e pasurisë. Fondi Garantues apo një kompani e sigurimit e cila nuk e rregullon dëmin valid brenda periudhës kohore prej dhjetë (10) ditësh, duhet të paguaj dënimin e barabartë me 20% të kamatës vjetore të llogaritur nga data e raportimit të dëmit deri në datën kur zhdëmtimi është paguar apo rregulluar. […]"

Mendim Juridik për Kamatën i miratuar në mbledhjen e përgjithshme të Gjykatës Supreme të Republikës së Kosovës i 1 dhjetorit 2020, i bazuar në nenin 26 paragrafi 1 pika 1.4 të Ligjit për Gjykatat

PJESA E PARË
Ligji i aplikueshëm

III. Për marrëdhëniet e detyrimeve që kanë lindur para datës 20.12.2012, për kamatën zbatohen dispozitat e Ligjit për Marrëdhëniet e Detyrimeve (Gazeta Zyrtare e RSFJ-së, nr.29/78, 39/85,57/89).

IV. Për marrëdhëniet që kanë lindur pas datës 19.12.2012, për kamatën zbatohen dispozitat e Ligjit për Marrëdhëniet e Detyrimeve, nr. 04/L-077, Gazeta Zyrtare e Republikës së Kosovës, nr.19/19, datë 19.06.2012.

PJESA E DYTË

VII. Për marrëdhëniet e detyrimeve që kanë lindur para datës 20.12.2012, shkalla/lartësia e kamatëvonesës vjetore për të gjitha kërkesat caktohet si për mjetet e depozituara në bankë, mbi një vit, pa destinim të caktuar.

VIII. […]

IX. Për marrëdhëniet e detyrimeve që kanë lindur pas datës 19.12.2012, shkalla/lartësia e kamatëvonesës vjetore për të gjitha kërkesat do të caktohet në lartësi prej 8 %, përveçse kur parashikohet ndryshe me ligj të veçantë.
IX. Për kërkesat e kreditorëve për rimbursim të dëmit nga të gjitha bazat e përgjegjësisë kur kreditorët kanë të drejtë në

rimbursim të dëmit, lartësia e kamatës caktohet sipas pikës IV (katër) dhe VI (gjashtë) të këtij mendimi juridik, varësisht se cili ligj është zbatuar (ka qenë në fuqi) kur kreditori në cilësinë e debitorit ka përmbushur detyrimin ndaj palës së tretë.

Situatat kur aplikohet norma e interesit vjetor prej 12 %:

- Kur kërkesat e paraqitura tek Kompanitë e Sigurimeve, për dëmin në persona, nuk trajtohen në afat prej 60 ditësh;

- Kur kërkesat e paraqitura tek Kompanitë e Sigurimeve, për dëmin në pasuri, nuk trajtohet brenda 15 ditësh;

Arsyetimi i Mendimit Juridik

Arsyetimi për pikën IX (nëntë) të mendimit juridik- *Në praktikën gjyqësore paraqiten raste të shpeshta të kreditorëve për rimbursim të dëmit të cilët kanë përmbushur detyrimet paraprakisht ndaj palëve të treta, e të cilat kryesisht ndërlidhen me rastet e siguruara nga kompanitë e sigurimeve vendore me kompanitë e huaja. Për këtë lloj të kërkesave në praktikën e gjykatave është vërejtur interpretim dhe zbatim i dispozitave ligjore në disa forma sa i përket shkallës/lartësisë së kamatëvonesës për rastet e kërkesave për rimbursim. Kjo ka ndodhur për shkak se kreditorët me rastin e paraqitjes së kërkesave për rimbursim të dëmit duke iu referuar nenit 26 të Ligjit për Sigurimin e Detyrueshëm nga Autopërgjegjësia, nr.04/L-018, i shpallur në Gazetën Zyrtare nr.4, me datën 14 korrik 2011, i cili ka hyrë në fuqi me datën 30 korrik 2011, kanë kërkuar që rimbursimi i kërkesës të bëhet me normë vjetore prej 12%, mirëpo Gjykata Supreme e Kosovës në Seancën e Përgjithshme të saj përmes këtij mendimi juridik ka vlerësuar se nuk mund të aplikohet norma/kamatëvonesa vjetore prej 12% në të gjitha rastet. Kjo për shkak se kërkesat e kreditorëve për rimbursim të dëmit kryesisht u referohen situatave për marrëdhëniet juridiko-civile (jokontraktuale për kreditorin dhe debitorin), prandaj, në një rast të tillë sipas vlerësimit të Gjykatës Supreme të Kosovës, kamatëvonesa vjetore duhet të paguhet sipas pikës IV (katër) dhe VI (gjashtë) të këtij mendimi juridik. Kjo nënkupton se në rast se kreditori ka përmbushur detyrimin ndaj palës së tretë, para datës 20.12.2012, norma e interesit do të zbatohet si për mjetet e deponuara në bankë mbi një vit pa destinim të caktuar, ndërsa në rast se kreditori ka përmbushur detyrimin ndaj palës së tretë pas datës 19.12.2012, atëherë*

shkalla/lartësia e kamatëvonesës do të zbatohet në shkallë prej 8%.

Përveç të cekurave, Gjykata Supreme vlerëson se shkalla/lartësia e kamatëvonesës vjetore prej 12%, nuk mund të zbatohet edhe për shkak të faktit se sipas dispozitave të Ligjit për Sigurimin e Detyrueshëm nga Auto Përgjegjësia, nr.04/L-018, i shpallur në Gazetën Zyrtare me nr.4, me datën 14 korrik 2011, i cili ka hyrë në fuqi me datën 30 korrik 2011, interesi vjetor 12%, vjen në shprehje për shkak të neglizhencës së kompanive të sigurimeve (të cilat pastaj paraqiten si kreditor regresues), sepse sikur kreditorët regresues t'i kishin trajtuar konform përgjegjësive ligjore kërkesat e palëve të treta, ndaj tyre nuk do të mund të zbatohej shkalla/lartësia e kamatëvonesës prej 12%, në vendimet e gjykatës, por do të zbatohej shkalla/lartësia si për mjetet e deponuara mbi një vit pa destinim të caktuar, apo shkalla/lartësia prej 8%, varësisht se cili ligj ka qenë në fuqi në kohën e lindjes së marrëdhënies së detyrimit.

Vlerësimi i pranueshmërisë së kërkesës

28. Gjykata së pari vlerëson nëse kërkesa i ka përmbushur kriteret e pranueshmërisë, të përcaktuara me Kushtetutë, të specifikuara më tej me Ligj dhe të parapara me Rregullore të punës.

29. Në këtë drejtim, Gjykata i referohet paragrafëve 1 dhe 7 të nenit 113 [Juridiksioni dhe Palët e Autorizuara] të Kushtetutës, të cilët përcaktojnë:

> *"1. Gjykata Kushtetuese vendos vetëm për rastet e ngritura para gjykatës në mënyrë ligjore nga pala e autorizuar.*
> *[...]*
> *7. Individët janë të autorizuar të ngrenë shkeljet nga autoritetet publike të të drejtave dhe lirive të tyre individuale, të garantuara me Kushtetutë, mirëpo vetëm pasi të kenë shteruar të gjitha mjetet juridike të përcaktuara me ligj."*

30. Gjykata gjithashtu i referohet paragrafit 4 të nenit 21 [Parimet e Përgjithshme] të Kushtetutës, i cili përcakton: *"Të drejtat dhe liritë themelore të parashikuara në Kushtetutë, vlejnë edhe për personat juridikë, për aq sa janë të zbatueshme".*

31. Në këtë drejtim, Gjykata vëren se parashtruesi i kërkesës ka të drejtë të paraqesë ankesë kushtetuese, duke u referuar në shkelje të pretenduara të të drejtave dhe lirive themelore të tij, të cilat vlejnë për

individët dhe për personat juridikë (shih rastin e Gjykatës Kushtetuese nr. KI41/09, parashtruesi i kërkesës: *Universiteti AAB-RIINVESTL.L.C.*, Aktvendim për papranueshmëri i 3 shkurtit 2010, paragrafi 14).

32. Për më tepër, Gjykata i referohet kritereve të pranueshmërisë, siç përcaktohen në Ligj. Në këtë drejtim, Gjykata i referohet neneve 47 [Kërkesa individuale], 48 [Saktësimi i kërkesës] dhe 49 [Afatet] të Ligjit, të cilët përcaktojnë:

Neni 47
[Kërkesa individuale]

"1. Çdo individ ka të drejtë të kërkojë nga Gjykata Kushtetuese mbrojtje juridike në rast se pretendon se të drejtat dhe liritë e tija individuale të garantuara me Kushtetutë janë shkelur nga ndonjë autoritet publik.

2. Individi mund ta ngritë kërkesën në fjalë vetëm pasi që të ketë shteruar të gjitha mjetet juridike të përcaktuara me ligj."

Neni 48
[Saktësimi i kërkesës]

"Parashtruesi i kërkesës ka për detyrë që në kërkesën e tij të qartësoj saktësisht se cilat të drejta dhe liri pretendon se i janë cenuar dhe cili është akti konkret i autoritetit publik të cilin parashtruesi dëshiron ta kontestoj."

Neni 49
[Afatet]

"Kërkesa parashtrohet brenda afatit prej katër (4) muajve. Afati fillon të ecë që nga dita kur parashtruesit i është dorëzuar vendimi gjyqësor...".

33. Gjatë vlerësimit të kushteve të lartpërmendura, Gjykata thekson se parashtruesi i kërkesës ka të drejtë të paraqesë ankesë kushtetuese, duke u thirrur në shkelje të pretenduara të të drejtave dhe lirive themelore të tij, që vlejnë si për individët ashtu edhe personat juridikë për aq sa janë të zbatueshme (shih, ndër të tjera, rastin e Gjykatës KI118/18, parashtrues, *Eco Construction sh.p.k.*, Aktvendim për papranueshmëri, i 10 tetorit 2019, paragrafi 29; dhe KI41/09, *parashtrues Universiteti AAB-RIINVEST SH.P.K*, Aktvendim për papranueshmëri i 3 shkurtit 2010, paragrafi 14). Prandaj, Gjykata

konstaton se parashtruesi i kërkesës është palë e autorizuar që konteston aktin e autoritetit publik, përkatësisht Aktgjykimin [E. Rev. 39/18] të Gjykatës Supreme të 8 janarit 2019, pas shterimit të të gjitha mjeteve juridike të parapara me ligj.

34. Gjykata vëren se Aktgjykimi [E. Rev. 39/18] i Gjykatës Supreme është i 8 janarit 2019, ndërsa kërkesa në shqyrtim është parashtruar më 7 maj 2019, që do të thotë se është parashtruar brenda afatit ligjor të paraparë me nenin 49 të Ligjit.

35. Gjykata gjithashtu konsideron që parashtruesi i kërkesës ka deklaruar saktësisht cilat të drejta të garantuara me Kushtetutë dhe KEDNJ janë shkelur në dëm të tij, në pajtim me kushtet e përcaktuara në nenin 48 të Ligjit.

36. Prandaj, Gjykata konkludon që parashtruesi i kërkesës është palë e autorizuar; se ai ka shteruar të gjitha mjetet juridike; se ai ka respektuar kushtin e paraqitjes së kërkesës brenda afatit ligjor; se ai theksoi saktësisht shkeljet e pretenduara të të drejtave dhe lirive themelore të njeriut; dhe gjithashtu, tregoi se cilin akt specifik të organit publik po e konteston.

37. Duke marrë parasysh pretendimet e parashtruesit dhe argumentet e tyre, Gjykata konsideron që kërkesa ngre çështje serioze kushtetuese dhe se përcaktimi i tyre varet nga shqyrtimi i meritave të kërkesës. Gjithashtu, kërkesa nuk mund të konsiderohet qartazi e pabazuar brenda kuptimit të rregullit 39 të Rregullores së punës dhe nuk është vërtetuar asnjë bazë tjetër për ta deklaruar atë të papranueshme (shih, Gjykata Kushtetuese, rasti nr. KI97/16, parashtrues *IKK Classic*, Aktgjykim i 4 dhjetorit 2017).

38. Gjykata e deklaron kërkesën të pranueshme për shqyrtim të meritave.

Meritat e kërkesës

39. Gjykata rikujton që parashtruesi i kërkesës pretendon shkelje të të drejtave të garantuara me nenin 31 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës në lidhje me nenin 6 (E drejta për një proces të rregullt) të KEDNJ-së. Parashtruesi i kërkesës pretendon se me Aktgjykimin e kontestuar të Gjykatës Supreme është shkelur e drejta e tij për vendim të arsyetuar, që gjithashtu shkaktoi shkelje të parimit të sigurisë juridike. Sipas parashtruesit të kërkesës, këto shkelje ndodhën për shkak se Gjykata Supreme në aktgjykimin e saj nuk ofroi një arsyetim të mjaftueshëm dhe adekuat për ndryshimin e

qëndrimit në lidhje me llogaritjen e kamatëvonesës, të cilin ajo vazhdimisht e kishte zbatuar në praktikën e saj.

40. Parashtruesi i kërkesës më tej pretendon se mbetet i paqartë dhe i pashpjegueshëm fakti se mbi të cilën bazë ligjore Gjykata Supreme e bazoi Aktgjykimin e saj për ndryshimin e kamatëvonesës të gjykuar nga gjykatat më të ulëta.

41. Parashtruesi i kërkesës shton se Aktgjykimit të Gjykatës Supreme i mungon arsyetimi përkatës i qasjes së re në këtë rast, në lidhje me institutin e kamatëvonesës në marrëdhëniet juridike të sigurimit të detyrueshëm të autopërgjegjësisë sepse Gjykata Supreme ka vendosur krejtësisht ndryshe në raste të njëjta.

42. Duke pasur parasysh pretendimet e bëra në kërkesën në shqyrtim, Gjykata i referohet nenit 31.1 dhe 2 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës, i cili përcakton:

> "1. *Çdokujt i garantohet mbrojtje e barabartë e të drejtave në procedurë para gjykatave, organeve të tjera shtetërore dhe bartësve të kompetencave publike.*
>
> *2. Çdokush gëzon të drejtën për shqyrtim publik të drejtë dhe të paanshëm lidhur me vendimet për të drejtat dhe obligimet ose për cilëndo akuzë penale që ngrihet kundër saj/tij brenda një afati të arsyeshëm, nga një gjykatë e pavarur dhe e paanshme, e themeluar me ligj.*"

43. Përveç kësaj, Gjykata i referohet nenit 6.1 (E drejta për një proces të rregullt), të KEDNJ-së që parasheh:

> *"Çdo person ka të drejtë që çështja e tij të dëgjohet drejtësisht, publikisht dhe brenda një afati të arsyeshëm nga një gjykatë e pavarur dhe e paanshme, e krijuar me ligj e cila do të vendosë si për mosmarrëveshjet në lidhje me të drejtat dhe detyrimet e tij të natyrës civile, ashtu edhe për bazueshmërinë e çdo akuze penale në ngarkim të tij."*

44. Gjykata përsërit se bazuar në nenin 53 [Interpretimi i Dispozitave për të Drejtat e Njeriut] të Kushtetutës është e detyruar të interpretojë të drejtat dhe liritë e njeriut të garantuara me Kushtetutë. Në pajtim me këtë, sa i përket interpretimit të pretendimeve për shkeljen e nenit 31 të Kushtetutës në lidhje me nenin 6 të KEDNJ-së, Gjykata do t'i referohet praktikës gjyqësore të GJEDNJ-së.

(i) Parimet e përgjithshme përkitazi me sigurinë juridike dhe konsistencën e praktikës gjyqësore

45. GJEDNJ në praktikën e saj gjyqësore ka përcaktuar se nuk është funksioni i saj të merret me gabimet e fakteve apo të ligjit, që pretendohet të jenë bërë nga një gjykatë vendore, përveç nëse dhe për aq sa ato mund të kenë shkelur të drejtat dhe liritë e mbrojtura me Konventën Evropiane (shih *García Ruiz kundër Spanjës,* cituar më lart, paragrafi 28). Po ashtu, nuk është funksioni i saj as t'i krahasojë, përveç në rastet e arbitraritetit të dukshëm, vendimet e ndryshme të gjykatave kombëtare, madje edhe nëse ato janë nxjerrë në procedurat që janë dukshëm të ngjashme, pasi që pavarësia e këtyre gjykatave duhet të respektohet (shih rastin e GJEDNJ-së *Ādamsons kundër Letonisë*, Aktgjykim i 24 qershorit 2008, paragrafi 118).

46. Mundësia e vendimeve kundërthënëse është një tipar i pandarë i çdo sistemi gjyqësor të bazuar mbi rrjetin e gjykatave themelore dhe të apelit me autorizime në kuadër të juridiksionit të tyre territorial. Një shmangie e tillë mund të ndodhë edhe brenda të njëjtës gjykatë. Kjo, në vetvete, nuk mund të konsiderohet në kundërshtim me Konventën (shih rastet e GJEDNJ-së *Santos Pinto kundër Portugalisë*, Aktgjykim i 20 majit 2008, paragrafi 41; dhe *Tudor Tudor kundër Rumanisë*, cituar më lart paragrafi 29).

47. Megjithatë, GJEDNJ në praktikën e saj ka vendosur kritere të cilat ajo i përdor për të vlerësuar nëse vendimet kundërthënëse të gjykatave vendore, duke gjykuar në instancën e fundit, shkelin kërkesën për gjykim të drejtë të parashikuar me nenin 6 paragrafi 1 të Konventës Evropiane, e ato kritere janë: ***i)*** *përcaktimi nëse ekzistojnë „dallime të thella dhe afatgjata" në praktikën gjyqësore të gjykatave të vendit*, ***ii)*** *nëse ligjet e vendit parashohin një mekanizëm i cili mund t'i tejkalojë këto kundërthënie*, ***iii)*** *nëse ky mekanizëm është zbatuar, dhe nëse po, në çfarë mase* (shih aktgjykimet e GJEDNJ-së *Iordan Iordanov dhe të tjerët kundër Bullgarisë*, Aktgjykim i 2 korrikut 2009, par. 49-50; *Beian kundër Rumanisë* (numër 1), Aktgjykim i 6 dhjetorit 2007, par. 34-40; *Ştefan dhe Ştef kundër Rumanisë,* Aktgjykim i 27 janarit 2009, par. 33-36; *Schwarzkopf dhe Taussik kundër Republikës Çeke,* vendim për pranueshmëri i 2 dhjetorit 2008; *Tudor Tudor*, i cituar në tekstin e mësipërm, paragrafi 31; dhe *Ştefănică dhe të tjerët kundër Rumanisë,* Aktgjykim i 2 nëntorit 2010, paragrafi 36).

(ii) Parimet e përgjithshme mbi të drejtën për një vendim të arsyetuar

48. Gjykata, para së gjithash, rikujton se garancitë e përmbajtura në nenin 6, paragrafin 1 të KEDNJ-së, përfshijnë detyrimin e gjykatave që të paraqesin arsyetim të mjaftueshëm për vendimet e tyre. Vendimi i arsyetuar gjyqësor u tregon palëve se rasti i tyre është shqyrtuar me të vërtetë (shih Aktgjykimin e GJEDNJ-së *H. kundër Belgjikës,* aktgjykim i 30 nëntorit 1987, paragrafi 53).

49. Gjykata, gjithashtu, thekson se sipas praktikës së GJEDNJ-së, neni 6, paragrafi 1 i detyron gjykatat që të arsyetojnë vendimet e tyre, megjithatë kjo nuk mund të interpretohet në mënyrë të tillë që nga gjykatat të kërkohet përgjigje e hollësishme për secilin pretendim (shih rastet e GJEDNJ-së, *Van de Hurk kundër Holandës,* Aktgjykimi i 19 prillit 1994; *Garcia Ruiz kundër Spanjës*, kërkesa nr. 30544/96, Aktgjykimi i 21 janarit 1999, paragrafi 26; *Jahnke dhe Lenoble kundër Francës*, vendim për pranueshmëri i 29 gushtit 2000).

50. Lidhur me këtë, GJEDNJ shton se gjykata vendore ka një liri të caktuar të vlerësimit në pranimin e argumenteve dhe vendosjen në pranueshmërinë e provave, por ajo gjithashtu ka edhe obligimin që të justifikojë veprimet e saj duke dhënë arsyetime për vendimet e saj (shih Aktgjykimin e GJEDNJ-së *Suominen kundër Finlandës*, kërkesa 37801/97, e 1 korrikut 2003, paragrafi 36).

51. Gjithashtu, Gjykata thekson se në pajtim me praktikën e GJEDNJ-së, gjatë shqyrtimit nëse arsyetimi i vendimit gjyqësor i plotëson standardet e të drejtës për gjykim të drejtë, duhet të merren parasysh rrethanat e rastit konkret. Vendimi gjyqësor nuk duhet të jetë pa asnjë arsyetim, dhe as arsyetimi nuk duhet të jetë i paqartë. Kjo posaçërisht vlen për arsyetimin e vendimit të gjykatës e cila vendos sipas mjetit juridik, në të cilin janë ndryshuar qëndrimet juridike të paraqitura në vendimin e gjykatës më të ulët (shih rastin e GJEDNJ-së, *Van de Hurk kundër Holandës,* cituar më lart, paragrafi 61).

52. Gjykata dëshiron të theksojë se nocioni i një gjykimi të drejtë, në pajtim me praktikën e GJEDNJ-së, gjithashtu kërkon që gjykata kombëtare e cila ka dhënë arsye të pakta për vendimet e saj, në të vërtetë të ketë adresuar çështjet themelore në kuadër të juridiksionit të saj, pra se nuk i kishte pranuar thjeshtë dhe pa përpjekje shtesë konkluzionet e arritura nga gjykata më e ulët. Kjo kërkesë është edhe më e rëndësishme në rast kur një palë në kontest nuk ka pasur mundësi për të paraqitur gojarisht rastin e saj në procedurën vendore (shih Aktgjykimin e GJEDNJ-së *Helle kundër Finlandës,* kërkesa 157/1996/776/977, e 19 dhjetorit 1997, paragrafi 60).

53. Gjykata i referohet edhe praktikës së saj gjyqësore ku ajo përcakton se arsyetimi i vendimit duhet të theksojë raportin ndërmjet konstatimeve të meritës dhe shqyrtimit të provave nga njëra anë, dhe konkluzionet ligjore të gjykatës, nga ana tjetër. Aktgjykimi i gjykatës do të shkelë parimin kushtetues të ndalimit të arbitraritetit në vendimmarrje, në qoftë se arsyetimi i dhënë nuk i përmban faktet e vërtetuara, dispozitat ligjore dhe marrëdhënien logjike midis tyre (shih, Gjykata Kushtetuese, rastet: nr. KI72/12, *Veton Berisha dhe Ilfete Haziri*, Aktgjykimi i 17 dhjetorit 2012, paragrafi 61; nr. KI135/14, *IKK Classic*, Aktgjykimi i 9 shkurtit 2016, paragrafi 58, dhe KI97/16 *IKK Classic*, Aktgjykimi i 11 janarit 2018).

(iii) Zbatimi i parimeve të përgjithshme në lidhje me sigurinë juridike dhe të drejtën në vendimin e arsyetuar në rrethanat e rastit konkret

54. Gjykata vëren se pretendimi kryesor ankimor i parashtruesit të kërkesës është se Gjykata Supreme, nuk ka deklaruar arsye të qarta dhe të mjaftueshme mbi të cilat ka mbështetur vendimin e saj për të ndryshuar aktgjykimet e gjykatave më të ulëta në lidhje me llogaritjen e lartësisë së kamatëvonesës në rastin e parashtruesit të kërkesës dhe duke mos arsyetuar se pse kishte marrë një vendim ndryshe në raport me praktikën e saj të mëparshme, ka shkelur parimin e sigurisë juridike të garantuar me nenin 31 të Kushtetutës dhe nenin 6 paragrafi 1 i KEDNJ-së.

55. Gjykata vlerëson se në rastin konkret pretendimet në lidhje me sigurinë juridike dhe te drejtën ne vendimin e arsyetuar , për shkak të natyrës së rastit dhe marrëdhënies së tyre të ndërlidhur, duhet të shqyrtohen në kontekstin e një arsyetimi të vetëm. Gjykata rikujton që Gjykata Supreme (Aktgjykimi E. Rev. 39/18) ndryshoi Aktgjykimet a shkallëve më të ulëta (Gjykatës së Apelit Ae. nr. 91/2016 të 31 gushtit 2018 dhe të Gjykatës Themelore III. C. nr. 506/2012 të 8 shkurtit 2016) vetëm në lidhje me vendimin për kamatën e gjykuar.

56. Në lidhje me këtë, Gjykata Supreme deklaroi: "*Refuzohet si i pabazuar revizioni i të paditurës, i paraqitur kundër aktgjykimit të Gjykatës së Apelit të Kosovës Ae. nr. 91/2016 datë 31.08.2018 dhe ndryshohet aktgjykimi i Gjykatës së Apelit të Kosovës Ae. nr. 91/2016 datë 31.08.2018 dhe aktgjykimi i Gjykatës Themelore në Prishtinë - Departamenti për Çështje Ekonomike III. C. nr. 506/2012 datë 08.02.2016, ashtu që shumën e gjykuar me këto aktgjykime në lartësi prej 50.858,62 €, detyrohet e paditura që paditëses t'ia paguajë me kamatën të cilën e paguajnë bankat vendore si për mjetet e deponuara në kursim me afat mbi 1 vit e pa destinim të caktuar, duke*

filluar nga data 24.01.2012 e tutje deri në përmbushjen përfundimtare të këtij borxhi".

57. Në këtë drejtim, Gjykata rithekson se për të mbështetur pretendimin e tij për shkelje të parimit të sigurisë juridike, parashtruesi i kërkesës dorëzoi tetë (8) vendime të Gjykatës Supreme në raste të ngjashme që kanë të bëjnë me çështjen e regresit dhe kamatëvonesës, përkatësisht:) [E. Rev. nr. 27/2018 i 24 shtatorit 2018]; (2) [E. Rev. nr. 23/2017 i 14 dhjetorit 2017], (3) [E. Rev. nr. 48/2014 i 13 majit 2014], (4) [E. Rev. nr. 62/2014 i 21 janarit 2015], (5) [E. Rev. nr. 14/2016 i 24 marsit 2016]; (6) [E. Rev. nr. 6/2015 të 19.03.2015], (7) [E. Rev. nr. 55/2014 i 3 nëntorit 2014] dhe (8) [E. Rev. nr. 20/2014 i 14 prillit 2014].

58. Në vijim, Gjykata do të rikujtoje pjesët përkatëse të disa prej vendimeve të sipërpërmendura.

59. Në Aktgjykimin e E. Rev. nr. 27/2018 të 24 shtatorit 2018, Gjykata Supreme në pjesën përkatëse arsyetoi: "*Ndërkohë që Gjykata Supreme e Kosovës vlerëson se aktgjykimi i gjykatës së shkallës së dytë, përkitazi me kamatën e gjykuar është marrë me zbatim të gabuar të së drejtës materiale, ndaj, edhe e ndryshoi të njëjtin në këtë pjesë, duke e lënë në fuqi aktgjykimin e gjykatës së shkallës së parë. Kështu nga se, Gjykata e shkallës së parë e ka zbatuar drejt të drejtën materiale kur paditësit i ka pranuar të drejtën në kamatë në shumën e gjykuar në lartësi prej 20% duke filluar nga dt. 15.04.2011 e deri me dt, 29.07.2011 dhe kamatën prej 12% duke filluar nga dt. 29.07.2011 e deri në pagesën definitive nga se sipas dispozitës së nenit 277 të LMD-së dhe nenit 26.6 të Ligjit për Sigurimin e Detyrueshëm nga Autopërgjegjësia, me të cilën dispozitë është paraparë se në rastin e mosrespektimit të afateve të përcaktuara në par. 1 të këtij neni dhe mospërmbushjes së detyrimit në pagesën e paradhënies nga par. 4 të këtij neni, siguruesi përgjegjës konsiderohet të jetë me vonesë në përmbushjen e detyrimit për dëmshpërblim, duke e ngarkuar me pagesë të interesit për vonesë, ky interes paguhet në lartësi prej 12 % të interesit vjetor dhe llogaritet për çdo ditë vonesë deri në shlyerjen e dëmshpërblimit nga siguruesi përgjegjës, duke filluar nga data e paraqitjes së kërkesës për dëmshpërblim".*

60. Në Aktgjykimin E. Rev. 23/2017, të 14 dhjetorit 2017, Gjykata Supreme në pjesën përkatëse arsyetoi: *"Kjo lartësi e kamatës ka qenë e paraparë deri në hyrje në fuqi të Ligjit për Sigurimin e Detyrueshëm nga Auto Përgjegjësia (nr 04/L-018) e cila ka hyrë në fuqi më 30.07.2011 dhe kjo datë duhet të llogaritet kamata prej 12% në bazë të nenit 26 pika 6. Gjykata e shkallës së dytë ka llogaritur kamatën në shumën e gjykuar në lartësi që paguajnë bankat në*

mjetet e deponuara mbi një vit pa destinim të caktuar si dhe kamatën në bazë të Rregullit 3 të Bankës Qendrore të Kosovës (BQK) dhe Ligjit për Sigurimin e Detyrueshëm nga Auto Përgjegjësia".

61. Në Aktgjykimin E. Rev. nr. 48/2014, të 27 tetorit 2014, Gjykata Supreme në pjesën përkatëse arsyetoi: "*Kjo Gjykatë vlerëson se gjykatat e instancës më të ulët drejt kanë aplikuar të drejtën materiale kur paditësit i kanë pranuar të drejtën në kamatë në shumën e borxhit kryesor në lartësi prej 20% vjetore duke filluar nga data 19.11.2010 e deri me datën 28.07.2011 dhe kamatën prej 12% duke filluar nga dt. 29.07.2011 e deri në pagesën definitive nga se sipas dispozitës së nenit 277 të LMD-së dhe nenit 26.6 të Ligjit për Sigurimin e detyrueshëm nga auto përgjegjësia nr. 04/L-018, me të cilën dispozitë është paraparë se në rastin e mosrespektimit të afateve të përcaktuara në paragrafin 1 të këtij neni dhe mospërmbushjes së detyrimit në pagesën e paradhënies nga paragrafi 4 të këtij neni, siguruesi përgjegjës konsiderohet të jetë me vonesë në përmbushjen e detyrimit për dëmshpërblim, duke e ngarkuar me pagesë të interesit për vonesë, ky interes paguhet në lartësinë prej 12 % të interesit vjetor dhe llogaritet për çdo ditë vonesë deri në shlyerjen e dëmshpërblimit nga siguruesi përgjegjës, duke filluar nga data e paraqitjes së kërkesës për dëmshpërblim".*

62. Në Aktgjykimin E. Rev. nr. 62/2014 të 21 janarit 2015, Gjykata Supreme në pjesën përkatëse arsyetoi: "*Kjo Gjykatë vlerëson se gjykata e shkallës së dytë drejt ka aplikuar të drejtën materiale kur të paditurës ia ka pranuar të drejtën në kamatë në shumën e borxhit kryesor në lartësi prej 12% duke filluar nga data 14.6.2010 e deri në pagesën definitive ngase sipas dispozitës së nenit 277 të LMD-së e lidhur me nenin 26.6 të Ligjit për Sigurimin e detyrueshëm nga autopërgjegjësia nr. 04/L-018, parashihet kamata në lartësi prej 12% në vit e cila llogaritet për çdo ditë vonesë deri në shlyerjen e dëmshpërblimit nga siguruesi, duke llogaritur nga data e paraqitjes së kërkesës për dëmshpërblim".*

63. Në Aktgjykimin E. Rev. nr. 14/2016 të 24 marsit 2016, Gjykata Supreme në pjesën përkatëse arsyetoi: "*Me aktgjykimin e Gjykatës së Apelit të Kosovës Ae. nr. 40/2015 datë 12.11.2015, është refuzuar si e pabazuar ankesa e të paditurës ndërsa është vërtetuar aktgjykimi i Gjykatës Themelore në Prishtinë – Departamenti për çështje ekonomike C. nr. 544/2013 datë 23.12.2014 me të cilin me pjesën I të diapozitivit është miratuar si e bazuar kërkesëpadia e paditësit që të detyrohet Kompania e Sigurimeve "Insig" me seli në Prishtinë, që paditësit t'ia kompensojë shumën prej 42.243.41 € në emër të regresit nga sigurimi i auto përgjegjësisë, me kamatë prej 12% në vit, duke e*

llogaritur nga data 14.1.2010 e deri në pagesën definitive, brenda afatit prej 7 ditësh nga dita e dorëzimit të këtij aktgjykimi [...] Gjykata Supreme e Kosovës, pas shqyrtimit të aktgjykimit të goditur sipas nenit 215 të LPK, ka gjetur se: Revizioni është i pabazuar".

64. Në Aktgjykimin E. Rev. nr. 6/2015 të 19 marsit 2015, Gjykata Supreme në pjesën përkatëse arsyetoi: "*Me aktgjykimin e Gjykatës së Apelit të Kosovës Ae. nr. 162/2013 datë 10.06.2014 është refuzuar si e pabazuar ankesa e të paditurës dhe është vërtetuar aktgjykimi i Gjykatës Themelore në Prishtinë – Departamenti për çështje ekonomike C. nr. 229/2012 datë 16.07.2013, me të cilin është aprovuar si e bazuar kërkesëpadia e paditësit dhe është detyruar e paditura që paditësit t'i paguajë shumën prej 17.924.35 € në emër të kompensimit të dëmit kasko regres lidhur me riparimin e automjetit të dëmtuar të tipit "BMW 5" me targa ES VS 2009 në aksidentin e datës 25.08.2009, pronar i të cilës ishte V.J. i cili klithe siguruar këtë automjet me sigurim kasko tek e paditura, me kamatë ndëshkuese prej 12%, duke filluar nga data 22.07.2010 e deri në pagesën definitive si dhe shpenzimet e procedurës në shumë prej 1.134.29 € [...] Gjykata Supreme e Kosovës shqyrtoi aktgjykimin e gjykatës së shkallës së dytë të goditur me revizion, në kuptim të nenit 215 të Ligjit mbi Procedurën Kontestimore (LPK), dhe gjeti se: Revizioni i të paditurës është i pabazuar".*

65. Në Aktgjykimin E. Rev. nr. 55/2014 të 3 nëntorit 2014, Gjykata Supreme në pjesën përkatëse arsyetoi: "*Me aktgjykimin e Gjykatës së Apelit të Kosovës Ae. nr. 46/2013 të datës 10.05.2014, është refuzuar si e pabazuar ankesa e të paditurës dhe është vërtetuar aktgjykimi i Gjykatës Ekonomike e Qarkut në Prishtinë C. nr. 282/2012 të datës 09.10.2012 me të cilin është aprovuar kërkesëpadia e paditësit dhe është detyruar e paditura, që të paguajë në emër të borxhit regresiv shumën prej 14.041.58 €, me kamatë vjetore prej 12% [...]Gjykata Supreme e Kosovës pas shqyrtimit të shkresave të lëndës dhe aktgjykimit të goditur, sipas dispozitës së nenit 215 të LPK, vlerësoi se: Revizioni është i pabazuar".*

66. Në Aktgjykimin E. Rev. nr. 20/2014 të 14 prillit 2014, Gjykata Supreme në pjesën përkatëse arsyetoi: "*Edhe thëniet e të paditurës në revizion se gjykatat e instancës më të ulët gabimisht kanë aplikuar të drejtën materiale kur paditëses i kanë pranuar të drejtën me kamatë në lartësinë e shumës së aprovuar në lartësi prej 12% vjetore janë të pabazuara, ngase gjykatat e instancës më të ulët drejt kanë aplikuar të drejtën materiale dhe atë dispozitën e nenit 277 të LMD-së lidhur me nenin 26 pika 6 të Ligjit për sigurimin e detyrueshëm nga auto*

përgjegjësia nr. 04/L-018 me të cilën dispozitë është paraparë se në rast të mosrespektimit të afateve të përcaktuara në parag. 1 të këtij neni dhe mospërmbushjes së detyrimit në pagesën e paradhënies nga paragrafi 4 i këtij neni siguruesi përgjegjës konsiderohet të jetë në vonesë në përmbushjen e detyrimit për dëmshpërblim, duke u ngarkuar me pagesë të interesit për vonesë. Ky interes paguhet në lartësi prej 12% të interesit vjetor dhe llogaritet për çdo ditë vonesë deri në shlyerjen e dëmshpërblimit nga siguruesi përgjegjës, duke filluar nga data e paraqitjes së kërkesës për dëmshpërblim".

67. Në rastet e lartpërmendura, Gjykata Supreme, ka arsyetuar se neni 26.6 i Ligjit në fjalë, zbatohet vetëm në rastet kur rënia në vonesë për shlyerjen e detyrimit (dëmshpërblimit) bëhet me kërkesë të personave të dëmtuar. Tutje, Gjykata Supreme arsyetoi, se në rrethanat e rastit konkret nuk kemi të bëjmë me kërkesë për dëmshpërblim nga personi i dëmtuar, por me kërkesë për rënien në vonesë të shlyerjes së detyrimit nga kompania vendore e sigurimeve EUROSIG, ndaj parashtrueses së kërkesës, andaj në këtë kuptim Gjykata Supreme ka arsyetuar se perse paragrafi 6 i nenit 26 i Ligjit për Sigurimin e Detyrueshëm nga Autopërgjegjësia nuk zbatohet për parashtruesen e kërkesës por paragrafi 7 i nenit 26 i të njëjtit Ligj.

68. Gjykata rikujton se parashtruesja e kërkesës edhe më tutje mund të mos jetë e kënaqur me arsyetimin dhe bazën ligjore të zbatuar nga Gjykata Supreme. Megjithatë, në praktikën e saj gjyqësore në mënyrë konsistente Gjykata ka konstatuar se çështjet e faktit dhe çështjet e interpretimit dhe zbatimit të ligjit bien brenda fushëveprimit të gjykatave të rregullta dhe të autoriteteve të tjera publike, dhe si të tilla janë çështje të ligjshmërisë, përveç dhe përderisa, çështje të tilla rezultojnë në shkelje të të drejtave dhe lirive themelore të njeriut ose krijojnë një situatë antikushtetuese (shih, mes tjerash, Gjykata Kushtetuese rasti nr. KI33/16, parashtruese *Minire Zeka*, Aktgjykim i 4 gushtit 2018, paragrafi 91).

69. Duke i marrë parasysh elaboratet e cekura më sipër, Gjykata do të përdorë testin e vendosur në bazë të praktikës gjyqësore të GJEDNJ-së për të përcaktuar: (i) nëse ekzistojnë dallime "*të thella dhe afatgjata"* në praktikën gjyqësore të gjykatave vendase; (ii) nëse ligjet vendase sigurojnë një mekanizëm që mund të zgjidhë këto mospërputhje; (iii) nëse ai mekanizëm është zbatuar; dhe iv) nëse vendimi i kontestuar i Gjykatës Supreme i përmbush kriteret e një vendimi të arsyetuar në përputhje me praktikën gjyqësore të GJEDNJ-së dhe praktikën gjyqësore të Gjykatës.

70. Gjykata i referohet përsëri Ligjit për Gjykatat nr. 06/L-054, i cili në nenin 14 parasheh mekanizmin për administrimin e duhur të drejtësisë dhe shqyrtimin e ndryshimeve në praktikën gjyqësore.

Neni 14
Kompetencat dhe Përgjegjësitë e Kryetarit dhe nënkryetarit të Gjykatës

> *"[...]*
> *Kryetari i gjykatës thërret takim vjetor të të gjithë gjyqtarëve për këshillim mbi Administrimin e Drejtësisë në atë gjykatë; për të analizuar organizimin e gjykatës; për të shqyrtuar dhe propozuar ndryshime në procedura dhe praktika.*"

71. Gjykata më tej thekson se në praktikën e saj gjyqësore në shumë raste ajo ka konstatuar se çështjet e faktit dhe çështjet e interpretimit dhe zbatimit të ligjit janë brenda domenit të gjykatave të rregullta dhe të autoriteteve të tjera publike, në kuptim të nenit 113.7 të Kushtetutës dhe si të tilla janë çështje të ligjshmërisë, përveç dhe përderisa, çështje të tilla rezultojnë në shkelje të të drejtave dhe lirive themelore të njeriut ose krijojnë një situatë antikushtetuese (shih, ndër të tjera, Gjykata Kushtetuese, rasti nr. KI33/16, parashtruese *Minire Zeka*, Aktgjykim i 4 gushtit 2018, paragrafi 91).

72. Gjykata konsideron se Gjykata Supreme është instanca e fundit dhe më e larta e gjyqësorit të rregullt dhe si e tillë duhet të kujdeset për harmonizimin e praktikës gjyqësore në Republikën e Kosovës, si dhe administrimin e duhur të drejtësisë. Është detyrim i Gjykatës Supreme që për rastet që janë relativisht të ngjashme, për aq sa është e mundur, vendimet e saj të jenë të parashikueshme dhe të karakterizohen nga korrektësia e rezultateve. Parashikueshmëria dhe rregullsia e vendimeve të Gjykatës Supreme do të ishin në të njëjtën mënyrë në favor të ankuesve dhe gjykatave më të ulëta.

73. Gjykata vëren se Gjykata Supreme konstatoi në Aktgjykimin e kontestuar: (i) se neni 324. 2 i LMD-së në lidhje me nenin 26.7 të Ligjit mbi Sigurimin e Autopërgjegjësisë janë dispozita ligjore që janë relevante për rastin e parashtruesit të kërkesës; (ii) që norma e interesit e "kualifikuar" prej 12% nuk zbatohet për rastet e regresit të borxhit, por vetëm për kërkesat për trajtimin e palëve të dëmtuara për dëmet në procedurat jashtë gjykatës; (iii) që interesi prej 12% të zbatohet vetëm për zgjidhjen dhe vonesën në zgjidhjen e pretendimeve të palëve për kompensim të dëmit, dhe jo për regresin e borxhit; dhe (iv) që për këto arsye, parashtruesi i kërkesës ka të drejtë në

kamatëvonesë "të thjeshtë" të paraparë në nenin 277 të LMD-së (kamata që paguhet për kursime me afat në një kohë më të gjatë se një vit pa destinim të caktuar) dhe jo kamatë të "kualifikuar" (12%).

74. Në lidhje me këtë, Gjykata i referohet pjesës përkatëse të Aktgjykimit të Gjykatës Supreme e cila përcakton: *"...Paragrafi 7 i nenit 26 të Ligjit të lartpërmendur përjashton zbatimin e kamatës prej 12% edhe për regresim borxhi, kamatë kjo e paraparë vetëm për mos trajtimin dhe rënien në vonesë të trajtimit të kërkesave të personave të dëmtuar, për dëmshpërblim. Kështu që, pa dyshim rezulton se paditësi ka të drejtë vetëm në kamatën e thjeshtë, e jo edhe në kamatë "të kualifikuar" sipas dispozitave të cituara nga gjykata e shkallës së parë dhe të dytë. Meqë paditësja me parashtresën e datës 24.01.2012, ka kërkuar regresim të borxhit nga e paditura, rezulton se nga kjo datë e paditura ka rënë në vonesë në kuptim të nenit 324.2 të LMD të vjetër i cili atëherë ka qenë në fuqi, sipas të cilës: "Në qoftë se afati për përmbushje nuk është caktuar, debitori është në vonesë kur kreditori ta ftojë që ta plotësojë detyrimin e vet, verbalisht ose me shkrim, paralajmërim jashtëgjygësor, ose duke filluar ndonjë procedurë, qëllimi i së cilës është realizimi i përmbushjes të detyrimit". Nga kjo rezulton se paditësi në kuptim të nenit 277.1 të Ligjit të lartpërmendur ka të drejtë që ndaj debitorit-këtu të paditurës i cili është vonuar me përmbushjen e borxhit në të holla, të kërkojë përveç lartësisë së borxhit edhe kamatën e cila paguhet si për deponimet në kursim me afat mbi 1 vit e pa destinim të përcaktuar, duke filluar nga dita e rënies së të paditurës në vonesë përkitazi me pagesën e borxhit kontestues. Përndryshe, sipas nenit 1057 të LMD të Republikës së Kosovës, dispozitat e këtij ligji nuk zbatohen në marrëdhëniet e detyrimeve që kanë lindur para hyrjes në fuqi të këtij ligji. Meqë dëmi ka ndodhur në kohën e vlefshmërisë së LMD të vjetër atëherë dispozitat e atij ligji zbatohen në përgjithësi, e në veçanti edhe për kamatën, nga se neni 1057 nuk përjashton nga zbatimi vetëm dispozitat për kamatën por tërë Ligjin e Marrëdhënieve të Detyrimeve të Republikës së Kosovës kur marrëdhëniet e detyrimeve kanë lindur para hyrjes në fuqi të këtij ligji, andaj në rastin konkret nuk mund të gjykohet asnjë lloj tjetër i kamatës përveç asaj të aprovuar si në dispozitiv të këtij aktgjykimi".*

75. Çështja, nëse parashtruesit të kërkesës i është njohur e drejta për kamatëvonesë të "kualifikuar" (12%) ose për kamatë "të thjeshtë" e cila paguhet për mjetet e depozituara me një afat më të gjatë se një vit pa destinim të caktuar, është çështje e aplikimit dhe interpretimit të ligjit nga Gjykata Supreme në gjykim, e cila, si e tillë, nuk është në vetvete në kundërshtim me të drejtën për një gjykim të drejtë dhe të paanshëm, përveç nëse duket se ka shkelje flagrante të të drejtave dhe

lirive themelore, gjë që nuk ka ndodhur në rastin i cili është në shqyrtim.

76. Bazuar në të cekurat më sipër, Gjykata konstaton se Gjykata Supreme ka përcaktuar bazën ligjore dhe ka shpjeguar se në cilat raste zbatohet norma ligjore e cila përcakton kamatëvonesën e "kualifikuar" prej 12% përkatësisht kamatën "e thjeshtë" të paguar për kursimet e afatizuara për një periudhë më të gjatë se një vit pa destinim të caktuar dhe pse në rastin e parashtruesit të kërkesës zbatohet norma me të cilën përcaktohet kamatëvonesa "e thjeshtë" nga kamata e paguar për mjetet e afatizuara në kursime për një periudhë më të gjatë se një vit pa destinim të caktuar. Në Aktgjykimin e kontestuar të Gjykatës Supreme, ekziston një lidhje logjike midis bazës ligjore, arsyetimit dhe përfundimeve të nxjerra, që do të thotë se Aktgjykimi i kontestuar i përmban të gjithë komponentët e një vendimi të arsyetuar.

77. Për sa i përket konsistencës së praktikës gjyqësore, në bazë të testit të trefishtë të vendosur nga GJEDNJ, Gjykata konstaton: (i) se në rastin në shqyrtim nuk është vërtetuar se ekzistojnë dallime "*të thella dhe afatgjata*" përkitazi me konsistencën e praktikës gjyqësore të Gjykatës Supreme; (ii) që ekziston mekanizmi për administrimin e duhur të drejtësisë dhe shqyrtimin e dallimeve në praktikën gjyqësore (shih Ligjin për Gjykatat Nr. 06/L-054, neni 14. 2.10); dhe (iii) që Gjykata Supreme, më 1 dhjetor 2020, lëshoi "Mendimin Juridik mbi kamatën, në lidhje me ligjin e aplikueshëm, lartësinë dhe periudhën e llogaritjes" në bazë të nenit 14. 2.10 të Ligjit për Gjykatat.

78. Në këtë drejtim, Gjykata thekson se neni 31 i Kushtetutës në lidhje me nenin 6.1 të KEDNJ-së nuk përcakton të drejtën e fituar për konsistencë të praktikës gjyqësore. Në vetvete, zhvillimi i praktikës gjyqësore nuk është në kundërshtim me administrimin e duhur të drejtësisë pasi dështimi për të mbajtur një qasje dinamike dhe evolutive do të rrezikonte parandalimin e reformës ose frustrimin e përmirësimit (shih rastet e GJEDNJ-së *Nejdet Şahin dhe Perihan Şahin kundër Turqisë*, Aktgjykim i 20 tetorit 2010, paragrafi 58; *Famullia Katolike Greke Lupeni dhe të tjerët kundër Rumanisë* (Aktgjykim i 29 nëntorit 2016, paragrafi 116). Dallimet në praktikë gjyqësore, nga vetë natyra e tyre, janë pasojë e qenësishme e çdo sistemi gjyqësor të bazuar në një rrjet të gjykatave të shkallës së parë dhe të apelit të autorizuara për të gjykuar në juridiksionin e tyre territorial. Roli i Gjykatës Supreme pasqyrohet saktësisht në zgjidhjen e konflikteve të tilla (shih GJEDNJ *Beian kundër Rumanisë* (nr. 1), cituar më lart, paragrafi 37).

79. Sa i përket vendimeve të Gjykatës Supreme të dorëzuara nga parashtruesi i kërkesës për të ilustruar pikëpamjet kontradiktore të Gjykatës Supreme dhe për t'i krahasuar ato me Aktgjykimin e kontestuar në rastin i cili është në shqyrtim, Gjykata thekson se nuk është funksioni i saj t'i krahasojë ato vendime me Aktgjykimin e kontestuar, me përjashtim të rasteve të arbitraritetit të dukshëm që nuk ndodhi në rrethanat e rastit konkret, veçanërisht në lidhje me respektimin e pavarësisë së gjykatave të rregullta (shih, *mutatis mutandis*, GJEDNJ *Adamsons kundër Letonisë*, cituar më lart, paragrafi 118).

80. Në bazë të të cekurave më lart, Gjykata konkludon se Aktgjykimi i kontestuar i Gjykatës Supreme është në pajtim me të drejtën në siguri juridike dhe për një vendim të arsyetuar: (i) shpjegon se kamatëvonesa e "kualifikuar" prej 12% vlen vetëm për moszgjidhjen apo vonesën për të zgjidhur pretendimet e palëve të dëmtuara për kompensim të dëmit, jo për regresim të borxhit; (ii) që parashtruesi i kërkesës, në bazë të nenit 277.1 të LMD-së së vjetër, ka të drejtë të kërkojë nga debitori, i cili është vonuar me përmbushjen e borxhit në të holla, përveç shumës së borxhit edhe shumën e kamatëvonesës "së thjeshtë" që paguhet për kursimet e afatizuara për një periudhë më të gjatë se një vit pa destinim të caktuar, duke filluar nga dita kur e paditura filloi të vonohej për sa i përket pagesës së borxhit të kontestuar; dhe (iii) se Gjykata Supreme, më 1 dhjetor 2020, lëshoi një "Mendim Juridik për kamatën sa i përket ligjit të aplikueshëm, lartësisë dhe periudhës së llogaritjes" në bazë të nenit 14.2.10 të Ligjit për Gjykatat.

81. Prandaj, Gjykata konstaton se nuk ka pasur shkelje të nenit 31 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës në lidhje me nenin 6.1 (E drejta për një proces të rregullt) të KEDNJ-së.

Përfundim

82. Në lidhje me pretendimet për shkelje të parimit të sigurisë juridike, Gjykata konstatoi: (i) se në rastin konkret nuk ishte vërtetuar ekzistenca e dallimeve "të thella dhe afatgjata" përkitazi me konsistencën e praktikës gjyqësore të Gjykatës Supreme; (ii) se ekziston mekanizmi për administrimin e duhur të drejtësisë dhe për shqyrtimin e dallimeve në praktikën gjyqësore (shih Ligjin për Gjykatat nr. 06/L-054, neni 14. 2.10); (iii) se Gjykata Supreme, më 1 dhjetor 2020, lëshoi një "Mendim Juridik për kamatën sa i përket ligjit të aplikueshëm, lartësisë dhe periudhës së llogaritjes" në bazë të nenit 14.2.10 të Ligjit për Gjykatat; (iv) që mundësia e vendimeve kontradiktore është një tipar i qenësishëm i çdo sistemi gjyqësor të bazuar në një rrjet të gjykatave themelore dhe të apelit me autorizime

brenda juridiksionit të saj territorial; (v) dhe se cili ligj duhet të aplikohet në rrethanat e rastit konkret është prerogativë dhe detyrë e Gjykatës Supreme; dhe (vi) se roli i Gjykatës Supreme është pikërisht të zgjidhë konflikte të tilla.

83. Në lidhje me pretendimet për shkelje të së drejtës për një vendim të arsyetuar, Gjykata konstatoi se: (i) Gjykata Supreme deklaroi bazën ligjore dhe shpjegoi pse në rastin e parashtruesit të kërkesës aplikohet norma e cila përcakton kamatëvonesën "e thjeshtë" që paguhet për mjetet e kursimeve të afatizuara për një periudhë më të gjatë se një vit pa destinim të caktuar; (ii) që Aktgjykimi i kontestuar i Gjykatës Supreme përmban lidhjen logjike midis bazës ligjore, arsyetimit dhe konkluzioneve të nxjerra; (iii) që, si një rrjedhë logjike midis bazës ligjore, arsyetimit dhe konkluzioneve, rezultoi që Aktgjykimi i kontestuar i Gjykatës Supreme plotëson kriterin e një vendimi të arsyetuar; dhe (iv) çështja nëse parashtruesit të kërkesës i është njohur e drejta për kamatëvonesë të "kualifikuar" prej 12% ose për kamatë "të thjeshtë" e cila paguhet për mjetet e depozituara me një afat më të gjatë se një vit pa destinim të caktuar, është çështje e aplikimit dhe interpretimit të ligjit dhe diskrecionit të Gjykatës Supreme në gjykim, e cila, si e tillë, nuk është në vetvete në kundërshtim me të drejtën për një gjykim të drejtë dhe të paanshëm.

84. Në fund, Gjykata konstaton se në rrethanat e rastit konkret nuk ka pasur shkelje të nenit 31 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës në lidhje me nenin 6.1 (E drejta për një proces të rregullt) të KEDNJ-së.

PËR KËTO ARSYE

Gjykata Kushtetuese, në pajtim me nenet 113.7 dhe 21.4 të Kushtetutës, nenet 20 dhe 47 të Ligjit dhe rregullin 59 (1) të Rregullores së punës, në seancën e mbajtur më 28 prill 2021

VENDOS

I. TË DEKLAROJË njëzëri kërkesën të pranueshme;

II. TË KONSTATOJË, me shumicë votash, se Aktgjykimi i Gjykatës Supreme të Republikës së Kosovës, E. Rev. nr. 39/2018, i 8 janarit 2019, është në pajtueshmëri me nenin 31 [E Drejta për Gjykim të Drejtë dhe të Paanshëm] të Kushtetutës së Republikës së Kosovës dhe nenin 6.1 (E drejta për një proces të rregullt) të Konventës Evropiane për të Drejta të Njeriut;

III. T'UA KUMTOJË këtë Aktgjykim palëve, dhe në pajtim me nenin 20.4 të Ligjit ta publikojë të njëjtin në Gazetën Zyrtare;

IV. Ky Aktgjykim hyn në fuqi menjëherë.

Gjyqtarja raportuese	**Kryetarja e Gjykatës Kushtetuese**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

KO88/21: Applicant: The President of the Republic of Kosovo, Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo

Published 19.07.2021

In the deliberation session held on 2July 2021, the Court reviewed case KO88/21, namely the Referral of the President of the Republic of Kosovo for (i) *"the interpretation of the notion "largest parliamentary group" in the context of the allocation of eats in the CEC for the parliamentary groups represented in the Assembly of the Republic of Kosovo, in terms of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo";* and (ii) *"for resolving conflicts of authorizations of parliamentary groups to propose the CEC members".*

The Court notes that based on the facts of this case, it results that (i) on 22 April 2021, the President of the Republic had sent a request to the parliamentary groups for the nomination of candidates for CEC members; and (ii) between 29 April 2021 and 12 May 2021, the parliamentary groups represented in the Assembly, who are not eligible to participate in the allocation of guaranteed seats, namely LVV, PDK, LDK and AAK, had proposed the respective members, whilst political entities, which hold seats guaranteed for non-majority communities in Kosovo, also submitted their nominations.

The President of the Republic of Kosovo, on 12 May 2021, has appointed eight (8) members of the CEC. Two (2) other members were not appointed by the President of the Republic of Kosovo, because (i) LVV proposed three (3) candidates for members of the CEC, while PDK proposed two (2) candidates for members of the CEC, and claiming *"lack of clarity"* in the context of paragraph 4 of Article 139 of the Constitution which stipulates that *"if fewer groups are represented in the Assembly, the largest group or groups may appoint additional members"*, the President of the Republic of Kosovo addressed the Court with a request for interpretation of *"the largest parliamentary group"* in the context of the abovementioned provision, respectively whether the vacant positions in the CEC belong only to the largest parliamentary *group* or *groups*; and (ii) the Bosnian community, in the current structure of the Assembly, is represented through three (3) different political entities with an equal number of seats in the Assembly, while there were three (3) proposals submitted to the Presidency from this community, even though the latter is entitled to only one (1) seat in the CEC. Consequently, the President of the Republic also alleges "*lack of clarity*" in the context of paragraph 4 of Article 139 of the Constitution, with respect to the appointment of the CEC members from among the communities that are

not in majority, in cases when a community is represented by more political entities, but with equal number of seats in the Assembly.

In the context of the circumstances mentioned above, and emphasizing that *"the lack of clarity of competencies prevents the President to appoint all members of the CEC, as a body which administers and manages the free, equal and direct elections in Kosovo"*, the President of the Republic of Kosovo addressed the Constitutional Court with (i) the request for interpretation of the notion of *"largest parliamentary group"* in the context of paragraph 4 of Article 139 of the Constitution, based on paragraph 9 of Article 84 of the Constitution; and (ii) the request to resolve the conflict of *"authorizations"* of parliamentary groups to propose the CEC members, based on item 1 of paragraph 3 of Article 113 of the Constitution.

(i) Regarding the assessment of admissibility in the context of paragraph 9 of Article 84 of the Constitution

In assessing the admissibility of the President's Referral for interpretation of lack of constitutional clarities pursuant to paragraph 9 of Article 84 of the Constitution, and the relevant request for an answer to four (4) questions submitted to the Court and which will be fully reflected in the Resolution on Inadmissibility that will be published in accordance with the procedural rules in the following days, the Court found that the Referral of the President is inadmissible. The Court, through its case law, including case KO79/18, in which also a request by the President of the Republic for interpretation of paragraph 4 of Article 139 of the Constitution was considered, has clarified that (i) paragraph 9 of Article 84 of the Constitution is not independent of Article 113 of the Constitution; (ii) paragraph 9 of Article 84 and paragraph 1 of Article 112 of the Constitution can not be interpreted outside the context of Article 113 of the Constitution; and (iii) based on Article 113 of the Constitution, the Court's possibility to take a consultative or advisory role through answering questions submitted to it is limited, as this role would be in conflict with its fundamental role to resolve cases brought before it.

(ii) Regarding the assessment of admissibility in the context of item (1) of paragraph 3 of Article 113 of the Constitution

In assessing the admissibility of the Referral of the President, based on item 1 of paragraph 3 of Article 113 of the Constitution, concerning the resolution of the conflict of *"authorizations"*, between the "*constitutional competence*" of the President and the "*competence of the parliamentary groups represented in the Assembly*" for the nomination of CEC members, the Court initially notes that the aforementioned Article of the Constitution stipulates that the President of the Republic of Kosovo is one of the three authorized parties to raise issues of *"conflict among constitutional competencies of the*

Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo". This provision has been interpreted by the Court, initially through the Resolutions in cases KO131/18 and KO181/18, where it clarified the three cumulative constitutional criteria which must be met in order for the referrals raised under this Article to pass the admissibility test. In the above-mentioned cases, the Court had clarified that in terms of Article 113.3 (1) of the Constitution, the following three criteria must be met: (i) the conflict must be raised by one of the three authorized parties; (ii) the conflict arises over "*constitutional competences"* of the Assembly, the President and/or the Government of the Republic of Kosovo; and that (iii) there be a conflict.

The Court clarified that in the circumstances of this case the first constitutional criterion was met, because the Referral was submitted to the Court by the President of the Republic of Kosovo, as one of the three authorized parties. However, the Court found that the second constitutional criterion in the context of Article 113.3.(1) of the Constitution has not been met, because as the Court clarified in cases KO131/18 and KO181/18, the alleged conflict must stem from the constitutional competences defined by the Constitution for the authorized parties. In the circumstances of the present case, unlike Articles 84 (26), 139 (3) and 139 (4) of the Constitution, which determine the constitutional competence of the President for the appointment of the Chair of the CEC and the manner of the appointment of the members of the latter, the competence of the President for the appointment of the CEC members is not provided by the Constitution, but only by the Law on General Elections in the Republic of Kosovo, respectively item (a) of paragraph 3 of its Article 61.

Consequently, in the assessment of the Court, in the circumstances of the present case, the President of the Republic has not raised before the Court a conflict of *"constitutional competencies"* as established in Article 113.3 (1) of the Constitution, and therefore, the Court declared the Referral of the President of the Republic of Kosovo inadmissible pursuant to Article 113 of the Constitution and rejected the request for imposition of an interim measure based on Article 27 of the Law on the Constitutional Court.

RESOLUTION ON INADMISSIBILITY

in

Case No. KO88/21

Applicant

The President of the Republic of Kosovo

Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo

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 the President of the Republic of Kosovo, Her Excellency, Vjosa Osmani-Sadriu (hereinafter: the Applicant).

Subject matter

2. The Applicant requests: (i) the interpretation of the notion "the largest parliamentary group" in the context of allocation of seats in the Central Election Commission (hereinafter: the CEC) for the parliamentary groups represented in the Assembly of the Republic of Kosovo (hereinafter: the Assembly), within the meaning of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo (hereinafter: the Constitution); and (ii) resolving conflict of authorizations of parliamentary groups to nominate CEC members.

3. In the context of paragraph 9 of Article 84 of the Constitution, the Applicant's Referral is presented in the form of four (4) questions which can be summarized as follows: (i) what is the meaning of the

notion of a parliamentary group or groups related to the word "may" of paragraph 4 of Article 139 of the Constitution; (ii) what is the prevailing criterion for deciding whether two (2) additional CEC members should be appointed by the largest parliamentary group or by several parliamentary groups, especially when a parliamentary group has won over 50% of the votes in the elections; (iii) whether the principle of proportionality (the number of deputies of one parliamentary group in relation to the others) should be reflected in deciding whether the two (2) additional CEC members belong to only one group or several parliamentary groups; and, (iv) in cases where non-majority communities have the same number of deputies, how is their order determined in the context of paragraph 4 of Article 139 of the Constitution?

4. The Applicant also requests the imposition of an interim measure reasoning: *"[d]ue to the specific circumstances explained in this referral, and in order to maintain legal certainty and public interest, it is required to impose an interim measure in the application of legal deadlines (60 days from the day of certification of the election result), as provided in Article 61, paragraph 4, of Law No. 03/L-073 on General Elections in the Republic of Kosovo, regarding the beginning of the mandate of two CEC members, who were not appointed in this round due to lack of constitutional clarity. The need for an interim measure for the running of the deadlines becomes especially relevant for the fact that local elections will be organized within this year, and it is necessary that the actions taken by the President regarding the appointment of CEC members be in full compliance with the Constitution of the Republic of Kosovo*".

Legal basis

5. The Referral is based on paragraph 9 of Article 84 [Competencies of the President] of the Constitution and sub-paragraph (1) of paragraph 3 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 31 [Accuracy of referral] and Article 27 [Interim Measures] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rule 68 [Referral pursuant to Article 113.3 (1) of the Constitution and Article 31 and 32 of the Law] and Rule 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 Court

6. On 12 May 2021, the Applicant submitted the Referral to the Court.

7. On 14 May 2021, the Applicant, the Prime Minister, the President of the Assembly of the Republic of Kosovo and the CEC Chair were notified about the registration of the Referral. The President of the Assembly of the Republic of Kosovo was requested to submit a copy of the referral to all deputies and parliamentary groups of the Assembly of the Republic of Kosovo, in order to submit their written comments, if any, by 31 May 2021.

8. On 17 May 2021, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

9. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP.71-2/21 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

10. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

11. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision no. KO88/21, appointed Judge Bajram Ljatifi as Judge Rapporteur replacing Judge Bekim Sejdiu following his resignation.

12. The parliamentary groups, the deputies of the Assembly of the Republic of Kosovo and any other notified Parties, did not submit comments on this referral, within the deadline set by the Court.

13. On 24 June 2021, the President of the Assembly addressed the Court with a request to extend the deadline for submission of comments by the Deputies of the Assembly of Kosovo, explaining that the letter of

14 May 2021 had not been sent to the Deputies of the Assembly for objective reasons.

14. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

15. On 28 June 2021, the Court notified the President of the Assembly of Kosovo that the request for extension of the deadline for submission of comments by the Deputies of the Assembly was submitted three weeks after the deadline for submission of comments and that it was rejected based on paragraph 3 of Rule 33 of the Rules of Procedure. The Court in its case law has rejected the requests for extension of the deadline for submission of comments (see the cases of the Constitutional Court: KO61/20 Applicant: *Uran Ismaili and 29 other Deputies of the Assembly of the Republic of Kosovo*, Judgment of 1 May 2020, paragraph 23 and KO98/20 Applicants: *Hajrulla Çeku and 29 deputies*, Decision to strike out the referral, of 18 November 2020, paragraph 19).

16. On 2 July 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral. On the same date, the Court decided by a majority that the Referral is inadmissible.

Summary of facts

17. On 14 February 2021, the early elections were held for the Assembly of the Republic of Kosovo.

18. On 12 March 2021, the CEC certified the final result of the elections: Vetëvendosje Movement 50.280% (58 seats), PDK 17.009% (19 seats), LDK 12.731% (15 seats), SL 5.094% (10 seats), AAK 7.124% (8 seats), KDTP 0.745% (2 seats), Vakat 0.616% (1 seat), IRDK 0.379% (1 seat), RI 0.364% (1 seat), NDS 0.331% (1 seat), SDU 0.292% (1 seat), JGP 0.248% (1 seat), PAI 0.245% (1 seat) and LPRK 0.139% (1 seat).

19. On 22 April 2021, the Office of the President of the Republic of Kosovo sent a request to the parliamentary groups for the nomination of candidates for CEC members, who would then be decreed by the President.

20. On 29 April 2021, the political entity AAK, as a parliamentary group represented in the Assembly, which has no right to participate in the allocation of reserved seats, nominated one (1) member from this political entity to the CEC.

21. On 5 May 2021, the political entity SDU, representing the Bosnian community with one (1) deputy in the Assembly of the Republic of Kosovo, submitted to OPRK the proposal for a CEC member.

22. On 5 May 2021, the political entity LS, representing the Serb community with ten (10) deputies in the Assembly of the Republic of Kosovo, sent to OPRK the proposal for a member of the CEC.

23. On 6 May 2021, the political entity IRDK, which represents the Egyptian community with one (1) deputy in the Assembly of the Republic of Kosovo, sent to the OPRK the proposal for a member of the CEC.

24. On 6 May 2021, the "Coalition VAKAT", representing the Bosnian community with one (1) deputy in the Assembly of the Republic of Kosovo, submitted the proposal for a member to the CEC.

25. On 6 May 2021, the political entity LDK, as a parliamentary group represented in the Assembly of the Republic of Kosovo, which has no right to participate in the allocation of reserved seats, nominated one (1) member from this political entity as a representative in the CEC.

26. On 7 May 2021, the political entity NDS, which represents the Bosnian community with one (1) deputy in the Assembly of the Republic of Kosovo, sent to OPRK the proposal for a member of the CEC.

27. On 7 May 2021, the political entity PDK, as a parliamentary group represented in the Assembly, which has no right to participate in the allocation of reserved seats, nominated two (2) members from this political entity as representatives in the CEC.

28. On 11 May 2021, the political entity KDTP, which represents the Turkish community with two (2) deputies in the Assembly of the Republic of Kosovo, sent to OPRK the proposal for one (1) member in the CEC.

29. On 12 May 2021, Movement Vetëvendosje, as a parliamentary group represented in the Assembly of the Republic of Kosovo, which has no

right to participate in the allocation of reserved seats, nominated three (3) members from this political entity as representatives at the CEC.

30. On 12 May 2021, the President of the Republic of Kosovo appointed eight (8) members of the CEC. The President of the Republic of Kosovo did not appoint two (2) other members of the CEC due to "lack of clarity" in the context of paragraph 4 of Article 139 of the Constitution, addressing the Constitutional Court.

Applicant's Referral

31. The Court recalls that the Applicant requests the interpretation of Article 139 [Central Election Commission] paragraph 4, of the Constitution. The Court reiterates that the Applicant's request for interpretation has been submitted in the form of four (4) questions which can be summarized as follows: (i) what is the meaning of the notion of a parliamentary group or groups related to the word "may" of paragraph 4 of Article 139 of the Constitution; (ii) what is the prevailing criterion for deciding whether two (2) additional CEC members should be appointed by the largest parliamentary group or by several parliamentary groups, especially when a parliamentary group has won over 50% of the votes in the elections; (iii) whether the principle of proportionality (the number of deputies of one parliamentary group in relation to the others) should be reflected in deciding whether the two (2) additional CEC members belong only to one group or several parliamentary groups; and, (iv) in cases where non-majority communities have the same number of deputies, how is their order determined in the context of paragraph 4 of Article 139 of the Constitution?

Regarding admissibility of the Referral

(i) With regard to item (1) of paragraph 3 of Article 113 of the Constitution

32. Regarding the admissibility of the Referral based on item (1) of paragraph 3 of Article 113 of the Constitution, the Applicant initially states that she is authorized to refer issues related to the conflict of inter-institutional competencies. In this regard she states that *"The Assembly of the Republic of Kosovo consists of 120 deputies. These deputies, in order to functionalize the work of the Assembly of the Republic of Kosovo, form parliamentary groups which exercise their function within the umbrella of the Assembly. Consequently, the parliamentary groups are constituent bodies of the Assembly of the*

Republic of Kosovo. The right to nominate CEC members is the competence of the parliamentary groups represented in the Assembly, as stipulated by Article 139, paragraph 4, of the Constitution of the Republic of Kosovo". According to the Applicant, *"the parliamentary groups of VV and PDK have nominated their candidates for members of the CEC, but the number of nominees does not correspond to the number of vacant seats for the members of these two parliamentary groups".*

33. Therefore, she claims that in the present case, *"we are dealing with the conflict of authorizations of the parliamentary groups (as bodies of the Assembly) to nominate candidates for CEC members, as an initial step before the appointment by the President, as a constitutional competence of the President. In this case, the competence of parliamentary groups to propose, as well as the competence of the President to appoint, is established in Article 139 of the Constitution of Kosovo. Therefore, both are constitutional competencies".*

34. The Applicant further states that in case KO131/18, the Court had set three criteria that must be met in order for the case to be considered admissible in accordance with Article 113, paragraph 3, sub-paragraph 1 [Jurisdiction and Authorized Parties] of the Constitution, and that the conflict of competencies: (i) is referred by one of the three authorized parties; (ii) that the conflict be raised over a constitutional competence provided by the Constitution for one of the three authorized parties; and, (iii) to have a conflict.

35. Consequently, the Applicant states that in the present case the three requirements set out in Article 113 paragraph 3, sub-paragraph 1 of the Constitution, broken down by the Court in case no. KO131/18 because: (i) the conflict is raised by one of the three authorized parties which is the President of the Republic of Kosovo; (ii) the conflict arises for a certain constitutional competence, in this case for the nomination and appointment of CEC members as provided in Article 139, paragraph 4 of the Constitution; (iii) the conflict exists as the nomination of CEC members, which is the competence of the parliamentary groups as bodies of the Assembly, precedes the appointment of the CEC members, as the competence of the President of the Republic of Kosovo; and, consequently, (iv) the case in question meets the three criteria established by the Court.

(ii) Regarding the admissibility of the Referral under paragraph 9 of Article 84 of the Constitution

36. With regard to the admissibility of the Referral pursuant to Article 84 of the Constitution, the Applicant alleges that: (i) *"According to Article 84, paragraph 2, of the Constitution, one of the competencies of the President is to guarantee the "constitutional functioning of institutions [...]";* (ii) The Constitution entitles the President to seek interpretation of constitutional issues when it comes to lack of clarity about the spirit of the Constitution, and this is supported by the fact that the right to refer constitutional matters is placed under the "umbrella" of the President's competencies based on Article 84 of the Constitution; (iii) the requirement based on paragraph 9 of Article 84 of the Constitution is not limited to other requirements and suggests a broad interpretation of the meaning of constitutional issues.

37. In this context, the Applicant alleges that: (i) the allocation of the number of proposals for the appointment of CEC members is not regulated by any act other than the Constitution, which proves that the referral is a "purely constitutional issue"; (ii) the Court's case-law shows that the notion of "constitutional issue" can be applied in an extended meaning (iii) the broader meaning of the term "constitutional issue" is adequate to apply to this referral because the issues raised have not been previously assessed by this Court or any other court; (iv) the constitutional issues may be accepted by the Court even when they are not related to the jurisdiction set out in Article 113 paragraphs 1 and 2 but also in Article 112 paragraph 1 and for this, among other things, cites the cases of the Court no. KO80/10; KO97/10; KO57/12; KO103/14; and KO130/15; and, that (v) this referral derives from Article 84 paragraph 9 of the Constitution which provides for the referral of constitutional issues to the Court as one of the functions of the President.

38. Therefore, the Applicant alleges that *"this referral meets the criteria required for its admissibility also under Article 84 [of the Constitution]. First, it refers to the competent and final authority in the Republic of Kosovo for the interpretation of the Constitution. Secondly, the referral derives from Article 84, paragraph 9 of the Constitution which provides for the referral of constitutional issues to the Constitutional Court as one of the functions of the President".*

Regarding the merits of the Referral

39. Regarding the merits of the Referral the Applicant alleges that: "*Article 139 paragraph 4 of the Constitution stipulates from which parliamentary groups members must be nominated in the event that*

there are six parliamentary groups which are not entitled to participate in the allocation of reserved seats. This article continues even in the situation when we have less than six parliamentary groups but does not explicitly specify which group the additional members belong to. Having said that, the second sentence of Article 139, paragraph 4, of the Constitution shows that the largest "group" or "groups" "may" appoint additional members".

40. The Applicant alleges that the interpretation of the constitutional issues would also serve as a reference for future processes of appointment of CEC members, for at least two reasons: (i) it would specify the formula for the appointment of CEC members; specifying the prevailing criteria for the appointment of members from the largest "group" or "groups" in the event that at least 6 parliamentary groups are represented in the Assembly, and (ii) specify the formula according to which non-majority members will be appointed, in case a certain community is represented in the Assembly with an equal number of deputies from different political entities.

41. The Applicant alleges that the interpretation of the Constitutional Court would provide legal certainty in taking actions by the President for the appointment of CEC members, and at the same time would be in the public interest by enabling the full functioning without delay of an important institution such as the CEC, especially given the fact that very soon the CEC is expected to begin work on the administration of local elections.

Regarding the imposition of an interim measure

42. With regard to the request for imposition of an interim measure, the Applicant states: (i) the imposition of an interim measure is required in application of the legal deadlines (60 days from the day of certification of the election result), as provided in Article 61, paragraph 4 of Law no. 03/L-073 on General Elections in the Republic of Kosovo, regarding the beginning of the mandate of two CEC members, who were not appointed in this round due to constitutional ambiguities; and, that (ii) the need for an interim measure for the running of the deadlines becomes especially relevant for the fact that local elections will be organized within this year, and it is necessary that the actions taken by the President regarding the appointment of CEC members be in full compliance with the Constitution of the Republic of Kosovo.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 84
[Competencies of the President]

[...]

(9) may refer constitutional questions to the Constitutional Court;

(26 appoints the Chair of the Central Election Commission;

[...]

Article 112
[General principles]

1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.

[...]

Article 113
[Jurisdiction and Authorized Parties]

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

2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;

(2) the compatibility with the Constitution of municipal statutes.

3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:

(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;

(2) compatibility with the Constitution of a proposed referendum;

(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;

(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;

(5) questions whether violations of the Constitution occurred during the election of the Assembly.

Article 139
[Central Election Commission]

[…]

3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.

4. Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest grup or groups may appoint additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo.

Law No. 03/L-073 on General Elections in the Republic of Kosovo (published in the Official Gazette on 15 June 2008)

Article 61
Mandate and Appointment of CEC Members

61.1 The Chair of the CEC shall be appointed in accordance with article 139(3) of the Constitution of Kosovo.

61.2 The mandate of the Chair of the CEC shall be seven (7) years commencing on the day stipulated in the notification of appointment by the President of Kosovo.

61.3 Appointment of CEC members as provided in article 139 (4) of the Constitution of Kosovo shall be done by the following procedures:

a) within 10 days of the coming into force of this law parliamentary groups entitled to appoint a member(s) to the CEC shall notify the President of Kosovo of their appointment. Provided that the individual appointed by the parliamentary group conforms to the requirements of this law, the President of Kosovo shall, within five (5) days confirm the appointment in writing. The appointment shall be effective on the day stipulated in the official appointment by the President of Kosovo;
b) the Chairman of the CEC shall serve for not more than 2 consecutive mandates;
c) the Members of the CEC shall serve for not more than 3 consecutive mandates. d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;
d) the termination of a mandate shall be on the last calendar day of the same month of the commencement of the mandate;

e) notwithstanding point (d) of this paragraph mandate that expires 90 or fewer days before an election or up to 90 days following the certification of the results of an election shall be automatically extended to 90 days after the certification of the results of an election.

61.4 The mandate of the members of the CEC shall begin no later than sixty (60) days after the certifications of the Assembly elections results.

Admissibility of the Referral

43. In order to decide on the Applicant's Referral, the Court must first examine whether the submitted Referral meets the admissibility requirements, as established in the Constitution and further specified in the Law and in the Rules of Procedure.

44. In this regard, the Court first refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution which also defines the jurisdiction of the Constitutional Court to decide on cases referred to by the Applicant, namely the President.

45. Pursuant to Article 113, paragraph 2, of the Constitution, "*[…] the President of the Republic of Kosovo […] [is] authorized to refer the following matters*:

(1) the question of the compatibility with the Constitution of laws, of decrees of the […] Prime Minister, and of regulations of the Government;

(2) the compatibility with the Constitution of municipal statutes.

46. Furthermore, Article 113, paragraph 3 of the Constitution stipulates that *[…], the President of the Republic of Kosovo […] [is] authorized to refer the following matters:*

(1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;
(2) compatibility with the Constitution of a proposed referendum;
(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;
(4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;

(5) questions whether violations of the Constitution occurred during the election of the Assembly.

47. The Court also refers to paragraph (9) of Article 84 [Competencies of the President], related to the above provisions, which stipulates:

"The President of the Republic of Kosovo::
[…]

(9) may refer constitutional questions to the Constitutional Court;
[…]

48. In this regard, the Court first notes that based on the facts of this case, it follows that (i) on 22 April 2021, the President of the Republic sent a request to the parliamentary groups for the nomination of candidates for CEC members; and (ii) between 29 April 2021 and 12 May 2021, the parliamentary groups represented in the Assembly, which are not entitled to participate in the allocation of guaranteed seats, namely LVV, PDK, LDK and AAK, proposed the respective members, while political entities holding guaranteed seats for non-majority communities in Kosovo also submitted their nominations.

49. The President of the Republic of Kosovo, on 12 May 2021, appointed eight (8) members of the CEC. The other two (2) members were not appointed by the President of the Republic of Kosovo, because (i) LVV proposed three (3) candidates for CEC members, while PDK proposed two (2) candidates for CEC members. and claiming "*lack of clarity*" in the context of paragraph 4 of Article 139 of the Constitution which stipulates that "*if fewer groups are represented in the Assembly, the largest group or groups may appoint additional members*", the President of the Republic of Kosovo addressed the Court with a request for interpretation of the "*largest parliamentary group*" in the context of the above provision, namely whether the vacant seats in the CEC belong only to the largest parliamentary group or groups; and (ii) the Bosnian community, in the current structure of the Assembly, is represented by three (3) different political entities with an equal number of seats in the Assembly, while three (3) proposals have been submitted to the Presidency by this community, although only one (1) seat in the CEC belongs to them. Consequently, the President of the Republic also claims "*lack of clarity*" in the context of paragraph 4 of Article 139 of the Constitution, regarding the appointment of CEC members from non-majority communities, in cases where a community is represented by more than one political entity, but with an equal number of seats in the Assembly.

50. The Court reiterates that the President's request for interpretation was presented in the form of four (4) questions which could be summarized as follows: (i) what is the meaning of the notion of a parliamentary group or groups related to the word "may" of paragraph 4 of Article 139 of the Constitution; (ii) what is the prevailing criterion for deciding whether two (2) additional CEC members should be appointed by the largest parliamentary group or by several parliamentary groups, especially when a parliamentary group has won over 50% of the votes in the elections; (iii) whether the principle of proportionality (the number of deputies of one parliamentary group in relation to the others) should be reflected in deciding whether the

two (2) additional CEC members belong only to one group or several parliamentary groups; and, (iv) in cases where non-majority communities have the same number of deputies, how is their order determined in the context of paragraph 4 of Article 139 of the Constitution?

51. In relation to the above, the Court notes that the Applicant requests the Court:

> (i) *"the interpretation of the notion "the largest parliamentary group" in the context of the allocation of seats in the CEC for parliamentary groups represented in the Assembly of the Republic of Kosovo, within the meaning of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo" based on paragraph 9 of Article 84 of the Constitution; and (ii) "resolution of the conflict of authoriazations of parliamentary groups to nominate CEC members", based on item 1 of paragraph 3 of Article 113 of the Constitution.*

52. The Court will further assess the admissibility of the President's Referral based on (i) paragraph 9 of Article 84 of the Constitution; and (ii) item 1 of paragraph 3 of Article 113 of the Constitution.

(i) Regarding the assessment of admissibility in the context of paragraph 9 of Article 84 of the Constitution

53. In this regard, the Applicant alleges that the Constitution entitles the President to seek interpretation of constitutional issues when it comes to lack of clarity about the spirit of the Constitution. According to her, this is based on the fact that the right to refer constitutional issues is placed under the "umbrella" of the competencies of the President based on Article 84 of the Constitution, thus not being limited to other requirements and suggesting a broad interpretation of the understanding of constitutional issues.

54. The Applicant alleges that in the present case the criteria required for admissibility have been met pursuant to Article 84 (9) of the Constitution. This is because: (i) the allocation of the number of proposals for the appointment of CEC members is not regulated by any act other than the Constitution, which confirms that the referral is a "purely constitutional issue"; (ii) the Constitution refers to the Constitutional Court as the competent and final authority in the Republic of Kosovo for the interpretation of the Constitution; and (iii) the referral derives from Article 84, paragraph 9 of the Constitution

which provides for the referral of constitutional issues to the Constitutional Court as one of the functions of the President.

55. In this regard, the Applicant maintains that "*the lack of clarity of competencies is making impossible for the President to appoint all members of the CEC, as a body which administers and manages the free, equal and direct elections in Kosovo*".

56. With regard to the Applicant's competence to file a Referral before the Court based solely on Article 84 (9) of the Constitution, the Court refers to the principles set out in its case law in similar cases.

57. The Court notes that in the context of filing referral before it based on paragraph 9 of Article 84 of the Constitution, it already has a consolidated case law and which, *inter alia*, emphasizes the President's possibility to refer constitutional issues in the context of paragraph 9 of Article 84 of the Constitution must be understood in relation to the provisions of the Constitution relating to the jurisdiction of the Court set forth in Article 113 of the Constitution. More precisely, paragraph 9 of Article 84 of the Constitution, cannot serve as a separate and independent basis from Article 113 of the Constitution and that the competence of the President to "refer constitutional issues" as defined in paragraph 4 of Article 84 of the Constitution must be related to Article 113 of the Constitution. (See, cases of the Constitutional Court: KO79/18, Applicant: *The President of the Republic of Kosovo*, Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo, Resolution on Inadmissibility, of 3 December 2018, paragraphs 72, 74 , 77, 78 and 82; KO131/18 Applicant: *The President of the Republic of Kosovo*, Resolution on Inadmissibility of 6 March 2019, paragraph 90; and KO181/18, Applicant: *The President of the Republic of Kosovo*, Resolution on Inadmissibility of 13 June 2019, paragraph 46).

58. In addition, the Court notes that setting from the fact that the Constitution has explicitly defined the jurisdiction of the Constitutional Court, including the authorized parties to activate its jurisdiction, the possibility of taking a consultative or advisory role was limited to the Court, as this role would conflict with its fundamental role to decide on the cases brought before it (see, case KO79/18, cited above, paragraph 76).

59. Therefore, the Court emphasizes that Article 84 (9) of the Constitution, must also relate to the jurisdiction of the Court set forth in Article 113, paragraphs 2 and 3 of the Constitution, which explicitly

and exhaustively defines the issues that the President of the Republic may refer to the Constitutional Court.

60. Therefore, the Court reiterates that Article 84 (9) of the Constitution cannot serve as the sole legal basis for the Applicant to file a request for interpretation before the Constitutional Court and consequently, the Court finds that the Applicant's request for interpretation of paragraph 4 of the Article 139 of the Constitution, is inadmissible for consideration.

(ii) Regarding the assessment of admissibility in the context of item (1) of paragraph 3 of Article 113 of the Constitution

61. In this regard, the Court notes that the President, in her capacity as Applicant, has also raised a case of conflict of constitutional competence between parliamentary groups, as bodies of the Assembly.

62. The Applicant alleges in this connection that: *"[...] in the present case, the three requirements set out in Article 113 paragraph 3, sub-paragraph 1 of the Constitution are met, broken down by the Court in case no. KO131/18 because: (i) the conflict is raised by one of the three authorized parties which is the President of the Republic of Kosovo; (ii) the conflict arises for a certain constitutional competence, in this case for the nomination and appointment of CEC members as provided in Article 139, paragraph 4 of the Constitution; (iii) the conflict exists as the nomination of CEC members, which is the competence of the parliamentary groups as bodies of the Assembly, precedes the appointment of the CEC members, as the competence of the President of the Republic of Kosovo.[...]."*

63. The Court once again refers to Article 113.3. (1) of the Constitution which stipulates that the President of the Republic of Kosovo is one of the three parties authorized to raise issues of "*conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo*".

64. The Court further refers to the legal requirements established in Article 31 [Accuracy of referral] and 32 [Deadlines] of the Law as well as Rule 68 [Referral pursuant to Article 113.3 (1) of the Constitution and Article 31 and 32 of the Law] of the Rules of Procedure as provisions further specifying the aforementioned constitutional provision for a "*conflict among constitutional competencies*":

Article 31

[Accuracy of referral]

A referral made pursuant to Article 113, Paragraph 3 item 1 of the Constitution shall be filed by any authorized party in conflict or from any authorized party directly affected from the said conflict. The referral shall include any relevant information in relation to the alleged conflict as further determined by the Rules of Procedures of the Constitutional Court.

Article 32
[Deadlines]

A referral made pursuant to Article 31 of this Law shall be submitted within six (6) months from the day upon which the alleged conflict started.

Rule 68
[Referral pursuant to Article 113.3 (1) of the Constitution and Article 31 and 32 of the Law]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.3 of the Constitution and Articles 31 and 32 of the Law.
(2) When filing a referral pursuant to this Rule, an authorized party shall state precisely what conflict exists between the constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo or the Government of Kosovo.
(3) The authorized party shall identify the act which violates its competence and the relevant provision of the Constitution which has been violated by such act.
(4) The referral under this Rule must be filed within a period of six (6) months from the day the alleged conflict started.
(5) The Secretariat shall provide notice to the authority whose act is challenged. They may respond within fifteen (15) days from the date of notification, unless good cause is shown for a longer time and the respective extension is granted.

65. In this context, the Court recalls its interpretation through its case law that Article 113.3 (1) of the Constitution encompasses three requirements of the constitutional level, which must be met cumulatively, namely the necessity that:

(i) the conflict be brought by one of the three authorized parties;

(ii) the issue be raised over a constitutional competence set forth in the Constitution for one of the three authorized parties; and,
(iii) to have a conflict (see cases of the Constitutional Court: KO131/18, cited above, paragraph 92; and KO181/18, cited above, paragraph 58).

66. Regarding the requirement (i), the Court notes that Article 113.3 (1) of the Constitution authorizes the Assembly, the President and the Government to raise cases of conflict among their constitutional competences. This authorization is mutual and each of these authorized parties may raise issues of conflict of competence for one or the other party, not excluding the possibility of raising the conflict against two parties at the same time. In the present case, this constitutional requirement is supplemented by the fact that the Referral is submitted by the President, as one of the three potential parties authorized to raise the issue of conflict among competences of the Government and the Assembly.

67. With respect to requirement (ii), the Court notes that Article 113.3 (1) of the Constitution provides that a conflict may arise only for a certain constitutional competence set forth in the Constitution for one of the three authorized parties. Although the Constitution leaves open the subject of conflict among the constitutional competencies, it makes a significant limitation on the fact that the alleged conflict of constitutional competence must necessarily stem from the constitutional competencies laid down in the Constitution for the President, the Assembly and the Government (See, cases of the Constitutional Court: KO131/18, cited above, paragraph 94 KO181/18, cited above, paragraph 60).

68. Therefore, the Court must further assess whether, in the present case, (ii) the constitutional criterion has been met, namely whether in the present case the alleged conflict arises for "*constitutional competence*" between the President of the Republic, the Assembly of Kosovo and the Government of Kosovo.

69. In this respect, the Court recalls that the Applicant in his Referral requests the interpretation of Article 139, paragraph 4 of the Constitution, which stipulates that:

> *"Six (6) members shall be appointed by the six largest parliamentary groups represented in the Assembly, which are not entitled to reserved seats. If fewer groups are represented in the Assembly, the largest group or groups may appoint*

additional members. One (1) member shall be appointed by the Assembly deputies holding seats reserved or guaranteed for the Kosovo Serb Community, and three (3) members shall be appointed by the Assembly deputies holding seats reserved or guaranteed for other Communities that are not in majority in Kosovo".

70. The Court also recalls the relevant provisions of the Constitution, which establish:

Article 84
[Competencies of the President]

[…]
(26) appoints the Chair of the Central Election Commission;
[…]

Article 139
[…]

[Central Election Commission]
[…]

3. The Chair of the Central Election Commission is appointed by the President of the Republic of Kosovo from among the judges of the Supreme Court and courts exercising appellate jurisdiction.
[…]

71. In this regard, the Court brings to attention the provision of Article 61.3.a of Law No. 03/L-073 on General Elections in the Republic of Kosovo, which provides: *"[…] a. Within 10 days of the coming into force of this law parliamentary groups entitled to appoint a member(s) to the CEC shall notify the President of Kosovo of their appointment. Provided that the individual appointed by the parliamentary group conforms to the requirements of this law, the President of Kosovo shall, within five (5) days confirm the appointment in writing. The appointment shall be effective on the day stipulated in the official appointment by the President of Kosovo."*

72. The Court notes that Article 84 [Competencies of the President] and paragraphs 3 and 4 of Article 139 [Central Election Commission] of the Constitution, prescribe the constitutional competence of the President for the appointment of the CEC Chair and the manner of appointing members of the latter but the competence of the President for the appointment of CEC members is not defined by the

Constitution, but only by the Law on General Elections in the Republic of Kosovo, namely by item (a) of paragraph 3 of Article 61 thereof (See the case of the Constitutional Court: KO79/18, cited above, paragraph 81). Considering that the conflict of competencies, in the circumstances of the present case, has been raised in relation to a competence of the President and which is not defined by the Constitution, the Court, based on item 1 of paragraph 3 of Article 113 of the Constitution and its case law through which it has interpreted this provision, states that the conflict of competencies has not been raised in relation to the "constitutional competencies" of the President and consequently, the second constitutional criterion has not been met in the context of "conflict of competencies" for the President, the Assembly and/or the Government. (See case of the Constitutional Court: KO131/18, cited above, paragraphs 102-106). Considering that the second constitutional criterion in the context of Article 113.3.1 of the Constitution, is not met in the circumstances of the present case, the Court, based on its case law considers that it is not necessary to assess the requirement (iii) of the admissibility of the Referral, namely, if there is a "conflict" between the competencies of the President, the Government and the Assembly. (See the case of the Constitutional Court: KO181/18, cited above, paragraph 72).

73. Therefore, in the Court's assessment in the circumstances of the present case, the President of the Republic, although a party authorized to raise issues of conflict of constitutional competencies between her and the Assembly, did not raise before the Court a conflict of "*constitutional competencies*", according to provisions of Article 113.3. (1) of the Constitution, and consequently, the Court declares the Referral of the President of the Republic of Kosovo inadmissible based on Article 113 of the Constitution.

Request for interim measure

74. The Court also notes that the Applicant has requested the imposition of an interim measure "*[...] The need for an interim measure for the running of the deadlines becomes especially relevant for the fact that local elections will be organized within this year, and it is necessary that the actions taken by the President regarding the appointment of CEC members be in full compliance with the Constitution of the Republic of Kosovo".*

75. The Court refers to Article 27 [Interim Measures] of the Law, which provides:

"1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.

2. The duration of the interim measures shall be reasonable and proportionate".

76. The Court has already held that the Referral is inadmissible pursuant to Article 113, paragraph 1, of the Constitution and consequently the request for an interim measure is to be rejected.

77. The Court rejects the request for imposition of an interim measure.

Conclusion

78. In the review session held on 2 July 2021, the Court reviewed case KO88/21, namely the Referral of the President of the Republic of Kosovo for (i) *"the interpretation of the notion "the largest parliamentary group" in the context of the allocation of seats in the CEC for the parliamentary groups represented in the Assembly of the Republic of Kosovo, in terms of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo;* and (ii) *"for resolving conflicts of authorizations of parliamentary groups to propose the CEC members*".

79. The Court notes that based on the facts of this case, it results that (i) on 22 April 2021, the President of the Republic had sent a request to the parliamentary groups for the nomination of candidates for CEC members; and (ii) between 29 April 2021 and 12 May 2021, the parliamentary groups represented in the Assembly, who are not eligible to participate in the allocation of reserved seats, namely LVV, PDK, LDK and AAK, had proposed the respective members, whilst political entities which hold guaranteed seats reserved for non-majority communities in Kosovo, also submitted their nominations.

80. The President of the Republic of Kosovo, on 12 May 2021, has appointed eight (8) members of the CEC. Two (2) other members were not appointed by the President of the Republic of Kosovo, because (i) LVV proposed three (3) candidates for CEC members, while PDK proposed two (2) candidates for CEC members, and claiming *"lack of clarity"* in the context of paragraph 4 of Article 139 of the Constitution which stipulates that *"if fewer groups are represented in the*

Assembly, the largest group or groups may appoint additional members", the President of the Republic of Kosovo addressed the Court with a request for interpretation of *"the largest parliamentary group"* in the context of the abovementioned provision, respectively whether the vacant positions in the CEC belong only to the largest parliamentary *group* or *groups*; and (ii) the Bosnian community, in the current structure of the Assembly, is represented by three (3) different political entities with an equal number of seats in the Assembly, and there were three (3) proposals submitted to the Presidency from this community, the same is entitled to only one seat in the CEC. Accordingly, the President of the Republic alleges "*lack of clarity*" in the context of paragraph 4 of Article 139 of the Constitution with respect to the appointment of the CEC members from among the communities that are not in majority, in cases when a community is represented by more political entities, but with equal number of seats in the Assembly.

81. In the context of the circumstances mentioned above, and emphasizing that *"the lack of clarity of competencies is making impossible for the President to appoint all members of the CEC, as a body which administers and manages the free, equal and direct elections in Kosovo"*, the President of the Republic of Kosovo addressed the Constitutional Court with (i) the request for interpretation of the notion of the *"largest parliamentary group"* in the context of paragraph 4 of Article 139 of the Constitution, based on paragraph 9 of Article 84 of the Constitution; and (ii) the request to resolve the conflict of *"authorizations"* of parliamentary groups to propose the CEC members, based on item 1 of paragraph 3 of Article 113 of the Constitution.

Regarding the assessment of admissibility in the context of paragraph 9 of Article 84 of the Constitution

82. In assessing the admissibility of the President's Referral for interpretation of lack of constitutional clarities pursuant to paragraph 9 of Article 84 of the Constitution, and the relevant request for an answer to four (4) questions submitted to the Court and which will be fully reflected in the Resolution on Inadmissibility that will be published in accordance with the procedural rules in the following days, the Court found that the Referral of the President is inadmissible. The Court through its case law including case KO79/18, in which also a request by the President of the Republic for interpretation of paragraph 4 of Article 139 of the Constitution was considered, clarified, that (i) paragraph 9 of Article 84 of the

Constitution is not independent of Article 113 of the Constitution; (ii) paragraph 1 of Article 112 of the Constitution may not be interpreted outside the context of Article 113 of the Constitution;; and (iii) based on Article 113 of the Constitution, the Court is limited in its possibility to take a consultative or advisory role by answering questions submitted to it, as this role would be in conflict with its fundamental role to resolve cases brought before it.

Regarding the assessment of admissibility in the context of item (1) of paragraph 3 of Article 113 of the Constitution

83. In assessing the admissibility of the Referral of the President, based on item 1 of paragraph 3 of Article 113 of the Constitution, concerning the resolution of the conflict of *"authorizations"*, between the "*constitutional competence*" of the President and the "*competence of the parliamentary groups represented in the Assembly*" for the nomination of CEC members, the Court initially notes that the aforementioned Article of the Constitution, stipulates that the President of the Republic of Kosovo, as one of the three authorized parties, is authorized to raise issues of *"conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo*". This provision has been interpreted by the Court, initially through the Resolution in cases KO131/18 and KO181/18,, where it clarified the three cumulative constitutional criteria that must be met in order for the referrals raised in the context of this Article to pass the admissibility test. In the above-mentioned cases, the Court had clarified that in terms of Article 113.3.(1) of the Constitution, the following three criteria must be met: (i) the conflict must be raised by one of the three authorized parties; (ii) the conflict arises over "*constitutional competence*s" of the Assembly, the President and/or the Government of the Republic of Kosovo;; and that (iii) there is a conflict.

84. The Court clarified that in the circumstances of this case the first constitutional criterion was met, because the Referral was submitted to the Court by the President of the Republic of Kosovo, as one of the three authorized parties. However, the Court found that the second constitutional criterion in the context of Article 113.3.(1) of the Constitution is not met, because as the Court clarified in cases KO131/18 and KO181/18, the alleged conflict must stem from the constitutional competences defined by the Constitution for the authorized parties. In the circumstances of the present case, unlike Articles 84 (26), 139 (3) and 139 (4) of the Constitution, which define the constitutional competence of the President for the appointment of

the Chair of the CEC and the manner for the appointment of members of the latter, the competence of the President for the appointment of the CEC members is not determined by the Constitution, but only by the Law on General Elections in the Republic of Kosovo, namely item (a) of paragraph 3 of its Article 61.

85. Therefore, in the assessment of the Court, in the circumstances of the present case, the President of the Republic did not raise before the Court a conflict of *"constitutional competencies"* as established in Article 113.3 (1) of the Constitution, and therefore, the Court declares the Referral of the President of the Republic of Kosovo inadmissible pursuant to Article 113 of the Constitution and rejected the request for imposition of an interim measure based on Article 27 of the Law on the Constitutional Court.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113, paragraph 1, of the Constitution, Article 27 of the Law and Rule 59 (2) of the Rules of Procedure, on 2 July 2021, by majority

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for imposition of the interim measure;

III. TO NOTIFY this Decision to the Parties;

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

V. This Decision is effective immediately

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka-Nimani

KI187/20, Applicant: Lorik Salihu, Constitutional review of Decision PN. no. 558/2020, of the Court of Appeals, of 18 August 2020

KI187/20, Resolution on Inadmissibility, of 30 June 2021, published on 05.08.2021

Keywords*: right to fair and impartial trial, right to legal remedies, inadmissible referral, manifestly ill-founded*

It is noted from the case file that the case is related to the seizure of the Applicant's vehicle, which has happened at the request of the Basic Prosecution in Gjakova, a request approved by the Basic Court, based on suspicion that the seized vehicle has been used by the Applicant for the commission of a criminal offense, which offense he is suspected to have committed. The Applicant had filed an appeal with the Basic Court, against the Order for permitting the seizure of the vehicle. The Basic Court had rejected the appeal, and in the legal advice of its Decision it was noted that against the same decision, the parties may file an appeal to the Court of Appeals within a deadline of 3 (three) days. Following the Applicant's appeal, the Court of Appeals had dismissed the appeal as impermissible, with the reasoning that the first instance court had miss instructed the Applicant, since based on Article 417, paragraph 5 of the CPCRK the appeal is not allowed in this specific case.

The Applicant, as the main allegation before the Constitutional Court, had raised the violation of the right protected by Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution.

With regard to Article 31 of the Constitution, the Applicant had only mentioned but had not elaborated or justified further before the Court how the violation of his right to fair and impartial trial guaranteed by this Article has occurred.

With regard to the allegation of violation of Article 32 of the Constitution, the Applicant alleged before the Court that his right to a legal remedy had been violated, because according to him he had based his appeal filed with the Court of Appeals on Article 24 in conjunction with Article 378 of the Criminal Procedure Code of the Republic of

Kosovo, as well as based on the legal advice of the Decision of the Basic Court. Furthermore, the Applicant alleged that the legal remedy had been available to the Applicant and was provided by legal provisions. The Applicant also alleges that the challenged decision is contradictory, adding that according to him the provision of paragraph 5 of Article 417 of the Criminal Procedure Code of the Republic of Kosovo, applies only with the exception of cases, and according to him not also in the respective case.

The Court first noted that the Applicant's allegation pertinent to the violation of Article 32 of the Constitution is in essence related to an erroneous interpretation of the applicable law.

The Court found that regardless of the constitutional right to an effective legal remedy, it is important to note that not every erroneous instruction on a legal remedy will result in a violation of the right to an effective legal remedy.
The Court regarding the case stated that the rejection of the appeal in question does not infringe the Applicant's right to a legal remedy because he can exercise his right with regard to the respective case through an appeal against the final judgment.

The Court based on the standards set in its case law in similar cases and the case law of the ECtHR, finds that the Applicant has not proved and nor has sufficiently substantiated his allegations of violation of his fundamental rights and freedoms guaranteed by the Constitution.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI187/20

Applicant

Lorik Salihu

Request for constitutional review of Decision PN.no.558/2020, of the Court of Appeals, of 18 August 2020

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 Lorik Salihu, from Gjakova (hereinafter: the Applicant), represented by Edona Sina, lawyer from Gjakova.

Challenged decision

2. The challenged decision is the Decision [PN.no.558/2020] of 18 August 2020, of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) in conjunction with Decision [PPr.Kr.no.33/20] of 13 July 2020 of the Basic Court in Gjakova-Department for Serious Crimes (hereinafter: the Basic Court).

3. The Applicant received the Decision [PN.no.558/2020] of 18 August 2020 of the Court of Appeals, on 26 August 2020.

Subject matter

4. The subject matter the Referral is the constitutional review of the challenged Decision of the Court of Appeals, which as alleged by the Applicant has violated his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

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

Proceedings before the Court

6. On 21 December 2020, the Applicant submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 30 December 2020, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 14 January 2021, the Court notified the Applicant's representative on the registration of the Referral and requested him to submit to the Court the power of attorney for representation of the Applicant, in accordance with Article 21 of the Law and Rule 32 (2) (c) of the Rules of Procedure.

9. On 20 January 2021, the Applicant's representative submitted to the Court, the power of attorney for representation.

10. On 16 March 2021, the Court notified the Court of Appeal on the registration of the Referral.

11. On 12 April 2021, the Applicant submitted to the Court a submission, whereby he supplemented his allegations.

12. On 17 May 2021, based on paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and the Court Decision KK-SP 71-2/21, it was decided that Judge Gresa Caka-Nimani, shall take over the duty of the President of the Court after the end of the mandate of the current President of the Court, Arta Rama-Hajrizi, on 25 June 2021.

13. On 18 May 2021, the Court notified the Basic Court in Gjakova on the registration of the case and requested them to submit to the Court the acknowledgment of receipt proving when the Applicant has received the challenged decision.

14. On 25 May 2021, pursuant to item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu submitted his resignation from the position of judge at the Constitutional Court.

15. On 31 May 2021, the Basic Court in Gjakova, submitted the requested acknowledgment of receipt.

16. On 25 June 2021, based on paragraph 4 of Rule 12 of the Rules of Procedure and the Decision of the Court KK-SP 71-2/21, Judge Gresa Caka-Nimani took over the duty of the President of the Court, whilst pursuant to item 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.

17. On 30 June 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

18. Based on the case file, it results that on 8 June 2020, the Basic Prosecution in Gjakova, by the request [PP/I.no.36/20] addressed to the Basic Court, requested the issuance of an order for temporary sequestration of the vehicle "BMW 335 D" (hereinafter: the vehicle) of the Applicant, stating that there is a reasonable suspicion that the same was used by the Applicant for the purpose of committing the

criminal offense of "*Unauthorized purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues*" under Article 267, paragraph 1 in conjunction with Article 31 "*Co-perpetration"* of the Criminal Code of the Republic of Kosovo (hereinafter: CCRK).

19. On 11 June 2020, the Basic Court by the Order [PPr.Kr.no.33/20] based on paragraph 1, 3 and 5 of Article 112 of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK) had ordered the temporary sequestration of the vehicle of the Applicant, stating that "*it is necessary to temporarily sequestrate the vehicle in order to verify the commission of criminal offense*".

20. On 10 July 2020, the Applicant filed an appeal with the Basic Court against the aforementioned Order of the Basic Court, proposing that the same be terminated, referring to paragraph 1 of Article 116 of the CPCRK. The Applicant has further claimed that the sequestration of the vehicle in this case is no longer necessary, stating that after the necessary checks by the police officers, there is no basis for the vehicle to remain sequestrated any longer.

21. On 13 July 2020, the Basic Court by Decision [PPr. Kr.no.33/20] rejected as ungrounded the Applicant's appeal, stating that "*in this case there is a grounded suspicion that the vehicle sequestrated from the defendant was used to commit this criminal offense, which is also noted from the pictures that are evidence in the case*". The decision of the Basic Court was decided on the basis of Articles 112 and 417 of the CPCRK.

22. At the Legal Advice of the Decision [PPr. Kr.no. 33/20], the Applicant is instructed according to the legal remedy - the appeal against the abovementioned Decision is allowed within 3 days at the Court of Appeals.

23. On 22 July 2020, the Applicant filed an appeal with the Court of Appeals against the aforementioned Decision of the Basic Court, alleging erroneous application of the criminal provisions.

24. On 18 August 2020, the Court of Appeals by Decision [PN.no.558/2020] dismissed the Applicant's appeal as impermissible with the reasoning that "*the appeal is not permitted*" stating that the first instance court had erroneously instructed the Applicant with legal advice and that such allegations pursuant to Article 417.5 [Review by the Review Panel of the Basic Court] of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK) can be submitted only

by an appeal against the final Judgment. The Court of Appeals based its Decision on Article 400 in conjunction with Article 416 paragraph 2 of the CPCRK.

25. On 23 October 2020, the Applicant by Request [PP/I.no.36/20] at the Basic Prosecution Office in Gjakova, has requested the return of the vehicle.

26. It results from the case file that so far, the Basic Prosecution in Gjakova has not responded to the abovementioned request of the Applicant for the return of the vehicle.

Applicant's allegations

27. The Applicant alleges that the Decision [PN.no.558/2020] of the Court of Appeals, of 18 August 2020, was issued in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] Article 32 [Right to Legal Remedies] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the ECHR.

28. Regarding the allegation of violation of Article 32 of the Constitution, the Applicant states that *"the defendant through his defense counsel has filed an appeal against the decision of the Criminal Panel of the Basic Court in Gjakova, based on Article 24 para. 6 of the Criminal Procedure Code, where it is determined that: "the deadline for appeals to decisions by a pre-trial judge or review panel is five days from the receipt of the decision by the party, in accordance with Article 378.", but the Court of Appeals, as the competent court to decide on this appeal has dismissed the appeal of defense as impermissible with the reasoning that the first instance court had erroneously instructed with the legal advice and that such allegations can be submitted only by an appeal against the final judgment".*

29. The Applicant further adds that "*in the present case the legal remedy was at the disposal of the Applicant, and the same has used it in accordance with the legal provisions. However, its effectiveness was non-existent, as a result of non-meritorious treatment. Consequently it led to violation of Article 31 of the Constitution [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 13 of the ECHR, since local authorities deciding on the case must consider the grounds/merits of the application under the Convention (see, mutatis mutandis, Judgment of the European Court of Human Rights, 20 September 1999, Smith and Grady v. the United Kingdom, No.33985/96 and 33986/96par,138) suppressing the facts of the*

Applicant under the umbrella of jurisprudence of the ECtHR as well as Article 13 of the ECHR, it can be respectively stated that: our legislation has provided for filing an appeal against the decision of the criminal/review panel, a remedy which has been legally accessible, but in practice it proved completely ineffective- due to the flagrant interpretation of legal provisions by the Court of Appeals - an interpretation which has turned out not to be issued at all on the merits of the case - and has led to the violation of the right to an effective legal remedy provided by Article 32 of the Constitution of Kosovo and Article 13 of the ECHR".

30. The Applicant further states that the challenged decision is contradictory due to the fact that according to him the provision of paragraph 5 of Article 417 of the CPCK, applies only with the exception of cases, and according to him not also in the present case.

31. Finally, the Applicant requests the Court to declare the challenged Decision of the Court of Appeals as null and void and to remand the case for reconsideration.

Relevant Legal Provisions

Criminal No. 04/L-123 Procedure Code

Article 24
[Orders and Decisions by the Pre-Trial Judge]

[...]

6. The deadline for appeals to decisions by a pre-trial judge or review panel is five (5) days from the receipt of the decision by the party, in accordance with Article 378 of this Code.

Article 116
[Return of Temporarily Sequestrated Items]

1. Objects temporarily confiscated during criminal proceedings shall be returned to the owner or possessor if the proceedings are suspended or terminated and there are no grounds for them to be sequestrated.

Article 378
[Timing of Objection, Request for Legal Remedy and Reply]

1. The objection being adjudicated by the review panel must be filed within forty-eight (48) hours, unless otherwise specified under the law.

2. The request being adjudicated by the court of appeals must be filed within five (5) days of the final judgment or decision, unless otherwise specified under the law.

3. The request being adjudicated by the Supreme Court of Kosovo must be filed within ten (10) days, unless otherwise specified under the law.

4. The reply to the objection must be filed within twenty-four (24) hours of an objection which is being adjudicated by the review panel.

5. The reply to the request must be filed within five (5) days of a request which is being adjudicated by the court of appeals.

6. The reply to the request must be filed within ten (10) days of a request which is being adjudicated by the Supreme Court of Kosovo.

Article 400
[Dismissal of Impermissible Appeal]

The Court of Appeals shall dismiss an appeal as not permitted by a ruling if it is established that it was filed by a person not entitled to file an appeal or by a person who has renounced the appeal, or if withdrawal from the appeal is established or if it is established that after withdrawal the appeal was filed again or if the appeal was not permitted under the law.

Article 417
[Review by Review Panel of Basic Court]

[...]

5. Unless otherwise determined under the present Code, a ruling on the objection by the review panel shall be reviewed by the Court of Appeals only upon an appeal of the judgment of the Basic Court.

Assessment of the admissibility of Referral

32. The Court first examines whether there have been fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and in the Rules of Procedure.

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

34. In addition, the Court also examines whether the Applicant has met the admissibility criteria as set out in the Law. In this regard, the Court first refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

> Article 47
> (Individual Requests)
>
> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*
>
> Article 48
> (Accuracy of the Referral)
>
> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*
>
> Article 49
> (Deadlines)

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]."

35. With regard to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, which challenges an act of a public authority, namely the Decision [PN.no.558/2020] of the Court of Appeal, of 18 August 2020, after having exhausted all legal remedies provided by law. The Applicant has also clarified his rights and freedoms that he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

36. In addition, the Court examines whether the Applicant has met the admissibility criteria set out in paragraph (2) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure sets out the criteria according to which the Court may examine the Referral, including the criterion that the Referral is not manifestly ill-founded. Rule 39 (2) provides in particular the following:

Rule 39
(Admissibility Criteria)

"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

37. In the context of the assessment of the admissibility of the Referral, respectively, in assessing whether the same is manifestly ill-founded on constitutional grounds, the Court will first recall the essence of the case contained in this Referral and the respective allegations of the Applicant in the assessment of which, the Court will apply the standards of case law of the ECtHR, in accordance with which, according to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

38. The Court recalls that the circumstances of the present case relate to the sequestration of the Applicant's vehicle, which was done at the request of the Basic Prosecution in Gjakova, a request approved by the Basic Court, under the suspicion that the sequestrated vehicle was used by the Applicant to commit a criminal offense, which offense he is suspected to have committed. The Applicant had filed an appeal

with the Basic Court against the Order allowing the sequestration of the vehicle. The Basic Court had rejected the appeal, and in the Legal Advice of its Decision it was noted that against the same decision, the parties may file an appeal to the Court of Appeals within three (3) days. Upon the Applicant's appeal, the Court of Appeals had rejected the appeals as impermissible, with the reasoning that the first instance court had erroneously instructed the Applicant, as based on Article 417, paragraph 5 of the CPCRK, the appeal in not allowed in this specific case.

39. The Court recalls once again the Applicant's allegations of violation of Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution.

40. Firstly, with regard to Article 31 of the Constitution, the Applicant only mentioned but has not elaborated nor justified further on how his right to a fair and impartial trial guaranteed by this Article, has been violated.

41. With regard to the abovementioned allegation of the Applicant for violation of Article 31 of the Constitution, the Court notes that the simple fact that the Applicant is not satisfied with the outcome of the Decision of the Court of Appeals or only the mere mentioning of the Articles of the Constitution is not sufficient to construct an allegation of constitutional violation. When such violations of the Constitution are alleged, the Applicants must provide substantiated allegations and convincing arguments (see, in this context, the case of the Court KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33)

42. Secondly, with regard to the allegation of violation of Article 32 of the Constitution, the Applicant alleges that his right to a legal remedy has been violated because according to him, his appeal filed to the Court of Appeals was based on Article 24 in conjunction with Article 378 of the CPCRK, as well as based on the legal advice of the Decision [PPr. Kr.no.33/20] of the Basic Court, which provides that "*Against this Decision, an appeal is allowed within 3 days upon its receipt, to the Court of Appeals in Prishtina, through this Court*".

43. Furthermore, the Applicant alleges that the legal remedy was available to the Applicant and provided by legal provisions. The Applicant also alleges that the challenged decision is contradictory, adding that according to him the provision of paragraph 5 of Article 417 of the CPCK applies only in exceptional cases, and according to him not also in the present case.

44. In considering these allegations, the Court notes that his allegation of violation of Article 32 of the Constitution in essence is related to a misinterpretation of the law applicable by the Court of Appeals, allegations which in accordance with its case law and that of the ECtHR, considers them as claims that fall within the scope of legality and consequently "*claims of the fourth degree*".

45. In this context, the Court recalls that in the circumstances of the present case, the Applicant's main allegations relate to the interpretation of paragraph 5 of Article 417 of the CPCRK, by the Court of Appeals, which invoking on the abovementioned Article, has dismissed the Applicant's appeal against the Decision [PPr.Kr.no.33/20] of 13 July 2020 of the Basic Court, as impermissible and thereby has violated his right to a legal remedy, denying the Applicant the use of legal remedy which according to the Applicant, existed under Article 24 in conjunction with Article 378 of the CPCRK.

46. The Court first notes that the Decision [PPr.Kr.no.33/20] of the Basic Court, of 13 July 2020, was issued by a trial panel consisting of three judges and the essence of the case was pertinent to the issue of evidence gathered in the preliminary criminal proceeding.

47. The Basic Court in this case, deciding on the Applicant's appeal filed against the Order of the Basic Court, which ordered the temporary sequestration of the Applicant's vehicle in order to verify the commission of the criminal offense, by the Decision had rejected the Applicant's appeal as unfounded.

48. The Court notes that Article 116 of the CPCRK provides that "*Objects temporarily confiscated during criminal proceedings shall be returned to the owner or possessor if the proceedings are suspended or terminated and there are no grounds for them to be sequestrated*".

49. The Court notes, however, that the Court of Appeals had dealt with the Applicant's appeal against the Decision [PPr.Kr.no.33/20] of the Basic Court, of 13 July 2020, and based on Article 417.5 of the CPCRK, had dismissed the same as impermissible. The Court of Appeals by Decision [PN.no.558/2020] of 18 August 2020, in this context, had stated as follows:

> "*The Court of Appeals finds that the appeal filed by the defense counsel of the defendant Lorik Salihu, lawyer Edona Sina,*

against the decision of the review panel of the Basic Court is impermissible, as based on the provision of Article 417 para. 5 of the CPCRK, it is provided that: "Unless otherwise determined under the present Code, a ruling on the objection by the review panel shall be reviewed by the Court of Appeals only upon an appeal of the judgment of the Basic Court", which in the respective case the Court of Appeals finds that the first instance court has erroneously instructed the defendant on the right to exercise the legal remedy. Therefore, since in the respective case the three-instance of legal remedies is not allowed, except in cases provided by law, the appeal of the defendant's defense counsel was dismissed as impermissible."

50. In addressing the abovementioned allegation, the Court first refers to the provision of Article 32 of the Constitution which provides:

Article 32 [Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

51. In this regard, the Court recalls that Article 417.5 of the CPCRK, on which the Court of Appeals was invoked, in the relevant part states the following:

[Review by the Review Panel of the Basic Court]

[...]

"5. Unless otherwise determined under the present Code, a ruling on the objection by the review panel shall be reviewed by the Court of Appeals only upon an appeal of the judgment of the Basic Court."

52. In addition to the foregoing, the Court notes that the very content of the legal provision of Article 417, paragraph 5 of the CPCRK is uncontested and that the appeal can be filed only against the Judgment of the Basic Court, that is, the decision issued in respect of the merits of the case.

53. The Court notes that the exercise of the right to legal remedy, including also the grounds for its use, are regulated by law. This Article is supplemented and read in conjunction with Article 13 (Right to an

effective remedy) of the ECHR, as well as the relevant case law of the Court and the ECtHR.

54. Consequently, Article 13 of the ECHR requires that where an individual has an arguable claim to be a victim of violation of the rights set out in the Convention, in those circumstances he must have a legal remedy before a national *"authority"* in order to decide on his application; and, if appropriate, to receive compensation (see cases of the ECtHR: *Klass and Others v. Germany*, Judgment of 6 September 1978, paragraph 64; *Silver and Others v. the United Kingdom,* Judgment of 25 March 1983, para. 113; *Leander v. Sweden*, Judgment of 26 March 1987, paragraph 77 (a), see also the case of the Court, KI 62/20, Applicant *Gekos Sh.p.k*, Resolution on Inadmissibility, dated 24 February 2021, paragraph 48, KI 130/19, Applicant *Fahri Mati,* Resolution on Inadmissibility of 27 November 2019, paragraph 50)**.**

55. However, the ECtHR has emphasized that Article 13 of the ECHR cannot be interpreted in such a way as to require a legal remedy in domestic law in respect of any alleged complaint that an individual may have, no matter how not-meritorious his appeal may be: the appeal and the allegation must be "sustainable" as regards the ECHR (see the case of ECtHR: *Boyle and Rice v. The United Kingdom*, Judgment of 27 April 1988, paragraph 52; *Maurice v. France*, Judgment of 6 October 2005, paragraph 106).

56. Based on the above-mentioned principles, the Court finds that the Applicant's allegation is not arguable, as the CPCRK, under Article 417.5 provides, "*a ruling on the objection by the review panel shall be reviewed by the Court of Appeals only upon an appeal of the judgment of the Basic Court*".

57. In light of the above, the Court considers that the right to use legal remedies in the present case is not defined by law.

58. Returning to this case, the Court will assess whether the advice on the legal remedy in the decision of the Basic Court in any way prevented the Applicant from having his appeal allegation examined by the court of the highest instance, in the present case the Court of Appeals, where he could have exercised his rights from the statement of claim, or the denial of the use of advice for the legal remedy of the Basic Court had directly denied the Applicant's right to an effective legal remedy, and with this it directly led to the violation of Article 32 of the Constitution in conjunction with Article 13 of the ECHR.

59. In the light of the foregoing, the Court finds that notwithstanding the constitutional right to an effective legal remedy, it is important to note that not every erroneous instruction on a legal remedy will result in violation of the right to access the court.

60. Furthermore, in terms of legal remedy, the Applicant cannot refer to the fact that the first instance court has erroneously authorized (instructed) the party entitled to appeal against the decision of the Basic Court, since such an erroneous instruction in a specific legal situation cannot replace the clear legal norm which for such situations does not provide a remedy of appeal, as provided by Article 417.5 of the CPCRK.

61. Furthermore, the Court notes that the rejection of the appeal in question does not infringe the Applicant's right to a legal remedy because he can exercise this eventual right also concerning the present case with an appeal against the final judgment (see similarly the case of the Court, KI 145/13, Applicant Privatization Agency of Kosovo, Resolution on Inadmissibility of 24 March 2014, paragraph 46).

62. The Court finally recalls that the Applicant, in support of his allegations of violation of Article 32 [Right to Legal Remedies], also referred to a case of the ECtHR (referred to in paragraph 29 of this Resolution). In this regard, the Court notes that in the case referred by the Applicant, the ECtHR in assessing the merits of the Referral, differs completely from the factual and legal circumstances of the Applicant's case. The ECtHR in the case invoked by the Applicant found violation of Article 8 in conjunction with Article 13 of the ECHR.

63. However, the Court notes that apart from the fact that the Applicant referred to this case in his Referral, he did not in any way elaborate their relevance, factual or legal, to the circumstances of the present case, a task which based on the case law of the Court, belongs to the Applicant (see, among others, and in this context, the Judgment in the case KI48/18 of 4 February 2019, with Applicant *Arban Abrashi and Lidhja Demokratike e Kosovës* (LDK), paragraph 275; and the case KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility of 3 May 2019, paragraph 80).

64. Having into account the allegations raised by the Applicant and the facts presented by him, as well as the reasoning of the regular courts set out above, the Court considers that the Applicant does not prove or sufficiently substantiate the allegation of violation of Article 32 of the Constitution. Consequently, the Court finds that this allegation is

manifestly ill-founded on constitutional grounds, as set out in paragraph (2) of Rule 39 of the Rules of Procedure.

65. Therefore in these circumstances, based on the above and having into account the allegations raised by the Applicant and the facts presented by him, the Court, based also on the standards set in its case law in similar cases and the case law of the ECtHR, finds that the Applicant has not proved and has not sufficiently substantiated his allegations of violation of his fundamental rights and freedoms guaranteed by the Constitution.

66. Consequently, the Court finds that the Referral is manifestly ill-founded on constitutional grounds and that the same is declared inadmissible, pursuant to paragraph 7 of Article 113 of the Constitution and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 39 (2) of the Rules of Procedure, on 30 June 2021, unanimously

DECIDES

VI. TO DECLARE the Referral inadmissible;

VII. TO NOTIFY this Decision to the Parties;

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

IX. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Gresa Caka-Nimani

KI59/21, Applicant: Democratic Party of Kosovo, Branch in Gjakova, request for constitutional review of Judgment Rev. No. 416/2020 of the Supreme Court, of 5 November 2020

KI59/21, Resolution on inadmissibility, of 22 July 2021, published on 12.08.2021

Keywords*: right to fair and impartial trial, inadmissible referral, legal person, manifestly ill-founded*

From the case file it resulted that the case was related to the conclusion of a lease contract between the Applicant and the Privatization Agency of Kosovo as administrator of socially owned enterprises. As a result of non-payment of contractual obligations by the Applicant, namely the payment of debt for rent for the period 1 June 2012 to 1 November 2015, the Privatization Agency of Kosovo filed a lawsuit with the Basic Court, and in the meantime requested the fulfillment of the statement of claim by requesting that the Applicant also pay interest. The Basic Court had partially approved the statement of claim of the Privatization Agency of Kosovo and obliged the Applicant to pay the debt on behalf of the unpaid rent, based on the lease contract, with the relevant legal interest paid by commercial banks in Kosovo for the means deposited in term over one year, while it rejected the other part as ungrounded. Following the Applicant's appeal to the Court of Appeals, where among others the Applicant challenged the passive and active legitimacy of the Privatization Agency of Kosovo in this case, the Court of Appeals rejected it as ungrounded. The Applicant filed a revision with the Supreme Court, and the latter rejected the revision against the Judgment of the Court of Appeals, while it modified the Judgment of the Basic Court only as to the date from which the interest should be paid.

The Applicant, raised as a main allegation before the Constitutional Court the violation of the right protected by Articles 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR.

The Applicant in essence alleged before the Court that the decisions of the regular courts are not sufficiently reasoned, namely the following issues) lack of reasoning made by the regular courts to the Applicant's allegation, regarding the lack of passive and active legitimacy of the Privatization Agency of Kosovo. to be a party to the proceedings; ii) allegation that the fact that the Applicant is a legal entity has been erroneously established; and iii) the Privatization Agency of Kosovo unduly represented before the regular courts, namely not in the manner provided by the Law on the Privatization Agency of Kosovo.

With regard to the Applicant's allegations, the Court first elaborated on the principles of its case law and that of the European Court of Human Rights, as regards the doctrine of the fourth instance, and then applied the latter to the circumstances of the present case.

The Court, in relation to these allegations, concluded that the latter are the issues of legality that fall into the category of allegations of "*fourth instance*", therefore, manifestly ill-founded allegations.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI59/21

Applicant

Partia Demokratike e Kosovës, Branch in Gjakova

Constitutional review of Judgment Rev.no416/2020, of the Supreme Court, of 5 November 2020

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 Partia Demokratike e Kosovës, Branch in Gjakova (hereinafter: the Applicant) represented by Ylli Bokshi, lawyer from Gjakova.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment [Rev.no.416/2020], of 5 November 2020 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ac.no.1067/2016] of the Court of Appeals of 16 July 2020.

3. The Applicant received the challenged Judgment on 27 November 2020.

Subject matter

4. The subject matter the Referral is the constitutional review of the challenged Judgment, which as alleged by the Applicant has violated its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 20 March 2021, the Applicant submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), which was received by the latter on 23 March 2021.

7. On 29 March 2021, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Safet Hoxha.

8. On 15 April 2021, the Court (i) notified the Applicant on the registration of the Referral; and (ii) requested him to submit the Referral Form, as well as to submit to the Court the acknowledgment of receipt proving when the Applicant received the challenged decision. On the same day, a copy of the Referral was sent to the Supreme Court.

9. On 27 April 2021, the Court received from the Applicant the Referral Form and the Applicant informed the Court that he did not possess the required acknowledgment of receipt.

10. On 17 May 2021, based on paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and the Court Decision KK-SP 71-2/21, it was decided that Judge Gresa Caka-Nimani, shall take over the duty of the President of the Court after the end of the mandate of the current President of the Court, Arta Rama-Hajrizi, on 25 June 2021.

11. On 18 May 2021, the Court notified the Basic Court in Gjakova on the registration of the referral and requested it to submit to the Court the acknowledgment of receipt proving when the Applicant has received the challenged decision.

12. On 25 May 2021, pursuant to item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu submitted his resignation from the position of judge at the Constitutional Court.

13. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision KSH59/21, appointed Judge Nexhmi Rexhepi as member of the Review Panel instead of Judge Bekim Sejdiu.

14. On 31 May 2021, the Basic Court in Gjakova submitted to the Court the requested acknowledgment of receipt.

15. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, with Decision no. KK160/21 determined that Judge Gresa Caka-Nimani be appointed Presiding of the Review Panels in cases where she was appointed as member of the Panel, including the current case.

16. On 26 June 2021, based on paragraph 4 of Rule 12 of the Rules of Procedure and the Decision of the Court KK-SP 71-2/21, Judge Gresa Caka-Nimani took over the duty of the President of the Court, whilst pursuant to item 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.

17. On 22 July 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

18. Based on the case file, it results that the Applicant and the Privatization Agency of Kosovo-Regional Office in Peja (hereinafter: PAK), on 30 May 2012, had concluded a Lease Contract [no. 324/3], based on which were agreed that the Applicant shall use the offices located on the left side of the building of the SOE "Deva", in Gjakova, and for which it must pay the amount of 500 euros per month.

19. As a result of non-payment of rent, on an unspecified date the PAK had filed a claim with the Basic Court in Gjakova (hereinafter: the Basic Court) against the Applicant for payment of rent for the above-mentioned facility, for the period from 1 June 2012 until 1 November 2015, in the total amount of 20.500,00 euros.

20. On 18 November 2015, the PAK, by a submission addressed to the Basic Court, requested the expansion of the statement of claim, requesting the Applicant to pay the relevant legal interest and the amount of 500 Euros until the handover of the building.

21. On 30 November 2015, the Applicant submitted a submission to the Basic Court, by which it challenged the passive legitimacy of the PAK regarding this issue and also contested the expansion of the statement of claim.

22. On 5 January 2016, the Basic Court, by Judgment [C.no.122/13] partially approved the statement of claim of the PAK, and thus obliged the Applicant as follows: i) on behalf of the unpaid rent from 1 June 2012 to 1 November 2015, based on the contract on rent to pay to the PAK the amount of 20.500,00 euros with the relevant legal interest paid by commercial banks in Kosovo for funds deposited for a period of over one year, and which begins to run from 18 November 2015; ii) to pay the procedural expenses; iii) the rest of the statement of claim and which is related to the payment of the amount of 500 euros for the period until the handover of the building, rejected it in its entirety as ungrounded.

23. Among other things, the Basic Court in addressing the allegations of the Applicant, in the reasoning of the above-mentioned Judgment stated "*regarding the allegations of the authorized respondent, that the claimant has no legitimacy, do not stand since as of 2008 the PAK manages socially owned enterprises and that the respondent with its request addressed the claimant for the lease of the building which resulted in the signing of the contract on rent which contract for the parties is law [...]*".

24. On an unspecified date the Applicant filed an appeal with the Court of Appeals against the aforementioned Judgment of the Basic Court alleging substantial violation of the provisions of the contested procedure, erroneous determination of the factual situation and erroneous application of the substantive law.

25. On 16 July 2020, the Court of Appeals by Judgment [Ac.no.1067/2016] rejected the Applicant's appeal as ungrounded, and upheld the above-mentioned Judgment of the Basic Court. The Court of Appeals in the reasoning of its Judgment considered that the Judgment of the Basic Court was fair, and does not involve essential violations of the provisions of the contested procedure and that the factual situation was correctly determined. Further with regard to the Applicant's allegation that the Applicant is not a legal entity and that the PAK lacks passive legitimacy, the Court of Appeals rejected them as ungrounded.

26. On an unspecified date the Applicant filed a revision with the Supreme Court, against the aforementioned Judgment of the Court of Appeals alleging, substantial violation of the provisions of the contested procedure, and erroneous application of the substantive law.

27. On 5 November 2020, the Supreme Court by Judgment [Rev.416/2020] rejected the Applicant's revision as ungrounded, while it amended the Judgment [C.no.122/13] of the Basic Court, only in respect of interest, obliging the Applicant to pay the amount of 19,440.00 Euros with the relevant legal interest starting from 8 April 2016, until the final payment.

Applicant's allegations

28. The Applicant alleges that by the challenged Judgment [Rev.no.416/2020] of the Supreme Court, of 5 November 2020, its fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR, have been violated.

29. The Applicant initially alleges that the Judgment [Ac.no.1067/2016] of 16 July 2020, is not sufficiently substantiated, claiming that through the latter, the Applicant's allegation regarding lack of active and passive legitimacy for the PAK to be a party in the proceedings was not substantiated, as well as the fact that the PAK was not represented before the regular courts in the manner provided by the Law on the Privatization Agency of Kosovo.

30. The Applicant with regard to the challenged Judgment of the Supreme Court, further alleges that it was erroneously determined the fact that the Applicant is a legal entity and that the PAK was not fairly represented before the regular courts. In relation to this, the Applicant alleges *"the Supreme Court of Kosovo has erroneously found when it concluded that the first instance court has correctly assessed that Partia Demokratike e Kosovës, respectively the Branch in Gjakova, has legitimacy in the proceedings referring to Article 23 par 1 of the statute of PDK"*.

31. The Applicant further alleges *"I consider that the principle of legality has been seriously violated at a high level, and based on the analysis of court decisions challenged with this Referral to the Constitutional Court, it is concluded that the regular courts have erroneously or arbitrarily and unilaterally applied relevant legal provisions with which they have seriously violated the constitutional guarantees*".

32. In support of the allegations of lack of reasoning of regular court decisions, the Applicant has been referred to a large number of cases of the European Court of Human Rights (hereinafter: the ECtHR) respectively the cases *(Talpis v. Italy, Judgment of 18 September 2017, paragraph 77 and references cited therein, Hadjianastassiou v. Greece, Judgment of 16 December 1992; Van de Hurk v. Netherland, Judgment of 19 April 1994; Hiro Balani v. Spain, Judgment of 9 December 1994; Higgins and others v. France, Judgment of 19 February 1998; Garcia Ruiz v. Spain, Judgment of 21 January 1999; Hirvisaari v. Finland, 27 September 2001; Suominen v. Finland, Judgment of 1 July 2003; Buzescu v. Romania, Judgment of 24 May 2005 Pronina v. Ukraine, Judgment of 18 July 2006; and Tatishvili v. Russia, Judgment of 22 February 2007)* as well as Court cases (*KI72/12, Veton Berisha and Ilfete Haziri, Judgment of 17 December 2012; KI22/16, Naser Husaj, Judgment of 9 June 2017; KI97/16, Applicant "IKK Classic", Judgment of 9 January 2018; and KI143/16, Muharrem Blaku and others, Resolution on Inadmissibility of 13 June 2018*.

33. Finally, the Applicant requests the Court to declare the challenged decision null and void, respectively, the Judgment [Rev.no.416/2020] of the Supreme Court, of 5 November 2020.

Assessment of the admissibility of Referral

34. The Court first examines whether the Referral has met the admissibility criteria set out in the Constitution, provided by law and further specified in the Rules of Procedure.

35. 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."*

36. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides:

> *"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."*

37. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, referring to the alleged violations of its fundamental rights and freedoms, which apply to both individuals and legal entities as far as they are applicable (see, among others, the case of the Court KI118/18, with Applicant, *Eco Construction L.L.C.*, Resolution on Inadmissibility, of 10 October 2019, paragraph 29 and the references used therein).

38. The Court also examines whether the Applicant has met the admissibility requirements as set out in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
(Accuracy of the Referral)

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
(Deadlines)

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

39. With regard to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, which challenges an act of a public authority, namely the Judgment [Rev.no.416/2020] of the Supreme Court, of 5 November 2020, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms that it alleges to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

40. In addition, the Court examines whether the Applicant has met the admissibility criteria set out in Rule 39 (Admissibility Criteria) of the Rules of Procedure. Paragraph (2) of Rule 39 of the Rules of Procedure sets out the criteria according to which the Court may examine the Referral, including the criterion that the Referral is not manifestly ill-founded. Rule 39 (2) provides in particular the following:

"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

41. The Court first notes that the above-mentioned rule, based on the case law of the ECtHR and the Court, enables the latter to declare referrals inadmissible on grounds relating to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible on the basis of and after the assessment of its merits, respectively if the same considers that the content of the referral is clearly ill-founded on constitutional grounds, as defined in paragraph (2) of Rule 39 of the Rules of Procedure.

42. Based on the case law of the ECtHR but also of the Court, a Referral may be declared inadmissible as *"manifestly ill-founded"* in its entirety or only with respect to any specific allegation that a Referral may contain. In this regard, it is more accurate to refer to the same as *"manifestly ill-founded allegations"*. The latter, based on the case law of the ECtHR, can be categorized into four distinct groups: (i) allegations that qualify as allegations of *"fourth instance"*; (ii) allegations categorized as having *"an apparent or evident lack of violation"*; (iii) *"unsubstantiated or unreasonable"* allegations; and finally, (iv) *"confusing and vague"* allegations.

43. In the context of the assessment of the admissibility of the Referral, respectively, in assessing whether the same is manifestly ill-founded on constitutional grounds, the Court will first recall the substance of the case contained in this Referral and the respective allegations of the Applicant, in the assessment of which the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

44. The Court recalls that the circumstances of the present case relate to a concluded contract for rent between the Applicant and the PAK as the administrator of the socially-owned enterprises. As a result of non-payment of contractual obligations, respectively for the payment of debt for rent for the period from 1 June 2012 to 1 November 2015, in the total amount of 20.500,00 euros, the PAK had filed a claim in the Basic Court, and in the meantime had requested to supplement the statement of claim by requesting the applicant to pay the interest as well as the amount of 500 euros per month until the final payment of the debt. The Basic Court had partially approved the statement of claim of the PAK and obliged the Applicant to pay to the PAK on behalf of the unpaid rent from 1 June 2012 to 1 November 2015, on the basis of the lease contract the amount of 20.500,00 euros with the relevant legal interest paid by commercial banks in Kosovo for funds deposited for a period of over one year, which starts to flow from 18 November 2015, while it rejected the remainder part as ungrounded. After the Applicant's appeal filed to the Court of Appeals, where, among other things, the Applicant challenged the passive and active legitimacy of the PAK in this case, the Court of Appeals rejected it as ungrounded. The Applicant filed a revision with the Supreme Court, and the latter rejected the revision against the Judgment of the Court of Appeals, while amended the Judgment of the Basic Court only as to the date from which the interest should be paid.

45. The Court recalls that these findings of the Court of Appeals and the Supreme Court are challenged by the Applicant before the Court, alleging in essence the violation of Article 31 of the Constitution and Article 6 of the ECHR due to the lack of reasoning of the court decisions, specifically Judgment [Rev.no.416/2020] of 5 November 2020 of the Supreme Court in conjunction with Judgment [Ac.no.1067/2016] of the Court of Appeals, of 16 July 2020.

46. Initially, the Court recalls that the allegations raised by the Applicant at the Court were also raised before the regular courts and relate mainly to the lack of reasoning of court decisions, namely: i) the lack of reasoning that the regular courts have maintained on the Applicant's allegation regarding the lack of passive and active legitimacy of the PAK to be a party in the proceeding; ii) the allegation that the fact that the Applicant is a legal entity has been erroneously determined; and iii) that the PAK has been unfairly represented before the regular Courts, respectively not in the manner provided by the Law on the Privatization Agency of Kosovo.

47. In relation to these allegations, the Court refers to the case law of the ECtHR, which has held that, although the authorities enjoy considerable freedom in choosing the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (1) of the ECHR, their courts must *"show with sufficient clarity the reasons on which they based their decision"* (see *Hadjianastassiou v. Greece*, application no. 12945/87, Judgment of ECtHR, of 16 December 1992, paragraph 33; see also the case of the Court KI97/16, Applicant "*IKK Classic",* Judgment of 9 January 2018, paragraph 45, see the case KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 17 May 2018, paragraph 54).

48. In accordance with the case law of the ECtHR, this Court has also, in a number of cases, stated that although the courts are not obliged to address all the allegations submitted by the Applicants, the courts have an obligation to address the main allegations of cases before them (see, *mutatis mutandis,* the above-mentioned case of the Court KI97/16, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 53). In this respect, the right to make a judicial decision in accordance with the law includes the obligation for the courts to give reasons for their decisions, both at the procedural and the substantive level (see, *mutatis mutandis,* the above-mentioned case of the Court KI97/16, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 54).

49. In the Applicant's case, the Court initially notes that the Supreme Court had rejected as ungrounded the revision filed by the Applicant against Judgment [Ac.no.1067/2016] of the Court of Appeals, of 16 July 2020. First, with respect to the Applicant's specific allegations that the Supreme Court did not address his allegations stated in the revision, the Court refers to the relevant part of the Judgment of the Supreme Court which reasoned:

> "*The statements in the revision that the judgments of the lower instance were taken with substantial violations of the provisions of the contested procedure, as it is emphasized that the decisive evidence for confirming the ownership of the disputed premises was not provided, and that the legitimacy of the claimant, the Supreme Court of Kosovo have assessed them as ungrounded. It has been uncontestably determined that the claimant is the owner of the premises and with no evidence the respondent had disputed this. The allegations mentioned in the revision that were the subject of review even before the second instance court which fairly assessed that the respondent, Partia Demokratike e Kosovës has the legitimacy of the party in the procedure, the Supreme Court approves for the fact that according to the official website where the statute of the respondent was published is defined in Article 7, which refers to the legal statute that "the PDK is a legal entity with rights and obligations arising from the Laws of the Republic of Kosovo and is registered in the official register of political organizations". Whereas in Article 23. 1., is defined that PDK Branches are the highest form of organization at the local level.*
>
> *The allegations that the claimant was unlawfully represented are rejected by the Supreme Court as ungrounded. According to Law no.03/1-067 on the Privatization Agency of Kosovo [...] applicable in the respective case, has the authority to administer, including the authority to sell, transfer and/or liquidate-Enterprises and Assets as defined under the present law. In the procedure, the claimant except Elmaze Nushi on behalf of the Management Board of the Bank was represented by Ilmi Miftaraj with power of attorney given by the PAK."*

50. In addition, the Court also refers to the Judgment [Ac.no.106/2016] of the Court of Appeals, of 16 July 2020, by which regarding the claim of the Applicant that it is not a legal person and that PAK lacks passive legitimacy, the Court of Appeals rejected as ungrounded and upheld the Judgment [C.no.122/13] of the Basic Court. The Court also recalls the reasoning of the Judgment [C.no.122/13] of the Basic Court, of 5

January 2016, which states that "*regarding the allegations of the authorized respondent, that the claimant has no legitimacy, do not stand since as of 2008 the PAK manages socially owned enterprises and that the respondent with its request addressed the claimant for the lease of the building which resulted in the signing of the contract on rent which contract for the parties is law [...]*".

51. In light of the above, the Court concludes that the Judgment [Rev.416/2020] of the Supreme Court, of 5 November 2020, is clear and addresses the substantive allegations raised by the Applicant in the revision. There is no substantive argument which the Supreme Court has left aside as unreasonable, as the Applicant alleges.

52. Consequently, the Supreme Court came to this conclusion after considering the reasoning given by the Basic Court and the Court of Appeals.

53. Therefore, the Court considers that the conclusions of the Supreme Court were reached after a detailed examination of all the arguments submitted by the Applicant. Consequently, the Court considers that the reasoning given by the Supreme Court meets all the necessary standards of the ECtHR and the Court for a reasoned court decision.

54. The Court, in the Applicant's case, notes that the Applicant's allegations raised in the Court, mainly raise issues of legality and as such do not fall within the realm of constitutionality. Therefore, in the light of the above, the Court also finds that the proceedings in the regular courts were not unfair or arbitrary (see the ECtHR Judgment, *Pekinel v. Turkey*, of 18 March 2008, No. 9939/02, paragraph 55, see also, in this respect, among others, the case of the Court KI22/19, cited above, paragraph 43)

55. In this regard, the Court notes that it is not its duty to deal with errors of law allegedly committed by the regular courts (legality), except and to the extent that such errors may have violated fundamental rights and freedoms protected by the Constitution (constitutionality). It alone cannot assess the law that has made a regular court approve a decision instead of another decision. If it were otherwise, the Court would act as a "fourth instance" court, which would result in exceeding the limits set in its jurisdiction. Indeed, it is the role of the regular courts to interpret and apply the relevant rules of procedural and substantive law (see case, *García Ruiz* v. *Spain,* ECtHR, no. 30544/96, Judgment of 21 January 1999, paragraph 28 and see also the Case KI70/11, Applicant *Faik Hima, Magbule Hima* and *Bestar Hima*, Resolution on Inadmissibility, of 16 December 2011).

56. The Court finally recalls that the Applicant's dissatisfaction with the outcome of the proceedings by the regular courts cannot in itself raise substantiated allegations of violation of constitutional rights (see the case of the ECtHR *Mezotur-Tiszazugi Tarsulat v. Hungary,* Judgment of 26 July 2005, paragraph 21).

57. Therefore and consequently, the Court finds that the Referral is manifestly ill-founded on constitutional grounds and that the same is declared inadmissible, pursuant to paragraph 7 of Article 113 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 22 July 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka-Nimani

KI175/19; Applicant Ismajl Zogaj, Constitutional review of Notification [KMLC. No. 129/2019] of the State Prosecutor of 13 August 2019, Decision [Ac. No. 3983/2018] of the Court of Appeals of the Republic of Kosovo, of 24 May 2019, and Decision [C. No. 118/2018] of the Basic Court in Gjakova – Branch in Malisheva of 2 February 2018

Keywords: individual referral, right to fair and impartial trial, non-implementation of the enforceable decision.

KI 175/19, Judgment rendered on 28 July 202, published on xxxxxx

The circumstances of the present case are related to the termination of the Applicant's employment relationship by the Municipality of Malisheva and the non-enforcement of the IOBCSK Decision, [no. 738], of 18 April 2006 which obliged the Municipality of Malisheva to reinstate the Applicant to his working place. By his lawsuit, the Applicant alleged before the Municipal Court in Malisheva the non-execution of the IOBCSK Decision by the Municipality of Malisheva for his reinstatement to his working place. The Municipal Court in Malisheva by Judgment [C. No. 166/2007] approved in its entirety the statement of claim as grounded which had to do with the payment of lost personal income for the period of time until the employment contract was valid, while rejecting the part of the statement of claim that had to do with the reinstatement to his working place after the expiration of the validity of the employment contract for the Applicant. The Court of Appeals, following the Applicant's appeal, by Judgment [Ac. No. 2942/2012] rejected the Applicant's appeal as ungrounded and upheld Judgment [C. No. 166/2007] of the Municipal Court in Malisheva. According to the Court of Appeals, the employment contract of the Applicant had already expired and that it would not be legal and logical to order the Applicant to reinstate to the working place as the contract was ibn force only until 31 March 2006. The Supreme Court by Decision [Rev. No. 6/2014] approved the Applicant's appeal on the grounds that the IOBCSK Decision is a final administrative decision, and as such should be enforced by the competent court. After remanding the case to the first instance for retrial, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 490/2014] obliged the Municipality of Malisheva to compensate the Applicant on behalf of the monthly salary in the amount of 934.78 euro, but rejected the Applicant's proposal for reinstatement to his working place and compensation of personal income after the expiration of the contract. The Court of Appeals by Decision [Ac. No. 3536/15] assessed that the Decision [Cp. No. 490/2014] of the Basic Court in Gjakova - Branch in Malisheva was rendered with essential violation of the provisions of the contested procedure. The Applicant accurately specified the proposal for enforcement of the IOBCSK Decision to the Basic Court. On 26 May 2017, the Basic Court in Gjakova - Branch in

Malisheva by Decision [Cp. No. 157/2016]: (i) approved the Applicant's proposal; (ii) obliged the Municipality of Malisheva, based on the decision of the IOBCSK, to reinstate the Applicant to his working place; (iii) obliged the Municipality of Malisheva to pay the procedural costs to the Applicant. Following the appeal of the Municipality of Malisheva, the Court of Appeals by Decision [Ac. No. 4085/17] annulled the Decision [Cp. No. 157/2016] of the Basic Court in Gjakova - Branch in Malisheva and remanded the case to the first instance for re-procedure. The Basic Court in Gjakova - branch in Malisheva, in the re-procedure by Decision [Cp. No. 118/2018] recognized to the Applicant only the right to compensation of financial income and only for the period until he had the contract. Following the Applicant's appeal, the Court of Appeals by Decision [Ac. No. 3983/2018] upheld the Decision [Cp. No. 118/2018] of the Basic Court of 2 July 2018. Whereas, the Decision of the IOBCSK [no. 738] of 18 April 2006, which determined the reinstatement of the Applicant to his workplace, in its entirety has never been enforced by the Municipality of Malisheva.

The Court noted that the enforcement of the IOBCSK Decision was directly related to the Applicant's reinstatement to the working place and not only to the issue of financial compensation on behalf of unpaid salaries during the period of dismissal.

Further, relying on the case file in its possession, the Court noted that despite the Applicant's relentless efforts to enforce the IOBCSK Decision, that decision has never been implemented or quashed. Thus, more than 12 (twelve) years have passed since the issuance of the IOBCSK Decision (18 April 2006) until the final decision of the Court of Appeals [Ac. No. 3983/2018], of 24 May 2019.

Therefore, the Court emphasizes that the implementation of a final and binding decision, within a reasonable time, is a guaranteed right under Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

In the circumstances of the present case, the Court found that the non-enforcement of IOBCSK Decision No. 738 of 18 April 2006, by the Municipality of Malisheva and the regular courts for such a long period of time since the issuance of the IOBCSK Decision, to reinstate the Applicant to his previous position constitutes a violation of Articles 31 of the Constitution in conjunction with Article 6.1 of the ECHR. As a result of this violation, the Applicant was deprived of his right to return to his working place in accordance with the order of the IOBCSK Decision issued in his favor.

JUDGMENT

in

case no. KI175/19

Applicant

Ismajl Zogaj

Constitutional review of Notification [KMLC. No. 129/2019] of the State Prosecutor of 13 August 2019, Decision [Ac. No. 3983/2018], of the Court of Appeals of the Republic of Kosovo, of 24 May 2019, and Decision [C. No. 118/2018] of the Basic Court in Gjakova – Branch in Malisheva of 2 February 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Ismajl Zogaj, from the Municipality of Malisheva (hereinafter: the Applicant) represented by Rrahman Kastrati, a lawyer from the Municipality of Prishtina.

Challenged decision

2. The Applicant challenges Notification [KMLC. No. 129/2019] of the State Prosecutor, of 13 August 2019, Decision [Ac. No. 3983/2018] of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) of 24 May 2019, in conjunction with Decision [C. No. 118/2018] of the Basic Court in Gjakova – Branch in Malisheva of 2 July 2018.

3. The Applicant was served with Decision [Ac. No. 3983/2018] of the Court of Appeals of 24 May 2019 on 28 June 2019.

Subject matter

4. The subject matter is the constitutional review of the Notification of the State Prosecutor and of the abovementioned decisions, which allegedly violate the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Court

6. On 30 September 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 4 November 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.

8. On 14 November 2019, the Court notified the Applicant about the registration of the Referral and requested him to submit the official form for submission of the Referral to the Court and the power of attorney for representation.

9. On 20 December 2019, the Court submitted the copy of the Referral to the State Prosecutor and the Court of Appeals.

10. On 3 September 2020, the Court notified the Basic Court in Prishtina (hereinafter: the Basic Court) about the registration of the Referral and requested it to submit the acknowledgment of receipt proving when the Applicant was served with the challenged Decision of the Court of Appeals.
11. On 21 September 2020, the Basic Court in Gjakova - Branch in Malisheva submitted to the Court the required acknowledgment of receipt.

12. On 26 March 2021, the Court reviewed the case and decided to adjourn the decision to another session in accordance with the required supplementations.

13. On 14 April 2021, the Court requested the Applicant to notify it if he was financially compensated by the Municipality of Malisheva.

14. On the same date, the Court requested the Municipality of Malisheva to notify it if it had implemented the decisions of the regular courts in awarding financial compensation to the Applicant.

15. On 19 April 2021, the Applicant submitted the response and informed the Court that he was not compensated by the Municipality of Malisheva.

16. On 23 April 2021, the Municipality of Malisheva submitted the response and informed the Court that the Applicant has not submitted a request for execution of the Decision [Ac. No. 3983/2018] of the Court of Appeals, of 24 May 2019.

17. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge of the Constitutional Court.

18. On 25 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and the Decision [KK-SP-71-2/21] of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1, of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and of the Judge of the Constitutional Court.

19. On 1 July 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 ant the review of the case on merits.

20. On the same date, on 1 July 2021, the Court decided: (i) unanimously that the Applicant's Referral is admissible; (ii) unanimously that the non-enforcement of the IOBCSK Decision No. 738, of 18 April 2006, violated Article 31 of the Constitution, in conjunction with Article 6 of the ECHR; (iii) to declare by a majority of votes the Decision [Ac. no. 3983/2018] of the Court of Appeals, of 24 May 2019, in conjunction with the Decision [C. no. 118/2018] of the Basic Court in Gjakova - Branch in Malisheva of 2 July 2018, invalid; (iv) to order, unanimously, the Municipality of Malisheva to implement the IOBCSK Decision no. 738, of 18 April 2006.

Summary of facts

21. The Applicant was employed in the Municipality of Malisheva, Directorate of Agriculture, Forestry and Rural Development in the position of Forestry Officer, according to the contract for a fix period from 2 March 2005 to 31 March 2006.

Proceedings before the Disciplinary Commission in the Municipality of Malisheva

22. On 21 October 2005, the Disciplinary Commission of the Municipality of Malisheva (hereinafter: the Disciplinary Commission) by Decision [06/769] terminated the employment relationship of the Applicant.

23. Against the abovementioned Decision, the Applicant complained to the Complaints Commission in the Municipality of Malisheva. The latter, on 23 December 2005, in the capacity of the second instance disciplinary body rendered the Decision [02/861] by which, rejected the Applicant's appeal, upholding the Decision of the Disciplinary Commission [06/769] given in the first instance.

Proceedings before the Independent Oversight Board of the Civil Service of Kosovo

24. On 18 January 2006, the Applicant filed a complaint with the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: the IOBCSK) against Decision [02/861] of the Municipality of Malisheva.

25. On 18 April 2006, the IOBCSK rendered Decision [No. 738] by which: (i) annulled the decision [02/861] of the Appeals Commission within the Municipality of Malisheva; (ii) obliged the Municipality of

Malisheva to reinstate the Applicant to his working place; (iii) requested the latter to implement this decision within 15 (fifteen) days.

26. More specifically, the IOBCSK through Decision [No. 738] found the following:

> *"Complaint 71/06 of 18.01.2006 submitted by Ismajl Zogaj with all appealing allegations is approved and the decision no. 02/861 of the Complaints Commission of the MA Malisheva of 23.12.2005 is annulled.*
>
> *The Employer Authority MA in Malisheva is authorized to reinstate the employee to the job position Forestry Officer in the Directorate of Agriculture with all the rights and obligations from the employment relationship from the date of dismissal".*

27. According to the Applicant *"he made attempts to return to his working place several times, but the Municipality of Malisheva did not implement the abovementioned decision of the IOBCSK".*

Proceedings before the regular courts regarding the Applicant's lawsuit for the implementation of the IOBCSK Decision no. 738 of 18 April 2006

28. On an unspecified date, the Applicant filed a lawsuit with the Municipal Court in Malisheva for reinstatement to his working place, namely for the implementation of the IOBCSK Decision [no. 738]. By his lawsuit, the Applicant alleged non-execution of the IOBCSK decision by the Municipality of Malisheva regarding his reinstatement to his working place.

29. On 21 December 2011, the Municipal Court in Malisheva by Judgment [C. No. 166/2007] approved as grounded in its entirety the statement of claim which had to do with the payment of lost personal income for the period the employment contract has been valid, while it rejected the part of the statement of claim that had to do with reinstatement to his working place after the expiration of the validity of the employment contract for the Applicant.

30. Against the abovementioned Judgment of the Municipal Court in Malisheva, the Applicant filed an appeal with the Court of Appeals alleging essential violations of the provisions of the contested

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

31. On 1 November 2013, the Court of Appeals by Judgment [Ac. No. 2942/2012] rejected the Applicant's appeal as ungrounded and upheld Judgment [C. No. 166/2007] of the Municipal Court in Malisheva. According to the Court of Appeals, the Applicant's employment contract had already expired and it would not be legal and logical to order that the Applicant be reinstated to his working place given that the concluded contract had legal force only until 31 March 2006.

32. Against the abovementioned Judgment of the Court of Appeals, the Applicant filed revision with the Supreme Court, alleging erroneous application of the substantive law and at the same time requested that the case be remanded for retrial.

33. On 7 March 2014, the Supreme Court by Decision [Rev. No. 6/2014] approved the Applicant's appeal on the grounds that the decisions of the previous courts were issued in violation of the substantive provisions of the contested procedure and that the enacting clause of the Judgment of the Court of Appeals is contrary to the evidence in the case file, therefore, as such the same judgment is contradictory to itself and to the reasons for the judgment and finally remanded the case for retrial to the first instance. The Supreme Court, deciding on the Applicant's revision by the Decision [Rev. No. 6/2014] quashed the Judgment of the first instance court [C. No. 166/2007] of 21 December 2011 and the Judgment [Ac. No. 2942/2012] of the second instance court of 1 November 2013 remanding the case for retrial to the first instance court, with the clear instruction that the lawsuit of the claimant, filed against the respondent, the court of first instance to treat it as a proposal for enforcement, initially suspending the contested procedure and the further procedure to continue according to the rules of enforcement procedure in order to be able to implement the Decision of the IOBCSK [no. 738] of 18 April 2006.

34. Among other things, the Supreme Court reasoned its decision as follows:

> *"The claimant in his lawsuit has requested the implementation, namely the enforcement in entirety, of the above mentioned decision of the IOBCSK, which is found in the case file, and the first instance court was obliged to consider his lawsuit as a proposal for enforcement of this decision, and to conduct the case according to the rules of the enforcement procedure and not that*

contrary to the petitum (request) of the lawsuit to conduct the procedure according to the rules of the contested procedure and after that, to decide on merits by a judgment. Within the meaning of Article 2.1 of the LCP, the court decides within the limits of the requests submitted by the litigants, therefore the court of first instance was obliged to decide according to the request of the lawsuit for the implementation of the above mentioned decision, which implementation is done in the enforcement proceedings, and in this context the court was able to instruct the claimant; to specify the submitted lawsuit and the title as a proposal for enforcement, or to consider the same lawsuit as a proposal for enforcement, and to conduct the further procedure according to the rules of the enforcement procedure. The above-mentioned decision of the IOBCSK is a final administrative decision, and as such must be executed by the competent court according to the proposal for execution by the creditor in terms of the realization of the right acquired in administrative proceedings".

The first retrial procedure regarding the Applicant's lawsuit on the implementation of the IOBCSK Decision [no. 738] of 18 April 2006

35. According to the above-mentioned Decision of the Supreme Court, the case was remanded to the first instance where the Applicant requested the enforcement of the IOBCSK Decision [no. 738] of 18 April 2006.

36. According to the instruction of the Supreme Court, the Applicant proposed the enforcement of the IOBCSK decision.

37. On 1 June 2015, the Basic Court in Gjakova - Branch in Malisheva in the re-procedure and retrial scheduled the main hearing session, in which session dealing with the Applicant's lawsuit as a proposal for enforcement and deciding that further proceedings should be conducted according to the rules of the enforcement procedure had administered and assessed the evidence proposed by the parties. In that case, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 490/2014]: (i) partially approved the Applicant's proposal; (ii) obliged the Municipality of Malisheva to compensate the Applicant on behalf of the monthly salaries in the amount of 934.78 euro; (iii) and rejected the Applicant's proposal to reinstate to his working place and compensate for personal income upon expiration of the contract.

38. On 14 August 2015, the Applicant filed an appeal against the Decision of the Basic Court in Gjakova - Branch in Malisheva with the Court of Appeals complaining about the violation of the provisions of the enforcement procedure, erroneous determination of the factual situation and erroneous application of substantive law, requesting his reinstatement to his place of work, as well as compensation for lost salaries.

39. On 8 March 2016, the Court of Appeals by Decision [Ac. No. 3536/15] approved as grounded the Applicant's appeal and assessed that the abovementioned decision was rendered in essential violation of the provisions of the contested procedure, and decided that: *"the decision issued by the first instance court should be quashed, in order for the court of first instance to avoid violations of the provisions of the enforcement procedure under article 36 para. 1, 38 parg.1, 43 parg.1 and 44 of the LEP in the re-procedure".*

40. In the present case, the Court of Appeals reasoned: "*The essential violations of the provisions of the contested procedure under article 182.2 point n) of the LCP in conjunction with article 17 of the LEP stand for the fact that the enacting clause of the appealed decision is in full contradiction with the evidence from the case file. Based on the appealed decision, it cannot be understood whether the first instance court has decided according to the rules of enforcement procedure, referring to the decision of the Independent Oversight Board of Kosovo no. 738 of 18.04.2006, which in this enforcement case has the quality of an executive document (enforcement title). Or the court of first instance has decided on the merits of the claimant's statement of claim according to the initial lawsuit, referring entirely to the rules of contested procedure, especially given the fact that the enforcement procedure is legally a very formal and strict procedure, and that during this procedure the executive body must act and implement the execution only within the obligation which is foreseen by the executive document."* Furthermore, the Court of Appeals added that *"....the first instance court again adjudicated and decided on a case decided by the Independent Oversight Board of Kosovo, by decision no. 738 of 18.04.2006, which based on Article 22 para. 1 point 1.2 of the LEP which explicitly states "enforcement decision awarded in administrative procedure and administrative settlement (hereinafter: the settlement) has the quality of the enforcement document, and that the court of first instance has not fully taken into account the instructions given with the decision of the Supreme Court of Kosovo, when the case was remanded for retrial and reconsideration of the same court".*

41. The Court of Appeals specifically stated that *"The first instance court has violated the provisions of the enforcement procedure of article 36 and 38 of the LEP, because in the main hearing session on the occasion of deciding that the claimant's lawsuit filed against the respondent, to treat it as a proposal for enforcement, within the meaning of article 38 para. 2 of the LEP in conjunction with article 102.1 of the LCP should have invited the creditor within the legal time limit to make the adjustment of the proposal for enforcement, instructing that the proposal for execution must contain all the required elements as provided by paragraph 1 of article 38 of the LCP. LEP and oblige the creditor to present to the court the original or certified copy of the enforcement document provided with clauses for enforceability this legal condition provided by the provision of article 36 paragraph 1 of the LEP."*

42. The Court of Appeals finally decided that *"the first instance court has to eliminate the violations of the provisions of the enforcement procedure in accordance with the findings and remarks presented above by the Court of Appeals, so as to first invite the creditor to rectify the proposal for execution within the legal time limit and to present to the court the original or a certified copy of the enforcement document equipped with enforcement clauses for enforcement, notifying him of the procedural omissions in case of inaction according to the court order, and then depending on the action or inaction of the creditor to take the further procedural steps provided by the legal provisions of the LEP".*

43. On an unspecified date, the Applicant, following the instruction of the Court of Appeals, made the accurate specification of the proposal for execution of the IOBCSK decision before the Basic Court.

44. On 26 May 2017, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 157/2016]: (i) approved the Applicant's proposal; (ii) obliged the Municipality of Malisheva, based on the IOBCSK Decision, to reinstate the Applicant to his working place; (iii) obliged the Municipality of Malisheva to pay the procedural costs to the Applicant.

45. Against the above mentioned Decision of the Basic Court in Gjakova - Branch in Malisheva, as an interested party, the Municipality of Malisheva filed an appeal with the Court of Appeals. In that case, the Municipality of Malisheva alleged a violation of the provisions of the contested procedure, erroneous determination of the factual

situation and erroneous application of substantive law. In this regard, the Municipality of Malisheva requested the Court of Appeals to approve its appeal as grounded and to reject the Decision of the Basic Court [Cp. No. 157/16] of 26 May 2017, as unfounded or to remand it to retrial based on the provisions of the Law on Enforcement Procedure (hereinafter: the LEP).

46. On 22 February 2018, the Court of Appeals by Decision [Ac. No. 4085/17] annulled the Decision [Cp. No. 157/2016] of the Basic Court in Gjakova - Branch in Malisheva and remanded the case to the first instance for retrial. The Court of Appeals in this case reasoned: *"The challenged decision taken by the first instance court contains violation of the provision from article 182 paragraph 1 in conjunction with article 199 of the LCP, and article 36 paragraph 1 of the LEP, the first instance court was obliged when assessing the proposal for execution to assess whether the document which is presented as an executive title meets the requirements as provided by the provision of article 36 of the LEP, which provides that: "The proposal for enforcement shall be submitted to the enforcement body accompanied with the enforcement document, in original or certified copy, with enforceability certificate for enforceability. Enforceability certificate is issued by the court, respectively state organ which has decided about the request in first instance procedure". On this occasion, the Court Of Appeals instructed "The first instance court is suggested that in the re-procedure ex officio reviews whether the procedural presumptions of the above-mentioned provisions have been met regarding the execution permit, based on the execution document, which in the present case based on the decision of the Independent Oversight Board of Kosovo, no. 738 of 24.04.2016 so that exactly the provisions of the law of execution procedure and especially article 27 par., of the LEP, regarding the adequacy of the execution document".*

The second retrial procedure regarding the lawsuit of the Applicant on the implementation of the IOBCSK Decision no. 738 of 18 April 2006

47. On 2 July 2018, the Basic Court in Gjakova - Branch in Malisheva, in retrial by Decision [Cp. No. 118/2018] partially approved the proposal recognizing the Applicant only the right to compensation of financial income and that only for the period until he had the contract.

48. More specifically, the reasoning of the Basic Court in Gjakova - Branch Malisheva stated as follows:

> *"The court partially approved the creditor's proposal regarding the compensation of salaries for the period from the date when the creditor's employment relationship was terminated, namely from 26.10.2005 until 31.03.2006 when the creditor's employment contract expired. The employment contract of the creditor with the debtor was for a fix period of time, therefore the salary belongs to the creditor only for the period the employment contract was valid, due to the fact that it was not certain that the employment contract of employee, now the creditor would be extended after its expiration, as it was fixed term contract. The court rejected the creditor's proposal regarding the reinstatement to work and work duties of the forestry officer in the Directorate of Forestry on the grounds that the creditor's employment contract was on fix- time period".*

49. Against the above-mentioned decision, the Applicant filed an appeal with the Court of Appeals on the grounds of violation of the provisions of the enforcement procedure and erroneous and incomplete determination of factual situation. In his appeal, more specifically, the Applicant had requested/emphasized:

> *"To oblige the debtor, the Municipality of Malisheva with office in Malisheva and the Directorate of Agriculture, Forestry and Rural Development, to reinstate the creditor Ismajl Zogaj to the position of Forestry Officer and to pay him the amount of € 28,636.02 in the name of lost salaries until 27.02.2015 (when the financial expertise was done) with the supplementation of the additional payment until 31.03.2017, the amount of 8,601.55 € for salaries and 301.05 € interest, so that this calculation continues until the day of final payment."*

50. On 24 May 2019, the Court of Appeals by Decision [Ac. No. 3983/2018] rejected the Applicant's appeal and upheld the Decision [Cp. No. 118/2018] of the Basic Court of 2 July 2018.

51. On 1 August 2019, the Applicant proposed to the State Prosecutor to file a request for protection of legality against the Decision [Cp. No. 118/2018] of the Basic Court of 2 July 2018 and against the Decision [AC. No. 3983/18] of the Court of Appeals of 24 May 2019. In his request for protection of legality, the Applicant requested the

annulment of the aforementioned Decision of the Court of Appeals, and remand the case for retrial.

52. On 13 August 2018, the Office of the Chief State Prosecutor by Notification [KMLC. No. 129/2019] rejected the Applicant's proposal on the grounds that the allegations mentioned in the proposal are not sufficient to file a request for protection of legality under Article 247, paragraphs a) and b) of the Law on Contested Procedure.

Applicant's allegations

53. The Applicant alleges that the non-enforcement of the IOBCSK Decision, [no. 738] of 18 April 2006, by the debtor Municipality of Malisheva, violates his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [Right to a fair trial] of the ECHR.

54. The Applicant alleges that *"by the challenged court decisions he was denied the right to reinstatement to his working place and the exercise of all his rights recognized according to the decision of the IOBK, no. 738, of 24 April 2006, recognizing only the right to compensation of salaries, as long as the employment contract was valid for a fix period of time, and not the reinstatement to work"*.

55. The Applicant states as follows: "*In this case, we consider that the law has been violated in the creditor's right anyway, given that the obligation to fully implement the IOBCSK Decision, has not occurred so that his right confirmed by that decision to return to work with all the rights has not been implemented yet and also despite all the remarks to conduct the enforcement procedure, the whole case was conducted in entirety as contested procedure, being denied the right to implementation of the decision of the IOBCSK*".

56. The Applicant specifically states "*Reinstatement to work was requested by the lawsuit and not a proposal, since the decision of the IOBCSK, until 2012 was not treated as an executive title*". The Applicant further states*: "From the ambiguity of the legal force of the Decision of the Independent Oversight Board until the issuance of the Judgment of the Constitutional Court of Kosovo, no. Ref. Agj/282/12 of 17.07.2012, the Applicant has requested his right for reinstatement to work by a lawsuit"*.

57. Finally, the Applicant requests the Court: (i) to declare the Referral admissible; (ii) to find that there has been a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR and Article 13 of Protocol no. 11 of the ECHR; (iii) to declare the Notification [KMLC. No. 129/2019] of the Office of the Chief State Prosecutor of 13 August 2018 invalid.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
(Right to a fair trial)

"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"
[...]

UNMIK REGULATION ON THE KOSOVO CIVIL SERVICE, no. 2001/36, 22 December 2001

Section 11
Appeals

11.3 Where the Board is satisfied that the challenged decision breached the principles set out in section 2.1 of the present regulation, it shall order an appropriate remedy by written decision and order directed to the Permanent Secretary or chief

executive officer of the employing authority concerned, who shall be responsible for effecting the employing authority's compliance with the order.

11.4 Where the employing authority concerned does not comply with the Board's decision and order, the Board shall report the matter to the Prime Minister and the Special Representative of the Secretary-General.

LAW NO.03/L-192 ON INDEPENDENT OVERSIGHT BOARD FOR CIVIL SERVICE OF KOSOVO

Article 12
Appeals

4. Where the Board is satisfied that through challenged decision there are breached the principles or rules set out in Civil Service of the Republic of Kosovo, it shall issue a written decision directed to the senior managing officer or the chief executive officer of the respective employing authority, who shall be responsible for implementation of Board's decision.

Article 13
Decision of the Board

Decision of the Board shall represent a final administrative decision and shall be executed by the senior managing officer or the person responsible at the institution issuing the original decision against the party. Execution shall be effected within fifteen (15) days from the day of receipt of the decision.

Article 15
Procedure in case of non-implementation of the Board's decision

1. Non-implementation of the Board's decision by the person responsible at the institution shall represent a serious breach of work related duties as provided in Law on Civil Service in the Republic of Kosovo.

Admissibility of the Referral

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

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

> *"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."*

60. The Court notes that the Applicant claims to be a victim of a constitutional violation, due to non-execution of the decision of a public authority, namely the IOBCSK. Therefore, he is an authorized party.

61. The Court also notes that the Applicant has exhausted all legal remedies provided by law and in the absence of any other effective remedy available to protect his rights, he addressed the Constitutional Court.

62. The Court also refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

> *Article 48*
> *[Accuracy of the Referral]*
>
> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".*

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision…".

63. The Court notes that the final decision in this proceeding is Decision, [Ac. No. 3983/2018], of the Court of Appeals of 24 May 2019, which was served on the Applicant on 28 June 2019 and the Referral was submitted to the Court on 30 September 2019. It results that the Referral was submitted in accordance with the legal deadline provided by Article 49 of the Law.

64. The Court also considers that the Applicant has accurately indicated what rights, guaranteed by the Constitution and the ECHR, he claims to have been violated to his detriment, due to non-enforcement of the IOBCSK Decision No. 739, of 18 April 2006.

65. Therefore, the Court concludes that the Applicant is an authorized party; that he has exhausted all legal remedies; that he respected the requirement of submitting the referral within the legal deadline; has accurately clarified the alleged violations of fundamental human rights and freedoms, and has indicated what is the challenged specific act of the public authority.

66. Moreover, in light of the allegations of the Referral and their argumentation, the Court considers that the Referral raises serious constitutional issues and their addressing depends on the consideration of the merits of the referral. Also, the referral cannot be considered as manifestly ill-founded, within the meaning of Rule 39 of the Rules of Procedure, and no other basis has been established to declare it inadmissible.

67. Therefore, the Court declares the Referral admissible for review of its merits.

Merits of the Referral

68. The Court first recalls that the circumstances of the present case relate to the termination of the Applicant's employment relationship by the Municipality of Malisheva and the non-enforcement of the

IOBCSK Decision [no. 738], of 18 April 2006 which obliged the Municipality of Malisheva to reinstate the Applicant to his working place. By his lawsuit, the Applicant alleged before the Municipal Court in Malisheva non-execution of the IOBCSK Decision by the Municipality of Malisheva on his reinstatement to his working place. The Municipal Court in Malisheva by Judgment [C. No. 166/2007] approved in its entirety as grounded the statement of claim which had to do with the payment of lost personal income for the period of time until the employment contract was valid, while it rejected the part of the statement of claim that had to do with the reinstatement to his working place after the expiration of the validity of the employment contract for the Applicant. The Court of Appeals, following the Applicant's appeal, by Judgment [Ac. No. 2942/2012] rejected the Applicant's appeal as ungrounded and upheld Judgment [C. No. 166/2007] of the Municipal Court in Malisheva. According to the Court of Appeals, the Applicant's employment contract had already expired and it would not be legal and logical to order the Applicant to reinstate to work as the contract entered was in force only until 31 March 2006. The Supreme Court by Decision [Rev. No. 6/2014] approved the Applicant's appeal on the grounds that the IOBCSK Decision is a final administrative decision, and as such should be enforced by the competent court. After remanding the case to the first instance for retrial, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 490/2014] obliged the Municipality of Malisheva to compensate the Applicant in the name of the monthly salary in the amount of 934.78 euro, but rejected the Applicant's proposal for reinstatement to work and compensation of personal income after the expiration of the contract. The Court of Appeals, by Decision [Ac. No. 3536/15] assessed that the Decision [Cp. No. 490/2014] of the Basic Court in Gjakova - Branch in Malisheva was rendered with essential violation of the provisions of the contested procedure. The Applicant made the accurate specification of the proposal for the enforcement of the IOBCSK Decision to the Basic Court. On 26 May 2017, the Basic Court in Gjakova - Branch in Malisheva by Decision [Cp. No. 157/2016]: (i) approved the Applicant's proposal; (ii) obliged the Municipality of Malisheva that based on the decision of the IOBCSK, to reinstate the Applicant to his working place; (iii) obliged the Municipality of Malisheva to pay the procedural costs to the Applicant. Following the appeal of the Municipality of Malisheva, the Court of Appeals by the Decision [Ac. No. 4085/17] annulled the Decision [Cp. No. 157/2016] of the Basic Court in Gjakova - Branch in Malisheva and remanded the case to the first instance for retrial. The Basic Court in Gjakova - Branch in Malisheva, in re-procedure by Decision [Cp. No. 118/2018] recognized to the Applicant only the right to compensation of

financial income and only for the period until he had the contract. Following the appeal of the Applicant, the Court of Appeals by Decision [Ac. No. 3983/2018] upheld the Decision [Cp. No. 118/2018] of the Basic Court of 2 July 2018. Whereas, the Decision of the IOBCSK [No. 738] of 18 April 2006, which determined the reinstatement of the Applicant to his working place, in its entirety was never enforced by the Municipality of Malisheva.

69. Therefore, the Applicant's main allegation in the present case is a violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, as a result of non-enforcement of the IOBCSK Decision [No. 738], of 18 April 2006, by the debtor Municipality of Malisheva.

70. Therefore, in examining the merits of the Referral, the Court notes that the Applicant's Referral raises two basic issues: (i) whether the IOBCSK decision in the present case is binding and executable; and, (ii) if the non-enforcement of the decision of the IOBCSK caused a violation of the Applicant's right to fair and impartial trial (Article 31 of the Constitution).

(i) whether the IOBCSK Decision in the present case has been binding and enforceable

71. Regarding the legal nature of the IOBCSK decisions, the Court considers it important that it first refers to Article 101 [Civil Service] of the Constitution, which stipulates:

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

72. In light of these constitutional provisions, the Court emphasizes its principled position that the IOBCSK is an independent institution established by the Constitution, in accordance with Article 101.2 of the Constitution. Therefore, all obligations arising from decisions of this institution, regarding the matters that are under its jurisdiction,

produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service of the Republic of Kosovo. In this regard, the IOBCSK has the features of a court, namely a tribunal for civil servants, within the meaning of Article 6 of the ECHR (see the cases of Court KI193/18, Applicant *Agron Vula*, Judgment of 12 May 2020, paragraph 100; and KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2017, paragraph 54)

73. In this regard, the Court refers to the case law of the ECtHR, according to which *"'a 'tribunal' is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner" (*see the cases of Court KI193/18, Applicant *Agron Vula*, cited above, paragraph 101; and KI33/16, Applicant *Minire Zeka*, cited above, paragraph 55; and cases of the ECtHR, Judgment of 30 November 1987 in the case of *H v. Belgium*, Series A no. 127, p. 34, paragraph 50);. see also ECtHR case *Belilos v. Switzerland*, Application No. 10328/83), Judgment of 29 April 1988, paragraph 64).

74. In the present case, the Court notes that the IOBCSK Decision [No. 738], of 18 April 2006 was rendered at a time when the establishment of the IOBCSK and the enforcement of its decisions were governed by UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo and Administrative Direction No. 2003/2 on the implementation of UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo, which entered into force on 22 December 2001, namely on 25 January 2003. At that time, the issue of competencies, functioning, organization and implementation of the IOBCSK decisions was regulated by the acts issued by UNMIK (which had exclusive legislative, executive and judicial powers in Kosovo).

75. In this regard, the Court emphasizes its consistent position that it has maintained in all cases decided by it, which have to do with the decisions of the IOBCSK, from 2012 onwards. The Court has consistently pointed out that a decision of the IOBCSK produces legal effects for the parties and, therefore, such a decision is a final decision in administrative and enforceable proceedings. (See decision of the Court in cases KI04/12 *Esat Kelmendi*, Judgment of 24 July 2012 and No. KI74/12, *Besa Qirezi*, Judgment of 4 April 2015 and the references cited therein; and cases KI193/18, Applicant *Agron Vula*, cited above, paragraph 103; and KI33/16, Applicant *Minire Zeka*, cited above, paragraph 57).

76. The Court brings to attention the fact that among the first cases where it was found that the decisions of the IOBCSK are final and binding for enforcement is the Judgment of the Constitutional Court in case No. KI04/12, of 24 July 2012. In the judgment in question, the Court dealt with the effect of the IOBCSK decision of 18 March 2011 - which means that after the entry into force of the Law on the IOBCSK No. 03/L-192, which was later, on 10 August 2018, replaced and repealed by the Law on the IOBCSK No. 06/L-048. Both laws in question were approved by the Assembly of the Republic of Kosovo.

77. The Court has consistently reiterated that the relevant constitutional and legal provisions, in addition to the subject matter jurisdiction of the IOBCSK to resolve labor disputes for civil servants, constitute a legal obligation for the respective institutions to respect and implement the decisions of the IOBCSK (see cases of the Court KI193/18, Applicant *Agron Vula*, cited above, paragraph 101; and KI33/16, Applicant *Minire Zeka*, cited above, paragraph 58).

78. In this context, the Court also refers to its case law regarding the non-enforcement by the courts of the administrative decisions - including the decisions of the IOBCSK - which did not provide for an exclusive obligation in cash (see, *inter alia*, decisions of the Constitutional Court in cases: KI94/13, Applicant *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 16 April 2014; KI112/12, Applicant *Adem Meta*, Judgment of 2 August 2018 and KI04/12, Applicant *Esat Kelmendi* , cited above, Judgment of 24 July 2012). In these cases, the Court concluded that a decision issued by an administrative body established by law produces legal effects for the parties and, consequently, such a decision is final and enforceable administrative decision" (see also case of the Court KI193/18, Applicant *Agron Vula*, cited above, paragraph 106).

79. In this case, the Court notes that the IOBCSK Decision is of 18 April 2006. However, the Court also notes that that decision had remained the subject of the court proceedings from 2011 to 2019.

80. In addition, based on the case file available, the Court specifically emphasizes the fact that the IOBCSK decision was upheld by the Supreme Court, as a final instance, by Decision [Rev. No. 6/2014] of 7 March 2014, which found that *"The above-mentioned decision of the IOBCSK is a final administrative decision, and as such must be executed by the competent court according to the proposal for execution by the creditor in terms of the realization of the right acquired in administrative proceedings."*.

81. The Court considers that the treatment of the IOBCSK Decision of 16 April 2006 for more than 6 years in the court proceedings and, in particular, the confirmation of its binding character by the regular courts, has made that the decision in question does not have the current character but continuous.

82. Therefore, the Court concludes that the IOBCSK decision in this case was final and binding to be executed.

(ii) if the non-enforcement of the IOBCSK Decision caused a violation of the Applicant's right to fair and impartial trial

83. The Court recalls that the Applicant alleges violations of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial of the ECHR.

84. In light of the facts and allegations of the Referral, the Court first refers to Article 31 of the Constitution [Right to Fair and Impartial Trial], which stipulates:

> *"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
>
> *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."*

85. In addition, the Court refers to paragraph 1, of Article 6 [Right to a fair trial] of the ECHR, which stipulates:

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

86. The Court also refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which stipulates:

> *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."*

87. The Court first notes that the IOBCSK Decision [no. 738] has established that the Municipality of Malisheva must reinstate the Applicant to his working place, with all the rights and obligations from the employment relationship from date of dismissal.

88. The Court notes that the enforcement of the IOBCSK Decision was directly related to the Applicant's reinstatment to the working place and not only to the issue of financial compensation on behalf of unpaid salaries during the period of dismissal.

89. Further, relying on the case file in its possession, the Court notes that despite the Applicant's relentless efforts to enforce the IOBCSK Decision, that decision has never been implemented or quashed. Thus, more than 12 (twelve) years have passed since the issuance of the IOBCSK Decision (18 April 2006) until the final decision of the Court of Appeals [Ac. Nr. 3983/2018], of 24 May 2019.

90. In light of these facts, the Court highlights the main allegation of the Applicant regarding the violation of his right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. In this regard, the Court refers to its judgment in case no. KI94/13, where it stated that "*the execution of a final and executable decision should be taken as an integral part of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of ECHR* (See the Constitutional Court, case No. KI94/13, Applicant*, Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj,* Judgment of 16 April 2014; and case KI193/18, Applicant A*gron Vula*, cited above, paragraph 106).

91. The Court notes that such a position is based on the case law of the ECtHR, which states that the enforcement of a final decision must be seen as an integral part of the right to a fair trial. Moreover, in the case *Hornsby v. Greece*, the ECtHR highlighted that the enforcement of a final decision is of greater importance within the administrative procedure regarding a dispute, which result is of special importance for the civil rights of the party to the dispute (*Hornsby v. Greece*, No. 18357/91, Judgment of 19 March 1997, paragraphs 40-41). In the case above, the ECtHR found that the Applicants should not have been deprived of the benefit of the enforcement of the final decision, which was taken in their favor.

92. Therefore, the Court emphasizes that the implementation of a final and binding decision, within a reasonable time, is a guaranteed right under Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

93. In this regard, the Court notes that the ECtHR in its consolidated case law found that by avoiding for more than 5 (five) years to take the necessary measures to implement a final and binding decision, the state authorities had stripped the provisions of Article 6 of all their beneficial effect (See *Hornsby v. Greece,* paragraph 45).

94. In the present case, the Court considers that the Applicant's dispute with the Municipality of Malisheva was not particularly complicated, as the IOBCSK had ordered the Applicant's reinstatement to his working place in accordance with applicable law. The decision of the IOBCSK has remained unimplemented by the Municipality of Malisheva to this date.

95. The Court takes into account some of the reasoning of the regular courts that, given that the Applicant's contract was fix-time until 31 March 2006, consequently according to them, the duration of the employment contract had already expired, only financial compensation was approved from the date of dismissal but not his reinstatement to working place as defined by the IOBCSK Decision of 18 April 2006.

96. However, the Court notes in the finding given in the Decision of the IOBCSK, that the Applicant's suspension from his job by the Municipality of Malisheva was made in violation of the relevant legal provisions in force. Therefore, the effect of the unlawful decision of the Municipality of Malisheva (of 2005), on the dismissal of the Applicant from his job, should be remedied by implementing the IOBCSK Decision. Furthermore, when the enforceability of the IOBCSK Decision was upheld by two decisions of the regular courts, namely by the Decision [Cp. No. 157/2016] of 26 May 2017, of the Basic Court in Gjakova – Branch in Malisheva and by the Decision [Rev. No. 6/2014], of 7 March 2017 of the Supreme Court.

97. In connection with this, the Court emphasizes that it would be meaningless if the legal system of the Republic of Kosovo would allow that a final court decision in the administrative procedure and enforceable to remain ineffective in disfavor of one party. Therefore, non-effectiveness of the procedures and the non-implementation of

the decisions produce effects that bring to situations that are inconsistent with the principle of rule of law (Article 7 of the Constitution) – a principle that the Kosovo authorities are obliged to respect (see, *mutatis mutandis*, Judgment of the Constitutional Court in case KI04/12; and KI193/18, Applicant *Agron Vula,* cited above, paragraph 126; and KI33/16, Applicant *Minire Zeka*, cited above, paragraph 66).

98. In the present case, the Court notes that based on the allegations of the Applicant, requesting the enforcement of the IOBCSK Decision, the Applicant addressed the Municipality of Malisheva and several times the regular courts. Furthermore, the Court reiterates that the regular courts (first and second instance) have rendered two decisions in favor of the Applicant - which allowed the enforcement of the IOBCSK Decision - and several contradictory decisions.

99. Thus, the Applicant has exhausted all legal remedies available for the enforcement of the IOBCSK Decision. However, despite his efforts, that Decision has not been enforced, neither by the competent bodies of the Municipality of Malisheva nor by the competent courts.

100. Based on the above, the Court finds that failure to enforce a final and binding decision of the IOBCSK constitutes a violation of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

Conclusion

101. The Constitutional Court emphasizes its constitutional obligation to ensure that the proceedings before the public authorities, especially before the courts, respect the fundamental human rights guaranteed by the Constitution.

102. In the circumstances of the present case, the Court finds that the non-enforcement of the IOBCSK Decision, No. 738, of 18 April 2006, by the Municipality of Malisheva and the regular courts for such a long period of time since the issuance of the IOBCSK Decision, to reinstate the Applicant to his previous position constitutes a violation of Articles 31 of the Constitution in conjunction with Article 6.1 of the ECHR. As a result of this violation, the Applicant was deprived of his right to return to his working place in accordance with the order of the IOBCSK Decision issued in his favor.

103. The Court finds that the fact that the IOBCSK Decision issued in favor of the Applicant has not been executed by the regular courts and the Municipality of Malisheva since 2006 onwards, has resulted in a violation of fundamental human rights and freedoms and non-compliance with constitutional procedures.

104. In this regard, the Court emphasizes that, based on the consolidated case law of the ECtHR, whenever a violation of the right to a fair trial from Article 6 of the ECHR is found, the Applicant should as far as possible be put in the position he would have enjoyed the rights had the proceedings complied with the ECHR requirements (see case of the ECtHR, *Kingsley v. United Kingdom*, Judgment of 28 May 2002, paragraph 40 and the references cited therein).

105. In sum, in accordance with Rule 66 (5) of the Rules of Procedure, IOBCSK Decision No. 738 of 18 April 2006 is to be implemented by the Municipality of Malisheva.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 59 (1) and 66 of the Rules of Procedure, on 1 July 2021,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that the non-enforcement of the IOBCSK Decision, No. 738, of 18 April 2006, has caused violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR;

III. TO DECLARE, with majority of votes, Decision [Ac. No. 3983/2018] of the Court of Appeals of the Republic of Kosovo, of 24 May 2019, in conjunction with Decision [C. No. 118/2018] of the Basic Court in Gjakova - Branch in Malisheva of 2 July 2018 invalid.

IV. TO ORDER the Municipality of Malisheva to implement the IOBCSK Decision, No. 738, of 18 April 2006, rendered in favor of the Applicant, in accordance with *ratio decidendi* of this Judgment;

V. TO ORDER the Municipality of Malisheva to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 20 December 2021, about the measures taken to implement the Judgment of the Court;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO ORDER that this Judgment be notified to the parties, and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VIII. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Gresa Caka-Nimani

KI167/20 and KI170/20, Applicants: *Tasim Zhuniqi and Nasip Zhuniqi*, Constitutional review of Judgment Pml. No. 344/2019 of the Supreme Court of the Republic of Kosovo, of 2 June 2020

KI167/20 and KI170/20, Resolution on Inadmissibility, of 21 July 2021, published on 17 August 2021

Keywords: *individual referral, requalification of criminal offence, inadmissible referral, manifestly ill-founded referral, non-exhaustion of legal remedies*

It follows from the case file that against the Applicants, on 27 March 2017, the Basic Prosecution in Gjakova filed the Indictment [PP/I. No. n38/2016] against the Applicants under the grounded suspicion that: (i) on 26 March 2016 in co-perpetration they committed the criminal offense of "murder" under Article 178 in conjunction with Article 31 of Criminal Code of the Republic of Kosovo No. 04/L-082 (hereinafter: CCRK), depriving the deceased N. K. of his life (ii) they committed the criminal offense of "unauthorized ownership, control or possession of weapons" under Article 374, paragraph 1 of the CCRK; and further; that (iii) the Applicant in case KI170/20 also committed the criminal offense of "causing general danger" under Article 365, paragraph 3 in conjunction with paragraph 1 of the CCRK. On 3 May 2017, the Basic Prosecution Office filed a modified Indictment with the Basic Court based on the mandatory Instruction of the Office of the Chief State Prosecutor [NA. No. 140/2017] of 19 April 2017 (hereinafter: the Mandatory Instruction, of 19 April 2017), by which the re-qualification of the criminal offense of "murder" in co-perpetration in the criminal offense of "aggravated murder" in co-perpetration under Article 179, paragraph 1, subparagraphs 1.4 and 1.5 in conjunction with Article 31 of the CCRK was requested. The issue of re-qualification of the criminal offense was raised both in the procedure for dismissal of the indictment and in the procedure of the court hearing. In the court hearing procedure, the Basic Court and the Court of Appeals found that this allegation was reviewed in the second hearing procedure, namely the procedure of dismissal of the Indictment by Decision PKR. No.36/2017, of 5 June 2017 of the Basic Court and Decision PN. No. 520/2017, of 6 July 2017 of the Court of Appeals. However, the Supreme Court by its challenged Judgment addressed and elaborated the same allegation raised in the requests for protection of legality and consequently, had also provided a finding regarding the grounds of this allegation for requalification of the criminal offence, stating that "*the change of the indictment by re-qualification of the criminal offense from murder in co-perpetration to aggravated murder in co-perpetration was not made unlawfully and that no legal provision prohibits the Prosecutor from changing the charge before the initial hearing*."

The Applicants before the Court; (i) challenge the issue of re-qualification of the criminal offence; whereas the Applicant in case KI167/20 also alleged: (ii) lack of impartiality on the part of the regular courts; (iii) and that the regular courts did not take into account the remarks given by Judgment PAKR. No. 256/2018, of 29 June 2018 of the Court of Appeals. The Applicants raise the abovementioned allegations in terms of violation of Article 31 [Right to Fair and Impartial Trial], Article 102 and Article 109 of the Constitution.

Initially, regarding the alleged violation of Articles 102 and 109 of the Constitution, the Court recalls its general principle that Articles of the Constitution which do not directly regulate fundamental rights and freedoms do not have an independent effect. Their effect applies solely to the "enjoyment of rights and freedoms" guaranteed by the provisions of Chapters II [Fundamental Rights and Freedoms] and III [Rights of Communities and Their Members] of the Constitution. In this regard, the Court noted that, in essence, the Applicants' allegations regarding Articles 102 [General Principles of the Judicial System] and Article 109 [State Prosecutor] of the Constitution are related to the alleged violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.

First, regarding the allegation of re-qualification of the criminal offense, the Court considered that the Applicants' referrals are inadmissible. In this respect, the Applicants were able to conduct two criminal proceedings, namely the procedure of dismissal of indictment and the court hearing procedure based on adversarial principle; that they were able to adduce the arguments and evidence they considered relevant to their case at the various stages of those proceedings; they were given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, which were relevant for the resolution of their case were duly heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair. Therefore, the Court found that this allegation is manifestly ill-founded on constitutional basis as established in Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

Secondly, with regard to the Applicant's allegation in case KI167/20 of lack of impartiality of the regular courts, the Court found that this allegation was not raised by the Applicant before the regular courts, and consequently, declared it inadmissible on the grounds of substantial non-exhaustion of all legal remedies, as required by paragraphs 1 and 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

Finally, with regard to the Applicant's allegation in case KI167/20 for disregarding the remarks given by Judgment PAKR. No. 256/2018, of 29 June 2018 of the Court of Appeals by the regular courts during the court hearing, the Court found that this allegation is manifestly ill-founded on constitutional basis, as established in Article 47 of the Law and paragraph (2) of Rule 39 of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI167/20 and KI170/20

Applicant

Tasim Zhuniqi and Nasip Zhuniqi

Constitutional review of
Judgment Pml. No. 344/2019 of the Supreme Court of the Republic of Kosovo, of 2 June 2020

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. Referral KI167/20 was submitted by Tasim Zhuniqi, who is represented by Myrvete Çollaku, a lawyer in Prizren (hereinafter: the Applicant in case KI167/20).

2. Referral KI170/20 was submitted by Nasip Zhuniqi, who is represented by Kosovare Kelmendi, a lawyer in Prishtina (hereinafter: the Applicant in case KI170/20).

Challenged decision

3. The Applicants challenge Judgment Pml. No. 344/2019, of 2 June 2020, of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment PAKR. No. 393/2019, of 20 September 2019, of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment PKR. No. 41/18, of 18 June 2019 of the Basic Court in Gjakova, Serious Crimes Department (hereinafter: the Basic Court).

4. The Applicants were served with the challenged Judgment on 22 July 2020.

Subject matter

5. The subject matter is the constitutional review of the challenged Judgment, whereby the Applicants allege that their fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial]; 32 [Right to Legal Remedies]; 54 [Judicial Protection of Rights]; Article 102 [General Principles of the Judicial System] and Article 109 [State Prosecutor] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have been violated.

Legal basis

6. The Referrals are based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), Rule 32 [Filing of Referrals and Replies] and Rule 40 [Joinder and Severance of Referrals] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 29 October 2020, the Applicant in case KI167/20 submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 2 November 2020, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha.

9. On 5 November 2010, the Applicant in case KI170/20 submitted the Referral to the Court.

10. On 17 November 2020, the President of the Court ordered the joinder of Referral KI170/20 with Referral KI167/20.

11. On 18 November 2020, the Court notified the Applicants about the registration and joinder of Referral KI167/29 with Referral KI170/20, and requested the Applicants' legal representatives (i) to submit their

powers of attorney for representation in the Constitutional Court, and (ii) all their appeals, filed with the regular courts.

12. On 30 November 2020, the Applicant's legal representative in case KI167/20 submitted additional documents to the Court.

13. On 1 December 2020, the Applicant's legal representative in case KI170/20 submitted additional documents.

14. On 11 December 2020, the Applicant's legal representative in case KI167/20 again submitted additional documents to the Court.

15. On 24 December 2020, the Court again requested the Applicants' legal representatives to submit valid powers of attorney to the Court.

16. On 8 January 2021, the Applicants' legal representatives submitted separately the powers of attorney for representation of the Applicants, requested by the Court.

17. On 19 February 2021, the Court notified the Supreme Court about the registration and joinder of Referral KI167/20 with Referral KI170/20. On the same date, the Court sent to the Basic Court the request for submission of the acknowledgment of receipt, which proves the date when the Applicants were served with the challenged Judgment of the Supreme Court.

18. On 26 February 2021, the Basic Court submitted to the Court the acknowledgments of receipts, which prove that the Applicants, namely their legal representatives, were served with the challenged Judgment of the Supreme Court on 22 July 2020.

19. On 29 March 2021, the Court sent to the Basic Court the request for submission of the complete case file.

20. On 8 April 2021, the Court received the full case file submitted by the Basic Court.

21. On 12 May 2021, the Court returned the complete case file to the Basic Court.

22. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of

Procedure and Decision KK-SP 71-2/21, of 17 May 2021 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

23. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

24. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision No. KK160/21 determined that Judge Gresa Caka-Nimani be appointed as Presiding in the Review Panels in cases where she was appointed as member of Panels, including the present case.
25. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of 17 May 2021 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

26. On 28 June 2021, the President of the Court, Gresa Caka-Nimani, rendered Decision KSH.KI167/20 replacing the previous President Arta Rama-Hajrizi as member of the Review Panel with Judge Selvete Gërxhaliu-Krasniqi

27. On 21 July 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

28. On 27 March 2017, the Basic Prosecution in Gjakova, Department for Serious Crimes (hereinafter: the Basic Prosecution) filed the Indictment [PP/I. No. n38/2016] against the Applicants under the grounded suspicion that:

    (i) Both Applicants on 26 March 2016 in co-perpetration committed the criminal offense of "murder" under Article 178 in conjunction with Article 31 of Code No. 04/L-082 of Criminal Code of the Republic of Kosovo (hereinafter: CCRK), depriving the deceased N. K. of his life;
    (ii) The Applicant in case KI167/20 also committed the criminal offense of "unauthorized ownership, control or possession of weapons" under Article 374, paragraph 1 of the CCRK;

(iii) The Applicant in case KI170/20 also committed the criminal offenses of "causing general danger" under Article 365, paragraph 3 in conjunction with paragraph 1 of the CCRK and "unauthorized ownership, control or possession of weapons" under Article 374, paragraph 1 of the CCRK.

29. On 3 May 2017, the Basic Prosecution Office filed a modified Indictment with the Basic Court based on the mandatory Instruction of the Office of the Chief State Prosecutor [NA. No. 140/2017] of 19 April 2017 (hereinafter: the Mandatory Instruction, of 19 April 2017), by which the re-qualification of the criminal offense of "murder" in co-perpetration in the criminal offense of "aggravated murder" in co-perpetration under Article 179, paragraph 1, subparagraphs 1.4 and 1.5 in conjunction with Article 31 of the CCRK was requested.

30. On 4 May 2017, the Basic Court held its first initial hearing. According to the minutes of the initial hearing, the Presiding of the trial panel handed over the indictment to the parties to the proceedings, which was "improved by the re-qualification of the criminal offense". Following the question of the Presiding Judge, whether the Applicants were served with the copies of the Indictment of 27March 2017 and the amended Indictment with the re-qualification of the criminal offense, the Applicants and their legal representatives stated that they received copies of the abovementioned indictments.

31. According to the above-mentioned minutes, the Applicant in case KI167/20 pleaded guilty to committing the criminal offenses of "aggravated murder" and "unauthorized ownership, control or possession of weapons". The Applicant in case KI170/20 pleaded not guilty to committing the criminal offense of "aggravated murder" in co-perpetration while pleading guilty to the criminal offense "unauthorized ownership, control or possession of weapons".

32. It was further noted in these minutes that the Applicants, in their capacity as defendants, were clarified: (i) the nature and consequence of the guilty plea; (ii) that under the provisions of the CCRK a guilty plea will be taken as a mitigating circumstance in determining the degree of punishment; (iii) that with the admission of guilt there will be no evidentiary procedure in which the accused, namely the Applicants, will have the opportunity to challenge the evidence of the indictment and to obtain evidence in their defense; and that (iv) the judgment rendered on the basis of a guilty plea cannot be appealed due to erroneous and incomplete determination of factual situation.

33. During the review of the initial hearing, the Prosecutor of the Basic Prosecution requested the Presiding Judge not to approve the "admission of guilt" of the Applicant in case KI167/20 on the grounds that he was charged with the criminal offense of aggravated murder in co-perpetration and added that due to the complexity of the case it is necessary to administer as evidence the statement of this Applicant in the capacity of the accused.

34. Following the conclusion of the initial hearing, the Presiding Judge by the Decision decided: (i) to approve the guilty plea of both Applicants in relation to the criminal offense of "unauthorized ownership, control or possession of weapons"; and (ii) rejected to plead guilty to the Applicant in case KI167/20 for committing the criminal offense of "aggravated murder" under Article 179, paragraph 1, subparagraphs 1.4 and 1.5 of the CCRK in conjunction with Article 31 of the CCRK.

Procedure for dismissal of Indictment PP/I. No. 38/2016 of 3 May 2017

35. On 25 May 2017 and 27 May 2017, respectively, the Applicants separately filed requests with the Basic Court for (i) objection of the evidence and (ii) dismissal of Indictment PP/I. No. 38/2016, of 3 May 2017 by which the criminal offense was re-qualified. In their requests, the Applicants specifically objected to the re-qualification of the criminal offense which was requested by the Mandatory Instruction, of 19 April 2017 of the Office of the Chief State Prosecutor.

36. On an unspecified date, the Prosecutor of the Basic Prosecution Office submitted a response to the Applicants' requests.

37. On 5 June 2017, the Basic Court after holding the second hearing session, by Decision PKR. No. 36/2017 rejected as ungrounded the Applicants' requests for (i) dismissal of the indictment; (ii) termination of criminal proceedings and (iii) failure to hear the protected witness.

38. The Basic Court held that *"the enacting clause of the indictment and the description of the actions are such that the accused in the indictment PP/I. No. 38/2016, of 03.05.2017, responds in full to the existence of elements of the criminal offense of aggravated murder under Article 179, para. 1 items 1.4 and 1.5 as co-perpetrators in conjunction with Article 31 of the CCRK, and the criminal offense of unauthorized ownership, control or possession of weapons, under Article 374, para. 1 of the CCRK, for which the indictment is based in accordance with legal provisions, and this is seen from the evidence provided by the Prosecution during the investigation procedure,*

especially from the statement of the injured parties [B.K and B.G], witnesses [G.Zh, E.Zh, Xh.Zh, R.K. A.K, F.E], forensic expertise [F.D.] ballistics expertise [L.R.] scene inspection report, vehicle examination report, list of confiscated weapons from the minutes of the search of the apartment and persons [...] as well as from the material evidence, the grounded suspicion that [the Applicants] have committed the criminal offenses which they are charged with, was grounded in entirety".

39. On 27 June 2017, against the above-mentioned decision of the Basic Court, the Applicants filed an appeal with the Court of Appeals on the grounds of essential violations of the provisions of criminal procedure and of the criminal law.

40. In their appeal, the Applicants alleged that the Indictment of 3 May 2017 with the re-qualification of the criminal offense based on the Mandatory Instruction of 19 April 2017 was issued in violation of the provisions of Law No. 05/L-034 on Supplementing and Amending Law no. 03/L-225 on the State Prosecutor (Law on Supplementing and Amending the Law on the State Prosecutor).

41. On 6 July 2017, the Court of Appeals by Decision PN. No. 520/2017, rejected as ungrounded the Applicants' appeals and upheld Decision PKR. No. 36/2017, of 5 June 2017 of the Basic Court.

42. The Court of Appeals in addressing the Applicants' allegations presented in their appeals found that *"[...]The first instance court by the challenged decision for dismissal of the indictment has taken care according to the statements in the request to assess and has rightly given sufficient reasons that the indictment filed and re-qualified by the Basic Prosecution in Prishtina, has sufficient evidence to support the reasonable suspicion that the accused have committed the criminal offenses which they are charged with and where all this evidence is also mentioned in the indictment filed and also in the appealed decision, and no legal basis is presented in the appeal for which an indictment may be filed, as required by the provisions of Article 250, par. 1, subpar. 1.1, 1.2, 1.3 and 1.4 of the CPCK, also from the actions described in the indictment, for the time of being exist the essential elements of the criminal offenses for which [the Applicants] have been charged with, and that from the evidence which the prosecutor proposed for reading during the court hearing on which evidence he based the grounded suspicion, when filing the indictment and its completion will be assessed in the court hearing. Also in the appeal [the Applicants] in their appeals did not state any circumstance on what evidence they support their allegations, but only objected the*

indictment in general without specifying any concrete circumstances or evidence that would support their allegation for dismissal of the indictment. The criminal procedure is now in the stage after the filing of the indictment and the statement about it, while the criminal-legal liability of [the Applicants] will be assessed during the main hearing with the issuance and announcement of evidence, and within this also the assessment of evidence by the court and that in these stages of the criminal proceedings, the guilt cannot be presumed either by the Court or by the parties".

Judicial review procedure

43. On 16 March 2018, the Basic Court, by Judgment PKR. No. 36/2017:

I. Found that the Applicants on 26 March 2016, intentionally and in co-perpetration deprived N.K. of his life, and consequently found them guilty of committing the criminal offense of "murder" in co-perpetration under Article 178 in conjunction with Article 31 of the CCRK ;

II. The Applicant in case KI170/20 was found guilty of committing the criminal offense of "unauthorized ownership, control or possession of weapons" under Article 374, paragraph 1 of the CCRK;

III. The Applicant in case KI167/20 for the criminal offense of "murder" in co-perpetration under Article 178 of the CCRK in conjunction with Article 31 of the CCRK sentenced him to imprisonment for a term of 15 (fifteen) years, while for the criminal offense "unauthorized ownership, control or possession of weapons" sentenced him to imprisonment for a term of 1 (one) year and 6 (six) months imprisonment. The Applicant in case KI170/20 for the criminal offense of "murder" in co-perpetration was sentenced to imprisonment for a term of 14 (fourteen) years, while for the criminal offense of "unauthorized ownership, control or possession of weapons" he was sentenced to imprisonment for a period of 1 (one) year and 6 (six) months. Consequently, the Basic Court based on Article 80 of the CCRK, sentenced the Applicant in case KI167/20 with aggregate sentence of imprisonment for a term of 16 (sixteen) years, in which sentence was counted the time spent in detention on remand from 26 March 2016, while the Applicant in case KI170/20 was sentenced to an aggregate sentence of imprisonment of 15 (fifteen) years, in which sentence would be counted the time spent in detention on remand from 26 March

2016. Finally, instructed the injured parties: B.K., the wife of the deceased N. K and B. G to realize the property-legal claim in a civil dispute.

44. The Basic Court, after administering the evidence and testimonies of witnesses, stated that it does not approve the legal qualification of the criminal offense of "aggravated murder" under Article 179, paragraph 1, sub-paragraphs 1.4 and 1.5 of the CCRK. In the context of the latter, the Basic Court found that in the actions of the Applicants there are all the objective and subjective features of the criminal offense of murder in co-perpetration under Article 178 of the CCRK in conjunction with Article 31 of the CCRK.

45. On an unspecified date, against the abovementioned Judgment of the Basic Court, in the Court of Appeals, the appeal was filed by: the Basic Prosecution, the injured party and the Applicants.

46. The Basic Prosecution in its appeal alleged (i) essential violation of the provisions of the criminal procedure; (ii) erroneous and incomplete determination of factual situation regarding the criminal offense of murder in co-perpetration under Article 178 of the CCRK in conjunction with Article 31 of the CCRK; and filed (iii) an appeal against the decision on sentence. In its appeal, the Basic Prosecution proposed that the Judgment of the Basic Court (i) regarding the criminal offense of "murder" in co-perpetration be annulled and the case be remanded for retrial, while (ii) regarding the criminal offense of "unauthorized ownership, control or possession of weapons" to change the sentence in order to impose more severe punishments on the Applicants.

47. On 29 June 2018, the Court of Appeals by Judgment PAKR. No. 256/2018:

(i) Rejected as ungrounded the appeals of the Basic Prosecution, the injured party and the Applicants, and upheld Judgment PKR. No. 36/2017, of 16 March 2018, of the Basic Court regarding the criminal offenses "unauthorized ownership, control or possession of weapons" under Article 374, paragraph 1 of the CCRK, for each Applicant separately;

(ii) Approved the appeals of the Basic Prosecution and [the Applicants], but also "*ex officio*" annulled Judgment PKR. No. 36/2017, of 16 March 2018, of the Basic Court regarding the criminal offense of "murder" in co-perpetration under Article 178 in conjunction with Article 31 of the CCRK and remanded the case for retrial and reconsideration;

(iii) Found that the appeal of the injured party against the decision on sentence for the criminal offense of murder in co-perpetration under Article 178 in conjunction with Article 31 of the CCRK, remains for the time being without subject matter ; and

(iv) Decided to extend the detention of the Applicants.

48. The Court of Appeals in its Judgment held that the above Judgment of the Basic Court was rendered in violation of the provisions of the criminal procedure and incomplete determination of factual situation.

49. The Court of Appeals stated that in the retrial, the first instance court, namely the Basic Court should act in accordance with the remarks given by this court, namely: to correct the contradictions in the enacting clause of the Basic Court; to proceed once again with all the evidence in order to "fairly and fully clarify the facts"; take into account eyewitness statements at the scene of event; to reconstruct the scene; after processing the evidence, it must assess them in accordance with Article 361 of the CXPCRK; to draw fair and lawful conclusions based on the evidence processed; and consequently to render the relevant and legal decision, by which the other allegations mentioned in the appeal are taken into account.

50. On 18 June 2019, the Basic Court, by Judgment PKR. No. 41/18, found the Applicants guilty that in co-perpetration they committed the criminal offense of "aggravated murder" under Article 179, paragraph 1, subparagraph 1.5 in conjunction with Article 31 of the CCRK, depriving the deceased N. K. of his life.

51. The Basic Court by its Judgment: (i) sentenced the Applicant in case KI167/20 with imprisonment for a term of 18 (eighteen) years, in which sentence would be counted also the time spent in detention on remand of 26 March 2016 and (ii) the Applicant in case KI170/20 was sentenced to imprisonment for a term of 16 (sixteen) years, in which sentence would be counted the time spent in detention on remand from 26 March 2016. Whereas the injured party B. K. was instructed in the civil dispute for the realization of the legal property claim.

52. The Basic Court in its Judgment stated that *"it has assessed and analyzed the allegations of the prosecution filed both in the indictment and during the court hearings, the allegations of the injured party, then the allegations of the defense filed during the court hearings, as well as all evidence administered separately, and then related to each other and found that the accused [Applicants] in co-perpetration committed the criminal offense of aggravated murder under Article*

179, par. 1, subpar. 1.5 of the CCRK in conjunction with Article 31 of the CCRK".

53. With regard to the Applicant's allegation in case KI167/20 of violation of legal provisions, as a result of the re-qualification of the criminal offense through the Indictment of 3 May 2017, the Basic Court found that: *"[...] this allegation of the defense is ungrounded and there is no legal support for the fact that for this allegation the defense has filed objections in the second hearing, as well as with an appeal against Decision PKR. No. 36/17 of 05.06.2017 taken in the second hearing, where by Decision PN. No. 520/2017 of the Court of Appeals in Prishtina, of 06.07.2017, the defense appeals filed on this basis have been rejected. Therefore, based on the fact that this allegation was decided by the court of highest instance, as well as based on the legal provisions of the Criminal Procedure Code which provides that the prosecution has the right to change the indictment, but the parties must be given the right to present their objections, based on the fact that the indictment was modified before the initial hearing, and all parties submitted their objections, on which objections it was decided, at the discretion of the court, this allegation is ungrounded and the indictment is lawful".*

54. On an unspecified date, against the aforementioned Judgment of the Basic Court, the injured party and the Applicants filed an appeal with the Court of Appeals. The Applicants in their appeals alleged: (i) essential violation of the provisions of the criminal procedure; (ii) erroneous and incomplete determination of factual situation; (iii) violation of criminal law; and (iv) filed an appeal against the decision on sentence. In their appeal, the Applicants again raised their allegation regarding the re-qualification of the criminal offense by the Indictment of 3 May 2017.

55. On 20 September 2019, the Court of Appeals by Judgment PAKR. No. 393/2019 rejected as ungrounded the appeals of the injured party and the appeals of the Applicants and upheld Judgment PKR. No. 41/18, of 18 June 2019, of the Basic Court.

56. The Court of Appeals initially found that the Judgment of the Basic Court does not contain violation of the provisions of the criminal procedure. Subsequently, the Court of Appeals, in addressing the Applicant's allegations in case KI167/20 regarding the re-qualification of the criminal offense by the Indictment of 3 May 2017, stated that: *"Regarding the allegation of essential violations in the case when the State Prosecutor has re-qualified the criminal offense from murder to aggravated murder, the Court of Appeals finds that this allegation is*

not based because the appeal in this regard was rejected by the Court of Appeals, by Decision PN.No. 520/17, of 06.07.2017, therefore the case has continued for the criminal offense of aggravated murder".

57. Whereas, with regard to the allegations of erroneous and incomplete determination of the factual situation and violation of criminal law, the Court of Appeals found that: *"Having regard to all the above-mentioned circumstances as well as the circumstances and reasons presented in a more detailed manner in the reasoning of the appealed judgment, it follows that the conclusion of the first instance court, that [the Applicants] committed the criminal offense of aggravated murder under Article 179 par. 1 subpar. 1.5 in conjunction with Article 31 of the CCRK, for which they have been found guilty and that such a conclusion is correct and that it has been undoubtedly established that the accused have committed incriminating acts for which they were found guilty. For these reasons, not only the appealing allegations that the first instance court has made an erroneous and incomplete determination of factual situation were not approved, but this court also found that the appealing allegations that the appealed judgment violated the criminal law to the detriment of the accused are ungrounded, because, the guilt of the accused has been undoubtedly proven, then the appealing allegations that the second accused [the Applicant in case KI170/20], did not commit the criminal offense, are not grounded because, they are contrary to the evidence administered in the court hearing, in which it is established that the criminal offense was committed in co-perpetration".*

58. Finally, with regard to the allegations of the decision on punishment, the Court of Appeals stated that the sentences imposed by the Basic Court would achieve the purpose of the punishment set out in Article 41 of the CCRK.

59. On an unspecified date, against Judgment PKR. No. 41/2018, of 18 June 2019 of the Basic Court and Judgment PAKR. No. 393/2019, of 20 September 2019, the Applicants separately filed requests for protection of legality with the Supreme Court on the grounds of (i) esential violations of the provisions of criminal procedure and (ii) of the provisions of criminal law.

60. The Applicant in case KI167/20, in his request for protection of legality claimed that: (i) the Basic Court and the Court of Appeals did not address the remarks given by first Judgment PAKR. No. 256/2018 of the Court of Appeals of 29 June 2018; and that (ii) by the modified Indictment, of 3 May 2017, through which the criminal offense based on the Mandatory Instruction of 19 April 2017 was re-qualified, were

informed on the day of the initial hearing in the Basic Court, namely on 4 May 2017 .

61. The Applicant in case KI170/20 in his request for protection of legality claimed that: (i) the Judgment of the Court of Appeals is contradictory and unclear; (ii) the Basic Court and the Court of Appeals did not address the remarks given by first Judgment PAKR. No. 256/2018 of the Court of Appeals of 29 June 2018; (iii) by modified Indictment, of 3 May 2017, through which the criminal offense was re-qualified and the criminal offense of "causing general danger" was removed based on the mandatory Instruction, of 19 April 2017 were informed on the day of the initial hearing in the Basic Court, namely on 4 May 2017; and (iv) violation of criminal law by challenging the credibility of the evidence and arguing that he did not commit the criminal offense which he was charged with and found guilty.

62. On 2 June 2020, the Supreme Court by Judgment Pml. No. 344/2019, rejected as ungrounded the requests for protection of legality submitted by the Applicants.

63. The Supreme Court in addressing the allegations of the Applicants regarding the allegations of essential violation of the provisions of the criminal procedure, namely regarding the allegation of the Applicants of modification of the Indictment [on 3 May 2017] before the initial hearing in the Basic Court [held on 4 May 2017], as a result of the Compulsory Instruction, of 19 April 2017 of the Office of the Chief State Prosecutor, reasoned as follows:

> *"First, the change of the indictment by re-qualification of the criminal offense from murder in co-perpetration to aggravated murder in co-perpetration was not made unlawfully as it is unfoundedly claimed in the requests. No legal provision prohibits the Prosecutor from changing the charge before the initial hearing. Whereas the fact that such a thing was done by the order of the Chief Prosecutor and not the assessment of the Prosecutor of the case falls within the duties and competencies of the State Prosecutor, [the Applicants] had the opportunity to challenge the modified accusation, and surprisingly the defense considers it unlawful, the minutes of the initial hearing show that the convict Tasim [the Applicant in case KI170/20] has pleaded guilty regarding the re-qualified criminal offense and the defense counsel has not objected to the admission of guilt".*

64. Subsequently, regarding the Applicants' allegation that the Basic Court and the Court of Appeals did not address the remarks given by first

judgment PAKR. No. 256/2018 of the Court of Appeals, of 29 June 2018, the Supreme Court reasoned that:

> *"Secondly, it is a fact that the Basic Court has a legal obligation to take all procedural actions and to examine all the contested issues highlighted in the decision of the Court of Appeals [PAKR. No. 256/2018 of 29 June 2018], but in this regard it is unfoundedly claimed in the requests that it did not act according to the remarks and suggestions of the Court of Appeals, and that court in the presence of the same violations upheld the judgment of the first instance. In the court hearing it was proceeded according to the modified accusation (Article 179 of the CCRK) the convicts were found guilty of the criminal offense of murder (Article 178 of the CCRK), but this judgment except the defense counsels of the convicts was also challenged by the prosecutor regarding the violation of the criminal law, while the Court of Appeals remanded the case for retrial on the grounds of essential violations (ambiguity of the enacting clause of the judgment in relation to the criminal offense for which the convicts were found guilty - ordinary murder) which were also related to the erroneous and incomplete determination of the factual situation, for which that court suggested the reconstruction of the scene of event in order to establish the circumstances in which the deceased [N.K.], was deprived of life, especially the determination of the facts and circumstances regarding the reaction of now [N.K.] at the moment when the accused shot at [N.K.]".*

65. In the context of this same allegation, the Supreme Court added that:

> *"In the retrial according to the remarks of the second instance, the scene was reconstructed and after processing other evidence, the first instance court concluded that in the actions of [the Applicants] there are elements of the criminal offense of aggravated murder, from Article 179 par. 1 item 1.5 in conjunction with Article 31 of the CCRK, and particularly in the reasoning of the judgment are given clear reasons regarding the reaction of the deceased at the time he was shot. The Court of Appeals in the appeal procedure deciding on the appeals has rejected it as unfounded and upheld the first instance judgment. From the fact that the first instance court in the retrial after taking actions according to the suggestions of the criminal procedure and the processing of evidence, concludes that in the actions of [the Applicants] the elements of the criminal offense of*

aggravated murder for which they have been charged are fulfilled, it cannot be concluded that the first instance court did not act according to the suggestions of the second instance, because despite the legal obligation to undertake all procedural actions and review the disputed issues, it without concluding whether the concrete fact has been proven, namely whether criminal liability and elements of the criminal offense have been proven, the allegation is grounded that while the first instance court of [the Applicant in case KI170/20] by the challenged judgment for the criminal offense of aggravated murder sentenced him to 16 years of imprisonment, while from the entry of the reasoning of the second instance judgment it turns out that he was sentenced to 18 years in prison, but this Court finds that in the present case we are dealing with a technical flaw, which does not make the judgment incomprehensible, because it is clear from the case file that [the Applicant in case KI170/20] was sentenced to 16 years of imprisonment, and this judgment was upheld by the Court of Appeals".

66. Further, regarding the Applicant's allegation in case KI170/20 that the Judgment of the Court of Appeals is contradictory and unclear, the Supreme Court stated:

"The differences in the factual description of the event between the enacting clause of the charge and the challenged judgment are a consequence of the evidence administered in the court hearing, which are not essential because they relate to the description of how the event took place after the convict Nasip [Applicant in case KI170/20] shot at the vehicle where the deceased and the injured party [B.G.] were and how he was shot at the deceased by both convicts, but they do not make the judgment unclear as the defense counsel claims unfoundedly because also from the enacting clause of the accusation, but also from the enacting clause of the judgment it is clear that both convicts shot at the deceased, the actions that have been proven, which prove their intent to deprive the victim of life, and it is not essential which the shooting caused the consequence or death of the deceased. In addition, these changes do not reflect the application of any other provision of criminal law, nor does it change the position of convicts".

67. Finally, with regard to the Applicant's allegation related the credibility of the evidence and testimonies of witnesses, the Supreme Court found that this allegation refers to the determination of factual situation for which the request for protection of legality is not allowed. However, the

Supreme Court, after assessing that this allegation is related to the allegation of violation of criminal law, found that the latter is ungrounded.

68. Based on the case file, it follows that on 22 October 2020, the Applicant in case KI167/20, through his legal representative, filed a submission with the Office of the Chief State Prosecutor, by which he raised concerns regarding the non-delivery of the mandatory Instruction, of 19 April 2017 by the Basic Prosecution and the Basic Court.

69. On 23 October 2020, the Applicant in case KI167/20, through his legal representative, also filed a request with the Basic Court, requesting that a copy of the mandatory Instruction of 19 April 2017 be submitted.

70. On 28 October 2020, the Basic Court by letter [AGJ.I. No. 230/20] answered as follows: "*The Basic Court of Gjakova informs you that the trial panels have decided in all court instances, regarding all the documents, including the submission that you are requesting for this case, which has been completed and archived in the Court".*

71. On 13 November 2020, the State Prosecutor, in his notification, responded as follows:

> *"Mandatory Instruction A. No. 140/2017 of 10 April 2017 issued by me, within the Office of the Chief State Prosecutor refers exclusively to the Chief State Prosecutor [A.U], who is in charge of criminal procedural treatment in the criminal case PP./I. No. 38/2016. Thus, the same binding instruction throughout the treatment of this criminal case by the state prosecutor in question, it is not referred to any other party in this criminal procedure and cannot be provided with it, because the latter represents an internal act within the prosecutorial system. Furthermore, in view of the transparency and non-violation of the principle of equality of the parties in criminal proceedings, You may only have access to view the content of the abovementioned instruction in my presence, so that in the future in the event of eventual exercise by your side of regular as well as extraordinary legal remedies against the judgment of the competent court regarding this criminal case, to be able to challenge that judgment according to the legal reasons provided in the Criminal Procedure Code of the Republic of Kosovo".*

Applicant's allegations

A. Applicant's allegations in case KI167/20

72. The Applicant in case KI167/20 alleges that Judgment [Pml. No. 344/2019] of 2 June 2020, of the Supreme Court, was rendered in violation of his fundamental rights and freedoms, guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], and 54 [Judicial Protection of Rights], as well as in violation of Articles 102 [General Principles of the Judicial System] and 109 [State Prosecutor] of the Constitution.

73. With regard to the allegation of violation of Article 31 of the Constitution, the Applicant states that the Basic Court, in the retrial procedure by Judgment PKR. No. 41/18, of 26 June 2018 did not take into account the remarks given by Judgment PAKR. No. 256/2018, of 29 June 2018. Subsequently, according to the Applicant, also the Court of Appeals by its second Judgment PAKR. No. 393/2019 did not take into account the remarks given on pages 9 and 10 of Judgment PAKR. No. 256/2018, of 29 June 2018 of the Court of Appeals. The Applicant continues with the allegation that the same remarks were not taken into account by the Supreme Court, by its challenged Judgment.

74. The Applicant alleges that *[...] in this criminal case, there was interference, as is evident, contamination at the scene of event, for which this criminal proceeding, did not see, did not pay attention, ignored any reaction of the parties".*

75. With regard to the allegation of violation of Article 102 of the Constitution, the Applicant states that *"In this criminal proceeding as we have explained above, in the exercise of their function, meaninglessly, the judges, at all stages, have not been independent and impartial in the exercise of their function [it has been evident as it is clarified above, the duties have been given by the second instance court, for the first instance court, this in the retrial has not performed the duties defined in the remarks of the second instance court, has decided in its own way".* Subsequently, the Applicant specifies that the Court of Appeals also "*in the exercise of its function has not been independent and impartial and its decision, such proceedings, represents a violation of paragraph 4 of Article 102 of the Constitution. Paragraph 5 with all its guarantees has also been violated*". In the context of the allegation of lack of impartiality and independence of the judiciary, the Applicant in this case also alleges a violation of Article 32 and Article 54 of the Constitution.

76. Regarding the allegation of violation of Article 109 of the Constitution, the Applicant states that after the Indictment was filed by the Basic

Prosecution [PP/I No. 38/2016] of 27 March 2017, one day before the initial hearing in the Basic Court, namely on 3 May 2017, they were informed that as a result of the mandatory Instruction, of 19 April 2017, the re-qualification of the criminal offense from the criminal offense of murder to the criminal offense of aggravated murder was requested. Subsequently, the Applicant states that the Basic Prosecution did not provide him with a copy or access to read the content of the mandatory Instruction. Therefore, based on this reasoning, the Applicant alleges that the above constitute a violation of Article 109 of the Constitution. .

77. With regard to the allegation of violation of Article 109 of the Constitution, the Applicant refers to Article 4 of the Law on Supplementing and Amending the Law on State Prosecutor, by which Article 13 was supplemented and amended, and in this regard cites the content of paragraph 7 and item 7.1 of this paragraph, which provisions refer to the issuance of a binding Instruction. In this context, the Applicant, referring to the content of this provision, specifies that according to this provision (i) it is required that such an instruction be reasoned, however the parties did not have access to its content; and (ii) that this provision should not contain guidance on the qualification of the criminal offense. Based on this reasoning, the Applicant alleges that "he State Prosecutor has not performed the defined legal duty", which, according to him, has resulted in violation of Article 109 of the Constitution.

78. Finally, the Applicant states that: *"This request has the subject to specify the provisions of the Constitution of Kosovo, for the party I represent. Because the provisions of the Constitution of Kosovo guarantee the citizens of Kosovo, the parties in criminal proceedings: -criminal proceedings based on law; fair, and impartial trial".*

B. Applicant's allegations in case KI170/20

79. The Applicant in case KI170/20 alleges that Judgment [Pml. No. 344/2019] of 2 June 2020, of the Supreme Court, was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], as well as in violation of Articles 102 [General Principles of the Judicial System] and 109 [State Prosecutor] of the Constitution.

80. The Applicant alleges a violation of Article 31 of the Constitution, as a result of the amended indictment through the binding Instruction of 19 April 2017. In this regard, the Applicant specifies that through the Indictment filed by the Basic Prosecution, he was initially charged with

the criminal offense of murder under Article 178 in conjunction with Article 31 of the CCRK, as well as the criminal offenses of "causing general danger" under Article 365, paragraph 3 in conjunction with paragraph 1 of the CCRK and "possession of a weapon without permission" under Article 374, paragraph 1 of the CCRK. According to him, after filing the indictment and consulting with the defense, the Applicant was prepared to plead guilty to committing the criminal offenses of "causing general danger" and that of "illegal possession of weapons". Subsequently, the Applicant underlines that as a result of the binding Instruction the criminal offense of "causing general danger" was removed and the criminal offense of "murder" was re-qualified to the criminal offense of "aggravated murder" under Article 179, paragraphs 1.4 and 1.5. In this regard, the Applicant underlines the fact that in order to understand the reason for the re-qualification of the criminal offense, in the initial hearing held in the Basic Court he requested a copy of the binding Instruction, which he had never received.

81. In the context of his allegation of a violation of Article 102 by claiming that *"it has never been handed over to the defense or even visually shown "Mandatory Instruction by the State Prosecutor's Office" on the grounds that this Instruction is secret and that the Office of the Chief State Prosecutor has forbidden it to be given to the defense or the accused"*.

82. Regarding the allegation of violation of Article 109 of the Constitution, the Applicant cites the content of paragraph 2 of this Article, and states that this provision has been violated as a result of the mandatory Instruction of 19 April 2017.

83. In the following, the Applicant refers to and cites the content of paragraph 7 and item 7.1 of Article 13, supplemented and amended by Article 4 of the Law on Supplementing and Amending the Law on State Prosecutor.

84. Finally, the Applicant states that: *"This request has the subject to specify the provisions of the Constitution of Kosovo, for the party I represent. Because the provisions of the Constitution of Kosovo guarantee the citizens of Kosovo, the parties in criminal proceedings: -criminal proceedings based on law; fair, and impartial trial"*.

Relevant constitutional and legal provisions

Article 31

[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.
5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.
6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice. 7. Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.

Chapter
VII Justice System

Article 102
[General Principles of the Judicial System]

Judicial power in the Republic of Kosovo is exercised by the courts.

2. The judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts.

3. Courts shall adjudicate based on the Constitution and the law.

4. Judges shall be independent and impartial in exercising their functions.

5. The right to appeal a judicial decision is guaranteed unless otherwise provided by law. The right to extraordinary legal remedies is regulated by law. The law may allow the right to refer a case directly to the Supreme Court, in which case there would be no right of appeal.

[...]

Article 109
[State Prosecutor]

1. The State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.

2. The State Prosecutor is an impartial institution and acts in accordance with the Constitution and the law.

[...]

European Convention on Human Rights

ARTICLE 6
Right to a fair trial

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

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3. *Everyone charged with a criminal offence has the following minimum rights::*

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;;

b. to have adequate time and facilities for the preparation of his defence;;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;;

e. have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Criminal Code No. 04/L-082 of the Republic of Kosovo

COLLABORATION IN CRIMINAL OFFENSES

Article 31
Co-perpetration

When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense.

Article 178
Murder

Whoever deprives another person of his or her life shall be punished by imprisonment of not less than five (5) years.

Article 179
Aggravated murder

1. A punishment of imprisonment of not less than ten (10) years or of life long imprisonment shall be imposed on any person who:

[…]

1.4. deprives another person of his or her life in a cruel or deceitful way;
1.5.deprives another person of his or her life and in doing so intentionally endangers the life of one or more other persons;

[…]

Criminal Procedure Code No. 04/L-123 of Kosovo

Article 26
Decisions prior to the Main Trial

1. Upon the filing of an indictment by the state prosecutor in the Basic Court, the single trial judge or presiding trial judge shall hold initial hearings and second hearings, rule on requests to dismiss the indictment, rule on requests to exclude evidence, and shall rule on requests for detention on remand or other measures to ensure the presence of the defendant.
2. The main trial shall be tried by a single trial judge or by the trial panel, as appropriate under this code.

CHAPTER IX INITIATION OF INVESTIGATIONS AND CRIMINAL PROCEEDINGS

1. STAGES OF THE CRIMINAL PROCEEDING

Article 68
Stages of a Criminal Proceeding

A criminal proceeding under this Criminal Procedure Code shall have four distinct stages: the investigation stage, the indictment and plea stage, the main trial stage and the legal remedy stage. A criminal proceeding may be preceded by initial steps by the police or information gathering under Article 84 of this Code.

Article 240
Criminal Trial Only Conducted after Filing of Indictment

1. After the investigation has been completed and when the state prosecutor considers that the information that he has in relation to the criminal offence and the offender provide a

wellgrounded suspicion that the defendant has committed a criminal offence or criminal offences, proceedings before the court may be conducted only on the basis of an indictment filed by the state prosecutor.

[...]

Article 241
The Indictment

1. The indictment shall contain:

1.1. an indication of the court before which the main trial is to be held; and
1.2. the first name and surname of the defendant and his or her personal data;
1.3. an indication as to whether and for how long detention on remand or other measures to ensure the presence of defendant were ordered against the defendant, whether he or she is at liberty and, if he or she was released prior to the filing of the indictment, how long he or she was held in detention on remand;
1.4. the legal name of the criminal offence with a citation of the provisions of the Criminal Code;
1.5. the time and place of commission of the criminal offence, the object upon which and the instrument by which the criminal offence was committed, and other circumstances necessary to determine the criminal offence with precision;
1.6. a recommendation as to evidence that should be presented at the main trial along with the names of witnesses and expert witnesses, documents to be read and objects to be produced as evidence.
1.7. an explanation of the grounds for filing the indictment on the basis of the results of the investigation and the evidence which establishes the key facts; 1.8. if a special investigative opportunity has been conducted, the indictment shall name the judges on the panel who heard the special investigative opportunity.
1.9. the indictment shall identify with specificity any building, immovable property, movable property, funds or other asset subject to forfeiture. The indictment must also describe the appropriate proof required to justify the forfeiture under Chapter XVIII of the present Code.

2. If the defendant is at liberty, the state prosecutor may make a motion in the indictment that detention on remand be ordered; if

the defendant is in detention on remand, the state prosecutor may make a motion that he or she be released.

3. A single indictment may be filed for several criminal offences or against several defendants only when, in accordance with Article 35 of the present Code, joint proceedings may be conducted.

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. The Court shall assign a single trial judge or presiding trial judge and panel based on an objective and transparent case allocation system, as appropriate. If a special investigative opportunity has been conducted, one of the panel judges shall be assigned to be the single trial judge or either the presiding trial judge or a judge on the trial panel.
3. The single trial judge or presiding trial judge may ex officio determine whether it has jurisdiction over the matter within the indictment.
4. The single trial judge or presiding trial judge shall immediately schedule an initial hearing to be held within thirty (30) days of the indictment being filed.
5. If the defendant is being held in detention on remand, the initial hearing shall be held at the first opportunity, not to exceed fifteen (15) days from the indictment being filed.
6. The single trial judge or presiding trial judge shall notify the state prosecutor, defendants and defence attorneys of the time and place of the initial hearing.

Article 243
Filings Supplemental to the Indictment

1. Concurrent with filing the indictment, the state prosecutor shall file the following documents if appropriate:
1.1. the state prosecutor shall file a notice of corroboration under Article 263 of the present Code with any statement taken under Article 132 of the present Code or evidence obtained under Article 219, paragraph 6 of the present Code that he or she intends to

submit as direct evidence without the presence of the witness. The notice of corroboration shall describe the independent evidence that corroborates the statement that the state prosecutor intends to submit as direct evidence. This notice of corroboration may be supplemented or filed at a later date if a witness for whom this provision applies is not longer available to testify at the main trial.
1.2. . the state prosecutor shall file a request to continue or implement any measure to ensure the presence of the defendant. Articles 173 to 193 of the present Code shall apply mutatis mutandis to any request under this paragraph.

2. The state prosecutor may file notices of corroboration or requests under this Article at other times if he or she could not know the basis for filing the notice or request at the time the indictment was filed.

Article 244
Materials Provided to Defendant upon Indictment

1. No later than at the filing of the indictment the state prosecutor shall provide the defense counsel or lead counsel with one (1) copy of the following materials or copies thereof which are in his or her possession, control or custody, including those in the possession, control or custody of the police, if these materials have not already been given to the defense counsel during the investigation:
1.1. records of statements or confessions, signed or unsigned, by the defendant;
1.2. names of witnesses whom the state prosecutor intends to call to testify and any prior statements made by those witnesses;
1.3. information identifying any persons whom the state prosecutor knows to have admissible and exculpatory evidence or information about the case and any records of statements, signed or unsigned, by such persons about the case;
1.4. results of physical or mental examinations, scientific tests or experiments made in connection with the case;
1.5. criminal reports and police reports; and
1.6. a summary of, or reference to, tangible evidence obtained in the investigation.

2. The statements of the witnesses shall be made available in a language which the defendant understands and speaks.

3. After the filing of the indictment, the state prosecutor shall provide the defense counsel with any new materials provided for in paragraph 1 of the present Article within ten (10) days of their receipt.

4. The provisions of the present Article are subject to the measures protecting injured parties, witnesses and their privacy and confidential information, as provided for by law.

Article 250
Request to Dismiss Indictment

1. Prior to the second hearing, the defendant may file a request to dismiss the indictment, based upon the following grounds:
1.1. the act charged is not a criminal offence;
1.2. circumstances exist which exclude criminal liability;
1.3. the period of statutory limitation has expired, a pardon covers the act, or other circumstances exist which bar prosecution; or
1.4. there is not sufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offence in the indictment..

2. The state prosecutor shall be given an opportunity to respond to the request verbally or in writing.

3. The single trial judge or presiding trial judge shall issue a written decision with reasoning that either denies the request or dismisses the indictment.

4. Either party may appeal a decision under paragraph 3 of this Article. The appeal must be made within five (5) days of the receipt of the written decision.

12. Amendments and Extension of the Indictment

Article 350
Modification of Indictment at Main Trial

1. If the state prosecutor finds in the course of the main trial that the evidence presented indicates that the factual situation as described in the indictment has changed, he or she may modify the indictment orally during the main trial and may also make a motion to recess the main trial in order to prepare a new indictment.

2. If the trial panel grants the recess of the main trial in order for a new indictment to be prepared, it shall determine the time in which the state prosecutor shall be obliged to file a new indictment. A copy of the new indictment shall be served on the accused. If the state prosecutor fails to file a new indictment within the prescribed period of time, the court shall resume the main trial on the basis of the previous indictment.

3. When the indictment has been modified, the accused or the defence counsel may make a motion to recess the main trial in order to prepare the defence. The trial panel shall recess the main trial to allow for the preparation of defence, if the indictment has been substantially modified or extended.

Law No.03/L-225 on State Prosecutor

Article 13
Authority of the Chief Prosecutor

1. *Each Chief Prosecutor shall be responsible to the Chief State Prosecutor and the Prosecutorial Council for the effective, efficient and fair operations of the state prosecutorial functions of the prosecution office and prosecutors within the office.*
2. *Each Chief Prosecutor shall be the administrative head of the office to which he/she is appointed. The Chief Prosecutor may make appropriate delegations of authority, subject to the consent of the Chief State Prosecutor.*
3. *Each Chief Prosecutor may undertake the functions of criminal prosecution that are assigned to a subordinate prosecutor in that prosecution office and may take over the direct management of investigations or criminal proceedings from him or her, with prior consent of the Chief State Prosecutor.*
4. *Each Chief Prosecutor shall assign cases to prosecutors within the prosecution office, taking into account the nature of the case, the experience and specialization of the prosecutors.*

Law No. 05/L -034 on amending and supplementing the Law No. 03/L-225 on State Prosecutor

Article 4

Article 13 of the basic Law shall be reworded with the following text:

Article 13
Chief Prosecutor

[...]

7. The Chief State Prosecutor, or an authorized prosecutor from the Chief State Prosecution Office, may give binding instructions in writing for a specific case to the Chief Prosecutor of a prosecution office or any other prosecutor of prosecution offices.

7.1. Chief Prosecutors of the Prosecution Offices may give such instructions in writing to the prosecutors in the prosecution office that they lead. Such instructions should be justified and should not violate the functional and professional independence of prosecutors, and in particular, should not contain instructions regarding the qualification of the act, methods of investigation and gathering the evidences, as well as justification of the investigation and indictment.

7.2. Internal procedures shall address the cases for which there shall be issued administrative instructions and internal procedures shall be drafted to address the situations when the instruction is either illegal or in contradiction to the conscience of the subordinate.

8. The instructions shall be given with the purpose of the enforcement of legality, increase of efficiency and unique implementation of practices and legislation.

9. The Chief State Prosecutor or the prosecutor of the Chief State Prosecution office authorized by him/her, may request reports or other written information on the progress, the status or solving of certain cases. Such a request shall be made in a written form.

10. Any of the Chief Prosecutors of respective prosecution offices may request such reports in writing or information by a subordinate prosecutor.

11. The Chief State Prosecutor and Chief Prosecutors may delegate certain competencies to their subordinates.

Admissibility of the Referral

85. The Court first examines whether the admissibility requirements established by the Constitution, foreseen by Law and further specified in the Rules of Procedure have been met.

86. 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".

87. In addition, the Court also examines whether the Applicants have fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

> *„The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".*

88. With regard to the fulfillment of these criteria, the Court notes that the Applicants have met the criteria set out in paragraph 7 of Article 113 of the Constitution, as they are authorized parties, challenge an act of a public authority, namely Judgment [Pml. No. 344/2019] of 2 June 2020, of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicants also clarified the rights and freedoms they claim to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

89. However, in assessing the admissibility of the Referral, the Court must also examine whether the Applicants have met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure establishes the requirements based on which the Court may consider a referral, including the requirement that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) of the Rules of Procedure provides that:

> *"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".*

90. In this regard, the Court recalls that the Applicants allege that Judgment [Pml. No. 344/2019] of 2 June 2020, of the Supreme Court was rendered in violation of their fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], 32 [Right to a Legal Remedies] and 54 [Judicial Protection of Rights]; as well as in violation of Article 102 [General Principles of the Judicial System] and Article 109 [State Prosecutor] of the Constitution.

91. The Court notes that the allegations regarding the issue of re-qualification of the criminal offense through the Indictment of 3 May 2017 based on the binding Instruction of 19 April 2017 are supported by the Applicants, alleging violations of Article 31, Article 102 and Article 109 of the Constitution.

92. As to the alleged violation of Articles 102 and 109 of the Constitution, the Court recalls its general principle that Articles of the Constitution which do not directly regulate fundamental rights and freedoms do not have an independent effect. Their effect applies solely to the "enjoyment of rights and freedoms" guaranteed by the provisions of Chapters II [Fundamental Rights and Freedoms] and III [Rights of Communities and Their Members] of the Constitution (see, in this regard, cases of the Court KI16/19, Applicant *Bejta Commerce*, Resolution on Inadmissibility, of 29 November 2019, paragraph 42; and KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility, of 23 January 2017, paragraph 128).

93. Therefore, based on the reasoning of the allegations raised by the Applicants, the Court notes that, in essence, the Applicants' allegations regarding Articles 102 and 109 of the Constitution are related to the alleged violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.

94. Consequently, the Court considers that the two Applicants specifically allege that: (i) The amended Indictment, of 3 May 2017, with the re-qualification of the criminal offense of 'murder" in co-perpetration in the criminal offense of "aggravated murder" in co-perpetration, based on the mandatory Instruction of 19 April 2017 of the Office of the Chief State Prosecutor was issued in violation of the legal provisions of the Law on Supplementing and Amending the Law on State Prosecutor and that they did not have access to the content of this Instruction; whereas the Applicant in case KI167/20 also alleges that: (ii) the regular courts have shown bias during the review and deciding of the case in criminal proceedings; and that (iii) the regular courts, including the Supreme Court, did not address the remarks given by the Court of Appeals by its first Judgment PAKR. No. 256/2018, of 26 June 2018.

95. In this connection, the Court, initially, recalls that the Constitutional Court has no jurisdiction to decide whether an Applicant was guilty of committing a criminal offence or not. Nor does it have jurisdiction to assess whether the factual situation has been correctly determined or to assess whether the judges of the regular courts have had sufficient evidence to establish the guilt of an Applicant (see case of the Constitutional Court KI68/17, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility, of 2 June 2017, paragraph 50).

96. Finally, the Court notes that in dealing with the abovementioned allegations of the Applicants relating to the right to fair and impartial trial guaranteed by Article 31 of the Constitution, in conjunction with

Article 6 of the European Convention on Human Rights (hereinafter; ECHR), it will apply its case law and the case law of the European Court of Human Rights (hereinafter: ECtHR), on the basis of which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. Regarding the allegation of re-qualification of the criminal offense through Indictment, of 3 May 2017

97. The Court recalls that the Applicants initially specify that the Indictment of 3 May 2017 of the Basic Prosecution, which was also based on the Mandatory Instruction of the Office of the Chief State Prosecutor, of 19 April 2017 was served on them during the initial hearing, held on 4 May 2017. Subsequently, the Applicants state that they were not provided with a copy or access to read the contents of the Mandatory Instruction by the Basic Prosecution.

98. Secondly, the Applicants allege that the Indictment of 3 May 2017, based on the Mandatory Instruction of 19 April 2017 is contrary to Article 4 of the Law on Supplementing and Amending the Law on the State Prosecutor, through which Article 13 was supplemented and amended, and in this regard cite the content of paragraph 7 and item 7.1, which provisions refer to the issuance of a mandatory instruction by the Office of the Chief State Prosecutor. In this context, the Applicants allege that under this provision the mandatory instruction should not contain an instruction on the qualification of a criminal offense.

99. The Court first recalls that the Indictment of the Basic Prosecution, of 3 May 2017, which contained the re-qualification of the criminal offense of aggravated murder, was changed prior to the initial hearing in the Basic Court, held on 4 May 2017. In this context, the Court also recalls that the Applicants in the initial hearing procedure did not object to the abovementioned Indictment of 3 May 2017. Furthermore, the Court recalls that during the initial hearing, the Applicant in case KI167/20 had pleaded guilty to the criminal offense of "'aggravated murder" in co-perpetration for which offense was also charged with the Indictment filed by the Prosecution, of 3 May 2017.

100. Therefore, based on the above, the Court recalls that the Applicants initially raised their allegation regarding the re-qualification of the criminal offense through the Indictment of 3 May 2017 (i) in the filing of indictment proceedings before the Basic Court and the Court of

Appeals, which procedure ended with the issuance of the Decision Pn. No. 520/2017, of 6 July 2017, of the Court of Appeals and subsequently they raised this allegation also (ii) in the court hearing proceedings which ended with the issuance of challenged Judgment Pml. No. 344/2019, of 2 June 2020 of the Supreme Court.

101. The Court notes that the allegations of the Applicants for re-qualification of the criminal offense through the Indictment of 3 May 2017 have been reviewed and assessed in the respective proceedings for dismissal of the indictment, after which procedure and consequently the confirmation of the indictment by the Basic Court and the Court of Appeals, the court hearing proceedings was also conducted. In this regard, the Court considers in principle that the Applicants' allegations referring to the filing of indictment procedure by the Basic Prosecution, including the re-qualification of the criminal offense and its confirmation by the courts have been reviewed and decided upon by Decision PN. No. 520/2017, of 6 July 2017 of the Court of Appeals, which in this procedure is considered as a final decision. However, as elaborated above, the Court reiterates that this specific allegation was continuously raised by the Applicants during and after the court hearing. In the court hearing procedure, the Basic Court and the Court of Appeals found that this allegation was reviewed in the second hearing procedure, namely the procedure of dismissal of the Indictment through decision PKR. No. 36/2017, of 5 June 2017 of the Basic Court and Decision PN. No. 520/2017, of 6 July 2017 of the Court of Appeals. However, the Supreme Court through its challenged Judgment addressed and elaborated the same allegation raised in the requests for protection of legality and consequently, had also provided a finding regarding the grounds of this allegation.

102. Therefore, having regard to the fact that this allegation has been examined by the regular courts in both proceedings, namely the indictment dismissal procedure and the regular court review procedure, the Applicants' allegation regarding the reconsideration of the offense will be dealt with under Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, and in this connection will refer to the case law of the ECtHR and to the Court itself with regard to the established principles referred to in criminal proceedings in its entirety, including the case law of the ECtHR with regard to the re-qualification of the criminal offense in the Indictment proceedings.

103. In this regard, the Court notes that the case law of the ECtHR determines that the fairness of a proceeding is assessed on the basis of the procedure in its entirety (See, in this context, the case of *Barbera,*

Messeque and Jabardo v. Spain, Judgment of 6 December 1988, paragraph 68). Consequently, in assessing the Applicant's allegations, the Court will also adhere to this principle. (See, case of the Court KI104/16, Applicant *Miodrag Pavic*, Judgment of 4 August 2017, paragraph 38; and Case KI 143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

104. In this regard, it must be borne in mind that the "justice" required by Article 31 of the Constitution in conjunction with Article 6 of the ECHR is not "substantial" justice, but "procedural" justice. In practical terms, and in principle, this is expressed by contradictory procedure, where the parties are heard and placed in the same conditions before the court (see, *mutatis mutandis,* the case of the Court no. KI42/16, Applicant *Valdet Sutaj*, Resolution on Inadmissibility, of 7 November 2016, paragraph 41 and other references mentioned therein).

105. Whereas, with regard to matter relating to the issue of the re-qualification of the criminal offense through the indictment and its notification to the parties, the Court also refers to the case law of the ECtHR which, in principle, has stated that Article 6, paragraph 3 (a) of the ECHR does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (see the cases of the ECHR, *Pélissier and Sassi v. France* [GC], Judgment of 25 March 1999, paragraph 53; *Drassich v. Italy*, Judgment of 11 December 2007, paragraph 34; *Giosakis v. Greece* (no. 3), Judgment of 3 May 2011, paragraph 29). In this regard, the ECtHR underlined that *"An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on written notice of the factual and legal basis of the charges against him*" (see *Kamasinski v. Austria*, Judgment of 19 December 1989, paragraph 79).

106. The ECtHR further specified that the accused must be duly and fully informed about the changes in the accusation, including the changes in its "cause" and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation (see cases of the ECtHR, *Mattoccia v. Italy*, Judgment of 25 July 2007, paragraph 61; and *Varela Geis v. Spain*, Judgment of 5 March 2013, paragraph 54).

107. The ECtHR has also specified that information regarding the Indictment, including the legal characterization that the court may adopt in this case, must be submitted to the court either in the form of an indictment or at least during the trial proceedings by other means

such as formal or implied extension of the indictment (see the case of the ECtHR *I.H. and Others v. Austria*, Judgment of 20 April, paragraph 34).

108. A re-qualification of the indictment is considered to be sufficiently foreseeable for the accused if it relates to an element which is essential in connection with the indictment (see ECtHR cases: *De Salvador Torres v. Spain*, Judgment of 24 October 1996, paragraph 33; *Sadak and Others v. Turkey* (no. 1), Judgment of 17 July 2001, paragraphs 52 and 56; and *Juha Nuutinen v. Finland*, Judgment of 24 April 2007, paragraph 32). Also the issue of re-qualification of the Indictment if it was considered during the criminal proceedings constitutes a further important element (see the case of the ECtHR, *Penev v. Bulgaria*, Judgment of 7 January 2010, paragraph 41).

109. The ECtHR further noted that flaws in the notification of the indictment could be remedied in the appeal proceedings if the accused had the opportunity to raise his claim for the re-indictment before the higher courts (see ECtHR cases *Dallos. v. Hungary*, Judgment of 1 March 2001, paragraphs 49-52; and *I.H. and Others v. Austria*, cited above, paragraphs 36-38).

110. Following the aforementioned elaboration, the Court, referring to the legal provisions, namely the provisions of the criminal procedure, notes that pursuant to Article 240 of the CPCRK, the indictment procedure begins after the completion of the investigation. Therefore, Article 241 of the CPCRK stipulates what are the elements that an indictment should contain and in the following, Article 242 of the CPCRK stipulates that the indictment filed by the Prosecution is submitted to the competent court which determines the holding of the initial hearing within 30 (thirty) days from the date the indictment was filed by the Prosecution. Further, pursuant to Article 250 of the CPCRK, it is determined that after the initial hearing, the defendants have the right to initiate the indictment.

111. Pursuant to the provisions of the CPCRK after the completion of the procedure for dismissal of indictment, and in the event that the defendants' objections and appeals regarding the dismissal of the indictment have been rejected, the court hearing procedure begins and within the latter and based on the criteria set out in Articles 350 and 351 of the CPCRK, the Prosecution is also allowed to amend or extend the indictment.

112. The Court in applying the abovementioned principles of case law of the ECtHR in the framework of the procedure after the filing of the initial Indictment of 27 March 2017, initially recalls that based on the case file, after the re-qualification of the criminal offense through the Indictment of 3 May 2017, the parties had received a copy of it during the initial hearing of 4 May 2017 in the Basic Court. It appears from the case file that the Applicant in case KI167/20 had also admitted guilt in connection with the commission of the criminal offense of aggravated murder, as specified in the amended Indictment of 3 May 2017. In the framework of the initial review procedure, the Court notes that the Applicants did not object to the re-qualification of the criminal offense through the aforementioned Indictment, of 3 May 2017.

113. After the end of the initial hearing, on the same date, the pre-trial judge through the decision rejected the guilty plea for committing the criminal offense of "aggravated murder" by the Applicant and approved the guilty plea of both Applicants regarding the criminal offense "unauthorized ownership, control, or possession of weapons" under Article 374, paragraph 1 of the CCRK.

114. The Court also recalls that the Applicants initiated the procedure for dismissal of Indictment PP. I. No. 38/2016, of 3 May 2017 through their objections filed on 25 May 2017 and 27 May 2017 in the Basic Court. In their requests for dismissal of the indictment, the Applicants specifically raised the issue of re-qualification of the criminal offense through the Indictment of the Basic Prosecution, of 3 May 2017, in which case they stated that the Mandatory Instruction of 10 April 2017, of the Office of the Chief State Prosecutor was rendered in violation of the legal provisions of the Law on Supplementing and Amending the Law on the State Prosecutor, and in this context they had specified that such an instruction should not contain *"instructions for re-qualification of the criminal offense"*.

115. The Basic Court by Decision PKR. No. 36/2017 of 5 June 2017, rejected their claims as ungrounded, finding that the enacting clause of the Indictment of 3 May 2017 and the description of the Applicants' actions respond "*in its entirety to the existence of elements of the criminal offense of aggravated murder*" under Article 179, paragraph 1, subparagraphs 1.4 and 1.5 in conjunction with Article 31 of the CCRK, as well as the criminal offense of unauthorized ownership, control or possession of weapons under Article 374, paragraph 1 of the CCRK. Moreover, the Basic Court, referring to all the evidence attached by the Basic Prosecution to the Indictment, concluded that "*the well-founded suspicion that [the Applicants] have committed the criminal offenses*

which they are charged with was fully substantiated". Based on this reasoning of the Basic Court, the Court notes that although the Applicants based their request for dismissal of the Indictment of 3 May 2017 on the binding Instruction which according to them is unlawful, the Basic Court based its reasoning for rejecting their request for dismissal of the indictment on the content of the indictment, namely the description of the actions and all the evidence that the Prosecution has attached to this indictment. Namely, the Court notes that the Basic Court does not address the issue of the binding Instruction of 19 April 2017, but bases its position regarding the existence of reasonable suspicion of committing criminal offenses by the Applicants on the elements of the factual situation provided by the Basic Prosecution and which relied on the material evidence and evidence attached to the indictment.

116. Subsequently, as a result of the Applicants' appeal against the abovementioned Decision of the Basic Court, the Court of Appeals, by its Decision PN. No. 520/2017, of 6 July 2017 upheld the position of the Basic Court and concluded that *"for the time of being exist the essential elements of the criminal offenses for which [the Applicants] have been charged with, and that from the evidence which the prosecutor proposed for reading during the court hearing on which evidence he based the grounded suspicion, when filing the indictment and its completion will be assessed in the court hearing".*

117. Therefore, based on the abovementioned reasoning of the Basic Court and that of the Court of Appeals, the Court reiterates that the latter based their reasoning regarding the allegations of the Applicants for the re-qualification of the criminal offense through the Indictment of 3 May 2017, specifically and substantively on the elements of the Applicants' actions which were based on the evidence attached by the Basic Prosecution in the indictment.

118. The Court further recalls that the Applicants, after the completion of the procedure for dismissal of indictment, raised their claim regarding the re-qualification of the criminal offense through the Indictment of 3 May 2017 based on the binding Instruction of 19 April 2017 in the proceedings of court hearing, namely in the procedure of retrial and reconsideration in the Basic Court, the Court of Appeals and finally in the Supreme Court. Having said that, the Court also recalls that the Basic Court in its first Judgment PKR. No. 36/2017, of 16 March 2018, found the Applicants guilty of committing the criminal offense of "murder" under Article 178 in conjunction with Article 31 of the CCRK, finding that in their actions there were no elements of committing the

criminal offense of aggravated murder. However, the Court of Appeals on this point quashed the Judgment of the Basic Court and remanded the case for retrial and reconsideration.

119. Following this, the Court recalls that the Basic Court in the retrial and reconsideration procedure by Judgment PKR. No. 41/18, of 18 June 2019 found that the allegation regarding the re-qualification of the criminal offense through the Indictment of 3 May 2017 is ungrounded because in this regard, the Applicants filed objections and complaints, which were rejected as ungrounded by Decision PKR. No. 36/17, of 5 June 2017, of the Basic Court and Decision PN. No. 520/2017, of 6 July 2017 of the Court of Appeals. Consequently, the Basic Court was based on the fact that in relation to the allegation regarding the Indictment of 3 May 2017 it was decided *"by the court of highest instance, as well as based on the legal provisions of the Criminal Procedure Code which provides that the prosecution has the right to change the indictment, but the parties must be given the right to present their objections, based on the fact that the indictment was modified before the initial hearing, and all parties submitted their objections, on which objections it was decided, at the discretion of the court, this allegation is ungrounded and the indictment is lawful"*.

120. Also the Court of Appeals by Judgment PAKR. No. 303/2019, of 20 September 2019, confirmed that the Applicants' allegation regarding the re-qualification of the criminal offense is ungrounded as in this regard it was decided in the procedure for dismissal of indictment, in which procedure the indictment was confirmed and consequently the criminal proceedings continued in the court hearing.

121. Finally, the Supreme Court by Judgment PML. No. 344/2019 of 2 June 2020 regarding this allegation of the Applicants, assessed that *"[...]the change of the indictment by re-qualification of the criminal offense from murder in co-perpetration to aggravated murder in co-perpetration was not made unlawfully as it is unfoundedly claimed in the requests. No legal provision prohibits the Prosecutor from changing the charge before the initial hearing. Whereas the fact that such a thing was done by the order of the Chief Prosecutor and not the assessment of the Prosecutor of the case falls within the duties and competencies of the State Prosecutor, [the Applicants] had the opportunity to challenge the modified accusation, and surprisingly the defense considers it unlawful, the minutes of the initial hearing show that the convict Tasim [the Applicant in case KI170/20] has pleaded guilty regarding the re-qualified criminal offense and the defense counsel has not objected to the admission of guilt"*.

122. Based on the aforementioned elaboration, the Court notes that the Applicants' allegation regarding the re-qualification of the criminal offense by the Indictment of 3 May 2017 has been addressed and reviewed in two proceedings before the regular courts. In this context, the Court considers that the procedure of dismissal of indictment and the court hearing procedure were conducted in accordance with the abovementioned principles, established through the case law of the ECtHR, principles which are also embodied in the provisions of the criminal procedure. Consequently, having examined the entire criminal proceedings in their entirety, the Court finds that they were not unfair or arbitrary (see, *mutatis mutandis*, case of the Constitutional Court: KI68/16, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility of 2 June 2017, paragraph 55, case and KI70/11, Applicants: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, paragraph 32).

123. From the above, the Court notes that the Applicants were able to conduct two criminal proceedings, namely the procedure of dismissal o f indictment and the court hearing procedure based on adversarial principle; that they were able to adduce the arguments and evidence they considered relevant to their case at the various stages of those proceedings; they were given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, relevant for the resolution of their case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair (see, *inter alia*, case of the Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility of 16 February 2018, paragraph 35; see also *mutatis mutandis*, *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January1999, paragraph 29).

124. The Court further considers that the dissatisfaction of the Applicants with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim of violation of the right to fair and impartial trial (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21).

125. Finally, the Court, based on the case file, recalls that on 22 October 2020 and respectively after the issuance of the challenged Judgment of the Supreme Court, the Applicant in case KI167/20, through his legal

representative in the Office of the Chief State Prosecutor had raised concerns regarding the non-submission of the binding Instruction, of 19 April 2017 by the Basic Prosecution and the Basic Court. Whereas, on 23 October 2020, the same Applicant in the Basic Court requested that the copy of the above-mentioned binding Instruction of 19 April 2017 be submitted to him. The State Prosecutor through his Notification of 13 November 2020 responded as follows: *"Mandatory Instruction A. No. 140/2017 of 10 April 2017 issued by me, within the Office of the Chief State Prosecutor refers exclusively to the Chief State Prosecutor [A.U], who is in charge of criminal procedural treatment in the criminal case PP./I. No. 38/2016. Thus, the same binding instruction throughout the treatment of this criminal case by the state prosecutor in question, it is not referred to any other party in this criminal procedure and cannot be provided with it, because the latter represents an internal act within the prosecutorial system. Furthermore, in view of the transparency and non-violation of the principle of equality of the parties in criminal proceedings, You may only have access to view the content of the abovementioned instruction in my presence, so that in the future in the event of eventual exercise by your side of regular as well as extraordinary legal remedies against the judgment of the competent court regarding this criminal case, to be able to challenge that judgment according to the legal reasons provided in the Criminal Procedure Code of the Republic of Kosovo". Whereas,* the Basic Court by letter of 28 October 2020 replied that *"[...]the trial panels have decided in all court instances, regarding all the documents, including the submission that you are requesting for this case, which has been completed and archived in the Court".*

126. In the context of the latter and taking into account the fact that these facts refer to the circumstances following the issuance of the challenged Judgment of the Supreme Court, and the same challenged Judgment as the final decision in criminal proceedings constitutes the subject matter of the Applicants' referrals, the Court considers that they cannot be addressed and reviewed in the framework of the criminal proceedings before the regular courts, which procedure based on the case file was completed with the issuance of the abovementioned Judgment of the Supreme Court.

127. As a result, the Court considers that the Applicants have not substantiated their allegations regarding the re-qualification of the criminal offense through the Indictment of 3 May 2017, and consequently finds that this allegation is manifestly ill-founded on

constitutional basis as established in Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

II. *Regarding the Applicant's allegation in case KI167/20 of lack of impartiality before the regular courts*

128. The Court recalls that the Applicant in case KI167/20 in his Referral specifies that *"In this criminal proceeding as we have explained above, in the exercise of their function, meaninglessly, the judges, at all stages, have not been independent and impartial in the exercise of their function [it has been evident as it is clarified above, the duties have been given by the second instance court, for the first instance court, this in the retrial has not performed the duties defined in the remarks of the second instance court, has decided in its own way"*. Subsequently, the Applicant specifies that the Court of Appeals also "*in the exercise of its function has not been independent and impartial and its decision, such proceedings, represents a violation of paragraph 4 of Article 102 of the Constitution. Paragraph 5 with all its guarantees has also been violated"*.

129. Based on the above, the Court notes that the Applicant in case KI167/20 alleges a lack of impartiality on the part of the Basic Court and the Court of Appeals. In the context of the allegation of lack of impartiality and independence of the judiciary, the Applicant in this case also alleges a violation of Article 32 and Article 54 of the Constitution. However, the Court recalls that the allegations of lack of impartiality and independence of the courts fall within the scope of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

130. In this regard, the Court recalls that the Applicants against the Judgment of the Basic Court filed an appeal with the Court of Appeals and a request for protection of legality with the Supreme Court. However, based on the case file, including the complete case file submitted by the Basic Court, it does not follow that the above allegation of the Applicant in case KI167/20 regarding the lack of impartiality in the Basic Court was raised in his appeal filed with the Court of Appeals and consequently it also does not appear that the allegation of the same Applicant of lack of impartiality in the Court of Appeals was raised in his request for protection of legality in the Supreme Court.

131. In such a context, when the Applicant's allegations have been neither formally nor substantially raised before the regular courts, the Court refers to its case law and the case law of the ECtHR concerning the

criterion of exhaustion of legal remedies in the substantial aspect, and recalls that in such circumstances, such allegations cannot be considered by the Court due to the lack of exhaustion of the legal remedies in the substantial aspect. Based on the same case law, the Court had refused to consider the relevant allegations because they had never been raised before the regular courts (see *inter alia*, in the cases of the Court, KI119/17, Applicant *Gentian Rexhepi,* Resolution on Inadmissibility, of 3 May 2009 (paragraph 71), KI154/17 and KI05/18, Applicants *Basri Deva, Aferdita Deva and Limited Liability Company "BARBAS"*, Resolution on Inadmissibility, of 22 July 2019 (paragraph 92), KI155/18, Applicant *Benson Buza*, Resolution on Inadmissibility, of 25 September 2019 paragraph 50; and KI239/19, Applicant *Hakif Veliu*, Resolution on Inadmissibility, of 10 February 2021, paragraph 147).

132. The Court reiterates that the exhaustion of legal remedies includes in itself two elements: (i) that of exhaustion in the formal-procedural aspect, which implies the possibility of using a legal remedy against an act of a public authority in a higher instance with full jurisdiction; and (ii) exhaustion of the remedy in a substantial aspect, which means reporting constitutional violations in "*substance*" before the regular courts so that the latter have the opportunity to prevent and rectify the violation of human rights protected by the Constitution and the ECHR. The Court considers the legal remedies as exhausted only when the Applicants, in accordance with the applicable laws, have exhausted them, in both aspects (See also, the cases of the Court, KI71/18, Applicants *Kamer Borovci, Mustafa Borovci and Avdulla Bajra*, Resolution on Inadmissibility, of 21 November 2018, paragraph 57; case KI119/17, cited above, paragraph 73; case KI154/17 and KI05/18, cited above, paragraph 94).

133. Such a stance is completely in line with the case law of the ECtHR, on the basis of which, in so far as there is a legal remedy enabling the regular courts to address, at least in substance, the argument of a violation of a right, then that legal remedy should be used. If the complaint brought before the Court has not been put, either explicitly or in substance, before the regular courts when it could have been raised in the exercise of a legal remedy available to the Applicant, then the regular courts have been denied the opportunity to address the issue, which the rule on exhaustion of legal remedies intends to provide (see, *inter alia*, the case of the ECtHR *Jane Nicklinson v. The United Kingdom and Paul Lamb v. The United Kingdom*, cited above, paragraph 90 and references therein; see also the case law of the Court,

KI154/17 and KI05/18, cited above, paragraph 93; and case KI239/19, cited above, paragraph 147).

134. Having regard to these principles and the circumstances in which, according to the case file it results that these specific allegations of the Applicant have been filed for the first time before the Court, it concludes that the Applicant did not give the opportunity to the regular courts, including the Court of Appeals and the Supreme Court, to address these allegations and, on that occasion, to prevent alleged violations raised by the Applicant directly before this Court, without having exhausted legal remedies in their substance (see, *inter a*lia, the cases of the Court, KI118/15, Applicant *Dragiša Stojković*, Resolution on Inadmissibility, of 12 April 2016, paragraphs 30-39; case KI119/17, cited above, paragraph 74; case KI154/17 and KI05/18, cited above, paragraph 95; case KI239/19, cited above, paragraph 150).

135. Consequently, the Court finds that this allegation must be rejected as inadmissible on procedural basis due to the substantial non-exhaustion of all legal remedies, as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

III. Regarding the Applicant's allegation in case KI167/20 that the regular courts, including the Supreme Court, did not address the remarks given by Judgment PAKR. No. 256/2018, of 26 June 2018, of the Court of Appeals

136. The Applicant in case KI167/20 specifies that the Basic Court, in the procedure of retrial and reconsideration by Judgment PKR. No. 41/18, of 26 June 2019 did not take into account the remarks given by the Court of Appeals, given by its first Judgment PAKR. No. 256/2018, of 29 June 2018.

137. Subsequently, according to the Applicant, the Court of Appeals itself by its second Judgment PAKR. No. 393/2019 did not take into account the remarks given by Judgment PAKR. No. 256/2018, of 29 June 2018 of the Court of Appeals. The Applicant continues with the allegation that the same remarks were not taken into account by the Supreme Court, through its challenged Judgment.

138. In the context of this allegation, the Court recalls that the Court of Appeals by its Judgment PAKR. No. 256/2018, of 29 June 2018, among others, had decided to approve the appeals of the Basic Prosecution, and of [the Applicants], but also "*ex officio*" annulled Judgment PKR.

No. 36/2017, of 16 March 2018, of the Basic Court regarding the criminal offense of "murder" in co-perpetration under Article 178 in conjunction with Article 31 of the CCRK and had remanded the case for retrial and reconsideration. By this Judgment, the Court of Appeals obliged the Basic Court, in the retrial to act in accordance with the remarks given by this court, namely: to eliminate the contradictions in the enacting clause of the Basic Court; to proceed once again with all the evidence in order to "fairly and fully clarify the facts"; take into account eyewitness' statements at the scene; to reconstruct the scene; after processing the evidence, it must assess them in accordance with Article 361 of the CPCRK; to draw fair and lawful conclusions based on the evidence processed; and consequently to issue the relevant and lawful decision, by which the other allegations mentioned in the appeal are taken into account..

139. As a result of the remand of the case for retrial, the Basic Court after holding hearings, reconstruction of the scene, hearing of witnesses and experts, allegations of the Basic Prosecution and protection of the Applicants "*concluded* that *the accused [Applicants] in co-perpetration committed the criminal offense of aggravated murder under Article 179, par. 1, subpar. 1.5 of the CCRK in conjunction with Article 31 of the CCRK".*

140. Subsequently, the Court of Appeals in addressing this allegation determined that:

> *"[...]In the court hearing it was proceeded according to the modified accusation (Article 179 of the CCRK) the convicts were found guilty of the criminal offense of murder (Article 178 of the CCRK), but this judgment except the defense counsels of the convicts was also challenged by the prosecutor regarding the violation of the criminal law, while the Court of Appeals remanded the case for retrial on the grounds of essential violations (ambiguity of the enacting clause of the judgment in relation to the criminal offense for which the convicts were found guilty - ordinary murder) which were also related to the erroneous and incomplete determination of the factual situation, for which that court suggested the reconstruction of the scene of event in order to establish the circumstances in which the deceased [N.K.], was deprived of life, especially the determination of the facts and circumstances regarding the reaction of now [N.K.] at the moment when the accused shot at [N.K.]".*

141. In the context of this same allegation filed in the requests for protection of legality, the Supreme Court held that:

> *"In the retrial according to the remarks of the second instance, the scene was reconstructed and after processing other evidence, the first instance court concluded that in the actions of [the Applicants] there are elements of the criminal offense of aggravated murder, from Article 179 par. 1 item 1.5 in conjunction with Article 31 of the CCRK, and particularly in the reasoning of the judgment are given clear reasons regarding the reaction of the deceased at the time he was shot. [...] From the fact that the first instance court in the retrial after taking actions according to the suggestions of the criminal procedure and the processing of evidence, concludes that in the actions of [the Applicants] the elements of the criminal offense of aggravated murder for which they have been charged are fulfilled, it cannot be concluded that the first instance court did not act according to the suggestions of the second instance, because despite the legal obligation to undertake all procedural actions and review the disputed issues, it without concluding whether the concrete fact has been proven, namely whether criminal liability and elements of the criminal offense have been proven, the allegation is grounded that while the first instance court of [the Applicant in case KI170/20] by the challenged judgment for the criminal offense of aggravated murder sentenced him to 16 years of imprisonment, while from the entry of the reasoning of the second instance judgment it turns out that he was sentenced to 18 years in prison, but this Court finds that in the present case we are dealing with a technical flaw, which does not make the judgment incomprehensible, because it is clear from the case file that [the Applicant in case KI170/20] was sentenced to 16 years of imprisonment, and this judgment was upheld by the Court of Appeals".*

142. The Court therefore considers that the reasoning of the regular courts, and in particular that of the Basic Court in the retrial procedure [PKR. No. 41/18] of 18 June 2019] as a result of Judgment PAKR. No. 256/2018 of 29 June 2018 of the Court of Appeals and through which the remarks were determined that the Basic Court is obliged to take them into account, is very clear and complete, and also considers that both the judgment of the Court of Appeals and that of the Supreme Court have addressed this allegation of the Applicants in their complaints and requests for protection of legality.

143. Further, regarding the issue of taking into account the remarks of the Court of Appeals by Judgment PAKR No. 256/2018 of 29 June 2018, the Court reiterates that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (*legality*), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (*constitutionality*). The Court has consistently held this view based on the ECtHR case law, which clearly states that it is not the role of this Court to review the findings of the regular courts as to the factual situation and the application of substantive law (see ECtHR case *Pronina v. Russia*, application no. 65167/01, Decision on Inadmissibility, of 30 June 2005, cases of the Court KI06/17, Applicant *L.G. and the five others*, Resolution on Inadmissibility, of 23 October 2017, paragraph 38; and KI122/16, Applicant *Riza Dembogaj*, Judgment of 30 May 2018, paragraph 58).

144. Based on the above, the Court reiterates that the reasoning of the regular courts given in their respective judgments, challenged by the Applicants, are clear and, after examining all the proceedings, the Court also finds that the proceedings in the regular courts have not been unfair or arbitrary (see, *mutatis mutandis*, cases of the Constitutional Court: KI68/16, Applicant: *Fadil Rashiti*, Resolution on Inadmissibility, of 2 June 2017, paragraph 55, and KI70/11, Applicant: *Faik Hima, MagbuleHima and Besart Hima*, Resolution on inadmissibility, of 16 December 2011, paragraph 32).

145. Therefore, the Court considers that this allegation of the Applicants is ungrounded on constitutional basis as established in Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

Conclusion

146. Therefore, and finally, the Court finds that the Applicants' Referrals are inadmissible.

(i) The allegation regarding the re-qualification of the criminal offense is manifestly ill-founded on constitutional basis, as established in Article 47 of the Law and paragraph (2) of Rule 39 of the Rules of Procedure;
(ii) The Applicant's allegation in case KI167/20 regarding the lack of impartiality of the courts is inadmissible as a result of non-exhaustion of legal remedies in accordance with paragraphs 1 and 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law, and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure; and

(iii) Applicant's allegation in case KI167/20 regarding the disregard of the remarks given by Judgment PAKR. No. 256/2018, of 29 June 2018 of the Court of Appeals by the regular courts during the court hearing is manifestly ill-founded on constitutional basis, as established in Article 47 of the Law and paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (1) (b) and (2) and 59 (2) of the Rules of Procedure, in its session held on 21 July 2021, unanimously:

DECIDES

I. TO DECLARE the Referrals inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Gresa Caka-Nimani

KI01/20, Applicant: Momir Marinković, Constitutional review of Judgment AC-I-17-0074-A123 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 8 October 2019

KI01/20, Judgment of 29 July 2021, published on 19 August 2021

Keywords: *individual referral, the right to a hearing, waiver of the hearing*

The Court recalls that the circumstances of the present case relate to the privatization of the Socially Owned Enterprise SOE "SHARR" and the rights of the respective employees to be granted the status of employees with legitimate rights to participate in the twenty percent proceeds (20%) from this privatization, as defined in Article 68 of the Annex to the Law on SCSC and paragraph 4 of Article 10 of Regulation 2003/13. The Applicant is one of the former employees of the aforementioned enterprise, who was not included in the Final List published on 7, 8 and 9 June 2012. His appeal to the Specialized Panel was rejected as ungrounded. Before the Appellate Panel, the Applicant filed allegations related to the erroneous determination of facts and discrimination and the same were rejected as ungrounded at the level of the Appellate Panel. A hearing was not held at the Specialized Panel or the Appellate Panel. The first pointed out that *"The judgment was rendered without holding a public hearing, because the facts and legal arguments that have been provided are sufficiently clear. The Panel does not expect any other relevant information for review. [...] ",* while the second, had stated that *"the Appellate Panel decides to waive the oral part of the proceedings".*

The Applicant challenged the findings of the Appellate Panel before the Court, alleging (i) a violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: ECHR) due to the failure to hold a hearing and the lack of reasoning for the court decision; (ii) violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR and Article 1 of Protocol no. 12 of the ECHR due to unequal treatment; and (iii) violation of Article 49 of the Constitution.

The Court, in the circumstances of this case, assessed the Applicant's allegations regarding the absence of a hearing, a right guaranteed, according to the explanations of this Judgment, by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

In assessing the relevant allegations, the Court has initially elaborated on the general principles deriving from the case-law of the ECtHR and that of the Court, on 5 (five) its judgments in the cases of the former enterprise "Agimi",

regarding the right to a hearing, clarifying the circumstances in which such is necessary, based, *inter alia,* on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*. The Court has clarified, *inter alia*, that (i) the absence of a party's request for a hearing does not necessarily imply the waiver of such a right and that the assessment of the impact of the absence of such a request depends on the specifics of the law and the particular circumstances of a case; and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless "*there are exceptional circumstances that would justify the absence of a hearing*", which based on the case law of the ECtHR, in principle relate to cases in which "*exclusively legal or highly technical issues are examined*".

In the circumstances of the present case, the Court finds that (i) the fact that the Applicant has not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Appellate Panel did not deal with "*exclusively legal or highly technical matters*", matters on the basis of which "*exceptional circumstances that would justify the absence of a hearing*" could have existed, but on the contrary considered both the issues of fact and law; and (iii) the Appellate Panel did not justify the "*waiver of the oral hearing*". Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely Judgment [AC-I-17-0074-A123] of 8 October 2019 of the Appellate Panel, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

Finally, the Court also notes that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the Applicant's other allegations with regard to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR with regard to the lack of reasoning of the court decision, as well as allegations of violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR, and Article 1 of Protocol no. 12 of the ECHR and Article 49 of the Constitution, because the latter must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

JUDGMENT

in

Case no. KI01/20

Applicant

Momir Marinković

Constitutional review of Judgment AC-I-17-0074-A123 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 8 October 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Momir Marinković, from the Municipality of Shtërpce (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [AC-I-17-0074-A123] of 8 October 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC) in conjunction with Judgment [C-II-12-0023] of 31 January 2017 of the Specialized Panel of the SCSC.

3. The Applicant was served with the Judgment of the Appellate Panel of the SCSC on 29 October 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by (i) 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 [Right to a fair trial] on the European Convention on Human Rights (hereinafter: the ECHR); (ii) Article 24 [Equality Before the Law] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) of the ECHR and Article 1 (General prohibition of discrimination) of Protocol No. 12 of the ECHR; and (iii) Article 49 [Right to Work and Exercise Profession] of the Constitution.

5. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure.

Legal basis

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

Proceedings before the Court

7. On 10 January 2020, the Court received the Referral submitted by the Applicant by mail service.

8. On 14 January 2020, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban.

9. On 7 February 2020, the Court (i) notified the Applicant about the registration of the Referral and requested him to submit a copy of the appeal submitted to the Appellate Panel of the SCSC; (ii) sent a copy of the Referral to the SCSC, also requesting that it submit a copy of the judgments of the Specialized and Appellate Panel in Albanian and Serbian to the Court; and (iii) submitted a copy of the referral to the Privatization Agency of Kosovo (hereinafter: PAK).

10. On 11 February 2020, the SCSC submitted the copies of the requested judgments to the Court.

11. On 27 February 2020, the Applicant submitted the document requested by the Court.

12. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP.71-2/21 of the Court of 17 May 2021, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi, on 26 June 2021.

13. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

14. On 8 June 2021, the President of the Court Arta Rama-Hajrizi, by Decision no. KI01/20, appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur replacing Judge Gresa Caka-Nimani.

15. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

16. On 29 July 2021, the Review Panel considered the report of the Judge Rapporteur, and by majority of votes recommended to the Court the admissibility of the Referral.

17. On the same date, the Court (i) by a majority found the Referral is admissible; and (ii) by a majority found that Judgment [AC-I-17-0074-A123] of 8 October 2019 of the SCSC Appellate Panel is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

18. Based on the case file, it results that the Applicant is a former employee of the Socially Owned Enterprise SOE “SHARR” Hani i Elezit

(hereinafter: SOE "SHARR"), which at the time of its commercialization by the United Nations Mission in Kosovo (hereinafter: UNMIK), on 13 June 2000, consisted of 4 (four) companies, namely: (i) the new company "Lepenci" in Kaçanik; (ii) the new company "Silkapor" in Doganaj; (iii) the new company "Sharr Salonit" in Hani i Elezit; and (iv) the company "Sharr Cem" in Hani i Elezit, which during the period from 8 March 2004 to 9 December 2010, were subject to the privatization process by the PAK.

19. On 7, 8 and 9 June 2012, namely, the PAK published the Final List of employees entitled to benefit twenty percent (20%) of the proceeds from the privatization of the respective Socially Owned Enterprise (hereinafter: the Final List). As the deadline for submission of complaints to the SCSC against this Final List was set for 30 June 2012.

20. On 29 June 2012, the Applicant, as a result of his non-inclusion in the Final List, filed a complaint with the SCSC. Through his complaint, the Applicant requested his inclusion in the Final List, alleging that his employment relationship with the Socially Owned Enterprise commenced on 10 February 1992 until 31 May 1997, which continued after the process of reorganization of this Enterprise into the new Socially Owned Enterprise "Sharr Silkapor" on 1 June 1997 until March 1999.

21. On 27 July 2012, the PAK filed a response to the Applicant's complaint, proposing that his complaint be rejected as ungrounded. In its response, the PAK specified that (i) on the basis of the relevant employment booklet, its employment relationship with the Socially Owned Enterprise was terminated on 31 May 1997, and thereafter, the Applicant "*has not submitted relevant evidence to prove the continuity of the employment relationship"; and (ii)* the Applicant *"has not taken any legal action to extend employment after June of 1999*".

22. On 31 January 2017, the Specialized Panel of the SCSC, deciding on all the complaints of the former employees of the Socially Owned Enterprise, by Judgment [C-II-12-0023], rejected the Applicant's appeal as ungrounded. By this Judgment, the Specialized Panel, referring to paragraph 11 of Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters (hereinafter: Annex to the Law on the SCSC), had specified that "*the Judgment was rendered without holding a public hearing, because the legal facts and arguments which have been provided are sufficient and clear. The Panel does not expect any other relevant information for review [...]*". Whereas, in

the part regarding the Applicant's complaint, reasoned that (i) the Applicant did not meet the criteria set out in paragraph 4 of Section 10 (Rights of Employees) of UNMIK Regulation 2003/13 on the Transformation of the Right of Use to Socially-Owned Immovable Property, as amended by UNMIK Regulation 2004/45 on Amending Regulation 2003/13 on Transformation of the Right of Use to Socially-Owned Immovable Property (hereinafter: UNMIK Regulation 2003/13 as amended by Regulation no. 2004/45) because at the time of the privatization of the Socially Owned Enterprise, he had not been registered as an employee of this Enterprise; (ii) on the basis of the copy of the work booklet submitted by the Applicant, it was not proved whether the work booklet "*is closed or open after 1997*"; and (iii) the Applicant has not raised any allegations of discrimination.

23. On 10 March 2017, against the Judgment of the Specialized Panel of the SCSC, the Applicant filed an appeal with the Appellate Panel of the SCSC, alleging erroneous and incomplete determination of the factual situation and erroneous application of the substantive law. With regard to the first, the Applicant stated that (i) the finding of the Specialized Panel that in his case there is a lack of evidence of his employment relationship after 1 June 1997 is "*erroneous and contrary to the material evidence presented*" because based the submitted evidence it is confirmed that he started his employment on 10 February 1992, while it was terminated in March 1999 as a result of "*war circumstances, [...] and after the war due to security circumstances and discrimination, I was actually unable to perform my work and work duties [...]";* (ii) his attached workbook as evidence confirms the fact that *"there is no termination of work experience after the date 01.06.1997*"; (iii) the statements of all employees of the said enterprise, as witnesses, could confirm the accuracy of its claims; and (iv) based on the evidence submitted, it is established that he meets the criteria set forth in paragraph 4 of Section 10 of UNMIK Regulation 2003/13 as amended by Regulation No. 2004/45. The Applicant stated that the Specialized Panel in violation of "*the principle of equal and fair trial*" has treated unequally "*employees of the non-Albanian community",* because *"one group of complaints of Serb employees to be approved on the basis of discrimination and the rest to be rejected due to the alleged absence of discrimination"*. In this context, the Applicant also informed the Appellate Panel that he and several other former employees of the Socially Owned Enterprise had submitted their allegations of discrimination to the Ombudsperson Institution on 10 October 2001.

24. On 8 October 2019, the Appellate Panel by Judgment [AC-I-17-0074-A123], rejected the Applicant's appeal as ungrounded, confirming the

Judgment of the Specialized Panel. By this Judgment, the Appellate Panel, referring to paragraph 1 of Article 64 [Oral Appellate Proceedings] of the Annex to the Law on the SCSC, specified that "*The Appellate Panel shall, on its own initiative or the written application*", while, in the relevant part with the Applicant's complaint, it reasoned that: (i) the Applicant did not provide sufficient evidence that at the time of the privatization of the Socially Owned Enterprise he was an employee of it; (ii) he did not complain to the Specialized Panel that he was a victim of discrimination as a reason for not continuing the employment relationship, while the claim that he was a victim of discrimination as a result of non-extension of the employment relationship was raised for the first time before the Appellate Panel; and (iii) the Applicant does not meet the requirerments of being on the payroll at the time of the privatization of the Socially Owned Enterprise as defined in paragraph 4 of Section 10 of UNMIK Regulation, in order to be granted the right to its inclusion in the Final List with the right to benefit in a part of 20% of the proceeds from the sale of the Socially Owned Enterprise.

Applicant's allegations

25. The Applicant alleges that the challenged Judgment of the Appellate Panel was rendered in violation of his fundamental rights and freedoms guaranteed by (i) Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR; (ii) Article 24 [Equality Before the Law] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) of the ECHR and Article 1 (General Prohibition of Discrimination) of Protocol no. 12 of the ECHR; and (iii) Article 49 [Right to Work and Exercise the Profession] of the Constitution.

26. With regard to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant states that the challenged Judgment of the Appellate Panel was rendered in violation of the procedural guarantees for one (i) hearing; and (ii) a reasoned court decision.

27. With regard to the first case, namely the absence of a hearing, the Applicant states that one was not held either before the Specialized Panel or before the Appellate Panel, preventing the parties from presenting their evidence. regarding his employment relationship in the Socially Owned Enterprise. In this regard, the Applicant states, *inter alia*, that (i) pursuant to paragraph 1 of Article 64 [Oral Appellate Proceedings] of the Annex to the Law on the SCSC, the Appellate Panel was obliged to hold a public hearing and that such an obligation was

based on this law, regardless of whether a request for a hearing has been filed or not, because failure to file a request for a hearing does not necessarily mean waiving the right to such a request; (ii) The Appellate Panel may be exempted of this obligation itself if "*there are exceptional circumstances which justify the absence of a hearing*"; and (iii) The Appellate Panel has prevented the parties from presenting their evidence because *"no regulation stipulates that the employment booklet is exclusively the only proof of the existence of the employment relationship",* whereas this was the decisive evidence on the basis of which the Applicant's allegations were rejected as ungrounded, not being given the opportunity to present through the hearing other of his evidence, including witnesses, as set out in Article 36 (General Rules on Evidence) of the Annex to the Law on SCSC. In the context of this category of allegations, the Applicant refers to the case law of the European Court of Human Rights (hereinafter: ECHR) in the cases of *Exel v. Czech Republic* (Judgment of 5 July 2005) and *Gőç v. Turkey* (Judgment of 11 July 2002).

28. As to the second case, namely the lack of a reasoned court decision, the Applicant states that the challenged Judgment fails to show the party that she/he has been heard and also, in the absence of adequate reasoning, prevents the party from exercising legal remedies against him effectively, the guarantees, which according to the Applicant, embodied in the case law of the ECHR regarding the reasoning of the court decision. In this context, the Applicant refers to the case law of the ECtHR, namely cases *H v. Belgium* (Judgment of 30 November 1987) and *Hirvisaari v. Finland* (Judgment of 25 December 2001).

29. Also, in support of his allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant also refers to the cases of the ECtHR, in the following cases: *Fredin v. Sweden* (no. 2) (Judgment of 23 February 1994); *Allan Jacobson v. Sweden* (no. 2), (Judgment of 19 February 1998); *Gőç v. Turkey* (Judgment of 11 July 2002); *Fischer v. Austria* (Judgment of 26 April 1995); *Salomonsson v. Sweden* (Judgment of 12 November 2002); *Dombo Beheer B.V. v. the Netherlands* (Judgment of 27 October 1993); *Golder v. United Kingdom*, (Judgment of 21 February 1975); *Stanev v. Bulgaria* (Judgment of 17 January 2012); *Ashingdane v. The United Kingdom* (Judgment of 28 May 1985) *Fayed v. The United Kingdom* (Judgment of 21 September 1990); *Marković and Others v. Italy* (Judgment of 14 December 2006); *Airey v. Ireland* (Judgment of 9 October 1979); and *Pretto and Others v. Italy* (Judgment of 8 December 1983).

30. With regard to the alleged violations of Article 24 of the Constitution in conjunction with Article 14 of the ECHR and Article 1 of Protocol no. 12 of the ECHR, the Applicant states that he was treated unequally in relation to the other parties in the proceedings before the Specialized Panel and the Appellate Panel both in terms of the assessment of the facts and the interpretation of the law. According to the Applicant (i) the evidence submitted to the SCSC was not treated in the same way as other employees of Albanian origin, because in the case of the latter, "*register from workers' registers on the grounds that their work booklets had been destroyed*"and the "*Health Booklet and the Decision of the SOE*" were accepted as evidence to prove the employment relationship, as long as the same did not happen in his case. In the context of this allegation, the Applicant refers to the reasoning given in the Judgment [C-II.-12-0023] of 31 January 2017 of the Specialized Panel in relation to two former employees of the Socially Owned Enterprise, respectively the K.B,, number of case [C-0026] and S.B., with case number [C-0029]; and (ii) the SCSC, has decided in different ways based on identical evidence and allegations both in relation to the factual situation but also in relation to discrimination. In the context of this allegation, the Applicant refers to the reasoning of the challenged Judgment of the Appellate Panel of the SCSC in relation to the former employee of the Socially Owned Enterprise, D.V. with case number [C-0004]. Furthermore, in support of his allegations of violation of the abovementioned articles of the Constitution and the ECHR, the Applicant refers to the case law of the ECtHR, namely *Sejdić and Finci v. Bosnia and Herzegovina* (Judgment of 22 December 2009); *Timishev v. Russia* (Judgment of 13 December 2005); and *Zornić v. Bosnia and Herzegovina* (Judgment of 15 July 2014). The Applicant also alleges a violation of the Convention on the Elimination of All Forms of Racial Discrimination.

31. With regard to the alleged violations of Article 46 of the Constitution, the Applicant, in essence, raises allegations related to Article 49 of the Constitution. Regarding the latter, the Applicant states, *inter alia*, that (i) the employment relationship with the Socially Owned Enterprise was established on the basis of the provisions of the "Law on Associated Labor (Official Gazette no. 53/76)" and based on Article 219 of this Law, in case of termination of employment, it is necessary for the employee to be served with a written decision, a decision which has never been served on the Applicant; and (ii) that "*his employment relationship officially existed at the time of privatization, and that the employment book and the register of workers on behalf of the Applicant was not closed and was not delivered to the Applicant should never be disregarded*". In this context, and finally, the Applicant also states that

in his case the "Conventions of the International Labor Organization" have been violated.

32. Finally, the Applicant requests the Court to impose an interim measure, reasoning as follows: *"Considering the duration of this procedure before the PAK and the SCSC, the Constitutional Court should act with priority according to this request, namely to submit the proposal for imposing an interim measure"*.

33. Finally, the Applicant requests the Court (i) to approve his Referral as admissible; (ii) to find a violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR; Article 31 of the Constitution in conjunction with Article 6 of the ECHR; and Article 49 of the Constitution; and (iii) modify the challenged Judgment [AC-I-17-0074-A123] of 8 October 2019 of the Appellate Panel, "*confirming his right to benefit 20% of privatization proceeds*" or order the Appellate Panel "*to repeat the procedure*" at the Specialized Panel of the SCSC.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 24
[Equality Before the Law]

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

Article 31
[Right to Fair and Impartial Trial]

5. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

Article 49 [Right to Work and Exercise Profession]

1. The right to work is guaranteed.
2. Every person is free to choose his/her profession and occupation.

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.
[...]

Article 14
Prohibition of discrimination

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

Protocol No. 12 of the European Convention on Human Rights

Article 1
General prohibition of discrimination

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Annex of the Law No. 04/L-033 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters –Rules of Procedure of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters

Article 36
General Rules on Evidence

[…]
3. A party alleging a fact or an event shall be given a reasonable opportunity to submit or produce material evidence in support of such allegation. If such party fails to submit or produce any such evidence, the party shall be determined to have not discharged its burden of proof with respect to that allegation.

Article 64
Oral Appellate Proceedings

1. *The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application must be filed prior to the closing of written appellate procedures.*
[…]

Article 65
Submission of New Evidence

In exceptional circumstances and for good cause shown, the Appellate panel may permit a party to present to the Appellate Panel new evidence that was not available to the party during

the evidentiary portion of the first instance proceedings. A written application for such permission must first be submitted to the Appellate Panel and served on the other parties not less than fifteen (15) days before the date of the hearing where such evidence is proposed to be presented. The Appellate Panel may authorize the presentation of such new evidence if it considers it to be in the interests of justice.

Article 68
Complaints Related to a List of Eligible Employees

1. The procedure for cases based on complaints falling within the scope of paragraph 1.6 of Article 4 of the Special Chamber Law shall, except as specifically provided in this Article 68, generally follow the other procedural rules set forth in this Annex, which the Special Chamber shall apply mutatis mutandis as the Special Chamber deems necessary and in the interest of justice.
2. Upon receiving a list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such a list, the Agency shall publish such list together with a notice to the public of the right of any person to file a complaint with the Agency within twenty (20) days after the date of publication requesting inclusion in such list and/or challenging the inclusion of one or more other persons in such list. The person filing any such request or challenge shall include therein a statement of the facts and the legal arguments supporting such request or challenge; such person shall have the burden of proving all facts alleged in the request and/or challenge.
[…]
6. The Agency shall publish its final list of eligible employees established pursuant to paragraph 5 of this Article in conformity with Section 10.6 of UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such list, together with a notice to the public of the right of any person to file a complaint with the Special Chamber within twenty (20) days after the date of publication challenging such list and/or the Agency's distribution of escrow funds to the persons identified therein. The complainant(s) filing any such complaint shall include therein a statement of the facts and the legal arguments supporting such complaint; the complainant(s) shall have the burden of proving all facts alleged in the complaint.
[…]
11. The concerned Specialized Panel, acting on its own initiative or pursuant to a written request of the complainant(s) or the

Agency, may decide to hold one or more oral hearings on the matter. If an oral hearing is to be held, the Specialized Panel shall cause the Registrar to serve on the parties, at least five (5) days in advance of such hearing, a written notice of the time and date of such hearing.
[…]
14. The Appellate Panel shall dispose of all such appeals as a matter of urgency.

Law No. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters [published in the Official Gazette of the Republic of Kosovo on 27 June 2019]

Article 69
Oral Appellate Proceedings

1. The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on one or more hearing sessions on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application shall be filed prior to the closing of written appellate procedures.
[…]

Regulation No. 2003/13 on the Transformation of the Right of Use to Socially Immovable Property

Article 10
Rights of Employees

[…]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Sociallyowned Enterprise at the time of privatisation or initiation of the liquidation. procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[…]

Regulation no. 2004/45 amending Regulation no. 2003/13 on the Transformation of the Right of Use to Socially-owned Immovable Property
Section 1
Amendments

As of the date of entry into force of the present Regulation,
[...]
B. Sections 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13 shall be amended to read:
[...]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially owned Enterprise at the time of privatisation or initiation of the liquidation procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[...]

Admissibility of the Referral

34. The Court first examines whether the Referrals have fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure.

35. 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 ofall legal remedies provided by law".

36. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the

Court refers to Article 47 [Individual Requests], Article 48 [Accuracy of the Referral] and Article 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...".

37. With regard to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party and challenges an act of public authority, namely Judgment [AC-I-17-0074-A123] of 8 October 2019 of the Appellate Panel in conjunction with Judgment [C-II-12-0023] of 31 January 2017 of the Specialized Panel of the SCSC, after having exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

38. The Court also finds that the Applicant's Referral also meets the admissibility criteria established in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. Furthermore, and finally, the Court considers that this Referral is not manifestly ill-founded as set out in paragraph (2) of Rule

39 of the Rules of Procedure and, consequently, it must be declared admissible and its merits examined.

Merits

39. The Court recalls that the circumstances of the present case relate to the privatization of the Socially Owned Enterprise SOE "SHARR" and the rights of the respective employees to be granted the status of employees with legitimate rights to participate in the twenty percent proceeds (20%) from this privatization, as defined in Article 68 of the Annex to the Law on SCSC and paragraph 4 of Article 10 of Regulation 2003/13. The Applicant is one of the former employees of the aforementioned enterprise, who was not included in the Final List published on 7, 8 and 9 June 2012. His appeal to the Specialized Panel was rejected as ungrounded. Before the Appellate Panel, the Applicant filed allegations related to the erroneous determination of facts and discrimination and the same were rejected as ungrounded at the level of the Appellate Panel. A hearing was not held at the Specialized Panel or the Appellate Panel. The first pointed out that *"The judgment was rendered without holding a public hearing, because the facts and legal arguments that have been provided are sufficiently clear. The Panel does not expect any other relevant information for review. […]",* while the second, had stated that *"the Appellate Panel decides to waive the oral part of the proceedings".*

40. The Applicant challenges the findings of the Appellate Panel before the Court, alleging (i) a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the failure to hold a hearing and the lack of reasoning for the court decision; (ii) violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR and Article 1 of Protocol no. 12 of the ECHR due to unequal treatment; and (iii) violation of Article 49 of the Constitution. These categories of allegations will be examined by the Court on the basis of the case law of the Court and the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

41. In this regard, the Court will first examine the Applicant's allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the absence of a hearing before the SCSC. To this end, the Court will first (i) elaborate on the general principles regarding the right to a hearing as guaranteed by the aforementioned Articles of the Constitution and the ECHR; and then, (ii) apply the same to the circumstances of the case.

(i) General principles regarding the right to a hearing

42. The Court first notes that the case law of the ECtHR established the basic principles regarding the right to a hearing. Based on this case law, the Court has also established the relevant principles and exceptions, based on which the necessity of holding a hearing is assessed, depending on the circumstances of the respective cases. Recently, through a number of judgments, the Court has emphasized these principles, finding a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the lack of a hearing before the SCSC, namely before the Specialized Panel of the ECHR and the Appellate Panel, when determining the rights of employees of the former enterprise "Agimi", after the privatization of the latter, to which cases Court will refer in the following as cases of the Court of the former enterprise "Agimi". (See 5 (five) judgments in the cases of the former enterprise "Agimi": KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicants *Et-hem Bokshi and others*, Constitutional Review of the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, AC-I-13-0181-A0008, of 29 August 2019, Judgment of 10 December 2020; KI160/19, KI161/19,KI162/19, KI164/19, KI165/19, KI166/19, KI167/19, KI168/19, KI169/19, KI170/19, KI171/19, KI172/19, KI173/19 and KI178/19, Applicant *Muhamet Këndusi and others*, Constitutional of review of the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, AC-I-13-0181-A0008, of 29 August 2019, Judgment of 27 January 2021; KI181/19, KI182/19 and KI183/19, with Applicant *Fllanza Naka, Fatmire Lima and Leman Masar Zhubi*, Constitutional review of the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo related Matters, AC-I-13-0181-A0008, of 29 August 2019; Judgment of 27 January 2021; KI220/19, KI221/19, KI223/19 and KI234/19, by Applicant *Sadete Koca Lila and others*, Constitutional review of the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, AC-I-13-0181-of 29 August 2019, Judgment, of 25 March 2021; and KI 186/19; KI187/19, KI200/19 and KI208/19, Applicant *Belkize Vula Shala and others*; Judgment, of 28 April 2021). The Court, during the elaboration of the elaborated principles confirmed through the above Judgments of the Court and the application of these in the circumstances of the present case will refer to its first Judgment in

relation to the former enterprise Agimi, namely cases KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others).*

43. The principles elaborated in the relevant case law of the ECtHR, but also in the above cases, namely the judgments of the Court in the cases of the former enterprise "Agimi", emphasize that the public nature of proceedings before judicial bodies referred to in Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, protects the litigants from the administration of justice in secret, in the absence of a public hearing. Publicity of court proceedings is also one of the main mechanisms through which trust in justice is maintained. Such a principle, moreover, contributes to the achievement of the goals of Article 31 of the Constitution and Article 6 of the ECHR, for a fair trial, the guarantee of which is one of the fundamental principles of any democratic society embodied in Constitution and ECHR (See the above cases of the Court in the case of the former enterprise Agimi KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 ans KI159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 47).

44. In principle, litigants are entitled to a public hearing, but such an obligation is not absolute. As relevant to the present circumstances, the case law of the Court bases on the case law of the ECtHR has developed key principles concerning (i) the right to a hearing in the courts of first instance; (ii) the right to a hearing in the courts of second and third instance; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of the first instance hearing can be corrected through a higher instance hearing and the relevant criteria for making that assessment. However, in all circumstances, the absence of a hearing must be justified by the relevant court. (See the cases of the Court in the case of the former enterprise "Agimi", KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 48).

45. With regard to the first issue, namely the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in the proceedings before a sole and first instance court, the right to a hearing is guaranteed by paragraph 1 of Article 6 of the ECHR (See, *inter alia*, the ECtHR cases *Fredin v. Sweden* (no. 2), Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden* (no. 2), Judgment

of 19 February 1998, paragraph 46; *Göç v. Turkey, Judgment of 11 July 2002, paragraph 47;* and *Selmani and Others v. the Former Yugoslav Republic of Macedonia,* Judgment of 9 February 2017, paragraphs 37-39, see also cases KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others,* cited above, paragraph 49).

46. According to the case law of the ECtHR, exceptions to this general principle are cases in which "*there are extraordinary circumstances that would justify the absence of a hearing*" in the first and only instance. (See, in this regard, the cases of the ECtHR, *Hesse-Anger and Anger v. Germany*, Decision of 17 May 2001; and the *Mirovni Institute v. Slovenia*, Judgment of 13 March 2018, paragraph 36). The character of such extraordinary circumstances stems from the nature of the cases involved in a case, for example, the cases dealing exclusively with legal matters or are of a very technical nature (See the case of the ECtHR, *Koottummel v. Austria*, Judgment of 10 December 2009, paragraphs 19 and 20).

47. With regard to the second case, namely the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified on the basis of the specific characteristics of the relevant case, provided that a hearing has been held in the first instance. (See, in this context, the case of the ECtHR, *Salomonsson v. Sweden*, Judgment of 12 November 2002, paragraph 36). Therefore, proceedings before the courts of appeal, which involve only matters of law and not matters of fact, may be considered to be in accordance with the guarantees embodied in Article 6 of the ECHR, even if in the second instance there has not been a hearing. (See the case of the ECtHR, *Miller v. Sweden*, Judgment of 8 February 2005, paragraph 30; and see also the cases of the Court, KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 50). Having said that, and in principle, the absence of a hearing can only be justified through the "*existence of exceptional circumstances*", as defined through the case law of the ECtHR, otherwise it is guaranteed to the parties in at least one level of jurisdiction, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

48. With regard to the third issue, namely the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to the Judgment of 6 November 2018 of the ECtHR *Ramos*

Nunes de Carvalho and Sá v. Portugal, in which the Grand Chamber of the ECtHR established the principles on the basis of which the necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) involves merely legal matters of a limited nature (see, ECtHR cases *Allan Jacobsson v. Sweden* (no. 2), cited above, para 49; and *Valová, Slezák and Slezák v. Slovakia*, Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see the case of the ECtHR, *Varela Assalino v. Portugal*, Decision of 25 April 2002); (ii) involves highly technical matters, which are better addressed in writing than through oral arguments in a hearing; and (iii) does not involve issues of credibility of the parties or disputed facts and the courts may decide fairly and reasonably on the basis of the parties' submissions and other written materials. (See the cases of the ECtHR, *Döry v. Sweden*, Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria*, Judgment of 18 December 2008, paragraph 73, see also the cases of the Court, KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 51).

49. On the contrary, based on the aforementioned Judgment, a hearing is necessary if the relevant case (i) involves the need to consider issues of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly (see, *inter alia*, the cases of the ECtHR, *Malhous v. Czech Republic*, Judgment of 12 July 2001, paragraph 60; and *Fischer v. Austria*, Judgment of 26 April 1995, paragraph 44); and (ii) requires the relevant court to gain a personal impression of the parties concerned, and to allow them the opportunity to clarify their personal situation, in person or through the relevant representative. Examples of this situation are cases where the court must hear evidence from the parties concerning personal suffering in order to determine the appropriate level of compensation (see ECtHR cases, *Göç v. Turkey*, cited above, paragraph 51; and *Lorenzetti v. Italy*, Judgment of 10 April 2012, paragraph 33) or must provide information about the character, conduct and dangerousness of a party (See the case of the ECtHR, *De Tommaso v. Italy*, Judgment of 23 February 2017, paragraph 167).

50. With regard to the fourth case, namely the possibility of a second-instance correction of the absence of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on powers of the highest court. If the latter has full jurisdiction to examine the merits of the case at hand, including the assessment of the facts, then the correction of the

absence of a hearing in the first instance may be made in the second instance (See the case of the ECtHR, *Ramos Nunes de Carvalho v. Portugal*, cited above, paragraph 192 and references used therein).

51. The Court, referring consistently to the case law of the ECtHR and that of the Court, states that the fact that the parties did not request to hold a hearing does not mean that they waived their right to hold one. (See the cases of the Court, KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 54, for more on the waiver of the right to a hearing, see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil limb, IV. Procedural Criteria B. Public Hearing, paragraphs 401 and 402 and references used therein). Based on the case law of the ECtHR, such a case depends on the characteristics of domestic law and the circumstances of each case separately (See the case of the ECtHR, *Göç v. Turkey*, cited above, paragraph 48).

52. Finally, the Court summarizes the factual circumstances of the cases of the former enterprise "Agimi" [Judgment of the Court of 10 December 2020 in cases KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19], as well as its findings, which have resulted in finding a violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, as a result of the absence of a hearing at the Appellate Panel of the SCSC. The circumstances of this above case were related to the privatization of Enterprise SOE "Agimi" in Gjakova and the respective rights of workers to be recognized the status of workers with legitimate rights to participate in the proceeds of twenty percent (20%) from this privatization, as defined in Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to the Law on the Special Chamber of the Supreme Court and paragraph 4 of Article 10 of Regulation no. 2003/13 and amended by Regulation no. 2004/45. The Applicants were not included in the Temporary List of Employees with legitimate rights to participate in the proceeds of twenty percent (20%) from the privatization of SOE "Agimi". As a result of the rejection of their appeal by the Privatization Agency of Kosovo, the Applicants initiated a lawsuit with the Specialized Panel of the Special Chamber of the Supreme Court, challenging the Decision of the Privatization Agency of Kosovo. All Applicants requested that a hearing before the Specialized Panel. The Specialized Panel rejected the request for a hearing on the grounds that "*the facts and evidence submitted are sufficiently clear*",

entitling the Applicants, with the exception of two, and finding that they were discriminated against, therefore they should be included in the Final List of the Privatization Agency of Kosovo. Acting on the basis of the appeal of the Privatization Agency of Kosovo against this Judgment, in August 2019, the Appellate Panel issued the challenged Judgment, by which it approved the appeal of the Privatization Agency of Kosovo and modified the Judgment of the Specialized Panel, removing from "*the list of beneficiaries 20% of the privatization process of SOE "Agimi" Gjakova*" all applicants. This Judgment was challenged by the Applicants before the Court, claiming, *inter alia*, that it was rendered contrary to Article 31 [Right to Fair and Impartial Trial] on the grounds that the Appellate Panel modified the Judgment of the Specialized Panel (i) without a hearing; (ii) without sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

53. In assessing the Applicants' allegations in these cases, the Court focused on those related to the absence of a hearing before the Special Chamber of the Supreme Court. The Court, after applying the abovementioned principles established through the case law of the ECtHR, found that the challenged Judgment, namely Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, regarding the right to a hearing, *inter alia*, because (i) the fact that the Applicants have not requested a hearing before the Appellate Panel, does not imply their waiver of this right, nor does it exempt the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the Special Chamber of the Supreme Court; (iii) the Appellate Panel had not dealt with "*exclusively legal or highly technical matters*", the matters on the basis of which "*extraordinary circumstances that could justify the absence of a hearing*" could have existed; (iv) The Appellate Panel had, in fact, considered "*fact and law*" issues, which, in principle, require a hearing; and (v) the Appellate Panel did not justify the "*waiver of the oral hearing*". The Court also recalls that the same principles and findings were applied and decided in three other judgments in the cases of the former enterprise "Agimi" through which it found a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of the failure to hold a hearing at the level of the Appellate Panel.

(i) Application of the principles elaborated above to the circumstances of the present case

54. The Court first recalls that based on the case law of the ECtHR and that of the Court, Article 31 of the Constitution and Article 6 of the ECHR, in principle, guarantee that a hearing be held at least one level of decision-making. Such is, as elaborated above, in principle, (i) mandatory if the court of first instance has sole jurisdiction to decide matters of fact and law; (ii) not mandatory in the second instance if a hearing is held in the first instance, despite the fact that such a determination depends on the characteristics of the case at hand, for example, if the second instance decides on both fact and law; and (iii) mandatory in the second instance if one has not been held in the first instance, in cases where the second instance has full competence to assess the decision of the first instance, also with regard to the issues of fact and law. Exceptions to these cases, in principle, are made only if "*there are exceptional circumstances that would justify the absence of a hearing*", and which the ECtHR, as explained above, through its case law has defined as cases that deal exclusively with legal issues or are of a highly technical nature.

55. Based on the principles set out above, in the following the Court must first assess, in the circumstances of the present case, the fact that the Applicant did not request a hearing before the Specialized Panel and the Appellate Panel may result in their finding that they have waived the right implicitly from a hearing. If the answer to this question turns out to be negative, then the Court, based on the case law of the ECtHR, must assess whether in the circumstances of the present case "*there are exceptional circumstances that would justify the absence of a hearing*" in the two instances of decision-making, mainly before the Specialized Panel and the Appellate Panel. The Court will also make this assessment based on the principles established by the Judgment of the Grand Chamber *Ramos Nunes de Carvalho and Sá v. Portugal,* as well as the case law of the Court itself in the cases of the former enterprise "Agimi".

a) If the Applicant has waived the right to a hearing

56. In this regard, the Court first recalls that through individual complaints filed with the Specialized Panel, all Applicants requested a hearing. The Court recalls that the Judgment of the Specialized Panel through which it was decided on the appeals of the former employees of the former Socially Owned Enterprise, who were not included in the Final List, stated that based on paragraph 11 of Article 68 of the Annex to the Law

on the SCSC, a hearing was not necessary because "*the facts and evidence submitted are sufficiently clear*".

57. As already clarified, the Specialized Panel, by Judgment [C-II-12-0023], based on the facts and evidence submitted by the Applicant, rejected his appeal as ungrounded. The Court also recalls that the Applicant against the aforementioned Judgment of the Specialized Panel filed an appeal with the Appellate Panel. In his appeal, the Applicant alleged erroneous and incomplete determination of the factual situation and erroneous application of the law. With regard to the first, the Applicant stated that (i) the finding of the Specialized Panel that in his case there is no evidence of his employment relationship after 1 June 1997 is "*erroneous and contrary to the presented material evidence*" because based on the submitted evidence, it is confirmed that he started his employment relationship on 10 February 1992, while the latter was terminated in March 1999 as a result of "*the circumstances of the war, [...] and after the war due to the circumstances of security and discrimination, I was in fact unable to perform my work and work duties [...]*"; (ii) his employment booklet attached as evidence confirms the fact that "*there is no termination of work experience after 01.06.1997*"; (iii) the statements of all employees of the said enterprise, as witnesses, would confirm the accuracy of his claims; and (iv) on the basis of the evidence submitted, it is established that he meets the criteria set forth in paragraph 4 of Section 10 of UNMIK Regulation 2003/13, as amended by UNMIK Regulation 2004/45.

58. The Court notes that the Applicant by his appeal to the Appellate Panel did not expressly request a hearing. However, based on the content of his appeal, which is briefly reflected in a summarized manner in the challenged Judgment of the Appellate Panel, the Applicant specifies that *"the fact that he worked in the SOE even after 01 June 1997 can be clearly confirmed by the statement of all employees in the mentioned enterprise, namely by hearing them as witnesses and the decision on the establishment of the registration commission no. 725 of 23 December 1998 as well as the certificate dated 25 February 1999*". Based on the content of this specific allegation, raised in his appeal, filed with the Appellate Panel, the Court notes that the Applicant in the reasoning of his allegation of erroneous and incomplete determination of the factual situation by the Specialized Panel specifies that the extension of his employment relationship even after 1 June 1997 can be proved by the statements of the former employees of the Enterprise after hearing them as witnesses.

59. In the following, the Court, based on the case file, and specifically on the content of the two judgments of the Specialized Panel and that of the Appellate Panel, cannot determine precisely whether the former employees of the former enterprise in the capacity of appellants in this proceedings, whose complaints were dealt with jointly by the Specialized Panel and that of the Appellate Panel to have filed such a request. In any case, the Court based on Judgment [C-II-12-0023] of the Specialized Panel and challenged Judgment [AC-I-17-0074-A123] of the Appellate Panel that these two instances had waived the holding a hearing with reference to Article 68, paragraph 11 and Article 64, paragraph 1 of the Annex to the Law on the SCSC. In this regard, the Court specifically reiterates that the Specialized Panel in its Judgment, namely in the part of the summary of facts and proceedings before this Panel specified that *"The judgment was rendered without holding a public hearing, because the facts and legal arguments which have been provided are sufficiently clear. The Panel does not expect any other relevant information for consideration. Article 68.11 of the Annex to the Law on the Special Chamber no. 04/L-033"*.

60. The Court also recalls that the Applicant in his Referral submitted to the Court alleges that (i) pursuant to Article 64 of the Annex to the Law on the SCSC, the Appellate Panel was obliged to hold a public hearing and that such an obligation it based on this law, regardless of whether a request for a hearing was filed or not, because failure to file a request for a hearing does not necessarily mean waiving the right to such a request; (ii) The Appellate Panel may have been exempted of this obligation only if "*there are exceptional circumstances which justify the absence of a hearing*"; and (iii) the Appellate Panel prevented the parties from presenting their evidence because "*no regulation stipulates that the employment booklet is exclusively the only evidence of the existence of the employment relationship*", while this was the decisive evidence based on which the allegations of the Applicant were rejected as ungrounded, by not being given the opportunity, as provided in Article 36 (General Rules on Evidence) of the Annex to the Law on SCSC, to present his other evidence through the hearing, such as witnesses. In the context of this category of allegations, the Court recalls that the Applicant referred to the cases of the ECtHR, namely case *Exel v. the Czech Republic* (Judgment of 5 July 2005); *Gőç v. Turkey*, (Judgment of 11 July 2002); *Fredin v. Sweden* (no. 2) (Judgment of 23 February 1994); *Allan Jacobson v. Sweden* (no. 2), (Judgment of 19 February 1998); *Fischer v. Austria* (Judgment of 26 April 1995); *Salomonsson v. Sweden* (Judgment of 12 November 2002).

61. In this context and as explained above based on the case law of the Court and of the ECtHR, the fact that the Applicant has not filed a request for a hearing before the Specialized Panel and expressly the same request was not filed in the the Appellate Panel does not necessarily mean that it has implicitly waived such a request, and also the absence of this request does not necessarily exempt the relevant court, namely the SCSC, from the obligation to hold such a hearing.

62. More specifically, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, such as the Applicant's case, the ECtHR, *inter alia*, assesses whether the absence of such a request may be considered as an implied waiver of the respective Applicant from the right to a hearing. Having said that, the lack of a request for a hearing, based on the case law of the ECtHR, is never the only factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing exempts a court from the obligation to hold a hearing depends on (i) the specifics of the applicable law; and (ii) the circumstances of a case. (See ECtHR case *Göç v. Turkey*, cited above, 46). In the following, the Court will assess these two categories of cases.

63. First, with regard to the specifics of the applicable law, namely the Law and the Annex to the Law on the SCSC, the Court recalls that pursuant to Article 64 (Oral Appellate Proceedings) of the same law, "*The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal*", based on its initiative or even a written request from a party. Article 69 (Oral Appellate Proceedings) of Law no. 06/L-086 on the SCSC, has the same content. Based on these provisions, the court by the judgments in the cases of the former enterprise "Agimi", assessed that the holding of a hearing does not necessarily depend on the request of the party. Based on the applicable provisions, it is also the duty of the relevant Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held. Furthermore, beyond the competencies of the Specialized Panel, based on Article 60 (Content of appeal) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the Appellate Panel has the competence to assess both issues of law and fact, and consequently, is equipped with full competence to assess how the lower authority, namely the Specialized Panel, has assessed the facts, namely the Specialized Panel. The Court notes that based on Article 64 of the Annex to the Law on SCSC and Article 69 of Law no. 06/L-086 on the SCSC, it is the obligation of the Appellate Panel, even on its own initiative, to assess whether the holding of a hearing is mandatory, and if not, to justify the non-holding of the latter (See in

this context the cases of the Court in the cases of the former enterprise "Agimi": KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, *Et-hem Bokshi and others*, cited above, paragraph 61).

64. Secondly, with regard to the circumstances of a case, the Court recalls that the case law of the ECtHR states that the absence of a request for a hearing, and the assessment of whether this fact may result in the finding that the party concerned implicitly waived the right to a hearing, it should be assessed in the entirety of the specifics of a procedure, and not as a single argument, to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR (See the cases of the Court in the case of the former enterprise Agimi, KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others*, cited above, paragraph 62).

65. More specifically, in cases where a party concerned has not made a request for a hearing in any of the instances, similar to the Applicant's case, the ECtHR in case *Salomonsson v. Switzerland* (Judgment of 12 February 2003), in which the Applicant did not request a hearing in either of the instances, although the ECtHR found that the Applicant could be considered to have implicitly waived the right to a hearing (see paragraph 35 of the case of *Salomonsson v. Switzerland*), nevertheless found a violation of Article 6 of the ECHR due to the absence of a hearing, because it concluded that in the circumstances of the present case, there were no exceptional circumstances that would justify the absence of a hearing, especially given the fact that the appellate level also considered factual issues and not just the law. (See ECtHR case *Salomonsson v. Switzerland*, cited above, paragraphs 36-40).

66. On the other hand, in the case of *Goc v. Turkey*, the ECtHR also found a violation of Article 6 of the ECHR due to the absence of a hearing, rejecting the allegations of the Turkish Government that (i) the case was simple and that it could be dealt with promptly only on the basis of the case file, in particular because the respective complainant did not request the submission of any new evidence through the complaint; and that (ii) the Applicant did not request the holding of a hearing (For the facts of the case, see paragraphs 11 to 26 of the case of ECtHR *Goç v. Turkey*). In the examination of the respective case, and after assessing whether there were any exceptional circumstances that would justify the absence of a hearing, the ECtHR found a violation of paragraph 1 of Article 6 of the ECHR, stating, *inter alia*, that (i) despite the fact that the Applicant concerned did not request a hearing, it does

not appear from the circumstances of the case that such a request would have any prospect of success; furthermore that (ii) it cannot be considered that the Applicant concerned has waived his right to a hearing by not seeking one before the Court of Appeals as the latter did not have full jurisdiction to determine the amount of compensation; (iii) the respective Applicant was not given the opportunity to be heard even before the lower instance and which had jurisdiction to assess both the facts and the law; and (iv) the substantive issue, in the circumstances of this case, was whether the Applicants concerned should be offered a hearing before a court which was responsible for establishing the facts of the case (for the reasoning of the case, see paragraphs 43 to 52 of case *Goç v. Turkey*).

67. Subsequently, referring to the factual and legal circumstances of the case *Gőç v. Turkey*, and comparing them with the factual and legal circumstances of the Applicant's case, the Court recalls that the Specialized Panel had waived the right to hold a hearing, on the grounds that the facts and arguments set out in writing were sufficiently clear for this Panel to consider and decide on the complaints of former employees of the former enterprise, including that of the Applicant. In the context of this finding of the Specialized Panel, including the similar finding of the Appellate Panel to waive the right from the hearing, as well as the fact that the Appellate Panel upheld the position of the Specialized Panel rejecting the Applicant's appeal against In the decision of the PAK, the Court considers that even if the Applicant had filed such a request before the Appellate Panel, it would not have had a prospect of success.

68. The Court recalls that in the circumstances of the present case, (i) the Applicant was not given the opportunity to be heard before the Specialized Panel, with jurisdiction to assess the facts and the law; The Appellate Panel confirmed that the Specialized Panel had fully determined the factual situation and had correctly applied the applicable law.

69. In the following, the Court comparing the factual and legal circumstances of the cases of the former Enterprise "Agimi" (see specifically the cases of the Court in the case of the former enterprise Agimi, KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *Et-hem Bokshi and others*, cited above) with the circumstances of the Applicant's case finds that the latter differ in the following aspects: (i) in contrast to the Applicant's case in the cases of the former Enterprise "Agimi" the Applicants in the Specialized Panel had requested that a hearing be held; (ii) The Specialized Panel,

with the exception of two Applicants, approved the Applicants' appeal against the PAK Decision not to include them in the Final List, and decided that they should be included in the PAK Final List; (iii) The Appellate Panel approved the appeal of the PAK against the Judgment of the Specialized Panel and consequently modified the latter, rejecting the appeal of all the Applicants against the Decision of the PAK as ungrounded and removing them from the Final List of the PAK. Whereas in the Applicant's case, the Specialized Panel rejected the Applicant's appeal against the PAK Decision as ungrounded, and consequently the Appellate Panel also rejected the Applicant's appeal against the Judgment of the Specialized Panel, confirming the position and finding of the latter. Despite the fact that the Appellate Panel has confirmed the position and finding of the Specialized Panel, which the latter based on the determination of the factual situation and the application of the relevant law, the Court considers that the Appellate Panel to achieve such a finding has reviewed all the facts submitted through the Applicant's initial complaint to the Specialized Panel and responds to the PAK complaint.

70. Therefore, despite the above-mentioned differences of the Applicant's case with the Applicants case of the former Enterprise "Agimi", who requested a hearing before the Specialized Panel, the Court could not, however, find that the lack of expression of the Applicant to hold a hearing means that he has waived his right to hold a hearing, at least in one of the instances of the SCSC. Furthermore, the Court recalls that the Applicant as in his appeal submitted to the Appellate Panel stated that his employment relationship even after 1997 could be proved through the statements of all the employees in the said enterprise, who in the capacity of witnesses, could confirm the accuracy of the his claims. In this connection, the Court recalls that the Applicant in his Referral before the Court alleges that the Appellate Panel prevented the parties from presenting their evidence because *"no regulation stipulates that the employment booklet is exclusively the only proof of the existence of the employment relationship",* while this was the decisive evidence on the basis of which the Applicant's allegations were rejected as unfounded, not being given the opportunity to present through the hearing his other evidence, including witnesses, as defined in Article 36. Having said that, the Court cannot find that the Applicant's failure to request a hearing at the level of the Appellate Panel can be considered as his implied waiver of the right to a hearing, and in particular, not without assessing whether in the circumstances of the present case, "*there are exceptional circumstances that would justify the absence of a hearing*". This is because, in all the cases in which the ECtHR had reached such a finding, it had made it in connection with the fact that the circumstances of the cases were

related to matters of an exclusively legal or technical nature, and consequently "*there were extraordinary circumstances that would justify the absence of a hearing*". Consequently, the Court must assess whether in the circumstances of the present case, "*there are exceptional circumstances that would justify the absence of a hearing*", namely whether the nature of the cases before the Appellate Panel can be classified as "*exclusively legal or of a highly technical nature*", based on the case law of the Court and the ECtHR.

a) Whether in the circumstances of the present case there are extraordinary circumstances which would justify the absence of a hearing

71. The Court recalls once again that based on the case law of the ECtHR, upheld by the case law of the Court itself, the parties are entitled to a hearing in at least one instance. This instance is mainly the first instance, and the one which has the jurisdiction to decide on both factual and legal issues (see Court cases concerning the former Enterprise Agimi, KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *E'them Bokshi and others*, cited above, paragraph 69). In this context, regarding the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified based on the specific characteristics of the relevant case, provided that a hearing be held in the first instance. In principle, if a hearing is held in the first instance, the proceedings before the courts of appeal, and which involve only matters of law, and not matters of fact, may be considered to be in accordance with the guarantees enshrined in Article 6 of the ECHR , even if in the second instance no hearing was held. Having said that, the exception to the right to a hearing are only those cases in which it is determined that "*there are extraordinary circumstances that would justify the absence of a hearing*". These circumstances, as explained above, the case law of the ECtHR has classified as cases which relate to "*exclusively legal or highly technical issues*". (See case *Schuler-Zgraggen v. Switzerland, cited above* and *Döry v. Sweden*, të cited above).

72. Similarly, the ECtHR operates also in those cases in which the issues before the relevant Court are exclusively legal, and do not involve an assessment of the disputed facts. (See ECtHR case *Saccoccia v. Austria,* cited above, paragraph 78).

73. On the contrary, in other cases in which the ECtHR found that the cases before the relevant courts involved both issues of fact and law, it did not

find that there "*were exceptional circumstances that would justify the absence of a hearing*". For example, in the cases of *Malhous v. the Czech Republic* (Judgment of 12 July 2001), the ECtHR found a violation of Article 6 of the ECHR due to the absence of a hearing, as it determined that the cases complained of by the respective Applicant were not limited to the issues of law but also the fact, namely the assessment of whether the lower authority had assessed the facts correctly (See the case of the ECtHR *Malhous v. Czech Republic*, cited above, paragraph 60). Similarly, in the case of *Koottummel v. Austria* (Judgment of 10 December 2009), the ECtHR found a violation of Article 6 of the ECHR for absence of a hearing because it found that the cases before it could not qualify as matters of an exclusively legal nature, or of a technical nature, which could consist of exceptional circumstances which would justify the absence of a hearing (See the case of the ECtHR, *Koottummel v. Austria*, cited above, paragraphs 20 and 21).

74. Similarly, as in the circumstances of the cases cited above of the ECtHR *Malhous v. Czech Republic* and *Koottummel v. Austria*, the Court by applying this position of the ECtHR also in the circumstances of the present case considers that the Appellate Panel has jurisdiction over both fact and law issues. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Law on the SCSC) and paragraph 4 of Article 64 (Oral Appellate Proceedings) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the parties have, *inter alia*, the opportunity to raise complaints before the Appellate Panel regarding both matters of law and facts, including the opportunity of presenting new evidence.

75. The Court further notes that in accordance with Article 68 of the Annex to the Law on the SCSC, in the event of complaints concerning the list of employees with legitimate rights, the burden of proof falls on the Applicants before the Specialized Panel. Also, the burden of proof for the opponent of such a request falls on the responding party, namely the PAK, in the circumstances of the present case. Before the Appellate Panel, the burden of proof also falls on the appellant concerned. The circumstances of the present case are also, in essence, related to allegations of discrimination. This allegation was rejected by the Appellate Panel through its Judgment on the grounds that the Applicant did not raise it in the proceedings before the Specialized Panel. In case of allegations of discrimination, the burden of proof, based on Article 8 (Burden of proof) of the Anti- Discrimination Law, falls on the respondent, namely the PAK, and not the Applicant. (See,

Court cases KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, cited above, paragraph 76).

76. In such circumstances, and applying the ECtHR position in cases *Malhous v. The Czech Republic* and *Koottummel v. Austria*, and in the case-law of the former enterprise "Agimi", the Court notes that: (i) the Appellate Panel has considered issues both of fact and law; (ii) and with regard to the facts, the burden of proof that they meet the criteria of paragraph 4 of Article 10 of UNMIK Regulation no. 2003/13, in principle falls on the Applicant. Therefore, the Court considers that it is indisputable that the issue under consideration before the Appellate Panel, is not (i) either an exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel contained important factual and legal issues. Consequently, the Court must find that in the circumstances of the present case, there are no circumstances which would justify the absence of a hearing.

77. In support of this finding, the Court recalls that the ECtHR Judgment *Ramos Nunes de Carvalho v. Portugal*, and to which it referred also in the cases of former enterprise "Agimi", specifically stated that a hearing was necessary in circumstances involving the need to consider matters of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly. This is especially true in circumstances in which a hearing has not been held even before the lower instance, as is the case in the circumstances of the present case.

78. Finally, the Court also notes the fact that the Appellate Panel did not justify its "*waiver of the hearing*", but merely referred to paragraph 1 of Article 69 of the Annex to Law 06/L-086 on the SCSC. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on holding of a hearing on its own initiative or at the request of a party. The relevant judgment does not contain any additional explanation regarding the decision of the Appellate Panel to "*waive the hearing*". In this context, the Court notes that based on the case law of the ECtHR, in assessing allegations relating to the absence of a hearing, it should also be considered whether the refusal to hold such a hearing is justified.

79. Therefore, and in conclusion, the Court, considering that (i) the fact that the Applicant did not expressly request a hearing at the level of the Specialized Panel and the Appellate Panel, does not imply that the latter has implicitly waived this right, especially considering that the latter has filed an appeal before the Appellate Panel (ii) also that the absence

of this request does not exempt the Appellate Panel from the obligation to assess the necessity of a hearing, furthermore on the fact that the Applicant in his complaint before this Panel had specified that his employment relationship in the enterprise after 1997 could be proved by the testimony of the former employees of this enterprise, as witnesses; (iii) that even if the Applicant had filed such a claim, it could have resulted in a lack of prospect of success; (iv) the cases before the Appellate Panel cannot be qualified either as exclusively legal matters or as matters of a technical nature, but rather as matters of fact and law, and their assessment, based on the case law of the Court and the ECtHR, entails the necessity of holding a hearing at least at one level of jurisdiction; and (v) the Appellate Panel did not justify the "*waiver of the hearing*", finds that in the present case there were no "*extraordinary circumstances to justify the absence of a hearing*", and consequently, the challenged Judgment of the Appellate Panel, namely Judgment [AC-I-17-0074-A123] of 8 October 2019 of the Appellate Panel, regarding the Applicant, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

80. The Court further refers to the Applicant's allegation of a violation of Article 24 of the Constitution, in conjunction with Article 14 of the ECHR, and Article 1 of Protocol No. 1. 12 of the ECHR, in the context of which he alleges that he was not treated equally in relation to three former employees of the Socially Owned Enterprise [K.B. with case number [C-0026] and S.B. with case number [C-0029] at the Specialized Panel and D.V. [with case number [C-0004] in the Specialized Panel and case number [A-001] in the Appellate Panel] based on the case file notes same in the case of the Applicant also the three former employees of the above-mentioned Social Enterprise, the Appellate Panel of the SCSC, through the challenged Judgment, rejected the appeal of these three former employees as ungrounded.

81. However, having regard to the fact that the Court has already found that the challenged Judgment of the Appellate Panel is not in accordance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the absence of a hearing, considers that it is not necessary to consider the abovementioned allegation of a violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR, and Article 1 of Protocol no. 12 of the ECHR, as the latter can be addressed and reviewed by the Appellate Panel. Also in relation to the Applicant's other allegations regarding a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR regarding the lack of reasoning of the court decision, as well as the allegation regarding a violation of Article 49 of the Constitution, the Court

considers that these allegations of the Applicant should be reviewed by the Appellate Panel, in accordance with the findings of this Judgment. Furthermore, given that the Appellate Panel has full jurisdiction to review the challenged decisions of the Specialized Panel based on the applicable laws of the SCSC, it has the possibility of correction at the second instance of the absence of a hearing in the first instance.

82. The Court's finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the absence of a hearing, as explained in this Judgment, and does not in any way relate to nor does it prejudice the outcome of the merits of the case. (See similarly the cases of the Court, KI145/19, KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant *E'them Bokshi and others*, cited above, paragraph 83).

Request for interim measure

83. The Court recalls that the Applicant filed a request for imposition of an interim measure without specifying what procedure or action should be suspended through the imposition of an interim measure.

84. The Court has already held that the Applicant's Referral should be declared admissible and to hold that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and consequently this decision renders further examination of the request for interim measure unnecessary. (See case of the Court KI207/19, Applicant *Social democratic NISMA, Alliance Kosova e Re and Justice Party,* Judgment of 10 December 2020, paragraph 237).

Conclusion

85. In the circumstances of this case, the Court assessed the Applicant's allegations regarding the absence of a hearing, a right guaranteed, according to the clarifications of this Judgment, by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

86. In assessing the relevant allegations, the Court has initially elaborated on the general principles deriving from its case-law and that of the ECtHR, regarding the right to a hearing, clarifying the circumstances in which such is necessary, based, *inter alia,* on 5 (five) its judgments in the cases of the former enterprise "Agimi", clarifying the circumstances in which one is necessary, based, *inter alia,* on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de*

Carvalho and Sá v. Portugal. The Court has clarified, *inter alia*, that (i) the absence of a party's request for a hearing does not necessarily imply the waiver of such a right and that the assessment of the impact of the absence of such a request depends on the specifics of the law and the particular circumstances of a case; and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless "*there are exceptional circumstances that would justify the absence of a hearing*", which based on the case law of the ECtHR in principle relate to cases in which "*exclusively legal or highly technical issues are examined*".

87. In the circumstances of the present case, the Court finds that (i) the fact that the Applicant has not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Appellate Panel did not deal with "*exclusively legal or highly technical matters*", matters on the basis of which "*exceptional circumstances that would justify the absence of a hearing*" could have existed, but on the contrary considered both the issues of fact and law; and (iii) the Appellate Panel did not justify the "*waiver of the oral hearing*". Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely Judgment [AC-I-17-0074-A123] of 8 October 2019 of the Appellate Panel, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

88. Finally, the Court also notes that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the Applicant's other allegations with regard to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR with regard to the lack of reasoning of the court decision, as well as allegations of violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR, and Article 1 of Protocol no. 12 of the ECHR and Article 49 of the Constitution, because the latter must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and Rules 57 and 59 (1) (a) of the Rules of Procedure, in the session held on 29 July 2021, by majority of votes:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that regarding the Applicant there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE the Judgment [AC-I-17-0074-A123] of 8 October 2019 of the Appellate Panel of the Special Chamber of the Supreme Court regarding the Applicant invalid;

IV. TO REJECT the request for interim measure;

V. TO REMAND the case to the Appellate Panel of the Special Chamber of the Supreme Court for retrial, in accordance with the findings of this Judgment;

VI. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court by 24 January 2022;

VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Gresa Caka-Nimani

KI64/21, Applicant: Ali Gjonbalaj, Constitutional review of Judgment Ac.no. 1848/17 of the Court of Appeals, of 11 August 2020

KI64/21, resolution of 29 July 2021, published on 31 August 2021

Keywords: individual referral, out of time referral

The Applicant had initiated a dispute at the regular courts in relation to a parcel and a wall. He requested that the relevant person (ii) hands over to him for unhindered use the area of 24 m2, part of the cadastral parcel; (ii) completely demolishes the wall built in the length of 8.94 m, the width of 25 cm and height of 2m; and (iii) refrains from any inconvenience.

The Basic Court decided to reject the Applicant's statement of claim as unfounded, and this position was upheld also by the Court of Appeals. The Applicant also submitted a proposal for initiation of a request for protection of legality to the Office of the Chief State Prosecutor, but the latter found that the Applicant's proposal is not to be approved.

The Applicant alleges before the Constitutional Court a violation of his right to a fair and impartial trial by challenging the standpoints of the Court of Appeals and the factual situation determined by the latter.

The Court, based on the fact that the Applicant (i) explicitly challenges the Judgment of the Court of Appeals, and (ii) does not present specific claims relating to the reasons given by the Notification of the Office of the Chief State Prosecutor and how the Notification of the latter for not filing a request for protection of legality to the Supreme Court had infringed the constitutional rights of the Applicant, finds that the Applicant's Referral in relation to the Judgment [no.1848 / 17] of the Court of Appeals, of 2 October 2020, was submitted after the legal deadline of 4 (four) months.

Consequently, the Court found that the Referral was not submitted within the legal deadline established in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure. Finally, the Court finds that the Referral is inadmissible on constitutional basis.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI64/21

Applicant

Ali Gjonbalaj

Constitutional review of Judgment Ac.no.1848/17 of the Court of Appeals, of 11 August 2020

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 Ali Gjonbalaj from Prizren (hereinafter: the Applicant), who according to the power of attorney is represented by the lawyer Ymer Koro from Prizren.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment Ac.no.1848/17 of the Court of Appeals, of 11 August 2020.

3. The Applicant has received the challenged decision, respectively the Judgment Ac.no. 1848/17 of the Court of Appeals, of 11 August 2020, on 2 October 2020.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly has violated the Applicant's fundamental rights and freedoms guaranteed by paragraph 2 of Article

22 [Direct Applicability of International Agreements and Instruments] , and paragraph 1 and 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

6. On 29 March 2021, the Applicant submitted the Referral by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), which the latter has received on 31 March 2021.

7. On 7 April 2021, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 12 April 2021, the Court notified the Applicant about the registration of the Referral. On the same day, the Court (i) notified the Court of Appeals about the registration of the case, and at the same time (ii) requested from the Basic Court in Prizren to submit the acknowledgment of receipt, which proves the date when the Applicant has received the Judgment Ac.no. 1848/17, of the Court of Appeals, of 11 August 2020.

9. On 29 April 2021, the Court received from the Basic Court in Prizren, the acknowledgment of receipt which proves that the Applicant has received the Judgment [Ac.no. 1848/17] of the Court of Appeals, of 11 August 2020, on 2 October 2020.

10. On 17 May 2021, based on paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of the President and Deputy-President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the

Constitutional Court. Pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and the Decision of the Court no. KK-SP 71-2/21, it was determined that Judge Gresa Caka-Nimani, shall assume the duty of President of the Court after the conclusion of the mandate of the current President of the Court Arta Rama-Hajrizi, on 26 June 2021.

11. On 25 May 2021, based on point 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu submitted his resignation from the position of a judge at the Constitutional Court.

12. On 27 May 2021, the President of the Court, Arta Rama-Hajrizi, by Decision No. KI64/20 appointed Judge Safet Hoxha as Judge Rapporteur instead of Judge Bekim Sejdiu following the resignation of the latter.

13. 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 the 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.

14. On 29 July 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

15. The Applicant and the person Z.T. are neighbours and both live in Prizren. On the basis of the case file, it results that the dispute between them arose due to a parcel with an area of 24 m2, and a boundary wall built in this parcel in 1981, when on the immovable property of the now Applicant (purchased in 2000), were living other owners.

16. On 5 August 2013, the Applicant sued the person Z.T. at the Basic Court in Prizren, requesting that the person Z.T. be obliged to hand over to the Applicant (i) in the unhindered use the area of 24 m2, part of the cadastral parcel no.3121, CZ Prizren; (ii) to completely demolish the wall built in the length of 8.94m, width of 25 cm and height of 2m; and (iii) to refrain from any inconvenience.

17. On 30 January 2017, the Basic Court in Prizren (hereinafter: the Basic Court) by Judgment C.no.719 / 2013, (i) rejected the Applicant's statement of claim as unfounded; and (ii) approved the counter-

statement of claim of the person Z.T., whereby it was proved that on the basis of the adverse possession he is the owner of the immovable property with an area of 24 m2, part of cadastral parcel no.3121, CZ Prizren and the boundary wall in the length of 8.94 m, width of 25 cm and height of 2m, and at the same time obliged the Applicant to recognize this right to the person Z.T., and to allow the registration of this area in the cadastral books.

18. On an unspecified date, the Applicant files an appeal against the Judgment of the Basic Court C.nr.719/2013, alleging essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation, and erroneous application of the substantive law.

19. On 11 August 2020, the Court of Appeals, through Judgment Ac.no. 1848/17, rejected the Applicant's appeal as unfounded, and upheld the Judgment C.no. 719/2013 of the Basic Court, of 30 January 2017. The Court of Appeals assessed that the Basic Court has correctly determined the factual situation and has decided correctly based on the substantive provisions, respectively on Article 25 and 28 of the LBPR.

20. On 30 January 2021, the Applicant submitted a proposal for initiation of a request for protection of legality to the Office of the Chief State Prosecutor.

21. On 28 December 2020, the Office of the Chief State Prosecutor, through Notification KMLC.no. 178/2020 found that the Applicant's proposal is not to be approved because *"the allegations stated in your proposal are not sufficient to file a request for protection of legality under Article 247.1 item a) and b) of the Law on Contested Procedure."*

Applicant's allegations

22. The Applicant alleges that the challenged Judgment [Ac.no.1848/17] of the Court of Appeals, of 11 August 2020, has violated his fundamental rights and freedoms guaranteed by paragraph 2 of Article 22 [Direct Applicability of International Agreements and Instruments], and paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

23. As regards the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant states that

"Since the Judge in this legal matter has applied the provisions of [LBPR], then according to Article 20 of the said law, [the Applicant], based on the law (mentioned contract), has become the legitimate owner of the disputable parcel with all the dimensions that have existed in the cadastre, including the disputable area of 24m 2."

24. The Applicant also states *"[...] copy of the plan of 10.02.1983, the disputable wall on c.p.no. 3121 has not existed, whilst the copy of the plan of 24.11.2000 shows the existence of the disputable wall, hence this copy of the plan of 2000, fully corresponds to the statement of the witnesses who state that that the disputable wall was built by the respondent on c.p.no 3121 in 1999."*

25. The Applicant, by referring to the issue of the adverse possession, states that the acquisition is lawful if there is a legal basis for the acquisition of ownership under Article 20 of the LBPR, or which was not acquired by fraud and misuse of trust. In the present case he is of the opinion that the person Z.T. has not benefited the disputable parcel on any legal basis. At this point, the Applicant alleges that Article 28 of the LBPR is also a wrong one.

26. The Applicant challenges the standpoints of the Court of Appeals and states that *"the findings of the Court of Appeals that the claimant did not object to the construction of the wall and that the witnesses have allegedly claimed that the wall has existed since 1981 are not true [....]. The Court of Appeals erroneously finds that the respondent has made arrangements for the construction of this wall with the former owner [...]."*

27. The Applicant also states that the Court of Appeals, on page 6 *"erroneously finds that the respondent has been in possession of the wall since 1998 [...] The Court of Appeals has erred in its calculation, because the difference in years between 1998 and 2013 is 15 years and not 20 years [...]"*

28. Finally, the Applicant requests the Court to (i) declare his Referral admissible, and to find a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; (ii) declare the Notification of the Office of the Chief State Prosecutor KMLC no.178/2020 of 28 December 2020 and the Judgment AC.no. 1848/17 of the Court of Appeals, of 11 August 2020, invalid (iii) remand the disputable case to the State Prosecution or the Court of Appeals for reconsideration and order them to notify the Court about the measures taken within a term of 6 months.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

LAW ON BASIC PROPERTY RELATION

Article 20

1. The property right can be acquired by law itself, based on legal affairs and by inheritance.
2. The ownership right can also be acquired by decision of the government authorities in a way and under conditions determined by law .
[...]

Article 25

1. If the builder has known that he/she builds on somebody else's land of if he/she hasn't known for that, and the owner has put his/her objections immediately, the land owner can request to be allocated the property right over such building or that the builder break down the building object and recover the land in the previous condition, or that the builder reimburse him/her the market price for the land..
[...]
8. The right of choice from paragraph 1 of this Article the land owner can realize at the latest within the time limit of three years from the day when the construction of the building object is finished.
[...]

Article 28

1. The conscientious and legal holder of the private property, over which somebody else holds the property right, shall acquire the property right over such object through adverse possession after expiration of three years.
2. The conscientious and legal holder of the real estate, over which somebody else disposes of the property right, shall acquire the property right over such object through adverse possession after expiration of ten years.

3. The conscientious and legal holder of the private property, over which somebody else has the property right, shall acquire the property right by adverse possession after expiration of ten years.
4. The conscientious holder of the real estate, over which somebody else disposes of the property right, shall acquire the property right over such an object by adverse possession after expiration of 20 years.
5. The heir shall become the conscientious holder from the moment of opening the inheritance even in the case when the testator was non conscientious holder, and the heir didn't know nor could have known for that, and the time for adverse possession starts to run from the moment of opening the inheritance.

LAW No. 03/L-006 ON CONTESTED PROCEDURE

Article 247

247.1 The public prosecutor may raise the request for protection of legality:
a) for basic violence of provisions of contested procedure, if the violence has to do with territorial competencies, if the court of the first instance has issued a verdict without main proceeding, while

it was its duty to held a main proceeding, if decided for the request, on which the contest is continuing, or if is in contradiction with the law, the public is excluded from the main proceeding;
b) for wrong application of the material right.
247.2 Public prosecutor can not raise a request for protection of legality because of the claim but not because of a wrong attestation or non complete facts.

Assessment of the admissibility of Referral

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

30. 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."

31. In the following, the Court refers to Article 47 [Individual Requests] of the Law, which provides:

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."

32. The Court also examines whether the admissibility criteria established in Article 49 [Deadlines] of the Law and Rule 39 [Admissibility Criteria], namely paragraphs (1) (b) and (c) of the Rules of Procedure have been fulfilled. They stipulate as follows:

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

Rule 39 of the Rules of Procedure
[Admissibility Criteria]

"(1) The Court may consider a referral as admissible if:

[...]
b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted;
c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant, and
[...]."

33. The Court finds that the Applicant is an authorized party who is challenging an act of a public authority. The Court takes into account that there was issued a Notification KMLC no. 178/2020 of the Office of the Chief State Prosecutor, of 28 December 2020, however, it notes that the Applicant explicitly challenges the constitutionality of the Judgment Ac.no. 1848/17 of the Court of Appeals, of 11 August 2020. In his Referral submitted to the Court, the Applicant himself states that "*The subject matter of the Referral is the constitutional review of the Judgment AC.no.1848 / 17 of the Court of Appeals in Prishtina, of 11.08. 2020 [...]*". Therefore, the Court shall assess whether the said judgment is submitted within the deadline provided by the Law and the Rules of Procedure.

34. In this context, the Court recalls that as a rule, the 4 (four) month deadline starts to run from the *"last decision"* in the process of exhaustion of legal remedies whereby the Applicant's Referral was rejected (see, *mutatis mutandis*, the ECtHR cases, *Gavrilov v. the Former Yugoslav Republic of Macedonia*, Decision of 1 July 2014,

paragraph 25; and *Paul and Audrey Edwards v. the United Kingdom*, Decision of 14 March 2002, see also the case of Court KI174/20, Applicant *"DE-KO"L.L.C..*, Resolution on Inadmissibility, of 10 February 2021, paragraph 32).

35. The Court also recalls that the Applicant must exhaust only those legal remedies that are expected to be effective and sufficient. Only effective remedies can be considered by the Court, as the Applicant cannot extend the strict deadlines prescribed by the Law and the Rules of Procedure, by trying to use legal remedies which are not effective in providing protection of rights for which the Applicant complains (see, *mutatis mutandis*, the ECtHR cases, *Gavrilov v. the Former Yugoslav Republic of Macedonia*, cited above, paragraph 25; and, *Fernie v. the United Kingdom*, Decision of 5 January 2006). In relation to the above criteria, the Court first considers that the requirement for exhaustion of legal remedies and the criterion for submitting the request within 4 (four) months are closely related (see, *mutatis mutandis*, the case of the ECtHR *Jeronovićs v. Latvia*, *Judgment of 6 June 2016, paragraph 75,* KI174/20, Applicant *"DE-KO"L.L.C..*, cited above, paragraph 33*).*

36. However, in the present case, the Applicant does not present specific allegations concerning the reasons given by the Notification of the Office of the Chief State Prosecutor and how the notification of the latter for not filing a request for protection of legality before the Supreme Court had infringed the constitutional rights of the Applicant. The Applicant's allegations in the present Referral are explicitly related to the Judgment of the Court of Appeals, and to the allegations that the latter by its Judgment Ac.no. 1848/17, of 11 August 2020 in essence (i) has erroneously determined the factual situation, thus referring to the issue of the construction of the wall and the manner in which the disputable parcel was possessed; and (ii) how the substantive law, namely the LBPR has been applied.

37. In this connection, the Court recalls that the Judgment [Ac.no. 1848/17] of the Court of Appeals was issued on 11 August 2020 and was received by the Applicant on 2 October 2020, this confirmed also by the acknowledgment of receipt sent by the Basic Court in Prizren. The Applicant, on the other hand, has submitted his Referral to the Court by mail on 29 March 2021. Consequently, it results that the Applicant's Referral in relation to the Judgment [no.1848/17] of the Court of Appeals, of 2 October 2020, was submitted after the legal deadline of 4 (four) months.

38. The Court recalls that the purpose of the 4 (four) month legal deadline under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, is to promote legal certainty by ensuring that the cases raising issues under the Constitution are dealt with within a reasonable time and that the past decisions are not continuously open to challenge (see, inter alia, the ECtHR cases: *Franz Hofstiidter v. Austria*, Application no. 25407/94, Decision of 12 September 2000; *Olivier Gaillard v. France*, Application no. 47337/99, Decision of 11 July 2000; see also, *inter alia*, the cases of Court KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 17 March 2014, paragraph 24, and KI120/17, Applicant *Hafiz Rizahu*, Resolution on Inadmissibility, of 7 December 2017, paragraph 39).

39. In conclusion, for the reasons elaborated above, the Court finds that the Referral has not been filed within the legal deadline provided for by Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure and, consequently, the Court cannot examine the merits of the case, namely, whether the challenged Judgment of the Court of Appeals has violated the Applicant's constitutional rights.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 49 of the Law and in accordance with Rule 39 (1) (c) of the Rules of Procedure, on 29 July 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Gresa Caka-Nimani

DECISION ON NON-ENFORCEMENT

regarding the

JUDGMENT

of the

Constitutional Court of the Republic of Kosovo

of 22 September 2010

in

Case No. KI56/09

Applicant

Fadil Hoxha and 59 others

vs.

Municipal Assembly of Prizren

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

Subject matter:

1. The subject matter is: (i) the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), regarding the enforcement of Judgment in case KI56/09, Applicant *Fadil Hoxha and 59 others*, Judgment of 22 September 2010 (hereinafter: the Judgment of the Court in case KI56/09), by the responsible authorities of the Republic of Kosovo, based on Article 116 [Legal

Effect of Decisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 19 (Taking of the decisions) of the Law no. 03 / L-121 on the Constitutional Court (hereinafter: the Law) and Rule 66 (Enforcement of decisions) of the Rules of Procedure no.01/2018 of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure),; and (ii) the decision-making of the Court regarding the Decision on Non-enforcement and the respective Notification to the State Prosecutor, as stipulated in paragraphs (6) and (7) of Rule 66 of the Rules of Procedure.

Legal basis for issuing the Decision on Non-Enforcement and Notification to the State Prosecutor:

2. The Court will initially cite, and then elaborate, the legal basis for the issuance of this Decision on Non-Enforcement and the issuance of the Notification to the State Prosecutor regarding the Judgment of the Court in case KI56/09. In the following, we present the relevant provisions of the Constitution, the Law, and the Rules of Procedure:

Constitution of the Republic of Kosovo

Article 116
[Legal Effect of Decisions]

1. Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.
[...]

Law on the Constitutional Court

Article 19
(Taking of the decisions)

1. The Constitutional Court decides as a court panel consisting of all Constitutional Court judges that are present.
2. The Constitutional Court shall have a quorum if seven (7) judges are present.
3. The Constitutional Court decides with majority of votes of judges present and voting.
[...]

Rules of Procedure

Rule 66

(Enforcement of decisions)

(1) The decisions of the Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.
(2) All constitutional organs as well as all courts and authorities are obligated to respect, to comply with and to enforce the decisions of the Court within their competences established by the Constitution and law.
(3) All natural and legal persons are obligated to respect and to comply with the decisions of the Court.
(4) The Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Court.
(5) The body under the obligation to enforce the decision of the Court shall submit information, if and as required by the decision, about the measures taken to enforce the decision of the Court.
(6) In the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Court about the measures taken, the Court may issue a ruling in which it shall establish that its decision has not been enforced. This ruling shall be published in the Official Gazette.
(7) The State Prosecutor shall be informed of all decision of the Court that have not been enforced.
(8) The Secretariat, under the supervision of the Judge who, in accordance with Rule 58, drafted the decision, shall follow up on the implementation of the decision and, if necessary, report back to the Court with recommendation for further legal proceedings to be taken.

3. The above legal basis represents the constitutional and legal regulation on the basis of which the Court is authorized to take actions regarding the monitoring of the enforcement of its Judgments and the relevant measures in case of ascertainment of their non-implementation.

4. In this respect, the Court states that based on Article 116 of the Constitution, its decisions are binding on the judiciary and all persons and institutions of the Republic of Kosovo. Moreover, based on the same article in conjunction with Rule 66 of the Rules of Procedure, (i) all constitutional organs as well as all courts and authorities are obligated to respect, to comply with and to enforce the decisions of the Court, within their competencies established by the Constitution and law, and (ii) all natural and legal persons are obligated to respect and to comply with the decisions of the Court.

5. The Court also states that pursuant to Rule 66 of the Rules of Procedure, the Court may specify in its decision: (i) the manner of and time-limit for the implementation of the decision of the Court; (ii) the body under the obligation to enforce the decision of the Court and to submit information, if and as required by the decision, about the measures taken to enforce the decision of the Court; (iii) in the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Court about the measures taken, the Court may issue a ruling in which it shall establish that its decision has not been enforced. This shall be published in the Official Gazette; and (iv) inform the State Prosecutor about all decisions of the Court that have not been enforced.

6. On the basis of paragraph (8) of Rule 66 of the Rules of Procedure, the Court through its mechanisms monitors the implementation of decisions and may undertake further legal proceedings. The assessment of the implementation of the decisions of the Court is carried out periodically and in case of finding that a decision has not been implemented, the Court issues a Decision on Non-enforcement and notifies the State Prosecutor in that respect.

7. In this context, the Court has undertaken the measures set out in its Rules of Procedure with respect to the Judgments (i) in case KO01/09 of 18 March 2010, Applicant *Qemail Kurtishi* (hereinafter: the case of Court KO01/09), by issuing the Order of 7 June 2010 and the Order of 21 June 2010[2]; (ii) in case KI08/09 of 17 December 2010, Applicant *The Independent Union of Workers of IMK Steel Factory in Ferizaj* (hereinafter: the case of Court KI08/09), by issuing a Decision on Non-Enforcement and notifying the State Prosecutor[3]; (iii) in case KI112/12 of 5 July 2013, Applicant *Adem Meta* (hereinafter: the case of Court KI112/12), by addressing a letter to the President of the Basic Court in Mitrovica and notifying the State Prosecutor about the non-

[2] See the Order in case KO01/09, of 7 June 2010, accessible via the following link: https://gjk-ks.org/wp-content/uploads/vendimet/urdher_rasti_ko_01_09.pdf and the Order in case KO01/09, of 21 June 2010, accessible via the following link: https://gjk-ks.org/wp-content/uploads/vendimet/urdher_rasti_ko_01_09.pdf

[3] See the Decision on Non-Execution of Judgment in case KI08/09 of 14 November 2012, accessible via link: https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ki_08_09_vmsp_shq.pdf, and the Notification to the Chief State Prosecutor for Failure to Execute the Judgment in case KI08 / 09 of 28 May 2019, accessible via the link: KI08-09_Njoftim-për-moszbatim-të-Aktgjykimit-të-Gjykatës-Kushtetuese_P.SH_.pdf (gjk-ks.org).

enforcement of this Judgment[4]; and (iv) in case KI187/13 of 1 April 2014, Applicant *N. Jovanović* (hereinafter: the case of Court KI187/13), by issuing an Updated Information regarding Judgment No. KI187-13 as well by notifying the State Prosecutor about the non-enforcement of Judgment KI187/13.[5]

Court's Judgment in Case KI56/09:

8. In the case of Court KI56/15, the Referral was submitted by Fadil Hoxha and 59 others (hereinafter: the Applicants).

9. The Applicants had challenged the Decision [01/011-3257] of 30 April 2009 of the Municipal Assembly of Prizren on changing the Urban Plan for the neighborhood Jaglenica (now Dardania) (hereinafter: the Decision on the Urban Plan).

10. The Applicants had requested the constitutional review of the above-mentioned Decision, by alleging violation of the fundamental rights and freedoms guaranteed by Articles 45 [Freedom of Election and Participation]; 52 [Responsibility for the Environment] and 124 [Local Self-Government Organization and Operation] of the Constitution. The Applicants also requested the imposition of interim measures for the suspension of the Decision on the Urban Plan, pending the final decision of the Court.

11. On 25 November 2009, the Court had approved the interim measures "*for a time period not longer than three (3) months from the day of the issuance of the [...] Decision*".[6] Whereas, on 15 March 2010, the Court had approved the extension of the interim measures for 45 days

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[4] See the letter *"Notification regarding the non-enforcement of Judgment of the Constitutional Court in case KI112/12"* and the letter addressed to the President of the Basic Court in Mitrovica, of 17 April 2014, accessible via the following link: https://gjk-ks.org/wp-content/uploads/2021/08/KI112-12_Njoftim-perkitazi-me-moszbatimin-e Aktgjykimit_P.SH_SHQ.pdf

[5] See the *"Updated Information regarding Judgment No. KI187-13"* of 6 February 2015, accessible via the following link: https://gjk-ks.org/wp-content/uploads/2021/08/informate_e_perditesuar_KI187_13_shq.pdf and the letter *"Information on non-enforcement of Judgment KI187 / 13"* of 6 February 2015, addressed to the Chief State Prosecutor, accessible via the following link: https://gjk-ks.org/wp-content/uploads/2021/08/njoftimi_për_moszbatimin_e_aktgjykimit_KI187_13_shq.pdf

[6] See the Court's Decision on the Request for Interim Measures in Case KI56/09, of 25 November 2009.

starting from 15 March 2010.[7] Moreover, on 30 April 2010, the Court again approved the extension of the interim measures for another two (2) months starting from 30 April 2010.[8]

12. On 22 September 2010, the Court decided to (i) declare the Referral admissible; and (ii) to find a violation of the Applicants' right guaranteed by Article 52 (2) of the Constitution. The Court came to this conclusion after finding that the respective Decision on the Urban Plan was approved without a public discussion or any other type of public participation. Consequently, the Applicants had not had the opportunity to be heard by the public institution regarding an issue that had an impact on the environment in which they live, contrary to the guarantees of paragraph 2 of Article 52 of the Constitution. The Court also requested from the Municipal Assembly of Prizren to submit to the Court, within six (6) months, the information on the measures taken to implement the Judgment in question.

13. The enacting clause of the Court's Judgment in case KI56/09, was voted as follows:

THE COURT, based on Article 113.7 of the Constitution, Article 20 of the Law and Articles 54 and 55 of the Rules of Procedure,

DECIDES

I. By a majority vote that the Referral is admissible.

II. Unanimously finds that there has been a violation of the Applicants' right guaranteed by Article 52 (2) of the Constitution of the Republic of Kosovo.

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

IV. HOLDS that, the Municipal Assembly of Prizren shall submit to the Court, within the period of six months, information about measures taken to enforce this Judgement.

[7] See the Court's Decision on the Request for Interim Measures in Case KI56/09, of 15 March 2010.
[8] See the Court's Decision on the Request for Interim Measures in Case KI56/09, of 30 April 2010.

V. The Judgment is effective immediately and it may be subject to editorial revision

14. On 24 January 2011, the Court had notified the relevant parties about the issuance of Judgment KI56/09, as follows: (i) the Applicant Mr. Fadil Hoxha; and (ii) the Municipal Assembly of Prizren.

Proceedings before the Court following the publication of the Judgment:

15. As stated above, the Judgment of the Court in case KI56/09 was voted on 22 September 2010 and was published on 22 December 2010.

16. After more than one (1) year from the issuance of the Judgment of the Court, respectively on 20 July 2012, the Applicant KI56/09, Fadil Hoxha, addressed the Court with a request that based on Article 116 of the Constitution, it takes the necessary actions for the implementation of this Judgment, as he considered that the above Judgment of the Court had not been enforced by the Municipal Assembly of Prizren. Whereas, on 19 November 2012, the Municipality of Prizren had notified the Court that the works in the building in the neighbourhood "Dardania" which related to the Urban Plan changed by the Decision [No. 01/011-3257] of the Municipal Assembly of Prizren, of 30 April 2009, have been stopped.

17. On 19 February 2015, the Court addressed a request to the Chairperson of the Municipal Assembly seeking information regarding the enforcement of the Judgment KI56/09, and in the respective answer received by the Court on 4 March 2015, it was stated as follows: "*Based on the competencies given to it by the Law on Local Self-Government, the Municipal Assembly is committed to debate and decide to harmonize this issue according to the requests of the residents of that neighbourhood and the requests of the Constitutional Court in one of the next sessions of the Municipal Assembly, and for the actions that will be taken by the Municipal Assembly of Prizren in relation to this issue, we shall notify you in a timely manner.*"

18. In the meantime, on 27 February 2015, the Applicant again addresses the Court, by stating, inter alia, that the Municipality of Prizren has not organized any public discussion with the residents of the neighborhood about this issue even after the issuance of Judgment KI56/09.

19. On 7 February 2020, the Court again addressed the Municipal Assembly of Prizren with a request for final information regarding the enforcement of the Judgment of the Constitutional Court of the Republic of Kosovo in case KI56/ 09. Through this letter, the Court had warned the Municipal Assembly, that based on Article 116 of the Constitution and Rule 66 (Enforcement of decisions) of its Rules of Procedure, in the absence of confirmation on the full enforcement of the respective Judgment within a term of fifteen (15) days, the Court will undertake the measures set out in its Rules of Procedure, including the Decision on Non-Enforcement and the Notification to the State Prosecutor. The Court did not receive any additional information on whether the Judgment of the Court was enforced or not.

20. On 3 August 2021, the Court, based on Rule 66 of the Rules of Procedure, assessed the enforcement of its Judgments together with the relevant documents received and sent by the Court after the issuance of these Judgments, in order to ascertain whether they had been implemented. Based on the letters sent by the Court, it resulted that the issuance of Decisions on Non-enforcement has been announced in a number of cases, including the case KI56/09, through the letter of the Court addressed to the Municipal Assembly of Prizren, of 7 February 2020. Despite this letter and in order for the Court to act only on the basis of updated information, it was decided to send again a final letter requesting additional information, to the respective parties and authorities in a number of cases, including the case of Court KI56/09.

21. On 11 August 2021, with the purpose of updating the information regarding the enforcement of the respective Judgment, the Court sent a letter to: (i) the Applicant, Fadil Hoxha; and (ii) the Chairperson of the Municipal Assembly of Prizren, requesting again that within fifteen (15) days the Court be finally notified whether the Judgment KI56/09 has been fully implemented or not.

22. On 19 August 2021, the Court was notified by the Kosovo Post Office that it was not possible to submit the letter to the Chairperson of the Municipal Assembly, for the reason that the latter was on annual leave, while the other municipal officials refused to accept the letter.

23. On 23 August 2021, the Court again sent the abovementioned letter to the Chairperson of the Municipal Assembly of Prizren.

24. On 30 August 2021, the Applicant Fadil Hoxha submitted his response to the Court, by stating, inter alia, that (i) Judgment KI56/09, *"has not been enforced, and no action by the Municipal Assembly of Prizren or the Mayor of Prizren has been taken to enforce it "……..; (ii) "during the last four years we have addressed official letters to the Mayor of Prizren twice" requesting to allocate the necessary financial means for the demolition of the disputable building, and to fully restore the dedicated respective space through the regulation of the neighbourhood park, with the participation of residents, experts and civil society organizations".....; and (iii) …….. "we have not received any response, on the contrary, not only has the building not been demolished, but it has been turned into a landfill and meeting point for different groups of individuals who use narcotic substances, as well as into a contaminated water tank [...] ".*

25. On 10 September 2021, the Chairperson of the Municipal Assembly submitted his response to the Court, stating, inter alia, as follows: (i) *"I have not been aware so far regarding the request and the issues submitted by you," ;* (ii) *"we will try to address [this issue] with the utmost seriousness and in accordance with the circumstances and possibilities of the institution";* and (iii) *"within the legal possibilities in one of the meetings of the Municipal Assembly, we will try to provide solutions to the issues raised by you and the residents of that neighbourhood."*

Court's assessment regarding the enforcement of the Judgment in Case KI132/15:

26. As explained above, by a letter of 7 February 2020 addressed to the Municipal Assembly, based on Article 116 of the Constitution and Rule 66 of the Rules of Procedure, the Court had announced the issuance of the Decision on Non-Enforcement and the Notification to the State Prosecutor in case KI56/09, in the *"absence of confirmation on the full enforcement of the Judgment of the Court in case KI56/09"*. However, in August 2021, the Court once again addressed the respective parties in order to update the information before the Court regarding the enforcement of its Judgment.

27. On 22 September 2021, based on the documents submitted to the Court, as presented above, the Court unanimously found that its Judgment in case KI56/09 had not been implemented. This is because the authorities responsible for its implementation, even after more than (10) years from the issuance of this Judgment, even though they had suspended the works in the disputable building, have not taken

the necessary measures for its full enforcement, despite the fact that through the respective Judgment, the Court, had found that the Decision [No. 01 / 011-3257] of 30 April 2009 of the Municipal Assembly of Prizren, was approved without public discussion or any other form of public participation, and consequently the Applicants had not had the opportunity to be heard by the public institution on an issue that had an impact on the environment in which they live, contrary to paragraph 2 of Article 52 of the Constitution , requesting from the Municipal Assembly of Prizren to submit to the Court, within six (6) months, information on the measures taken to enforce the Judgment in question.[9]

28. The above finding is based on the response of the parties submitted to the Court, namely (i) the Applicant, who stated, inter alia, that even after ten (10) years, the Municipality has not taken the necessary actions to enforce the Judgment of the Court; and (ii) the Chairperson of the Municipal Assembly of Prizren, who, among other things, stated *"so far I have not been aware of this case",* but that *" in one of the meetings of the Municipal Assembly, they will try to provide a solution to the issue raised by the Court, respectively, the enforcement of Judgment KI56/09"*. Consequently, the Court notes that the non-enforcement of the Judgment of the Court in case KI56/09 is not disputed even by the parties involved in this case.

29. The Court has acted in the same way also in other cases cited above, in which it has assessed that contrary to Article 116 of the Constitution, its decisions have not been enforced. In the letter addressed to the Acting Chief State Prosecutor, of 6 February 2015, regarding the case of Court KI187/13, the Court, inter alia, had stated that despite the fact that since the establishment of the Court *"almost 99% of the decisions of the Constitutional Court have been enforced",* the Court *" being committed to follow the procedures of enforcement of its decisions up to the full realization of the Applicants' rights arising from its decisions"*, identifies cases which have not yet been enforced by the respective authorities, by drawing the attention of *"state institutions that, due to their constitutional competencies and obligations, they are to ensure mechanisms to enforce its decisions, in full compliance with Article 116.1 of the Constitution"*. Whereas, in the letter addressed to the Chief State Prosecutor, of 28 May 2019, regarding the

[9] A similar finding was made by the Court in the Decision on Non-Execution of Case KO08/09, mentioned above, wherein in paragraph 23 it had stated that "The Constitutional Court now finds that the deadline given to the enforcement authorities for the enforcement of its Judgment, in case KI08/09, has expired for almost two years".

case of Court KI08/09 and the respective notification for the issuance of the Decision on Non-Enforcement, among other things, it had had stated that "*non-enforcement of decisions of the Constitutional Court constitutes a constitutional violation and is contrary to fundamental principles of the rule of law in a state governed by the rule of law and democracy*".

30. The Court also emphasizes that based on the case law of the European Court of Human Rights (hereinafter: ECtHR), according to which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court interprets fundamental rights and freedoms guaranteed by the Constitution, it highlights that one of the basic aspects of the rule of law is the principle of legal certainty, which, among other things, requires that final judicial decisions be enforced and not questioned.[10] Furthermore, the case law of the ECHR consistently reiterates that the right to a fair trial as guaranteed by Article 6 (Right to a fair trial) of the ECHR and which is directly applicable to the legal order of the Republic of Kosovo based on Article 22 [Direct Applicability of International Agreements and Instruments] of its Constitution, would be *"illusory"* if domestic legal systems would *"allow a final, binding judicial decision to remain inoperative to the detriment of one party*" and it would be *"inconceivable for Article 6 to describe in detail the procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions"*.[11] Such situations would be in clear violation of the principle of the rule of law which the Contracting States have undertaken to respect on the basis of the ECHR.

31. Moreover, the Court recalls that the Constitution of the Republic of Kosovo in Article 3 [Equality before the Law] stipulates that the Republic of Kosovo is a multi-ethnic society, consisting of Albanians and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions. Furthermore, the Constitution in Article 7 [Values], also stipulates that the constitutional order of the Republic of Kosovo is

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[10] See, inter alia, the cases of the ECHR, *Guðmundur Andri Ástráðsson v. Island*, application no. 23674/18, Judgment of the Grand Chamber of the ECHR of 1 December 2020, paragraph 238; *Brumărescu v. Romania*, application no. 28342/95, Judgment of the Grand Chamber of the ECHR of 28 October 1999, paragraph 61; as well as, *Agrokompleks v. Ukraine*, application no. 23465/03, Judgment of the Grand Chamber of the ECHR of 25 July 2013, paragraph 148.

[11] See, inter alia, the case of the ECtHR *Romashov v. Ukraine*, application no. 67534/01, Judgment of the ECHR of 24 July 2004, paragraph 42.

based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state power, and a market economy. The rule of law is also an element that reflects the joint European heritage as defined in the preamble of the ECHR of the Council of Europe and the Charter of Fundamental Rights of the European Union, and an essential objective reflected in the Statute of the Venice Commission.[12]

32. In view of the above principles, and since based on the documents submitted to it, the Court has found that the Judgment in case KI56/09 has not been enforced by the responsible authorities of the Republic of Kosovo, pursuant to Article 116 of the Constitution and Rule 66 of the Rules of Procedure, the Court issues the present Decision on Non-Enforcement regarding the case of Court KI56/15. At the same time, the Court also notifies the State Prosecutor regarding the non-enforcement of its Judgment in case KI56/09.

33. Finally, it must be emphasized that beyond the finding about non-enforcement of a Judgment, through the Decision on Non-Enforcement and the relevant Notification to the State Prosecutor, the Constitutional Court has no competence to assess the responsibility of the authorities responsible for non-enforcement of a Court decision, as the competence for such an assessment based on the Criminal Code and the Criminal Procedure Code of the Republic of Kosovo, thereafter belongs to the State Prosecutor.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, pursuant to Article 116 of the Constitution of the Republic of Kosovo, Article 19 of the Law on the Constitutional Court of the Republic of Kosovo and Rule 66 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, on 22 September 2021, unanimously:

DECIDES

I. TO HOLD that the Judgment of the Constitutional Court of the Republic of Kosovo in case KI56/09, with Applicant *Fadil Hoxha and*

[12] See, inter alia, (i) the ECHR Preamble; (ii) The Preamble of the Charter of Fundamental Rights of the European Union; and, (iii) the Statute of the Venice Commission

59 others, of 22 September 2010 **has not been enforced** by the responsible authorities of the Republic of Kosovo;

II. TO PUBLISH this Decision on Non-Enforcement regarding the Judgment of the Constitutional Court of the Republic of Kosovo in case KI56/09;

III. TO COMMUNICATE this Decision on Non-Enforcement to the parties;

IV. TO NOTIFY the State Prosecutor for the issuance of this Decision on Non-Enforcement;

V. In accordance with Article 20.4 of the Law and for the purposes of Rule 66 (6) of the Rules of Procedure, this Decision shall be published in the Official Gazette of the Republic of Kosovo and on the official website of the Constitutional Court of the Republic of Kosovo.

President of the Constitutional Court

Gresa Caka-Nimani

DECISION ON NON-ENFORCEMENT

regarding

JUDGMENT

of the

Constitutional Court of the Republic of Kosovo

of 19 May 2016

in

Case No. KI132/15

Applicant

Deçani Monastery

Constitutional review of two Decisions of 12 June 2015, no. AC-I-13-0008 and no. AC-I-13-0009 of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters

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

Subject matter:

1. Based on Article 116 [Legal Effect of Decisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 19 (Taking of the decisions) of the Law no. 03/L-121 on the Constitutional Court (hereinafter: the Law) and Rule 66 (Enforcement of decisions) of the Rules of Procedure no. 01/2018 of the Constitutional Court of the Republic of Kosovo (hereinafter: the

Rules of Procedure), the subject matter of this Decision is (i) the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), pertaining to the enforcement of Judgment in case KI132/15, *applicant* Deçani Monastery, Judgment of 19 May 2016 (hereinafter: the Judgment of the Court in case KI132/15), by the responsible authorities of the Republic of Kosovo; and (ii) the decision-making of the Court with regard to the Decision on Non-Enforcement and the relevant Notification to the State Prosecutor, as set forth in paragraphs (6) and (7) of Rule 66 of the Rules of Procedure

Legal basis for issuing the Decision on Non-Enforcement and Notification to the State Prosecutor:

2. The Court will initially cite, and then elaborate the legal basis for the issuance of this Decision on Non-Enforcement and the issuance of the Notification to the State Prosecutor pertaining to the Judgment of the Court in case KI132/15. In what follows, are the relevant provisions of the Constitution, the Law and the Rules of Procedure:

Constitution of the Republic of Kosovo

Article 116
[Legal Effect of Decisions]

1. Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.
[...]

Law on the Constitutional Court

Article 19
(Taking of the decisions)

4. The Constitutional Court decides as a court panel consisting of all Constitutional Court judges that are present.
5. The Constitutional Court shall have a quorum if seven (7) judges are present.
6. The Constitutional Court decides with majority of votes of judges present and voting.
[...]

Rules of Procedure

Rule 66
(Enforcement of decisions)

(1) The decisions of the Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.
(2) All constitutional organs as well as all courts and authorities are obligated to respect, to comply with and to enforce the decisions of the Court within their competences established by the Constitution and law.
(3) All natural and legal persons are obligated to respect and to comply with the decisions of the Court.
(4) The Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Court.
(5) The body under the obligation to enforce the decision of the Court shall submit information, if and as required by the decision, about the measures taken to enforce the decision of the Court.
(6) In the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Court about the measures taken, the Court may issue a ruling in which it shall establish that its decision has not been enforced. This ruling shall be published in the Official Gazette.
(7) The State Prosecutor shall be informed of all decision of the Court that have not been enforced.
(8) The Secretariat, under the supervision of the Judge who, in accordance with Rule 58, drafted the decision, shall follow up on the implementation of the decision and, if necessary, report back to the Court with recommendation for further legal proceedings to be taken.

3. The above legal basis represents the constitutional and legal regulation based on which the Court is authorized to take action pertaining to the enforcement of its Judgments and the relevant measures in case of ascertainment of their non-enforcement.

4. In this respect, the Court states that based on Article 116 of the Constitution, its decisions are binding on the judiciary and all persons and institutions of the Republic of Kosovo. Moreover, based on the same article in conjunction with Rule 66 of the Rules of Procedure: (i) all constitutional organs as well as all courts and authorities are obligated to respect, to comply with and to enforce the decisions of the Court, within their competencies established by the Constitution and law; and (ii) all natural and legal persons are obligated to respect and to comply with the decisions of the Court.

5. The Court also states that pursuant to Rule 66 of the Rules of Procedure, the Court may specify in its decision: (i) the manner and the time-limit for the enforcement of a decision of the Court; (ii) the authority with the obligation to enforce the respective decision of the Court and to submit information, if and as required by the decision, about the measures taken to enforce the decision of the Court; (iii) in the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Court about the measures undertaken, the Court may issue a ruling in which it shall establish that its decision has not been enforced. This ruling shall be published in the Official Gazette; and (iv) to inform the State Prosecutor of all decisions of the Court that have not been enforced.

6. On the basis of paragraph 8 of Rule 66 of the Rules of Procedure, the Court through its mechanisms, monitors the enforcement of its decisions and may undertake further legal action. The Court's assessment pertaining to the enforcement of its decisions is carried out periodically and in the event of determining that a decision has not been enforced, the Court issues a Decision on Non-Enforcement and notifies the State Prosecutor.

7. In this context, the Court has undertaken the measures set out in its Rules of Procedure with respect to the Judgments (i) KO01/09, of 18 March 2010, applicant *Qemail Kurtishi* (hereinafter: the Judgment of the Court KO01/09), by issuing the Order of 18 June 2010 and the Order of 21 June 2010[13]; (ii) KI08/09 of 17 December 2010, applicant *The Independent Union of Workers of IMK Steel Factory in Ferizaj* (hereinafter: the Judgment of the Court KI08/09), by issuing a Decision on Non-Execution and notifying the State Prosecutor[14]; (iii) KI112/12 of 5 July 2013, applicant *Adem Meta* (hereinafter: the Judgment of the Court KI112/12), by addressing a letter to the President of the Basic Court in Mitrovica and by notifying the State

[13] See the Order in case KO01/09, of 7 June 2010, accessible via the following link: https://gjk-ks.org/wp-content/uploads/vendimet/urdher_rasti_ko_01_09.pdf and the Order in Case KO01/09, of 21 June 2010, accessible via the following link: https://gjk-ks.org/wp-content/uploads/vendimet/urdher_rasti_ko_01_09.pdf

[14] See the Decision on Non-Execution of Judgment in case KI08/09 of 14 November 2012, accessible via link: https://gjk-ks.org/wp-content/uploads/vendimet/gjk_ki_08_09_vmsp_shq.pdf , and the Notification to the Chief State Prosecutor for Failure to Execute the Judgment in case KI08/09 of 28 May 2019, accessible via the link: KI08-09_Njoftim-për-moszbatim-të-Aktgjykimit-të-Gjykatës-Kushtetuese_P.SH_.pdf (gjk-ks.org).

Prosecutor about the non-enforcement of this Judgment[15]; and (iv) KI187/13 of 1 April 2014, applicant *N. Jovanović* (hereinafter: the Judgment of the Court KI187/13), by issuing an "*Updated Information*" pertaining to *Judgment* KI187-13 as well as by notifying the State Prosecutor about the non-enforcement of Judgment KI187/13.[16]

Court's Judgment in Case KI132/15:

8. In Court's Judgment KI132/15, the referral was submitted by the Deçani Monastery, which was represented in the proceedings before the Constitutional Court by Dragutin (Sava) Janjić, the Abbot of the Deçani Monastery.

9. The applicant challenged two decisions of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC), respectively, Decisions [no. AC-I-13-0008] and [AC-I-13-0009] of 12 June 2015.

10. The applicant requested the constitutional review of the two above-mentioned decisions, alleging a violation of the fundamental rights and freedoms guaranteed by articles 24 [Equality before the Law]; 31 [Right to Fair and Impartial Trial]; 32 [Right to Legal Remedies]; 46 [Protection of Property]; 54 [Judicial Protection of Rights] of the Constitution and article 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR). The applicant also requested the imposition of interim measure pending the final decision of the Constitutional Court.

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[15] See the letter *"Notification regarding the non-enforcement of the Judgment of the Constitutional Court in case KI112/12"* and the letter addressed to the President of the Basic Court in Mitrovica, of 17 April 2014, accessible via the following link: https://gjk-ks.org/wp-content/uploads/2021/08/KI112-12_Njoftim-perkitazi-me-moszbatimin-e Aktgjykimit_P.SH_SHQ.pdf

[16] See the *"Updated Information regarding Judgment No. KI187-13"* of 6 February 2015, accessible via the following link: https://gjk-ks.org/wp-content/uploads/2021/08/informate_e_perditesuar_KI187_13_shq.pdf and the letter *"Information on non-enforcement of Judgment KI187/13"* of February 6, 2015, addressed to the Chief State Prosecutor, accessible via the following link: https://gjk-ks.org/wp-content/uploads/2021/08/njoftimi_për_moszbatimin_e_aktgjykimit_KI187_13_shq.pdf

11. On 12 November 2015, the Court approved the interim measure until 29 February 2016.[17] Whereas, on 10 February 2016, the Court approved the extension of the interim measure until 31 May 2016.[18]

12. On 19 May 2016, the Court decided (i) to declare the referral admissible; (ii) to hold that there has been a violation of article 31 of the Constitution in conjunction with article 6 of the ECHR; (iii) to hold that the two decisions of the Appellate Panel of the SCSC, of 12 June 2015, respectively [no. AC-I-13-0008 and no. AC-I-13-0009], are null and void; and (iv) to hold that the two decisions of the Specialized Property Panel of the SCSC of 27 December 2012, [no. SCC-08-0026 and no. SCC-08-0227], respectively, are final and binding and as such *res judicata*.[19]

13. The enacting clause of the Court's Judgment in case KI132/15, was voted as it follows:

> *The Constitutional Court, pursuant to Articles 21.4 and 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (a) of the Rules of Procedure, in the session held on 19 May 2015, by majority*
>
> ***DECIDES***
>
> *I. TO DECLARE the Referral admissible;*
> *II. TO HOLD that there has been violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights;*
> *III. TO HOLD that it is not necessary to examine whether there has been a violation of Articles 24, 32, 46 and 54 of the Constitution, and of Article 13 of the European Convention on Human Rights;*
> *IV. TO HOLD that the two Decisions of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 12 June 2015, Nos. AC-I-13-0008 and AC-I-13-0009, are null and void, and that the two Decisions of the Specialized Panel on*

[17] See the first Decision of the Court approving the interim measures in case KI132/15.
[18] See the second Decision of the Court extending the interim measures in case KI132/15.
[19] For more details about the facts of the case, see paragraphs 20-46 of Judgment KI132/15; in relation to the allegations see paragraphs 47-52; in relation to the admissibility of the Referrals see paragraphs 53-68; whereas, in relation to the reasoning and merits of the case see paragraphs 69-94.

Ownership of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters of 27 December 2012, No. SCC-08-0226 and No. SCC-08-0227, are final and binding, and as such are res judicata;

V. TO NOTIFY this Decision to the Parties;

VI. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

VII. This Decision is effective immediately."

14. On 20 May 2016, the Court notified the relevant parties about the issuance of the Judgment of the Court, as follows: (i) the SCSC; (ii) the Basic Court in Peja, Branch in Deçan; (iii) the Municipality of Deçan; (iv) the SOE Bletaria "Apiko" (hereinafter: Apiko); and (v) the SOE Hotel Tourist Enterprise "Iliria" (hereinafter: "Iliria").

Proceedings before the Court following the publication of the Judgment:

15. As stated above, the Judgment of the Court in case KI132/15 was voted on 19 May 2016 and published on 20 May 2016.

16. Two (2) years after the issuance of the Judgment of the Court, respectively on 8 March 2018, the Deçani Monastery submitted a letter-request to the Court regarding the enforcement of the Judgment in case KI132/15, stating that it was not enforced *"due to the refusal of the Municipality of Deçan to implement this decision"*. Through the letter in question, the Deçani Monastery informed the Court that: (i) on 23 April 2017, it had requested the enforcement of the Judgment in case KI132/15 from the Cadastral Office of the Municipality of Deçan; (ii) on 26 May 2017, the Office of the Mayor of Deçan, had rejected the request of the Deçani Monastery; (iii) on 3 July 2017, it had filed a complaint with the Kosovo Cadastral Agency (hereinafter: the KCA); (iv) on 25 July 2017, the KCA requested additional documentation from the Deçani Monastery; and (v) on 2 August 2017, the Deçani Monastery had submitted the requested documents to the KCA. Based on the letter of the Deçani Monastery, KCA had not taken any action, and consequently, the applicant had requested from the Court to act pursuant to article 116 of the Constitution regarding the enforcement of its Judgment in case KI132/15.

17. On the basis of the documents submitted to the Court, the response of the Municipal Office of Deçan of 26 May 2017 addressed to the Monastery of Deçan, states, inter alia, that (i) *"on the occasion of the decision of the Special Chamber of the Supreme Court of Kosovo and the Decision of the Constitutional Court of Kosovo being issued, the*

Municipal Assembly of Deçan held an extraordinary session and took decisions whereby it opposes the enforcement of these decisions and it was explicitly stated that the Directorate for Cadastre in Deçan and the Kosovo Geodetic Agency should not implement the aforementioned decisions"; (ii) *"immediately after receiving the aforementioned court decision of the Special Chamber of the Supreme Court, the Publicly Owned Enterprises "Iliria" and "Apiko" by a claim filed with the Basic Court in Peja – Branch in Deçan, have requested the annulment of all contracts on donation of lands for the Monastery. From that time up to the present day, the Court has not reviewed these claims";* (iii) *"The PAK [Privatization Agency of Kosovo] by a claim has requested from the Special Chamber of the Supreme Court of Kosovo the annulment of all the above donation contracts and as of that time up to the present day the claim has not been reviewed" ;* (iv) *"in relation to these parcels we have also found the Decision of the Municipal Directorate of Geodesy in Deçan of 15.09.1992 bearing the number 07-952/624, whereby these parcels are returned to the ownership of the Municipality of Deçan by the OP "Visoki Deçani". The Municipality has started the enforcement of this decision";* (v) *"the law stipulates that the properties of the Publicly Owned Enterprises for which the liquidation procedure has been initiated may not change the owner until the liquidation is completed. Thus, the liquidation of the Public Enterprises "Iliria" and "Apiko" has been initiated on 22.02.2017";* and finally (vi) *"taking into consideration the above circumstances, as a municipality we are not in position to make any decision".*

18. On 8 November 2018, the Court addressed the SCSC regarding the applicant's allegations that the Judgment of the Court was not enforced, also inquiring about the measures taken by the SCSC to enforce the Judgment in case KI132/15. Through this letter, the Court had requested to be notified within fifteen (15) days whether the respective Judgment had been enforced in its entirety. Moreover, the Court's letter also stated that (i) *"there is no reason on the basis of which the non-enforcement of a final decision of the Constitutional Court could be justified";* (ii) *"it is the responsibility of the responsible organs to find the most appropriate ways and means to enforce a decision of the Constitutional Court in which have been found violations of human rights and freedoms guaranteed by the Constitution and the European Convention on Human Rights";* and (iii) *"in the absence of confirmation regarding the full implementation of the Judgment of the Court in case KI132/15, the Constitutional Court shall issue a Decision on Non-Enforcement, pursuant to point (6) of Rule 66 (Enforcement of decisions) of the Rules of Procedure which provides that in the event of non-*

enforcement of a decision or delay in providing information, the Constitutional Court may issue a ruling stating that a decision has not been enforced. Further, in accordance with point (7) of the same rule: The State Prosecutor shall be informed of all decision of the Court that have not been enforced". Finally, the Court had stated that based on article 116 of the Constitution, decisions issued by the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo and that *"non-enforcement of decisions of the Constitutional Court constitutes a constitutional violation and is contrary to fundamental principles of the rule of law in a state governed by the rule of law and democracy"*.

19. On 28 January 2019, the Court notified the applicant, namely the Deçani Monastery, that (i) the Court's Judgment in case KI132/15 was issued by the Court on 20 May 2016; (ii) it was published in the Official Gazette of the Republic of Kosovo; (iii) on 20 May 2016, *"the Special Chamber of the Supreme Court of the Republic of Kosovo on Privatization Agency of Kosovo Related Matters, the Basic Court in Peja- Branch in Deçan, the Municipality of Deçan and the enterprises "Apiko" and "Illyria"* were informed about the relevant Judgment; (iv) based on article 116 of the Constitution, the Judgment in case KI132/15 creates obligations for all parties involved in the process; (v) the Court continuously monitors the enforcement of its decisions; and (vi) in relation to the Judgment in case KI132/15 and all its other decisions, it shall *"take all available action under the Constitution, Law, and Rules of Procedure"*.

20. On 21 November 2019, the SCSC submitted the response to the Court's letter for "*final information regarding the enforcement of the Judgment in case KI132/15*" of 8 November 2018. Through this response, the SCSC, inter alia, stated that (i) *"The Special Chamber of the Supreme Court considers the same as you have ascertained in your Referral that the two Judgments of the Special Chamber, SCC-08-0226 and SCC-08-0227, are final, binding and eligible for enforcement"*; (ii) *"pursuant to Article 116.1 of the Constitution of the Republic of Kosovo, the decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo"*; but that (iii) the SCSC "*has no legal authority given to it by law regarding to the enforcement of the final Judgment of the courts"*; and (iv) moreover, "*the Constitutional Court by Judgment KI132/15 has not given any task to the Special Chamber to be performed in the future"*. Having emphasized the jurisdiction established by law and the fact that the SCSC *"has no legal authority and cannot take any legal action in the enforcement of this Judgment"*, the SCSC nevertheless stated that (i) "*the Special*

Chamber of the Supreme Court informs that the Judgments of the Specialized Panel of the SCSC which were declared final and binding by the Judgment of the Constitutional Court KI132/15, in the absence of the request of the party, have not been endowed with the finality clause, to be eligible for enforcement of the Judgment of the Constitutional Court"; and (ii*) "to date the Deçani Monastery, as a party to the proceedings, even though it has a legal and legitimate interest to have the Judgment of the Constitutional Court enforced, has not filed any request with the Special Chamber seeking to include the finality clause in the issued, final, Judgments. The SCSC will immediately endow these Judgments with the finality clause"*. Finally, the SCSC also stated that (i) *"on the basis of what is stated above, the Special Chamber is of the opinion that pursuant to Article 307.1 of the Law no.04/L-139 on the Enforcement Procedure, the party that won the court case has the legal authority to begin to take the necessary legal steps in order to enforce these final Judgments, by addressing an enforcement Court or the Cadastral Office in the Municipality where the property, subject matter of the Judgment, is situated, for having it registered in the cadastral register in its name"*; and (ii) *"moreover pursuant to Article 13.1 of the Law No.04/L-013 on Cadastre, the party that has such interest in the enforcement of the Judgment, must submit the application to the cadastral body in the respective municipality to initiate the procedure for registration of property rights in the cadastral register."*

21. On 3 August 2021, the Court, pursuant to Rule 66 of the Rules of Procedure, reassessed the status of enforcement of all its Judgments, together with the relevant letters received and sent by the Court after the issuance of these Judgments, in order to determine whether they had been enforced. Based on the letters sent by the Court, it resulted that the issuance of Decisions on Non-Enforcement had been announced in a number of cases, including case KI132/15, through the Court's letter addressed to the SCSC dated 21 November 2019. Despite this letter, in order for the Court to act only on the basis of updated information, it was decided that additional letters seeking additional/updated information shall be sent to the parties and relevant authorities in a number of cases, including the Court's Judgment KI132/15.

22. On 11 August 2021, in order to update the information regarding the enforcement of the relevant Judgment, the Court sent a letter (i) to the Applicant; and (ii) the KCA, taking into consideration the content of the response of the SCSC submitted to the Court on 21 November 2019 and the fact that, based on the case file, the applicant's complaint of 3

July 2017 submitted against the decision of the Office of the Mayor of Deçan, resulted to be under review before the KCA.

23. On 26 August 2021, the KCA submitted its response to the Court, stating, among others, that (i) on 20 November 2020, it received an additional complaint [no. 03/3539/20] filed by the Deçani Monastery; (ii) after reviewing the aforementioned complaint, it found that the Directorate for Cadastre and Geodesy of the Municipality of Deçan, has not acted in accordance with paragraph 3.5 of article 3 (Registration of Immovable Property Rights) of the Law no.2002/5 on the Establishment of the Immovable Property Rights Register, because *"it has made administrative silence in reviewing the request submitted by the representative of the Deçani Monastery"*; (iii) consequently, the KCA issued Decision [No. 03/3539/20] of 17 December 2020, through which it obliged the Directorate for Cadastre of the Municipality of Deçan to make a decision on the complaint of the Deçani Monastery; (iv) on 15 January 2021, the KCA addressed a request for information to the Directorate for Cadastre and Geodesy of the Municipality of Deçan pertaining to actions taken in relation to the aforementioned decision; (v) on 21 January 2021, the KCA was notified by the relevant municipality that it had filed a lawsuit against the KCA decision of 17 December 2020 to the Department for Administrative Matters of the Basic Court in Prishtina; (vi) on 18 February 2021, the Deçani Monastery filed another complaint with the KCA due to "*administrative silence*"; (vii) on 22 March 2021, the KCA received a request from the Mayor of Deçan Municipality, by which it was requested not to proceed with this case until the end of *"all negotiations that have begun with the Deçani Monastery, Government of Kosovo, Quint Ambassadors, OSCE and EU"* pertaining to the issue in question; (viii) after the abovementioned letter of the Mayor, the KCA did not undertake any other action; and (ix) after the receipt of the letter of the Court of 12 August 2021, on 16 August 2021, the KCA addressed a request for information regarding the enforcement of Judgment KI132/15 of the Court to the Mayor of Deçan Municipality and has not received a response.

24. On 30 August 2021, the Deçani Monastery submitted its response to the Court, explaining the developments that have taken place since the last correspondence with the Constitutional Court, enclosing the relevant documents, wherefrom it results that: (i) on 26 August 2020, the Deçani Monastery, once more submitted a request for registration of ownership according to Judgment KI132/15, to the Cadastral Office of the Municipality of Deçan; (ii) after not receiving a response to this request, on 12 October 2020, the Deçani Monastery submitted a

request for reconsideration of the request at the Cadastral Office of the Municipality of Deçan; (iii) on 20 November 2020, considering that it had not received a response from the relevant office of the Municipality of Deçan, the Deçani Monastery filed a complaint with the KCA due to the "*administrative silence*"; (iv) on 17 December 2020, the KCA through Decision [03/3539/20], requested from the Directorate for Cadastre and Geodesy in Deçan to decide on the request of the Deçani Monastery within a timeline of fifteen (15) days; (v) the Municipality of Deçan had not issued a decision according to the abovementioned Decision of the KCA, but on 21 January 2021, filed a lawsuit at the Department of Administrative Matters of the Basic Court in Prishtina, against the respective decision of the KCA, to which the Deçani Monastery responded on 24 March 2021; (vi) on 18 February 2021, the Deçani Monastery again filed a complaint with the KCA due to the "*administrative silence*" of the Municipality of Deçan, stating, inter alia, that based on article 13 (Administrative Conflict) of Law no.03/L-202 on Administrative Conflicts, an administrative conflict in this case is not permitted, moreover that, based on article 22 of the same law, the lawsuit does not suspend the enforcement of the relevant decision; and (vii) the Deçani Monastery has not received a response from the KCA despite the fact that based on article 116 of the Constitution, *"decisions of the Constitutional Court are binding on all persons and bodies in Kosovo"*. The Deçani Monastery also states that (i) *"The Municipal Assembly of Deçan held a session on 27.05.2019, in which it was again stated that the Judgment of the Constitutional Court is unfair and which the Municipality will not enforce, and that the execution of the Judgment would create huge obstacles among the citizens of the Municipality of Deçan, for the consequences of which the Municipality would not be able to respond"*; (ii) *"it is clear that the institutions at all levels simply refuse to enforce this decision, that is, they commit a conscious and deliberate obstruction of our rights"*; and (iii) *"please undertake everything you have at your disposal, so that our right to land, is finally registered in our name, five years after the Constitutional Court has issued Judgment KI132/15.*"

25. On 3 September 2021, the KCA submitted to the Court the response of the Municipality of Deçan regarding the *"case of the Deçani Monastery"* of 1 September 2021, by which the Mayor of Deçan Municipality stated, inter alia, that (i) *"The Municipality of Deçan has continuously expressed and declared its position for non-compliance with Judgment KI132/15 which has to do with the properties of Socially Owned Enterprises APIKO and ILIRIA, which with the abovementioned Judgment [...] were given (donated) to the Deçani Monastery";* (ii) *"from 2017, we have tried to have an understanding*

and a harmonized solution with the Deçani Monastery to end all disputes with the Deçani Monastery"; (iii) *"we inform you that the Municipality of Deçan has no reason and no obligation and does not take over the enforcement of this decision, until the discussions between the Municipality and the Monastery on the disputes created between us would be finally resolved";* and (iv) *"until a final epilogue, we ask the KCA not to take any action regarding this process!.*"

Court's assessment regarding the enforcement of the Judgment in Case KI132/15:

26. As explained above, by a letter of 8 November 2019 addressed to the SCSC, based on article 116 of the Constitution and rule 66 of the Rules of Procedure, the Court had announced the issuance of the Decision on Non-Enforcement and the Notification to the State Prosecutor about the Court's Case KI132/15, in the *"absence of confirmation on the full enforcement of the Judgment of the Court in case KI132/15"*. However, in August 2021, the Court once again addressed the relevant parties in order to update the information before the Court regarding the enforcement of its Judgment.

27. On 22 September 2021, based on the assessment of all documents before it, as presented above, the Court unanimously found that its Judgment in case KI132/15 has not been implemented. This because, the authorities responsible for its implementation, even after five (5) years after the issuance of this Judgment, have not undertaken the necessary measures for its implementation, despite the fact that by the Judgment of the Court, the two Decisions of the Specialized Panel on Ownership of the SCSC, [no. SCC-08-0026] and [No.SCC-08-0227], of 27 December 2012, respectively, were declared final, binding and, as such, *res judicata*.

28. The Court has come to the above stated conclusion, based on the submissions reflected in this Decision on Non-Enforcement, namely: (i) the assertion of the SCSC that it has no jurisdiction to implement this Judgment of the Court, despite the fact that it states that the same must be enforced pursuant to article 116 of the Constitution; (ii) the position of the Municipality of Deçan, following the request of the Deçani Monastery of 2017 for the implementation of the Judgment of the Court, that "*on the occasion of the decision of the Special Chamber of the Supreme Court of Kosovo and the Decision of the Constitutional Court of Kosovo being issued, the Municipal Assembly of Deçan held an extraordinary session and took decisions whereby it opposes the enforcement of these decisions and it was explicitly stated that the Directorate for Cadastre in Deçan and the Kosovo Geodetic Agency*

should not enforce the aforementioned decisions; (iii) the position of the Municipality of Deçan based on the letter of 1 September 2021 addressed to the KCA, that the same *"has continuously expressed and declared its non-compliance with Judgment KI132/15 and consequently it has no reason and no obligation and does not take over the execution of this Judgment"*; and (iv) the fact that the KCA, despite the constant complaints of the Deçani Monastery, beyond the Decision [03/3539/20] of 17 December 2020 through which it obliged the Municipal Cadastral Office to issue a decision on this matter and the rejection of the same to act based on the decision of the KCA, has not undertaken any other steps, arguing that it had received a letter from the Mayor of Deçan Municipality, by which it was requested not to proceed with this case *"until the end of all negotiations that have begun regarding the disputed properties"*.

29. The Court notes that after the issuance of its Judgment KI132/15 in 2016, a series of proceedings were conducted for more than five (5) years and which had the only effect of non-enforcement of a final Judgment in contradiction with article 116 of the Constitution.

30. The Court has acted in the same manner also in other previous cases that have been cited above, in which it had determined that contrary to article 116 of the Constitution, its decisions have not been implemented. Among others, in the letter addressed to the Acting Chief State Prosecutor, of 6 February 2015, regarding the Court's Judgment KI187/13, the Court, inter alia, stated that despite the fact that since the establishment of the Court *"almost 99% of the decisions of the Constitutional Court have been enforced",* the Court *"being committed to follow the procedures of enforcement of its decisions up to the full realization of the applicants' rights arising from its decisions"*, identifies cases which have not yet been implemented by the respective authorities, also emphasizing that *"the state institutions that, based on their constitutional competencies and obligations, are obliged to ensure mechanisms to enforce its decisions, in full compliance with article 116.1 of the Constitution"*. Whereas, in the letter addressed to the Chief State Prosecutor of 28 May 2019, regarding the Court's Judgment KI08/09 and the respective notification for the issuance of the Decision on Non-Execution, among others, stated that the "*non-enforcement of decisions of the Constitutional Court constitutes a constitutional violation and is contrary to fundamental principles of the rule of law in a state governed by the rule of law and democracy*".

31. The Court also emphasizes that the case-law of the European Court of Human Rights (hereinafter: ECtHR), based on which, pursuant to

article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court interprets fundamental rights and freedoms guaranteed by the Constitution, emphasizes that one of the fundamental aspects of the rule of law is the principle of legal certainty, which, among other things, requires that final judicial decisions be enforced and not questioned.[20] Furthermore, the case-law of the ECHR consistently reiterates that the right to a fair trial as guaranteed by article 6 (Right to a fair trial) of the ECHR and which is directly applicable to the legal order of the Republic of Kosovo based on article 22 [Direct Applicability of International Agreements and Instruments] of its Constitution, would be *"illusory"* if domestic legal systems would *"allow a final, binding judicial decision to remain inoperative to the detriment of one party*" and it would be *"inconceivable for article 6 to describe in detail the procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions"*[21]. Such situations would be in clear violation of the principle of the rule of law which the Contracting States have undertaken to respect on the basis of the ECHR.

32. The Court furthermore recalls that the Constitution of the Republic of Kosovo in its article 3 [Equality before the Law] stipulates that the Republic of Kosovo is a multi-ethnic society, consisting of Albanians and other communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions. Furthermore, the Constitution, in article 7 [Values], also stipulates that the constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state power, and a market economy. The rule of law is also an element that reflects the joint European heritage as defined in the preamble of the ECHR and the

[20] See, *inter alia*, the cases of the ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, application no. 23674/18, Judgment of the Grand Chamber of the ECtHR of 1 December 2020, paragraph 238; *Brumărescu v. Romania*, application no. 28342/95, Judgment of the Grand Chamber of the ECtHR of 28 October 1999, paragraph 61; as well as, *Agrokompleks v. Ukraine*, application no. 23465/03, Judgment of the Grand Chamber of the ECtHR of 25 July 2013, paragraph 148.

[21] See, inter alia, the case of the ECtHR *Romashov v. Ukraine*, application.no. 67534/01, Judgment of the ECtHR of 24 July 2004, paragraph 42.

Charter of Fundamental Rights of the European Union, and an essential objective reflected in the Statute of the Venice Commission.[22]

33. In view of the above principles, and based on the documents submitted to it, taking into account that the Court has found that the Court's Judgment KI132/15 has not been implemented by the responsible authorities of the Republic of Kosovo, pursuant to article 116 of the Constitution and rule 66 of the Rules of Procedure, the Court issues the present Decision on Non-Enforcement regarding the Judgment KI132/15. At the same time, the Court also notifies the State Prosecutor regarding the non-enforcement of its Judgment KI132/15.

34. Finally, it should be emphasized that beyond it conclusion on non-enforcement of a Judgment, through a Decision on Non-Enforcement and the respective Notification to the State Prosecutor, the Constitutional Court has no competence to assess the responsibility of the respective authority for the non-enforcement of a Court decision. The competence for such an assessment, thereafter belongs to the State Prosecutor, based on the Criminal Code and the Criminal Procedure Code of the Republic of Kosovo.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, pursuant to article 116 of the Constitution of the Republic of Kosovo, article 19 of the Law on the Constitutional Court of the Republic of Kosovo and rule 66 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, on 22 September 2021, unanimously:

DECIDES

I. TO HOLD that the Judgment of the Constitutional Court of the Republic of Kosovo in case KI132/15, with Applicant *Deçani Monastery*, of 19 May 2016 **has not been implemented** by the responsible authorities of the Republic of Kosovo;

II. TO PUBLISH this Decision on Non-Enforcement regarding the Judgment of the Constitutional Court of the Republic of Kosovo in case KI132/15;

[22] See, inter alia, (i) the ECHR Preamble; (ii) The Preamble of the Charter of Fundamental Rights of the European Union; and (iii) the Statute of the Venice Commission.

III. TO COMMUNICATE this Decision on Non-Enforcement to the parties;

IV. TO NOTIFY the State Prosecutor for the issuance of this Decision on Non-Enforcement;

V. In accordance with article 20.4 of the Law and for the purposes of rule 66 (6) of the Rules of Procedure, this Decision shall be published in the Official Gazette of the Republic of Kosovo and on the official website of the Constitutional Court of the Republic of Kosovo.

President of the Constitutional Court

Gresa Caka-Nimani

KI82/21, Applicant: Municipality of Gjakova, Constitutional review of Judgment UPP-APP. no. 1/2020 of the Supreme Court of Kosovo, of 28 October 2020

KI82/21, Judgment of 9 September 2021, published on 5 October 2021

Keywords: *individual referral, principle of equality of arms and adversarial proceedings*

It is noted from the case file that the interested party, A.R., was employed in the Municipality of Gjakova in the position of Municipal Public Lawyer, starting from 2008. While exercising this function, the Municipality of Gjakova had received notifications from the Prosecution, regarding the initiation of investigative actions against him as a result of suspicion of committing several criminal offenses. Consequently, the Mayor of Gjakova had suspended the individual A.R., from the respective function. His complaint against the decision on suspension of the Municipality of Gjakova, to the Independent Oversight Board for the Civil Service of Kosovo was rejected. The party, A.R., had initiated proceedings at the regular courts which had returned the case for reconsideration to the Independent Oversight Board and which again upheld the abovementioned decision of the Municipality to suspend A.R. from work. Meanwhile, in the criminal proceedings, the party A.R., was found guilty of the criminal offense of conflict of interest by the Judgment of the Court of Appeals. As a result, the Municipality of Gjakova initiated disciplinary proceedings, as a result of which, the party A.R., was expelled from work. In relation to this decision, proceedings have been conducted at the Basic Court, Court of Appeals and the Supreme Court, respectively, and which ultimately rejected the request of the party A.R. However, the latter filed a request for repetition of the procedure, which was approved on 28 October 2020, by the Judgment of the Supreme Court challenged before the Court by the Municipality of Gjakova in the circumstances of this case.

The Municipality of Gjakova before the Court alleged violation of the right to fair and impartial trial guaranteed by the Constitution and the European Convention on Human Rights, mainly focusing on the violation of the principle of adversarial proceedings and the principle of equality of arms during the proceedings, because according to the allegation, the Supreme Court had decided at the request of the party A.F., without notifying the Municipality of Gjakova, preventing and denying the same the submission of the response.

In assessing the Applicant's allegations and the relevant response of the party A.R., the Court first elaborated on the general principles of its case law and

the case law the European Court of Human Rights, regarding the principle of adversarial proceedings and the principle of equality of arms, and then applied the same in the circumstances of the respective case. The Court reiterated, among others, that the principle of *"equality of arms"* requires *"a fair balance between the parties"* where each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage vis-à-vis the opponent. In this sense, the Court found that the Supreme Court, deciding on the request for repetition of the procedure submitted by the party A.R., without notifying and giving the other party, namely the Municipality, the opportunity to present counter-arguments regarding such a request, has failed to guarantee the application of the principle of equality of arms and the principle of adversarial proceedings. The Court also noted that beyond the constitutional guarantees, the applicable laws also clearly define the legal obligation of sending the request for repetition of the procedure also to the opposing party and interested individuals, an obligation, which has been avoided in the circumstances of the present case.

Consequently and based on the justifications given in the published Judgment, the Court found that the challenged Judgment of the Court was issued in violation of the procedural guarantees set out in Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights, returning the same to the Supreme Court for reconsideration.

JUDGMENT

in

Case No. KI82/21

Applicant

Municipality of Gjakova

Constitutional review of Judgment UPP-APP. No. 1/2020 of the Supreme Court of Kosovo of 28 October 2020

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 the Municipality of Gjakova, which is represented by Vjollca Shyti (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [UPP. APP-1/2020] of 28 October 2020 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

3. The Applicant was served with the challenged Judgment on 12 April 2021.

Subject matter

4. The subject matter is the request for constitutional review of the challenged Judgment, which, according to the Applicant's allegations,

was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles} and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 29 April 2021, the Applicant submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court.

8. On 18 May 2021, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

9. On 24 May 2021, the Court notified the Applicant about the registration of the Referral and requested the completion of the referral form of the Court, as well as the specific power of attorney for representation before the Court.

10. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

11. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, appointed Judge Selvete Gërxhaliu-Krasniqi as member of the Review Panel replacing Judge Bekim Sejdiu. Judge Selvete Gërxhaliu-Krasniqi was appointed as Presiding of the Review Panel.

12. On 1 June 2021, the interested party, Afrim Radoniqi, submitted a request for providing information regarding Referral KI82/21.

13. On 8 June 2021, the President of the Court Arta Rama-Hajrizi, by Decision No. KI82/21, appointed Judge Radomir Laban as Judge Rapporteur replacing Judge Gresa Caka-Nimani.

14. On 11 June 2021, the Applicant submitted to the Court by email the completed form as well as the specific power of attorney for representation before the Court.

15. On 24 June 2021, the Court notified the interested party, Afrim Radoniqi, about the registration of the Referral and provided the latter with a copy of the Referral.

16. On 24 June 2021, the Court notified the Supreme Court about the registration of the Referral and requested information that: *(1) have you notified the Applicant, in this case the Municipality of Gjakova, regarding the proposal for repetition of the procedure? What is the legal obligation for such a notice?; and (2) The Applicant - Municipality of Gjakova, alleges that the Supreme Court allowed the use of an unauthorized legal remedy, as the repetition of the procedure is not prescribed in the Law on Administrative Conflicts, but only. What is the position of the Supreme Court regarding this allegation of the Municipality of Gjakova?*

17. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

18. On 1 July 2021, the interested party, Afrim Radoniqi, submitted to the Court his comments regarding the case KI82/21.

19. On 2 July 2021, the Supreme Court responded to the Court's request for additional information.

20. On 7 July 2021, the Court requested the Basic Court to notify the Court regarding the date on which the Applicant was served with the challenged Judgment of the Supreme Court.

21. On 9 July 2021, the Basic Court submitted to the Court the acknowledgment of receipt indicating that the Applicant was served with the challenged Judgment on 12 April 2021.

22. On 9 September 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral.

Summary of facts

23. Initially, the interested party, Afrim Radoniqi, was a party before the Court also in the case KI32/17, in which the subject of review was the Judgment [Pml. No. 276/2016] of 5 December 2016 of the Supreme Court. In this case the Court by the Resolution on Inadmissibility had decided that the Referral is manifestly ill-founded on constitutional basis.

24. It follows from the case file that the interested party, Afrim Radoniqi, was employed in the Municipality of Gjakova in the position of Lawyer, starting from 2008. During the time the interested party was working, the Municipality of Gjakova had received notifications from the Prosecution for initiating the investigation actions against him for committing criminal offenses during the exercise of his function, due to the criminal offense of falsifying official document under Article 434 paragraph 1 of the Criminal Code of the Republic of Kosovo (hereinafter: CCRK), the offense of abusing official position or authority under Article 422 paragraph 1 of the CCRK and the criminal offense of conflict of interest under Article 424 paragraph 1 and paragraph 4 of the CCRK. Consequently, on 25 March 2014, the President of Municipality by Decision [01 No. 118-2664] decided to suspend Afrim Radoniqi with payment of 50% of his salary, until a decision is rendered by the Court, and that the employer after the completion of the court proceedings will act in accordance with the law on civil service of Kosovo. Against the Decision of the Municipality of Gjakova, the interested party, Afrim Radoniqi, filed a complaint with the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: IOBCSK).

25. On 22 October 2014, the IOBCSK by Decision [No. A.02/354/2014] rejected as ungrounded the appeal of the interested party Afrim

Radoniqi, upholding the abovementioned Decision for preventive suspension of the Municipality of Gjakova.

26. On 18 November 2014, the interested party, Afrim Radoniqi, by a lawsuit requested the Basic Court to annul the Decision [No. A. 02/354/2014] of the respondent IOBCSK, of 22 October 2014, by which his appeal against the decision [no. 118-2624/2014] of the President of the Municiplaityof of Gjakova 25 March 2014 for preventive suspension was rejected. He alleged that the IOBCSK Decision contained violation of the provisions of the Law on Administrative Procedure and the Regulations on Rules and Complaints Procedures.

27. On 15 July 2016, the IOBCSK, in its capacity as a respondent, filed a response to the lawsuit challenging the aforementioned lawsuit alleging that it did not result from the facts and evidence presented and that the claimant could not substantiate by any evidence his allegations, proposing to reject the claimant's lawsuit as ungrounded, while upholding its decision.

28. On 13 September 2016, the Basic Court in Prishtina, by Judgment [A. No. 2306/14] decided to: (i) Approve the statement of claim of the interested party Afrim Radoniqi as grounded; and (ii) Decision [A02/354/2014] of 22 October 2014, of the respondent-IOBCSK is annulled and the case is remanded to the respondent for reconsideration and decision.

29. On an unspecified date, the IOBCSK filed an appeal with the Court of Appeals on the grounds of: (i) essential procedural violations; (ii) erroneous and incomplete determination of factual situation; and (iii) erroneous application of the substantive law with the proposal that the above Judgment is repealed and the decision [A/02/354/2014] of 22 October 2014 of the IOBCSK be upheld. Response to the appeal was filed by the interested party, Afrim Radoniqi, with the proposal that the IOBCSK appeal be rejected as ungrounded, while the abovementioned judgment be upheld.

30. On 21 March 2017, the Court of Appeals by Judgment [AA. No. 20/2017] rejected as ungrounded the appeal of the respondent IOBCSK, while the Judgment of the Basic Court is upheld.

31. On 15 May 2017, in the review and reconsideration procedure, the IOBCSK by Decision [A/02/436/2016] decided: (i) to reject the complaint of 22 August 2014, submitted by the interested party, Afrim

Radoniqi as ungrounded; and (ii) upheld the Decision on suspension [01 No. 118-2664) of 25 March 2014, of the Municipality of Gjakova.

Procedure of proposal for Enforcement of Judgment [AA. No. 20/2017] of 21 March 2017 of the Court of Appeals

32. On 2 November 2017, the interested party, Afrim Radoniqi, submitted a proposal for enforcement against the Applicant, Municipality of Gjakova, for the enforcement of the execution document, Judgment [A. No. 2306/14] of 13 September 2016 upheld by Judgment [AA. No. 20/2017] of 21 March 2017, of the Court of Appeals.

33. On 8 December 2017, the Applicant, the Municipality of Gjakova, filed an objection against the Enforcment Order stating that: (i) the Basic Court has no subject matter jurisdiction to grant the proposed enforcement; (ii) the execution of administrative decisions is done by the competent authority of the Administration. Consequently, the Applicant stated that the proposal for enforcement is premature and without subject of enforcement, because by the Judgment of the Court of Appeals does not recognize the right of the creditor Afrim Radoniqi, but it was decided to remand the case to the IOBCSK for review and reconsideration. The interested party, Afrim Radoniqi, did not respond to the objection.

34. On 26 December 2017, the Basic Court in Gjakova by Decision [CP. No. 279/17] approved as grounded: (i) the objection of the debtor, Municipality of Gjakova, of 8 December 2017; and (ii) annulled the Decision on enforcement of the Basic Court [CP. No. 279/17] of 2 November 2017, and quashed all enforcement actions taken by the latter.

Criminal proceedings against Afrim Radoniqi and his dismissal

35. On 18 July 2016, the Basic Court in Gjakova, by Judgment [PKR. No. 105/15] the interested party, Afrim Radoniqi: (i) acquitted of the charge for criminal offense of falsifying an official document under Article 434 paragraph 1 of the Criminal Code; (ii) acquitted of the charge for the criminal offense of abuse of official position or authority under Article 422 paragraph 1 of the CCRK; (iii) found guilty of committing a criminal offense a conflict of interest under Article 424 paragraphs 1 and 4 of the CCRK, for which a fine in the amount of € 3,000 was imposed, which the accused was obliged to pay within 15 days after the entry into force of the Judgment.

36. On 9 August 2016, the interested party, Afrim Radoniqi, filed an appeal against point III of the abovementioned Judgment, on the grounds of: (i) essential violation of the provisions of the criminal procedure; (ii) erroneous and incomplete determination of factual situation; (iii) violation of the Criminal Law and the decision regarding the criminal sanction, with the proposal to approve his appeal as grounded; and (iv) modify point III of the above Judgment, or decide to remand the matter to the court of first instance for retrial and reconsideration.

37. On 20 September 2016, the Court of Appeals, by Judgment [PAKR. No. 497/16] decided that: (i) with the partial approval of the appeal of the interested party, Afrim Radoniqi, the Judgment of the Basic Court in Gjakova [PKR. no. 105/15] of 18 July 2016, only in relation to the decision on the criminal sanction so that the accused for a criminal offense Conflict of interest under Article 424 paragraph 1 in conjunction with paragraph 4 of the CCRK, is sentenced to a fine in the amount of 2000 (two thousand) euro, which fine is obliged to pay within (fifteen) days after the entry into force of this Judgment; (ii) in the acquittal part the judgment remains unaffected.

Procedure for dismissal of the interested party, Afrim Radoniqi

38. Municipality of Gjakova, based on Judgment [PAKR. No. 497/16] of the Court of Appeals, initiated disciplinary proceedings against Afrim Radoniqi. Thus, on 7 March 2017, the Disciplinary Commission in the Municipality of Gjakova by Decision [01/070-01/2927] decided to terminate the employment relationship, while the interested party, Afrim Radoniqi, was found guilty of committing the criminal offense of conflict interest.

39. On 30 March 2017, the interested party filed an appeal against the Decision of the Disciplinary Commission of the Municipality of Gjakova.

40. On 5 May 2017, the Dispute Resolution and Complaints Commission in the Municipality of Gjakova, by Decision [01-070-7914] found that Decision [01-070-7914] of the Disciplinary Commission, of 7 March 2017 is in accordance with paragraph 4 of Article 63 (Responsibilities) of the Law on Civil Service of Kosovo, which stipulates that *"If the Civil Servant is found guilty by final decision and is convicted of criminal*

offence with elements that comprise violations of civil service principles and rules from employer body should initiate the procedure for dismissal of the Civil Servant".

41. On an unspecified date, the interested party, Afrim Radoniqi, filed an appeal with the IOBCSK against the above-mentioned Decision of the Dispute Resolution and Complaints Commission in the Municipality of Gjakova, requesting that he be reinstated to work.

42. On 18 July 2017, the IOBCSK by Decision [A/02/250/2017] rejected the appeal of the interested party and upheld the decisions of the Disciplinary Commission and the Dispute Resolution and Complaints Commission of the Municipality of Gjakova.

43. On 17 August 2017, the interested party, Afrim Radoniqi, filed a lawsuit with the Basic Court in Prishtina requesting the annulment of the decisions of the respondent IOBCSK, namely: (i) Decision [A/02/436/2016] of 15 May 2017 (mentioned in paragraph 30, which upheld the Decision of the President of Municipalityfor suspension); and (ii) Decision [A/02/250/2017] of 18 July 2017 (which upheld Decision [01-070-7914] of the Dispute Resolution and Complaints Commission).

44. The Basic Court in Prishtina (hereinafter: the Basic Court) initially joinder the two cases, as the subject of the statement of claim and the parties were the same, and on 9 August 2018, by Judgment [A. No. 975/2017] decided to: (i) Approve in part as grounded, the statement claim of the interested party, Afrim Radoniqi; (ii) to annul the Decision [A02/250/20 17] of 18 July 2017, of the respondent IOBCSK and the decisions of the Municipality of Gjakova, the Decision of the Dispute Resolution and Complaints Commission [no. 01-070-7914], of 5 May 2017 and the Decision of the Disciplinary Commission [01-070-01-2927] of 7 March 2017 and obliges the Municipality of Gjakova to return the claimant, Afrim Radoniqi, to his working place, Municipal Public Lawyer with all rights from the employment relationship according to the Appointment Act [01-118-143-9] of 1 June 2013 from the moment of leaving the employment relationship according to the decision of the Municipality of Gjakova of 7 March 2017; (iii) The part of the claimant's statement of claim, requesting the annulment of the Decision [A02/436/2017] of 15 May 2017 of the respondent, the IOBCSK and the Decision of the Municipality of Gjakova [118-2624/2014], of 25 March 2014, is rejected as ungrounded.

45. On 14 September 2018, the Applicant, Municipality of Gjakova, filed an appeal against the approving part, namely points I and II of the enacting clause of the abovementioned Judgment, on the grounds of essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law, with the proposal that the Court of Appeals approve as grounded the appeal filed by him and the case be remanded to the first instance court for retrial and reconsideration.

46. On 17 September 2018, the interested party, Afrim Radoniqi, filed an appeal against point III of the abovementioned Judgment of the Basic Court, on the grounds of violation of the provisions of the court procedure; erroneous and incomplete determination of factual situation and erroneous application of substantive law, with the proposal that the appeal be approved as grounded, the point III of the Judgment [A. No. 975/18] of the Basic Court be modified, the Municipality of Gjakova be obliged to compensate to claimant Afrim Radoniqi the unpaid personal income in the amount of 50% by calculating the legal interest starting from 25 March 2014 until 5 May 2017 and the compensation of all other benefits from the employment relationship.

47. On 21 September 2018, the IOBCSK filed an appeal against the aforementioned Judgment of the Basic Court, on the grounds of violation of the provisions of the administrative procedure; erroneous determination of factual situation and erroneous application of substantive law, with the proposal that the appealed Judgment be annulled as non based on law.

48. On 26 September 2018, the Municipality of Gjakova submitted a response to the appeal, stating that the Basic Court, when deciding on point III of its Judgment, provided sufficient reasons, clear and based on legal provisions, and that the substantive law was correctly applied.

49. On 5 November 2019, the Court of Appeals by Decision [AA. No. 505/2018]: (i) rejects as ungrounded the appeal of the interested party, Afrim Radoniqi, of 17 September 2018, while upholds point III of the Judgment of the Court Basic; (ii) approves as grounded the appeals of the respondent IOBCSK and the Applicant, Municipality of Gjakova, while point II of the Judgment of the Basic Court is quashed and the case is remanded to the first instance court for retrial and reconsideration; and (iii) In the other part, the enacting clause of the appealed Judgment remains unchanged.

50. On 29 November 2019, the interested party, Afrim Radoniqi, filed a request for extraordinary review of the court decision, of the Decision [AA. No. 505/2018] of the Court of Appeals, on the grounds of violations of the provisions of the procedure and erroneous application of substantive law, with a proposal to approve the request and modify the challenged decision.

51. On 16 December 2019, the Applicant, Municipality of Gjakova, through the response to the request for extraordinary review, challenged the allegations of the interested party, Afrim Radoniqi, in entirety with a proposal that the request be rejected as ungrounded.

52. On 20 January 2020, the Supreme Court of Kosovo (hereinafter: the Supreme Court) by Decision [ARJ-UZVP. No. 15/2020] rejected as inadmissible the request of the interested party, Afrim Radoniqi, for extraordinary review of the court decision, filed against the Decision of the Court of Appeals [AA. No. 505/2018] of 9 August 2018. In its reasoning the Supreme Court states that: *"[...] by the challenged judgment of the Court of Appeal [AA. No. 505/2019] of 5 November 2019, in point II of the Decision, the Judgment of the Basic Court in Prishtina [A. No. 975/2017] of 9 August 2018 was annulled and the case was remanded to the first instance court for retrial and reconsideration. Since the court decision has not become final, as the case has been returned to the first instance court for retrial and reconsideration, this Court has dismissed the request as inadmissible"*.

53. The interested party, Afrim Radoniqi, filed a request for repetition of the procedure challenging the legality of the Decision [ARJ-UZVP no. 15/2020] of 20 January 2020, of the Supreme Court. The interested party claims that by the challenged Decision, deciding upon the request for extraordinary review of the court decision, whereby the interested party, Afrim Radoniqi, had challenged the decision of the second instance in the part where the decision of the first instance was upheld, which rejected the appeal of the interested party to annul the Decision [A/02/436/2017] of 15 May 2007 of the IOBCSK, in the part which annulled the decision of the first instance by the second instance court and it was not decided in the part where the claimant's appeal was rejected.

54. On 28 October 2020, the Supreme Court by Judgment [UPP-APP. No. 1/2020] allowed as grounded the proposal for repetition of the procedure of the claimant Afrim Radoniqi, filed against the Decision

of the Supreme Court [ARJ-UZVP. No. 15/2020] of 20 January 2020, thus annulling the said Decision.

55. On 14 May 2021, the Basic Court by Decision [A. No. 2691/2019] approves as grounded the proposal of the Municipality of Gjakova, given in the submission of 11 May 2021, and the procedure according to the lawsuit of Afrim Radoniqi is terminated until the Constitutional Court of the Republic of Kosovo decides regarding the appeal of the Municipality of Gjakova of 28 April 2021, filed against the Judgment of the Supreme Court of Kosovo [UPP-APP. No. 1.2020] of 28 October 2020.

Comments of interested party Afrim Radoniqi

56. On 24 June 2021, the interested party, Afrim Radoniqi, through the comments submitted to the Court states that *"the Applicant's complaint -the Municipality of Gjakova in the Constitutional Court is an abuse of procedural rights and has the sole purpose of prolonging the decision on merits of the labor dispute, which dispute has been initiated since 2014 and for the same subject of the statement of claim so far a total of 5 (five) Judgments/Decisions by the of first, second and third instance courts have been issued resulting in violation of the provisions of the Constitution, namely Article 34 (Right not to be tried two (2) times for the same criminal act)".*

Response of the Supreme Court of Kosovo

57. On 2 July 2021, the Court received from the Supreme Court the answers to the questions posed: *(1) have you notified the Applicant, in this case the Municipality of Gjakova, regarding the proposal for repetition of the procedure? What is the legal obligation for such a notice?; and (2) The Applicant - Municipality of Gjakova, alleges that the Supreme Court has allowed the use of an unauthorized legal remedy, as the repetition of the Procedure is not defined in the Law on Administrative Conflicts, but only. What is the position of the Supreme Court regarding this allegation of the Municipality of Gjakova?*

58. The Supreme Court, in relation to the answer to the first question (1), stated that: *"regarding the requested information, we found that the claimant addressed this court with a request to review the decision [ARJ-UZVP. No. 15/2020] on 20.10.2020, because, according to the claimant, the Supreme Court has erroneously proceeded and*

reconsidered point II of the enacting clause of Decision AA. UZH. No. 505/2018 of 05.11.2019, of the Court of Appeals.

In the case file the Municipality of Gjakova was not a party to the proceedings and there is no evidence that this request was sent to the latter."

59. The Supreme Court regarding the answer to the second question (2) stated that: *"as to the information for point 2) of your request, as a court administration we cannot comment on the court decision of the panel of this court and give any professional answer regarding the allegations of the Municipality of Gjakova, whether the use of this legal remedy is allowed, this it is a matter of professional assessment and competence of the panel of judges. The position of this court, according to the challenged judgment, until it is proven otherwise".*

Applicant's allegations

60. The Applicant alleges that the challenged Judgment [UPP-APP. No. 1/2020] of 28 October 2020 of the Supreme Court, was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR. Consequently, the Applicant alleges that by the challenged Judgment, the following have been violated: (i) the principle of adversarial proceedings and the principle of equality of arms in the proceedings; and (ii) the principle of legal certainty related to the right to a reasoned court decision.

(i) Regarding the Applicant's allegation of violation of the principle of adversarial proceedings and equality of arms in the proceedings

61. Initially, the Applicant states that while the interested party, Afrim Radoniqi, submitted a request for repetition of the procedure, the latter should be sent to the Applicant, namely the Municipality of Gjakova, as they had the status of "*the interested party*" in all proceedings conducted before the regular courts. Therefore, the Applicant, the Municipality of Gjakova, was prevented and denied the filing of response to that request and was prevented from submitting counter-evidence.

62. Accordingly, the Applicant states that as a result of not notifying the Municipality of Gjakova with the claimant's proposal for repetition of

the procedure, the principle of equality of arms and the principle of adversarial proceedings have been violated. The Applicant states that according to the ECtHR, Article 6.1 of the Convention obliges the courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice of whether they are relevant to its decision (see, *similarly*, the ECtHR case, *Kraska v. Switzerland*, Judgment of 19 April 1993; *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988).

63. The Applicant states that in such an analogous situation, the Constitutional Court decided with Judgment in case no. KI193/19, Applicant *Salih Mekaj*. According to the Applicant, in the summary of this Judgment, the Court stated that that the principle of equality of arms and the principle of adversarial proceedings, as essential elements of the right to a fair and impartial trial, require the courts to strike a fair balance between the parties to the proceedings, as well as to enable them to have a substantive confrontation of claims and arguments.

64. Therefore, the Applicant further states that the analogy between the cases related to the procedural violations that preceded the challenged Judgment and the case KI193/19, with the Applicant *Salih Mekaj* is present. Article 6 of the ECHR [Right to a fair trial] in defining his civil rights and obligations states that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

(ii) Regarding the allegation of violation of the principle of legal certainty related to the right to a reasoned court decision

65. The Applicant initially states that the challenged Decision is arbitrary, which violates the principle of legal certainty, since in the reasoning of the challenged decision is not mentioned any reasoning regarding the permission to repeat the procedure. Such an action, namely silence, the total lack of justification of the admissibility of the request for repetition of the procedure by the Supreme Court, is an unconstitutional action.

66. The Applicant further states that the Constitutional Court in its decision found that the essential function of a reasoned decision, according to the ECtHR, is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision gives an opportunity to the party to appeal against it, as well as the possibility of having the

decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be a public scrutiny of the administration of justice (see, *Hirvisaari v. Finland*, no. 49684/99, Judgment of 27 September 2001, paragraph 30; T*atishvili v. Russia*, application no. 1509/02, Judgment of 22 February 2007, paragraph 58; case of Court K197/16, Applicant "*IKK Classic*", Judgment of 9 January 2018, paragraph 46; and KI22/16, *N. Husaj*, Judgment of 9 June 2017, paragraph 40). Due to the failure to notify the Municipality of Gjakova about the claimant's proposal for repetition of the procedure, the principle of equality of arms and the principle of adversarial procedure have been violated. According to the ECtHR, Article 6.1 of the Convention obliges the courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice of whether they are relevant to its decision (see, the ECtHR case, *Kraska v. Switzerland*, Judgment of 19 April 1993; *Barbera, Messegue and Jabardo v. Spain, judgment of 6 December 1988).* According to the Applicant, this failure of the Supreme Court is a sufficient basis for the Constitutional Court to approve this constitutional complaint.

67. The Applicant further states that the challenged Judgment in its enacting clause states: *"The proposal of the claimant for repetition of the procedure is allowed, ..."*, whereas according to the Law on Administrative Conflicts, the legal institution of repetition of the procedure is not foreseen. The application of this non-existent institution in the administrative conflict procedure is not defined, since Law No. 03/L-202 on Administrative Conflicts, in Article 55, provides for review (not repetition of the procedure).

68. In addition, the Applicant states that the Supreme Court in this procedure, as there was no legal or factual basis to review the procedure or to repeat the procedure, has not provided any legal basis for review under Article 55 of the LAC. The absolute lack of reasons why the "*proposal for repetition of the procedure*" is allowed represents a sufficient factual and legal basis that makes the challenged Judgment unlawful, creates legal uncertainty that represents a violation of basic constitutional principles.

69. The Applicant further states that even for the review estabished in Article 55 of the LAC, there is no basis for its admissibility, as the Supreme Court would have to consider the requirements of admissibility and effectiveness set out in Article 55.2 and articles 56 and 57 of the LAC. Whereas, the Supreme Court is satisfied with giving a general reasoning: *"Since this judgment annulled the judgment of*

the Supreme Court of Kosovo [ARJ UZVP. No. 15/2020] of 20 January 2020, by which the request for extraordinary review of the court decision was rejected as inadmissible, this court, assessing the reasons of the claimant given in the request for extraordinary review of the court decision, found that the latter are grounded".

70. In the same line of argument, the Applicant states that the Constitutional Court must decide in this case that the Supreme Court of Kosovo "*applied the law in a manifestly erroneous manner*" and consequently had resulted in arbitrary and manifestly unreasonable conclusions towards it and that this arbitrary position of the Supreme Court sets a bad precedent, harmful to the legal system in the Republic of Kosovo.

71. Finally, the Applicant requests the Court: (I) to declare the constitutional complaint admissible; (II) to find a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, namely a violation of the principle of a fair trial under Article 6 of the ECHR; Article 31 [Right to a Fair and Impartial Trial] of the Constitution, the principle of legal certainty, the lack of necessary reasoning for a court decision, the violation of the principle of equality of arms and the principle of adversarial proceedings and the lack of reasoning of a court decision; (III) to declare invalid the Judgment of the Supreme Court of Kosovo [UPP-APP. No. 1/2020] of 28 October 2020; (IV) to remand the Judgment of the Supreme Court [UPP-APP. No. 1/2020] for reconsideration in accordance with the findings of this Judgment of the Constitutional Court; (V) to order the Supreme Court to notify the Constitutional Court, as soon as possible about the measures taken to implement the Judgment of the 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.

3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.
[...]

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

Law No. 03/L-202 on Administrative Conflicts

Article 21

The position of the party in an administrative conflict has the person, to whom the annulment of contested administrative act shall cause direct or indirect damages.

Article 30

1. The name of the court where the indictment is submitted, name, surname and residence, respectively the residence of the plaintiff shall be included in the indictment, the administrative act against which the indictment was addressed, and in which direction and volume the annulment of administrative act has been proposed. Together with the indictment the original or a copy of the contested act shall be attached.

2. If through indictment return of thing or compensation of harm is required, a certain request shall be submitted in the viewpoint of the thing or amount of harm.

3. Together with the indictment, a copy of the indictment and attached documents shall be presented for the indicted body and to any interested person, if there is such.

Article 55
Reviewing

1. The interested party may request reviewing of the decision in effect, when:

1.1. the party is informed about new facts, or if it finds or creates opportunities to use new proves, on which base the conflict shall be solved in more favorable manner for it, if this facts or proofs were raised or used in previous court procedure;

1.2. the court decision came as a consequence of judge's penal act, the court employee or the decision has been issued by fraudulence act of the representatives or the authorizer of the party, his/her objector, representative or by the objector authorizer, whereas this action presents penal act;

1.3. the decision is based on issued act decision on penal or civil matter, whereas this judgment has been annulled later by a final court decision;

1.4. the document, on which the decision is based is falsified, or if the witness, expert or party during the hearing before the court has given a mendacity declaration and the court decision was based on this declaration;

1.5. the party finds or creates opportunities to use the previous decision issued in the same administrative conflict; and

1.6. the interested person was not allowed to take part in the administrative conflict.

2. Because of the circumstances under sub-paragraph 1.1 and sub-paragraph 1.5 of this paragraph the reviewing shall be allowed only if the party, without her/his blame, was not able to raise these circumstances in the previous procedure.

Article 60

1. On request for reviewing the court shall decide in a closed session.

2. The Court shall overrule the request with the decision if the court verifies that the request was submitted by an unauthorized person or the request was not submitted on time, or that the party has not made believable the existence of legal basis for reviewing.

3. If the court does not overrule the request under paragraph 2 of this Article, then the request shall be delivered to the contested party and interested persons, and shall ask them to respond to the request within fifteen (15) days.

Article 61

1. After the time-limit for response to the request for reviewing expires, the court shall decide on the request for reviewing by a judgment.

2. If the reviewing is allowed, the previous decision shall be in whole or partly annulled.

3. Previous procedural actions, which does not influence in reviewing reasons shall not be repeated.

4. By the judgment, by which the reviewing is allowed, shall be also decided on key issues.

Article 63
Other procedure provisions

If this law does not contain provisions for the procedures on administrative conflicts, the law provisions on civil procedures shall be used.

Article 53
[no title]

The court shall decide on the request for extraordinary review or the request for legal defense, as a rule, in a closed session, whereas the objected decision shall be reviewed only within the limits of the request.

Law Nr. 03/L-006 on Contested Procedure

Article 160
[no title]

160.1 A verdict compiled in written should have: summary, disposition, justification and guide on the right to file a complaint against the verdict. 160.2 The summary of the verdict should have: the name of the court, the name of the judge, the names of the parties and their address, the names of their legal representatives, brief narrative of the contesting issue and the amount, the ending day of the main hearing, the narrative of the parties and their legal representatives and with proxy that were present in the session of the kind as well as the day when the verdict was issued.
160.3 The verdict disposition consists of: decision which approves or rejects special requests dealing with issue at stake and accessing requests, decision for existence or non-existence of the proposed requests to compensate it with statement of claim as well as the decision on procedural expenses.
160.4 Justification of the verdict consists of: requests of parties, facts submitted and proposed proofs, which of the facts are validated, why and how they were validated, if they were validated according to the proof which proofs were used and how they were validated.
160.5 The court specifically should show which provisions of the material right are applied in the case of deciding upon the requests from the parties. If necessary, the court will pronounce on the standing of the parties regarding the judicial basis for the contests, as well as for their proposals and turndowns, for which the court hasn't justified decisions issued earlier in the process.
160.6 In the contumacy verdict, verdict on the basis of pleading guilty, verdict on the basis of withdrawing the charges, or the verdict due to the lack of attendance, the justification consists of only the reasons for issuing the verdict of the kind.

Article 182

[...]

182.2 2 Basic violation of provisions of contested procedures exists always:

[...]

n) if the decision has leaks due to which it' can't be examined, especially if the disposition of the decision is not understandable or contradictory in itself with the reasoning of the verdict, or when the verdict has no reason or which gives no justification for the final facts, or which reasoning are unclear, contradictory, or if in the final facts there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding;

Admissibility of the Referral

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

73. In this respect, the Court initially refers to paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

Article 21

"[...]

4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

Article 113

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

[...]

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

74. In addition, the Court also examines whether the Applicant has met the admissibility requirements as established in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48

(Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

"1. Every individual is entitled to requestfrom 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...".

75. Initially, The Court clarifies that, in accordance with Article 21.4 of the Constitution, the Applicant is entitled to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, which apply to individuals as well as to legal persons (see cases of the Court, K110/20, Applicant "*Regional Water-Supply Company "Hidroregjioni Jugor" J.S.C. - Unit Malësia e Re Prizren*, Resolution on Inadmissibility of 5 October 2020, paragraph 35; case KI41/09, Applicant *University AAB-RIINVEST L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

76. Further, regarding the fulfillment of the abovementioned procedural criteria, the Court notes that the Applicant is an authorized party, challenging an act of a public authority, namely Judgment [UPP-APP. No. 1/2020] of 28 October 2020 of the Supreme Court, after having exhausted all legal remedies provided by Law. The Applicant has also clarified the fundamental rights and freedoms it alleges to have been violated, in accordance with the requirements of Article 48 of the Law

and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

77. Finally and after the review of the Applicant's constitutional complaint, the Court considers that the Referral cannot be considered as manifestly ill-founded on constitutional basis as established in paragraph (2) of Rule 39 of the Rules of Procedure (see, also ECtHR case *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144, and see similarly the case of Court KI27/20, Applicant *Movement VETËVENDOSJE!*, Judgment of 22 July 2020, paragraph 43).

78. 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. The latter cannot be declared inadmissible on the basis of the criteria set out in paragraph (3) of Rule 39 of the Rules of Procedure.

Merits of the Referral

79. The Applicant alleges that the challenged Judgment [UPP-APP. No. 1/2020] of 28 October 2020 of the Supreme Court, was rendered in violation of its fundamental rights and freedoms guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. Consequently, the Applicant alleges that by the challenged Judgment the following have been violated: (i) the principle of adversarial proceedings and the principle of equality of arms in proceedings; and (ii) the principle of legal certainty as to the right to a reasoned court decision. In assessing the admissibility of these allegations, the Court will also apply the case law of the European Court of Human Rights (hereinafter: ECtHR), in accordance with which, the Court under Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

80. The Court first recalls that the Applicant alleges that the challenged Judgment of the Supreme Court violated its right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, namely the Applicant specifies that in its case have been violated: I. The principle of adversarial proceedings and the principle of equality of arms in the procedure, as a result of failure to notify it about the request for repetition of the procedure filed by the interested party, Afrim Radoniqi; and II. The principle of legal certainty related to the right to a reasoned court

decision, regarding the reasoning for allowing the claimant's proposal for repetition of the procedure.

I. Regarding the allegation of violation of the principle of adversarial proceedings and equality of arms in the procedure

81. The Court first recalls that the Applicant relates its allegation of violation of the principle of equality of arms and the principle of adversarial proceedings to the failure to send a proposal for repetition of the proceedings submitted by the interested party, Afrim Radoniqi, and not giving the opportunity to submit a response to this request.

82. Consequently, in the light of the Applicant's allegations, the Court will elaborate on the general principles developed in the case law of the ECtHR regarding the adversarial principle and the principle of equality of arms.

83. Finally, the Court, in considering and elaborating on the general principles established through the case law of the ECtHR regarding the principle of adversarial proceedings and equality of arms, will consider and assess whether the cases of the ECtHR and of the Court mentioned by the Applicant in its Referral refers to similar factual and legal circumstances as those in its case and will also assess whether these cases are applicable in its case.

a. General principles according to the case law of the Court and of the ECtHR regarding adversarial principle and the equality of arms

84. The concept of a fair trial includes the fundamental right to a trial based on the principle of adversarial proceedings. At the same time, this principle is closely related to the principle of equality of arms (see, the ECtHR case *Regner v. Czech Republic*, Judgment of 19 September 2017, paragraph 146).

85. The Court, referring also to the case-law of the ECtHR, first reiterates that the principle of "*equality of arms*" is an element of a broader concept of a fair trial (see ECtHR case *Borgers v. Belgium*, no. 12005/86, Judgment of 30 October 1991, paragraph 24).

86. The ECtHR and the Court in case law emphasized that the principle of *"equality of arms"*, requires *"fair balance between the parties"* where each party must be afforded a reasonable opportunity to present his or her case, under conditions that do not place him/her at a substantial

disadvantage *vis-a-vis* his/her opponent (see the cases of the ECtHR *Yvon v. France*, application no. 44962/98, Judgment of 24 July 2003, paragraph 31 and *Dombo Beheer B.V. v. the Netherlands*, application no. 14448/88, Judgment of 27 October 1993, paragraph 33 see also other references in this Judgment, *Öcalan v. Turkey* [GC], paragraph 140, *Grozdanoski v. Former Yugoslav Republic of Macedonia,* application no. 2150/03, Judgment of 31 May 2007, see also the cases of the Court: KI230/19, with Applicant *Albert Rakipi,* Judgment of 8 January 2021, paragraph 98; KI239/19, with Applicant *Hakif Veliu,* Resolution on Inadmissibility of 19 March 2021, paragraph 112; KI52/12, Applicant *Adije Iliri,* Judgment of 5 July 2013, KI103/10, Applicant *Shaban Mustafa,* Judgment of 20 March 2012, paragraph 40*)*.

87. The Court further recalls that the case law of the ECtHR has established 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 the ECtHR). of: *Dombo Beher BV v. the Netherlands*, Judgment of 27 October 1993, paragraph 33). Also, the claims arising from the right to adversarial proceedings are in principle the same in both civil and criminal cases (see ECtHR case: *Werner v. Austria*, Judgment of 24 November 1997, paragraph 66).

88. In addition, the Court also notes that a fair trial also includes the right to a trial in accordance with the "*principle of adversarial proceedings*", a principle which is linked to the principle of "*equality of arms*". In this context, there has been considerable development in the case law of the ECtHR, in particular as regards the importance attached to appearances and the increase in public attention or sensitivity to the proper administration of justice (see *Borgers v. Belgium*, cited above, paragraph 24).

89. The right to adversarial proceedings means in principle the possibility for the parties to a criminal or civil trial to have knowledge of and comment on all evidence received or submissions submitted, even by an independent member of the national legal service, in order to influence the court decision (see ECtHR cases: *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, paragraph 63; *McMichael v. United Kingdom*, Judgment of 24 February 1995, paragraph 80; *Vermeulen v. Belgium*, Judgment of 20 February 1996, paragraph 33; *Lobo Machado v. Portugal*, Judgment of 20 February 1996, paragraph 31; *Kress v. France*, Judgment of 7 July 2001, paragraph 74). This request can also be applied before a Constitutional Court (see ECtHR case: *Milatová and Others v. the Czech Republic*, Judgment of 21 June

2005, paragraphs 63-66; *Gaspari v. Slovenia*, Judgment of 21 July 2009, paragraph 53).

90. Examples of non-compliance with the principle of equality of arms, namely the ECtHR found that this principle had been violated in cases where one of the parties had been placed at a clear disadvantage: the complaint of one party was not given to the other party, which there was therefore no opportunity to respond (see ECtHR case: *Beer v. Austria*, Judgment of 6 February 2001, paragraph 19).

b. Application of these principles in the case of the Applicant

91. The Court first recalls the allegation of the Applicant, the Municipality of Gjakova, of violation of the principle of equality of arms and the principle of adversarial proceedings as a result of not submitting the proposal for repetition of the procedure submitted by the interested party, Afrim Radoniqi, and not giving it the opportunity to submit a response to this request.

92. With regard to this allegation of the Applicant, the Court recalls that it requested information from the Supreme Court whether it had notified the Applicant, the Municipality of Gjakova, regarding the proposal to repeat the proceedings? How and what was the legal obligation for such a notice?

93. The Supreme Court in its response to the Court of 2 July 2021 stated the following:

> *"Regarding the requested information, we found that the claimant addressed this court with a request to review the decision [ARJ-UZVP. No. 15/2020] on 20.10.2020, because, according to the claimant, the Supreme Court has erroneously proceeded and reconsidered point II of the enacting clause of Decision [AA. UZH. No. 505/2018] of 05.11.2019, of the Court of Appeals.*
>
> *In the case file the Municipality of Gjakova was not a party to the proceedings and there is no evidence that this request was sent to the latter."*

94. The Court further places emphasis on (i) paragraph 3 of Article 60; and (ii) paragraph 1 of Article 61 of the Law on Administrative conflicts, which establish:

Article 60

[...]

3. If the court does not overrule the request under paragraph 2 of this Article, then the request shall be delivered to the contested party and interested persons, and shall ask them to respond to the request within fifteen (15) days.

[...]

Article 61

1. After the time-limit for response to the request for reviewing expires, the court shall decide on the request for reviewing by a judgment.

95. First, the Court notes that the Supreme Court in its reply of 2 July 2021, states that it has not submitted a request for repetition of the procedure to the Municipality of Gjakova. Also, the Supreme Court declares that the Municipality of Gjakova was not a party to the proceedings. Despite the answer given, the Court notes that there was an obligation to send the request for repetition of the procedure to the opposing party and interested persons, which derived from the abovementioned provisions of the Law on Administrative Conclicts

96. The Court recalls that 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 given a reasonable opportunity to present its case in conditions which do not place it in considerably unequal position *vis-à-vis* the opposing party. In this regard, the Court considers that the Supreme Court has failed to guarantee the application of the principle of equality of arms and the principle of adversarial proceedings, because the Applicant has been placed at a considerable disadvantage *vis-à-vis* the claimant, the interested party Afrim Radoniqi, being deprived of the opportunity to have a real and substantive confrontation with the arguments and allegations presented by the interested party, as an opposing party in the procedure.

97. The right to adversarial proceedings in principle means the possibility for the parties in the criminal or contested proceedings to be aware of and comment on all the evidence administered or on the submissions submitted, even by an independent member of the national legal service, as well as to influence the court decision. Thus, the Court considers that the obligation to notify the opposing party, by the courts, of the exercise of legal remedies against them, is not an end in itself. This obligation is a necessary procedural step to enable the parties to be treated equally, to be able to challenge the claims and arguments of the opposing party and to present their case effectively (see the case of Court KI193/19, with Applicant *Salih Mekaj*, Judgment of 31 December 2020, paragraph 59).

98. Therefore, the Court considers that this non-submission of the abovementioned request and the lack of any opportunity for the Applicant, the Municipality of Gjakova, to respond to the request for repetition of the procedure of the interested party, Afrim Radoniqi, constitutes a violation of principles of adversarial proceedings and equality of arms as guaranteed by Article 31 of the Constitution in conjunction with Article 6 paragraph 1 of the ECHR (see, *mutandis mutandis*, case of Court KI209/19, by Applicant *Memli Krasniqi*, Judgment of 26 November 2020, paragraph 57).

99. The Court reiterates that examples of non-compliance with the principle of equality of arms, namely the ECtHR has found that this principle has been violated in cases where one of the parties has been placed in a clearly unfavorable position: the complaint of one party has not been served on the other; which thus failed to respond (see, case of ECtHE: *Beer v. Austria*, Judgment of 6 February 2001, paragraph 19).

100. Accordingly, the Constitutional Court considers that this failure of the Supreme Court constitutes an insurmountable procedural flaw, as the Applicant has been deprived of his right to a fair trial, which is guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

101. Therefore, the Court finds that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 paragraph 1 of the ECHR.

102. The Court further clarifies that when it examines the proceedings as a whole, in conjunction with Article 31 of the Constitution, first of all

assesses: 1) whether the Applicant has had the opportunity to present arguments and evidence, which it considers relevant to its case during the various stages of the proceedings; 2) if it has been given the opportunity to effectively challenge the arguments and evidence presented by the opposing party, and if all the arguments which were relevant to the resolution of its case, viewed objectively, were duly heard and examined by the courts; 3) whether the factual and legal reasons against the challenged decisions were examined in detail; 4) if according to the circumstances of the case, the proceedings, viewed in their entirety, were fair (see, *mutatis mutandis*, the case of the Court: KI193/19, Applicant *Salih Mekaj*, cited above, paragraph 62; no. KI118/17, Applicant *Sani Kervan and others*, Resolution on Inadmissibility, of 16 February 2018, paragraph 35; see also *Garcia Ruiz v. Spain*, ECtHR, Application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

103. Given that the Court has found a violation of the principles of adversarial proceedings and of equality of arms in the context of the right to a fair trial guaranteed by Article 31 of the Constitution and in conjunction with Article 6 of the ECHR, it does not consider it necessary to examine separately the allegations regarding the principle of legal certainty related to the right to a reasoned court decision, regarding the reasoning for allowing the claimant's proposal for repetition of the procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 9 September 2021, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE Judgment [UPP-APP. No. 1/2020] of 28 October 2020, of the Supreme Court of Kosovo invalid;

IV. TO REMAND Judgment [UPP-APP. No. 1/2020] of 28 October 2020, of the Supreme Court of Kosovo, for reconsideration in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court of Kosovo to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 9 March 2022, about the measures taken to implement the Judgment of this Court;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO NOTIFY this Judgment to the parties, and in accordance with Article 20 (4) of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka-Nimani

KO61/21, Applicant, *Slavko Simić and 10 other deputies of the Assembly of the Republic of Kosovo*, constitutional review of Decision No. 08/V-005 of the Assembly of the Republic of Kosovo of 22 March 2021 on the Election of the Government of the Republic of Kosovo

KO61/21, Judgment rendered on 24 September 2021

Keywords: Institutional referral, appointment of ministers, non-majority community, approval/consultations

In the title **– CONCLUSIONS** – of this Judgment, the Court summarized the essence of the case as follows:

In Referral KO61/21, the subject matter of review was the constitutional review of the Decision [no. 08/V-005] of the Assembly of the Republic of Kosovo, of 22 March 2021, on the election of the Government of the Republic of Kosovo. The Applicants before the Court alleged that the Decision on the election of the Government is not in compliance with Article 96 [Ministries and Representation of Communities] of the Constitution, because the Minister of Local Government Administration was not elected after consulting a majority of deputies representing non- majority communities in the Assembly of Kosovo.

The main issue in this case relates to the manner in which the ministers representing the non-majority communities in the Government are appointed. Before the Court, the manner of appointing one (1) Minister who is mandatorily appointed by the Serb community was not challenged; or one (1) Minister who is mandatorily appointed by other non-majority communities, but the appointment of the "third" Minister in the Government by non-majority communities, which is a constitutional obligation in case the Government consists of more than twelve (12) Ministers. In this regard, the Applicants alleged that the appointment of the "third" Minister in the Government requires consultation/approval by a majority of all deputies representing non-majority communities in the Assembly, namely by at least eleven (11) out of twenty (20) deputies representing the non-majority communities.

The Constitutional Court stated that, for the purposes of the constitutionality of the composition of the Government, based on Article 96 of the Constitution, the Government should have at least one (1) Minister from the Serb community and one (1) Minister from other non-majority communities. The manner of election of these Ministers varies depending on whether the candidate nominated for Minister is a deputy of the Assembly or not. In order

to appoint a candidate for Minister from among the deputies of the Assembly, consultation with parties, coalitions or groups representing non-majority communities in Kosovo is necessary. Whereas, for the appointment of a candidate for Minister outside the ranks of the deputies of the Assembly, the formal approval of the majority of the deputies of the Assembly, who belong to parties, coalitions, civic initiatives and independent candidates, who have declared that they represent the community in question is necessary. The Constitutional Court also stated that the Constitution stipulates that if the composition of a Government has more than twelve (12) Ministers, the Government must also have a third Minister, "representing a Kosovo non-majority Community". The Court further emphasized that, with regard to the third Minister, the Constitution provides for the discretion of the candidate for Prime Minister regarding the ranks of the respective communities, from which a third Minister may be elected, without necessarily stipulating that this Minister should be proposed/approved from the deputies representing the Serb community or from the deputies representing other non-majority communities, but requesting that the same procedure be followed, namely consultation/approval of the "community in question", depending on whether the respective candidate is a deputy of the Assembly or not.

In the circumstances of the present case, the Court noted that the "third" minister from the non-majority communities, namely the Minister of Local Government Administration, was a deputy of the Assembly elected in the elections of 14 February 2021, declaring that he represents one of the other non-majority communities in the Assembly within the meaning of Article 64 [Structure of the Assembly] of the Constitution and who is proposed for this position in consultation with the deputies representing other non-majority communities in the Assembly. Considering that the respective candidate was an elected member of the Assembly, formal approval by the community in question is not a constitutional obligation, while before the Court there was no claim that the deputies representing other non-majority communities were not consulted in the proposal of this candidate for Minister, despite the fact that the Court had enabled them to submit their comments on the Referral submitted by the Applicants.

The Court finally clarified that based on Article 96 of the Constitution, the consultation or the approval of the deputies representing the "community in question" is mandatory, namely the deputies representing the Serb community or representing other non-majority communities, depending on whether the respective candidate is a deputy of the Assembly or not, and not the majority of all deputies representing non-majority communities. In the circumstances of the present case, the candidate nominated for Minister was a member of the Assembly and consequently his formal approval was not a constitutional obligation, while before the Court there was no claim that the

obligation to consult the “community in question” had not been exhausted. Therefore, the Court found that the challenged Decision of the Assembly of Kosovo on the election of the Government was not rendered in contradiction with paragraphs 3 and 5 of Article 96 of the Constitution.

JUDGMENT

in

Case No. KO61/21

Applicant

Slavko Simić and 10 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decision No. 08/V-005 of the Assembly of the Republic of Kosovo of 22 March 2021 on the Election of the Government of the Republic of Kosovo

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 Slavko Simić, Zoran Mojsilović, Miljana Nikolić, Ivan Todosijević, Verica Ćeranić, Branislav Nikolić, Jasmina Dedić, Ljubinko Karadžić, Miloš Perović, Adem Hodža and Igor Simić (hereinafter: the Applicants), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

2. The Applicants have authorized the deputy of the Assembly, Igor Simić, to represent them in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

Challenged act

3. The Applicants challenge the constitutionality of the Decision of the Assembly no. 08/V-005, of 22 March 2021, on the election of the Government of the Republic of Kosovo (hereinafter: the challenged Decision).

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly is not in compliance with paragraphs 3 and 5 of Article 96 [Ministries and Representation of Communities] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

5. The Applicants further request the Court to impose an interim measure *"which would put in a state of calmness the position of the Minister who was appointed Minister of Local Government Administration - Elbert Krasniqi because he does not have the support of (11) eleven deputies who compose the majority of (20) twenty deputies who represent non-majority communities"*.

6. The Applicants also request the Court that *"in accordance with Article 24 of the Law on the Constitutional Court and Rule 42 of the Rules of Procedure of the Constitutional Court, to hold a public hearing in which it would invite all deputies representing the non-majority communities in Kosovo (non-majority Serb community of (10) ten deputies and of other non-majority communities of (10) ten deputies) […]"*.

Legal basis

7. The Referral is based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties], of the Constitution, Articles 27 [Interim Measures], 42 [Accuracy of the Referral] and 43 [Deadline] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law), as well as Rules 56 [Request for Interim Measures], 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

8. On 29 March 2021, the Applicants submitted their Referral to the Court.

9. On the same date, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi (members).

10. On 30 March 2021, the Applicants were notified about the registration of the Referral.

11. On the same date, the Referral was communicated to the Acting President of the Republic of Kosovo, Mr. Glauk Konjufca (hereinafter: the Acting President), the Prime Minister of the Republic of Kosovo, Mr. Albin Kurti (hereinafter: the Prime Minister) and the Ombudsperson, with the instruction to submit to the Court the comments, if any, by 14 April 2021. The Referral was also communicated to the President of the Assembly, Mr. Glauk Konjufca, who was asked to notify the deputies of the Assembly that they can submit their comments regarding the Applicants' Referral, if any, by 14 April 2021.

12. On 30 March 2021, the Court also requested the Secretariat of the Assembly to submit to the Court by 14 April 2021 all relevant documents for the challenged decision.

13. On 2 April 2021, the Secretariat of the Assembly submitted to the Court the relevant documents relating to the challenged decision, namely:

- Decree no. 61/2021, of 22 March, of the Acting President;
- The request of the 52 deputies of the Assembly for convening the Extraordinary Session for the voting of the Government: Do-08/13, of 22 March 2021;
- Invitations to hold the Extraordinary Session of the Assembly of 22 March 2021;
- Decision of the Assembly no. 08-V -005, of 22 March 2021; and,
- Transcript of the Extraordinary Meeting (Session) of the Assembly, of 22 March 2021.

14. On 14 April 2021, the Prime Minister on behalf of the Government submitted comments regarding the Referral.

15. On 20 April 2021, the Court notified the Applicants, President Mrs. Vjosa Osmani, President of the Assembly, and the Ombudsperson, regarding the comments of the Prime Minister and the documents received from the Secretariat of the Assembly. The Court also notified the Prime Minister about the documents received from the Secretariat of the Assembly.

16. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule

12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP.71-2/21 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

17. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

18. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision KSH61/21, appointed Judge Remzije Istrefi-Peci as a member of the Review Panel instead of Judge Bekim Sejdiu.

19. On 24 June 2021, the Applicants submitted the letter to the Court *"Supplementation of the Referral KO 61-21"*. In this letter, the Applicants stated that *"By this submission we want to supplement the Referral and notify the Constitutional Court that in addition to the violations which we have highlighted in our first Referral registered in the Court with number KO 61-21, a continuing violation of Article 96 paragraph 4 has been already existing for 90 days as no Deputy Minister has been appointed to the Government before the Serb community, as provided for in Article 96 paragraph 4 [of the Constitution]"*.

20. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

21. On 28 June 2021, the President of the Court, Gresa Caka-Nimani, rendered Decision KSH61/21, replacing the previous President, Arta Rama-Hajrizi, in her role as the Presiding of the Review Panel.

22. On 28 July 2021, the Court considered the report of the Judge Rapporteur and decided to consider the case again at a forthcoming session. The Court also decided that it could not consider the new allegations under Referral KO61/21, which is already being considered by it. Consequently, on 3 August 2021, the Court notified the Applicants that in accordance with Rules 33 (Registration of Referrals

and Filing Deadlines), 34 (Correction of Referrals and Replies) and 38 (Review Panels) of the Rules of Procedure, the allegations submitted in the letter for "*supplementation of the Referral KO 61-21*" submitted on 24 June 2021, cannot be reviewed by the Court through the Referral K061/21.

23. On 22 September 2021, the Court considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

24. On 24 September 2021, the Court decided (i) unanimously, that the Referral is admissible; (ii) by a majority of votes, that the challenged Decision is in compliance with the Constitution; (iii) unanimously rejected the request for the imposition of an interim measure; and (iv) by a majority of votes, rejected the request to hold a hearing.

Summary of facts

25. On 6 January 2021, the Acting President Mrs. Vjosa Osmani, rendered Decision No. 02/2021, on the appointment and announcement of early elections for the Assembly, which were scheduled for 14 February 2021.

26. On 14 February 2021, early elections were held for the Assembly.

27. On 13 March 2021, the Central Election Commission (hereinafter: the CEC) certified the results of the elections of the Assembly of 14 February 2021, by Decision No. 950/2021, according to the following list of the election results:

a) VETËVENDOSJE! Movement (hereinafter: the LVV), 58 deputies;
b) Democratic Party of Kosovo - PDK, 19 deputies;
c) Democratic League of Kosovo - LDK, 15 deputies;
d) Serb List, 10 deputies;
e) Alliance for the Future of Kosovo -AAK, 8 deputies;
f) Kosovo Democratic Turkish Party - KDTP, 2 deputies;
g) Coalition "Vakat", 1 deputy;
h) New Democratic Initiative of Kosovo, 1 deputy;
i) i. Romani Initiative – RI, 1 deputy;
j) New Democratic Party - NDS, 1 deputy;
k) Social Democratic Union –SDU, 1 deputy;
l) United Gorani Party, 1 deputy;
m) Ashkali Party for Integration, 1 deputy;
n) Kosovo Progressive Roma Movement - LPRK, 1 deputy.

28. On 16 March 2021, following meetings with political parties representing non-majority communities in the Assembly, a meeting was held between representatives of the LVV and those of the Serb List.

29. On 21 March 2021, Mr. Albin Kurti, in his capacity as President of LVV, sent a letter to Mr. Goran Rakić, in the capacity of the latter as President of the Serb List, emphasizing that: *"[...] in accordance with Article 96, par. 3 and 4 [of the Constitution], in conjunction with Article 92 par. 1 and 2, in the capacity of the President of the winning party and the future Prime Minister of the Government of the Republic of Kosovo, pursuant to Article 95 par. 3 and 4 [of the Constitution], I invite you - the Serb List, to propose the names of the three deputies of your party, among whom I will select a Minister of the Ministry of Communities and Returns [...]".*

30. On the same date, on 21 March 2021, Mr. Goran Rakić, in his capacity as President of the Serb List, sent a letter to Mr. Albin Kurti in the capacity of the latter as President of LVV, in response to the above letter, emphasizing the following: "[...] *in case you propose a Government with 12 ministers, we will give the name of a minister.*

In case you propose a Government with more than 12 ministries, I want to inform you that in accordance with Article 96, paragraphs 3, 4 and 5, you are obliged to appoint 3 ministries in the administration of non-majority communities in Kosovo.

In this regard, I would like to inform you that the parliamentary group of the Serb List in the new legislature will have 11 deputies (10 from the Serb List and 1 from the United Gorani Party), representing the majority of the total number of (20) deputies in the Assembly of Kosovo, representing non-majority communities in accordance with Article 96, paragraphs 3, 4 and 5.

Thus, if the next government has more than 12 ministries, tomorrow we will provide you with 2 names for ministers who are not from the ranks of deputies, but in accordance with the Constitution have the support of 11 deputies who hold seats intended for non-majority communities. [...]".

31. On 22 March 2021, the constitutive meeting of the Assembly was held, with three items on the agenda:

4. Establishment of the Temporary Committee for Verification of the Quorum and the Mandates of the Deputies;
5. Taking the oath of the deputies;
6. Election of the President and Vice-Presidents of the Assembly.

32. The Temporary Committee for the Verification of Quorums and Mandates presented the Report to the Assembly on the same date. After that, the deputies took the oath and with the election of the President and Vice-Presidents, the Assembly was constituted.

33. On the same date, the Acting President issued Decree No. 61/2021 by which *"Mr. Albin Kurti is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo"*.

34. On 22 March 2021, 52 (fifty two) members of the Assembly submitted a request to hold an Extraordinary Session for voting of the Government.

35. On the same date, on 22 March 2021, Mr. Albin Kurti, in his capacity as President of the LVV and as a candidate for Prime Minister, sent a letter to Mr. Goran Rakić, in his capacity as President of the Serb List, emphasizing, among other things, the following *"in the capacity of the president of the winning party and the mandate for Prime Minister for the formation of the Government of the Republic of Kosovo, based on Article 95, paragraphs 3 and 4, I invite you - the Serb List to propose the names of three deputies of your party, of whom I will elect one for Minister of the Ministry of Communities and Returns [...]."*

36. On the same date, Mr. Goran Rakić, in his capacity as president of the Serb List, sent a letter to Mr. Albin Kurti in the capacity of the latter as President of the LVV and candidate for the formation of the Government, emphasizing the following: *"[...] Given that you propose a Government with more than 12 ministries, in accordance with Article 96 par. 3, 4 and 5 you are obliged to divide three ministries in the administration of non-majority communities in Kosovo. In this regard, we would like to inform you that 11 deputies (10 from the Serbian List and one from the Gorani United Party) representing the majority of the total number (20) of deputies representing non-majority communities in the Assembly of Kosovo, in accordance with Article 96, paragraphs 3, 4 and 5 of the Constitution of Kosovo give you the name of the candidate for the third minister.*
He is:
Dalibor Jevtic [...]".

37. On the same date, on 22 March 2021, the Assembly held an extraordinary meeting convened by 52 deputies of the Assembly, with the agenda, the Election of the Government of the Republic of Kosovo, in which case the mandated Prime Minister Mr. Albin Kurti, presented the composition of the Government, as follows:

1. Albin Kurti, Prime Minister;
2. Besnik Bislimi, First Deputy Prime Minister for European Integration, Development and Dialogue;
3. Donika Gërvalla, Second Deputy Prime Minister and Minister of Foreign Affairs and Diaspora;
4. Emilija Redžepi, Third Deputy Prime Minister for Minority and Human Rights Issues (representative from other non-majority communities in the Assembly);
5. Hekuran Murati, Minister of the Ministry of Finance, Labor and Transfers;
6. Albulena Haxhiu, Minister of the Ministry of Justice;
7. Armend Mehaj, Minister of Ministry of Defense;
8. Xhelal Sveçla, Minister of the Ministry of Internal Affairs and Public Administration;
9. Arben Vitia, Minister of the Ministry of Health;
10. Arbërie Nagavci, Minister of the Ministry of Education, Science, Technology and Innovation;
11. Hajrulla Çeko, Minister of the Ministry of Culture, Youth and Sports;
12. Elbert Krasniqi, Minister of the Ministry of Local Government Administration (representatives from other non-majority communities in the Assembly);
13. Liburn Aliu, Minister of the Ministry of Environment, Spatial Planning and Infrastructure;
14. Faton Peci, Minister of the Ministry of Agriculture, Forestry and Rural Development;
15. Rozeta Hajdari, Minister of the Ministry of Industry, Entrepreneurship and Trade;
16. Artane Rizvanolli, Minister of the Ministry of Economy;
17. Goran Rakić, Minister of the Ministry of Communities and Returns (voted by non-majority deputies representing the Serb community in the Assembly);
18. Fikrim Damka, Minister of the Ministry of Regional Development (representatives from other non-majority communities in the Assembly).

38. As noted above, regarding Mr. Goran Rakić, proposed for the position of Minister of the Ministry of Communities and Returns by representatives of the Serb community in the Assembly of Kosovo, as

he was not a deputy of the Assembly, pursuant to paragraph 5 of Article 96 [Ministries and Representation of Communities], was voted separately by the deputies of the Serb community, in which case that proposal received 10 out of 10 votes of the deputies representing the Serb community in the Assembly of Kosovo.

39. On the same date, 22 March 2021, by the challenged decision, no. 08/V-005, the Assembly elected the Government of the Republic of Kosovo, with 67 votes "for", 30 "against" and no "abstention", according to the proposed composition mentioned above.

Applicant's allegations

40. The Applicants allege that the challenged decision is not in compliance with paragraphs 3 and 5 of Article 96 [Ministries and Representation of Communities] of the Constitution.

41. The Applicants state that Article 96 of the Constitution provides that in the Government there must be at least *" one (1) minister from the Serb community and one (1) minister from any other non-majority community in Kosovo. If there are more than twelve ministers, the Government will have a third minister, who represents one of the non-majority communities in Kosovo"*.

42. In this connection they add that *"in accordance with Article 96 par. 3 reserving the seat for at least (2) two ministers of non-majority communities, but does not exclude the possibility that the Government will have more than two such ministers. However, according to the obligations under this article, at least (2) two ministers from non-majority communities in Kosovo must be part of the Government. The reserved representation of non-majority communities in the Government constitutes the so-called "broad government" principle in terms of multiethnicity, and is a key condition of consotiational democracy. This model of Government structure enables the guaranteed multiethnic character of the state to be expressed not only for reserved representation in government, but also because the ministers resulting from this article of the Constitution represent the voice of their communities in the government policy-making process"*. In this regard they refer to the Commentary, the Constitution of the Republic of Kosovo *Hasani, Enver and Čukalović, Ivan*, (2013) GIZ, Prishtina (hereinafter: the Commentary on the Constitution).

43. Referring again to the Commentary on the Constitution they add that *"the appointment of ministers and deputy ministers from non-*

majority communities in accordance with Article 96.4 shall be made after consultation with parties, coalitions or groups representing non-majority communities in Kosovo. If candidates are nominated from outside the structure of deputies of the Assembly of Kosovo, their appointment requires the votes of the majority of the deputies of the Assembly, who are members of parties, coalitions, civic initiatives and independent candidates who have stated that they will represent the communities in question. [...] From a legal point of view, the term "consultation" used in this article refers to the procedure when the party/coalition representing the community in question in the Assembly of Kosovo submits its candidacy for the composition of the Government that nominates the candidate for Prime Minister. Acceptance of the candidate proposed by the party/coalition representing the relevant non-majority community is mandatory within the meaning of Article 96.5, otherwise it would be considered that the obligation for full consultation with the party/coalition in accordance with this Article has not been fulfilled. This means that this article imposes a kind of parliamentary coalition, even implicitly, between the parties/coalitions that aim to form the Government and the deputies of the non-majority communities, as the acceptance of their candidate in the composition of the government is an obligation. according to the article in question. This type of coalition, even implicitly, results in a multiethnic parliamentary coalition, which is the only way to implement the provisions arising from this article [Article 96 of the Constitution]".

44. Regarding the third ministry from the ranks of non-majority communities, the Applicants state that *" The Constitution does not clearly state here whether this minister comes from the ranks of non-majority Serb communities or from other non-majority communities. But Article 96 paragraph 5 stipulates that ministers representing non-majority communities must be appointed "after consultation with parties, coalitions or groups representing non-majority communities in Kosovo".*

45. Therefore, they add that *"[...] it is clear that neither here nor in previous cases of minority representation has the Constitution left the possibility for the candidate or the Prime Minister to have freedom of choice, but the Constitution requires consultation to ensure a representative representation of non-majority communities in consultation with parties. coalitions or groups representing non-majority communities in Kosovo". Therefore, they ask the question "how to put up a representative representation of non-majority communities in the case when the Constitution does not clearly define*

from which community the third minister comes as in the previous two cases".

46. They hold the position that *"[...] if the minister representing the Serb community is appointed by a majority of (10) ten deputies representing the Serb community, and if the minister from other non-majority communities is appointed by a majority of (10) ten deputies representing other non-majority communities, then it is entirely logical that the (3) the third minister nominated by non-majority communities shall be appointed by a majority of (20) twenty deputies who, in accordance with Article 64 of the Constitution, represent the non-majority communities in Kosovo (Serb non-majority community (10) deputies and other non-majority communities from (10) ten deputies). [...] Which means that the Prime Minister is obliged to hold consultations and as the third minister representing the non-majority communities in Kosovo appoints a representative of the non-majority communities (either from the non-majority Serb community or from other non-majority communities) in Kosovo who manages to secure the support of majority of (20) twenty deputies constituting the majority of communities, respectively (11) eleven out of a total of (20) twenty deputies who, in accordance with Article 64 of the Constitution, represent the non-majority communities in Kosovo (non-majority Serb community (10) ten deputies and other non-majority communities (10) ten deputies)*".

47. Based on the above arguments, the Applicants add that "*the third minister is the Minister of Local Government Administration - Elbert Krasniqi who was appointed without consultation as a representative of the non-majority community in violation of Article 96 of the Constitution because he did not secure the support of (11) eleven deputies out of a total of (20) twenty deputies who , in accordance with Article 64 of the Constitution, represent the non-majority communities in Kosovo (non-majority Serb community (10) ten deputies and other non-majority communities (10) ten deputies). Therefore, in the present case they consider that "the rights of non-majority communities in general and the Serb community in particular have been marginalized and in the most rude way neglects the letter and spirit of the Constitution by appointing Minister of Local Self-Government Administration - Elbert Krasniqi who in the last legislature was not even part of the group of non-majority communities but was part of the parliamentary group of the political entity of Vetëvendosje Movement".*

48. Therefore, they emphasize that *"[w]e consider that the Prime Minister should have, in accordance with Article 96, convened consultations*

with all non-majority communities and appointed as the third Minister in accordance with Article 96 paragraph 3 the representative of the non-majority communities who manages to provide (11) eleven votes of the deputies, namely, the majority of votes out of (20) twenty votes in the council of communities, which is why it exists to express the views of non-majority communities".

49. Comparing with the positions of other non-majority communities in the Assembly or appointed by the Assembly, they emphasize that *"[...] almost all representatives of non-majority communities are appointed in this way, for example (Deputy President of the Assembly before the Serb community), it is logical that with 10 Serb votes he can never get 61 votes as he should be appointed Deputy President of the Assembly of Kosovo, but this does not mean that the President of the Assembly can impose on the Serb community which of the Serb depuuties will be the Deputy President of the Assembly. Judges of the Constitutional Court are appointed similarly, with two judges first required to vote in the community council, and only after receiving approval from non-majority community deputies they will be voted in the Assembly into the full legislature. [...] With such norms, the constitution-maker wanted to protect the rights of non-majority communities, so that the majority would not outvote and marginalize them, which is exactly what was done during the election of the government".*

50. Therefore, the Applicants request the Court: i) to declare the Referral admissible; ii) to find that the challenged decision is not in accordance with paragraphs 3 and 5 of Article 96 [Ministries and Representation of Communities] of the Constitution; and iii) order the Prime Minister, in accordance with Article 96 [Ministries and Representation of Communities] of the Constitution, to carry out the reorganization of the Government and to appoint as third Minister from the non-majority communities a person belonging to the non-majority communities proposed and supported by a simple majority of (11) eleven deputies out of a total of (20) twenty deputies representing non-majority communities in the Assembly.

Request for imposition of the interim measure

51. The Applicants, regarding the request for an interim measure, reason that the conditions established in paragraph (4) of Rule 57 of the Rules of Procedure for the imposition of an interim measure have been met, as in this case we have a *" prima facie case on the merits of the referral" because the case was submitted by (11) eleven deputies*

within (8) eight days and in accordance with Article 113 paragraph 5, the case is manifestly admissible on the merits"

52. They add that *"[...] regarding the irreparable damage itself, it is clear that we have a non-representative representation of non-majority communities in the Assembly of Kosovo where one person represents non-majority communities even though he does not have the support of (11) eleven deputies who make up the majority of (20) twenty deputies representing non-majority communities, in which case the majority in non-majority communities suffer irreparable damage because they are represented by an unauthorized person who is not a representative representative of non-majority communities".*

53. Also as regards the criterion that the interim measure should be in the public interest they reason that *"the Government of Kosovo is currently in an unconstitutional composition because a person who does not have the authority of a deputy of non-majority communities to represent non-majority communities sits in its composition. It is in the public interest for the Government to be established in a Constitutional composition and for the Government to work and function in accordance with the Constitution. Because this is not the case at the moment, it is in the public interest to impose an interim measure that would put the position of minister who was appointed Minister of Local Government Administration - Elbert Krasniqi in a state of calm because he has not support of (11) eleven deputies constituting a majority of (20) twenty deputies representing non-majority communities".*

Request for holding a public hearing

54. The Applicants also request the Court to hold a hearing at which the latter would invite all deputies representing non-majority communities in Kosovo to determine the following issues::
- which representative of the Serb community has the support of a majority of 10 (ten) deputies representing the Serb community in order to be appointed Minister;
- which representative of other non-majority communities has the support of a majority of (10) ten deputies representing other non-majority communities, in order to be appointed Minister;
- which representative of all non-majority communities has the support of the majority or (11) eleven out of a total of (20) twenty deputies to be appointed third Minister of non-majority communities if the Government has more than 12 (twelve) ministries;

- to determine that the third Minister before the non-majority communities who has been appointed Minister of Local Government Administration - Elbert Krasniqi, who is the representative of all non-majority communities, did not have the support of the simple majority of (11) eleven out of 20 twenty deputies who according to Article 64 of the Constitution represent non-majority communities.

Comments of the Prime Minister, Mr. Albin Kurti, submitted on behalf of the Government

55. The Prime Minister emphasized that regarding the Referral submitted to the Court, the Applicants are authorized parties under Article 113.5 of the Constitution, have exercised their right within the constitutional deadline, have informed the Court about the constitutional provisions which are relevant for the constitutional review of the challenged act, but have failed to provide evidence in relation to their allegations. In this context, the Prime Minister stated that "*The Government considers it necessary that despite the fact that the Referral is not based on evidence and does not justify the Applicants' allegation of the unconstitutionality of the challenged decision (manifestly ill-founded on constitutional basis), in order for the procedure of election and appointment of minority representatives within the Government of Kosovo to be considered adjudicated by the Constitutional Court, the Government considers it necessary and in the interest of constitutional stability for the Court to declare the Referral admissible and decide on the merits of the case. Because a case is considered "res judicata" only when it is adjudicated by a judgment and not if due to lack of reasoning it is declared procedurally inadmissible".*

56. Regarding the Applicants' allegation that paragraphs 3 and 5 of Article 96 of the Constitution were violated during the election of the Government, the Prime Minister states that *" the Applicants have misinterpreted paragraphs 3 and 5 of Article 96 of the Constitution, because the candidate for Prime Minister has fulfilled the constitutional obligations provided by this Constitution".* As the Constitution in paragraph 3 of Article 96 stipulates that at least one (1) minister from the Serb community, and one (1) minister from other minority communities, must be represented in the Government, according to paragraph 3 of Article 96 of the Constitution, if they are more more than twelve ministers, the Government will also have a third minister, who represents one of the non-majority communities in Kosovo. However, according to the Prime Minister "*the Constitution does not stipulate that the third minister representing*

minority communities must necessarily be representative of the Serb community. The Constitution in this case is clear and contains a precise wording, which does not leave room for ambiguity". In this regard he states that *" non-majority communities" refers not only to the Serb community, but also to other non-majority communities living in the Republic of Kosovo",* adding that on the basis of this, are allocated the seats guaranteed under Article 64.4 of the Constitution.

57. In this regard, the Prime Minister refers to other laws which define the representation of non-majority communities in other state institutions which refer to the representation of non-majority communities in general without setting quotas for the Serb community in particular. In this regard, he refers to the Law on the Ombudsperson, the Law on the Independent Media Council, and the Law on the Independent Oversight Board of the Civil Service. The Prime Minister argues that the above laws prove that when it is not specified from which non-majority communities a member should be appointed, it does not automatically mean that these nominees should be from the Serb community. This is evidenced by the current practice of functioning of these independent institutions, which elect their members after the vote of the Assembly.

58. The Prime Minister, regarding the issue of consultation with non-majority parties for the appointment of ministers from non-majority communities, states that before the election of the Government, *" The Applicants confirm themselves that on 21.03.2021 they had an exchange of letters with the candidate for Prime Minister, while on 22.03.2021 they met with him, after the formal mandate from Acting President. Consequently, the constitutional obligation to consult with them as representatives of the Serb minority in Kosovo has been exhausted. They also confirm that Mr. Goran Rakic has been elected minister on the proposal of their parliamentary group". He adds that "[i]f their proposal had been ignored and instead of Mr. Rakic was elected another person in the position of guaranteed minister for the representatives of the Serb minority, then the Applicant's claim would have been grounded. However, the latter do not challenge the election of Mr. Rakić".*

59. In this context, he holds that *" Consultation is not a category which entitles a certain minority the right to dictate the composition and division of ministries within the Government. However, it is a process that gives the representatives of that minority the right to announce the candidate for Prime Minister who will be the representatives of that minority within the representation guaranteed by the Constitution".*

60. The Prime Minister adds that *"The Government reiterates that the Republic of Kosovo is a state of its citizens (Article 2.1 of the Constitution) and a multiethnic society consisting of Albanians and other communities which is governed democratically (Article 3.1 of the Constitution). In the framework of this democracy, the Albanian majority has guaranteed the representation of minorities in the framework of its institutions and through the above constitutional provisions has guaranteed the unitary character of the constitutional order and the territory of the Republic of Kosovo (Article 1 of the Constitution)"*. He further emphasizes that in this case the non-majority communities have been consulted and in this respect the constitutional procedures for their representation in the Government have been respected.

61. Regarding the request of the Applicants for the imposition of an interim measure, the Prime Minister states that *"In addition to the lack of reasonableness for the request for an interim measure, the imposition of an interim measure would be in full contradiction with the public interest. By the interim measure, the Government considers that irreparable damage would be caused, at a time when the country needs a functioning Government in providing vaccines for protection against the COVID-19 pandemic and in the overall management of the pandemic. Moreover, the imposition of the interim measure would directly affect the Government's ability to work in the process of economic recovery and would also endanger national security. Therefore, an interim measure for the case in question is not in the public interest and may cause irreparable harm"*. The Prime Minister also emphasizes that it is not necessary to hold a hearing as in this case there is no ambiguity regarding the issue of law and fact, therefore, the request for a hearing should be rejected.

Relevant provisions of the Constitution, laws and sub-legal acts

Constitution of the Republic of Kosovo

"Article 64 [Structure of the Assembly]

1. *The Assembly has one hundred twenty (120) deputies elected by secret ballot on the basis of open lists. The seats in the Assembly are distributed amongst all parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly.*

2. *In the framework of this distribution, twenty (20) of the one hundred twenty (120) seats are guaranteed for representation of communities that are not in the majority in Kosovo as follows:*

   (1) Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the Kosovo Serb Community shall have the total number of seats won through the open election, with a minimum ten (10) seats guaranteed if the number of seats won is less than ten (10);

   (2) Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the other Communities shall have the total number of seats won through the open election, with a minimum number of seats in the Assembly guaranteed as follows: the Roma community, one (1) seat; the Ashkali community, one (1) seat; the Egyptian community, one (1) seat; and one (1) additional seat will be awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes; the Bosnian community, three (3) seats; the Turkish community, two (2) seats; and the Gorani community, one (1) seat if the number of seats won by each community is less than the number guaranteed.

   [...]

Article 95 [Election of the Government]

7. *After elections, the President of the Republic of Kosovo proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government.*

8. *The candidate for Prime Minister, not later than fifteen (15) days from appointment, presents the composition of the Government to the Assembly and asks for Assembly approval.*

9. *The Government is considered elected when it receives the majority vote of all deputies of the Assembly of Kosovo.*

10. *If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. If the Government is not elected for the*

second time, the President of the Republic of Kosovo announces elections, which shall be held not later than forty (40) days from the date of announcement.

11. *If the Prime Minister resigns or for any other reason the post becomes vacant, the Government ceases and the President of the Republic of Kosovo appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the Government.*

12. *After being elected, members of the Government shall take an Oath before the Assembly.*
The text of the Oath will be provided by law.

Article 96 [Ministries and Representation of Communities]

1. *Ministries and other executive bodies are established as necessary to perform functions within the powers of the Government.*

2. *The number of members of Government is determined by an internal act of the Government.*

3. *There shall be at least one (1) Minister from the Kosovo Serb Community and one (1) Minister from another Kosovo non-majority Community. If there are more than twelve (12) Ministers, the Government shall have a third Minister representing a Kosovo non- majority Community.*

4. *There shall be at least two (2) Deputy Ministers from the Kosovo Serb Community and two (2) Deputy Ministers from other Kosovo non-majority Communities. If there are more than twelve (12) Ministers, the Government shall have a third Deputy Minister representing the Kosovo Serb Community and a third Deputy Minister representing another Kosovo non-majority Community.*

5. *The selection of these Ministers and Deputy Ministers shall be determined after consultations with parties, coalitions or groups representing Communities that are not in the majority in Kosovo. If appointed from outside the membership of the Kosovo Assembly, these Ministers and Deputy Ministers shall require the formal endorsement of the majority of Assembly deputies belonging to parties, coalitions, citizens' initiatives and*

independent candidates having declared themselves to represent the Community concerned..

6. *The Prime Minister, Deputy Prime Minister(s) and Ministers of the Government may be elected from the deputies of the Assembly of Kosovo or may be qualified people who are not deputies of the Assembly.*

7. *The incompatibilities of the members of the Government as to their functions shall be regulated by law".*

Admissibility of the Referral

62. The Court first examines whether the Referral meets the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

63. In this respect, the Court refers to paragraph 1 of Article 113 of the Constitution, which establishes that:

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

64. In addition, the Court also refers to Article 113.5 of the Constitution, which provides:

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

65. The Court finds that the Referral is filed by 11 (eleven) deputies the Assembly, in accordance with Article 113.5 of the Constitution. Therefore, the Applicants are authorized parties to submit this Referral.

66. In addition, the Court takes into account Article 42 [Accuracy of the Referral] of the Law, which establishes that the Referral submitted in accordance with Article 113.5 of the Constitution must contain:

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

1.3. presentation of evidence that supports the contest."

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

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

68. The Court notes that the Applicants: (i) entered the names of the deputies and their signatures; (ii) submitted the power of attorney for the person representing them before the Court; (iii) specified the challenged decision, specifically the Decision of the Assembly no. 08/V-005, of 22 March 2021 on the election of the Government of the Republic of Kosovo, and submitted a copy; (iv) referred to specific constitutional provisions, which they claim that the challenged decision is not in compliance with; as well as (v) presented evidence and proof to support their allegations.

69. Therefore, the Court considers that the criteria set out in Article 42 of the Law and further specified in Rule 74 of the Rules of Procedure have been met. Likewise, regarding the deadline set for submitting the Referral, which is 8 (eight) days from the date of approval of the challenged act, the Court notes that the challenged decision was adopted on 22 March 2021, while the Referral was submitted to the Court on 29 March 2021. Consequently, the Court finds that the Referral was filed within the time limit set by paragraph 5 of Article 113 of the Constitution.

70. In view of the above, the Court finds that the Applicants have met the admissibility requirements, established in the Constitution and further specified in the Law and the Rules of Procedure, and therefore, the Court declares the Referral admissible and will consider its merits in the following.

Merits of the Referral

Summary of the Applicants' allegations and arguments of the Government

71. The Court recalls that the Applicants request the constitutional review of the challenged decision of 22 March 2021 of the Assembly on the election of the Government, which they consider to be inconsistent with paragraphs 3 and 5 of Article 96 [Ministries and Representation of Communities] of the Constitution.

72. The Applicants state that according to paragraph 3 of Article 96 of the Constitution, there will be at least one (1) Minister from the Serb community in the Government and one (1) Minister from any other non-majority community in Kosovo. Whereas, if there are more than twelve ministers, the Government will have a third minister, who represents one of the non-majority communities in Kosovo (hereinafter: the "third" Minister). In this regard, they consider that given that the appointment of ministers of the non-majority community will be decided after consultation with parties, coalitions or groups representing non-majority communities in Kosovo, the appointment of a "third" minister should be proposed. and have the support of a majority of twenty (20) deputies of the Assembly representing non-majority communities in Kosovo. Therefore, the Applicants construct their arguments for constitutional violation by emphasizing that the Government elected by the challenged decision, and that more than twelve ministers, the "third" elected Minister, namely Minister Elbert Krasniqi, was elected in violation with paragraphs 3 and 5 of Article 96 of the Constitution. According to them, this is because his appointment in the Government has not been proposed/approved by the majority of twenty (20) deputies of the majority communities in Kosovo, including the deputies of the Serb community.

73. Finally, the Applicants allege that pursuant to paragraphs 3 and 5 of Article 96 of the Constitution, the appointment of the "third" Minister in the Government required the appointment/approval of majority of all deputies representing the non-majority communities in Kosovo,

who in this case, means the proposal/approval by at least eleven (11) deputies of these communities out of twenty (20) deputies, which are a total number in the current legislature of the Assembly.

74. With regard to the abovementioned allegations of the Applicants, the Prime Minister, on behalf of the Government, states that the Constitution in paragraph 3 of Article 96 stipulates that at least one (1) Minister from the Serb community, and one (1) Minister from other non-majority communities in Kosovo, must be represented in the Government. Whereas, if there are more than twelve ministers, the Government will have a third minister, who represents one of the non-majority communities in Kosovo. In this regard, the Prime Minister maintains that the Constitution does not stipulate that the "third" minister representing minority communities must necessarily be representative of the Serb community. This is because "non-majority communities" does not refer only to the Serb community, but also to other non-majority communities living in the Republic of Kosovo. As the Constitution does not specify from which majority communities the "third" minister should be appointed, as long as he/she belongs to one of the majority communities in Kosovo, the conditions for representation of non-majority communities in the Government are met as defined in Article 96 of the Constitution. Therefore, the Constitution does not require the "third" minister is nominated or approved by a majority of all deputies representing the non-majority community in the Assembly.

75. With regard to the Applicants' allegation referring to the constitutional requirement for "consultation" with non-majority parties for the appointment of ministers from non-majority communities, the Prime Minister alleges that the consultation process does not imply that this entitles a certain minority to dictate the composition and division of ministries within the Government. However, the request for "consultation" under Article 96 of the Constitution is a process which entitles the representatives of that minority to notify the candidate for Prime Minister of who will be the representatives of that minority within the representation guaranteed by the Constitution.

76. Therefore, in the light of these allegations of the parties, the Court will first assess the constitutional criteria for the representation of non-majority communities in the Government, namely: (i) whether the Constitution of Kosovo, including paragraphs 3 and 5 of Article 96 of the Constitution, provides that the "third" Minister of the Government representing the non-majority communities in Kosovo (in case the

Government consists of more than twelve (12) ministers) belongs to a certain non-majority community; (ii) clarify whether the "third" minister should be nominated and receive the formal support of a majority of all deputies representing non-majority communities in Kosovo as well as constitutional obligations regarding consultation with non-majority communities for the appointment of the "third" minister; and (iii) assess whether the constitutional criteria for appointing the "third" Minister to the Government have been respected in the present case.

(i) Whether the "third" minister of the Government representing non-majority communities in Kosovo (in case the Government consists of more than twelve (12) ministries) belongs to a certain non-majority community

77. The Court initially finds it necessary to clarify that Article 64 [Structure of the Assembly] of the Constitution stipulates that out of one hundred and twenty (120) deputies that is the total number in the Assembly, twenty (20) of them are guaranteed for representation of non-majority communities in Kosovo.

78. Under this guaranteed quota, parties, coalitions, civic initiatives and independent candidates who have declared themselves to represent the Serb community will have the number of seats in the Assembly won in the open elections, with a minimum of ten (10) guaranteed seats, if the number of seats won is less than ten (10) (hereinafter: deputies representing the Serb community).

79. Whereas parties, coalitions, civic initiatives and independent candidates, who have declared themselves to represent other non-majority communities in the Assembly, will have the number of seats won in the open elections with the minimum guaranteed seats as follows: Roma community one (1) place; Ashkali community one (1) place; Egyptian community one (1) place; and one (1) additional seat shall be awarded to the Roma, Ashkali, or Egyptian community with the highest number of total votes; Bosniak community three (3) seats, Turkish community two (2) seats and Gorani community one (1) seat, if the number of seats won by each community is less than the number of guaranteed seats (hereinafter: deputies representing other non-majority communities in Kosovo).

80. Therefore, the Court notes that Article 64 of the Constitution as regards the twenty seats guaranteed in the Assembly for non-majority

communities in Kosovo, divides between: (i) deputies representing the "*Serb community*", who are represented in the Assembly by ten (10) guaranteed seats; and (ii) the deputies that represent *"other non-majority communities"*, namely: Roma, Ashkali, Egyptian, Bosniak, Turk and Gorani communities, who, together, are represented in the Assembly with ten (10) guaranteed seats, according to the division defined between them in the abovementioned article of the Constitution. Therefore, in this Judgment, the Court will refer to this division between non-majority communities in the Assembly.

81. In the following, with regard to the Applicants' Referral, the Court will refer to the constitutional criteria regarding the election, composition and representation of communities in the Government, in particular the criteria and procedure for the appointment of the "third" Minister representing the non-majority communities.

82. The Court notes that the criteria for the election, composition and representation of communities in the Government are set out in Chapter VI [Government of the Republic of Kosovo] of the Constitution, which in Articles 92-101 thereof, *inter alia*, set out the general principles for the Government, the competencies of the Government and the Prime Minister, the procedures for the election of the Government, as well as the manner of representation of the communities in the Government. The Court will further elaborate Articles 92 [General Principles], 95 [Election of the Government] and 96 [Ministries and Representation of Communities] of the Constitution, which are relevant to the present case..

83. In this respect, the Court first refers to Article 92 [General Principles] of the Constitution which stipulates that the Government exercises executive power and which consists of the Prime Minister, Deputy Prime Ministers and Ministers.

84. The Court also refers to Article 95 [Election of the Government] of the Constitution which determines the manner of election of the Government. More precisely, as explained in the Judgment of the Court in case KO72/20, paragraph 1 of Article 95 of the Constitution, determines that the President proposes to the Assembly the candidate for Prime Minister, in consultation with the political party or coalition that has won the necessary majority in the Assembly to form the Government. Paragraphs 2 and 3 stipulate that this candidate, no later than fifteen (15) days after the appointment, presents the composition of the Government to the Assembly of the Republic of Kosovo and requests the approval of the Assembly. The Government is considered

elected if it receives the majority of votes of all deputies of the Assembly of Kosovo, namely the vote of sixty one (61) deputies (see in this context, Judgment of the Constitutional Court KO72/20, Applicant: *Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo*, Judgment of 28 May 2020, published on 1 June 2020, paragraph 428).

85. However, the Court notes that the specific criteria for the composition of the Government and the representation of communities are set out in Article 96 [Ministries and Representation of Communities] of the Constitution. Article 96 of the Constitution in paragraphs 1 and 2 stipulates that ministries and other executive bodies are established to perform functions within the competencies of the Government and that the number of members of the Government is determined by its internal act. Whereas paragraph 6 of Article 96 of the Constitution provides that the Prime Minister, Deputy Prime Ministers and Government Ministers may be elected from among the deputies of the Assembly or other qualified persons who are not members of the Assembly.

86. Whereas, despite the fact that in accordance with paragraph 2 of Article 96 of the Constitution, the number of members of the Government is determined by its internal act, paragraphs 3, 4 and 5 of the same Article of the Constitution establish special criteria for the composition of the Government, which specifically refer to the representation of non-majority communities in the Government.

87. In this regard, the Court notes that it is a clear constitutional requirement established in paragraph 3 of Article 96 of the Constitution for the Government to have at least one (1) minister from the Serb community, and one (1) minister from the other non-majority communities in Kosovo. Furthermore, according to paragraph 3 of Article 96, if the Government consists of more than twelve ministers, it will also have a "third" minister, who represents one of the non-majority communities in Kosovo.

88. Therefore, as stated by both the Applicants and the Prime Minister, as a representative of the Government, the Government elected under paragraph 3 of Article 95 of the Constitution must also meet the criteria set out in Article 96, paragraph 3 of the Constitution, and that in its composition should be: one (1) minister from the Serb community and one (1) minister from other non-majority communities in Kosovo, as well as the criteria set out in Article 96, paragraph 4 that in its composition to have at least two (2) Deputy Ministers from the Kosovo Serb community and two (2) Deputy

Ministers from other non-majority communities in Kosovo. This division of representation in the Government is in line with the definition of representation of non-majority communities in the Assembly and the terminology used in Article 64. of the Constitution, explained above.

89. Furthermore, if the Government consists of more than twelve (12) ministers, then an additional minister is appointed, namely the "third" minister who represents one of the non-majority communities in the Government, as well as one (1) third deputy minister, who represents the Serb community, and one (1) other Deputy Minister, who represents one of the other non-majority communities in Kosovo. The Court notes that with regard to the "third" minister from the non-majority communities, neither paragraph 3 of Article 96 of the Constitution nor any other provision of the Constitution determines whether the "third" minister must be from the Serb community or other non-majority communities. The language used in paragraph 3 of Article 96 of the Constitution is clear when talking about the *"third"* minister, namely this provision only determines that the latter represents *"one of the non-majority communities in Kosovo"*. The Court considers that the "third" seminar in the Government is appointed by "*one of*" the communities defined in paragraph 2 of Article 64 of the Constitution represented in the Assembly, which in this case means: either by *(i)* the Serb community, or by *(ii)* other non-majority communities in the Assembly. This fulfills the constitutional criterion for the "third" minister to represent the majority communities in the Government.

90. Therefore, the Court concludes that according to the Constitution, the appointment of a "third" Minister to the Government by non-majority communities is a constitutional obligation if the Government consists of more than twelve (12) ministers. However, the Constitution does not specify the constitutional obligation which non-majority community defined in paragraph 2 of Article 64 of the Constitution, is represented by the "third" minister. Thus, this does not mean but does not exclude the possibility that the "third" Minister in the Government from the non-majority communities, is appointed by the Serb community in Kosovo.

91. The Court also notes that the representation of communities in the Government according to paragraph 3 of Article 96 of the Constitution is the minimum representation of non-majority communities in the Government of Kosovo. Relevant constitutional provisions on the composition of the Government enable non-majority communities to have greater representation in the Government, as part of political

agreements or coalitions with other parties in the Assembly, which have won elections and/or managed to obtain the required majority of at least sixty one (61) deputies, in accordance with paragraph 3 of Article 95 of the Constitution, to form the Government.

92. In this context, the Court notes that the Government of Kosovo elected through the challenged decision, in addition to the fact that it consists of three (3) ministers from the non-majority community, is composed of a Deputy Prime Minister from the non-majority communities who came, not as a result of constitutional requirements, but as a result of agreements between political entities in the Assembly, which represent the non-majority communities. This is in full compliance with Article 96 of the Constitution which provides for the minimum representation of communities in Government, and is not limited to what the Constitution stipulates as minimum representation, but allows political entities, including those of the non-majority communities, to reach a political agreement on division of ministerial positions and representation in Government, beyond minimum representation and guaranteed participation. In the following, the Court will elaborate the procedure to be followed regarding the appointment of ministers representing the non-majority community in the Government.

(ii) Whether the appointment of ministers from non-majority communities, including the appointment of a "third" minister in the Government, requires formal approval from all non-majority communities

93. Considering what the Court explained above that the "third" Minister in the Government from non-majority communities, if the Government has more than twelve (12) ministers, may be appointed by each non-majority community represented in the Assembly, in accordance with the division of seats in the Assembly, in accordance with paragraph 2 of Article 64 of the Constitution, the Court will further elaborate on the procedure for electing ministers representing non-majority communities in the Government, and if the appointment of the "third" minister requires the formal approval of all non-majority communities in the Assembly. This procedure is defined in paragraph 5 of Article 96 of the Constitution.

94. Paragraph 5 of Article 96 of the Constitution establishes: *"The selection of these Ministers [...] shall be determined after consultations with parties, coalitions or groups representing Communities that are not in the majority in Kosovo. If appointed from outside the membership of the Kosovo Assembly, these*

Ministers and Deputy Ministers shall require the formal endorsement of the majority of Assembly deputies belonging to parties, coalitions, citizens' initiatives and independent candidates having declared themselves to represent the Community concerned".

95. The Court notes that according to the abovementioned provisions of paragraph 5 of Article 96 of the Constitution the appointment of ministers from non-majority communities can be made as follows:

1) when a representative of the non-majority community who is a deputy of the Assembly is appointed Minister, where according to paragraph 5 of Article 96 of the Constitution, in addition to the consultation with parties, coalitions or groups representing non-majority communities in Kosovo, no formal approval is required from the deputies of the non-majority communities, on the condition that one (1) minister from the Serb community and one (1) minister from the other non-majority communities in Kosovo be elected. Similarly, also in regard to the "third" minister from non-majority communities, if the Government consists of more than twelve (12) ministers, the Constitution does not require any formal approval from the deputies of non-majority communities, provided that after consultation a minister is appointed representing non-majority communities, if the latter is a deputy of the Assembly; and

2) when a representative of a non-majority community is appointed as a minister who is not a deputy of the Assembly and where according to paragraph 5 of Article 96 of the Constitution, in addition to preliminary consultations, that candidate is specifically required to receive formal approval of the majority of deputies representing the community in question. In this respect, this procedure takes place both in cases when one (1) minister is elected from the Serb community, and one (1) minister from another non-majority community in Kosovo, who must necessarily receive the votes of the majority of the deputies of "other non-majority" community. Similarly, a formal approval from the community "*in question*" is required also in cases when a person belonging to the non-majority community in Kosovo, the Serb community or another non-majority community is appointed as a "third" minister, but is not a deputy of the Assembly of Kosovo.

96. In this regard, the Court notes that the Constitution, namely paragraph 5 of its Article 96, regarding the formal approval of candidates from non-majority communities refers to a party, coalitions or groups "*representing Communities that are not in the*

majority in Kosovo", but putting the emphasis at the end of this paragraph on *"the community in question"*.

97. In this context, the Court finds that *(i)* regarding the Minister representing the Serb community, consultation with/approval is required (depending on whether the candidate is a deputy or not) parties, coalitions or groups representing the Serb community in the Assembly. In this regard, it is about ten (10) deputies who hold guaranteed seats for parties, coalitions, civic initiatives, from the Serb community, according to Article 64, paragraph 2, subparagraph 1 of the Constitution, elaborated above. Similar to *(ii)* the appointment of 1 (one) Minister from "other non-majority communities", in which case the candidate for this position must consult/obtain approval from (depending on whether the candidate is a deputy or not) parties, coalitions or with groups representing other non-majority communities in the Assembly. This refers to the ten (10) deputies holding guaranteed seats for parties, coalitions, civic initiatives, and Roma; Ashkali; Egyptian, Bosnian, Turkish and Gorani communities, as established in Article 64, paragraph 2, subparagraph 2.

98. Whereas, for the appointment of the "third" Minister, the candidate for Prime Minister, in accordance with paragraph 3 of Article 96, has the possibility, after consultation/approval by (depending on whether the candidate is a deputy of Parliament or not) to appoint a candidate belonging to "*one of the non-majority communities*" represented in the Assembly. Thus, in this case, either by *(i)* parties, coalitions or groups "*representing the Serb community (as a whole); or by (ii)* parties, coalitions or groups "*representing other non-majority communities*" (as a whole), according to the division provided for in Article 64 of the Constitution.

99. Therefore, the Court considers that the candidate for Prime Minister is obliged for the appointment of a minister from the non-Serb community to consult/obtain approval only from the Serb community, while for the appointment of a minister from other non-majority communities, he should consult/obtain approval (depending on whether the candidate for minister is a deputy of the Assembly or not) only from other non-majority communities.

100. In contrast, for the appointment of the "third" Minister in the Government, in this case the candidate for Prime Minister decides from which community "in question", namely the "Serb community" or "the other non-majority" community wants to appoint the third Minister. And in this case the candidate for Prime Minister (i) consults with the community "in question"; or (ii) obtains their approval (if the

candidate is not a deputy of the Assembly), namely: either (i) the Serb community, or (ii) other non-majority communities.

101. This interpretation is also consistent with the position of the Applicants that *"The reserved representation of non-majority communities in the Government constitutes the so-called "broad government" principle in terms of multiethnicity, and is a key condition of consotiational democracy [...]."*

102. Consequently, and based on the above, the Court considers that neither Article 96 nor any other provision of the Constitution requires formal approval of the "third" minister from all deputies representing the non-majority communities, in case the "third" minister that is appointed from among the non-majority communities, is a deputy of the Assembly.

103. Formal approval of ministers from the non-majority community "in question", from the Serb community or from other non-majority communities, is required only if a candidate is appointed from the non-majority community in question who is not a deputy of the Assembly, and this division is made clear in the Constitution. If a formal approval were required for candidates who are also deputies of the Assembly, then the division made in the Constitution as to whether a person is a deputy of the Assembly or not, to be appointed a minister representing non-majority communities, would not have sense.

(iii) If the aforementioned criteria have been applied in the present case

104. As to the present case, the Court notes that on 14 February 2021, early elections for the Assembly were held. While after counting the votes, on 13 March 2021, the CEC certified the election results in which case, LVV was the winning party with fifty eight (58) deputies while twenty (20) seats in the Assembly which are guaranteed by the Constitution were allocated for non-majority communities, in which case, the Serb List, which was declared to represent the Serb community in Kosovo had about ten (10) deputies, while ten (10) other seats were allocated to other non-majority communities in Kosovo, in accordance with Article 64 of the Constitution.

105. The Court also notes that after the announcement of the election results by the CEC, the President of the LVV, as the winning party in the elections, started consultations with political entities in Kosovo, including those of non-majority communities. In this context, on 16 March 2021, a meeting was held between the representatives of LVV

and those of the Serb List. Similar meetings were held with representatives of political entities of other non-majority communities in Kosovo. Moreover, on 21 March 2021, respectively on 22 March 2021 there were letter exchanges between Mr. Albin Kurti, in his capacity as President of the LVV and candidate for Prime Minister and Mr. Goran Rakić, in the capacity of the latter as President of the Serb List, regarding the appointment of representatives of the Serb community in the Government.

106. On 22 March 2021, the Acting President issued Decree no. 61/2021 whereby "*Mr. Albin Kurti is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo*" On the same date, by the challenged decision, no. 08/V-005, the Assembly with 67 votes "for", 30 "against" and no abstentions elected the Government of the Republic of Kosovo, consisting of fifteen (15) ministries. Three (3) ministerial positions in the Government and one (1) position of Deputy Prime Minister were assigned to representatives from the non-majority community, as follows: *a)* Mr. Goran Rakić, Minister of the Ministry of Communities and Returns, from the Serb community, who after not being a deputy of the Assembly, had previously been voted and received 10 out of 10 votes of the representatives of the Serb community in the Assembly, in accordance with paragraph 5 of Article 96 of the Constitution; *b)* Fikrim Damka, Minister of the Ministry of Regional Development, from another non-majority community, in this case the Turkish community; and *c)* Elbert Krasniqi, Minister of the Ministry of Local Government Administration, from the non-majority community, in this case from the Egyptian community in Kosovo, as the "third" minister in the Government. Whereas, *d)* Emilija Redžepi, from the non-majority community, in this case from Bosniak community in Kosovo, Deputy Prime Minister for Minority Affairs and Human Rights.

107. The Court recalls that before the Court it is disputable the manner and procedure regarding the appointment of a "third" Minister in the Government. The Court has concluded above that the Constitution does not require the approval of the proposal of the "third" minister by the deputies representing the non-majority communities, in case the "third" minister from the non-majority communities is a deputy of the Assembly.

108. In the present case, the "third" Minister from the non-majority communities, Elbert Krasniqi, in relation to whom the Applicants complain before the Court, was a deputy of the Assembly elected in the elections of 14 February 2021, stating that he represents one of the

other non-majority communities in the Assembly, within the meaning of Article 64 of the Constitution, and who was appointed to this position after consultation with the representatives of other non-majority communities in the Assembly, before the vote of the Government.

109. In this context, the other non-majority communities have not even made any allegations that they have not been consulted regarding the appointment of the latter as Minister, although they have been enabled by the Court to submit their comments regarding the Referral submitted by Applicants. The Applicants either do not dispute the fact that there were discussions regarding the appointment of ministers from non-majority communities before the election of the Government, but allege that the "third" minister should have had the approval of the majority of all twenty (20) deputies of the non-majority community.

110. The Court also recalls that the Applicants relate their argument for the election of the third Minister by comparing it with other Assembly positions in which non-majority communities are represented, as well as with other positions elected in the Assembly, where non-majority communities are represented. An example of this is the election of the Deputy President of the Assembly proposed by the Serb community, but also the appointment of judges of the Constitutional Court.

111. However, the cases when the approval of the majority of all representatives of non-majority communities is required, namely of the 20 deputies of the non-majority community (the Serb community and other non-majority communities as a whole), are explicitly defined in the Constitution. In this context, in accordance with paragraph 3 of Article 114 [Composition and Mandate of the Constitutional Court], regarding the proposal of two (2) judges, out of nine (9) that the Constitutional Court has, the fact remains that the Decision to propose two (2)) other judges, is made with the majority of votes of the deputies of the Assembly, who are present and voting, but which can be done only after giving the consent of the majority of the deputies of the Assembly, who hold the seats that are guaranteed for representatives that are not majority communities in Kosovo. But, as noted, in this case, such a request is expressly provided in paragraph 3 of Article 114 of the Constitution.

112. In contrast to the above case, in the case of the election of members of the Government representing non-majority communities, such a constitutional requirement for voting the members of the Government by all non-majority communities is not provided for in the

Constitution as Article 96 paragraph 5 of the Constitution emphasizes approval by the community "*in question*", and not by all non-majority communities. And such a request was implemented in the case of approval of the proposal of Minister Goran Rakić, from the Serb community, who, as he was not a deputy of the Assembly, according to the transcript of the Extraordinary Meeting of the Assembly, of 22 March 2021, was initially voted by the deputies representing the Serb community and was then included for voting in the full composition of the Government. If the intention of the constitution-maker was for the "third" minister to be appointed after the approval of the majority of deputies representing the non-majority communities in the Assembly, this would be specified in the relevant provisions of the Constitution, as explained above, when electing judges of the Constitutional Court.

113. Therefore, based on the above, the Court considers that the allegation of the Applicants of violation of paragraphs 3 and 5 of Article 96 of the Constitution, when appointing the "third" Minister in the Government, is ungrounded.

114. Therefore, the Court finds that the challenged decision is in compliance with paragraphs 3 and 5 of Article 96 [Ministries and Representation of Communities] of the Constitution.

Regarding the request to hold a hearing

115. The Court recalls that the Applicants also requested the Court to hold a hearing in which it would invite all deputies representing non-majority communities in Kosovo to determine issues related to the representation of non-majority communities in the Government.

116. In this regard, the Court recalls that based on paragraph (1) of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure: *"Only referrals determined to be admissible may be granted a hearing before the Court, unless the Court by majority vote decides otherwise for good cause shown";* whereas pursuant to paragraph (2) of the same Rule: *"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law".*

117. The Court notes that the abovementioned Rule of the Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file are sufficient, beyond any doubt, to reach a

decision on merits in the case under consideration (see case of the Constitutional Court, KO43/19, Applicants: *Albulena Haxhiu, Driton Selmanaj and thirty other deputies of the Assembly of the Republic of Kosovo,* Judgment of 13 June 2019, paragraph 116; see also case, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110).

118. In the circumstances of the present case, the Court does not consider that there is any uncertainty regarding the *"evidence or law"* and therefore does not consider it necessary to hold a hearing. The documents and letters that are part of the case file KO61/21 are sufficient to decide the merits of this case.

119. Therefore, the Applicants' request to hold a hearing is rejected as ungrounded.

As to the request for interim measure regarding the challenged decision

120. The Court recalls that the Applicants also request the Court to render a decision on the imposition of an interim measure "*which would put in a state of calm the position of the Minister who was appointed Minister of Local Government Administration - Elbert Krasniqi because he does not have the support of (11) eleven deputies who compose the majority of (20) twenty deputies who represent non-majority communities".*

121. The Court has just concluded that the challenged decision is in compliance with Article 96 [Ministries and Representation of Communities] of the Constitution.

122. Therefore, in accordance with paragraph 1 of Article 27 [Interim Measures] of the Law and Rule 57 [Decision on Interim Measures] of the Rules of Procedure, the request for interim measure is without the subject of review and, as such, is rejected.

Conclusion

123. The main issue in this case relates to the manner in which the ministers representing the non-majority communities in the Government are appointed. Before the Court, the manner of appointing one (1) Minister who is mandatorily appointed by the Serb community was not challenged; or one (1) Minister who is mandatorily appointed by other non-majority communities, but the appointment of the "third" Minister in the Government by non-majority communities, which is a constitutional obligation in case the

Government consists of more than twelve (12) Ministers. In this regard, the Applicants alleged that the appointment of the "third" Minister in the Government requires consultation/approval by a majority of all deputies representing non-majority communities in the Assembly, namely by at least eleven (11) out of twenty (20) deputies representing the non-majority communities.

124. The Constitutional Court stated that, for the purposes of the constitutionality of the composition of the Government, based on Article 96 of the Constitution, the Government should have at least one (1) Minister from the Serb community and one (1) Minister from other non-majority communities. The manner of election of these Ministers varies depending on whether the candidate nominated for Minister is a deputy of the Assembly or not. In order to appoint a candidate for Minister from among the deputies of the Assembly, *consultation with parties*, coalitions or groups representing non-majority communities in Kosovo is necessary. Whereas, for the appointment of a candidate for Minister outside the ranks of the deputies of the Assembly, the formal approval of the majority of the deputies of the Assembly, who belong to parties, coalitions, civic initiatives and independent candidates, who have declared that they represent the community in question is necessary. The Constitutional Court also stated that the Constitution stipulates that if the composition of a Government has more than twelve (12) Ministers, the Government must also have a third Minister, "*representing a Kosovo non- majority Community*". The Court further emphasized that, with regard to the third Minister, the Constitution provides for the discretion of the candidate for Prime Minister regarding the ranks of the respective communities, from which a third Minister may be elected, without necessarily stipulating that this Minister should be proposed/approved from the deputies representing the Serb community or from the deputies representing other non-majority communities, but requesting that the same procedure be followed, namely consultation/approval of the "*community in question*", depending on whether the respective candidate is a deputy of the Assembly or not.

125. In the circumstances of the present case, the Court noted that the "third" minister from the non-majority communities, namely the Minister of Local Government Administration, was a deputy of the Assembly elected in the elections of 14 February 2021, declaring that he represents one of the other non-majority communities in the Assembly within the meaning of Article 64 [Structure of the Assembly] of the Constitution and who is proposed for this position in consultation with the deputies representing other non-majority

communities in the Assembly. Considering that the respective candidate was an elected member of the Assembly, formal approval by the community in question is not a constitutional obligation, while before the Court there was no claim that the deputies representing other non-majority communities were not consulted in the proposal of this candidate for Minister, despite the fact that the Court had enabled them to submit their comments on the Referral submitted by the Applicants.

126. The Court finally clarified that based on Article 96 of the Constitution, the consultation or the approval of the deputies representing the "*community in question*" is mandatory, namely the deputies representing the Serb community or representing other non-majority communities, depending on whether the respective candidate is a deputy of the Assembly or not, and not the majority of all deputies representing non-majority communities. In the circumstances of the present case, the candidate nominated for Minister was a member of the Assembly and consequently his formal approval was not a constitutional obligation, while before the Court there was no claim that the obligation to consult the "*community in question*" had not been exhausted. Therefore, **the Court found that the challenged Decision** of the Assembly of Kosovo on the election of the Government **was not rendered in contradiction** with paragraphs 3 and 5 of Article 96 of the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113, paragraph 5 of the Constitution, Articles 27, 42 and 43 of the Law and pursuant to Rules 42, 57, 59 (1) and 74 of the Rules of Procedure, on 24 September 2021;

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, by majority of votes, that the procedure followed for rendering Decision No. 08/V-05 of the Assembly of the Republic of Kosovo on the Election of the Government of the Republic of Kosovo, of 22 March 2021, was conducted in accordance with paragraphs 3 and 5 of Article 96 [Ministries and Representation of Communities] of the Constitution;

III. TO REJECT, unanimously, the request for imposition of interim measure;

IV. TO REJECT, with majority of votes, the request for holding a hearing;

V. TO NOTIFY this Judgment to the parties;

VI. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20, paragraph 4 of the Law; and

VII. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Gresa Caka-Nimani

KI94/21, Applicant: Fatmir Hoti, Constitutional review of Decision Ac. No. 5974/2020 of the Court of Appeals of 11 December 2020

KI94/21, Resolution on Inadmissibility, of 23 September 2021, published on 12 October 2021

Keywords: *individual referral, request for security measure, lack of a reasoned court decision, ratione materiae referral, inadmissible referral, apparent absence of violation, unsubstantiated and unsupported claim*

the Court recalls that the circumstances of the present case relate to the statement of claim of the Applicant filed with the Basic Court in Gjakova against E.H for the payment of a debt to him in the amount of 470,000.00 euro. As a result of his statement of claim, the Applicant in the Basic Court in Prishtina requested the imposition of a security measure on immovable property on behalf of E.H, which claim was approved by Decision [C. No. 1710/15] of 21 October 2015 of this court. However, on 4 September 2019, E.H. in the same court, namely in the Basic Court in Prishtina filed a request for annulment of the security measure imposed by this court on the grounds that (i) the Applicant in the final Judgment [PKR . No. 23/14] of 16 May 2016, of the Basic Court in Gjakova was found guilty and sentenced to one year and six months imprisonment for committing the criminal offense "Contracting disproportionate benefit"; (ii) that the Applicant, in order to avoid serving his sentence, is on the run as a result of this Judgment; and (iii) that the Applicant based his request for a security measure on incriminating action. The Basic Court in Prishtina, after holding a hearing, where it had heard the litigants and the administration of the attached evidence, decided to annul the security measure against the immovable property on behalf of E.H. In its Decision, the Basic Court in Prishtina, referring to paragraph 1 of Article 309 and paragraph 2 of Article 312 of the LCP, found that the circumstances on the basis of which the security measure was imposed had changed. Against this Decision of the Basic Court in Prishtina, the Applicant filed an appeal with the Court of Appeals, with the essential allegation that the Basic Court did not reason its decision with the facts and legal requirements on the basis of which a certain measure of security can be imposed and annulled. The Court of Appeals, by Decision [Ac. No. 5974/2020] of 11 December 2020 rejected the Applicant's appeal as ungrounded, upholding the above-mentioned Decision of the Basic Court in Prishtina as fair and based on law.

The Applicant, in his Referral, alleged a violation of his fundamental rights guaranteed (i) by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR), as a result of

the lack of a reasoned court decision; and (ii) Article 1 (Protection of Property) of Protocol no. 1 of the ECHR.

Initially, in the context of the Applicant's allegation of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court, taking into account the fact that the challenged Decision of the Court of Appeals is related to the imposition of a security measure, issued in the preliminary procedure, examined whether the referral is *ratione materiae* in compliance with the Constitution, namely examined and assessed whether in this case the procedural guarantees set out in Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, are applicable. In this context, the Court, applying the criteria established in the case law of the ECtHR and the Court itself, found that in the Applicant's circumstances the criteria for the applicability of the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been met. Consequently, the Court continued to examine the allegation of violation of the Applicant's right to a fair and impartial trial, due to the lack of a reasoned court decision.

The Court by applying again the principles established through the case law of the ECtHR and of the Court regarding the right to a reasoned court decision, found that the Court of Appeals has addressed the Applicant's allegations raised in his appeal regarding the Decision of the Basic Court in Prishtina, by which the imposition of a security measure on immovable property in the name of E.H. was annulled. In this context, the Court, based on the explanations above, and specifically taking into account the allegations raised by the Applicant and the facts presented by him, as well as the reasoning of the regular courts elaborated above, considers that the challenged decision of the Court of Appeals is not characterized by a lack of a reasoned court decision. Therefore, the Applicant's allegation regarding the lack of a reasoned court decision is manifestly ill-founded on constitutional basis due to "*clear or apparent absence of a violation*" as established in Rule 39 (2) of the Rules of Procedure.

Whereas, regarding the Applicant's allegation of violation of his right to property, guaranteed by Article 1 of Protocol no. 1 of the ECHR, the Court considered that this allegation is "*unsubstantiated or unsupported*" claim, and therefore, inadmissible as established in Article 48 of the Law and Rule 39 (1) (d) and (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI94/21

Applicant

Fatmir Hoti

Constitutional review of Decision Ac. No. 5974/2020 of the Court of Appeals of 11 December 2020

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 Fatmir Hoti, residing in Gjakova, represented with power of Attorney by Teki Bokshi, a lawyer in Gjakova (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision [Ac. No. 5974/2020] of 11 December 2020 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) in conjunction with Decision [C. No. 1710/15] of 23 September 2020 of the Basic Court in Prishtina, General Department, Civil Division (hereinafter: the Basic Court).

3. The Applicant was served with the challenged Decision of the Court of Appeals on 20 January 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision, whereby the Applicant alleges that his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR), as well as Article 1 (Protection of property) of Protocol No. 1 of the ECHR have been violated.

Legal basis

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

Proceedings before the Court

6. On 17 May 2021, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), received the Applicant's Referral.

7. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP.71-2/21 of 17 May 2021 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

8. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

9. On 4 June 2021, the President of the Court Arta Rama-Hajrizi appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Safet Hoxha and Nexhmi Rexhepi.

10. On 11 June 2021, the Court notified the Applicant about the registration of the Referral and requested to submit his appeal filed with the Court of Appeals.

11. On the same date, the Court sent an acknowledgment of receipt to the Court of Appeals and submitted to the Basic Court the request for submission of the acknowledgment of receipt proving the date when the Applicant was served with the challenged decision of the Court of Appeals.

12. On 17 June 2021, the Basic Court submitted the acknowledgment of receipt to the Court, which proves that the Applicant was served with the challenged Decision of the Court of Appeals on 20 January 2021.

13. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

14. On 7 July 2021, the Applicant submitted to the Court the copy of the appeal filed with the Court of Appeals, requested by the Court.

15. On 23 September 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

16. According to the case file, it turns out that the Applicant on 17 April 2014 in the Basic Court in Gjakova filed a lawsuit against E.H for payment of debt in the amount of 470,000.00 euro.

17. On 24 July 2015, as a result of the above statement of claim, the Applicant filed a request with the Basic Court in Prishtina for an interim security measure against immovable property of E.H,, registered in the Cadastral Zone of the Municipality of Obiliq with a specific request. to prohibit the alienation and encumbrance with mortgages or change the state of construction of these immovable properties.

18. On 21 October 2015, the Basic Court in Prishtina, by Decision [C. No. 1710/15] imposed the security measure and prohibited the respondent, namely the opponent of the security E.H. to alienate, to encumber with

a mortgage or to change the situation with construction or in any other way in the above-mentioned immovable property. At the same time, the Basic Court obliged the Cadastral Office in the Municipality of Obiliq and the Chamber of Notaries to record the security measure imposed according to the first point of the enacting clause of this Decision in the relevant registers.

19. On 4 September 2019, E.H had filed a request with the Basic Court for the annulment of the security measure against the above-mentioned immovable property on the grounds that the Applicant's statement of claim and his request for the imposition of a security measure was based on false evidence. In his request E.H stated that: (i) the Applicant by the final Judgment [PKR. No. 23/14] of 16 May 2016, of the Basic Court in Gjakova was found guilty and sentenced to one year and six months imprisonment for committing the criminal offense "Contracting disproportionate benefit"; (ii) that the Applicant, in order to avoid serving his sentence, is on the run as a result of this Judgment; and (iii) that the Applicant based his request for a security measure on incriminating action.

20. On 23 September 2020, the Basic Court, after holding a hearing by Decision [C. No. 1710/15], annulled the above-mentioned Decision of the Basic Court, of 21 October 2015, imposing a security measure against E.H., releasing the above immovable property from the security measure.

21. The Basic Court in its Decision stated that it bases its decision on the evidence attached to the proposal for imposing a security measure; evidence attached to the request for annulment of the security measure, filed by E.H; final Judgment [PKR. No. 23/14] of 16 May 2016, of the Basic Court in Gjakova, certified by Judgment [PAKR. No. 421/2016] of 9 September 2016; and statements of litigating parties during the hearing.

22. The Basic Court, finally referring to paragraph 1 of Article 309 and paragraph 2 of Article 313 of the LCP and without prejudice to the decision on the merits of the main lawsuit filed by the Applicant, decided to annul the imposition of the security measure by the reasoning that the conditions and circumstances on the basis of which the security measure was imposed had changed.

23. Against the above-mentioned Decision of the Basic Court, the Applicant filed an appeal with the Court of Appeals on the grounds of: (i) essential violations of the provisions of the contested procedure; (ii) erroneous

and incomplete determination of factual situation; and (iii) erroneous application of the substantive law. The Applicant in essence alleged that the Basic Court did not provide a reasoning for the legal facts and conditions on the basis of which the security measure could be imposed or annulled; did not provide a reasoning regarding the credibility of his request for a security measure and did not assess and address his allegations at the hearing.

24. On 11 December 2020, the Court of Appeals by Decision [Ac. No. 5974/2020] rejected the Applicant's appeal as ungrounded and upheld the above-mentioned Decision of the Basic Court.

25. The Court of Appeals found that the Basic Court in Prishtina, which based its decision on the Judgment of the Basic Court in Gjakova, of 16 May 2016, by which he was found guilty and convicted of the criminal offense of "contracting disproportionate benefit" upheld by Judgment [PAKR. No. 421/2016] of 9 September 2016, of the Court of Appeals and referring to paragraph 1 of Article 309 and paragraph 2 of Article 313 of the LCP has correctly decided when to annul its decision for imposing the security measure.

26. The Court of Appeals in its Decision also referred to paragraph 1 of Article 309, and paragraph 2 of Article 313 of the LCP, stating that by these provisions is provided the possibility for the court to annul its decision to impose security measure in case of change of circumstances due to which the security measure was imposed.

27. Subsequently, the Court of Appeals, without prejudice to the decision on the merits according to the statement of claim of the Applicant submitted to the Basic Court in Gjakova [with case number C. No. 212/2014], finally concluded that the Decision [C. No. 1710/15] of 23 September 2020, of the Basic Court in Prishtina on the annulment of the security measure does not contain violation of the contested provisions and erroneous application of substantive law.

28. The Court further refers to the fact that the Applicant on 9 February 2017 and 27 January 2020, respectively submitted the Referral to the Court, registered under numbers KI09/17 and 18/20, respectively..

(i) The conducted procedure that constituted the subject matter of the review by the Court in case KI09/17 was related to the regular criminal procedure against the Applicant, in the framework of which the Judgment [Pml. no. 281/2016] of 5 December 2016, of the Supreme Court of Kosovo was rendered, by which the request for

protection of legality submitted by the Applicant against the above Judgment [PKR. No. 23/14] of 16 May 2016 of the Basic Court in Gjakova, through which he was found guilty of committing the criminal offense of contracting disproportionate gain and sentenced to imprisonment for a term of one year and six months and Judgment [PAKR No. 421/2016] of 9 September 2016 of the Court of Appeals. The Court, by Resolution on Inadmissibility, of 5 September 2017, declared the Applicant's Referral inadmissible as manifestly ill-founded on constitutional basis as established in Rule 36 (1) (d) of the Rules of Procedure applicable at the time; and

(ii) The conducted procedure that that constituted the subject matter of the review by the Court in case KI18/20 was related to the request of the Applicant for the review of the above mentioned criminal procedure, within which as the last decision issued in this procedure was Decision [PN. No. 794/2019] of 23 July 2019, of the Court of Appeals by which the Applicant's appeal against the Decision [KP. no. 278/19] of 3 July 2019, of the Basic Court in Gjakova was rejected. By the above-mentioned decisions by the regular courts it was concluded that the legal criteria set out in the provisions of the criminal procedure for review of the criminal procedure were not met. The Court, by Resolution on Inadmissibility of 17 December 2020, declared the Applicant's Referral inadmissible *ratione materiae* with the Constitution as defined by Rule 39 (3) (b) of the Rules of Procedure.

Applicant's allegations

29. The Applicant alleges that the challenged Decision of the Court of Appeals was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 1 (Protection of property) of Protocol no. 1 of the ECHR.

30. With regard to Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Applicant alleges that the challenged Decision of the Court of Appeals in conjunction with Decision of the Basic Court regarding the annulment of the security measure does not meet the standards of a reasoned court decision. Having said that, the Applicant specifies that the regular courts have not provided a reasoning regarding the legal facts and requirements on the basis of which the security measure is imposed or can be annulled.

31. In support of his allegation, the Applicant refers to the case of Court KI07/18, Applicant *Çeliku Rrollers* (Judgment, of 18 December 2019), namely paragraphs 99-101 of this Judgment, to which the Court referred its case law and that of the European Court of Human Rights regarding the right to a reasoned judicial decision, a guarantee embodied in Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

32. Subsequently, the Applicant states that starting from 2015, the counter-proposer [E.H] against whom the security measure was imposed by his continuous actions had damaged the Applicant's property.

33. With regard to the allegation of Article 1 of Protocol no. 1, the Applicant does not specify and reason how the right to property has been violated in his case.

34. Finally, the Applicant requests the Court to: (i) declare his Referral admissible; (ii) to find a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and Article 1 of Protocol no. 1 of the ECHR; (iii) to declare the challenged Decision [Ac. No. 5974/2020] of 11 December 2020 of the Court of Appeals in conjunction with Decision [C. No. 1710/15] of 23 September 2020 of the Basic Court in Prishtina invalid.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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

European Convention on Human Rights

ARTICLE 6
Right to a fair trial

4. 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.

[...]

Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1
Protection of property

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

LAW NO. 03/L-006 ON CONTESTED PROCEDURE

Article 309

309.1 The measures of insurance set by the court by a verdict are in force until a new verdict related to the measures of insurance is issued.

[...]

Article 313

[...]
313.2 Based on the insurance opponent's proposition the procedure that began will end, and taken actions will be annulled if the circumstances based on which it has been determined have changed.

Admissibility of the Referral

35. The Court first examines whether the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure have been met.

36. 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."*

37. The Court further refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

> Article 47
> [Individual Requests]
>
> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*
>
> Article 48
> [Accuracy of the Referral]
>
> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*
>
> Article 49
> [Deadlines]

> *„The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. […]*

38. With regard to the fulfillment of these requirements, the Court finds that the Applicant is: an authorized party; challenges an act of a public authority, namely the Decision [Ac. No. 5974/2020] of 11 December 2020 of the Court of Appeals; specified the rights and freedoms he claims to have been violated; has exhausted all legal remedies provided by law, and has submitted the referral within the legal deadline.

39. In the following and in order to assess the other admissibility criteria, the Court first recalls that the Applicant, in his Referral, alleges a violation of his fundamental rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR; and Article 1 (Protection of property) of Protocol no. 1 to the ECHR.

I. Regarding Article 31 of the Constitution, in conjunction with Article 6 of the ECHR

40. Based on the above, the Court notes that the Applicant alleges a violation of his right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR for due to lack of reasoning of the court decision.

41. However, in the circumstances of the present case and in the context of the Applicant's allegation of a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court first refers to item (b) of paragraph (3) of the Rule 39 of the Rules of Procedure, according to which the Court may consider a Referral inadmissible if the latter is not *ratione materiae* compatible with the Constitution.

42. Therefore, in the context of the latter, the assessment of this criterion in the circumstances of the case is important because the proceedings before the regular courts fall within the scope of the "*preliminary proceedings*", namely the challenged decision of the Court of Appeals is related to the decision of the Basic Court in Prishtina for the annulment of the security measure, which was imposed by the latter by the Decision [C. No. 1710/15] of 21 October 2015 while the statement of claim for debt payment filed with the Basic Court in Gjakova is still in the procedure of the review of merits. Therefore, the Court will assess whether Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is applicable in the circumstances of the Applicant's case.

43. In this specific context, the Court notes that the question of the applicability of Article 6 of the ECHR to pre-trial proceedings has been interpreted by the ECtHR through its case-law, in accordance with which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution.

44. The Court also points out that the criteria in respect of the applicability of Article 31 of the Constitution concerning pre-trial procedures are also set out in the cases of this Court, including but not limited to cases KI122/17, Applicant *Česká Exportní Banka A.S.*, Judgment of 30 April 2018; KI150/16, Applicant *Mark Frrok Gjokaj*, Judgment of 31 December 2018; KI81/19, Applicant *Skender Podrimqaku*, Resolution on Inadmissibility of 9 November 2019; KI107/19, Applicant *Gafurr Bytyqi*, Resolution on Inadmissibility, of 11 March 2020; KI195/20 Applicant *Aigars Kesengfelds*, Judgment, of 29 March 2021. The general principles established through these above-mentioned Court decisions are based on the ECtHR case, *Micallef v. Malta*, Judgment of 15 October 2009.

45. Consequently, in order to determine whether the Applicant's Referral is compatible *rationae materiae* with the Constitution, the Court will first refer to the general principles established through the case law of the ECtHR and that of the Court as regards the applicability of procedural guarantees of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR in the circumstances of the present case, and which relate to the the procedure for the annulment of the security measure, which is the subject of review of this referral, and then it will apply the same to the circumstances of the present case.

(iii) General principles on the applicability of Article 31 of the Constitutionand Article6 of the ECHR to preliminary proceedings

46. The Court first points out that Article 31 of the Constitution and Article 6 of the ECHR, in the civil limb, apply to proceedings determining civil rights or obligations (see, the ECtHR case: *Ringeisen v. Austria*, Judgment of 22 June 1972, and see the case of the Court, KI122/17, Applicant *Česká Exportní Banka AS*, cited above, paragraph 125 and KI195/20, Applicant *Aigars Kesengfelds*, cited above, paragraph 73). In this context, the Court further notes that, in principle, based on the case law of the ECtHR, “preliminary proceedings”, like those concerned with the granting of an interim measure/injunctive relief, are not considered to determine “civil rights and obligations” and therefore, in principle, do not fall within the ambit of such protection of Article 6 of the ECHR (see, the ECtHR case *Micallef v. Malta*, cited

above, paragraph 75 and references therein, see case KI122/17, Applicant *Česká Exportní Banka AS*, paragraph 126).

47. However, through Judgment *Micallef v. Malta*, the ECtHR altered and consolidated its previous approach regarding the non-applicability of the procedural guarantees of Article 6 of the ECHR to the "preliminary proceedings".

48. Through this Judgment, the ECtHR assessed as follows:

> *"79. The exclusion of interim measures from the ambit of Article* 6 *has* so*far been justified by the fact that they do not* in *principle determine civil rights and obligations. However, incircumstances where many Contracting States face considerable backlogs intheir overburdened justice systems leading to excessively long proceedings, ajudge's decision on aninjunction will often be tantamount to* a *decision onthe merits of the claim for* a *substantial period of time, even permanently* in *exceptional cases. It follows that, frequently interim and main proceedings decide the same civil rights or obligations and have the same resulting long-lasting or permanent effects."*(see, the ECtHR case: *Micallef v. Malta,* application no. 17056/06, Judgment [GC], 15 October 2009, paragraph 79)".

49. Based on this Judgment of the ECtHR, the Court notes that not all injunctive relief/interim measures determine civil rights or obligations and in order for Article 6 of the ECHR to be applicable, the ECtHR determined the criteria on the basis of which the applicability of Article 6 of the ECHR to the "preliminary proceedings" should be assessed (see, the ECtHR case, *Micallef v. Malta*, cited above, paragraphs 83-86).

50. According to the criteria determined in the case *Micallef v. Malta*, which have been accepted also by this Court through case law, firstly, the right at stake should be "civil" in both the main trial and in the injunction proceedings, within the autonomous meaning of this notion under Article 6 of the ECHR (see, in this context, the ECtHR case, *Micallef v. Malta*, cited above, paragraph 84, and references cited therein, as well as see the cases of Court KI122/17, Applicant *Česká Exportní Banka AS*, cited above, paragraph 130; KI81/19, Applicant *Skender Podrimqaku*, cited above, paragraph 47; and KI107/19, Applicant *Gafurr Bytyqi*, cited above, paragraph 53; and KI195/20, Applicant *Aigars Kesengfelds*, cited above, paragraph 77). Secondly, this procedure must effectively determine the relevant civil law (see the ECtHR case, *Micallef v. Malta*, cited above, 85 and

references cited therein, as well as the Court cases, KI122/17, Applicant *Česká Exportní Banka AS*, cited above, paragraph 131 and KI81/19, Applicant *Skender Podrimqaku*, cited above, paragraph 48, KI107/19, Applicant *Gafurr Bytyqi*, cited above, paragraph 53; and KI195/20, Applicant *Aigars Kesengfelds*, cited above, paragraph 77).

51. Therefore, the Court must further assess whether these two criteria are fulfilled in the circumstances of the present case, by consequently enabling the applicability of the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

(iv) Application of the abovementioned principles to the Applicant's circumstances

52. The Court recalls that the circumstances of the Applicant's case refer to the Applicant's claim filed in the Basic Court in Gjakova against E.H. for the payment of a debt in the amount of 470,000.00 euro. As a result of this statement of claim, the Applicant filed a request for the imposition of a security measure on immovable property on behalf of E.H., thus resulting in the existence of a civil right.

53. Consequently, the purpose of the request for the imposition of a security measure is to provide for at least a certain period of time to secure the same right that is also challenged in the contested procedure regarding the merits of the case. The imposition of a security measure in the contested procedure is provided in Articles 296-319 of the LCP.

54. Therefore, based on the above, the Court finds that the first criterion for the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the relevant pre-trial proceedings is met.

55. The Court further notes that in the Applicant's circumstances, the imposition of a security measure was decisive for this right because it is a possible mechanism for the Applicant to secure the payment of the debt owed to him, which constitutes also the subject of his statement of claim filed with the Basic Court in Gjakova. Therefore, the Court finds that the second criterion for the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the relevant preliminary proceedings, is met.

56. Therefore, the Court finds that in the Applicant's circumstances, based on his case law and that of the ECtHR, the criteria for the applicability

of the procedural guarantees set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been met.

57. Therefore, the Court finds that the Applicant's Referral regarding the allegation of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR is *ratione materiae* in compliance with the Constitution.

58. However, in addition, the Court also examines whether the Applicant has met the admissibility criteria set out in Rule 39 (2) of the Rules of Procedure. Specifically, Rule 39 (2) provides that:

> *"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."*

59. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as „*manifestly ill-founded*" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as „*manifestly ill-founded claims*". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of „*fourth instance*"; (ii) claims that are categorized as „*clear or apparent absence of a violation*"; (iii) „*unsubstantiated or unsupported*" claims; and finally, (iv) „*confused or farfetched*" claims". This concept of inadmissibility on the basis of a claim assessed as "*manifestly ill-founded*", and the specifics of the above four categories of claims qualified as "*manifestly unfounded*" developed through the case law of the ECtHR, the Court has also adopted in its case law including but not limited to cases KI40/20 with Applicant *Sadik Gashi*, Resolution on Inadmissibility, of 20 January 2021; KI163/18, Applicant *Kujtim Lleshi*, Resolution on Inadmissibility, of 24 June 2020; and KI21/21, Applicant, *Asllan Meka*, Resolution on Inadmissibility, of 28 April 2021).

60. In the context of the assessment of the admissibility of the Referral, namely, the assessment of whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the substance of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

61. In this regard, and initially, the Court recalls that the circumstances of the present case relate to the statement of claim of the Applicant filed with the Basic Court in Gjakova against E.H for the payment of a debt to him in the amount of 470,000.00 euro. As a result of his statement of claim, the Applicant in the Basic Court in Prishtina requested the imposition of a security measure on immovable property on behalf of E.H, which claim was approved by Decision [C. No. 1710/15] of 21 October 2015 of this court. However, on 4 September 2019, E.H. in the same court, namely in the Basic Court in Prishtina filed a request for annulment of the security measure imposed by this court on the grounds that (i) the Applicant in the final Judgment [PKR . No. 23/14] of 16 May 2016, of the Basic Court in Gjakova was found guilty and sentenced to one year and six months imprisonment for committing the criminal offense "Contracting disproportionate benefit"; (ii) that the Applicant, in order to avoid serving his sentence, is on the run as a result of this Judgment; and (iii) that the Applicant based his request for a security measure on incriminating action. The Basic Court in Prishtina, after holding a hearing, where it had heard the litigants and the administration of the attached evidence, decided to annul the security measure against the immovable property on behalf of E.H. In its Decision, the Basic Court in Prishtina, referring to paragraph 1 of Article 309 and paragraph 2 of Article 312 of the LCP, found that the circumstances on the basis of which the security measure was imposed had changed. Against this Decision of the Basic Court in Prishtina, the Applicant filed an appeal with the Court of Appeals, with the essential allegation that the Basic Court did not reason its decision with the facts and legal requirements on the basis of which a certain measure . of security can be imposed and annulled. The Court of Appeals, by Decision [Ac. No. 5974/2020] of 11 December 2020 rejected the Applicant's appeal as ungrounded, upholding the above-mentioned Decision of the Basic Court in Prishtina as fair and based on law.

62. Before the Court, the Applicant challenges the finding of the Court of Appeals, alleging a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, due to the lack of reasoning of the court decision by this court. In the context of this allegation, the Applicant refers to the case of the Court KI07/18 [Applicant, *Çeliku Rrollers*, Judgment, of 8 December 2019] through which case the Court affirmed and applied the principles established through the case law of the ECtHR and of the Court itself regarding the right to reasoning of a court decision, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. Therefore, in considering this allegation, the Court will first (i) briefly elaborate on the general principles regarding the right to a reasoned judicial decision

established through the case law of the ECtHR and the Court; and then, (ii) will apply the latter to the circumstances of the present case.

63. As to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case-law. This case-law was built based on the case law of the ECtHR, including but not limited to the cases of *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. Moreover, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic",* Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019; KI35/18, Applicant "*Bayerische Versicherungsverbrand",* Judgment of 11 December 2019; and case of the Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 135).

64. In principle, the Court notes that the guarantees embodied in Article 31 of the Constitution and Article 6 of the ECHR include the obligation of courts to provide sufficient reasons for their decisions (See the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53; and see case of the Court KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139 and case KI87/18, Applicant *IF Skadiforsikring,* paragraph 44).

65. The Court also notes that based on its case law, when assessing the principle which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law (see similarly ECtHR cases *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994,

paragraph 27; and *Higgins and Others v. France*, paragraph 42, see also the case of the Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). By not seeking a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their claims that are crucial to the outcome of the proceedings (see case *Morerira Ferreira v. Portugal*, Judgment of 5 July 2011, paragraph 84, and all references used therein; and case of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 137).

66. The Court recalls that the Applicant alleges that the challenged Decision of the Court of Appeals does not meet the standards of a reasoned court decision because it does not provide a reasoning regarding the facts and legal conditions on the basis of which it can be determined and subsequently annulled its decision to impose a security measure.

67. The Basic Court in Prishtina, as a result of E.H. request, of 4 September 2019, annulled its decision on imposing a security measure, stating that it bases its decision on the evidence attached to the proposal for imposing a security measure; evidence attached to the request for annulment of the security measure, filed by E.H; final Judgment [PKR. No. 23/14] of 16 May 2016, of the Basic Court in Gjakova [by which the Applicant was found guilty and sentenced to imprisonment for a term of one year and six months for committing the criminal offense of "contracting disproportionate benefit", upheld by Judgment [PAKR. No. 421/2016] of 9 September 2016; and statements of litigating parties during the hearing. Consequently, the Basic Court in Prishtina, without prejudice to the decision on the merits of the case, referring to paragraph 1 of Article 309 and paragraph 2 of Article 313 of the LCP, found that the conditions and circumstances on the basis of which the security measure was imposed had changed.

68. The Applicant challenged the findings of the Basic Court, through an appeal to the Court of Appeals alleging a lack of reasoning of the court decision by the Basic Court in Prishtina. More specifically, the Applicant in his appeal essentially stated that the Decision of the Basic Court does not contain a reasoning of the facts and legal conditions on the basis of which its decision to impose a security measure can be annulled.

69. The Court of Appeals by Decision [Ac. No. 5974/2020] of 11 December 2020 had assessed that the Basic Court in Prishtina, based its decision

on the Judgment of the Basic Court in Gjakova, of 16 May 2016, by which he was found guilty and convicted of the criminal offense of "contracting disproportionate benefit", which judgment was upheld by Judgment [PAKR. No. 421/2016] of 9 September 2016, of the Court of Appeals. Accordingly, the Court of Appeals found that the Basic Court in Prishtina had correctly decided when it annulled its decision to impose a security measure. In the context of the latter, the Court also referred to paragraph 1 of Article 309, and paragraph 2 of Article 313 of the LCP, stating that by these provisions is provided the possibility for the court to annul its decision to impose security measure in case of change of circumstances due to which the security measure was imposed.

70. The Court also reiterates that the procedure for imposing the security measure and its annulment is determined by the provisions of the LCP, namely Articles 296-319 of the LCP. Taking into account the circumstances of the present case, the Court notes that paragraph 1 of Article 309 of the LCP provides for the possibility that the decision to impose a security measure may be modified or annulled. While paragraph 2 of Article 312 of the LCP, clearly defines the possibility of the security opponent to propose the annulment of the decision to impose a security measure "*and taken actions will be annulled if the circumstances based on which it has been determined have changed.*"

71. In the circumstances of the present case, based on the case file, it follows that the Basic Court upheld its decision as a result of the change of circumstances on the basis of which it had previously decided to approve the Applicant's request for imposition of a security measure.

72. The Court, based on the general principles regarding the right to a reasoned court decision and elaborated above, recalls that in addressing the allegations of the respective Applicants, the regular courts are obliged to give answers, *inter alia*, regarding those claims which are substantial or determinative of the circumstances of a case.

73. In the circumstances of the present case, the Court considers that the Court of Appeals has addressed the Applicant's allegations raised in his appeal regarding the Decision of the Basic Court in Prishtina, by which the imposition of a security measure on immovable property in the name of E.H. was annulled.

74. In this context, the Court, based on the explanations above, and specifically taking into account the allegations raised by the Applicant and the facts presented by him, as well as the reasoning of the regular courts elaborated above, considers that the challenged decision of the Court of Appeals is not characterized by a lack of a reasoned court

decision. Therefore, the Applicant's allegation regarding the lack of a reasoned court decision is manifestly ill-founded on constitutional basis in the "*clear or apparent absence of a violation*" as established in Rule 39 (2) of the Rules of Procedure.

II. Regarding the allegation of violation of Article 1 of Protocol no. 1 of the ECHR

75. The Court recalls that the Applicant in his Referral has mentioned that he alleges a violation of Article 1 (Protection of property) of Protocol No. 1. of the ECHR, but did not elaborate and justify at all how this right was violated in his case. In his Referral the Applicant requests that his Referral be declared admissible and the Court finds that the challenged Decision [Ac. No. 5974/2020] of 11 December 2020, of the Court of Appeals in conjunction with Decision [C. No. 1710/15] of 23 September 2020 of the Basic Court in Prishtina violated his right guaranteed by Article 1 of Protocol No. 1 of the ECHR. Furthermore, the Court recalls that his request for the imposition of a security measure was related to the imposition of security on the immovable property of E.H.

76. In this context, the Court states that, pursuant to Article 48 of the Law and paragraphs (1) (d) and (2) of Rule 39 of the Rules of Procedure and its case law, it has consistently stated that (i) the parties have an obligation to clarify precisely and present adequately the facts and allegations; and also (ii) to sufficiently prove and substantiate their allegations for violation of constitutional rights or provisions. (see cases of the Court KI163/18, Applicant *Kujtim Lleshi*, cited above, paragraph 85, and KI124/20 Applicant *Muhamed Ali Ceysűlmedine*, Resolution on Inadmissibility, of 20 January 2021, paragraph 42).

77. Based on the above, the Court considers that the Applicant's allegation of violation of Article 1 of Protocol No. 1 of the ECHR, is "*unsubstantiated or unsupported*" claim, and consequently, inadmissible as established in Article 48 of the Law and Rule 39 (1) (d) of the Rules of Procedure.

78. Therefore, and finally, the Court finds that the Applicant's Referral is inadmissible because, the allegation (i) regarding Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to lack of reasoning of the court decision is manifestly ill-founded on constitutional basis in the "*clear or apparent absence of a violation*", in accordance with paragraph 7 of Article 113 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure; whereas (ii) with regard to Article 1 of Protocol no. 1 of the ECHR is inadmissible

as "*unsubstantiated or unsupported*" as established in Article 48 of the Law and Rule 39 (1) (d) and (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Articles 20, 47 and 48 of the Law and Rule 39 (1) (d) and (2) of the Rules of Procedure, in the session held on 23 September 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka-Nimani

KI100/21, Applicant: Moni Commerce L.L.C., constitutional review of the Decision ARJ-UZVP-no. 72/2020, of the Supreme Court of Kosovo, 28 October 2020

KI100/21, Judgment of 24 September 2021, published on 12 October 2021

Keywords: legal entity, customs and excise code, violation of the right to fair and impartial trial, unreasoned decision
The Applicant is a company, which imports goods from "Company L", originating from China. It is noted from the case file that the value of these goods declared for customs clearance by the Applicant was re-assessed by the Customs. The decision of Kosovo Customs for re-assessment was challenged by the Applicant in the second instance of Kosovo Customs, which decided that in this case, it was acted correctly because based on, among others, the information received from the regular clearances and prices received from the stock exchange at the time of purchase of the goods, the value of the goods declared for customs clearance did not turn out to be the real value paid for the goods for the purpose of import. Consequently, the Applicant had initiated proceedings in the regular courts, challenging the legality of the decisions of the two instances of Kosovo Customs. Following the proceedings in the regular courts, the Basic Court, the Court of Appeals and the Supreme Court, respectively, found that the Kosovo Customs has acted correctly in the case of assessment of goods according to the relevant method of the Customs and Excise Code. Furthermore, they also referred to the fact that the Applicant could not harmonize the declared value of the goods in question with the value paid with two bank transfers, stating specifically that the Applicant did not certify the compliance of the value of bank transactions in the amount of 7,600.00 USD and 5,400.00 USD, with the value of the accompanying invoice of the goods, having the total value of 22,000.00 USD.

The Applicant, as the main allegation before the Constitutional Court has raised the issue of unreasoned judicial decision, alleging that the Supreme Court has not addressed, respectively has not reasoned, his essential and determining allegation that all lower instance courts have erroneously read the reflected facts in the bank transactions regarding the real amount paid, respectively the amount of 15,400.00 USD in court decisions was written as 5,400.00 USD, resulting in erroneous findings regarding the discrepancy between the amount paid and declared.

In assessing the allegations of the Applicant for violation of his rights to fair and impartial trial as a result of the lack of a reasoned court decision, the Court first elaborated and then applied in the circumstances of the present case, the principles of its case law and of the European Court of Human Rights, recalling that on the basis of the same, and as far as it is relevant to

the circumstances of the present case, the extent to which the obligation to give reasons applies, may vary depending on the nature of the decision and should be determined in the light of the circumstances of the present case, however it is the obligation of all courts to address and justify the substantive and defining allegations of a party. In the circumstances of the present case, the Court found that the Court of Appeals and the Supreme Court, respectively, had not responded to the Applicant regarding his main allegation in relation to the issue of the amount reflected in the bank transactions. The Court considered that this allegation of the Applicant is substantial and, in addition, may be decisive regarding the merits of the Applicant's lawsuit.

Consequently and based on the justification given in the published Judgment, the Court found that the challenged Decision of the Supreme Court was issued contrary to the procedural guarantees set out in Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights, remanding the same to the Supreme Court, for reconsideration.

JUDGMENT

in

Case No. KI100/21

Applicant

Moni Commerce L.l.c

Constitutional review of Decision ARJ-UZVP-No. 72/2020 of the Supreme Court of Kosovo of 28 October 2020

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 Moni Commerce L.l.c based in Podujeva (hereinafter: the Applicant), which with power of attorney is represented by Kushtrim Bytyqi, a lawyer in Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decision ARJ-UZVP-No. 72/2020 of the Supreme Court of Kosovo of 28 October 2020 in conjunction with Judgment AA. No. 682/2019 of 10 July 2020 of the Court of Appeals and Judgment A. No. 1470/17 of 17 April 2019 of the Basic Court in Prishtina – Department for Administrative Matters.

3. The Applicant was served with the challenged decision on 26 January 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, whereby the Applicant alleges that its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR) have been violated.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles} and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 24 May 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

8. On 4 June 2021, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Safet Hoxha (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

9. On 9 June 2021, the Court notified the Applicant and the Supreme Court about the registration of the Referral. On the same date, the Court requested the Basic Court in Prishtina to attach the acknowledgment of receipt proving the date when the Applicant was served with Decision ARJ-UZVP-no. 72/2020, of 28 October 2020 of the Supreme Court.

10. On 11 June 2021, the Basic Court in Prishtina attached the acknowledgment of receipt which proves that the Applicant was served with Decision ARJ-UZVP. 72/2020 of the Supreme Court on 26 January 2021.

11. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

12. On 24 September 2021, the Review Panel considered the report of the Judge Rapporteur, and by majority recommended to the Court the admissibility of the Referral. On the same date, the Court decided by majority that (i) the Applicant's Referral is admissible; (ii) that Decision ARJ-UZVP-no. 72/2020 of the Supreme Court of Kosovo, of 28 October 2020, is not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Summary of facts

13. Based on the case file, the Applicant imports chewing gums from "Company L", as an export company originating from China (hereinafter: "Company L").

14. On 16 June 2017 on the occasion of the declaration for customs clearance of this goods, through the Single Customs Declaration (hereinafter: SCD) with reference R13844 and on the occasion of the presentation of other relevant documents, Kosovo Customs (Central Admission Office) in the procedure of customs post-clearance, has disputed the value of the goods and re-evaluated it based on method 6 of evaluation, assigning a new customs value, based on the data of Kosovo Customs, namely previous customs clearance.

15. On 20 June 2017, the Applicant files an appeal against Decision R13844 of 16 June 2017, in the Decisions Review Sector of Kosovo Customs.

16. On 25 July 2017, Kosovo Customs by Decision No. 01.3.2.2/419, rejected the Applicant's appeal reasoning that the Central Admission Office acted correctly because (i) the value of the goods declared for customs post-clearance is not the real value paid for the goods for import purposes, because the value was declared less than the real paid value, in view of Article 33 of Code no. 03/L-109 Customs and

Excise Code of Kosovo (hereinafter: Customs and Excise Code); (ii) has made the evaluation of the goods based on the valuation method 6 of Article 35 of the Customs and Excise Code, because the information obtained in the regular customs post-clearance reflects the real value of the disputed goods and in this case the reference value is taken the price of the goods from the value file, respectively the prices taken from reuters as stock market prices at the time of purchase of the goods. Further, Kosovo Customs stated that the contract presented by the subject in the procedure, has not been signed and stamped by the parties, and the latter does not differ from the invoice proforma, except the change "Proforma Invoice" in the "Contract", therefore the same is not reliable document. Regarding the application of Article 33 of the Customs and Excise Code, Kosovo Customs reasoned that the entity must prove that the declared value is the real value of the transaction and contrary to the claims of the Applicant show the prices of previous customs post-clearance.

17. On 25 August 2017, the Applicant filed a lawsuit against Decision No. 01.3.2.2/419, of 25 July 2017 of the Kosovo Customs, stating that in the case of customs clearance of goods, the Applicant possessed and presented to the customs officials all mandatory documents for the declaration of goods. The Applicant alleged (i) violation of the provisions of the Customs and Excise Code because Article 33 of this Code has not been applied, even though the relevant documents have been presented; (ii) violation of Administrative Instruction 11/2009, namely Articles 60-68 and 123 because the verification and acceptance of documents has not been done; (iii) erroneous and incomplete determination of factual situation due to the way in which the value of the goods was determined; (iv) violation of the provisions of the administrative procedure because according to him, the customs officials at the Kosovo Customs have not acted objectively in the case of disputing the value of this goods, by not giving due weight to the facts presented in the case of declaration; (v) erroneous application of substantive law, namely Article 35 of the Customs and Excise Code.

18. On 17 April 2019, the Basic Court in Prishtina - Department for Administrative Matters (hereinafter: the Basic Court) by Judgment A. No. 1470/17 rejected the Applicant's statement of claim as ungrounded, and upheld Decision No. 01.3.2.2/419 of 25 July 2017 of the Kosovo Customs. The Basic Court first stated that (i) it was acted correctly when the determination of value of goods was based on method 6 of the evaluation of Article 35 of the Customs and Excise Code, based on data obtained from Kosovo Customs because these data were obtained from regular customs post-clearance examinations at branches, and as a reference value is the prices taken from reuters

as stock exchange prices at the time of purchase of goods SCD R13880/2016; (ii) the accompanying documentation of the material goods was assessed as insufficient evidence because the contract presented by the Applicant was not signed and stamped by the parties and which did not differ by any letter from the invoice proforma. Second, the Basic Court reasoned that the evidence administered (i) does not dispute the fact that the banking transactions presented in the case file are the subject of "Company L" in China, but the value of these transactions could not be reconciled by the Basic Court. with the declared value of the goods according to the accompanying invoice of the goods declared with SCD R13844/ of 16 June 2017 in ZBK Merdare; (ii) The court could not reconcile the declared value of the material goods with the paid value of the transaction presented according to the bank transfers of 09 March 2017 and 06 June 2017 to TEB Bank and the Applicant in its lawsuit and the court hearing did not explain why the value of these banking transactions in the amount of 7,600 USD and 5,400USD, are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 which has a total value of 22,000 USD, and the Contract of 24 February 2017 which has the same value. Consequently, the Basic Court stated that since from the administered evidence it could not conclude that the Applicant paid to "Company L" the real value of the goods, then the Kosovo Customs acted correctly when applying the 6th method of assessment according to Article 35 of the Customs and Excise Code.

19. The Basic Court also stated that the Applicant did not find that the value of the goods in question is close to the value of identical or similar goods sold for export to Kosovo, presented at the same time, in which case the provision of Article 34 paragraph 2 points (a) and (b) of the Customs and Excise Code, and the Applicant has not managed to prove the value of the transaction, therefore, the allegations that the accompanying documentation is in accordance with Article 123 of Administrative Instruction 11/2009 cannot be approved for the implementation of the Customs and Excise Code (hereinafter Administrative Instruction 11/2009).

20. On an unspecified date, the Applicant filed an appeal against Judgment A. No. 1470/17 of the Basic Court, considering that the latter contians (i) an essential violation of the provisions of the procedure, stating that after assessing and evaluating only the evidence submitted by the Applicant and did not oblige Kosovo Customs to establish the facts and upholding the challenged decision of the latter, and moreover, the Basic Court has erred in calculating the payments from the bank payment orders; (ii) erroneous and incomplete

determination of factual situation because according to him, the first instance court erred in reading the contents of the bank transfer of 6 June 2017 after considering that the amount paid is **5,400 USD**, but from the documents of the case is seen to be **15, 400 USD**, and emphasizes that the value indicated on the invoice SHX/MONI01 of 24 February 2017 is 22,000.00 USD and payment of 1,000.00 USD on behalf of the labels of the case products and which does not enter the customs base, and that both payment orders in the amount of 23,000.00 USD were paid on behalf of the subject invoice which is in line with the payment values with this invoice; (iii) erroneous application of substantive law when Article 35 of the Customs and Excise Code was applied and Article 33 thereof had to be applied. Also, the Applicant alleged a violation of Article 123 of Administrative Instruction No. 11/2009.

21. On 10 July 2020, the Court of Appeals by Judgment AA. No. 682/2019 rejected as ungrounded the Applicant's appeal and upheld Judgment A. No. 1470/17 of the Basic Court, accepting the legal position of the latter as grounded. Regarding the allegations of essential violations of the provisions of the procedure, the Court of Appeals assessed that it is ungrounded because the steps were respected according to the provisions of the Law on Administrative Conflicts (hereinafter: LAC) and of the Customs and Excise Code. Subsequently, with regard to the allegations concerning erroneous and incomplete determination of the factual situation, the Court of Appeals considered that the Basic Court had produced sufficient evidence to prove that the Applicant's allegations were ungrounded and stated that it could not prove another factual situation from the situation found by Kosovo Customs. The Court of Appeals refers to the issue of non-reconciliation of the declared value of the material goods paid with the transaction of 09 March 2017 and 06 June 2017 in TEB Bank and the fact that the latter in the amount of 7600 USD and 5400 USD are not reconciled with the value of accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 in the total value of 22,000 USD and the contract with the same value. For this reasoning, the Court of Appeals was based on Article 35 and Article 34 paragraph 2 items (a) and (b) of the Customs and Excise Code. Secondly, regarding the value of 22,000 USD and 1,000 USD for placing tickets, the Court of Appeals did not approve them because according to it, the Applicant was not able to prove the value of the transaction paid for the goods, therefore the allegations that the documentation was submitted in accordance with Article 123 of the Administrative Instruction cannot be accepted.

22. On 29 September 2020, the Applicant filed a request for extraordinary review alleging essential violation of the provisions of the procedure

and erroneous application of substantive law. The Applicant stated that the Court of Appeals did not establish the facts and evidence on which it based the reassessment, initially the Kosovo Customs, and then the documents by which it allegedly supported its decision in the appeal procedure to the Kosovo Customs and in conflict procedure in the court. The Applicant stated that initially the Basic Court has erroneously determined the factual situation in this regard, considering it as insufficient documents, on the grounds that the bank payments made in the name of the invoice for the goods did not match the value of the invoice. It states that from paragraph 6, of page 2 of the reasoning of the Judgment of the Basic Court, the value of the bank transfer of 6 June 2017 was erroneously evidenced, determining incorrectly its value of **5,400 USD**, instead of the real amount of **15,400 USD**. In relation to this point, the Applicant states that (i) the value of the goods declared by SCD R-13844 of 16 June 2017, is also recorded in the SHX/MONI01 invoice of 24 February 2017, and that amount of 22,000 USD, and in this invoice is added the value of the goods of 1,000 USD due to the placement of labels on the products. Therefore, the Applicant states that it paid on 9 March 2017 the amount of 7,600 USD, while on 6 June 2017 the amount of 15,400 USD and both payment orders form the amount of 23,000 USD. Therefore, the Applicant considers that the finding of the Basic Court that the Applicant could not reconcile bank payments and invoices is ungrounded. Finally, regarding the issue of payment of 1,000 USD, paid on behalf of the tickets, the Applicant considers that it does not enter the customs base for the calculation of import duties and therefore states that the Court of Appeals has not applied legal provisions under Article 33 of the Customs and Excise Code and Article 123 of Administrative Instruction 11/2009.

23. On 28 October 2020, the Supreme Court, by Decision ARJ-UZVP-no. 72/2020, rejected as ungrounded the Applicant's request for extraordinary review. The Supreme Court stated that the lower instance courts have rightly concluded that no evidence could be found in the case file which would prove that the Applicant paid the real value of the transaction of the imported goods as provided by Article 33 of the Customs and Excise Code and that the accompanying documentation of the material goods is not in accordance with Article 123 of Administrative Instruction 11/2009. The Supreme Court clarified to the Applicant that to accept the value of the goods under Article 34 paragraph 2 items (a) and (b) of the Customs and Excise Code, the Applicant must prove that the value of the goods in question is approximately equal to the value of the identical or similar goods sold for export to Kosovo and also stated that the court could not reconcile the declared value of subjected goods with the paid value of

the bank transfer transaction on 9 March 2017 the amount of 7,600 USD, while on 6 June 2017 the amount of 5,400 USD although the value of these transactions is not reconciled with the accompanying invoice SHX/MONI01 of 20 April 2017 in the amount of 22,000 USD. Finally, the Supreme Court stated that: (i) it could not approve the allegation from the lawsuit that the declared value of the goods represents its real value; (ii) acknowledges the findings of the Kosovo Customs that the Applicant has not submitted the complete documentation which would prove that the declared price is at the same time the real value of the goods under Article 34 paragraph 2 items (a) and (b) of the Customs and Excise Code; (iii) as it has not been established the Applicant paid to "Company L" the real value based on the invoices, then Kosovo Customs has acted rightly regarding the new determination of value of the goods and the application of method 6 provided by Article 35 of the Customs and Excise Code.

Applicant's allegations

24. The Applicant alleges that by the challenged decision, it was deprived of its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a trial). regular) of the ECHR.

25. The Applicant initially alleges that when declaring the goods for import, it presented all the mandatory documents to make convincing the real value of the goods, and these documents were not taken into account by the Kosovo Customs officials, who disputed the value of the goods and re-evaluated it.

26. The Applicant further alleges that the Basic Court erred in reading the contents of the transfer because in fact the bank transfer of 6 June 2017 is 15,400 USD and not 5,400 USD, and this error was also followed in the other two court instances, therefore, according to the Applicant the finding that it could not reconcile bank payments and invoices is ungrounded.

27. Accordingly, based on Article 31 of the Constitution, the Applicant states that it challenges the findings of the Supreme Court, stating that the banking transaction in the amount of 15,400.00 USD was read as 5,400.00 EUR and this does not represent an erroneous assessment of the evidence and the factual situation, but the inability of the judge to see the exact content of this document, therefore considers that this consists of an irregular judicial process. The Applicant states that in

three court instances, it stated that the content of the bank transfer was read erroneously.

28. The Applicant considers that with regard to the allegations related to the lack of financial documentation to establish the price of the goods, the Supreme Court has upheld the position of the lower instances despite the fact that bank transfers prove compliance with the invoice and prove the price of the goods.

29. Further, the Applicant alleges that the Supreme Court did not provide a reasoned decision namely, it (i) did not provide a reasoning for its decision; (ii) based on the case law of the European Court of Human Rights (hereinafter: the ECtHR), the courts are required to consider a party's substantive arguments; and that (iii) the courts' silence regarding the Applicants' substantive allegations can be used as a rejection.

30. Consequently, the Applicant alleges that the decision of the Supreme Court was rendered in violation of the Applicant's right to a reasoned court decision because it failed to address the Applicant's substantive allegations of a violation of the applicable law, namely Article 33 of the Customs and Excise Code, in conjunction with Article 123 of the Administrative Instruction.

31. The Applicant, more specifically states that the Supreme Court, has not clarified why the value of these banking transactions in the amount of 7,600.00 and 5,400.00 USD are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 with the total amount of the invoice 22,000.00 USD and the Contract of 24 February 2017 which has the same value. However, in this case there is no justification regarding the Applicant's allegation that the invoice actually has a value of 22,000.00 USD and 1,000.00 USD for the labeling of goods in total 23,000.00 USD, which was paid through two bank transfers, one in the amount of 7,400.00 USD and the other 15,400.00 and not 5,400.00, as it was read by all the judges so far, read incorrectly.

32. The Applicant further states that it also alleges a violation of its right to fair and impartial trial, because no hearing was held on the appeal, and such violation was not noted by the Supreme Court, which takes care *ex officio*.

33. Finally, the Applicant requests the Court to (i) declare the Referral admissible; (ii) to hold that there has been a violation of Article 31 of the Constitution and Article 6 of the ECHR; (iii) to declare invalid

Decision ARJ-UZVP-no. 72/2020 of the Supreme Court of 28 October 2020; Judgment AA. No. 682/2019 of the Court of Appeals, of 10 July 2020 and Judgment A. No. 1470/17 of the Basic Court, of 17 April 2019, as well as to remand the case for reconsideration.

Relevant constitutional and legal provisions

THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 31
[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
(Right to a fair trial)

3. 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.
[...]

CODE No. 03/L-109 CUSTOMS AND EXCISE CODE OF KOSOVO

Article 33

1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to Kosovo, adjusted, where necessary, in accordance with Articles 36 and 37, provided:

a) that there are no restrictions as to the disposal or use of the goods by the buyer, other than restrictions which:

- are imposed or required by a law or by the public authorities in Kosovo,

- limit the geographical area in which the goods may be resold, or

- do not substantially affect the value of the goods;

b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with Article 36; and

d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.

2. For the purposes of paragraph 1, the following shall apply:

a) In determining whether the transaction value is acceptable, the fact that the buyer and the seller are related shall not in it self be sufficient grounds for regarding the transaction value as unacceptable. Where necessary, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the declarant or otherwise, the Customs have grounds for considering that the relationship influenced the price, they shall communicate their grounds to the declarant and he shall be given a reasonable opportunity to respond. If the declarant so requests, the communication of the grounds shall be in writing.

b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with paragraph 1

wherever the declarant demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(i) the transaction value in sales, between buyers and sellers who are not related in any particular case, of identical or similar goods for export to Kosovo;

(ii) the customs value of identical or similar goods, as determined under Article 34 (2) (c);

(iii)) the customs value of identical or similar goods, as determined under Article 34 (2) (d).

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 36 and costs incurred by the seller in sales in which he and the buyer are not related and where such costs are not incurred by the seller in sales in which he and the buyer are related.

c) The tests set forth in subparagraph (b) are to be used at the initiative of the declarant and only for comparison purposes. Substitute values may not be established under the said subparagraph.

3. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly.
Activities, including marketing activities, undertaken by the buyer on his own account, other than those for which an adjustment is provided in Article 36 are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller or have been undertaken by agreement with the seller, and their cost shall not be added to the price actually paid or payable in determining the customs value of imported goods.

Article 34

1. Where the customs value cannot be determined under Article 33, it is to be determined by proceeding sequentially through subparagraphs (a), (b), (c) and (d) of paragraph 2 to the first subparagraph under which it can be determined, subject to the proviso that the order of application of subparagraphs (c) and (d) shall be reversed if the declarant so requests;

It is only when such value cannot be determined under a particular subparagraph that the provisions of the next subparagraph in a sequence established by virtue of this paragraph can be applied.

2. The customs value as determined under this Article shall be:

a) the transaction value of identical goods sold for export to Kosovo and exported at or about the same time as the goods being valued;

b) the transaction value of similar goods sold for export to Kosovo and exported at or about the same time as the goods being valued;

c) the value based on the unit price at which the imported goods for identical or similar imported goods are sold within Kosovo in the greatest aggregate quantity to persons not related to the sellers;

d) the computed value, consisting of the sum of:

- the cost or value of materials and fabrication or other processing employed in producing the imported goods,

- an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to Kosovo,

- the cost or value of the items referred to in Article 36 (1) (e).

3. Any further conditions and rules for the application of paragraph 2 above shall be determined in the Administrative Instruction implementing this Code.

Article 35

1. Where the customs value of imported goods cannot be determined under Articles 33 or 34, it shall be determined, on the basis of data

available in Kosovo, using reasonable means consistent with the principles and general provisions of:

- the agreement on implementation of Article VII of the General Agreement on Tariffs and Trade of 1994;.

- Article VII of the General Agreement on Tariffs and Trade of 1 1994;

- the provisions of this chapter.

2. No customs value shall be determined under paragraph 1 on the basis of::

a) the selling price in Kosovo of goods produced in Kosovo;

b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

c) the price of goods on the domestic market of the country of exportation;

d) the cost of production, other than computed values which have been determined for identical or similar goods in accordance with Article 33 (2) (d);

e) prices for export to a country other than Kosovo;

f) minimum customs values; or

g) arbitrary or fictitious values.

ADMINISTRATIVE INSTRUCTION No 11/2009, ON IMPLEMENTATION OF CUSTOMS AND EXCISE CODE

HEADING IV
CUSTOMS VALUE
CHAPTER 1

General provisions
Article 60

1. For application of provisions from article 32 up to 35 of the Customs and Excise Code, as well as those in this heading, Kosovo Customs shall comply with provisions specified in Annex 12.

Provisions specified in the first column of Annex 12, shall be applied in view of the explanatory note indicated in the second column.

2. If necessary to refer to the general accepted principles of accounting in order to determine the customs value, then provisions from Annex 13 shall be applied.

Article 61

1. For the purposes of this heading:

a) „Agreement" means the Agreement for Implementation of Article VII of the General Agreement for Tariff and Trade reached in the framework of multilateral trade negotiations from 1973 until 1979 and referred in the beginning of Section 3 5.1 of the Code;

b) „Produced goods" include the cultivated goods, produced or extracted from the underground or mineral resourced;

c) „identical goods" means the goods produced in the same place, which are identical in every aspect, including the physical features, quality and reputation. Small visible changes do not comprise a cause to be considered non-identical;

d) „similar goods" means the goods produced in the same place, which even if not the same in all the aspects, have similar features and similar material components, that enables them to perform the same functions and from the commercial aspect are unalterable; the quality of goods, their prospect and the existence of protection sign are factors among others to be considered in the definition if the goods are similar;

e) "goods of same type or class" means the goods that are qualified within the group or range of goods produced by the special industry or industrial sector, including also identical or similar goods.

2. „identical or similar goods", as appropriately are not applied for goods, which are incorporated or submit an engineering work, development, artistry, design, as well as drawing and sketching, for which no arrangement is performed according to article 36.1 (b) (iv) of the Code, so long as such elements are not undertaken in Kosovo.

Article 62

1. For the purposes of Heading II, Chapter 3 of the Code and this Heading, persons shall be considered to be regarded only if:

a) They are officials or managers of other's businesses;

b) According to law that are recognized as business partners;

c) They are employer and employee;

d) Any person, who directly or indirectly has possession, controls or maintains 5% or more of the voting power from funds or holding of both;

e) One of them directly or indirectly controls the other;

f) Both of them directly or indirectly are controlled by the third person;
g) Them together directly or indirectly control the third person, or
h) They are members of the same family. Persons are to be considered as members of the same family, only if they are related in one of the following with each other:
[...]

2. For the purposes of this heading, persons joined in a business with each-other, since one of them is a sole agent, distributor or other's concessionary, whatsoever the designation may be, shall be considered to be related, only if they are included in one of the relations from paragraph 1.

Article 63

In order to determine the customs value of goods according to article 33 of the Code, the goods for which the price is not paid in the set out time to pay the obligation at the set out time, as per the rule is taken as a base for the customs value.

Article 64

1. When the declared goods for free circulation are part of a huge quantity of same goods, bought in a single transaction, the actual price paid or payable, according to article 33.1 of the Code, will be the price presented proportionally of the general price for goods that has the same quantity for the purchased goods.

Separation of paid or payable price may also be applied in the event of losing a part of the consignment or when goods while being assessed, are damaged before release to free circulation.

2. After the release to free circulation, price aligning which is indeed paid or payable for goods, when the seller executes for the buyer, may be considered for determination of the customs value in accordance to article 33 of the Code, if they proof to customs that;

a) Goods were damaged at the moment set out in Section 71 of the Code;

b) The seller has arranged (exchanged) the execution of the guarantor obligations as set out in the transaction contact, which is bound prior to releasing goods to free circulation;

c) Goods deficiencies are not considered in the relevant transaction contract.

3. The paid or payable price for the goods adjusted in accordance to Paragraph 2, may be taken under advisement only if the adjustment is performed within 12 months from the date of receiving the declaration for release to free circulation.

Article 65

When the paid or payable price for the purposes of article 33.1 of the Code includes the amount (value) in relation to the applicable internal tax of the country of origin or export regarding the actual goods, the provided amount is not included in the customs value provided that can be proven to Customs, that the actual goods are released or will be released from this tax in behalf of the buyer.

Article 66

1. For the purposes of article 33 of the Code, the fact that goods are object to sale are presented for free circulation, which is considered as an appropriate indicator that they are sold for export in Kosovo. For successive sales, only the last sale that resulted with the entry of goods in Kosovo or their sale, performed in Kosovo prior to be being released for free circulation, should comprise an indicator as such.

When the declared price has to do with the performed sale prior to the last sale on which basis the goods have entered in Kosovo, then it should be proven to Customs that this goods sale is performed for export in Kosovo:

2. When the goods are used in another place between the sale period of time and the time of entering to free circulation, the customs value shall not be the transaction value.

3. The buyer doesn't have to fulfil any other condition from what it was part of the transaction contract.

Article 67

When applying article 33.1 (b) of the Code, it is ascertained that the imported goods transaction or price is subject to a condition or value compensation, which is determined, and this value is considered as indirect payment of the buyer for the seller and the part or paid or payable price, if conditions are fulfilled or subsequently doesn't have to do with:

a) The activity on what the article 33.3 (b) of the Code is applied; or

c) Factors which have to be added to the paid or payable price according to provisions of article 36.1 until 36.5 of the Code.

Article 68

1. For the purposes of article 33.3 (b) of the Code, the term "marketing activities" means all the activities regarding advertising

and promotion of goods sale and all the activities regarding the rights and guarantees related to them.
2. Such undertaken activities by buyers should be considered to be undertaken in its own account, even if they are conducted in accordance to the obligation taken by the buyer, being in agreement with the seller.

[...]

Article 91
The person referred in Article 88 (a) of this act, must submit to customs the copy of the invoice based on what he presents the imported goods value. When the customs value is declared in writing, Customs shall keep a copy of it.

Documents to attach to the customs declaration
Article 123

1. The following documents should be attached to the customs declaration for placing goods into free circulation*:*

a) the invoice based on what the customs value of goods is declared, as required according to article 91 of this act;
b) when requested by Article 88 of this act, the declaration for customs value of goods is done in accordance with terms delivered in the provided article;
c) the requested documents for application of tariff preferential arrangements and other measures that derive from applicable legal rules for declared goods;
d) All the other requested documents for application of provisions that regulate relief to free circulation of declared goods.

2. Customs may require at the moment of submitting the declaration to submit the transport documents or in the event of, submission of documents related to the previous customs procedure. When a single item is displayed in two or more packing's, customs may require the submission of a packing list or a document equivalent to the contents display for each of the packaging's.

3. When the goods fulfil the terms for relief from customs import duties, the documents mentioned in paragraphs 1(a), (b) and (c) shall not be requested, except if customs considers it as necessary for the purpose of implementing provisions that regulate the placement of goods into free circulation.

LAW No. 04/L-102 ON AMENDING AND SUPPLEMENTING THE LAW ON TAX ADMINISTRATION AND PROCEDURE No 03/L-222

Article 81.G
Hearing

1. The Fiscal Divisions of the Administrative Department of the Basic Court and the Court of Appeal shall hold a public hearing where parties are heard and evidence is reviewed.
2. The court may hold a closed session, when there are appropriate reasons concerning security and confidentiality issues involved.

Admissibility of the Referral

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

35. 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."*

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

37. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, referring to the alleged violations of its fundamental rights and freedoms, which apply to both individuals and legal entities as far as they are applicable (see case of the Court KI41/09, Applicant *University AAB-RIINVEST L.L.C.,* Resolution on Inadmissibility of 3 February 2010, paragraph 14; and see case KI26/19, Applicant *Xhavit Thaqi owner of the company "NTP INTERBAJ",* Resolution on Inadmissibility of 7 October 2020, paragraph 56).

38. The Court also examines whether the Applicant has met the admissibility requirements as established in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

"1. Every individual is entitled to requestfrom the Constitutional Court legal protection when he considers that his/ her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

„The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".

39. As regards the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, challenging the act of the public authority, namely Decision ARJ-UZVP-no. 72/2020 of the Supreme Court, of 28 October 2020, after the exhaustion of all available legal remedies provided by Law. The Applicant also clarified the rights and freedoms it claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

40. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure and that it cannot be declared inadmissible on the basis of the requirements set out 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 set out in paragraph (2) of Rule 39

of the Rules of Procedure, therefore, it must be declared admissible and its merits must be examined.

Merits

41. The Court recalls that the Applicant as an importing company has declared for customs post-clearance examination of the goods from "Company L" through the relevant SCD. The value of the goods submitted by the Applicant to ZBD Merdare, was challenged by Kosovo Customs which re-assessed the value of the goods based on method 6 of assessment under Article 35 of the Customs and Excise Code. This decision was challenged by the Applicant in the second instance at the Kosovo Customs, which stated that the Central Admission Office acted correctly because (i) the value of the goods declared for customs post-clearance examination is not the real value paid for the goods with import value, because declared a value less than the real value paid, in view of Article 33 of the Customs and Excise Code of (ii) the evaluation of the goods has been made based on method 6 of the evaluation of Article 35 of the Customs and Excise Code, because the information received at the regular customs post-clearance examinations reflects the real value of the disputed goods and in this case as a reference value is taken the price of the goods from the value file, namely the prices received by Reuters as stock exchange prices at the time of purchase of goods. Further, Kosovo Customs stated that the contract presented by the subject in the procedure, has not been signed and stamped by the parties, and it does not differ from the invoice proforma, except the change "Proforma Invoice" to "Contract", therefore, the latter is not a reliable document.

42. The Applicant complained to the regular courts, where the Basic Court initially stated that (i) it was acted correctly when in assessing the goods it was based on method 6 of assessment of Article 35 of the Customs and Excise Code, based on data received from Kosovo Customs because these data were obtained from regular customs post-clearance examination at the branches, and as reference value was taken the prices received from Reuters as stock exchange prices at the time of purchase of goods SCD R13880/2016; (ii) the accompanying documentation of the material goods was assessed as insufficient evidence because the contract presented by the Applicant was not signed and stamped by the parties and which did not differ by any letter from the invoice proforma. While all three court instances in essence referred to the issue of non-reconciliation of the declared value of the goods paid with the transaction of 09 March 2017 and 06 June 2017 in TEB Bank and the fact that the latter in the amount of 7,600 USD and 5,400 USD are not reconciled with the value of the

accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 in the total value of 22,000 USD and the contract with the same value. The Applicant, in its appeal to the Court of Appeals, and its request for extraordinary review before the Supreme Court alleged erroneous and incomplete determination of factual situation because according to it, the first instance court erred in the case of reading the contents of the bank transfer of 6 June 2017 after considering that the amount paid is **5,400 USD**, but from the case file it can be seen that it is **15, 400 USD**, and emphasizes that the value listed on the invoice SHX/MONI01 of 24 February 2017 is 22,000.00 USD and payment of 1,000.00 USD in the name of labels of material products and which is not entered in the customs base, and both payment orders in the amount of 23,000.00 USD are paid in the name of the material invoice which is in line with the payment values with this invoice;

43. Therefore, the Applicant's main allegation before the Court is the issue of determination of factual situation, stating that the Supreme Court did not address, namely did not substantiate its allegation regarding the real amount paid in the transaction of 6 June 2017, because all instances have erroneously read the amount of 15, 400 USD which in court decisions is marked as 5,400 USD. In this regard, the Applicant considers that regarding the allegations related to the lack of financial documentation to prove the price of goods, the Supreme Court has approved the position of lower instances despite the fact that bank transfers prove compliance with the invoice and certify the price of goods.

44. Second, the Applicant alleges that the Supreme Court should have *ex officio* taken care to find a violation because the Court of Appeals did not hold a hearing under Article 81G of Law no. 04/L-102 on amending and supplementing the law on Tax Administration and Procedures no. 03/L-222. Consequently, the Court will address the Applicant's allegations of violation of its right to fair and impartial trial by first addressing the general principles developed by the case law of the ECtHR and the case law of this Court regarding the reasoning of court decisions by addressing the allegation about the factual situation, and the issue of holding the court hearing.

45. Therefore, based on the specifics of the present case, the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. Regarding the allegation of unreasoned court decision

(i) General principles regarding the reasoning of court decisions

46. As to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case-law. This case-law was built based on the case law of the ECtHR, including but not limited to the cases of *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. Moreover, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019; KI35/18, Applicant "*Bayerische Versicherungsverbrand"*, Judgment of 11 December 2019; and case of the Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 135).

47. In principle, the Court notes that the guarantees embodied in Article 6 of the ECHR include the obligation of courts to provide sufficient reasons for their decisions. (See the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53; and see case of th Court KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139 and case KI87/18, Applicant *IF Skadiforsikring,* paragraph 44).

48. The Court also notes that based on its case law, which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law (see similiarly ECtHR cases *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27; and *Higgins*

and Others v. France, paragraph 42, see also the case of the Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). By not seeking a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their claims that are crucial to the outcome of the proceedings (see case *Morerira Ferreira v. Portugal*, Judgment of 5 July 2011, paragraph 84, and all references used therein; and case of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 137).

49. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and the examination of evidence on the one hand, and the legal conclusions of the court, on the other. A judgment of a court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic*, Judgment of 8 December 2017, see Court cases KI87/18 Applicant *"IF Skadeforsikring"*, Judgment of 27 February 2019, paragraph 44; KI138/19 Applicant *Ibish Raci*, cited above, paragraph 45, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 138).

(ii) Application of these principles in the circumstance of the present case

50. The Court recalls that the Applicant complains about the reasoning given by the regular courts regarding the value of the transaction, namely, the fact that the first instance court erred in reading the contents of the bank transfer of 6 June 2017, after considering that the amount paid is **5,400 USD**, but from the case file it can be seen that it is **15, 400 USD**, and emphasizes that the value listed in the SHX/MONI01 invoice of 24 February 2017 is 22,000.00 USD and the payment of 1,000.00 USD on behalf of the labels of the products and which does not enter the customs base, and that both payment orders in the amount of 23,000.00 USD were paid on behalf of the substantive invoice which is in line with the payment values with this invoice. According to the Applicant, this error was also forwarded to the Judgment of the Court of Appeals and the Supreme Court. Second, the Applicant alleges that the Supreme Court found no violation regarding the fact that the Court of Appeals did not hold a hearing as required by Article 81G of Law no. 04/L-102 on amending and

supplementing the law on Tax Administration and Procedures no. 03/L-222, not reasoning on this point.

51. In this regard, the Court first recalls the reasoning of the regular courts regarding the rejection of the Applicant's allegations. In this respect, the Court recalls that the Court of Appeals by Judgment AA. No. 682/2019, rejected as ungrounded the Applicant's appeal, reasoning as follows:

> *"[...] with regard to the appealing allegations of erroneous and incomplete determination of factual situation, this panel considers that the court of first instance in the case of the claimant's lawsuit, has administered sufficient evidence which proves that the claimant's allegations are ungrounded, because from the administered evidence, the court could not prove another factual situation from the situation found by the respondent during the administrative proceeding, because the court does not challenge the facts that in the banking transactions presented in the case file as the beneficiary of the means is the exporter - the entity ["Company L"], but the value of these transactions of goods declared in the Single Customs Declaration R-13844 of 16.06.2017 in ZBD Merdare. The court could not reconcile the declared value of the material goods with the paid value of the transaction presented according to the bank transfers of 09.03.2017 and 06.06.2017 of TEB Bank, the claimant also in the court session did not explain why the value of these banking transactions in the amount of 7600 USD and 5400 USD, are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20.04.2017 which has a total value of 22000 USD, and the contract of 24.02.2017 which has the same value. Therefore, the court from the administered evidence could not prove that the claimant paid the exporter the real value of the material goods according to the accompanying invoice of the goods. Therefore, the first instance court correctly decided when it assessed that the respondent acted correctly when by the challenged decision it confirmed the re-evaluation of the material goods by the central admission office, applying the 6th evaluation method from Article 35 of the Customs and Excise Code, namely available data to Kosovo Customs (SCD R-13880/2016). Therefore, it is rightly concluded that the claimant in this administrative conflict has not proved that the value of the material goods is approximate to the value of identical or similar goods sold for export in Kosovo, presented at the same time, which in this case the provision of Article 34 par.2 item a) and b) of the Customs and Excise Code of Kosovo would be applied.*

The panel of this court, based on this situation of the matter, finds that the first instance court did not find grounded facts that argue that the claimant paid the exporters the real value of the goods. Therefore, the first instance court rightly considers that the respondent acted correctly when by the challenged decision it confirmed the re-evaluation of the material goods by applying the method of 6 evaluation method under Article 35 of the Customs and Excise Code of Kosovo, since these data were obtained from regular customs through the branches and as a reference value is taken the price of the goods from the value file, namely the prices received from Reuters as the stock market price at the time of purchase of goods, SCB R-13880/2016. Therefore, based on the current state of the case, this court finds that the first instance court rightly decided when based on the provisions of LAP, LAC, Law no. 04/L-102 on Amending and Supplementing the Law on Tax Administration and Procedures no. 03/L-222, as well as Code no.03/L-109 on Customs and Excise in Kosovo."

52. As to the value of the goods the Court of Appeals reasoned:

"The transaction price and the price actually paid for the goods imported and declared by the contested customs declaration is 22.000.00 USD. Terms of delivery for the goods are determined based on the CFR Durrës parity. The value of these goods is indicated in the invoice SHX/MONI01 dated 24.02.2017, namely the amount of 22.000.00 USD, then in the same invoice from the exporter is added the payment of 1.000.00 USD in the name of placing labels on the material product. This panel did not approve these appealing allegations, because it assessed the latter are ungrounded, unsubstantiated in concrete evidence and have no legal support to approve the appeal, due to the fact that the first instance court from the administration of all evidence in this procedure of the administrative conflict concluded that the claimant was not able to prove to the court the evidence proving the value of the transaction paid for the goods, so even according to the assessment of the panel of this court, the allegations that the accompanying documentation of the goods is in accordance with Article 123 of Administrative Instruction 11/2009 on the Implementation of the Customs and Excise Code of Kosovo cannot be accepted. Therefore, according to the assessment of the panel of this court, in the present case it has been convincingly and in an uncontested manner that there is no sufficient evidence to prove that the claimant has paid the true value of the transaction of the goods. Therefore, the appealed judgment of the first instance court

is clear and understandable and contains sufficient reasons for the decisive facts which this court also accepts, so that the claimant's appeal was rejected as ungrounded while the appealed judgment was upheld as fair and lawful."

53. The Court also recalls that the Supreme Court by its Decision ARJ-UZVP-no. 72/2020, reasoned as follows, referring to the administered evidence, namely the factual situation:

"[...] the lower instance courts [...] have rightly concluded that in the case file could not be found any evidence which would prove that the claimant has paid the real value of the transaction of imported goods as provided by Article 33 of the Kosovo Customs and Excise Code No. 03/L-109 and that the accompanying documentation of the material goods is not in accordance with Article 123 of Administrative Instruction 11/2009. In order to accept the paid value of the transaction according to the method for determining the value of the imported goods, pursuant to Article 34 paragraph 2 items (a) and (b) of the Customs and Excise Code of Kosovo, the claimant in this case must prove that the value of the goods is approximately equal to the value of the identical or similar goods sold for export to Kosovo. In the opinion of this court, according to the banking transactions presented in the case file, it is not disputed that "Company L" is a user, but the court could not reconcile the value of these transactions with the declared value of the goods according to the accompanying invoice presented for the goods declared in [SCD] R13844/16.06.2017 in ZBD Merdare. The court could not reconcile the declared value of the goods with the paid value of the transaction presented according to the bank transfers of 09.03.2017 the amount of 7,600 USD, while on 06.06.2017 the amount of 5,400 USD and why the value of these transactions is not reconciled with the accompanying invoice SHX/MONI01 of 20.04.2017 with the invoice of the total value of 22,000 USD, and the contract dated 24.02.2017 which has the same value".

54. The Supreme Court further noted that:

[...] this court is of the opinion that the claimant has not submitted complete documentation and harmonized with the real value of the paid goods. Respectively, the decisive facts, those the most relevant, such as bank transfers and export declaration, harmonized with the values of the invoices, within the meaning of Article 123 of of Administrative Instruction 11/2009, the court could not certify them, therefore it could not accept the allegation

from the lawsuit that the declared value of the goods represents its real value. Therefore, this court accepts the findings of the respondent authority that the claimant did not present the complete documentation which would prove that the declared price is at the same time the real value of the goods (Article 34 paragraph 2 items (a) and (b) of Kosovo Customs and Excise Code). Since the lower instance courts, based on the evidence in the case file, could not substantiate the claimant's allegations that the claimant paid the exporters the fair value on the basis of invoices, it turns out that the lower instance courts rightly established that the respondent has acted legally when it has decided on the new evaluation of the subjected goods and the application of method number 6, provided by Article 35 of the Customs and Excise Code no. 03/L-109, namely the assessment in the database available to customs."

55. The Court recalls that in case when a court of third instance, as in the case of the Applicant, the Supreme Court, which upholds the decisions taken by the lower courts - its obligation to reason decision-making differs from cases where a court changes the decision-making of lower courts. In the present case, the Supreme Court did not change the decision of the Court of Appeals or that of the Basic Court-which rejected the Applicant's lawsuit and appeal but only proved their legality, given that, according to the Supreme Court, there were no essential violations of procedure and erroneous application of substantive law in this procedure (see, *mutatis mutandis,* cases of the Court: KI194/18, Applicants *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility of 5 February 2020, paragraph 106; and KI122/19, Applicant: *F.M*, Resolution on Inadmissibility, of 9 July 2020, paragraph 100).

56. Based on the above reasoning of the Court of Appeals, and the Supreme Court, the Court notes that both have, in essence, reasoned that (i) to accept the value of the transaction paid according to the method for determining the value of the imported goods pursuant to Article 34, paragraph 2, items (a) and (b) of the Customs and Excise Code, the Applicant must prove that the value of the goods in question is equal to the value of the identical or similar goods sold for export to Kosovo; (ii) as it has not been possible to establish that the Applicant has paid the exporter the fair value on the basis of invoices, then it has been duly decided regarding the new evaluation of the goods and the application of method number 6, provided by Article 35 of the Customs and Excise Code; (iii) the accompanying documentation of the goods is not in accordance with Article 123 of Administrative Instruction 11/2009; (iv) it is not possible to reconcile the declared

value of the goods with the paid value of the transaction presented according to the bank transfers to TEB Bank of 09 March 2017 in the amount of 7,600 USD and 06 June 2017 in the amount of 5,400 USD, and that these are not harmonized with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 which has a total value of 22,000 USD, and the contract of 24 February 2017 which has the same value.

57. The Court of Appeals further stated that the value of the goods was recorded on invoice SHX/MONI01 of 24 March 2017, in the amount of 22,000.00 USD, then in the same invoice from the exporter was added the payment of 1,000.00 USD in name of the label on the subject product. However, the Court of Appeals stated that the Applicant was not able to prove to the court the evidence proving the value of the transaction paid for the goods in question.

58. From the legal provisions applied in this case by the regular courts, the Court notes that the Customs and Excise Code stipulates in Article 34 paragraph 2 that the customs value determined under this Article shall be under item (a) the transaction value of identical goods sold for export to Kosovo and exported at or about the same time, or approximately, at the same time as the goods being valued and (b) the transaction value of similar goods sold for export to Kosovo and exported at or about the same time as the goods being valued. Subsequently, this Code in Article 35 paragraph 1 stipulates that where the customs value of imported goods cannot be determined under Articles 33 or 34, it shall be determined, on the basis of data available in Kosovo, using reasonable means consistent with the principles and general provisions. In this regard, the Court recalls that the Applicant's allegation that it paid the transaction value of the imported goods as provided by Article 33 of the Customs and Excise Code was not approved and the value of the transaction paid according to the method for determining the value of the imported goods under Article 34 paragraph (a) and (b) of the Customs and Excise Code has not been accepted. Finally, with regard to the documents submitted, the Court recalls that Article 123 paragraph 1 of Administrative Instruction 11/2009 lists the documents to be attached to the customs declaration, which are: (a) the invoice on the basis of which the customs value of the goods is declared , as required by Article 91 of this act; (b) Where required under Article 88 of this Act, declarations of the customs values of the goods declared shall be made in accordance with the conditions laid down in that Article; (c) Documents required for the application of tariff preferential arrangements and other measures that derive from applicable legal rules for declared goods; (d) All other documents required for the application of the provisions governing the

relief to free circulation of declared goods. In the Applicant's case, the regular courts considered that the these requirements were not met.

59. In the present case, it is not disputed that the Applicant performed banking transactions (payments) in the account of "Company L", and it is not disputed that the focus of all regular courts was on the value of the imported goods. Disputable are the answers of the regular courts regarding the harmonization of the value of these transactions with the declared value of the goods in question according to the accompanying invoice.

60. In the present case, the Court recalls that the Applicant in its appeal and in its request for extraordinary review claimed that the value recorded as a transaction in the bank transfer of 6 June 2017 is not 5,400 USD but 15,400 USD. The Court of Appeals and the Supreme Court did not explain why they could not reconcile the declared value of the goods with the paid value of the transaction presented according to the bank transfers to TEB Bank of 9 March 2017 in the amount of 7,600 USD and 06 June 2017 in the amount of 5,400 USD, and that these are not reconciled with the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 which has a total value of 22,000 USD, and the contract of 24 February 2017 which has the same value.

61. However, the Court recalls that it is the substantive arguments of the Applicants that need to be addressed and the reasons given must be based on the applicable law (see paragraph 48 above, and the references used therein). By not requesting a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their allegations that are crucial to the outcome of the proceedings (see paragraphs 48 above, and references used therein).

62. While the Court is aware that according to the reasoning of the regular courts regarding the applicability of Articles 33, 34 and 35 of the Customs and Excise Code, the Court also takes into account the Applicant's argument regarding the harmonization of the value paid of transactions through bank transfers, and the value of the accompanying invoice of customs goods no. SHX/MONI01 of 20 April 2017 which has a total value of 22,000 USD. Regarding this point, the Court notes that from the case file, the transfer made to TEB Bank on 06 June 2017 marked in all court instances as a value of 5,400 USD, is actually in the amount of 15,400 USD. This would result in a transaction of 23,000 USD, according to the Applicant's claim 22,000 USD for the accompanying invoice of the customs goods, while 1,000

USD paid on behalf of the labels, which according to the Applicant does not enter the customs base for the calculation of import duties.

63. The Court cannot assess whether the correction of this technical error, namely the replacement of the amount of 5,400 USD, which is actually 15,400 USD in the bank transfer of 6 June 2017, entails in itself any changes regarding the harmonization of the declared value of the goods in question with the paid value of the transaction presented according to bank transfers. The Applicant considers this claim substantial because "*the bank transfers prove compliance with the invoice and certify the price of the goods*". Therefore, the Court considers that this claim of the Applicant is essential and can be decisive regarding the merits of the lawsuit of the Applicant. Regarding this specific allegation of the Applicant, the Court of Appeals and the Supreme Court have remained silent.

64. The silence of the courts regarding the relevant allegations of the respective Applicants has been specifically examined through the case law of the ECtHR. For example, in the following cases: *Ruiz Torija v. Spain*, cited above and *Hiro Balani v. Spain*, cited above, the ECtHR, beyond the general principles regarding the right to a reasoned judicial decision, also addressed the circumstances in which the relevant courts had remained silent on the arguments, which the ECtHR deemed essential. In both cases, the ECtHR considered whether the silence of the relevant court could reasonably be interpreted as an implicit rejection of the parties' arguments. (See the ECtHR case, *Hiro Balani v. Spain*, cited above, paragraph 28). However, in the absence of proper reasoning, the ECtHR stated that it was impossible to ascertain whether the respective courts had simply neglected to deal with the respective claims or implied their rejection and, if that was its purpose, what were its reasons for such an approach. (See ECtHR cases: *Hiro Balani v. Spain*, cited above, paragraph 28; and *Ruiz Torija v. Spain*, cited above, paragraphs 29 and 30). In both cases, the ECtHR found a violation of Article 6 of the ECHR (see case of the Court KI24/20, Applicant *"PAMEX L.L.C.",* Judgment of 3 February 2021, paragraph 57).

65. Consequently, the Court in the circumstances of the present case, having regard to the fact that the Supreme Court has failed to address and substantiate the Applicant's substantive allegations raised before it, a court decision may not be compatible with the standards of a reasoned court decision, as set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the relevant case law of the Court and the ECtHR.

66. Finally, the Court recalls that the Applicant also alleges that the Supreme Court did not reason and found a violation regarding the holding of a hearing in the Court of Appeals. However, the Applicant did not raise such a claim in its request for extraordinary review, and for this reason the Court will not take into account the latter.

67. Therefore, and finally taking into account the observations above and the procedure as a whole, the Court considers that the Decision of the Supreme Court, namely Decision ARJ-UZVP-no. 7/2020 of the Supreme Court of 28 October 2020 was rendered in violation of the Applicant's right to a reasoned court decision, as an integral part of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because it failed to address the Applicant's substantive allegations regarding the allegation of error in the reading of the banking transaction of 6 June 2017 and the issue of its harmonization with the value of the accompanying invoice of the customs goods no. SHX / MONI01 of 20 April 2017.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, on 24 September 2021, by majority

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE Decision ARJ-UZVP-no. 72/2020 of the Supreme Court of Kosovo of 28 October 2020 invalid;

IV. TO REMAND Decision ARJ-UZVP-no. 72/2020 of the Supreme Court of Kosovo of 28 October 2020, for reconsideration in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 28

March 2022 about the measures taken to implement the Judgment of this Court;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO NOTIFY this Judgment to the Parties, and in accordance with Article 20 (4) of the Law, to publish it in the Official Gazette.

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka-Nimani

KI01/21, Applicant: Ajshe Aliu, Constitutional review of Judgment ARJ-UZVP. No. 37/2020 of the Supreme Court of Kosovo, of 11 June 2020

KI01/21, Judgment of 7 October 2021, published on 1 November 2021

Keywords: *individual referral, right to respect for private and family life, lack of reasoned court decision*

The circumstances of the respective case are related to the alleged right of a biological mother to notify/contact her child given up for adoption and who has already reached the age of majority, in the specifics clarified in the published Judgment. The issues involved in the Referral relate, among other things, to the right for private life, and the relevant principles and exceptions, as guaranteed by the respective articles of the Constitution and the European Convention on Human Rights, and the relevant case law of the Court and of the European Court of Human Rights.

More specifically, it is noted from the case file that the Applicant, on 1 March 2016, submitted a request at the Centre for Social Work within the Municipality of Prishtina, by which she had requested that her biological adult child, whom she had given up for adoption in 1989, to be notified of: (i) the existence of his biological mother; and (ii) her interest in notifying him. The Centre for Social Work responded by stating that (i) there is no legal basis to notify her biological child in relation to his/her adoption; and that (ii) pursuant to paragraph 2 of Article 194 (Principles) of the Family Law of Kosovo, at full age the adoptee has the right of access to all information concerning his adoption and shall on request be provided with personal information about his biological parents. As a result of the Applicant's request for reconsideration of the response of the Centre for Social Work, the finding of the latter was also confirmed by the Complaints Commission within the Social and Family Policies Department in the Ministry of Labour and Social Welfare. Consequently, the Applicant filed a statement of claim with the Basic Court in Prishtina requesting, among other things, that the Social and Family Policy Department be obliged to inform her biological child about his/her adoption. The Basic Court rejected the Applicant's claim as ungrounded, confirming the above findings of the Centre for Social Work and of the Complaints Commission within the Ministry of Labour and Social Welfare, and finding that based on the legal provisions in force, the Centre for Social Work it is not obliged to inform the child with regard to his/her adoption and that only the adult adoptee has the right to access such data upon his/her request. Subsequently, the Applicant filed an appeal against this Judgment of the Basic Court, with the Court of Appeals, and the latter rejected her appeal as ungrounded, confirming the finding of the first

instance court. As a result of the Applicant's request for extraordinary revision of the Judgment of the Court of Appeals filed with the Supreme Court, the latter by the Judgment of 11 June 2020, also rejected the respective request of the Applicant as ungrounded. The Supreme Court by the challenged Judgment has upheld the findings of the Basic Court and of the Court of Appeals, and has concluded that the facts and circumstances of the adoption should not be disclosed or investigated without the consent of the adopter and the child, unless it is required for special reasons and for reasons of public interest.

The Applicant challenged before the Court the abovementioned findings of the Supreme Court, including also those of the first and second instance courts. The essence of the Applicant's allegation before the Court was that the regular courts have violated her right for private life, guaranteed by Article 8 (Right to respect for private and family life) of the European Convention on Human Rights, by not to approving her request for notifying her biological child with regard to the existence of his/her biological mother and the Applicant's interest in notifying him/her. As a result of the same, she had also alleged: (i) violation of Article 31 (Right to Fair and Impartial Trial) of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights due to the non-reasoning of the court decision; and (iii) violation of Article 7 of the Convention on the Rights of the Child.

In assessing the Applicant's allegations, the Court focused on the guarantees enshrined in Article 36 (Right to Privacy) of the Constitution in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights, and in this context, first elaborated the general principles deriving from the case law of the Court and of the European Court of Human Rights, and then, applied the same in the circumstances of the present case. The Court noted that the Applicant's request, by which she had expressed her interest in notifying her child given up for adoption in 1989, contains elements that belong to an important part of her identity as biological mother and which affect her right for private life in terms of the notion of *"her private life"* guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with paragraph 1 of Article 8 of the European Convention on Human Rights. Having said that, given that this allegation affects her right for private life, the Court recalled that, according to its case law and that of the European Court of Human Rights, during the review of cases to find whether in a particular case there was a restriction and violation of human rights and freedoms guaranteed by the Convention, applies the same concepts, respectively if the respective restriction or intervention: (i) is *"in accordance with the law"* or "*prescribed by law"*; (ii) has *"pursued a legitimate aim"*; and (iii) is *"necessary in a democratic society."* In this context, the Court in the circumstances of the present case,

held that the decisions of the regular courts, by which the Applicant's specific request was rejected: (i) were based on law; (ii) had pursued a legitimate aim – the protection of the rights and freedoms of the adopted child and his/her adoptive family; and (iii) had pursued a fair balance between the interests of the adopted child, already of adult age, and the respect of his/her right for private and family life within his/her adoptive family.

Consequently, the Court held that the challenged Judgment of the Supreme Court does not involve violation of her right for private life guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with paragraph 1 of Article 8 of the European Convention on Human Rights. Whereas, concerning the allegation of violation of the right to fair and impartial trial, as a result of the lack of reasoned court decision, the Court, applying the general principles established with the case law of the Court and that of the European Court of Human Rights, recalling that on the basis of the same and as far as it is relevant to the circumstances of the present case, the extent to which the obligation to give reasons applies, may vary depending on the nature of the decision and should be determined in the light of the circumstances of the present case, found that in the Applicant's circumstances, the challenged Judgment of the Supreme Court meets the criteria and standard for a reasoned court decision, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the Convention.

Finally, based on the circumstances of the present case and based on the explanations given in the published Judgment, the Court found that the challenged Judgment of the Supreme Court is in accordance with (i) Article 36 [Right to Privacy] of the Constitution in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights; and also (ii) Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights.

JUDGMENT

in

case no. KI01/21

Applicant

Ajshe Aliu

Constitutional review
of Judgment ARJ-UZVP. no. 37/2020 of the Supreme Court of Kosovo,
of 11 June 2020

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 is submitted by Ajshe Aliu, who is represented by Artan Qerkini and Florin Vërtopi, lawyers in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [ARJ-UZVP. no. 37/2020] of 11 June 2020, of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [AA. no. 178/2019] of 15 May 2020, of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [A. no. 651/16] of 25 January 2019, of the Basic Court in Prishtina, Department for Administrative Matters (hereinafter: the Basic Court).

3. The Applicant was served with the challenged Judgment of the Supreme Court on 18 November 2020.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental rights and freedoms, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution)), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), and Article 10 of the Universal Declaration of Human Rights (hereinafter: the UDHR); Article 8 (Right to respect for private and family life) of the ECHR; and Article 7 [no title] of the Convention on the Rights of the Child.

Legal basis

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

Proceedings before the Constitutional Court

6. On 5 January 2021, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral.

7. On 18 January 2021, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.

8. On 2 February 2021, the Court notified the legal representatives of the Applicant about the registration of the Referral and also requested them to submit valid power of attorney for representation before the Constitutional Court.

9. On 16 February 2021, the Court received the requested power of attorney for representation.

10. On 18 February 2021, the Court sent a copy of the Referral to the Supreme Court, and on the same date requested the Basic Court to submit the acknowledgment of receipt, which proves the date when the Applicant was served with the challenged Judgment of the Supreme Court.

11. On 19 February 2021, the Basic Court submitted to the Court the complete case file.

12. On 4 March 2021, the Court returned the case file to the Basic Court.

13. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP.71-2/21 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

14. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

15. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision No. KK160/21 determined that Judge Gresa Caka-Nimani be appointed as Presiding in the Review Panels in cases where she was appointed as member of Panels, including the present case.

16. On 1 June 2021, the President of the Court Arta Rama-Hajrizi, by Decision No. KI01/21, appointed Judge Radomir Laban as Judge Rapporteur instead of Judge Gresa Caka-Nimani.

17. On 8 June 2021, the President of the Court Arta Rama–Hajrizi rendered Decision No. K.SH.KI 01/21, on appointment of Judge Gresa Caka-Nimani replacing Judge Radomir Laban as a member of the Review Panel.

18. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court of 17 May 2021, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination

of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

19. On 7 October 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral. On the same date, the Court unanimously decided that the Applicant's Referral is admissible and that Judgment [ARJ-UZVP. no. 37/2020] of 11 June 2020, of the Supreme Court: (i) is in compliance with Article 36 of the Constitution, in conjunction with Article 8 of the ECHR; and (ii) is in compliance with Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

Summary of facts

20. On 1 March 2016, the Applicant submitted a request to the Center for Social Work within the Directorate for Health and Social Welfare of the Municipality of Prishtina (hereinafter: the Center for Social Work) entitled "Request for notification of an adult child about his biological mother") by which she requested that her biological adult child, whom he had given for adoption in 1989, be notified: (i) in connection with the existence of his biological mother; and (ii) her interest to notify him.

21. The Applicant, by her request, expressly asked the following *"[...], we ask you, as the competent body to which this matter is to be addressed, to take the necessary steps to inform the adult child, once named [X.X], about the existence of his biological mother, and to inform him about the interest of the latter to meet him".*
"1. Therefore, taking into account all the arguments and facts provided above, we ask you, after reviewing the latter, to notify the adult in question about the adoption with the notes described above, in this submission, regarding the legal rights that belong to him, whether under our legislation or international law, so that he can decide whether he wants to exercise the right to contact his biological mother.
[...]."

22. The Applicant based her Referral on Article 194 [Principles] paragraph 2 of Law no. 2004/32 on the Family of Kosovo (hereinafter: Family Law), Article 8 of the ECHR and Article 22 [Access to and Disclosure of Information] of the Council of Europe Convention on the Adoption of Children, as amended and adopted on 27 November 2008 (hereinafter: the Convention on Adoption).

23. On 7 March 2016, the Center for Social Work by letter [Protocol no.: 05 / 55-128] to the request, dated 1 March 2016, of the Applicant, responded as follows: *"Based on the legislation in force, the Custodian Body at the CSW [Center for Social Work] has no legal support and no legal obligation to inform the adopted child about the biological family, under any circumstances, as this right is reserved exclusively for the abandoned child, regardless of whether or not the biological parents are known, as long as the biological child does not submit a written request for meeting the biological parent (s). In this case, the request submitted by the biological mother which in accordance with the above provisions [Article 194 of the Law on Family of Kosovo and Article 17 [After the establishment of adoption], paragraph 3 and Article 18 [Other provisions] paragraph 2 of the Administrative Instruction (MLSW) no. 09/2014 for regulation of adoption procedures for children without parental care] prevents the custodian body - CSW from providing information about the child. The exclusive right to search for the biological parent (s) belongs to the child".*

24. On 11 March 2016, the Applicant submitted a request to the Center for Social Work for reconsideration of the response, dated 7 March 2016, of the Center for Social Work. The Applicant in her request for reconsideration of the above Response specified that *"her request was not about informing [her] about the data and circumstances of the adoption, but was about the request and obligation that [the Center for Social Work] has to inform the adult child about his adoption".*

25. On 17 March 2016, the Center for Social Work, by its letter [05/55-141] addressed the Applicant's request to the Department for Social and Family Policy in the Ministry of Labor and Social Welfare [hereinafter: MLSW Department].

26. On 25 March 2016, the Commission for Review and Settlement of Complaints in the second instance within the Department of MLSW (hereinafter: the Complaints Commission of MLSW), by Decision [DPSF no. 521] rejected the Applicant's request for reconsideration of the response of the Center for Social Work, of 11 March 2016 as ungrounded. The Appeals Commission, in its Decision, referring to paragraph 1 of Article 194 of the Law on Family and paragraph 3 of Article 17, and paragraph 1 of Article 18 of the Administrative Instruction (MLSW) no. 09/2014 on the regulation of adoption procedures of children without parental care (hereinafter: Administrative Instruction of MLSW) concluded that *"[Center for Social Work] has no legal support and legal obligation to inform the*

adopted child about the biological family as long as the biological child does not submit a written request for recognition of the biological parents. The exclusive right to search for the biological parent (s) belongs to the child".

27. On 29 April 2016, the Applicant filed a lawsuit with the Basic Court for an administrative dispute, requesting that: (i) her lawsuit be approved; (ii) annul the Decision of 25 March 2016 of the MLSW Complaints Commission, and (iii) oblige the MLSW Department to inform the child about his rights deriving from Article 194, paragraph 2 of the Law on Family and Article 18, paragraph 1 of the MLSW Administrative Instruction.

28. On 7 May 2018, the State Attorney at the Ministry of Justice, in his capacity as the representative of the MLSW Department, as a respondent in the procedure, submitted a response to the Applicant's lawsuit requesting that the Applicant's lawsuit be dismissed as ungrounded. The reasoning of the response to the lawsuit was based on the legal provisions in force, according to which MLSW in its capacity as a respondent stated that; (ii) the exclusive right to information belongs to the adopted child; and (iii) The Center for Social Work is obliged to maintain the confidentiality and privacy of the child throughout the adoption process and after adoption and in no circumstances should it provide documentation or information from the child's file, except to competent officials in the CSW, DSWF and court.

29. On 25 January 2019, the Basic Court by Judgment [A. no. 651/16] rejected the Applicant's lawsuit as ungrounded.

30. The Basic Court, in its Judgment, initially referred to Article 194 of the Family Law, paragraph 3 of Article 17 and paragraphs 1 and 2 of Article 18 of the MLSW Administrative Instruction, Article 8 of the ECHR, Article 7 of the Convention on the Rights of the Child and Article 22 of the European Convention on the Adoption of the Child. Based on the above provisions and the evidence administered, the Basic Court found that: *"[...] the data of the adoptee must be stored throughout and after the adoption process, and the CSW [Center for Social Work], has the duty to disclose them only in the case before and as required by law, and in case the applicant is the adult adoptee , which means that the right of access to them, which cannot be denied by anyone, has the adult adoptee".*

31. Following the latter, the Basic Court concluded that the MLSW Complaints Commission, based on the complete and correct determination of the factual situation, has correctly applied the provisions of procedural and substantive law.

32. On 6 February 2019, against the above Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals on the grounds of: (i) erroneous application of substantive law; and (ii) essential violation of the provisions of the Law on Contested Procedure (hereinafter: LCP). In her complaint, the Applicant, in terms of the allegation of essential violation of the provisions of the LCP, specified, *inter alia* that: (i) she has never requested that she be granted access to the documentation of the adoption of her biological child , being aware that in this regard she would have encountered legal obstacles set out in Article 194 of the Family Law but that he had requested that *"her biological child be informed about the circumstances of the adoption, so that he if he wishes to have the opportunity, as provided in Article 194 of the Family Law, to be informed about the fact who is his biological mother";* (ii) the Basic Court did not provide a reason why the Center for Social Work is forbidden to notify her biological child *"that he has been adopted into the adoptive family";* (iii) reiterates the fact that *"blood gender is a marital barrier, while potentially the claimant's biological child, already adopted, may marry the claimant's biological children, who were born in her existing marriage"*; (iv) the Basic Court did not reason why in her case Article 7 of the Convention on the Rights of the Child does not apply; and (v) the challenged Judgment does not meet the standards of a reasoned judicial decision, as guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

33. On 15 May 2020, the Court of Appeals by Judgment [AA. no. 178/2019] rejected the Applicant's appeal as ungrounded.

34. In the context of the latter, the Court of Appeals found that: (i) there is no legal support and legal obligation for the Center for Social Work to notify the already adopted adult child about his biological mother as long as he has not filed a request to know about his biological parents; and (ii) " *[...] the adoption data and its circumstances should not be disclosed or investigated without the consent of the adopter and the child unless otherwise required by special reasons of public interest. In the present case we have no special circumstances of public interest and that such a request is admissible only to the adoptee and not to his biological parents."* The Court of Appeals, in relation to the Applicant's allegation of erroneous interpretation of

Article 194 of the Family Law, emphasizes the content of paragraph 2 of the same Article, reasoning under this provision, the right to file a request for knowing his biological parents has only the adult adoptee. Consequently, the Court of Appeals concluded that the Basic Court, on the basis of a complete and correct determination of the factual situation, correctly applied the provisions of the procedural and substantive law.

35. On an unspecified date, the Applicant filed a request with the Supreme Court for an extraordinary review of the court decision, namely Judgment [AA. no. 178/2019] of 15 May 2020, of the Court of Appeals on the grounds of: (i) erroneous application of substantive law; and (ii) essential violation of the provisions of the LCP, with a request that: (i) her lawsuit be approved as grounded; (ii) annul the Decision of 25 March 2016 of the MLSW Complaints Commission; and (iii) oblige the MLSW Department and the Center for Social Work to inform the child about his rights deriving from Article 194, paragraph 2 of the Family Law and Article 18, paragraph 1 of the MLSW Administrative Instruction .

36. First, with regard to her allegation of erroneous application of substantive law, the Applicant, referring to paragraph 1 of Article 194 of the Family Law, states that: *"It is the duty of the custodian body, in addition to the advice, to inform and instruct the adoptive parents as well as the children of this age that, as soon as the child reaches the age of 18, he acquires the legal right to see the adoption data, including the data for the biological parents*. According to her *"then it is only the exclusive right of the adoptee whether he wants to know and contact his biological parents".*

37. Secondly, the Applicant in her request also referred to paragraph 5 of Article 22 of the European Convention on the Adoption of the Child, paragraph 1 of Article 7 of the Convention on the Rights of the Child, and Article 8 of the ECHR. In regard to the latter, the Applicant did not provide any relevant reasoning as to how her specific request is supported by the provisions of Article 22 of the European Convention on the Adoption of the Child and paragraph 1 of Article 7 of the Convention on the Rights of the Child, however with regards to Article 8 of the ECHR she referred to the case law of the European Court of Human Rights (hereinafter: the ECHR), namely the cases *Odièvre v. France* (Judgment, of 13 February 2003); *Gaskin v. the United Kingdom (Judgment of 7 July 1989]; Mikulić v. Croatia (Judgment of 7 February 2002); Jäägi v. Switzerland (Judgment of 13 July 2006) and Phinikaridou v. Cyprus (Judgment of 20 December 2007).*

With regard to the latter, the Applicant stated that: *"in all cases of the Court [ECHR], the right of the child, and the right of knowing the origin, in one form or another takes precedence over the interests of third parties, and where they have previously signed confidentiality clauses. This means that in an own interpretation of these cases with the situation in question, given the fact that the only parties who oppose the provision of information to their adult child in this case are the adoptive parents, it can be concluded that: the adoptive parents have no right to deprive their adopted child from raising awareness of the rights of the child under Article 194 of the Family Law of Kosovo, or under Article 8 of the European Convention on Human Rights".*

38. Third, the Applicant alleged that the Judgment of the Court of Appeals lacks the reasoning for the court decision. In this context, the Applicant stated that the Court of Appeals has approved in entirety the positions of the Basic Court, but has not addressed her appealing allegations raised before this court.

39. Finally, the Applicant stated that she did not request that she personally have access to her biological child's adoption documentation, but requested that her biological child be informed about the fact of his adoption, in order that he has the right to decide if he wants to know his biological mother.

40. On 11 June 2020, the Supreme Court by Judgment [ARJ-UZVP. No. 37/2020] rejected the Applicant's request for extraordinary review of the court decision as ungrounded.

41. The Supreme Court emphasized: (i) paragraphs 1 and 2 of Article 194 of the Family Law; and (ii) in paragraphs 1 and 2 of Article 17, and paragraphs 1 and 2 of Article 18 of the MLSW Administrative Instruction, reasoning that the Center for Social Work is obliged to maintain the confidentiality and privacy of the child throughout the adoption process and after it.

42. Based on the above, the Supreme Court interpreted the abovementioned provisions as follows: (i) *pursuant to Article 194 paragraphs 1 and 2 of the Family Law the facts which could reveal the existence and circumstances of the adoption of the child may not be discovered or investigated without the consent of the adopter and the child, unless this is required for special reasons and is in the public interest. Upon reaching the age of majority, the adoptee acquires the right of access to all information related to his adoption and at his*

request personal information about his biological parents will be provided; (ii) in accordance with Article 17, paragraphs 1 and 2 of the MLSW Administrative Instruction, the competent CSW is obliged to maintain the confidentiality and privacy of the child throughout the adoption process, and in no circumstance should provide the documentation from the file of the child, except for competent officials from the CSW, DSWF (MLSW) and the court; (iii) based on Article 18 paragraph 1 of the MLSW Administrative Instruction, responsible for data protection and privacy of information collected during the adoption process, are responsible: the Basic Court where the adoption was made and the Custodian Body competent for protection of the child. While in paragraph 2 of the same article it is determined that the adoptee in adulthood has the right to all information related to his adoption and at his request, he will be provided personal information about his biological parents.

43. In the context of the above, the Supreme Court held *"[...] that is, the biological mother of the adopted child has no legal basis to inform the adopted child about his biological mother until the adopted child submits a written request to know his biological parents",* reasoning that this right belongs only to the adopted child.

44. The Supreme Court further found that: (i) the facts and circumstances of the adoption should not be disclosed or investigated without the consent of the adopter and the child; and (ii) in the present case there are no "*public benefit interests and such a request is approved only if submitted by the adoptee and not by his biological parents*".

45. Finally, the Supreme Court, addressing the Applicant's allegation of lack of a reasoned court decision, found that the reasoning given in the Judgment of the Court of Appeals is clear and understandable, namely it contains sufficient reasoning in relation to the decisive facts, which are accepted by this court as well, and concluded that the substantive law has been correctly applied and the law has not been violated to the detriment of the Applicant.

Applicant's allegations

46. The Applicant alleges that the Judgment [ARJ-UZVP. no. 37/2020] of 11 June 2020, of the Supreme Court was rendered in violation of her fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 10 [no title] of

the UDHR; Article 8 (Right to respect for private and family life) of the ECHR, as well as Article 7 of the Convention on the Rights of the Child.

47. The Applicant initially refers to the issue of direct implementation of international agreements and instruments directly applicable in the Republic of Kosovo under Article 22 of the Constitution, namely the UDHR, the ECHR and the Convention on the Rights of the Child.

48. In the following, the Applicant in her Referral refers to paragraph 2 of Article 194 of the Law on Family, and Articles 1 and 12 of the Law on Social and Family Services.

49. In relation to paragraph 2 of Article 194 of the Family Law, the Applicant refers to the "Commentary on the Family Law" [authors: *Haxhi Gashi, Abdullah Aliu and Adem Vokshi*, published in 2012, page 144. Commentary on in relation to paragraph 2 of Article 194 contains the following: *"Paragraph 2 provides for the possibility that the adopted child after reaching the age of majority has the right to access or otherwise disclose data related to adoption. He can get acquainted with the entire adoption procedure, documents or data related to him and the adoptive family, but also with other data related to other participants in the adoption procedure. Another important aspect envisaged in this paragraph is the right of the child to be informed about the data relating to his or her biological family. So, the child is recognized another personal right, but also a natural right to have information and to find out who was his biological family, namely biological parents and other data related to biological parent"*.

50. In the context of the latter, the Applicant states that: *"[...] in the legal system, access to data related to his adoption applies to a child who has reached the age of 18 years. In fact, it is the duty of the custodian body, in addition to the advice, to inform and instruct the adoptive parents as well as the children of this age that, as soon as the child reaches the age of 18, he acquires the legal right to see the adoption data, including personal data for biological parents. Then, it is only the exclusive right of the adoptee whether he wants to know and contact his biological parents"*.

Regarding the allegation of a violation of Article 31 in conjunction with Article 6 of the ECHR

51. The Applicant substantiates her allegation of a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, with a

lack of reasoning of the challenged Judgment of the Supreme Court. The Applicant relates the alleged violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, to the violation of Article 10 of the UDHR.

52. In the context of this allegation, the Applicant alleges that her request raised before the court instances was misunderstood because she did not request that she personally have access to her biological child adoption documentation, but requested that her child be informed about the fact of his adoption, so that he has the right to decide "*whether or not he wants to know his biological mother*". In the following, the Applicant specifies that this basic request filed in her lawsuit before the Basic Court has not been addressed by the regular courts.

53. In this regard, the Applicant states that "*The Supreme Court has not addressed the substance of the request. The Applicant in none of the instances of the regular courts has received a response to her request as to why the Respondent (Ministry of Labor and Social Welfare/Municipality of Prishtina) has no competence to notify her biological child that he is adopted and that he has the right under Article 194 of the Family Law to be aware of his biological mother. No right, including the right of access to the adoption documentation by the child, can be exercised if it is not known to its potential user*".

54. Subsequently, the Applicant specifies that: "*as a result of [misunderstanding] of [her] claim, she was denied the right to have a reasoned court decision, because failure to address the claims filed in the lawsuit made the court decision unreasoned. This is due to the fact that the court decision must address the requests of the party to the proceedings in such a way that if her requests are rejected she be aware of the reasons for this rejection. The court decision that does not address the basic claim of the lawsuit cannot have the features of a reasoned court decision, because even in theory it cannot give reasons for the decisive facts*".

55. In the context of this allegation, the Applicant underlines that the principle of reasoning of court decisions has been affirmed through the case law of the Court, and in this connection refers to the case KI72/12 Applicant *Veton Berisha,* Judgment of 17 December 2012.

56. In addition, the Applicant also states that the regular courts have never given reasons why the provisions of the Law on Social and Family Services are not applicable.

Regarding the allegation of violation of Article 8 of the ECHR

57. In the context of this allegation, the Applicant first refers to and cites the content of Article 22, paragraph 5 of the Convention on Adoption and Article 7 of the Convention on the Rights of the Child. According to the Applicant, these provisions clearly state *"the importance of knowing the origin and identity, and in the way they are compiled, consider that the right to know origin is implied" and further underlines that "the international practice has shown that knowing the origin is considered to be an integral part of the rights deriving from Article 8 of the [ECHR]".*

58. The Applicant supports her reasoning for allegation of violation of Article 8 of the ECHR by referring to and providing a brief summary of the ECtHR cases, namely*: Odièvre v. France* (Judgment of 13 February 2003); *Anayo v. Germany* (Judgment of 21 December 2010); *Gaskin v. The United Kingdom* (Judgment of 7 July 1989); *Mikulić v. Croatia* (Judgment of 7 February 2002); *Jäägi v. Switzerland* (Judgment of 13 July 2006); and *Phinikaridou v. Cyprus* (Judgment of 20 December 2007) providing a summary of the ECtHR findings in these cases.

59. Subsequently, the Applicant states that in all cases of the ECtHR *"the right of the child, and the right to know the origin, in one form or another, takes precedence over the interests of third parties, even when they have previously signed confidentiality clauses. This means that, an own interpretation of these cases with the situation in question, given the fact that the only parties who oppose the provision of information to their adult child in this case are the adoptive parents, we can conclude that: adoptive parents have no right to deprive the child adopted from the notification of the rights of the child under Article 194 of the Family Law of Kosovo, or under Article 8 of the European Convention on Human Rights".*

60. Finally, the Applicant specifies that *"[…] any other interests that the adoptive parents may have in not informing the adult child have no legal basis to refrain from this information. Furthermore, adoptive parents may not invoke any personal or emotional interests in an attempt to protect those interests, depriving their child of presenting very important information on the life and development of the child, rights protected about the origin and interests of the child, as defined in numerous national and international instruments".* Finally, the Applicant also refers to Article 21 [Consanguinity] of the Family Law, stating that *"This legal provision of an imperative nature and with*

criminal-legal consequences can be violated if [her] biological child is not informed about who is his biological mother".

61. Finally, the Applicant requests the Court to: (i) declare her Referral admissible, (ii) find that the Judgment [ARJ-UZVP. no. 37/2020] of 11 June 2020, of the Supreme Court contains violation of Article 31 of the Constitution in conjunction with paragraph 1, Article 6 of the ECHR; Article 8 of the ECHR; and Article 7 of the Convention on the Rights of the Child; (iii) declare invalid the Judgment [ARJ-UZVP. No. 37/2020] of 11 June 2020, of the Supreme Court, remanding her case for retrial to the Supreme Court.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

1. *2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.*
   [...]"

Article 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.*
   [...]

Article 55
[Limitations on Fundamental Rights and Freedoms]

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.

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.
[...]"

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.

Convention on the Rights of the Child

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Council of Europe Convention on the Adoption of Children [opened for signature on 27 October 2008 and entered into force on 1 September 2011]

Article 22 – Access to and disclosure of information

1 Provision may be made to enable an adoption to be completed without disclosing the identity of the adopter to the child's family of origin.

2 Provision shall be made to require or permit adoption proceedings to take place in camera.

3 The adopted child shall have access to information held by the competent authorities concerning his or her origins. Where his or her parents of origin have a legal right not to disclose their identity, it shall remain open to the competent authority, to the extent permitted by law, to determine whether to override that right and disclose identifying information, having regard to the circumstances and to the respective rights of the child and his or her parents of origin. Appropriate guidance may be given to an adopted child not having reached the age of majority.

4 The adopter and the adopted child shall be able to obtain a document which contains extracts from the public records attesting the date and place of birth of the adopted child, but not expressly revealing the fact of adoption or the identity of his or her parents of origin. States Parties may choose not to apply this provision to the other forms of adoption mentioned in Article 11, paragraph 4, of this Convention.

5 Having regard to a person's right to know about his or her identity and origin, relevant information regarding an adoption shall be collected and retained for at least 50 years after the adoption becomes final.

6 Public records shall be kept and, in any event, their contents reproduced in such a way as to prevent persons who do not have a legitimate interest from learning whether a person was adopted or not, and if this information is disclosed, the identity of his or her parents of origin.

Law no. 2004/32 Family Law of Kosovo

Article 21
Consanguinity

(1) Persons related by blood in a direct blood line (consanguinity) or indirect blood line (kin), such as a brother and a sister from the same father and mother, father's and mother's sister and brother, uncle (mother's brother) and niece, aunt (father's sister) and nephew, children of mother's and father's sisters and brothers from the same mother and father (nephews and nieces), as well as sisters' and brothers' children of the same mother and father, shall not enter into wedlock;

(2) This also applies for brothers and sisters from one mother or father as well as if the relationship has ceased to exist because of an adoption.

(3) Extra-marital consanguinity is the same marriage ban as the marital one.

9. Prohibition of Disclosure and Inquiry

Article 194
Principle

(1) Information about the adoption and its circumstances shall not be disclosed or investigated without the consent of the adopter and the child, unless special reasons of public interest require this.

(2) At full age the adoptee has the right of access to all information concerning his adoption and shall on request be provided with personal information about his biological parents.
[…]

11. Rights and Obligations of the Adopting Party and Adoptee

Article 201
Creation and Termination of Family Relations

(1) Upon adoption family relations are created between the adopting party and persons in his family on the one hand, and the adoptee and his descendants on the other, with all the rights and obligations thereby.
(2) Adoption terminates the rights and obligations of the adoptee towards his parents and other persons in the family, as well as the rights and obligations of the parents and family towards him.

Law No. 02/L-17 on Social and Family Services

Article 1
[General provisions]

1.3. Definitions

1. Counseling is a systematic and programmed process of providing information, advice and guidance aimed at helping an individual or a family to improve their social or interpersonal circumstances.

Article 12
[Services to Adults]

12.1. In cooperation with families, communities, non-Government organizations and other statutory bodied, a Municipality provides social care, counseling and, in exceptional circumstances, material assistance to people in need of social services residing in or, and in its territory, based on their assessed need for such services and the Municipality's ability to reasonably provide them.

Administrative Instruction (MLSW) no. 09/2014 for regulation of procedures for adoption of children without parental care

Article 17
After the establishment of adoption

[...]

3. CSW responsible for the child is obliged to maintain the confidentiality and privacy of the child during the entire process of adoption and post-adoption and under no circumstances shall provide documentation or information from the child dossier, except for the competent officials in the CSW, DSFW, MLSW and the Court.

Article 18
Other provisions

1. *For data protection and privacy of information collected during the process of adopting responsible are fundamental Court where has become the foundation for the adopton and the Custodian body kompetent for child protection.*

   2. At the adulthood the adoptee has the right to access in all information related to his/her adopton and with the request of his/her will be offered the personal information for his/her biological parents.

Relevant legal provisions of other countries

Family Code of Albania

Article 262

The minor, biological parents and adoptive parents are entitled to the right of confidentiality regarding the adoption process. When age and maturity allow, the adoptee has the right to know his/her history, and if available to obtain information about his/her biological parents.

Family Act of Croatia
Article 142

(1) A welfare centre keeps files of subjects and a register of the subjects of adoption.
(2) Information about adoption is an official secret.
(3) An adult adopted child, an adoptive parent and a parent who has given consent for the adoption of a child in line with Article 129 paragraph 2 of this Law will be allowed to inspect the files of subjects of adoption and the register of births of an adopted child.
(4) A minor adopted child will be allowed by a welfare centre to see the files of subjects concerning adoption, and a registrar into the register of births of adopted children, if the welfare centre determines that a sight of the adoption files and the register of births is in the child's interest.
(5) Close blood relatives of the adopted child will be allowed to look into the files of adoption subjects if the welfare centre obtains the consent of an adult adopted child.
(6) The minister competent for welfare matters will prescribe the manner of keeping register and files of adoption subjects.

German Civil Code
Article 1751
Effect of parental consent, maintenance obligation

(1) On the consent of one parent to the adoption, the parental custody of this parent is suspended; the power to have personal contact with the child may not be exercised. The youth welfare office becomes the guardian; this does not apply if the other parent exercises parental custody alone or if a guardian has already been appointed. An existing curatorship is unaffected. The adoptive parent, during the time of personal care prior to adoption, is governed by section 1688 (1) and (3) with the necessary modifications.
(2) Subsection (1) does not apply to a spouse whose child is adopted by the other spouse.
(3) Where the consent of one parent has ceased to apply, the family court must transfer the parental custody to the parents if and to the extent that this does not conflict with the best interests of the child.
(4) The adoptive parent has an obligation to pay maintenance before the relatives of the child as soon as the parents of the child have given the necessary consent and the child has been taken into the care of the adoptive parent with the purpose of adoption. If a spouse wishes to adopt a child of his spouse, the spouses have an obligation to the child before the other relatives of the child to pay maintenance as soon as the necessary consent of the parents of the child has been given and

the child has been taken into the care of the adoptive parent with the purpose of adoption.

Section 1758
Prohibition on disclosure and exploratory questioning

(1) Facts that are suited to reveal the adoption and its circumstances may not be revealed or discovered by exploratory questioning without the approval of the adoptive parent and of the child unless special reasons of the public interest make this necessary.
(2) Subsection (1) applies with the necessary modifications if the consent under section 1747 has been given. The family court may order that the effects of subsection (1) occur if an application for substitution of the consent of a parent has been made.

Belgian Civil Code

368-6. The competent authorities shall keep information on the origin of the adoptee, including those relating to the identity of the mother and his father, as well as the data necessary to monitor the health status of the adoptee and his family, in order to later allow the adoptee, if he/she so wishes, to discover his origin. They provide the adoptee or his/her representative with access to this information, with appropriate advice, to the extent permitted by Belgian law. Collection, storage and access to information are regulated by a royal decree approved by the Council of Ministers.

Family Law of Serbia

Article for registration and insight into the register of births

326

(1) Ruling on new entry of birth of adoptee shall be serviced without delay to the registrar keeping the register of births for the child.
(2) After the new entry of birth of adoptee, right of insight into the register of births shall pertain only to the child and child's adopters.
(3) Before allowing the child insight into the register of births, the registrar shall be under the obligation to refer the child to psychosocial counselling in the guardianship authority, family counselling service or in other institution specialised in mediation in family relations.

Montenegrin Family Law

Article 143

Guardianship authority shall keep records and documents in reference to adoption. The data on adoption constitute an official secret. A major adoptee, the adopter and the child's parent who gave consent to adoption by the step-father or step-mother shall have insight into the case file. Guardianship authority shall allow insight into the case file to a minor adoptee if it determines that this is in his best interests. Detailed conditions for keeping records and retaining documents, or the case file, shall be set forth by the ministry responsible for social welfare.

Article 145

Through adoption mutual rights and duties of the adoptee and his blood relatives cease to exist, except if the child is adopted by a step-mother or a step-father.

Admissibility of the Referral

62. The Court first examines whether the admissibility requirements established in the Constitution, and further specified in the Law and in the Rules of Procedure have been met.

63. 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."*

64. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 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…".

65. The Court first recalls that the Applicant alleges that the challenged Judgment of the Supreme Court violated her fundamental rights and freedoms guaranteed by Article 8 of the ECHR, Article 7 of the Convention on the Rights of the Child and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

66. In the context of these allegations, the Applicant alleges a violation of Article 7 of the Convention on the Rights of the Child, which is one of the international instruments, which according to Article 22 of the Constitution is directly applicable in the Republic of Kosovo and *"in the case of conflict, have priority over provisions of laws and other acts of public institutions"*.

67. In this regard, the Court also recalls its case law where it stated that human rights and fundamental freedoms guaranteed by the international instruments contained in Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution are directly applicable and are part of the legal order of the Republic of Kosovo (see, *inter alia*, case no. KO162/18, Applicant: *President of the Assembly of the Republic of Kosovo*, Judgment of 19 December 2018, paragraph 36 and KI207/19, Applicant *NISMA Social Democratic, the*

New Kosovo Alliance and the Justice Party, Judgment of 10 December 2020, paragraph 107*).*

68. Having said that, however, the Court must assess whether the Applicant can raise allegations of a violation of Article 7 of the Convention, or more specifically whether this provision applies in her case. The Applicant neither in her submissions before the regular courts nor in her Referral before this Court did specify how this provision of this Convention applies in her case, namely did not specify how this provision supports her Referral to oblige the public authority, namely the Center for Social Work to notify her biological child that he is adopted.

69. The Court also refers to Article 1 of this Convention, which provides that: "*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".* In view of the latter, the Court recalls that the Applicant filed her request with the Center for Social Work in 2016, when her biological child had reached the age of majority.

70. Therefore, taking into account the scope of this Convention, the Court considers that in the present case the Applicant cannot raise allegations of a violation of the rights guaranteed by the provisions of this Convention on the grounds that her biological child, at the time of filing her application at the Center for Social Work had reached adulthood.

71. Finally, and returning to the Applicant's allegation that the regular courts have also violated Article 7 of the Convention on the Rights of the Child, the Court finds that this Article does not apply in her case.

72. As regards the Applicant's allegations of a violation of Article 8 of the ECHR and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court finds that the Applicant is an authorized party who also challenges an act of a public authority, namely Judgment [ARJ-UZVP. No. 37/2020] of 11 June 2020 of the Supreme Court, having exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms she alleges to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

73. The Court also finds that the Applicants' Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 (Admissibility

Criteria) of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure.

74. In addition and finally, the Court considers that this Referral is not manifestly ill-founded as set out in paragraph (2) of Rule 39 of the Rules of Procedure and, consequently, it must be declared admissible and its merits examined in respect of the Applicant's allegations that the decisions of the regular courts, namely the challenged Judgment of the Supreme Court has violated her rights guaranteed by: (i) Article 8 of the ECHR, and (ii) Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

Merits of the Referral

75. The Court recalls that the Applicant filed a request with the Center for Social Work on 1 March 2016, requesting that her biological adult child, whom she had given up for adoption in 1989, be notified about the biological mother's existence and her interest in notifying him. On 7 March 2016, the Center for Social Work responded that: (i) there is no legal basis to notify her biological child about his adoption; and that (ii) only adult adopted child has access to information regarding the biological parents at his/her request. On 11 March 2016, the Applicant filed a request for reconsideration of the response of 7 March 2016 of the Center for Social Work in the same center. On 17 March 2016, the Center for Social Work, by its letter [05/55-141] addressed the Applicant to the Department of MLSW. On 25 March 2016, the Complaints Commission of the MLSW, by Decision [DPSF no. 521] rejected the Applicant's request for reconsideration of the response of 11 March 2016 as ungrounded. Therefore, on 29 April 2016, the Applicant filed a lawsuit with the Basic Court. As a result of her lawsuit, the Basic Court by Judgment [A. No. 651/16] of 25 January 2019 rejected the Applicant's lawsuit as ungrounded. Subsequently, as a result of the appeal filed against the Judgment of the Basic Court by the Applicant, the Court of Appeals by Judgment [AA. No. 178/2019] of 15 May 2020, rejected her complaint as unfounded. On an unspecified date, the Applicant filed a request with the Supreme Court for an extraordinary review of the court decision, namely Judgment [AA. No. 178/2019] of 15 May 2020, of the Court of Appeals on the grounds of erroneous application of the substantive law and essential violations of the provisions of the LCP, with the request that: (i) her lawsuit be approved as grounded; (ii) annul the Decision of 25 March 2016 of the MLSW Appeals Commission; and (iii) oblige the MLSW Department and the Center for Social Work to inform the child about his/her rights

deriving from Article 194, paragraph 2 of the Family Law and Article 18, paragraph 1 of the MLSW Administrative Instruction. The Supreme Court by Judgment [ARJ-UZVP. No. 37/2020] of 11 June 2020, rejected the Applicant's request for extraordinary review of the court decision as ungrounded.

76. The Supreme Court by the challenged Judgment emphasized that the data and circumstances of the adoption should not be disclosed or investigated without the consent of the adopter and the child, unless this is required for special reasons and for reasons of public interest. Following this, the Court found that in the circumstances of the present case *"there are no public benefit interests and such a request is approved only if submitted by the adoptee and not by his biological parents"*.

77. In her Referral to the Court, the Applicant challenges the abovementioned findings of the Supreme Court, including those of the regular courts, alleging: (i) a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR due to non-reasoning of the court decision, and (ii) violation of Article 8 of the ECHR.

78. The Court recalls that the Applicant during the conduct of all proceedings before the public authorities and those of the regular courts, namely the request for reconsideration of the response of the Center for Social Work, her claim to the Basic Court, the appeal to the Court of Appeals and the request for extraordinary review of the court decision by the Supreme Court had specified that her request to the Center for Social Work contained the specific request that her biological child, an adult, whom she had given up for adoption in 1989, be notified: (i) in connection with the existence of his biological mother; and (ii) her interest in notifying him. This request was supported by the Applicant in paragraph 2 of Article 194 of the Family Law, interpreting this provision as an obligation of the relevant body that her biological child should be informed about his right deriving from this provision.

79. Having said that, the Court notes that the Applicant's specific Referral submitted to the Court contains two elements, namely: (i) the allegation that the relevant custodian authority has an obligation to notify her biological child about the circumstances of his adoption; and (ii) expressing her interest in informing her biological child. However, the Court, referring to the second element in her Referral, through which it expresses her interest in notifying her biological child, considers that the Applicant, by requesting or claiming that the responsible custodian body is obliged to notify her biological child for

his adoption aims to exercise a right related to the aspect of her private life.

80. Therefore, in relation to the abovementioned allegations, the Court considers that the substance of the Applicant's allegation is that the regular courts have violated her right to privacy guaranteed by Article 8 (Right to respect for private and family life) of the ECHR by not approving her request for notification of her biological child regarding the existence of his biological mother and the Applicant's interest to notify him. The Applicant's allegation in relation to Article 8 of the ECHR, which encompasses aspects of her right to privacy is also guaranteed by paragraph 1 of Article 36 [Right to Privacy] of the Constitution.

81. Therefore, the abovementioned allegations of the Applicant in relation to Article 36 of the Constitution, in conjunction with Article 8 of the ECHR, including the allegation in relation to Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court will review them based on the case law of the ECtHR, in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

82. Therefore, the Court: (i) will consider the Applicant's substantive allegation under Article 36 of the Constitution and Article 8 of the ECHR; to proceed with (ii) addressing the Applicant's allegation under Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

I. Regarding violation of Article 36, paragraph 1 of the Constitution in conjunction with Article 8 of the ECHR

83. In this regard, and with a view to addressing the Applicant's substantive allegations of respect for privacy, the Court will first elaborate on: (i) the general principles of Article 36 of the Constitution in conjunction with Article 8 of the ECHR, in order to assess the applicability of these articles in the circumstances of the Applicant's case, to proceed with the application of these general principles in the circumstances of the present case.

A. General principles regarding the right to respect for private and family life

84. The Court first refers to paragraph 1 of Article 36 of the Constitution, which provides that *"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"*.

85. Paragraph 1 of Article 8 of the ECHR stipulates that "*Everyone has the right to respect for his private and family life, his home and his correspondence*".

86. The Court initially notes that although the scope of Article 36 of the Constitution and Article 8 of the ECHR is not unlimited, the ECtHR has broadly defined the scope of Article 8 of the ECHR, including cases where a specific right is not specifically highlighted in this article (see in this regard the case of the Court, KI56/18, Applicant *Ahmet Frangu*, Judgment of 22 July 2020, paragraph 83). The primary purpose of this article, according to the ECtHR case law, is to protect individuals from arbitrary "interference" with their (i) private; (ii) family life, (iii) home; or (iv) correspondence. (see, in this context, 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, se also the case of the Court KI56/18, Applicant *Ahmet Frangu* , cited above, paragraph 83). Guaranteed rights based on the ECHR system and the relevant case law of the ECtHR are ensured through: (i) negative obligations, namely the obligation of the state not to "interfere" in private and family life (see, in this context cases of ECtHR *Libert v. France*, Judgment of 22 February 2018, paragraphs 40-42; and *Kroon and Others v. the Netherlands*, Judgment of 27 October 1994, paragraph 31); and (ii) positive obligations, namely the obligation of the state to ensure that these rights are effectively exercised (see cases of the ECtHR *Lozovyye v. Russia*, Judgment of 24 April 2018, paragraph 36, and *Evans v. the United Kingdom* [GC], Judgment, of 10 April 2007, paragraph 75).

87. Therefore, the individuals alleging a violation of Article 36 of the Constitution in conjunction with Article 8 of the ECHR must show that their Referral falls into at least one of the four categories of interests protected by these two provisions, namely the right to: (i) privacy; (ii) family life; (iii) residence; and (iv) correspondence (see the case of Court KI56/18, cited above, paragraph 83).

88. Having said that, in dealing with allegations relating to violations of the right to privacy, the ECtHR in its case law first determines whether the Applicant's Referral falls within the scope of Article 8 of the ECHR, or

more precisely, whether this article is applicable in the circumstances of that case. Once the applicability of Article 8 of the ECHR in the circumstances of the present case has been established, the ECtHR proceeds with the further examination of the allegation submitted under Article 8 of the ECHR. This position and finding, established through the case law of the ECtHR is also affirmed in the case law of the Court, namely in the above case KI56/18, Applicant *Ahmet Frangu* paragraphs 90-99 of the Judgment).

89. Second, the ECtHR assesses whether the case should be treated from the point of view of a negative or positive obligation of the state, despite the fact that the difference between these obligations is not always easily and clearly visible. However, according to the ECtHR, in principle it is important to assess whether the state has acted, namely intervened, or the state has failed to act, more precisely if the respective state has failed to ensure through its legal or administrative system the right to respect private and family life in the circumstances of this case (see ECtHR case *Gaskin v. the United Kingdom*, Judgment of 7 July 1989, para. 41).

90. Therefore, based on the abovementioned principles in relation to Article 8 of the ECHR, the Court reiterates that it will address the Applicant's allegations by applying the relevant case law of the ECtHR on this assessment. The Court will, therefore, first address the issue of the applicability of Article 36 of the Constitution in conjunction with Article 8 of the ECHR with regard to the concrete issues of this case, namely the rejection of the Applicant's request by the public authorities, starting with the Center for Social Work to inform her adult child about the existence of his or her biological mother and her interest in informing him. After determining the applicability of paragraph 1 of Article 36 of the Constitution and paragraph 1 of Article 8 of the ECHR, the Court will further examine and determine whether the Referral should be treated from the point of view of a negative or positive obligation of the Republic of Kosovo. If it is to be treated from the point of view of a negative obligation, it will assess whether there has been an "interference" in the Applicant's rights and whether such "interference"; (i) was "in accordance with the law" or "defined by law"; (ii) has "pursued a legitimate aim"; and (iii) has "been necessary in a democratic society". Whereas, in case the specific issue is to be treated from the point of view of a positive obligation, the Court will examine whether, in the circumstances of the present case, the state had an obligation to take measures which would ensure the effective exercise of the Applicant's right to a private life, as guaranteed by paragraph 1

of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

A. Applicability of Article 36 of the Constitution in conjunction with Article 8 of the ECHR in the circumstances of the present case

91. In this context, the Court first reiterates that the right to privacy is enshrined in: (i) paragraph 1 of Article 36 of the Constitution, which expressly provides that: *"Everyone enjoys the right to have her/his private and family life respected [...]"*; and, as noted above, (ii) paragraph 1 of Article 8 of the ECHR, and which expressly states that "*Everyone has the right to respect for his private and family life [...]*".

92. Within the framework of this right, the case law of the ECtHR also includes cases related to the relationship between biological parents and children.

93. The Court further notes that the ECtHR has conducted in detail the applicability test of Article 8 through its case law referring to cases of paternity assignment or child applications granted for adoption, seeking information about their biological parents.

94. However, taking into account the factual circumstances of the Applicant's case in the present case, the Court during its analysis and review whether Article 36 of the Constitution and Article 8 of the ECHR are applicable in its case, will specifically 'refers to the case of the ECtHR *I.S. v. Germany* (Judgment of 13 October 2014), in which case the ECtHR determined and found that the biological mother's relationship with her adopted children falls within the scope of Article 8 of the ECHR. The Court, in order to apply its findings with regard to the applicability of Article 8 of the ECHR, in the case *I.S. v. Germany* insofar as they are applicable in the circumstances of the Applicant will briefly summarize the factual circumstances of this case of the ECtHR and the principles applied by the latter in the present case which have resulted in its finding of the applicability of Article 8, paragraph 1 of the ECHR in this case.

95. The circumstances of the case of the ECtHR *I.S. v. Germany* related to that the Applicant had complained that she had not been enabled to have regular contact and receive information about her biological minor children who had been adopted by another couple. She claimed that the decision of the German regular courts regarding contact and information about her biological children violated her rights

guaranteed by Article 8 of the ECHR. In her request, she specifically claimed that she had been promised a "*semi-open adoption, giving her the right to have contact with her children, which was not respected*". The ECtHR had initially stated that the claim in the case of *I.S. v. Germany* exclusively concerns the refusal of the domestic courts to grant the Applicant access and information about her biological children. The ECtHR recalled in this connection that the Applicant had not, in fact, challenged the validity of her consent to place her newborn children for adoption (paragraph 67, of the Judgment).).

96. Next, the ECtHR considered that the Applicant's relationship with her children fell under the protection of Article 8 of the ECHR, within the notion of "family life", only at the time when her biological children were born. According to the ECtHR "*The relationship between the Applicant and the children may have ceased to fall within the scope of "family life" at the time when the Applicant signed her consent to place the children for adoption"* (paragraph 67, of the Judgment).

97. The ECtHR further referred to its case-law on the grounds that "*the biological family bond between a biological parent and a child, by itself, without any further legal or factual elements indicating the existence of a close personal relationship, may be insufficient to seek the protection of Article 8"* (paragraph 68, of the Judgment, in this connection see the references used by the ECtHR in cases *Schneider v. Germany*, Judgment of 15 September 2011, paragraph 80, and *Hülsmann v. Germany*, Decision on admissibility, 18 March 2008). The ECtHR further stated that although the Court has considered in some cases that even "targeted family life" may fall, in exceptional circumstances, within the limits of Article 8, the ECtHR found that in the case of *I.S. v. Germany*, the existing family relationship was intentionally aggravated by the Applicant (paragraph 69, of the Judgment).

98. The ECtHR, however, continued its assessment by finding that the determination of other existing or newly established rights of the applicant, adoptive parents and biological children, although falling outside the scope of "family life", belong to an important part of the Applicant's identity as a biological mother and her "private life" within the meaning of Article 8 para 1 of the ECHR (paragraph 69 of the Judgment). This finding was supported by the ECtHR in its previous case law, namely in the cases *Schneider v. Germany* and *Anayo v. Germany*. The Court notes that in these two cases, the ECtHR similarly found that the family relationship intended by the biological parents or children did not fall within the scope of "family life" within the meaning

of Article 8 of the ECHR; however, such a targeted relationship belongs to an important part of the Applicant's identity and his/her private life within the meaning of Article 8, paragraph 1 of the ECHR (see the above-mentioned cases of the ECtHR *Anayo v. Germany*, cited above, paragraph 62, and *Schneider v. Germany*, cited above, paragraph 90).

99. In view of the above, in particular the ECtHR finding as to the applicability of Article 8 in a similar case as that of the Applicant, which relates to the biological mother's intended relationship with her child, the Court applying the reasoning given in this finding of the ECtHR considers that in the Applicant's case the protection of Article 36 of the Constitution, in conjunction with Article 8 of the ECHR within the notion of family law has also ceased at the moment when the Applicant had given her consent for the adoption of her child in 1989. The issue of the Applicant's consent was not in dispute either in her application submitted to the Center for Social Work or in her statement of claim and appeals before the regular courts. Having said that, the Court finds that Article 36 of the Constitution in conjunction with Article 8 of the ECHR within the meaning of the notion of "family right" may not be applicable in her case because the request falls outside the scope of this notion.

100. However, the Court, applying the position and finding of the ECtHR through its case law in the above cases, considers that the Applicant's request, by which she had expressed her interest in notifying her child given up for adoption in 1989 incorporates elements that belong to an important part of her identity as a biological mother and which affects her right to privacy within the meaning of the notion of "her private life" guaranteed by Article 36 of the Constitution in conjunction with Article 8 of the ECHR. Having said that, based on the factual and legal circumstances of the Applicant's Referral, the Court finds that her Referral falls within the scope of paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR within the meaning of the notion of "private life", and consequently, finds that the latter are applicable in the circumstances of the present case.

101. As a result of its finding that Article 36 of the Constitution in conjunction with Article 8 of the ECHR is applicable in the Applicant's circumstances, the Court will then assess whether the decision of the public authorities, namely the decision of the Center for Social Work and regular court judgments to reject her request for notification of her child given for adoption and the expression of her interest in notifying her child is in accordance with or not in accordance with the rights guaranteed by the aforementioned articles. Having said that, and as

explained above, in advance, the Court must assess whether the circumstances of the present case are to be assessed from the point of view of the negative or positive obligation of the Republic of Kosovo.

102. In its view whether the case should be treated from the point of view of the negative obligation of the state, the Court notes that the criteria on the basis of which the state may interfere with the exercise of the abovementioned rights within the meaning of paragraph 1 of Article 8 of the ECHR are defined in paragraph 2 of the same article which stipulates that: *"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."* Based on this, it results that the restriction or intervention of the state is allowed if it is "in accordance with the law" or "defined by law" and if it is "necessary in a democratic society" in order to protect one of the goals, established in paragraph 2 of Article 8 of the ECHR.

103. The Court further recalls that throughout the course of the proceedings, both the Applicant and the regular courts referred to Article 22 of the Council of Europe Convention on Adoption. In relation to the latter, the Court notes that this international instrument is not applicable in the Republic of Kosovo, because the Republic of Kosovo is not a signatory to this convention. However, the Court notes that the provisions of this Convention are embodied in the relevant legislation of the Republic of Kosovo, which refers to adoption procedures.

104. In this regard, referring to the case law of the ECtHR, the Court notes that Article 22 of the Convention on Adoption was also interpreted and applied through the case law of the ECtHR (in relation to the application of Article 22 of the Convention on Adoption, of 2008, see case *I.S. v. Germany*, cited above, paragraph 76).

105. In this regard, the Court reiterates that according to Article 53 of the Constitution, the courts of the Republic of Kosovo, all without exception, have the obligation to interpret "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*". This means that, in all instances when the Constitutional Court or the regular courts of the Republic of Kosovo interpret the human rights and freedoms guaranteed by the Constitution, the human rights standards set out in the case law of the

ECtHR, should apply to these rights and freedoms when applicable. In the event of a conflict between the two, the standards set by the ECtHR in interpreting the ECHR will prevail (see case of the Court KI207/19, cited above, paragraph 109*)*.

106. Therefore, and based on the above, in the following, the Court in assessing the principles established by the ECtHR in similar cases and their application in the circumstances of the present case, will refer to and take into account the case law of the ECtHR, in those cases when Article 22 of the Convention on Adoption has been interpreted.

107. Following this, and as noted above, the Court recalls that the specific Referral of submitted to the Court contains two elements, namely: (i) the request or the claim of the Applicant that the relevant custodian body has the obligation to inform the adopted child about the circumstances of his adoption; and (ii) expressing her interest in informing her biological child. With regard to the former, the Court notes that the Applicant has interpreted the relevant provisions in force of domestic law, namely paragraph 2 of Article 194 of the Family Law, claiming that the obligation of the relevant custodian authority to notify her biological child that is adopted derives from this provision. Further, referring to the second element of her Referral, namely the expression of her interest in notifying her biological child, the Court considers that the Applicant requesting or claiming that the responsible custodian body is obliged to notify the child about his adoption aims to exercise her right related to the aspect of her private life, namely to know her biological child.

108. The Court first recalls the Applicant's specific allegation, stating that in all cases of the ECtHR *"in all cases of the Court [ECHR], the right of the child, and the right of knowing the origin, in one form or another, takes precedence over the interests of third parties, and where they have previously signed confidentiality clauses. This means that in an own interpretation of these cases with the situation in question, given the fact that the only parties who oppose the provision of information to their adult child in this case are the adoptive parents, it can be concluded that: the adoptive parents have no right to deprive their adopted child from raising awareness of the rights of the child under Article 194 of the Family Law of Kosovo, or under Article 8 of the European Convention on Human Rights"*.

109. In this regard, the Applicant supports her abovementioned allegation by referring to and providing a brief summary of the cases of the ECtHR in her Referral, namely: *Odièvre v. France* (Judgment of 13 February

2003); *Anayo v. Germany* (Judgment of 21 December 2010); *Mikulić v. Croatia* [Judgment of 7 February 2002]; and *Phinikaridou v. Cyprus* (Judgment of 20 December 2007). The Court recalls that the Applicant had supported the statement of claim, the appeal and the request for extraordinary review of the court decision, namely before the regular courts, among other things, in the above-mentioned cases of the ECtHR.

110. For the purpose of assessing whether the cases referred to by the Applicant in her Referral relate to similar factual circumstances as in her case and whether the findings and positions of the ECtHR can be applied in the present case, in the following Court will present a summary of the abovementioned cases namely the factual circumstances and the finding of the ECtHR, given in the cases: *Odièvre v. France*; *Anayo v. Germany*; *Mikulić v. Croatia*; and *Phinikaridou v. Cyprus*.

111. The circumstances of the case *Odièvre v. France* were related to the fact that the Applicant had been abandoned by her biological mother after giving birth and left to the Department of Health and Social Security. Her biological mother, according to the legislation in force at the time, had requested that her identity be kept secret even after the adoption procedure. The Applicant, meanwhile, had been adopted on the basis of a full adoption order, and after a certain period had submitted a request for disclosure of the identity of the biological parents, which request was rejected by the French authorities on the grounds that she had been born under a special procedure, which at that time allowed mothers to remain anonymous. In the present case, the ECtHR found that there had been no violation of Article 8 (Right to respect for private life), considering in particular that the Applicant had been given access to non-identifying information about her biological mother and family enabled her to trace some of its roots, ensuring the protection of the interests of third parties. In addition, the last legislation passed in France in 2002 allowed the waiver of confidentiality and consequently established procedures that facilitated the search for the biological family of adopted children. Consequently, according to the ECtHR, the Applicant based on this amended law was enabled to disclose the identity of her biological mother, provided that she obtained the latter's consent to ensure that the mother's need for protection and legitimate request of the applicant to be compatible with each other in order to ensure a fair balance and sufficient proportion between competing interests.

112. The circumstances of the case *Anayo v. Germany* were related to the refusal of the German courts to allow the Applicant, as the biological father, to meet his twin children with whom he had not previously lived. His biological children lived with her mother and her husband. The ECtHR found that there had been a violation of Article 8 (Right to respect for private and family life) of the ECHR. The ECtHR found that the intervention of the German authorities in the Applicant's right, guaranteed by Article 8 of the ECHR was not "necessary in a democratic society", namely the local authorities had not considered whether a relationship between the Applicant and his biological children would be in the interest of the latter.

113. The circumstances of the case *Mikulić v. Croatia* relate to a child born out of wedlock who, together with her mother, had filed a civil suit to establish paternity. The Applicant complained that Croatian law did not oblige men against whom citizenship lawsuits had been filed to comply with court orders to undergo DNA tests, and that the failure of local courts to decide on her request for paternity recognition had left her unsure as to her personal identity. The ECtHR found a violation of Article 8 of the ECHR. The ECtHR noted in particular that, in establishing a claim for paternity, courts were required to take into account the basic principle of the best interests of the child. In the present case, the ECtHR found that during the followed proceedings a fair balance had not been struck between the Applicant's right to eliminate her uncertainty regarding her personal identity without undue delay and that of her alleged father to not undergo DNA testing. Therefore, the inefficiency of the courts had left the Applicant in a state of prolonged uncertainty regarding her personal identity.

114. As regards the case *Phinikaridou v. Cyprus*, the circumstances of this case relate to the fact that in 1991 the Government of Cyprus had enacted legislation enabling children born out of wedlock to seek judicial recognition of paternity. The limitation period for a request by a child under this law was three years from the date the child has reached the age of majority or, in the case of children who had already reached the age of majority, three years from the date of entry into force of the Law. The Applicant, who had reached the age of majority on the date the law entered into force, had not learned the identity of her biological father until December 1997. In June 1999 she had submitted a request to the family court for judicial recognition of paternity. However, this was rejected on the grounds that the statute of limitations applicable in her case had expired on 1 November 1994, three years after the law had entered into force. The ECtHR considered that it should be determined whether the state had complied with its

positive obligations in handling the Applicant's claim for judicial recognition of paternity. The question, then, was whether the nature of the deadline and/or the manner in which it was applied was in line with the ECHR and whether a fair balance between competing rights and interests had been reached. The ECtHR, assessing that there was no uniform approach to the legislation of the Contracting States, found that in the present case it was clear from the judgment of the Supreme Court of Cyprus that the general interest and the competing rights and interests of the alleged father and his family was given a greater weight than the Applicant's right to know her origin. The ECtHR further assessed that the application of a rigid time-limit for initiating the paternity recognition procedure, notwithstanding the circumstances of the individual case and in particular the Applicant's knowledge of the facts concerning her biological father, had damaged precisely the substance of the Applicant's right to respect for her private life. Consequently, the ECtHR found a violation of Article 8 of the ECHR.

115. Based on the summaries of the aforementioned cases, the Court notes that the circumstances of these cases relate mainly to the children's right to know their biological parents, with the exception of case *Anayo v. Germany*, which was related to the father's right to contact with his biological children, who lived with their mother and her husband. In these cases the ECtHR had applied the relevant tests in terms of whether the obligations of the states constituted a positive obligation for the respective states to take measures or a negative obligation, namely whether the rejection of the Applicants' request constituted an interference with their right to respect for the private and family life guaranteed by Article 8 of the ECHR.

116. The Court emphasizes the fact that the Applicant's case differs from the above-mentioned cases of the ECtHR and the latter can hardly be applied in the circumstances of the present case. This is because the latter are mainly related to the rights of biological children, in the capacity of applicants before the courts of the respective states and before the ECtHR to recognize their origin. More specifically, the Applicant's case relates to her claim, as a biological mother, to oblige public authorities to inform her biological adult child that she is an adopted child, so that she has the opportunity to know him in case this would express interest.

117. As noted above, after assessing the applicability of Article 36 of the Constitution in conjunction with Article 8 of the ECHR, based on the case law of the ECtHR, the Court reiterates that it must determine whether the Applicant's Referral and allegations, should be treated

from the perspective of negative or positive obligations of the state. While, as the ECtHR has pointed out, the difference between these two categories of obligations is not always clear, in principle the first category is related to the obligation of the state not to "interfere" with fundamental rights and freedoms, while the second category, is related to the obligation of the state to take measures through which the guarantee of the respective right of the Applicant for private life is ensured. In the sense of the latter, the Court, referring also to the criteria established through the case law of the ECtHR regarding the positive obligations that states must undertake for the effective enjoyment of the Applicant's right to privacy, within the meaning of Article 8 of the ECHR, considers that it must be assessed in terms of a fair balance to be struck between the competing interests of the individual and the community as a whole (see the cases of the ECHR, *Evans v. The United Kingdom*, cited above, paragraph 75; *Gaskin v. The United Kingdom*, cited above, paragraph 40; and *Odievre v. France*, cited above, paragraph 40).

(i) If the case involves a positive interference or obligation

118. In this regard, the ECtHR in its case-law in particular in the above-mentioned case *I.S. v. Germany* stated that "*while the substantial purpose of Article 8 of the ECHR is to protect individuals from arbitrary interference by public authorities, it simply does not oblige the state to abstain from such interference; in addition to this negative interference, there may be positive obligations, which are inherent in the effective respect of private or family life* [...] "(paragraph 70, of the Judgment). Following this, the ECtHR in this case considered that there are elements that may suggest that the decision of the German courts can be considered in the light of positive obligations. Again in this case, the ECtHR emphasized that the boundaries between positive and negative obligations of the state do not allow a precise definition, but considered that the applicable principles are nevertheless similar (paragraph 70, of the Judgment). The ECtHR, in this case, referring to its case law, stated that "*In determining, if such an obligation exists, a fair balance must be taken into account which must be pursued between the general interest and the individual interest*"; and in the sense of both, the State enjoys a margin of appreciation" (see paragraph 70 of Judgment *I.S. v. Germany* and the references used therein in cases *Mikulić v. Croatia*, cited above, paragraph 58; *Evans v. the United Kingdom*, cited above, paragraph 75, S.*H. and others v. Austria* [GC], Judgment of 3 November 2011, paragraph 88).

119. However, taking into account: (i) the Applicant's specific request; (ii) the relevant legislation in force relating to the matter, in particular the rights of the adoptive family and the adoptee; (iii) the examination of the Applicant's request by the state authorities, in particular that of the Center for Social Work, in the capacity of the competent authority vested with responsibilities and obligations specified by law and relevant sub=legal acts; (iv) the finding of the regular courts that the competent authorities have no legal basis for notifying their biological child that he is adopted and that the right to know the biological parents is reserved only for the adopted child at the time of reaching adulthood, the Court notes that in the present case, the Applicant's Referral should be considered within a meaning of a negative obligation, namely whether the decisions of the regular courts had interfered with the observance of the Applicant's private right, guaranteed by Article 36 of the Constitution and Article 8 of the ECHR.

120. Having said that, in its assessment whether the rejection of the Applicant's Referral constitutes an interference with her right guaranteed by Article 36 of the Constitution, in conjunction with Article 8 of the ECHR, the Court will apply Article 55 of the Constitution in conjunction with paragraph 2 of Article 8 of the ECHR.

121. With regard to the application of Article 55 [Limitations of Fundamental Rights and Freedoms] of the Constitution in the circumstances of the present case, the Court further recalls that this article stipulates that the fundamental rights and freedoms guaranteed by this Constitution: (i) "may be limited only by law "; (ii) the interference and limitation of a right or liberty must have and pursue a "legitimate aim"; (iii) human rights and freedoms may be limited only "to the extent necessary" namely if the limitation is proportionate; and (iv) limitations imposed by law must be such as to be deemed necessary in an "open and democratic society".

122. Whereas the fourth paragraph of Article 55 of the Constitution emphasizes the fact that in cases of limitation of fundamental rights and freedoms, a constitutional responsibility is created for the institutions of public power, and especially for the courts that during the interpretation and decision in cases before them, pay 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 aim to be achieved, and to consider the possibility of achieving the purpose with a lesser limitation. Finally, the fifth paragraph of Article 55 of the Constitution emphasizes that the limitation of fundamental rights and freedoms guaranteed by this

Constitution shall in no way deny the essence of the guaranteed right. What is the essence of a guaranteed right depends on the type of right or freedom in question (see the case of Court KO54/20, Applicant *President of the Republic of Kosovo*, Constitutional Review of Decision no. 01/15 of the Government of the Republic of Kosovo, Judgment of 31 March 2020, paragraphs 194-195).

123. For the purposes of interpreting these notions and concepts, the Court recalls that the ECtHR, when examining cases before it to determine whether in a particular case there was a restriction and violation of human rights and freedoms guaranteed by the ECHR, applies the same concepts, namely if the limitation or interference: (i) has been "in accordance with the law" or "prescribed by law"; (ii) has "pursued a legitimate aim"; and (iii) has been "necessary in a democratic society." In the present case, with regard to the right to respect for private life guaranteed by Article 8 of the ECHR, the Court recalls that paragraph 2 of this Article provides the same obligation respectively "*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".*

(ii) *Assessment pursuant to Article 55 of the Constitution and paragraph 2 of Article 8 of the ECHR*

124. Therefore, based on the above, the Court within the meaning of Article 55 of the Constitution, in conjunction with paragraph 2 of Article 8 of the ECHR, will assess whether the challenged decisions of the regular courts were (i) in accordance with the law; (ii) have "pursued a legitimate aim"; and (iii) has been "necessary in a democratic society". In assessing these, the Court will refer to the case law of the ECtHR, insofar as it is applicable in the circumstances of the present case. Having said that, the Court will hereby refer to the analysis and review of the requirements set out in paragraph 2 of Article 8 of the ECHR, referring also to the above-mentioned case of the ECHR *I.S. v. Germany*. With regard to the latter, the Court recalls that the factual circumstances of this case are not identical to that in the Applicant's case for the following reasons: in the case *I.S. v. Germany*, the Applicant requested access to information and a meeting with her adopted biological children and at that time they were minors. Whereas in the case of the Applicant, the latter submitted her request to the Center for Social Work, by which she requested that this center notify

her biological child that he is adopted and as a result, she expresses her interest in meeting her biological child. In relation to the latter, the Applicant's request also refers to an additional element, namely the obligation of the Family Center to inform her biological child about the circumstances of the adoption, more specifically the fact that he is adopted, to which obligation the Applicant claims that it derives from paragraph 2 of Article 194 of the Family Law. However, the Court considers that it may refer to the principles or findings of the ECtHR with regard to the assessment of the requirements set out in paragraph 2 of Article 8 of the ECHR, in so far as they may be applicable in the circumstances of the present case.

(a) in accordance with law

125. The ECtHR repeatedly stated that any interference by public authority with the individual's right to respect for private life and correspondence must be in accordance with the law (see the case of the ECHR, *Klaus Muller v. Germany*, Judgment of 19 November 2020, paragraphs 48-51). The ECtHR further noted that "in accordance with the law" also refers to the quality of the law, which is required to be in accordance with the rule of law (see *Halford v. The United Kingdom*, Judgment of 25 June 1997, paragraph 49).

126. The Court notes that neither Article 194 of the Family Law nor Articles 17 and 18 of the MLSW Administrative Instruction give the Applicant the right to have access to information about her biological child. According to these provisions, the right of access to information is reserved only to the adopted child, who expresses the desire to know his/her biological parents may request this after reaching the age of majority. Having said that, the Court recalls that to the extent that it has been notified through the case file, such an opportunity the biological child of the Applicant and given for adoption up to this stage has not exercised this right defined by law. In this regard, the Court also recalls that at the time of the request submitted by the Applicant to the Center for Social Work, her biological child was an adult.

127. The Court further notes that according to the applicable legal provisions, the termination of the Applicant's legal right as a parent is a consequence of giving her consent for adoption. Having said that, by giving her consent for adoption, the ECtHR had also assessed that her rights to contact her child had also ended. The Court recalls that based on the case file, it does not appear that the issue of granting the Applicant's consent was challenged in proceedings before the regular courts, including the court proceedings, which is the subject of this

Referral (see regarding the assessment of the ECtHR in paragraphs 72 and 73, of the Judgment in the above case *I.S. v. Germany*).

128. However, referring to the Applicant's request, namely the first element of this request, through which the Applicant requested the Center for Social Work to notify her biological child, the Court notes that she supports this by interpreting that this obligation derives from paragraph 2 of Article 194 of the Family Law. In this regard, the Court refers to paragraph 2 of Article 194 of the Family Law, which stipulates that: *"At full age the adoptee has the right of access to all information concerning his adoption and shall on request be provided with personal information about his biological parents"*. This right of the adoptee is defined in paragraph 2 of Article 18 of the Administrative Instruction of MLSW.

129. Based on the abovementioned provisions of the Law on Family and the Administrative Instruction of MLSW, as well as other provisions of the same law and the above instruction, respectively, the Court notes that such an obligation of the Center for Social Work or MLSW to notify the biological child that he is adopted is not defined by any provision of these two above mentioned acts. Subsequently, the Court refers to paragraph 3 of Article 17 [After the establishment of adoption] of the MLSW Administrative Instruction, which stipulates that: "*CSW responsible for the child is obliged to maintain the confidentiality and privacy of the child during the entire process of adoption and post-adoption and under no circumstances shall provide documentation or information from the child dossier, except for the competent officials in the CSW, DSFW, MLSW and the Court."* With regard to this provision, the Court places emphasis on the wording *"CSW responsible for the child is obliged to maintain the confidentiality and privacy of the child during the entire process of adoption and post-adoption"*.

130. Therefore, based on the above and also taking into account the fact that the Applicant's request expressly did not contain the request that she have direct access to the data of the adoption procedure and the adoptive family, finds that: (i) the refusal of the courts to approve the Applicant's request; and (ii) the reasoning given by the regular courts regarding the rejection of her request is based on law.

(b) legitimate aim

131. Paragraph 2 of Article 8 enumerates legitimate aims which justify the limitation of the rights protected by Article 8 of the ECHR: *"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". The ECtHR has, however, assessed that this assessment is for local authorities to support that the intervention pursued a legitimate aim (see ECtHR case *Mozer v. Republic of Moldova and Russia* [GC], Judgment of 23 February 2016, paragraph 194).

132. The Court, first referring to the case law of the ECtHR, and specifically to the above case *I.S. v. Germany* emphasized that *"[German] legal provisions regarding the adoption of children do not define the biological parents' right to have contact with their adopted children but are intended to protect the child's right to privacy and family life*". The ECtHR further noted that the relevant legal provisions of Germany are intended to protect the rights of children to develop within their adoptive family (see paragraph 76 of the Judgment). According to the ECtHR, the relevant legal provision of Germany was also in accordance with Article 22 of the Council of Europe Convention on Adoption. In the context of the latter, that *"pursuing this aim, the German legal provisions were in accordance with Article 20 of the European Convention on Adoption of 1967, as well as Article 22 of the amended Convention of 2008",* recalling the fact that Germany was not a signatory and ratifier of the latter. Having said that, the ECHR, referring to the above-mentioned provisions of these two Conventions, stressed that their purpose, according to the preparatory reports of these Conventions, is to avoid the difficulties which may arise from the knowledge of the biological parents regarding the identity of the adopter. The ECtHR also noted that: *"notes in this context that the most current [2008] Convention allows for less stringent rules regarding adoption, however it does not favor such an approach*".

133. Similarly in the present case, namely based on the content of the relevant legal provisions in force in the Republic of Kosovo, namely Article 194 of the Law on Family and Articles 17 and 18 of the Administrative Instruction of MLSW, the Court also notes that the purpose and the aim of the legislator in this case is to maintain the confidentiality of data, which are aimed at protecting the right of the child and his adopter to family life, in particular the unimpeded development of their family relationship. Such a right, namely for having knowledge or access to information regarding the biological parents, the legislator gives only to the biological child, who based on his/her choice and after reaching the age of majority can request information about his/her biological parents.

134. Also in the comparative context, namely the legislation of other states regarding adoption, and in particular the rules relating to the rights of biological parents, adoptive families and adoptees, the Court notes that access to information is reserved only for the adopted child, who wishes to disclose the origin or identity of the biological parents (see in this context, the relevant provisions of the relevant laws of Belgium, Germany, Croatia, Montenegro, Albania and Serbia cited in the section entitled "*Relevant legal provisions of other countries*" of this Judgment*)*.

135. The Court, returning to the Applicant's Referral, notes that the interpretation by the regular courts, including the Supreme Court, is in accordance with the will of the legislator.

136. The Court in this case refers to the reasoning given by the Basic Court referring to Article 194 of the Family Law, paragraph 3 of Article 17 and paragraphs 1 and 2 of Article 18 of the MLSW Administrative Instruction, Article 8 of the ECHR- Article 7 of the Convention on the Rights of the Child and Article 22 of the European Convention on the Adoption of the Child, stating that *"[...]the data of the adoptee must be stored throughout and after the adoption process, and the CSW [Center for Social Work], has the duty to disclose them only in the case before and as required by law, and in case the applicant is the adult adoptee , which means that the right of access to them, which cannot be denied by anyone, has the adult adoptee"*.

137. Secondly, the Court also refers to the reasoning given by the Court of Appeals, which by its Judgment upheld the position given by the Basic Court, concluding as follows: [...] *the data of the adoption and its circumstances should not be disclosed or investigated without the consent of the adopter and the child unless specifically required by reasons of public interest. In the present case we have no special circumstances of public interest and that such a request is acceptable only to the adoptee and not to his biological parents"*. The Court of Appeals, in relation to the Applicant's allegation of erroneous interpretation of Article 194 of the Family Law, reasoned that, according to this provision, the right to file a request to know biological parents belongs only to the adult adoptee.

138. And thirdly, the Court also refers to the reasoning of the Supreme Court, which in addressing the allegations raised by the Applicant in her request for extraordinary review of the Judgment of the Court of Appeals found that *" [...] it is the position of this court that the data of the adoption and its circumstances should not be disclosed or*

investigated without the consent of the adopter and the child unless specifically required by reasons of public interest. In the present case we have no interest of public benefit and that such a request is approved only if it submitted by the adoptee and not by his biological parents". In the context of this reasoning of the Supreme Court, the Court notes that the latter in its reasoning in particular put emphasis on: (i) paragraphs 1 and 2 of Article 194 of the Family Law; (ii) paragraphs 1 and 2 of Article 17, and paragraphs 1 and 2 of Article 18 of the MLSW Administrative Instruction, reasoning that the Center for Social Work is obliged to maintain the confidentiality and privacy of the child throughout the adoption process; and after it.

139. In the light of the above, the Court notes that the regular courts, and specifically the Supreme Court, have pursued the legitimate aim of protecting the rights and freedoms of the third parties, in particular the rights of the adopted child and his adoptive family.

(c) Necessary in a democratic society

140. The Court first notes that the ECtHR through its case law specified that the notion of "necessary in a democratic society" for the purposes of Article 8 of the ECHR *"implies that the conclusion [regarding this criterion] must correspond to a pressing social need and, in particular, must remain proportionate to the legitimate aim pursued."* According to the ECtHR when determining whether an interference was "necessary", it will take into account margin of appreciation which the state authorities have at their discretion, but it is the obligation of the state authority to demonstrate the existence of an urgent social need behind the interference or restriction of this right (see case of ECtHR, *Piechowicz v. Poland*, Judgment of 17 April 2012, paragraph 212).

141. The issue to be addressed below is whether the decisions of the regular courts regarding the request of the Applicant were necessary to pursue the abovementioned purpose by law and have enabled a fair balance between the rights of the adopted child, the adoptive family and of the Applicant's private law as a biological mother (see similarly paragraph 79 of the Judgment in *I.S. v. Germany*).

142. The Court, applying this criterion in the Applicant's circumstances, considers that the proceedings before the regular courts related to the Applicant's request, initiated at the Center for Social Work, were fair in their entirety.

143. The Court reiterates that the Applicant's legal rights in relation to her biological child ceased as a result of the consent given for adoption and the latter was fully informed about the legal and factual consequences.

144. In the following, the Court considers that the decisions of the regular courts to give priority to the confidentiality of her biological child, already adult and the adoptive family, were proportionate. Furthermore, the Court finds that the regular courts in their finding had correctly applied the law, when they concluded that such an obligation to notify the adopted child is not provided for by applicable law.

145. The Court therefore considers that the decisions of the regular courts rejecting the Applicant's specific request were necessary because they were: (i) provided by law; (ii) had pursued a legitimate aim; and (iii) had also pursued a fair balance between the interests of the adopted child, already of adult age, and respect for his private and family rights within his adoptive family. Therefore, the Court finds that the findings of the regular courts, including the Supreme Court, were proportionate.

146. Based on the explanation above, the Court finds that Judgment [ARJ-UZVP. no. 37/2020] of 11 June 2020, of the Supreme Court in conjunction with Judgment [AA. no. 178/2019] of 15 May 2020, of the Court of Appeals and Judgment [A. no. 651/16] of 25 January 2019, of the Basic Court does not contain violation of the Applicant's right to respect for her private life, guaranteed by Article 36 of the Constitution, in conjunction with Article 8 of the ECHR.

147. In the light of the subject matter of the Referral, the Court notes and clarifies that the Applicant's Referral regarding her allegation of a violation of Article 8 of the ECHR has been dealt with and considered in the light of her request submitted to public authorities and regular courts, and that the subject matter of the Referral is not to review and elaborate on the rights of the adopted child to seek information about biological parents, and which are established by applicable law, international conventions and the case law of the ECtHR.

II. Regarding the allegation of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR

148. Following the above mentioned findings, in the following the Court will also examine the Applicant's allegations regarding the violation of her right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in respect of

her specific allegation of lack of a reasoned court decision. To this end, the Court will elaborate on the general principles deriving from the case law of the Court and the ECtHR in relation to Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, and will apply them in the circumstances of present case.

A. General principles

149. Regarding the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court initially notes that it has already consolidated case law. This case law was built based on the ECtHR case law (including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to cases KI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and Others,* Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019, KI35/18, Applicant *Bayerische Versicherungsverbrand*, Judgment, of 11 December 2019; and case of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 135).

150. In principle, the Court notes that the guarantees enshrined in Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, include the obligation for courts to give sufficient reasons for their decisions (see case of the Court KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139).

151. The Court also notes that based on its case law in assessing the principle which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the

Applicants that need to be addressed and the reasons given need to be based on the applicable law (see ECtHR cases *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999. paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42, see also the case of Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). By not seeking a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their claims that are crucial to the outcome of the proceedings (see case *Morerira Ferreira v. Portugal*, Judgment of 5 July 2011, paragraph 84, and all references used therein; and case of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 137).

152. In addition, the concept of "*sufficiency of reasoning*" is a concept developed and also used by the ECtHR itself even where desirable could be a wider and more detailed reasoning (See case *Merabishvili v. Georgia*, No. 72508/13, Judgment of the Grand Chamber of 28 November 2017, paragraph 227. Although the circumstances of the case are not the same with the case referred to by the ECtHR, the concept of "*sufficiency of reasoning*" this case of the Grand Chamber of the ECtHR implies that the reasoning of the relevant decisions of the regular courts, in certain circumstances, although undesirable, may be sufficient. In this respect, in the above-mentioned Judgment of the ECtHR, the latter stated the following:: "*Whilst more detailed reasoning would have been desirable, the Court* [ECtHR] *is satisfied that this [reasoning] was enough in the circumstances"* (see also case no. KI48/18, Applicants, *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 4 February 2019, paragraph 186).

B. Application of these principles in the circumstances of the present case

153. The Court first recalls succinctly that the Applicant in her request for extraordinary review of the court decision, filed with the Supreme Court, claimed the following: (i) with respect to her allegation of erroneous application of the substantive law, the Applicant stated that *"It is the duty of the custodian body, in addition to the advice, to inform and instruct the adoptive parents as well as the children of this age that, as soon as the child reaches the age of 18, he acquires the legal right to see the adoption data, including the data for the biological parents*. According to her: *"[…] then it is only the exclusive right of the adoptee whether he wants to know and contact his biological*

parents"; (ii) also specified that the Judgment of the Court of Appeals lacked the reasoning for the court decision; and (iii) that she did not request that she personally have access to the adoption documentation of her biological child, but requested that her biological child be notified about the fact of his adoption, so that he is entitled decide if he wants to know his biological mother.

154. Whereas in her Referral to the Court with regard to her allegation of non-substantiation of the court decision, the Applicant alleges that her request raised before the court instances was misunderstood because she did not request that she personally have access to the adoption documentation of her biological child, but requested that her child be informed about the fact of his adoption, so that he has the right to decide "*whether or not he wants to know his biological mother or not*". In the following, the Applicant specifies that this basic request filed in her lawsuit before the Basic Court has not been addressed by the regular courts. In the context of this allegation, the Applicant also states that the regular courts have never given reasons why the provisions of the Law on Social and Family Services are not applicable.

155. In the context of the latter, the Court recalls the Applicant's request submitted to the Center for Social Work, in which she requested that her biological child, an adult, whom she had given in adoption in 1989, be notified: (i) about the existence of his biological mother and (ii) of her interest in notifying him. The Court also recalls that the Applicant based this request on Article 194, paragraph 2 of the Law on the Family of Kosovo, Article 8 of the ECHR and Article 22 of the European Convention on the Adoption of Children.

156. In response to the Applicant's request, the MLSW Complaints Commission, referring to the aforementioned provisions of the Family Law, namely Article 194 and Articles 17 and 18 of the MLSW Administrative Instruction, reasoned that "*has no legal support and legal obligation to inform the adopted child about the biological family as long as the biological child does not submit a written request for recognition of the biological parents. The exclusive right to search for the biological parent (s) belongs to the child".*

157. The Court further recalls that as a result of the Applicant's statement of claim in the Basic Court, the latter supported the abovementioned finding of the MLSW Commission by interpreting Article 194 of the Law on Family and Articles 17 and 18 of the Administrative Instruction of MLSW. Following this, the Court of Appeals also found that "*the data of the adoption and its circumstances should not be disclosed or*

investigated without the consent of the adopter and the child unless specifically required by reasons of public interest. In this regard, the Court of Appeals found that in the present case there are no special circumstances of public interest and that such a request is acceptable only to the adoptee and not to his biological parents".

158. Whereas the Supreme Court in addressing the allegations raised by the Applicant in her request for extraordinary review of the Judgment of the Court of Appeals stated that "*Pursuant to Article 194 paragraphs 1 and 2 of the Family Law the facts which could reveal the existence and circumstances of the adoption of the child may not be discovered or investigated without the consent of the adopter and the child, unless this is required for special reasons and is in the public interest. Upon reaching the age of majority, the adoptee acquires the right of access to all information related to his adoption and at his request personal information about his biological parents will be provided. In accordance with Article 17, paragraphs 1 and 2 of the MLSW Administrative Instruction Nr. 09-2014 on the regulation of adoption procedures of children without parental care is determined that, the competent CSW is obliged to maintain the confidentiality and privacy of the child throughout the adoption process, and in no circumstance should provide the documentation from the file of the child, except for competent officials from the CSW, DSWF (MLSW) and the court. In accordance with Article 18 paragraph 1 of the MLSW Administrative Instruction, responsible for data protection and privacy of information collected during the adoption process, are responsible: the Basic Court where the adoption was made and the Custodian Body competent for protection of the child. While in paragraph 2 of the same article it is determined that the adoptee in adulthood has the right to all information related to his adoption and at his request, he will be provided personal information about his biological parents".*

159. The Court, referring also to the Applicant's allegation in the request submitted to the Supreme Court, and in that to the Court places the following emphasis on the reasoning of the Supreme Court as follows: *"In view of the abovementioned articles of the Law and the Instruction and in the opinion of this, the court, the respondent [the Applicant], namely the biological mother of the adopted child has no legal basis to inform the adopted child about his biological mother until the adopted child does not submit a written request to know his biological parents, as this right belongs only to the child. In fact, the position of this court is that the data and circumstances of the adoption should not be disclosed or investigated without the consent of the adopter and the child, unless this is required for special reasons and in the public*

interest. In the present case there are no public benefit interests and such a request is approved only if submitted by the adoptee and not by his biological parents".

160. The Court recalls: (i) the Applicant's specific allegation that the regular courts did not deal with her specific request filed with the Center for Social Work and her statement of claim in the Basic Court, namely that she by the latter had expressly requested to ask the Center for Social Work to notify her adult biological child about his adoption; and (ii) the abovementioned reasoning of the regular courts, considers that the latter have responded to and addressed her request, emphasizing the fact that no legal basis stipulates that the Center for Social Work or MLSW are obliged to inform her biological child about the fact of his adoption.

161. Similarly and in the same line of reasoning, provided by the regular courts, in particular by the Supreme Court, the Court also recalls that cases where a court of third instance, as in the Applicant's case the Supreme Court, which confirms the decisions taken by the lower courts – its obligation to reason decision-making differs from cases where a court changes the decision-making of lower courts (see, similarly, the cases of Court KI194/18, Applicant *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility of 5 February 2020, paragraph 106; and KI122/19, Applicant *F.M.,* Resolution on Inadmissibility, of 9 July 2020, paragraph 100). In the present case, the Supreme Court did not change the decision of the Court of Appeals or that of the Basic Court, by which the Applicant's request submitted to the Center for Social Work was rejected, but only confirmed its finding and legality. In this regard, the Supreme Court found that the Judgment of the Court of Appeals was clear and comprehensible and that it contained sufficient reasoning regarding the decisive facts.

162. In view of the above, the Court considers that in the present case, the Applicant has been given procedural opportunities to address her allegations and that, in substance, she has received a response to her substantive allegations raised in the request for extraordinary review of the decision of the Supreme Court. Therefore, the Court considers that the challenged Judgment meets the criteria and standard established through the case law of the Court and that of the ECtHR for a reasoned court decision, as guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

163. Therefore, based on the above, the Court finds that Judgment [ARJ-UZVP. no. 37/2020] of 11 June 2020, of the Supreme Court is in

compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Conclusions

164. The Court, in assessing the fulfillment of the admissibility criteria, with respect to the Applicant's allegation regarding Article 7 of the Convention on the Rights of the Child, found that this provision does not apply in her case, and as such this allegation is inadmissible. With regard to the Applicant's allegations that the challenged Judgment of the Supreme Court was rendered in violation of Article 8 of the ECHR and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, the Court found that the Referral has met all admissibility criteria, established in the Constitution, Law and Rules of Procedure, and consequently proceeded with the examination of the referral on merits.

165. After assessing the merits of the Applicant's Referral, the Court found that: (i) Judgment [ARJ.UZVP. no. 37/2020] of 11 June 2020 of the Supreme Court in conjunction with Judgment [AA. no. 178/2019] of 15 May 2020, of the Court of Appeals and Judgment [A. no. 651/16] of 25 January 2019, of the Basic Court is in compliance with paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR; and (ii) Judgment [ARJ.UZVP. no. 37/2020] of 11 June 2020 of the Supreme Court is in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

166. First, in order to reach the abovementioned finding, the Court first clarified that the circumstances of the present case, namely the refusal by the public authorities of the Applicant's request to notify her adult biological child about her existence and interest to notify him entail issues relating to the right to privacy, within the notion of the Applicant's private right as guaranteed by paragraph 1 of Article 8 of the ECHR. Accordingly, the Court found that Article 36, paragraph 1 of the Constitution and Article 8, paragraph 1 of the ECHR are applicable in the Applicant's case. In this context and throughout the examination of this case, the Court has elaborated on the general principles deriving from the case law of the ECtHR with regard to paragraph 2 of Article 8 of the ECHR to determine whether the decisions of public authorities to reject the Applicant's request constitute an interference with her right guaranteed by Article 36, paragraph 1 of the Constitution, in conjunction with paragraph 1 of Article 8 of the ECHR, and then applied the latter in the circumstances of the present case. In this regard, and in terms of the subject matter of the Referral, the Court also

clarified that the Applicant's Referral has been dealt with and reviewed in terms of her request submitted to the public authorities and regular courts, and that the subject matter of the Referral is not to review and elaborate on the rights of the adopted child to seek information about biological parents, and which are established by applicable law, international conventions and the case law of the ECtHR.

167. Second, with regard to the allegation of a violation of the right to fair and impartial trial, as a result of the lack of a reasoned court decision, the Court, applying the general principles established through the case law of the Court and of the ECtHR, in the circumstances of the present case found that the challenged Judgment of the Supreme Court meets the criteria and standard for a reasoned court decision, as guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

168. Therefore, and finally the Court found that Judgment [ARJ.UZVP. no. 37/2020] of 11 June 2020 of the Supreme Court is in compliance with the fundamental rights and freedoms of the Applicant guaranteed by: (i) paragraph 1 of Article 36 of the Constitution in conjunction with paragraph 1 of Article 8 of the ECHR; and (ii) Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 7 October 2021, unanimously:

DECIDES

I. TO DECLARE, the Referral admissible;

II. TO HOLD that Judgment [ARJ.UZVP. no. 37/2020] of 11 June 2020, of the Supreme Court is in compliance with Article 36 [Right to Privacy] of the Constitution in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights;

III. TO HOLD that Judgment [ARJ.UZVP. no. 37/2020] of 11 June 2020, of the Supreme Court is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

IV. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20.4 of the Law, to publish the latter in the Official Gazette;

V. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka-Nimani

KI117/21, Applicant: Shefqet Nikqi, Constitutional review of Judgment Rev. No. 360/2020 of the Supreme Court of 2 April 2021

KI117/21, Resolution on Inadmissibility, of 21 October 2021, published on 9 November 2021

Keywords: *individual referral, right to property, equality before the law, judicial protection of rights, manifestly ill-founded referral, fourth instance claims, unsubstantiated and unsupported claims*

It follows from the case file that the Applicant filed statement of claim with the Municipal Court in Peja whereby he specified that after the engagement of the surveyor in 2007, it was ascertained that the border or the boundary line between the immovable property, namely the plots [320/1 and 321/1] registered in the name of the Applicant and the immovable property of the respondents [J.N and D.N], namely the plot [320/2] is not where it is recorded in the cadastral registers but it is a few meters deep in the immovable property of the respondents on the east side of the immovable property of the Applicant. The Applicant's specified statement of claim filed with the Basic Court specified that this disputed immovable property included a surface area of 1670 m2. Consequently, the Applicant requested the Basic Court to (i) approve his statement of claim; (ii) to find that the respondents J.N and D.N have usurped the abovementioned immovable property registered in the certificate of ownership on behalf of the Applicant and (iii) to oblige the respondents to return this part of the immovable property. On 24 May 2013, J.N and D.N, in their capacity as respondents - counterclaimants, filed a counterclaim with the Basic Court whereby they requested that the Applicant's statement of claim be rejected in its entirety and to confirm that J.N is the owner on the basis of the adverse possession of the disputed immovable property. On 17 June 2015, the Basic Court by Judgment C. No. 561/12 among other things (i) rejected as ungrounded the Applicant's statement of claim in its entirety; (ii) approved as partially grounded the statement of claim of the respondent-counterclaimant J.N and confirmed that the latter is the owner on the basis of the adverse possession of the immovable property in the surface area of 1670 m2 between plot 320/1 and 320/2 as well as established in paragraph 4 of Article 28 of the LBPR. Against the Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals, and the latter by Judgment of 29 January 2020, rejected the Applicant's appeal as ungrounded, upholding the finding and position of the Basic Court in entirety. As a result, the Applicant against the aforementioned Judgment of the Court of Appeals filed revision with the Supreme Court. On 2 April 2021, the Supreme Court by Judgment [Rev. No. 360/2020] rejected the Applicant's revision as ungrounded.

The Applicant before the Constitutional Court alleged a violation (i) of his right to equality before the law, guaranteed by Article 24 of the Constitution; (ii) his right to property, guaranteed by Article 46 of the Constitution; and (iii) the judicial protection of his rights, guaranteed by Article 54 of the Constitution.

In assessing the Applicant's allegations, the Court first elaborated on the general principles of its case law and that of the European Court of Human Rights regarding (i) the allegation of a violation of his property right, finding that this allegation is inadmissible, as manifestly ill-founded on constitutional basis as established in Rule 39 (2) of the Rules of Procedure of the Court; and (ii) allegations of violation of Article 24 and Article 54 of the Constitution, the Court found that these allegations are unsubstantiated or unsupported, and therefore, inadmissible as established in Article 48 of the Law on the Constitutional Court, and Rule 39 (1) (d) and (2) of the Rules of Procedure of the Court.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI117/21

Applicant

Shefqet Nikqi

Constitutional review
of Judgment Rev. No. 360/2020 of the Supreme Court
of 2 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 Shefqet Nikqi, residing in Peja, represented with power of attorney by Agim Shala, a lawyer in Peja (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [Rev. No. 360/2020] of 2 April 2021 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ac. No. 2837/15] of 29 January 2020 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [C. No. 561/12] of 17 June 2015 of the Basic Court in Peja (hereinafter: the Basic Court).

3. The Applicant was served with the challenged Judgment of the Supreme Court on 19 April 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, whereby the Applicant alleges that his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law]; 46 [Protection of Property] paragraph 1; and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have been violated.

Legal basis

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

Proceedings before the Court

6. On 28 June 2021, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral.

7. On 8 July 2021, the President of the Court Gresa Caka-Nimani appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 22 July 2021, the Court notified the legal representative about the registration of the Referral and requested him to submit the power of attorney for representation of the Applicant before the Constitutional Court.

9. On 5 August 2021, the Applicant's legal representative submitted the power of attorney requested by the Court.

10. On 13 August 2021, the Court submitted a copy of the Referral to the Supreme Court. On the same date, the Court sent to the Basic Court in Prishtina a request to submit the acknowledgment of receipt, which proves the date when the Applicant was served with the challenged Judgment of the Supreme Court.

11. On 24 August 2021, the Basic Court submitted to the Court the acknowledgment of receipt, which proves that the Applicant was served with the challenged Decision of the Supreme Court on 19 April 2021.

12. On 21 October 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. On 12 July 2012, the Applicant filed a claim with the Municipal Court in Peja for the return of the property occupied by J.N. and D.N. In his statement of claim, the Applicant specified that after the engagement of the surveyor in 2007, it was ascertained that the border or the defining line between the immovable property, namely the plots [320/1 and 321/1] registered in the name of the Applicant and the immovable property of the respondents is not where it is recorded in the cadastral registers but it is a few meters deep in the immovable property of the respondents on the east side of the immovable property of the Applicant. Consequently, the Applicant requested the Municipal Court in Peja to find that the respondents have usurped a part of cadastral plots no. 320/1 and 321/1 registered and evidenced in the certificate of ownership in the name of the Applicant.

14. On 24 May 2013, J.N and D.N filed a counterclaim with the Basic Court in Peja by which they requested that the Applicant's statement of claim be rejected in its entirety and that it be confirmed that J.N is the owner on the basis of the adverse possession. According to J.N and D.N the boundary line between their immovable properties and of the Applicant was determined with the consent of their distant predecessors. According to them, the registration in the cadastral registers cannot change the factual situation, which according to them, was set many years ago.

15. On 11 February 2015, the Applicant submitted the specification of his statement of claim to the Basic Court in Peja, whereby he specified that the disputed immovable property for which he filed a statement of claim covered a surface area of 1670 m2.

16. On 17 June 2015, the Basic Court in Peja, by Judgment C. No. 561/12 (i) rejected the Applicant's statement of claim as ungrounded in its entirety; (ii) approved the statement of claim of the respondent J.N as partially grounded and confirmed that J.N is the owner on the basis of adverse possession of the immovable property of 1670 m2 between

plot 320/1 and 320/2; (iii) rejected the statement of claim of the respondent J.N. by which he claimed to be the owner based on the holding by adverse possession of the part of plot 320/2 in a surface area of 200m2 as partly ungrounded; (iv) obliged the Applicant to recognize the property right to J.N, according to item II of the enacting clause and also to allow the registration of the property in the cadastral books; and (iv) ordered the Applicant to pay to J.N and D.N. the costs of proceedings.

17. The Basic Court in its Judgment stated that in order to fully determine the factual situation on the proposal of the parties and *ex officio* heard the witnesses, appointed a surveyor and also in the presence of the surveyor, the litigating parties and their authorized persons had also realized the site inspection. The Basic Court after assessing the evidence found that the Applicant's statement of claim is ungrounded, and consequently concluded that J.N is the owner based on the holding through adverse possession of the immovable property in a surface area of 1670 m2 between plot 320/1 and 320/2. In relation to the latter, the Basic Court referred to Article 20 of the Law on Basic Property Relations of the SFRY, 1980 (hereinafter: LBPR) finding that J.N. acquired the right of ownership on the basis of good faith and the adverse possession over a period of twenty (20) years. Consequently, the Basic Court, referring to paragraphs 1 and 2 of Article 37 of the LBPR, found that the Applicant had lost the right to return the immovable property after more than twenty (20) years have passed since J.N started to hold the disputed immovable property.

18. On 10 July 2015, the Applicant filed an appeal with the Court of Appeals against the abovementioned Judgment of the Basic Court on the grounds of essential violations of the contested provisions; erroneous and incomplete determination of the factual situation and erroneous application of the substantive law. In the context of his allegation of erroneous application of the substantive law, the Applicant stated that part of his immovable property was usurped and that the respondents hold this part of the immovable property in bad faith.

19. On 29 January 2020, the Court of Appeals by Judgment [Ac. No. 2837/15] rejected as ungrounded the Applicant's appeal and upheld Judgment [C. No. 561/12] of 17 June 2015, of the Basic Court.

20. The Court of Appeals initially found that the above Judgment of the Basic Court did not contain essential violation of the provisions of the contested procedure, that the Basic Court correctly determined the

factual situation and that the latter correctly applied the substantive law.

21. The Court of Appeals held that *"In the present case with the administered evidence, the continuity of possession and expiration of the necessary term for gaining ownership by adverse possession has been proven, as their predecessor but also [J.N and D.N] have held it in unimpeded possession in relation to [the Applicant] since 1973, a fact that has not been contested either by [the Applicant], until the filing of the claim of this case, the latter have not been impeded by the [Applicant]'s predecessors, therefore, the conclusion of the first instance court on the grounds of the statement of claim [J.N and D.N] is in full compliance with the substantive legal provisions, in this case the Law on Basic Legal Property Relations, Article 28, paragraph 4, and that the requirements deriving from the content of the cited provision for the acquisition of property by adverse possession in this disputed case, have been completed cumulatively, therefore, the court of appeals accepts the decision of the first instance court as fair and lawful"*.

22. On 2 April 2020, the Applicant filed a revision with the Supreme Court against the abovementioned Judgment of the Court of Appeals on the grounds of essential violation of the provisions of the contested procedure and erroneous application of the substantive law. The Applicant, *inter alia*, stated that (i) the Basic Court and the Court of Appeals have applied the provisions of the law, namely LBPR, which according to him, is not applicable in the Republic of Kosovo since the entry into force of Law No. 03/L-159 on Property and Other Real Rights in 2009; and also states that (ii) *"in the present case we are not dealing with any acquisition of the ownership of the adverse possession in good faith, because in the present case there is no element of good faith. Also, the Court should have proved that in the present case the relations and family relations between the litigants may be aggravated due to the situation and the reason on which the [Applicant's] predecessor acquired the right of ownership, namely these two plots, plots no. 320/1 and 321 from the possession list no. 78 [...] have been given to the Applicant's predecessor in the name of reconciliation of (blood) entanglement"*.

23. On 2 April 2021, the Supreme Court by Judgment [Rev. No. 360/2020] rejected as ungrounded the Applicant's revision.

24. The Supreme Court initially found that the Judgments of the Basic Court and the Court of Appeals did not contain essential violation of

the provisions of the contested procedure or an erroneous application of substantive law.

25. The Supreme Court also found that J.N. was in possession in good faith and unimpeded by others in the disputed immovable property for more than twenty (20) years and consequently, on the basis of the adverse possession, under paragraph 4 of Article 28 of the LBPR has acquired the right of ownership over this immovable property.

26. The Supreme Court further finds that the fact that the disputed immovable property is evidenced in the name of the Applicant does not constitute a legal basis or a way of acquiring property (*iustus titullus-modus aquirendi*).

27. Finally, the Supreme Court reasoned that in the present case the provisions of the LBPR were applied, because the civil-legal relationship between the litigating parties had been established prior to the entry into force of the Law on Property and Other Real Rights.

28. On 26 May 2021, the Applicant filed a proposal with the State Prosecutor's Office to initiate a request for protection of legality against the Judgment of the Basic Court; Judgment of the Court of Appeals and Judgment of the Supreme Court.

29. On 7 June 2021, the State Prosecutor by Notification [KMLC. No. 49/2021] notified the Applicant that in accordance with paragraph 3 of Article 245 of the LCP his proposal to initiate a request for protection of legality is inadmissible.

Applicant's allegations

30. The Applicant alleges that the challenged Judgment of the Supreme Court was rendered in violation of his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law]; 46 [Protection of Property] paragraph 1; and 54 [Judicial Protection of Rights] of the Constitution.

31. With regard to Article 24 of the Constitution, the Applicant only states that *"These judgments violate the provision of Article 24 of the Constitution of the Republic of Kosovo, because I think that equality of the parties did not exist in the present case."*

32. Secondly, with regard to paragraph 1 of Article 46 of the Constitution, the Applicant alleges that *"There has also been a violation of the provision of Article 46 par. 1 of the Constitution of the Republic of Kosovo, regarding the protection of the right to property, by rejecting the right to the property where I am a legitimate and lawful owner and the property registered in my name"*.

33. Thirdly, in relation to Article 54 of the Constitution, the Applicant only states that *"There has been a [violation] of the provision of Article 54 of the Constitution of the Republic of Kosovo, regarding the judicial protection of rights, here human rights related to property have been violated"*.

34. The Applicant in the context of his abovementioned allegations also specifies that in his case Article 18 of the Law on Property and Other Real Rights has been violated, as well as paragraph 1 of Article 20 and paragraph 1 of Article 33 of the LBPR have been violated. Also, the Applicant alleges that in his case the provisions of the contested procedure have been violated, namely paragraph 2 of Article 182 of the LCP.

35. Finally, the Applicant requests the Court to find:

> *"-Has the Basic Court in Peja decided correctly by Judgment C. No. 561/12 when it rejected my claim in its entirety, when I was in the occupied property when I am a legitimate and lawful owner, I had the property registered in my name as a legitimate heir and this property belongs to my predecessors as compensation for blood feud reconciliation - murder. How can the right of ownership be recognized to a person who is an usurper and possessor in bad faith of the property in question in this legal-civil dispute, when the Law on Property and Other Real Rights states in an explicit manner that the usurper-possessor in bad faith cannot become owner of the immovable property he has in possessions, and this issue has been regulated by both the previous law on LBPR and the current LPORR law.*
>
> *- Has the Basic Court in Peja decided correctly, by its Judgment C. No. 561/12, only for the first respondent - counterclaimant [J.N], bypassing the second respondent - counterclaimant [D.M], and by not justifying at all why it has not been decided in relation to the latter and what is the fate of the usurped property, has it remained in the ownership of the legitimate and lawful owner - claimant, or the usurper.*

[…]

- Has the second instance court (the Court of Appeals of Kosovo) decided correctly according to the law, when it rejected my appeal and upheld in entirety the judgment of the first instance court and the Supreme Court of Kosovo, has it decided according to the law regarding the revision filed by the claimant, as well as the Office of the State Prosecutor, whether it has decided correctly regarding the Request for Protection of Legality.

- Is there an excess of jurisdiction by the court?
- By these court acts, is there an incentive to renew the murders? (This was mentioned as a sensitive case in the present case, not a threat).”

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo
Article 24
[Equality Before the Law]

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

Article 46
[Protection of Property]

1. The right to own property is guaranteed.
[…]

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.

LAW ON BASIC PROPERTY RELATIONS
[promulgated on 30 January 1980]

Article 28

The conscientious and legal holder of the private property, over which somebody else holds the property right, shall acquire the property right over such object through adverse possession after expiration of three years.

The conscientious and legal holder of the real estate, over which somebody else disposes of the property right, shall acquire the property right over such object through adverse possession after the expiration of ten years.

The conscientious holder of the private property, over which somebody else disposes of the property right over such object by adverse possession after expiration of ten years.

The conscientious holder of the real estate, over which somebody else disposes of the property right over such object by adverse possession after expiration of 20 years.

The heir shall become the conscientious holder from the moment of opning the inheritance even in the case when the testator was non- conscientious holder and the heir didn't know nor could have known for that, and the time for adverse possession start to run from the moment of opening the inheritance .

Article 30

The time needed for adverse possession starts to run from the day the holder has entered into the right of possession of the object and it shall be terminated with expiration of the last day of the period needed for adverse possession.

In time needed for adverse possession shall also be counted the time during which the predecessors of the present holder have

been holding the object conscientious and legal holders, that is conscientious holders.

For interruption, that is delay of the adverse possession shall accordingly be applied provisions on interruption, that is delay of the obsolete demand.

Article 33

On the basis of the legal work the property right over a real estate shall be acquired by registration into the "public notary book" (cadastral books) or in some other appropriate way that is prescribed by law.

LAW No. 03/L-154 ON PROPERTY AND OTHER REAL RIGHTS

PART III
OWNERSHIP CHAPTER I
GENERAL PROVISIONS

Article 18
Ownership

1. Ownership is the comprehensive right over a thing. The owner of a thing may, unless it is not contrary to the law or the rights of third parties, deal with the thing in any manner he sees fit, in particular possess and use it, dispose of it and exclude others from any interference.

[...]

Admissibility of the Referral

36. The Court first examines whether the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure have been met.

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

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

[…]

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

38. The Court further refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".

Article 48
[Accuracy of the Referral]

In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

Article 49
[Deadlines]

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. […]

39. With regard to the fulfillment of these requirements, the Court finds that the Applicant is: an authorized party; challenges an act of a public authority, namely Judgment Rev. No. 360/2020 of 2 April 2021 of the Supreme Court; has specified the rights and freedoms he claims to have been violated; has exhausted all legal remedies provided by law, and has submitted the referral within the legal deadline.

40. In addition, the Court also examines whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of

the Rules of Procedure. In this regard, the Court will refer to the relevant rules of the Rules of Procedure as follows:

Rule 39
Admissibility Criteria

"(1) The Court may consider a referral as admissible if:

(...)

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

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

41. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as „*manifestly ill-founded*" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as „*manifestly ill-founded claims*". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of „*fourth instance*"; (ii) claims that are categorized as „*clear or apparent absence of a violation*"; (iii) „*unsubstantiated or unsupported*" claims; and finally, (iv) „*confused or farfetched*" claims". This the Court has also adopted in its case law the concept of inadmissibility on the basis of a claim assessed as "*manifestly ill-founded*", and the specifics of the above four categories of claims qualified as "*manifestly ill-founded*" developed through the case law of the ECtHR, including but not limited to cases KI40/20 with Applicant *Sadik Gashi*, Resolution on Inadmissibility, of 20 January 2021; KI163/18, Applicant *Kujtim Lleshi*, Resolution on Inadmissibility, of 24 June 2020; and KI21/21, Applicant, *Asllan Meka*, Resolution on Inadmissibility, of 28 April 2021).

42. In the context of the assessment of the admissibility of the Referral, namely, the assessment of whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the substance of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of

the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

43. In this regard, and initially, the Court recalls that the circumstances of the present case relate to the statement of claim of the Applicant filed with the Municipal Court in Peja whereby he specified that after the engagement of the surveyor in 2007, it was ascertained that the border or the boundary line between the immovable property, namely the plots [320/1 and 321/1] registered in the name of the Applicant and the immovable property of the respondents is not where it is recorded in the cadastral registers but it is a few meters deep in the immovable property of the respondents on the east side of the immovable property of the Applicant. The Applicant's specified statement of claim filed with the Basic Court specified that this disputed immovable property included a surface area of 1670 m2. Consequently, the Applicant requested the Basic Court to (i) approve his statement of claim; (ii) to find that the respondents J.N and D.N have usurped the abovementioned immovable property registered in the certificate of ownership on behalf of the Applicant and (iii) to oblige the respondents to return this part of the immovable property. On 24 May 2013, J.N and D.N, in their capacity as respondents - counterclaimants, filed a counterclaim with the Basic Court whereby they requested that the Applicant's statement of claim be rejected in its entirety and to confirm that J.N is the owner on the basis of the adverse possession of the disputed immovable property. On 17 June 2015, the Basic Court by Judgment C. No. 561/12 among other things (i) rejected as ungrounded the Applicant's statement of claim in its entirety; (ii) approved as partially grounded the statement of claim of the respondent-counterclaimant J.N and confirmed that the latter is the owner on the basis of the adverse possession of the immovable property in the surface area of 1670 m2 between plot 320/1 and 320/2 as well as established in paragraph 4 of Article 28 of the LBPR. Against the Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals, and the latter by Judgment [Ac. No. 2837/15], of 29 January 2020, rejected the Applicant's appeal as ungrounded, upholding the finding and position of the Basic Court in entirety. As a result, the Applicant against the aforementioned Judgment of the Court of Appeals filed revision with the Supreme Court. On 2 April 2021, the Supreme Court by Judgment [Rev. No. 360/2020] rejected the Applicant's revision as ungrounded.

44. The Court also notes that after the issuance of the Judgment [Rev. No. 360/2020] of 2 April 2021 of the Supreme Court, namely on 26 May 2021, the Applicant filed a proposal with the State Prosecutor's Office

to initiate a request for protection of legality against the Judgments of the Basic Court, the Court of Appeals and the Supreme Court, for which proposal the State Prosecutor by his Notification, of 7 June 2021 notified the Applicant that his proposal is inadmissible.

45. However, the Court recalls that the Applicant in his Referral specifically referred to the Judgment [Rev. No. 360/2020] of 2 April 2021 of the Supreme Court as a final decision, rendered in court proceedings. Having said that, the Court also recalls that the Applicant challenges the findings given by the challenged Judgment of the Supreme Court alleging a violation of his fundamental rights guaranteed by Articles 24 [Equality Before the Law]; 46 [Protection of Property] paragraph 1; and 54 [Judicial Protection of Rights] of the Constitution.

46. The Court will further examine the Applicant's allegation in relation to paragraph 1 of Article 46 of the Constitution to proceed with the examination of his allegations in relation to Articles 24 and 54 of the Constitution.

I. Regarding the allegation of violation of Article 46 of the Constitution

47. The Court recalls that the Applicant in his Referral alleges that his property right has been violated, and in this connection, in essence, specifies that he is the legitimate owner of the abovementioned immovable property, which is registered in the cadastral books in his name. In the context of his allegation of violation of his right to property, the Applicant also alleges a violation of Article 18 of the Law on Property and Other Real Rights and paragraph 1 of Article 20 and paragraph 1 of Article 33 of the LBPR, 1980.

48. In this regard, the Court considers that the Applicant's allegation related to the finding of the regular courts that the respondent - counterclaimant J.N acquired his immovable property on the basis of the adverse possessions as established in paragraph 4 of Article 28 of the LBPR falls into the category of "*fourth instance*" allegations, because it includes issues related to the interpretation and application of the law, namely "*legality*" and not "*constitutionality*".

49. The Court has also consistently asserted that it is not the role of this Court to review the findings of the regular courts concerning the factual situation and the application of substantive law, and that it cannot assess itself the facts which have made a regular court to render

one decision and not another. Otherwise, the Court would act as a court of "*fourth instance*", which would result in disregard for the boundaries set in its jurisdiction (see, in this context, the ECtHR case, *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28 and references used therein; and see also the Court cases, KI49/19, Applicant *Joint Stock Company Limak Kosovo International Airport J.S.C., "Adem Jashari",* Resolution of 31 October 2019, paragraph 48; and KI154/17 and KIO5/18, with Applicants, *Basri Deva, Aferdita Deva and the Limited Liability Company "Barbas"* Resolution on Inadmissibility, of 12 August 2019, paragraph 61).

50. In this regard, and in accordance with its case law and that of the ECtHR, the Court may not, as a general rule, question the findings and conclusions of the regular courts relating to: (i) the verification of case facts; (ii) the interpretation and application of the law; (iii) the admissibility and evaluation of evidence at trial; (iv) substantive justice of the outcome of a civil dispute; (see similarly the case of Court KI163/18, with Applicant *Kujtim Lleshi*, Resolution on Inadmissibility, of 24 June 2020, paragraph 73).

51. With regard to this allegation of the Applicant, the Court notes that all decisions of the regular courts, namely of the Basic Court, the Court of Appeals and the Supreme Court provided the relevant reasoning for the rejection of the statement of claim, appeal and revision. The three instances of the regular courts confirmed that J.N. in the capacity of the respondent-counterclaimant acquired his ownership of the disputed immovable property on the basis of the adverse possession in accordance with paragraph 4 of Article 28 of the LBPR.

52. In this regard, the Court first recalls the finding of the Basic Court, which, *inter alia*, stated that: *"The allegation of [the Applicant] that in the present case [the Applicant] has the right of ownership of the disputed immovable property and registered in the public books, and [J.N and D.N] have usurped a part of the immovable property and that part must be handed over to him [the Applicant] because they hold it without legal basis, as such it is ungrounded, because [the Applicant] has lost the right to request the return of the disputed immovable property within the meaning of Article 37.1 and 2. of the LBPR, because according to the provision of article 28.4 of the LBPR, [J.N] has acquired the right of ownership in the part of the immovable property described as in item II, in the enacting clause of this Judgment, with the adverse possession because more than 20 years have passed that [JN] holds this part of the immovable property and has never been disturbed or impeded by [the Applicant] but a claim of a third party, until the moment of filing the claim and*

that to originally acquire the right of ownership by adverse possession, three conditions must be met cumulatively: that there must be possession of the thing, that the possession of the thing is in good faith and that the thing be kept longer than 20 years uninterruptedly, with a deep conviction that he keeps his property and behaves as the owner of the property, which in this case [J.N] by the evidence administered managed to substantiate these conditions with relevant and necessary facts".

53. Furthermore, the Court also refers to Judgment [Ac. No. 2837/15] of 29 January 2020 of the Court of Appeals, by which the latter, *inter alia*, stated that: "*In the present case with the administered evidence, the continuity of possession and expiration of the necessary term for gaining ownership by adverse possession has been proven, as their predecessor but also [J.N and D.N] have held it in unimpeded possession in relation to [the Applicant] since 1973, a fact that has not been contested either by [the Applicant], until the filing of the claim of this case, the latter have not been impeded by the [Applicant]'s predecessors, therefore, the conclusion of the first instance court on the grounds of the statement of claim [J.N and D.N] is in full compliance with the substantive legal provisions, in this case the Law on Basic Legal Property Relations, Article 28, paragraph 4, and that the requirements deriving from the content of the cited provision for the acquisition of property by adverse possession in this disputed case, have been completed cumulatively, therefore, the appellate court accepts the decision of the first instance court as fair and lawful."*

54. The Court further recalls that the Supreme Court in addressing the Applicant's allegations raised in his revision filed with this Court, in essence (i) found that the Judgments of the Basic Court and that of the Court of Appeals do not contain essential violations of the provisions of the contested procedure and erroneous application of substantive law; (ii) confirmed that J.N was in possession in good faith and unhindered by others in the disputed immovable property for more than twenty (20) years and consequently on the basis of adverse possession under paragraph 4 of Article 28 of the LBPR has acquired the right of ownership over this immovable property; (iii) ascertained that the fact that the disputed immovable property is registered in the name of the Applicant does not constitute a legal basis or a way of acquiring ownership; and (iv) reasoned that in the present case the provisions of the LBPR were applied because the civil-legal relationship between the litigating parties was established before the

entry into force of Law No. 03/L-154 on Property and Other Real Rights.

55. With regard to the Applicant's substantive allegation raised in his revision that the respondents - counterclaimants [J.N and D.N] had usurped the disputed immovable property, which was recorded in the cadastral books and according to the ownership certificate that was registered in his name, the Supreme Court reasoned that *"[...] the mere fact that the disputed immovable property was evidenced on behalf of [the Applicant], does not mean that this represents neither the legal basis nor the manner of acquiring ownership (iustus titullus-modus aquirendi), while, on the other hand, as it follows from the case file, this Court considers that [J.N] has acquired ownership over the above stated immovable property, according to the law, namely based on the institute of civil law-adverse possession-holding, namely, based on the legal provisions of Article 20, namely Article 28.4 of the Law on Basic Legal Property Relations [...]."*

56. The Court recalls that the Applicant his allegation of violation of his right to property, as a result of the rejection of his statement of claim and the finding of the regular courts that J.N has acquired ownership on the basis of adverse possession, in essence bases on the fact that the disputed immovable property is registered in his name and that the respondents - counterclaimants have held this part of the immovable property in bad faith.

57. With regards to the latter, the Court recalls that Article 46 of the Constitution does not guarantee the right to acquire property. Such a position is based on the ECtHR case law (See *Van der Mussele v. Belgium*, paragraph 48, ECtHR Judgment, of 23 November 1983; and *Slivenko and Others v. Latvia*, paragraph 121, ECtHR Judgment, of 9 October 2003).

58. The Applicant may allege a violation of Article 46 of the Constitution, only insofar as the challenged decision relates to his "property". Within the meaning of this provision, "property" may be "existing possessions", including claims in respect of which the applicants may have "legitimate expectations" that they will acquire an effective enjoyment of any property right (see the cases of the Constitutional Court KI26/18, Applicant "*Jugokoka*", Resolution on Inadmissibility, of 6 November 2018, paragraph 49; and case KI156/18, Applicant *Verica (Aleksić) Vasić and Vojislav Čađenović*, Resolution on Inadmissibility, of 17 July 2019, paragraph 52 and case KI41/19, Applicant *Ramadan Koçinaj*, Resolution on Inadmissibility, of 15 January 2020, paragraph 60).

59. In the light of the abovementioned facts, despite the fact that the Applicant has not expressly raised allegations related to a fair trial (guaranteed by Article 31 of the Constitution), the Court considers it necessary to point out that the Applicant was able to conduct the procedure based on the principle of adversarial proceedings; that he was able to present arguments and evidence he considered relevant to his case during the various stages of the proceedings; and that all the arguments, viewed objectively, which were relevant to the resolution of his case have been duly heard and examined by the courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in their entirety, were fair.

60. Therefore, based on the above, the Court considers that the Applicant has not substantiated as to how the decision on rejection of his statement of claim by the Basic Court and the finding of the latter that J.N acquired the disputed immovable property, which was evidenced on behalf of the Applicant, on the basis of adverse possession for holding it for more than twenty (20) years, a decision upheld by the Court of Appeals and the Supreme Court, has violated his right to property, guaranteed by paragraph 1 of Article 46 of the Constitution. Consequently, the Court concludes that this allegation of the Applicant of violation of his property rights, guaranteed by paragraph 1 of Article 46 of the Constitution is manifestly ill-founded on constitutional basis as established in Rule 39 (2) of the Rules of Procedure.

I. Regarding Articles 24 and 54 of the Constitution

61. Based on the above, the Court notes that the Applicant alleges a violation of equality before the law, guaranteed by Article 24 of the Constitution. In this regard, the Applicant only stated that "*I think that equality of the parties did not exist in the present case*" by not elaborating and further reasoning how this right guaranteed by the Constitution has been violated in his case.

62. As to his allegation of a violation of Article 54 of the Constitution, the Applicant states that "*There has been a [violation] of the provision of Article 54 of the Constitution of the Republic of Kosovo, regarding the judicial protection of rights, here, the human rights related to property have been violated.*" In addition, the Court notes that the Applicant has not elaborated and specified at all how this article of the Constitution has been violated in his case, nor does he specify whether this Article has been violated because of a violation of any other right guaranteed by the Constitution.

63. In this context, the Court states that, pursuant to Article 48 of the Law and paragraphs (1) (d) and (2) of Rule 39 of the Rules of Procedure and its case law, it has consistently stated that (i) the parties have an obligation to accurately clarify and adequately present the facts and allegations; and also (ii) to sufficiently prove and substantiate their allegations of violation of constitutional rights or provisions. (see cases of the Court KI163/18, Applicant *Kujtim Lleshi*, cited above, paragraph 85, and KI124/20 Applicant *Muhamed Ali Ceysűlmedine*, Resolution on Inadmissibility, of 20 January 2021, paragraph 42).

64. Based on the above, the Court considers that the Applicant's allegation of violation of Articles 24 and 54 of the Constitution are "*unsubstantiated or unsupported*" claims, and consequently, inadmissible as established in Article 48 of the Law and Rule 39 (1) (d) of the Rules of Procedure.

65. Therefore, and finally, the Court finds that the Applicant's Referral is inadmissible because, the allegation (i) regarding Article 46 of the Constitution is manifestly ill-founded on constitutional basis as established in Rule 39 (2) of the Rules of Procedure; whereas (ii) with regard to Articles 24 and 54 of the Constitution, it is inadmissible as "*unsubstantiated or unsupported*" as established in Article 48 of the Law and Rule 39 (1) (d) and (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20, 47 and 48 of the Law and Rules 39 (1) (d) and (2) and 59 (2) of the Rules of Procedure, in the session held on 21 October 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Gresa Caka-Nimani

KI189/21, Applicant: IPKO Telecommunications L.L.C, Constitutional review of Judgment ARJ-UZPV. No. 17/2020, of the Supreme Court of the Republic of Kosovo, of 20 January 2020

KI189/21, Judgment of 20 October 2021, published on 11 November 2021

Keywords: *individual referral, unreasoned court decision*

The circumstances of the present case are related to the allegations of the Applicant, in the capacity of provider of electronic communications services, that based on the Law on Electronic Communications and for purposes of public interest, is exempted from the payment of tax on immovable property, an allegation which in addition to the Judgment of the Basic Court, was also rejected by the respective Municipality as well as by the Judgments of the Court of Appeals and the Supreme Court, respectively which the Applicant challenges before the Court.

It is noted from the case file that after being charged with the payment of tax on immovable property for "BTS Antena" by the Municipality of Gjakova, the Applicant has filed a complaint with the Municipal Board for complaints on tax on immovable property, with the reasoning that the imposition of a property tax invoice is contrary to Article 22 (Basis for the Installation of Electronic Communications Infrastructure) of the Law on Electronic Communications, according to which provision the same alleged that he is exempted from payment of property tax. The Municipality of Gjakova rejected the Applicant's appeal as ungrounded, upholding the property tax invoice. In the proceedings before the regular courts, the Basic Court had initially approved the statement of claim of the Applicant filed against the Municipality of Gjakova, obliging the latter to exempt the Applicant from property tax debt. However, the Court of Appeals and the Supreme Court, respectively, acting upon the appeal of the Municipality of Gjakova and subsequently, upon the request for extraordinary review of the court decision of the Applicant, amended the Judgment of the Basic Court, finally rejecting the Applicant's allegations, which based on the Law on Electronic Communications, was exempted from property tax.

The Applicant, before the Supreme Court, alleged inter alia, that the Judgment of the Court of Appeals by which the Judgment of the Basic Court was amended did not meet the criteria of a reasoned court decision, because it did not clarify the difference between the property tax from which electronic communications networks and associated facilities are exempted, because their construction is in the public interest in accordance with Law on Electronic Communications, and tax on immovable property from which they are not exempted according to the Law on Immovable Property Tax. The

Applicant also referred to the interpretation of the Regulatory Authority of Electronic and Postal Communications according to which, tax on immovable property and property tax referred to, in the two respective Laws have the same meaning, and the operators of electronic communications networks are exempted from the same. Taking into account that according to the Applicant, the Supreme Court only confirmed the decision of the Court of Appeals and did not address nor justified his allegations raised with the request for extraordinary review of the decision, before the Court, the Applicant alleged a violation of his right to a fair and impartial trial guaranteed by the Constitution and the European Convention on Human Rights.

In assessing the Applicant's allegations, the Court first elaborated on the general principles of its case law and that of the European Court of Human Rights with regard to the right to a reasoned court decision, and then applied the same to the circumstances of the present case. The Court, based on its consolidated case law, and as far as it is relevant to the circumstances of the present case, stated, inter alia, that the failure to provide clear and complete answers regarding the substantive and defining allegations raised by the Applicant and that are related to the distinctive specifics of tax on immovable property and property tax defined by two laws, the Law on Immovable Property Tax and the Law on Electronic Communications, respectively, is not in accordance with the guarantees associated with the right to a reasoned decision, as an integral part of the right to a fair and impartial trial guaranteed by the Constitution and the European Convention on Human Rights.

Consequently and based on the explanations given in the published Judgment, the Court found that the challenged Judgment of the Court was issued in violation of the procedural guarantees set out in Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights, remanding the same to the Supreme Court for reconsideration.

JUDGMENT

in

case no. KI189/20

Applicant

IPKO Telecommunications LL.C

Constitutional review
of Judgment ARJ-UZPV. No. 17/2020, of 20 January 2020
of the Supreme Court of the Republic of Kosovo

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 company IPKO Telecommunications LL.C, which is represented by lawyer Isamedin Dedinca from the Municipality of Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [ARJ-UZPV. no. 17/2020] of 20 January 2020, of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), in conjunction with Judgment [AA. no. 585/2018] of 1 November 2019, of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) and Judgment [A. no. 2105/14] of 6 September 2018, of the Basic Court in Prizren (hereinafter: the Basic Court)

3. The challenged Judgment was served on the Applicant on 10 September 2020.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, whereby the Applicant alleges that its fundamental rights and freedoms guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial] and 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR) and Article 10 of the Universal Declaration of Human Rights (hereinafter: UDHR) have been violated.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 24 December 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 30 December 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

8. On 14 January 2021, the Court notified the Applicant about the registration of the Referral, and requested it to fill in the referral form of the Court.

9. On 14 January 2021, the Court notified the Supreme Court about the registration of the Referral and provided it with a copy of the Referral.

10. On 28 January 2021, the Applicant submitted to the Court the requested completion, namely the referral form of the Court.

11. On 29 April 2021, the Court requested the full case file from the Basic Court.

12. On 30 April 2021, the Basic Court submitted the case file to the Court.

13. On 17 May 2021, the Court notified the Municipality of Gjakova in the capacity of the interested party, about the registration of the Referral.

14. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court.

15. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

16. On 27 May 2021, the President of the Court, Arta Rama-Hajrizi, appointed Judge Selvete Gërxhaliu-Krasniqi as a member of the Review Panel instead of Judge Bekim Sejdiu. Judge Selvete Gërxhaliu-Krasniqi was appointed as Presiding of the Review Panel.

17. On 28 May 2021, the Municipality of Gjakova submitted its comments to the Court via email.

18. On 25 June 2021, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

19. On 30 June 2021, the Review Panel considered the report of the Judge Rapporteur and requested the supplementation of the report.

20. On 20 October 2021, the Review Panel considered the report of the Judge Rapporteur and by majority recommended to the Court the admissibility of the Referral.

Summary of facts

21. On 7 February 2014, the Municipality of Gjakova submitted to the Applicant the Property Tax Invoice no. [102120/30227493] of 14 January 2014, for BTS antenna for 2014, by which the Applicant was obliged to pay property tax for 2014 in the amount of 4,160 euro, until 30 June 2014, the second installment in the amount of 4,160 euro until 31 December 2014 and to pay immediately the debt for previous years in the amount of 42,608 euro, a total amount of 50,928.00 euro.

22. On 28 February 2014, the Applicant filed a complaint with the Municipal Board for Immovable Property Tax Complaints, Directorate of Economy and Finance of the Municipal Assembly of Gjakova, reasoning that the imposition of a property tax invoice is contrary to the general principle of legality under Article 3 (The principle of legality) of the Law on Administrative Procedure and represents a violation of the provision of paragraph 6 of Article 22 (Basis for the Installation of Electronic Communications Infrastructure) of the Law on Electronic Communications (hereinafter: LEC) according to which provision the immovable property tax does not apply to electronic communications networks and associated facilities, including those used for the mobile networks (GSM), base stations, satellites and underground infrastructure.

23. On 7 March 2014, the Municipal Board for Review of Immovable Property Tax Complaints, Municipality of Gjakova by Decision No. [03-430-2026] (i) rejected the Applicant's complaint as ungrounded; and (ii) upheld the property tax invoice [102120/30227493] of 14 January 2014.

24. On 17 October 2014, the Applicant by a lawsuit filed with the Basic Court in Prishtina, Department for Administrative Matters (hereinafter: the Basic Court) initiated an administrative dispute against the respondent Municipality of Gjakova, on the grounds of procedural violations, erroneous application of substantive law, with the proposal to approve the lawsuit as grounded and to annul the abovementioned decision of the Municipality of Gjakova.

25. On 4 July 2016, the Municipality of Gjakova in its capacity as an interested party filed a response to the lawsuit challenging in entirety the Applicant’s allegations as ungrounded.

26. On 6 September 2018, the Basic Court by Judgment [A. no. 2105/14]: (i) approved the Applicant’s statement of claim; (ii) annulled Decision

no. [03-430-2026] of 7 March 2014, of the Municipality of Gjakova - Municipal Board for Complaints; and (iii) obliged the Municipality of Gjakova-Municipal Board to review of immovable property tax complaints in order to exempt the Applicant from the property tax debt including interest and penalties according to invoices no. [102120/30227493] of 14 January 2014.

27. On 19 October 2018, the respondent Municipality of Gjakova, in the capacity of the interested party, filed an appeal with the Court of Appeals, on the grounds of violation of the provisions of the Law on Administrative Procedure, erroneous and incomplete determination of the factual situation, erroneous application of substantive law, with the proposal to annul the appealed Judgment and to remand of case to the first instance court for reconsideration and retrial.

28. On 1 November 2019, the Court of Appeals by Judgment [AA. no. 585/2018]: (i) approved the appeal of the interested party as grounded and modified the Judgment of the Basic Court; (ii) rejected the statement of claim of the Applicant, by which it requested the annulment of Decision no. [03-430-2026] of 07 March 2014, of the interested party – the Municipality of Gjakova; (iii) upheld Decision no. [03-430-2026] of 07 March 2014, of the Municipality of Gjakova .

29. On 22 November 2019, the Applicant submitted to the Regulatory Authority for Electronic and Postal Communications (hereinafter: RAEPC) the request for interpretation of the provision of Article 22 paragraph 6 of the LEC. On 9 December 2019, RAEPC submitted to the Applicant the Official Memo [no. 642\2\19] of the interpretation of Article 22 paragraph 6 of the LEC, where it emphasized that:

> *"in the interpretation of RAEPC it is more than clear that this provision has to do with tax on immovable property.*
> *[...]*
> *[...] any tariff imposed on electronic communications service providers, other than those referred to in the Law, turns out to be contrary to the Law and has a negative impact on the extension of the infrastructure of electronic communications network operators.*
> *RAEPC once again confirms that Article 22 par. 6 of the Law on Electronic Communications deals with tax on immovable property."*

30. On 10 December 2019, the Applicant filed with the Supreme Court a request for extraordinary review of the court decision, on the grounds of violation of the provisions of the procedure and erroneous application of substantive law with a proposal that: The Applicant's Referral be approved as grounded, and to modify the Judgment of the Court of Appeals. The Applicant stated that the Court of Appeals did not give any reasoning what is meant by property tax defined by the provision of Article 22 paragraph 6 of the LEC, why the tax on immovable property is not the same as property tx, where the difference is, for what the immovable property tax is applied and for what property tax is applied in order for the reasoning of this Judgment to contain the reasons on the decisive facts and for what reasons the second instance court decided as in the enacting clause of the Judgment. The Applicant also attached as evidence to this request also RAEPC Official Memorandum, which specified that tax on immovable property and property tax are the same within the meaning of Article 22 paragraph 6.

31. On 21 December 2019, the Municipality of Gjakova, by opposing the Applicant's request for extraordinary review, challenged in entirety its allegations, proposing that the request be rejected as ungrounded. Among other things, the Municipality of Gjakova requested the Supreme Court to request from the *Government of the Republic of Kosovo - Ministry of Finance, the interpretation of Article 22 paragraph 6 of Law no. 04/L-109 on Electronic Communications or what is meant by the term "tax on immovable property" and what by the term "property tax"*.

32. On 20 January 2020, the Supreme Court of Kosovo (hereinafter: the Supreme Court) by Judgment [ARJ-UZVP. No. 17/2020] rejected as ungrounded the Applicant's request for extraordinary review of the court decision, filed against Judgment [AA. UZH. No. 585/2018] of 1 November 2019, of the Court of Appeals.

Applicant's allegations

33. The Applicant alleges that Judgment ARJ-UZPV. No. 17/2020 of the Supreme Court, of 20 January 2020, was rendered in violation of the fundamental rights and freedoms guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial] and 53 [Interpretation of Human Rights Provisions] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 10 of the UDHR.

34. Initially, the Applicant alleges that the court proceedings conducted before the Court of Appeals and the Supreme Court were irregular, because the court decisions were rendered with essential violations of the provisions of the contested procedure, they lack the reasons on the decisive facts, the reasoning does not contain the requests of the Applicant, therefore these decisions are arbitrary and represent a violation of individual rights guaranteed by Article 31 of the Constitution, Article 10 of the UDHR, as well as Article 6 of the ECHR.

35. The Applicant states that the Court of Appeals has arbitrarily applied the provisions of paragraph 3.1 of Article 8 (Exemption from Immovable Property Tax) of the Law on Immovable Property Tax, because it has not reasoned what is the difference between the tax on immovable property and property tax provided by the provision of Article 22 paragraph 6 of the LEC, for what the tax on immovable property is applied and for what property tax is applied. The Applicant also alleges that the Court of Appeals did not provide any reasoning as to why the conclusion of the first instance court that the Law on Immovable Property Tax could not be applied as *Lex Specialis* in this case is ungrounded, but as such *(Lex Specialis)* should be considered the Law on Electronic Communications according to the legal principle "*lex specialis derogat legi generali*".

36. In addition, the Applicant states that in another case (Case A. no. 1073/14, AA. ru. 52/2016) for the same issue on the property tax (for electronic communications network) imposed on the Applicant from the Municipality of Suhareka, the first instance court approved the statement of claim of the Applicant IPKO Telecommunication LLC, remanded the case for reconsideration and retrial, so that it obliged the respondent when deciding to take into account the Official Memo issued by RAEPC and that the Court of Appeals upheld the decision of the first instance court. While in the present case, contrary to its legal position in the aforementioned case, the Court of Appeals did not take into account the Memorandum of RAEPC and did not give any reason why it should not be taken into account in this case, while it had previously decided otherwise.

37. The Applicant further states that the Supreme Court did not reason what is meant by property tax defined by the provision of Article 22 paragraph 6 of the LEC, why the tax on immovable property and property tax are not the same, where is the difference, for what tax on immovable property is applied and for what property tax is applied, as well as did not address the issue that LEC should be treated as *Lex*

Specialis in this case according to the principle "*lex specialis derogat legi generali* ".

38. The Applicant also alleges that the Supreme Court did not take into account the evidence provided by it, regarding the interpretation of the LEC, namely the Official Memorandum of RAEPC, of 6 December 2019 as the competent authority for interpretation. of the provisions of the LEC, which states that the tax on property as defined by the provision of Article 22 paragraph 6 of the LEC relates to property tax and as such, the operators are exempt from this type of tax.

39. In relation to the issues raised above, the Applicant alleges that the court has erroneously applied the provision of Article 8 paragraph 3.1 of the Law No. 03/L-204 on Immovable Property Tax which stipulates that "*exemption from this tax does not apply when the property is used, or retained for use, for commercial activities or generation of revenues"*, as this legal provision applies to other businesses that use the property or maintain commercial activity, but for the Applicant the situation is completely different, because he is an operator who provides services of public interest and with a special law which regulates in its entirety the field of electronic communications tax on property/property tax for equipment and other facilities is exempted, as defined in the provision of Article 22 paragraph 6 of the LEC.

40. The Applicant also mentions some cases of the Court regarding the case law of the Court for unreasoned decision, including cases KI135/14, Applicant *IKK Classic*, KI18/16, Applicant *Bedri Salihu*, KI31/17, Applicant *Shefqet Berisha*, KI97/16, Applicant *IKK Classic*, KI35/18, Applicant *Bayerische Versicherungsverbrand*.

41. Finally, the Applicant requests the Court to find that (i) the Referral of Applicant IPKO Telecommunications L.L.C is admissible; (ii) To find a violation of the Applicant's individual rights guaranteed by Article 31 paragraph 1 and 2 of the Constitution, Article 10 of the Universal Declaration and Article 6 of the European Convention, as a result of violations by the Court of Appeals and the Supreme Court of the rights guaranteed by these instruments and the Law on Contested Procedure; (iii) To declare invalid Judgment [ARJ-UZVP. No. 17/2020] of the Supreme Court of Kosovo of 20 January 2020, challenged in this Referral and remand the case for retrial to the Supreme Court of Kosovo.

Comments of the interested party

42. The Municipality of Gjakova in the capacity of the interested party submitted its comments entitled "response to the referral", through which it considers that the allegations of the Applicant, namely the company "IPKO TELECOMMUNICATIONS L.L.C" are ungrounded in entirety.

43. The Municipality of Gjakova further stated that in the present case it has decided based on the legal definition of the Law on Property Tax no. 06/L-005, which has priority in application. Also, the Municipality of Gjakova emphasizes that in order to remove the dilemmas of distinguishing the terms "immovable property tax" and "property tax" the Government of Kosovo should be requested, namely the Ministry of Finance to interpret Article 22 paragraph 6 of the Law on Electronic Communications.

44. Finally, the Municipality of Gjakova opposes the Applicant's Referral in entirety as ungrounded and contrary to the factual and legal situation, with the proposal that the Court issues a Decision by which: it would (i) DECLARE the Referral of "IPKO TELECOMMUNICATIONS LLC" inadmissible; (ii) NOTIFY this decision to the parties; (iii) PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

[...]

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

Law No. 03/L-204 on Taxes on Immovable Property

Article 8
Exemption from Immovable property tax

1. The institutions or organizations that own or use the property and shall exempted from immovable property tax are as follows:

[...]

3. Pursuant to paragraph 1 of this Article, exemption from this tax does not apply when:

3.1. the property is used, or retained for use, for commercial activities or generation of revenues;

Law No. 04/L-109 on Electronic Communications

Article 22
Basis for the Installation of Electronic Communications Infrastructure

6. The construction of public communications networks and associated facilities is in the public interest. The immovable property tax do not apply for public communications networks and associated facilities, including those used for the mobile (e.g.

GSM), base stations, satellites and the underground infrastructure.

Assessment of admissibility of the Referral

45. The Court first examines whether the admissibility requirements established in the Constitution, and further specified in the Law and in the Rules of Procedure have been met.

46. In this respect, the Court initially refers to paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

Article 21

"[...]

5. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

Article 113

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

[...]

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

47. The Court further refers to the admissibility requirements as specified by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual

rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]."

48. Initially, The Court clarifies that, in accordance with Article 21.4 of the Constitution, the Applicant is entitled to file a constitutional complaint, by referring to alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as for legal persons (see cases of the Court, KI10/20, Applicant *"Regional Water-Supply Company "Hidroregjioni Jugor" J.S.C. – Unit Malësia e Re Prizren,* Resolution on Inadmissibility of 5 October 2020, paragraph 35; case KI41/09, Applicant *University AAB-RIINVEST L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

49. Further, regarding the fulfillment of the abovementioned procedural criteria for the admissibility of constitutional referrals, the Court first states that the Applicant is an authorized party, challenging an act of a public authority, namely Judgment ARJ-UZVP. no. 17/2020 of 20 January 2020, of the Supreme Court, after having exhausted all legal remedies provided by Law. The Applicant also clarified the fundamental rights and freedoms it alleges to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

50. The Court finally considers that the Referral cannot be considered manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure and there is no other ground for declaring it

inadmissible. Therefore, it must be declared admissible (see also ECtHR case *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

Merits of the Referral

51. The Court recalls that the Applicant alleges a violation of his rights guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial] and 53 [Interpretation of Human Rights Provisions] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR as well as Article 10 of the UDHR.

52. In this context, the Court first recalls that the circumstances of the case relate to the Applicant's statement of claim for payment of immovable property tax for BTS Antenna by the Municipality of Gjakova. The Applicant filed a complaint with the Municipal Board for complaints in immovable property tax, on the grounds that the imposition of a property tax invoice is contrary to the provision of paragraph 6 of Article 22 (Basis for the installation of electronic communications infrastructure) of the LEC, according to which provision the latter claimed to be exempt from payment. The Municipality of Gjakova rejected as ungrounded the Applicant's appeal, upholding the property tax invoice. Subsequently, the Basic Court approved the statement of claim of the Applicant, filed against the Municipality of Gjakova, obliging the latter to exempt from property tax debt. Acting on the respective appeal of the Municipality of Gjakova, the Court of Appeals, approves as grounded its appeal in which case it rejected the statement of claim of the Applicant. Against the Judgment of the Court of Appeals, the Applicant filed a request for extraordinary review of the court decision, stating that the Judgment of the Court of Appeals lacked the reasoning on the decisive facts, namely the reasoning of what "*property tax*" means, and had attached as evidence the Official Memorandum of RAEPC, which specified that tax on immovable property and property tax are the same within the meaning of Article 22 paragraph 6 of the LEC. This request was rejected as ungrounded by the Supreme Court which stated that the Municipality of Gjakova did not oblige the Applicant for the tax on immovable property, but invoiced him for the property tax, but the latter did not clarify what the property tax is, as well as had not addressed the official Memorandum of RAEPC. The Applicant challenges before the Court the findings of the Court of Appeals and the Supreme Court, alleging, in essence, a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, which resulted in an unreasoned decision

as a result of failure to provide a specific answer to the decisive allegation as to what the property tax is, which would enable its exemption from the obligation to pay property tax. The Court will then review and assess the Applicant's allegations.

53. The Applicant mainly alleges that the challenged Judgment of the Supreme Court, violates its rights to a *reasoned decision* were violated, because his essential arguments, which were essential for the correct determination of factual situation, were not addressed, namely his exemption from the obligation to pay tax on immovable property, as well as the correct application of substantive law, namely Article 22 paragraph 6 of the LEC. Thus, the Court notes that the Applicant's substantive allegations relate to the lack of reasoning of the decisions of the Court of Appeals and the Supreme Court as a result of not addressing his substantive arguments.

54. The Court notes that the right to a reasoned decision is guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and its application has been interpreted by the European Court of Human Rights (hereinafter: the ECtHR) through its case law. The Court based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution, in accordance with the case law of the ECtHR. Therefore, with regard to the interpretation of the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECtHR.

(i) General principles on the right to a reasoned decision as developed by the case law of the Court and the ECtHR

55. Regarding the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court initially notes that it has already consolidated case law. This case law was built based on the ECtHR case law (including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22

February 2007. In addition, the fundamental principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to cases KI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and Others,* Resolution on Inadmissibility of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment, of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment, of 27 May 2019, KI35/18, Applicant *Bayerische Versicherungsverbrand*, Judgment, of 11 December 2019; and case of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020).

56. In principle, the Court notes that the guarantees enshrined in Article 31 of the Constitution, include the obligation for courts to give sufficient reasons for their decisions (see cases of the Court, KI09/20, Applicant *"SUVA" Rechtsabteilung,* Judgment of 31 May 2021, paragraph 56; KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139).

57. The Court also notes that based on its case law, which is based on the ECtHR case law, in assessing the principle which refers to the proper administration of justice, the court decisions must contain the reasoning on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. It is the substantive arguments of the Applicants that need to be addressed and the reasons given need to be based on the applicable law (see ECtHR cases *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42, see also the case of the Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). By not seeking a detailed response to each complaint raised by the Applicant, this obligation implies that the parties to the proceedings may expect to receive a specific and explicit response to their claims that are crucial to the outcome of the proceedings (see case *Morerira Ferreira v. Portugal*, Judgment of 5 July 2011, paragraph 84, and all references used therein; and case of the Court KI230/19, Applicant *Albert Rakipi,* Judgment of 9 December 2020, paragraph 137).

58. The case law of the ECtHR states that the essential function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision gives an opportunity to the party

to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be a public scrutiny of the administration of justice (see, *mutatis mutandis*, ECtHR cases, *Hirvisaari v. Finland*, no. 49684/99, Judgment of 27 September 2001, paragraph 30; T*atishvili v. Russia*, application no. 1509/02, Judgment of 22 February 2007, paragraph 58; and *Suominen v. Finland*, application no. 37007/97, Judgment of 1 July 2003 paragraph 37).

59. However, even though the ECtHR states that Article 6 of the ECHR obliges the courts to provide reasons for their decisions, this obligation cannot be understood as requiring a detailed answer to each allegation. (See: ECtHR cases, *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61; *Higgins and others v. France*, application no. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42).

60. The extent to which the obligation to provide reasons is applied may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case (See: ECtHR cases *Garcia Ruiz v. Spain*, application no. 30544/96, judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27 and *Higgins and Others v. France*, cited above, paragraph 42).

61. The courts are therefore required to consider: the main arguments of the litigants (see ECtHR cases *Buzescu v. Romania*, application no. 61302/00, Judgment of 24 May 2005, paragraph 67; *Donadze v. Georgia*, application no. 74644/01, Judgment of 7 March 2006, paragraph 35); the claims concerning the rights and freedoms guaranteed by the Convention and its Protocols, which are required to be examined with the utmost rigor and due diligence (see ECtHR cases: *Fabris v. France*, application no. 16574/08, Judgment of 7 February 2013 paragraph 72; *Wagner and JMWL v. Luxembourg*, application no. 76240/01, Judgment of 28 June 2007, paragraph 96).

62. However, the ECtHR also noted that, although the courts have a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' allegations, a domestic court is obliged to reason its activities by giving reasons for its decisions (Case of the ECtHR, see *Suominen v. Finland*, cited above, paragraph 36).

63. Therefore, it is not necessary for the regular courts to deal with every point raised in the Applicant's argument (see also case of the ECtHR *Van de Hurk v. The Netherlands*, cited above, paragraph 61), the main arguments of the applicants need to be addressed (see cases of the ECtHR *Buzescu v. Romania*, application no. 61302/00, Judgment of 24 May 2005, paragraph 63; *Pronina v. Ukraine*, application nr. 63566/00, Judgment of 18 July 2006, paragraph 25). Also, giving a reason for a decision that is not well grounded in law will not meet the criteria of Article 6 of the ECHR.

64. Finally, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and the reflections when the proposed evidence are considered on the one hand, and the legal conclusions of the court, on the other. A judgment of the court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; and KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58).

65. Further, when a party's claim is decisive for the outcome of the proceedings, the latter seeks a specific and expressive response (see ECtHR cases: *Ruiz Torija v. Spain*, paragraph 30; *Hiro Balani v. Spain*, paragraph 28; and compare *Petrović and others v. Montenegro*, paragraph 43).

66. In case *Hiro Balani*, the Applicant challenged the lawsuit for removal of her trademark from the register, *inter alia*, by a submission based on the preference of another trademark she owned. This submission was made in writing before the regular courts and was formulated quite clearly and accurately. An official testimony was presented with it as evidence. The Supreme Court, which quashed the first-instance decision and rendered a new decision on the merits, was obliged, under the applicable procedural law, to review all submissions made during the proceedings, as they had been "the subject of the argument".

(i) Application of the abovementioned principles in the present case

67. The Applicant alleges that by the Judgment of the Court of Appeals and the Supreme Court it fails to understand why it is denied its right

to exemption from immovable property tax, given that its essential allegations have not been addressed and nor are they reasoned by the challenged Judgment. In particular, the Applicant states that the Supreme Court rendered an unreasoned decision as a result of not giving a specific answer to the decisive allegation of what is property tax, which would enable its exemption from the obligation to pay tax/property tax.

68. The Court notes that the Applicant, during the court proceedings before the regular courts, namely the Court of Appeals and the Supreme Court, has alleged that they have not rendered a reasoned decision as to what is meant by exemption from certain immovable property tax defined by the provision of Article 22 paragraph 6 of the LEC, why immovable property tax and property tax are not the same, where is the difference between them, for what is the property tax applied, and the issue that the LEC should be treated as *Lex Specialis* in the relation with the Law on Immovable Property Tax is not addressed, according to the principle "*Lex specialis derogate legi generali*". The Applicant also claims that the Supreme Court did not take into account the decisive evidence provided by it, regarding the interpretation of the LEC, namely the Official Memo of 6 December 2019, of RAEPC, as the competent authority for the interpretation of the provisions of the LEC, which states that the property tax as defined by the provision of Article 22 paragraph 6 of the LEC relates to property tax and as such, the operators are exempt from this type of tax.

69. From the case file the Court notes that the Court of Appeals, in relation to the Applicant's allegations, provided this reasoning:

> *"Law no. 04/L-109 on Electronic Communications, namely Article 22 par.6, which stipulates that: "The construction of public communications networks and associated facilities is in the public interest. The immovable property tax do not apply for public communications networks and associated facilities, including those used for the mobile (e.g. GSM), base stations, satellites and the underground infrastructure". This legal provision cannot be applied in the present case, because such a provision is related to the property tax and not to the property fee. The respondent has invoiced the claimant for BTS Antennas located in the Municipality of Gjakova, namely the use of commercial activity through which the internet service and television are sold, the creation of revenues. by Article 3 par.1 item 1, of the Law no. 03/L204 on Immovable Property Tax,*

which stipulates that: "1. Terms used in this law will have the following meaning: 1.1. Immovable property- land and buildings, establishments, structures, below or above the land surface and connected to the land. Immovable property shall include units within buildings such as apartments, areas for commercial and industrial purposes", whereas Article 8 paragraph 3.1 establishes that: "3. Pursuant to paragraph 1 of this Article, exemption from this tax does not apply when: 3.1. the property is used, or retained for use, for commercial activities or generation of revenues", therefore based on the above provisions and taking into account the fact that the respondent did not oblige the claimant for property fee but billed the claimant for property tax, for BTS Antennas located in the Municipality of Gjakova because, from these antennas are sold internet and television service, the same generates revenues for the claimant, and the law on immovable property tax does not provide for exemption from property tax for this type of activity."

70. The Court notes that the Supreme Court, in its Judgment [ARJ-UZVP. no. 17/2020] of 20 January 2020, in an attempt to address the Applicant's decisive allegations, does not clarify what is the immovable property tax and why the Applicant cannot be exempted from the obligation to pay property tax charged by the Municipality of Gjakova. In this regard, the Supreme Court states as follows:

Article 22 par. 6 of Law no. 04/L-109 on Electronic Communications, stipulates that the construction of public communications networks and associated facilities is in the public interest. The immovable property tax do not apply for public communications networks and associated facilities, including those used for the mobile (e.g. GSM), base stations, satellites and the underground infrastructure

By Article 3.1 of the Law no. 03/L204 on Immovable Property Tax, which stipulates that terms used in this law will have the following meaning: Immovable property- land and buildings, establishments, structures, below or above the land surface and connected to the land. Immovable property shall include units within buildings such as apartments, areas for commercial and industrial purposes. Article 2 of this law establishes a tax on immovable property and sets forth the standards and procedures that municipalities shall follow in administering the tax. Whereas Article 8.1 stipulated what institutions or organizations that own or use the property and shall exempted from immovable property

tax. Paragraph 3 establishes that pursuant to paragraph 1 of this Article, exemption from this tax does not apply when the property is used, or retained for use, for commercial activities or generation of revenues.

Setting from such situation of the case and based on the legal provisions of Law no. 04/L-109 and 03/L-204, the Supreme Court considers that the second instance court acted correctly when it modified the Judgment of the Fiscal Division of the Department for Administration of the Basic Court in Prishtina, [A.U. no. .21 05/2014] of 07.09.2018, rejecting as ungrounded the statement of claim of the claimant 'IpkoTelecom.' LLC by which it requested that the decision of the respondent _ Municipality of Gjakova, no. 03-430-2026 of 07.03.2014 be annulled, and leaving this decision in force. In the present case, the respondent did not oblige the claimant for the property tax (according to Article 22.6 of the Law no. 04/L-109 on Electronic Communications), but billed the claimant for the property tax, for the BTS antennas located in the Municipality of Gjakova, through which the internet and television service is sold, the same generate income for the claimant, and the Law on Immovable Property Tax does not provide for exemption from property tax for this type of activity (Article 8 paragraph 3 item 3).

71. However, the Judgment of the Supreme Court does not address the Applicant's substantive allegations and does not provide adequate reasoning as to what is the difference between immovableproperty tax and property tax, for which the immovable property tax is applied, and the allegation that LEC should be treated as *Lex Specialis* in relation to the Law on Immovable Property Tax is not addressed. Also, the Supreme Court did not address the official Memorandum of RAEPC, which stated that "*property tax as defined by the provision of Article 22 paragraph 6 of the LEC relates to property tax and as such, the operators are exempt from this type of tax*". Clearly determining what law is special in similar circumstances, what is immovable property tax are crucial for the Applicant and also the economic entities, as this reasoning determines whether the Applicant is obliged to pay or not the immovable property tax.

72. In fact, the Judgment of the Supreme Court did not explain why the Applicant did not acquire the right to be exempted from payment of the immovable property tax in the context of responding to the Applicant's crucial allegations that (i) the tax on immovable property and property tax are the same, (ii) the LEC should have been applied

in the Applicant's case and (iii) non-response regarding the official RAEPC Memorandum, which confirms that the property tax set out in Article 22 paragraph 6 of the LEC, deals with property tax.

73. Furthermore, it is not for the Court to decide what would be the most appropriate way for the regular courts to deal with the arguments raised. However, the Court considers that the Supreme Court, by not distinguishing between what determines the tax on immovable property defined in Article 22 paragraph 6 of the LEC, by avoiding the reasoning given in the official Memorandum of RAEPC, avoids the issue almost completely, although it was specific, relevant, important and decisive, in which case it does not fulfill its obligations under Article 6, paragraph 1 of the ECHR. (See ECtHR case *Property v. Ukraine*, Application No. 63566/00, Judgment of 18 July 2006, paragraph 25).

74. Therefore, taking into account the observations above and the proceedings as a whole, the Court considers that the Judgment of the Supreme Court did not provide sufficient reasons to the Applicant as to why its alleged rights to be exempted from immovable property tax were denied. Consequently, he did not meet the criteria of justice as required by Article 6 of the ECHR. (See the case of the ECtHR *Grădinar v. Moldova*, case no. 7170/02, Judgment of 8 April 2008, paragraph 115).

75. The Court considers that the inability of the Supreme Court to provide clear and complete answers regarding the distinctive specifics of property tax and immovable property tax constitutes a violation of the Applicant's right to be heard and the right to a reasoned decision, as an integral part of the right to a fair and impartial trial. Thus, the right to a reasoned decision beyond the fact that the allegations must be an essential, determining and decisive for the acquisition or non-acquisition of the claimed right, the latter must also show that the Applicant has been heard and has received sufficient explanations why it does not enjoy the alleged right.

76. In this respect, the Court reiterates that the ECtHR*, inter alia*, in Judgment *Hiro Balani*, cited above, and specifically in the case of *Donadze v. Georgia* (Application No. 74644/01, Judgment of 7 March 2006, paragraph 35) took the position that the domestic courts had not conducted a thorough and serious examination of the Applicant's decisive and determining allegations. That said, even if the courts cannot be required to state the grounds for rejecting any argument of a party, they are nevertheless not excluded from examining and giving

proper reasoning to the main and decisive allegations raised by the Applicant.

77. The Court further notes that a sufficient and clear reasoning regarding the "*immovable property tax*" was not provided to the Applicant in the Judgments of the Court of Appeals and the Supreme Court, on the contrary, this decisive and determining allegation, that Article 22 of the LEC exempts it from the payment of property tax, as the main and determining claim remained not addressed sufficiently.

78. In this regard, the Court notes that it is not the duty of the Constitutional Court to examine to what extent the Applicants' allegations in the proceedings before the regular courts are reasonable. However, procedural justice requires that substantive claims raised by parties before the regular courts must be properly answered - especially if they relate to the decisive allegation that in this case refers to the issue of exemption from the immovable property tax, and which according to the Applicant is the same as property tax.

79. Therefore, taking into account the observations above and the proceedings as a whole, the Court considers that the Supreme Court upheld the position of the Court of Appeals, without responding to the Applicant's specific allegation regarding its right to be exempted from tax on immovable property which according to his allegation is the same as property tax.

80. In accordance with the aforementioned issues, it should be noted that the Judgment of the Supreme Court [ARJ-UZVP. no. 17/2020] of 20 January 2020, did not meet the criteria of a "*fair trial*" under Article 31 of the Constitution in conjunction with Article 6, paragraph 1 of the ECHR, due to lack of reasoned decision.

81. In this regard, the Court notes that this conclusion relates exclusively to the challenged Judgment of the Supreme Court from the point of view of the sufficiency of the reasoning relating to the Applicant's essential and decisive allegations, and in no way prejudices the outcome of the merits of the case. In this context, the Court notes that its finding that the challenged Judgment of the Supreme Court was rendered in violation of the Applicant's right to a reasoned court decision, refers specifically only to the allegation raised by the Applicant in the Referral before the Court.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4, 113.1 and 113.7 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, on 20 October 2021, by majority:

DECIDES

I. TO DECLARE, the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO HOLD that Judgment [ARJ-UZVP. no. 17/2020] of the Supreme Court of 20 January 2020, is invalid and it is remanded for retrial;

IV. TO ORDER the Supreme Court to notify the Constitutional Court as soon as possible, but not later than 6 (six) months, namely until 18 April 2022, about the measures taken to implement the Judgment of this Court, in accordance with Rule 63 of the Rules of Procedure;

V. TO REMAIN seized of the matter pending compliance with that order;

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. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka-Nimani

KI63/21, Applicant: Hysen Metahysa, Constitutional review of Notification GJ.A. No. 29/21 of the Basic Court in Peja - branch in Istog, of 3 February 2021, in conjunction with the enforcement of Judgment Pml. No. 112/2015 of the Supreme Court of 22 June 2015

KI63/21, Resolution on Inadmissibility of 7 October 2021, published on……

Key words: *individual referral, ratione materiae, manifestly ill-founded*

It follows from the case file that the essence of the dispute before the regular courts related to the criminal proceedings for the criminal offense of "*accepting bribes under Article 343 paragraph 2 in conjunction with Article 23 of the Criminal Code of Kosovo (hereinafter: CCK)"*, which has allegedly been committed by the Applicant and I.G. as members of the Kosovo Police Service. In this regard, three court proceedings were conducted, of which; the first court proceedings concerned criminal proceedings in which the Applicant and I.G. were found criminally liable, the second court proceeding was criminal proceeding against person M.M., a truck owner who allegedly bribed I.G., an alleged accomplice of the Applicant, in the commission of the criminal offense, while the third court proceedings concerned the Applicant's request for a review of the criminal proceedings in which he and I.G. were convicted. Regarding the second court proceedings, the Court must emphasize another important fact, and that is that the Applicant submitted to the Court with the referral Judgment P. No. 497/13 of the Basic Court regarding criminal proceedings in which he does not appear as direct party to the proceedings, but the outcome of the criminal proceedings itself had direct implications for the third court proceedings initiated by the Applicant with a request for review of the criminal proceedings. This is the criminal proceeding against person M.M., the owner of the truck who allegedly gave bribe to the person I.G., the alleged accomplice of the Applicant in the commission of the criminal offense, which will also be presented separately within the factual situation.

Having in mind this fact, the Applicant initiated proceedings before the Basic Court to review the criminal proceedings, considering that the very fact that M.M. was found guilty of committing the criminal offense "*false statement under Article 307, paragraph 1 of the CCK*", is sufficient evidence that the court must take into account when assessing the fulfillment of the requirement for reopening of the criminal proceedings.

That request was rejected by the Basic Court, the Court of Appeals, as well as the Supreme Court, considering that there are no conditions for reopening the proceedings due to the fact that M.M. was convicted in another criminal

case for the criminal offence of "*false statement under Article 307, paragraph 1 of the CCK*", which has no touch point with the Applicant's case.

The Applicant claimed before the Court that such decisions of the regular courts violated his constitutional rights guaranteed by Article 31 of the Constitution as well as Article 32 of the Constitution.

Assessing the allegations of the Applicant in the context of the stated violations of the articles of the Constitution, the Court had to determine whether the court proceedings in connection with the opening of criminal proceedings are protected by Article 31 of the Constitution and Article 6 of the ECHR. In analyzing the Applicant's allegations, the Court referred to the principles of Article 6 of the ECHR, as well as its case law, and accordingly concluded that the regular courts in the proceedings on the request for reopening decide only on whether the request for reopening meets procedural requirements, in order to be adopted, and not on the Applicant's "*civil rights and obligations*" in terms of the meaning of the right to a fair trial under Article 31 of the Constitution and Article 6 of the ECHR. In addition, the Court referred to the case law of the ECtHR, which states that Article 6 of the ECHR does not apply to the repetition of proceedings, on the grounds that a person whose sentence has become final and who requests a reopening of the case is not "charged with a criminal offense" within the meaning of Article 6 (see: case of ECtHR, *Franz Fischer v. Austria*, no. 27569/02, of 6 May 2003).

The Court concluded that the Applicant's allegations regarding the court proceedings conducted by the courts on his request for reopening the proceedings were not *ratione materiae* in compliance with Article 31 of the Constitution and in conjunction with Article 6 of the ECHR.

As for the second allegation of the Applicant regarding the violation of Article 32 of the Constitution, the Court concluded during the analysis that his allegations were ungrounded due to the fact that he had legal remedies but did not use them as such to exercise his rights, and, therefore, the Court declared them as (ii) "*apparent or evident absence of violation*" allegations, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI63/21

Applicant

Hysen Metahysa

Constitutional review of
Notification GJ.A. No. 29/21 of the Basic Court in Peja – branch in Istog,
of 3 February 2021, in conjunction with enforcement of Judgment
Pml. No. 112/2015 of the Supreme Court of 22 June 2015

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 Hysen Metahysa from Gjakova (hereinafter: the Applicant). The Applicant is represented by Skender Musa and Leonora Dervishaj-Pacolli, lawyers from Prishtina.

Challenged decision

2. The Applicant challenges Notification GJ.A. No. 29/21, of the Basic Court in Peja – branch in Istog (hereinafter: the Basic Court), of 3 February 2021, in conjunction with enforcement of Judgment Pml. No. 112/2015 of the Supreme Court, of 22 June 2015.

Subject matter

3. The subject matter is the constitutional review of Notification GJ.A. No. 29/21 of the Basic Court in conjunction with enforcement of Judgment of the Supreme Court, which allegedly has violated the Applicant's fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 30 March 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 7 April 2021, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Bajram Ljatifi (members).

7. On 12 April 2021, the Court notified the Applicant’s representative about the registration of the Referral, and at the same time requested them to submit to the Court the authorization to represent the Applicant. The representatives submitted the power of attorney to the Court within the deadline.

8. On 22 April 2021, the Court sent an additional letter to the Applicant's representatives, requesting additional documents.

9. On 27 April 2021, the Court received additional documents from the Applicant's representative.

10. On 28 April 2021, the Court sent a letter to the Basic Court in Peja about the registration of the Referral, and at the same time requested the court to provide evidence when Judgment Pml. No. 112/2015 of the Supreme Court, of 22 June 2015, was served on the Applicant's representatives or the Applicant.

11. On 6 May 2021, the Basic Court in Peja by electronic mail sent to the Court the notification informing it that the Applicant's case was in the Basic Court in Istog, and to contact it regarding the evidence of service of the Supreme Court's judgment.

12. On 12 May 2021, the Court sent a letter to the Basic Court in Istog requesting it to provide evidence when Judgment Pml. No. 112/2015 of the Supreme Court, of 22 June 2015, was served on the Applicant's representatives or the Applicant.

13. On 17 May 2021, the Court sent an additional letter to the Applicant's representatives requesting them to submit to the Court Decision No. 159/15, of the Municipal Court of 5 August 2015, as well as to provide additional explanations regarding a part of court proceedings, giving them 7 days to do so. The Court finds that the Applicant's representatives did not provide any response despite the fact that they received the letter from the Court on 19 May 2021, which the Court concluded on the basis of the acknowledgment of receipt.

14. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 25 June 2021.

15. On 25 May 2021, the Basic Court in Istog sent the requested evidence of service of the judgment of the Supreme Court.

16. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision No. KK 160/21 determined that Judge Gresa Caka-Nimani be

appointed as Presiding in the Review Panels in cases where she was appointed as member of Panels, including the present case.

17. On 3 June 2021, the Court sent an additional letter to the Applicant's representatives requesting them to submit a response to the letter sent to them by the Court on 17 May 2021. Based on the acknowledgment of receipt, the Court concludes that the Applicant's representatives received the Court's letter of 3 June 2021, on 7 June 2021, but did not provide any response again within the prescribed deadline.

18. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

19. On 28 June 2021, the President of the Court, Gresa Caka-Nimani, rendered Decision No. K.SH.KI63/21, replacing the previous President Arta Rama-Hajrizi as Presiding of the Review Panel with Judge Gresa Caka-Nimani.

20. On 7 October 2021, the Review Panel considered the report of the Judge Rapporteur, and recommended to the Court the inadmissibility of the Referral.

Summary of facts

21. Based on the case file, the Court finds in the present case, that the essence of the dispute before the regular courts related to the criminal proceedings conducted for the criminal offense of "*accepting bribes under Article 343 paragraph 2 in conjunction with Article 23 of the Criminal Code of Kosovo (hereinafter: CCK)"*, which has allegedly been committed by the Applicant and I.G. as members of the Kosovo Police Service.

22. In this regard, three court proceedings were conducted, of which; the first court proceedings concerned criminal proceedings in which the Applicant and I.G. were found criminally liable, the second court proceeding was criminal proceeding against person M.M., a truck owner who allegedly bribed I.G., an alleged accomplice of the Applicant, in the commission of the criminal offense, while the third

court proceedings concerned the Applicant's request for a review of the criminal proceedings in which he and I.G. were convicted.

23. Regarding the second court proceedings, the Court must emphasize another important fact, and that is that the Applicant submitted to the Court with the referral Judgment P. No. 497/13 of the Basic Court regarding criminal proceedings in which he does not appear as direct party to the proceedings, but the outcome of the criminal proceedings itself had direct implications for the third court proceedings initiated by the Applicant with a request for review of the criminal proceedings. This is the criminal proceeding against person M.M., the owner of the truck who allegedly gave bribe to the person I.G., the alleged accomplice of the Applicant in the commission of the criminal offense, which will also be presented separately within the factual situation.

24. Having in mind these facts, the Court has the need to present all the court proceedings that it has listed individually in the following text of this resolution, all with the aim of determining all the circumstances of the present case.

First court proceedings regarding the determination of the criminal liability of the Applicant and person I.G.

25. It results from the case file that the Applicant and I.G., as members of the Kosovo Police Service, on 7 May 2008 stopped a truck with two people on it, and allegedly asked for and then received gifts from the owner of the truck M.M.

26. On 25 June 2008, the Peja Municipal Public Prosecutor's Office filed summary indictment PP. No. 888/08 with the Basic Court in Istog against the Applicant and the person I.G., due to grounded suspicion that they as co-perpetrators committed a criminal offense, "*accepting bribes under Article 343 paragraph 2 in conjunction with Article 23 of the CCK "*.

27. During the main hearing before the Basic Court, the owner of the truck, M.M., also appeared as a witness, repeating his earlier statement, stating, *"that he gave the accused the amount of 50 euro in order not to fine him for traffic violation, which was committed by the truck driver."*

28. On 26 January 2009, the Municipal Court in Istog rendered Judgment P. No. 284/08 whereby the Applicant and the person I.G. were found guilty of a criminal offense *"accepting bribes under Article 343*

paragraph 2 in conjunction with Article 23 of the CCK", and sentenced to 3 months imprisonment.

29. The Applicant filed an appeal with the District Court in Peja, on the grounds of serious violations of the provisions of the criminal procedure, erroneous determination of factual situation, and erroneous application of substantive law.

30. On 1 October 2009, the District Court rendered Decision AP. No. 29/09, approving the Applicant's appeal, annulled Judgment P. No. 284/08 of the Basic Court and remanded the case for reconsideration and decision. In the reasoning of the decision, the District Court stated:

> *"According to the assessment of the panel of this court, the challenged judgment contains essential violation of the provisions of the criminal procedure under Article 403 par. 1 subpar. 12. of the CPCK, due to the fact that the enacting clause of the judgment is incomprehensible. The enacting clause states that the accused [...] found guilty of bribery under Article 343 paragraph 2 in conjunction with Article 23 of the CCK, and sentenced to 3 months imprisonment, for each, without finding the defendant separately, for the offense and sentence imposed, and thus +for failure to act in terms of Article 391, paragraph 1 of Article 3 of the CCK. For these reasons, the challenged judgment had to be quashed and the case be remanded to the first inastance court for reconsideration".*

31. On 27 May 2010, in the repeated procedure, the Municipal Court rendered Judgment P. No. 14/10, in which it found the Applicant and I.G. guilty of the criminal offense *accepting bribes under Article 343 paragraph 2 in conjunction with Article 23 of the CCK,* and sentenced them to 90 days in prison, as well as a fine of 20 euro. In the reasoning of the judgment, the Basic Court stated: "*[...] Based on this procedural and assessed evidence, the court found that the actions of the accused contain elements of a criminal offense, accepting bribes under Article 343/2 in conjunction with Article 23 of the CCK, or a criminal offense in cooperation, because by the abovementioned evidence it was undoubtedly established the factual situation described in the enacting clause of this judgment, and for which criminal offense, the court declares the defendants criminally liable because there are no circumstances that would exclude their criminal liability".*

32. From the case file, the Court finds that Judgment P. No. 14/10 of the Municipal Court of 27 May 2010, became final on 15 September 2011.

The second court proceedings, namely the Criminal Proceedings against person M.M., the owner of the truck who allegedly gave a bribe to the person I.G., the alleged accomplice of the Applicant in the commission of the criminal offense

33. On 6 November 2013, the Municipal Public Prosecutor's Office from Peja filed indictment PP-No. 1181/2012, with the Basic Court in Peja - branch in Istog (hereinafter: the Basic Court), against person M.M., for the criminal offense, "*false statement under Article 307, paragraph 1 of the CCRK*".

34. More specifically, the Municipal Public Prosecutor's Office filed an indictment against M.M., the owner of the truck, on the basis of which the criminal reports to the police and later statements during the trial, the Applicant and person I.G., were found guilty of accepting bribes under Article 343, paragraph 2 in conjunction with Article 23 of the CCK, and convicted by Judgment P. No. 14/10, of the Municipal Court of 27 May 2010.

35. On 4 June 2014, the Basic Court rendered Judgment P. No. 497/13, by which it found the accused M.M. guilty of the criminal offense "*false statement under Article 307, paragraph 1 of the CCRK ",* and sentenced him to suspended sentence.

36. The reasoning of Judgment P. No. 497/13, of the Basic Court reads:

> *"[...] During the initial main hearing, the convict pleaded guilty. Based on the evidence presented during the main trial, undisputed facts and circumstances where the convict did not dispute and admitted guilt, on the critical day 7 June 2012 in the Municipal Court in Klina, made a false statement in the administrative procedure, by giving a written statement on that date revoking his statement given at the court hearing, aware that by this statement declares untrue the facts proven and on the basis of which Islam Gervalla and Hysen Metahysa by Judgment P. No. 284/08, were found guilty of the criminal offense of accepting bribes, by which he committed the criminal offense...".*

Third court proceedings of the Applicant in conjunction with the request for review of the criminal proceedings after

the sentencing Judgment P. No. 497/13, of the Basic Court, by which the person M.M. was found guilty of committing a criminal offense "*false statement under Article 307 paragraph 1 of CCK*"

37. On an unspecified date, the Applicant submitted to the Basic Court a request for review of the criminal proceedings, stating as the main evidence of the grounds of his request the fact that the person M.M. was found guilty in another court proceeding of a criminal offense "*false statement under Article 307 paragraph 1 of the CCRK*" in the criminal proceedings against him and I.G., whereby they were convicted and sentenced by Judgment P. No. 14/10 of the Municipal Court, of 27 May 2010.

38. On 27 January 2015, the Basic Court rendered Decision P. No. 342/2014, rejecting the request for repetition of the criminal proceedings of the Applicant as ungrounded, stating that: „*The Court, after assessing the request for reopening in accordance with the provisions of Article 423 of the CPCK, found that in this case the legal requirements for reopening criminal proceedings against the convict Hysen (Mazllum) Metahysa have not been met, due to the fact that the convict in his request did not submit any additional evidence to prove the different factual situation established by the judgment in question".*

39. The Applicant filed an appeal with the Court of Appeals against Decision P. No. 342/2014 of the Basic Court, alleging violations of the provisions of criminal procedure, with a proposal that the Court of Appeals modifies the appealed decision, allowing the reopening of criminal proceedings.

40. On 27 March 2015, the Appellate Prosecutor by submission PPN/II. No. 67/2015, proposed that the Applicant's appeal against the appealed decision be rejected as ungrounded.

41. On 1 April 2015, the Court of Appeals rendered Decision PN. No. 131/2015, rejecting the Applicant's appeal as ungrounded. In the reasoning of the decision, the Court of Appeals stated:

> *„According to the assessment of this court, the appealing allegations are ungrounded. The first instance court rejected the request to reopen the criminal proceedings for the above-mentioned convict, reasoning that in this case the legal requirements for reopening the criminal proceedings against the convict Hysen (Mazllum) Metahysa were not met, due to the fact*

that the convict in question did not submit any additional evidence to prove different factual situation from the one established by the final judgment in this case. Therefore, on the basis of this determined factual situation of the first instance court, this panel assessed the appealed decision in relation to the appealing allegations and finds that the appealing allegations of the convict by a final judgment are ungrounded, because the latter nor by the request to reopen criminal proceedings submitted to the first instance court, or by appeal to this court, did not submit any concrete evidence in accordance with Article 423 paragraph 1 of the CPCK, and which would be sufficient evidence for the court to have a legal basis to reopen the criminal proceedings, which in this case was concluded by a final judgment…".

42. The Applicant submitted to the Supreme Court a request for protection of legality against Decision PN. No. 131/2015 of the Court of Appeals of 1 April 2015 and Decision PK. No. 342/2014 of the Basic Court of 27 January 2015.

43. On 22 June 2015, the Supreme Court rendered Judgment Pml. No. 112/2015, approving the request for protection of legality of the Applicant, annulling the decision of the Court of Appeals of Kosovo and remanding the case to the Basic Court for retrial.

44. In the reasoning of the judgment, the Supreme Court stated:

"Pursuant to the provision of Article 423, paragraph 1, item 1 of the CPCK, criminal proceedings terminated by a final judgment may be repeated if it is proven that the judgment is based on a forged document or false statement of a witness, expert or interpreter.

Therefore, the reasons stated in the decision of the first and second instance courts are completely unclear and for the decisive fact, that is, for the existence of new evidence (abovementioned judgment) which can be the basis for reopening criminal proceedings, there is a contradiction between what is stated in the reasoning of the quashed decisions and contents of the case file. This is a basic violation of the provisions of criminal procedure under Article 384 paragraph 1 item 12 of the CPCK and results in the annulment of these decisions.

In the reopening, the first instance court should take into account the final judgment of the Basic Court in Peja - branch in Klina P. no. 497/2013 of 04.06.2014, to legally assess and to render a decision on the grounds of the request to reopen the criminal proceedings. Therefore, this judgment cannot be ignored, regardless of its content - whether it is a judgment that really shows the need to reopen the procedure or not. In its assessment, one should take into account what Muhamet Meta was found guilty of - for making a false statement during the criminal proceedings that influenced the conviction of the convicts Hysen Metahysa and Islam Gervalla, or out of these proceedings".

45. Acting upon the recommendation of the Supreme Court, in the repeated proceedings the Basic Court assessed all the evidence in order to determine the grounds of the request for repeated proceedings, including Judgment P. No. 497/2013 of the Basic Court, of 4 June 2014. Accordingly, on 5 August 2015, the Basic Court rendered Decision PK. No. 159/15, whereby rejected the request for reopening the proceedings of the Applicant as ungrounded, stating:

"After assessing the request for review in accordance with the provisions of Article 423 of the CPCK, the Court found that in this case the legal requirements for reviewing the criminal proceedings against the convict Hysen (Mazllum) Metahysa were not met, due to the fact that the court, based on the evidence submitted by the convict in the request, and on the basis of which the latter was found guilty, such as the statement of the injured party in the capacity of witness Muhamet Mehaj, given at the court hearing on 24.12.2008. in the Municipal Court in Istog, assessed by this panel as true, due to the fact that the witness in the second statement he gave in the administrative procedure of 07.06.2012 changed his earlier statement with the reasoning that the statement given during the court hearing in the Municipal Court in Istog on 24.12.2008 was not true and that the latter for the statement of 07.06.2012 was accused and convicted by Judgment P. No. 497/13 of the Basic Court - Branch in Klina, of 4 June 2014, with suspended sentence for the crime of false statement, under Article 307, paragraph 1 of the CPCK. Therefore, the court, taking into account the above, found that the second statement of the witness, given on 07.06.2014, is a false statement, not the statement given on 24.12.2008, which was given before the Municipal Court in Istog, in view of the above, did not find any reason to prove any factual situation other than that established by the judgment in question".

46. By the same decision, the Basic Court stated in the instruction on legal remedy: "*the party has the right to appeal to the Court of Appeals within 3 days*".

47. It follows from the case file that the Applicant did not file within three days, as stated in Decision PK. No. 159/15 of Basic Court, an appeal with the Court of Appeals against the decision of the Basic Court of 5 August 2015.

48. On an unspecified date, the Applicant sent to the Basic Court a request to schedule the main trial in his criminal case, considering that the Basic Court should schedule a hearing pursuant to Judgment Pml. No. 112/2015, of the Supreme Court.

49. On 22 October, 2020, the Basic Court sent Notification PK. No. 342/2014, to the Applicant in which it notified him that "*[...] court in Peja by Decision PK. No. 342/14 of 27 January 2015 rejected the request for review of the criminal proceedings of the convict Hysen Metahysaj, convicted by Judgment P. No. 14/10 of the Municipal Court in Istog of 27 May 2010, final from 15 September 2011, as ungrounded*".

50. On 5 January 2021 and 8 January 2021, the Applicant sent two requests to the Basic Court to schedule the main hearing in his criminal proceedings.

51. On 3 February 2021, the Basic Court sent Notification GJ.A. No. 29/21, to the Applicant, in which it stated, *inter alia*:

> *"By Judgment Pml. No. 112/2015, of 22 June 2015, the Supreme Court approved the request for protection of legality submitted by the convict Hysen Metahysaj, against Decision PK. No. 342/2014 of the Basic Court in Peja, of 27.01.2015, which rejected the request for repetition of proceedings and Decision PN. No. 13/2015 of the Court of Appeals of Kosovo of 01.04.2015, which upheld the first instance decision, the same decisions were annulled by the Supreme Court and remanded for reconsideration in the first instance with the instruction that the first instance court consider final Judgment P. No. 497/2013 of the Basic Court in Peja – Branch in Klina, of 04.06.2014, in which the convict supported the request for review of the criminal proceedings (to assess it as evidence and not to conclude that he did not present evidence).*

Therefore, the Supreme Court by Judgment Pml. No. 112/2015 of 22.06.2015. did not order the scheduling of the main trial, but remanded the case for retrial to decide again on the request of the accused for repetition of the proceedings, with the abovementioned reasons in the judgment.

The Basic Court in Peja by Decision PC. No. 159/15 of 05.08.2015, acting in accordance with Judgment Pml. No. 122/15 of the Supreme Court of Kosovo, of 22 June 2015, in the case of a retrial, upon the request for review of the criminal proceedings concluded by final Judgment P. No. 14/10 of the former Municipal Court in Istog, of 27 May 2010, rejected as ungrounded the request for review of the criminal proceedings submitted by the accused Hysen (Mazllum) Metahysaj. The Court, after examining the request for repetition of proceedings of the accused and the Judgment of the Supreme Court, found that the request was ungrounded and found no reason to prove other factual situation than the one established by the judgment of the case.

Against the last decision of the Basic Court in Peja, PK. No. 159/15, of 05.08.2015, the party was ordered to have the right to appeal within three (3) days, in the Court of Appeals in Prishtina.

It follows from the case file that Decision PK. No. 159/15 of 05.08.2015, was personally accepted by the accused Hysen Metahysa and no appeal was filed against this decision.

Therefore, it follows from the above that the criminal proceedings against the now accused Hysen Metahysa is an adjudicated case (res judicata) and there is no reason for this court to schedule and hold the main trial".

Applicant's allegations

52. The Applicant alleges that the notification of the Basic Court violates the provisions of Article 31 and Article 32 of the Constitution, as well as Article 6 of the ECHR.

53. More specifically, the Applicant alleges "*that a fair and impartial trial is guaranteed to all citizens without distinction in proceedings before courts and other state authorities and paragraph 2 of Article 31 of the Constitution guarantees that everyone enjoys the right to public, fair and impartial review of decisions on rights and obligations or*

for any criminal charges filed against him/her within a reasonable time by an independent court".

54. The Applicant in support of the allegation of violation of Article 31 of the Constitution, also adds "*by the enacting clause of Judgment Pml. No. 112/2015, where the decision of the Basic Court in Peja PK. No. 342/2014 and Decision of the Court of Appeals of Kosovo Pn. No. 131/2015 of 01.04.2015 were annulled and the case is remanded for reconsideration to the first instance court, therefore, in accordance with this judgment, the first instance court was obliged to schedule a hearing and ensure fair and impartial trial and not to decide on the so-called request for repetition of proceedings because the higher court annulled the decisions of lower courts, therefore the first instance court was obliged ex-officio to schedule a hearing and act upon the indictment. By these actions, the Basic Court in Peja violated the Constitution of the Republic of Kosovo Article 31 and thus violated the right of our protected person to a fair and impartial trial, a right that is part of fundamental human rights"***.***

55. Accordingly, the Applicant considers that the Basic Court by not scheduling a hearing "*acted contrary to Article 406 of the Criminal Procedure Code, the provision applicable in conjunction with Article 407, paragraph 2 of this Law and in accordance with paragraph 3 of Article 406 of the CPCRK was obliged to take all procedural actions and consider all issues raised in the decision of the Supreme Court. Pursuant to paragraph 40 of Article 406, the Basic Court in Peja was obliged to continue the case referred to trial by the Supreme Court of Kosovo on the basis of the previous indictment because its decision and the decision of the Court of Appeals were annulled in entirety".*

56. Regarding the violation of Article 32 of the Constitution, the Applicant alleges **"***that Article 32 of the Constitution guaranteeing the right to legal remedies was violated and in this case, the party exercised the right to extraordinary legal remedies, the request for protection of legality submitted to the Supreme Court of Kosovo, which approved this request and obliged the first instance court to decide the case for a retrial, not to decide out of court and to reject the enforcement of the decision of the Supreme Court of Kosovo".*

57. The Applicant asks the Court to oblige **"***the Basic Court in Peja to apply Article 31 of the Constitution of the Republic of Kosovo, in order to ensure a fair and impartial trial by implementing the judgment of the Supreme Court of Kosovo and scheduling a court session and reviewing substantial procedural violations, violations of criminal*

law and erroneous and incomplete determination of factual situation".

Admissibility of the Referral

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

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

> *"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".*

60. The Court also examines whether the Applicant has fulfilled other admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests] and 48 [Accuracy of the Referral] 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".*

61. As regards the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, that he has exhausted all available legal remedies and that he specified the act of the public authority which constitutionality he challenges before the Court.

62. The Court also takes into account Article 49 [Deadlines] of the Law, which stipulates:

> *"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*
>
> *[...]."*

63. As regards the fulfillment of other requirements, the Court finds that the Applicant filed referral in a capacity of an authorized party, challenging the act of the public authority, namely Notification GJ.A. No. 29/21, of the Basic Court in Peja – branch in Istog, of 3 February 2021, in conjunction with enforcement of Judgment Pml. No. 112/2015 of the Supreme Court of 22 June 2015, after the exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms he claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

64. In addition, the Court also refers to Rule 39 (2) and (3) (b) of the Rules of Procedure, which establish:

> *"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."*
>
> *(3) The Court may also consider a referral inadmissible if any of the following conditions are present:*
>
> *[...]*
>
> *(b) the Referral is incompatible ratione materiae with the Constitution;*
>
> *[...]."*

65. In the context of the assessment of the admissibility of the referral, namely, the assessment of whether the present Referral is admissible or manifestly ill-founded on constitutional basis, the Court will first recall the merits of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

66. The Court also adds that, based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as „manifestly ill-founded" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as „manifestly ill-founded claims". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of „fourth instance"; (ii) claims that are categorized as „clear or apparent absence of a violation"; (iii) „unsubstantiated or unsupported" claims; and finally, (iv) „confused or farfetched" claims. (See, more precisely, the concept of inadmissibility on the basis of a referral assessed as „manifestly ill-founded" and the specifics of the four above-mentioned categories of claims qualified as „manifestly ill-founded", the Practical Guide to the ECtHR on Admissibility Criteria of 31 August 2019; part III. Inadmissibility Based on Merit; A. Manifestly ill-founded applications, paragraphs 255 to 284).

67. Accordingly, the Court finds, based on the facts of the case file and the Applicant's allegations, that the Applicant in essence has two main allegations, which he brings exclusively in connection with his request for reopening of the criminal proceedings. More specifically, the Applicant considers that non-approval of his request for reopening of criminal proceedings violates his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 of the ECHR, as well as Article 32 [Right to Legal Remedies] of the Constitution.

68. Therefore, the Court will deal with these allegations of the Applicant separately in the continuation of the report.

Applicant's allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

69. As to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court finds that the Applicant cites as the main argument for the alleged violation of Article 31 of the Constitution and Article 6 of the ECHR that "*the Supreme Court by judgment annulled the decision of the Basic Court in Peja PK. No. 342/2014 and Decision of the Court of Appeals of Kosovo Pn. No. 131/2015 of 01.04.2015 and the case is remanded for reconsideration to the first instance court, therefore, in accordance with this judgment, the first instance court was obliged to schedule a hearing and ensure fair and impartial trial and not to decide on the so-called request for repetition of proceedings because the higher court annulled the decisions of lower courts, therefore the first instance court was obliged ex-officio to schedule a hearing and act upon the indictment*".

70. The Court, considering this allegation of the Applicant in the context of procedural guarantees of Article 31 of the Constitution and Article 6 of the ECHR, finds that the mentioned court proceedings on which the Applicant bases his appealing allegations, concerned exclusively the assessment of the fulfillment of procedural requirements that a request for reopening of court proceedings must meet, in order for it to be admissible, and thus the case be reopened for consideration and assessment in repeated proceedings.

71. In this regard, the Court finds that in the present case the Basic Court acted according the instructions of the Supreme Court, which ordered the Basic Court to consider all evidence and arguments in terms of procedural assessment of the requirements for reopening the proceedings and thus assesses them, with special emphasis on the assessment of Judgment P. No. 497/13 of the Basic Court, which, according to the findings of this court, the Basic Court did.

72. The Court wishes to clarify that the regular courts in the proceedings according to request for reopening of the procedure decide exclusively on the issue whether the request for reopening meets the procedural requirements for its adoption, and not on the Applicant's "*civil rights and obligations*" in terms of the meaning of the right to a fair trial under Article 31 of the Constitution and Article 6 of the ECHR.

73. In addition, the Court, referring to the case law of the ECtHR, which establishes that Article 6 of the ECHR does not apply to the proceedings for the reopening of a criminal case because a person whose sentence has become final and who applies for his case to be reopened is not "*charged with a criminal offence*" within the meaning

of Article 6 (see ECtHR cases *Franz Fischer v. Austria*, application no. 27569/02, Judgment of 6 May 2003).

74. In this respect, the Court cites the ECtHR's legal reasoning in the aforementioned case of *Franz Fischer v. Austria* in connection with his appeal for non-opening of the court procedings, in which the ECtHR found:

> *"The applicant complained that the proceedings concerning his application for a retrial following the Court's Franz Fischer v. Austria judgment of 29 May 2001 had not fulfilled the requirements of Article 6, which, so far as relevant, reads as follows:*
>
> *"In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal..."*
>
> *The Court will first examine whether Article 6 applies to the proceedings at issue. In this connection, the Court reiterates that according to established case-law, Article 6 does not apply to proceedings for the reopening of criminal proceedings, given that someone who applies for his case to be reopened and whose sentence has become final is not "charged with a criminal offence" within the meaning of the said Article (see Dankevich v. Ukraine (dec.), no. 40679/98, 25 May 1999, unreported; Sonnleitner v. Austria (dec.), no. 34813/97, 6 January 2000, unreported; and Kucera v. Austria (dec.), no. 40072/98, 20 March 2001, unreported, each with further references).*
>
> *Likewise, Article 6 has been found not to apply to proceedings on a plea of nullity for the preservation of the law, brought with the aim of setting aside a final conviction following the finding of a violation by the Court, as in such proceedings the person concerned was not "charged with a criminal offence" (Oberschlick v. Austria, nos. 19255/92 and 21655/93, Commission decision of 16 May 1995, Decisions and Reports 81, p. 5).*
>
> *The Court considers that proceedings under Article 363a of the Austrian Code of Criminal Procedure, concerning an application for a retrial following the finding of a violation by the European Court of Human Rights, are akin to proceedings for the reopening of criminal proceedings. They are brought by a*

person whose conviction has become final and do not concern the "determination of a criminal charge" but the question whether or not the conditions for granting a retrial are met. The Court, therefore, concludes that Article 6 does not apply to the proceedings in question."

75. The Court, bringing the Applicant's allegations in connection with the case law of the ECtHR, notes that in the present case, the Applicant was not granted a request for repetition of the criminal proceedings with a clear reasoning of the Basic Court, which, acting on the Supreme Court's recommendation, in the repeated procedure rejected as ungrounded the request for reopening of the Applicant's procedure, stating;

"After assessing the request for review in accordance with the provisions of Article 423 of the CPCK, the Court found that in the present case the legal requirements for reviewing the criminal proceedings against the convict Hysen (Mazllum) Metahysa were not met, due to the fact that the court, based on the evidence submitted by the convict in the request, and on the basis of which the latter was found guilty, such as the statement of the injured party in the capacity of witness M.M., given at the court hearing on 24.12.2008. in the Municipal Court in Istog, assessed by this panel as true, due to the fact that the witness in the second statement he gave in the administrative procedure of 07.06.2012 changed his earlier statement with the reasoning that the statement given during the court hearing in the Municipal Court in Istog on 24.12.2008 was not true and that the latter for the statement of 07.06.2012 was accused and convicted by Judgment P. No. 497/13 of the Basic Court - Branch in Klina, of 04.06.2014, with suspended sentence for the crime of false statement, under Article 307, paragraph 1 of the CPCK. Therefore, the court, taking into account the above, found that the second statement of the witness, given on 07.06.2014, is a false statement, not the statement given on 24.12.2008, which was given before the Municipal Court in Istog, in view of the above, did not find any reason to prove any factual situation other than that established by the judgment in question."

76. Accordingly, the Court having regard to the content of the court proceedings on which the Applicant based his appealing allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court recalls the case law of the ECtHR and its own case law, according to which Article 31 of the Constitution and Article 6 of the ECHR do not apply to requests for the reopening or repeating

of proceedings (see: by analogy Constitutional Court cases: KI07/17/15, *Pashk Mirashi*, Resolution on Inadmissibility of 12 June 2017, paragraph 64; KI80/15, 81/15 and 82/15, *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, paragraph 31, see also ECtHR cases, *inter alia, Oberschlick v. Austria*, No. 23727/94, Decision on Inadmissibility of 21 March 1994; *Dowsett v. United Kingdom*, No. 8559/08, Decision on Inadmissibility of 4 January 2011).

77. Therefore, the Court considers that the Applicant's allegations concerning the court proceedings conducted by the courts on his request for reopening of proceedings are not *ratione materiae* compatible with Article 31 of the Constitution and Article 6 of the ECHR.

Applicant's allegations of violation of Article 32 of the Constitution

78. As to the violation of Article 32 of the Constitution, the Court also finds that the Applicant also brings these allegations exclusively in connection with his request for reopening of the court proceedings, considering that he as a party, by the Judgment of the Supreme Court "*exercised the right to extraordinary legal remedies, due to the fact that by the judgment of the Supreme Court, the first instance court was obliged to decide on the case for retrial, and not to decide out of court and to reject to implement the decision of the Supreme Court of Kosovo".*

79. Having in mind the nature of the Applicant's allegations, the Court should consider whether there is any legal argument in the Applicant's allegations regarding his claims of violation of Article 32 of the Constitution in the context of the proceedings conducted on his request for reopening of the court proceedings.

80. However, before that, the Court needs to determine whether the Applicant, by concrete judgment Pml. No. 112/2015, of the Supreme Court acquired, or as he states in the request "*exercised the right to extraordinary legal remedies*" in the repeated court proceedings before the Basic Court, and whether they were used as such by the Applicant.

81. The Court finds that by Judgment Pml. No. 112/2015 of the Supreme Court on the approval of the request for protection of legality, the Applicant's proceedings were remanded to the Basic Court, which was

obliged to take into account all observations and to correct all flaws in decisions noted by the Supreme Court, with special reference to the assessment of Judgment P. No. 497/13, of the Basic Court, as proven, on which the Applicant based his request for reopening of the proceedings.

82. In this regard, the Court finds that by adopting the request for protection of legality and remanding the case to the Basic Court, the Supreme Court created a legal situation which in itself carried procedural possibilities provided by law, and which in itself means the right to use certain legal remedies.

83. The Court notes that in the newly created legal circumstances, acting in accordance with the instructions of the Supreme Court, on 5 August 2015, it rendered new Decision PK. No. 159/15, concluding that not all procedural conditions for adopting the request for reopening the court proceedings were met. However, what is of essential importance for this Court is the fact that the Basic Court in Decision PK. No. 159/15, provided for the possibility of filing an appeal with the Court of Appeals against its decision within 3 days.

84. The Court emphasizes in particular the fact that such new legal remedy in the form of an appeal provided by the Basic Court in Decision PK. No. 159/15, was an opportunity for the Applicant to continue his procedural path before the Court of Appeals, exclusively to challenge Decision PK. No. 159/15 of the Basic Court on procedural non-fulfillment of all conditions for reopening the procedure, and not a legal remedy that would mean for the Applicant the possibility of using it in order to challenge criminal liability before the Court of Appeals, because the request for reopening the procedure does not decide on "*rights and obligations*" and thus on criminal liability.

85. However, the Court notes that in addition to the fact that the Applicant was notified about Decision PK. No. 159/15 of the Basic Court, which was handed to him personally, and which can be concluded from the case file, he missed the opportunity of continuing the procedural possibility proving the merits of his request for reopening of court proceedings, by the fact that he did not use within the prescribed period the available legal remedy in the form of an appeal.

86. It can be concluded from the above that the Applicant had a legal remedy at his disposal at that time, but that he did not use that legal remedy in the manner and within the timeframe provided in the instruction on legal remedy of the Basic Court. Therefore, by not using

it, the Applicant voluntarily waived the further procedural path in which his allegations could be considered by the higher courts.

87. On the basis of all the above, the Court concludes that there is no legal argument in the Applicant's allegations in support of his allegations of violation of Article 32 of the Constitution in the context of denial of the "*right to extraordinary legal remedies*" in procedural terms.

88. The Court recalls that it has consistently emphasized that the mere reference to the articles of the Constitution and the ECHR and their mention is not sufficient to build a reasoned allegation of a constitutional violation. When alleging such violations of the Constitution, the Applicants should provide substantiated allegations and convincing arguments (see case of the Court KI175/20, Applicant: *Privatization Agency of Kosovo*, Resolution on Inadmissibility of 27 April 2021, paragraph 81, see case of the Court KI166/20, cited above, paragraph 51). Therefore, in relation to these allegations, the Court, in accordance with its case-law, declares the Applicant's Referral as manifestly ill-founded and therefore inadmissible.

89. Therefore, the Court finds that the Applicant's allegations of violation of Article 32 of the Constitution should be declared inadmissible as manifestly ill-founded, because these allegations qualify as allegations falling into the category of (ii) *"clear or apparent absence of a violation"* allegations, because the Applicant had at his disposal a legal remedy which was provided for in the legal instruction by decision PK. No. 159/15 of the Basic Court and this legal remedy was not used by the Applicant. Therefore, these allegations are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

Conclusion

90. Therefore, the Court concludes that the Applicant's allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, are incompatible *ratione materiae* with the Constitution, while with regard to the allegations of violation of Article 32 of the Constitution, the Court declares them as (ii) *"clear or apparent absence of a violation"* allegations. Therefore, the latter are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 20 of the Law and Rule 39 (2) and (3) (b) of the Rules of Procedure, in its session held on 7 October 2021, by majority of votes,

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka-Nimani

KI110/20, Applicant: Et-hem Bokshi, Constitutional review of Judgment Plm. No. 76/2020 of the Supreme Court of 8 April 2020

KI110/20, resolution of 3 November 2021, published on

Keywords: *individual referral, principle Ne bis in idem, Right to fair and impartial trial, protection of property*

The circumstances of the present case relate to the criminal proceedings conducted against the Applicant in relation to tax evasion, namely non-presentation of the actual turnover realized within the activities of the business entity PKP "Marigona" which is co-owned by the Applicant. In relation to this case, initially an administrative procedure was initiated with TAK, which due to non-presentation of the actual turnover realized in the framework of carrying out activities, it obliged to pay that part of income tax and has fined the entity PKP "Marigona" in co-ownership of the Applicant. After that, in relation to the same offense, the Basic Prosecution in Gjakova filed an indictment against the Applicant and his business partner, for the criminal offense of tax evasion in co-perpetration. This criminal procedure, which was the subject of judicial control, where, first, the Basic Court found the Applicant and his business partner guilty of committing the criminal offense, for which it imposed a fine and a suspended imprisonment sentence. In the appeal procedure, the Court of Appeals rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court in its entirety. The Supreme Court also rejected the Applicant's request for protection of legality, finding that the judgments of the lower courts were fair and lawful.
The Applicant challenged the Judgment of the Supreme Court before the Constitutional Court claiming *i.* violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle *ne bis idem*; *ii.* violation of the right under Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle *of equality of arms*; *iii.* violation of the rights guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the erroneous or arbitrary manner of application of legal provisions and *iv.* violation of the rights guaranteed by Article 1 of Protocol no. 1 of the ECHR.
With regard to the alleged violation of the rights guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle *ne bis in idem*, the Court found that these allegations qualify as allegations of "*apparent or evident absence of violation*" ; and as such, declared these allegations of the Applicant as manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39.
With regard to the alleged violation of the rights guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in connection with the principle of equality of arms, the Court found that this part of the allegations qualifies as "*unsubstantiated or unsupported*" allegations; and as such, declared these

allegations of the Applicant as manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39.

With regard to the alleged violation of the right to property guaranteed by Article 1 of Protocol no. 1 of the ECHR, the Court found that this allegation of the Applicant falls into the category of "*unsubstantiated or unsupported*" allegations, and as such, the Court on a constitutional basis declared it as manifestly ill-founded, and accordingly, inadmissible.

Therefore, the Court concludes that the Referral must be declared in its entirety as manifestly ill-founded, and consequently, inadmissible on constitutional basis, in accordance with Rule 39 (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI110/20

Applicant

Et-hem Bokshi

Constitutional review of Judgment Plm. No. 76/2020 of the Supreme Court of 8 April 2020

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 Et-hem Bokshi from Gjakova (hereinafter: the Applicant), who is represented by Ylli Bokshi, a lawyer from Gjakova.

2. The Court notes that the same Judgment of the Supreme Court was challenged in case KI 108 20 where the Applicant is Luan Kazazi

Challenged decision

3. The Applicant challenges Judgment Plm. No. 76/2020 of the Supreme Court of 8 April 2020, in conjunction with Judgment PA1. No. 1265/2019 of the Court of Appeals of Kosovo of 12 November 2019 and Judgment P. No. 540/13 of the Basic Court in Gjakova of 6 June 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, whereby, according to the Applicant's allegations, his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (1) (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR), as well as Article 1 of Protocol No. 1 (Protection of property) of the ECHR have been violated.

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests] and 48 [Accuracy of the Referral] of the of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 9 July 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 14 July 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur in the first Referral, and the Review Panel in the first Referral, composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu Krasniqi and Gresa Caka Nimani.

8. On 21 July 2020, the President of the Court, in accordance Rule 40 (1) of the Rules of Procedure, ordered the joinder of Referrals KI108/20 and KI110/20, due to the fact that both the first Referral and the second Referral are about the same court proceedings, consequently the Judge Rapporteur and the composition of the Review Panel remain the same in both cases, as in Referral KI108/20.

9. On 10 August 2020, the Court notified the Applicants about the joinder of the Referrals and at the same time requested the Applicants to complete the official referral form and submit it to the Court, On the same date the Court sent a copy of the Referral to the Supreme Court.

10. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21, of 17 May 2021 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

11. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

12. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision KSH 108/20, appointed Judge Remzije Istrefi-Peci as member of the Review Panel replacing Judge Bekim Sejdiu.

13. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision No. KK 160/21 determined that Judge Gresa Caka-Nimani be appointed as Presiding in the Review Panels in cases where she was appointed as member of Panels, including the present case.

14. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of 17 May 2021 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

15. On 30 August 2021, as there was no reply to the letter sent previously of 10 August 2020, the Court sent again a letter to the Applicant, whereby it notified the Applicant about the registration of the Referral and by which it again requested him to fill out the referral form.

16. On 10 September 2021, the Applicant responded to the Court's letter of 30 August 2021 and submitted to the Court the completed referral form of the Constitutional Court of Kosovo, while in the case KI 108/20 the Applicant did not respond to the request sent by the Court.

17. On 7 October 2021, pursuant to Rule 40 (3) of the Rules of Procedure, the Court decided to review Referrals KI108/20 and KI110/20 separately, as individual cases, with the same Judge Rapporteur and the Review Panel.

18. On 12 October 2020, the Court notified the Applicants in cases KI108/20 and KI110/20 and the Supreme Court about the severance of referrals.

19. On 3 November 2021, the Review Panel considered the report of the Judge Rapporteur, and by majority of votes recommended to the Court the inadmissibility of the Referral.

Summary of facts

Procedures that have been conducted at the Tax Administration of Kosovo due to non-fulfillment of tax obligations

20. On an unspecified date, the Tax Authority of Kosovo (hereinafter TAK) after conducting the inspection and calculation of additional tax, through control has identified irregularities in the registration and reporting of revenues for fiscal years 2008, 2009, 2010 and 2011 to the business entity NPT "Marigona" in co-ownership of the Applicants, and consequently in this regard TAK notified the Applicant about its findings and obliged him to pay the tax liabilities identified after the inspection and to pay the monetary fine for the offense committed.

21. On 12 March 2012, the Applicant filed a complaint against the notification of TAK to the TAK Complaints Panel on the grounds of incorrect application of legal provisions, incomplete and incorrect determination of factual situation and irregular application of the procedure.

22. On 2 May 2012, the TAK Complaints Panel, by Decision no. 57/2012 partially approved the Applicant's complaint in a way that reduced the amount of debt for the period for fiscal years 2008, 2009 and 2010, while the debt for the remaining period and the fine for irregularities found during the control were confirmed.

Proceedings conducted before the regular courts regarding the criminal liability of the Applicant

23. On 25 March 2015, the Basic Prosecution of Gjakova filed the indictment under number PP/II. no. 756/2013 against the Applicant and L.K., for the criminal offense of tax evasion for the period from January 2007 to May 2011 on behalf of the business entity NPT „Marigona" in co-ownership of the Applicant.

24. On 11 April 2019, the Basic Court in Gjakova (hereinafter the Basic Court) by Judgment (P. no. 540/13) found the Applicant guilty because during 2009, until May 2011, in the capacity of director and co-owner of the entity NPT „Marigona“ LLC based in Gjakova, has avoided reporting and payment of tax for his activities in the business of NPT „Marigona“ LLC, so they have not declared the actual turnover they had in business activities and thus caused damage to the Tax Administration of Kosovo (hereinafter: TAK) in the period from January 2007 to the end of 2008, the court found that the criminal prosecution had reached the absolute statute of limitation.

25. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court (P. no. 540/13) of 11 April 2019. The Applicant bases his appeal *inter alia*, on the allegation that throughout the proceedings he has consistently stated his objection to the indictment as regards the timeframe for filing the indictment. The Applicant also challenged the conclusions and findings of the expert involved in his case *"on the grounds of essential violations of the contested procedure, incomplete and erroneous determination of factual situation and erroneous application of substantive law"*.

26. On 12 November 2019, the Court of Appeals by Judgment (PA 1. no. 1265/2019) rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court in its entirety.

27. In the part of the reasoning of the judgment of the Court of Appeals regarding the time limit of the investigative procedure, namely the time limit for filing the indictment, it is stated, *"The indictment was filed within 1 year as provided by Article 69 of the special law, Law no. 03/L-222 on Tax Administration and Procedures, because the decision to initiate investigations PP/II. no. 756/2012 was served on 14.05.2013, while the indictment PP/II. no. 756/2012 was submitted to the court on 14.11.2013, which means within a period of one year, in accordance with Article 69 of Law no. 03/L-222 on Tax Administration and Procedures, while regarding the indictment PP/II. no. 756/2012 of 25.03.2015, this court considers that we are not dealing with two indictments as claimed by the defense counsels of the accused with complaints, because according to the letter of the prosecution of 25.03.2015 it is confirmed that only the technical error regarding the legal qualification of the criminal offense was corrected, therefore the appealing allegations regarding essential violations of the provisions of the criminal procedure are ungrounded"*.

28. In the part of the reasoning of the judgment, which has to do with challenging the conclusion of the financial expert A. Sh., the Court of Appeals states, „*expert A. Sh., who during the court hearing stated that: The first instance court has given full trust to the testimony of expert A. Sh. because the latter is in line with the testimony of witnesses, as to the issue that fact that the accused as co-owners of the business "Marigona" have evaded tax is indisputable and the first instance court first gave the expert full trust because the latter has very clearly explained the findings and shortcomings in the TAK report and based on the documentation provided by the Prosecution and the reports of TAK inspectors, the latter has made the elaboration over years summarized for tax evasion and obligations that have been made by business entity B "Marigona" in years 2005 to 2010 and the same in a tabular way with his expertise has presented evasion from tax by business entity "Marigona" to which expertise the court has given the trust*.

29. On an unspecified date, the Applicant filed with the Supreme Court a request for protection of legality *on the grounds of essential violations of the criminal procedure, erroneous and incomplete determination of the factual situation and violation of the criminal law,* raising the same allegations as in the procedure before the Court of Appeals regarding the deadline for filing the indictment, namely the development of the investigative procedure as well as the findings of the expert.

30. On 10 March 2020, the Office of the Chief State Prosecutor by submission KMLP. II. no. 44/2020 proposed that the Applicant's request for protection of legality be rejected as ungrounded.

31. On 8 April 2020, the Supreme Court by Judgment PML. no. 76/2020 rejected the Applicant's request for protection of legality which he filed against the judgment of the second instance court of 12 November 2019 and the judgment of the first instance court of 11 April 2019.

32. In the part of the reasoning of the judgment of the Supreme Court, which has to do with the time limit of the investigation procedure, namely the time limit for filing an indictment, it is stated that, *"this court finds that this claim of the defense counsels of the accused is ungrounded, as the indictment was filed within the time limit as provided by Article 69 of the special law, Law no. 03/L-222 on Tax Administration and Procedures, because the decision to initiate investigations was issued on 14.05.2013, while the indictment was submitted to the court on 14.11.2013, which means within a period*

of one year, in accordance with Article 69 of this Law. Regarding the second indictment of 25.03.2015 as claimed by the defense, this does not stand, because according to the case file it follows that the document of prosecution dated 25.03.2015 proves that only the technical error regarding the legal qualification of the criminal offense has been rectified, therefore the appealing allegations regarding the essential violations of the provisions of the criminal procedure are ungrounded".

33. In the reasoning of the part of the Judgment of the Supreme Court which has to do with the challenging of the conclusion of the financial expert A.Sh., the Supreme Court states that the Applicant "*did not give reasons that would establish the contradictions of the expert's expertise and his contradictions with the evidence as claimed by the defense, from this court rightly found that the appointment of another expert was unnecessary for this criminal case, and accordingly pursuant to Article 142 of the CPCK, the court may appoint another expert if the data and findings of the experts differ substantially or when their findings are unclear, incomplete or in contradiction with themselves or with the circumstances examined and in this case these flaws cannot be avoided, by re-examination of experts the opinion of other experts may be sought, and in this case the court rightly assessed that the defense did not provide sufficient reasons regarding the contradictions or findings of expert Ali Shunjaku and there was no other expert on the matter and therefore rejected the defense proposal as ungrounded, and the allegation that the principle of "equality of arms" had been violated turns out to be ungrounded, because there can be no question of any violation of equality".*

Applicant's allegations

34. The Applicant alleges that the challenged judgments of the regular courts violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) and Article 1 of Protocol no. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: the ECHR).

Allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle Ne bis in idem

35. *The fundamental principle has been violated: Ne bis in idem, also for two reasons, namely, a) Article 69 provides that the duration of the investigation of criminal offenses in the field of taxes for the*

completion of investigations in relation to tax offenses is ***one year*** *with the possibility of further extension of such additional time necessary and justified by the complexity of the case by the decision of the pre-trial judge. In this case it is not disputed that no request for extension of the investigation deadline has been submitted and as the investigations have lasted longer than one year, according to any indictment. This provision, in addition to being a* ***lex specialis*** *for tax offenses, is even more favorable to the defendant and this should be applied.* ***Based on the above, the investigation should have been terminated****, -* ***Article 159, paragraph 1, of the CPCRK*** *and b) The other violation on the basis of ne bis in idem lies in the fact that the TAK has conducted a punitive procedure of the Law on Tax Administration of Kosovo [. ..] due to irregularities encountered in the controls conducted at the business entity NTB „B-Marigona" with NRB 600204292, was issued a penalty in the amount of 1,000.00 € according to Law 03/L-222, Article 53, paragraph 2.4. [...] The control of TAK, argues that TAK has reviewed the penalty-fine, i.e. sanction, and on the other hand argues that in criminal proceedings should have been conducted in accordance with Law no. 04/L-030 on liability of legal persons for criminal offenses.*

36. When it comes to the violation of the *Ne bis in idem* principle, the Applicant also refers to the case law of the ECtHR, namely the case *Maresti v. Croatia*, Judgment of 25 June 2009, which elaborates on the application of the principle *Ne bis in idem*.

Allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle of equality of arms

37. The challenged report was issued by a partial expert, because the Applicant did not have an effective opportunity to participate in the expertise preparation process, the rejection of the request for the appointment of a new expert was not justified at all, therefore, the principle of "equality of arms" has been violated against the Applicant.

Allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR regarding erroneous or arbitrary manner of application of legal provisions

In the investigation procedure that preceded the criminal report of TAK, as well as during the investigations by the State Prosecutor's Office, no action was taken within the meaning of Article 122, paragraph 2 and 132, paragraph 5.7 of the CPCRK, paragraph 5 of

CPCRK, and such an action constitutes arbitrariness and makes this trial unfair and incorrect, namely such an action constitutes a violation of Article 6 § 1 of the ECHR (Right to a fair trial).

38. The Applicant also initiated these allegations regarding the filing of the indictment, namely the conduct of the investigation procedure, as well as the findings of the expert in the Court of Appeals and the Supreme Court.

Allegations of violation of Article 1 of Protocol no. 1 of the ECHR

39. The Applicant merely alleges a violation of Article 1 of Protocol No. 1. of the ECHR, but he does not reason or explain how the violation of this article came occurred.

40. The Applicant proposes to the Court to declare his Referral admissible, to find a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as well as a violation of Article 1 of Protocol No. 1. of the ECHR; and that the challenged judgments of the regular courts be declared invalid.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

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

[...]

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

[...]

Protocol No. 1 of the Convention for the protection of human rights and fundamental freedoms

Article 1
Protection of property

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

[...]

Law No. 03/L-222 on Tax Administration and Procedures
of 12 July 2010

Article 69
Duration of an investigation of criminal tax offenses

The period for the completion of the investigation of a criminal tax offense is one year with the possibility of a further extension of such additional time as necessary and justified by the complexity of the case upon the decision of the pre-trial judge.

Admissibility of the Referral

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

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

Article 113
[Jurisdiction and Authorized Parties]

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

[...]

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

[...]

43. In addition, the Court also examines whether the Applicant fulfilled the admissibility requirements as further prescribed by the Law, namely Articles 47, 48 and 49 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...".

44. With regard to the fulfillment of the above-mentioned criteria, the Court considers that the Applicant: 1) has legitimized himself as an authorized party, within the meaning of Article 113.7 of the Constitution; 2) that the latter challenges the constitutionality of the act of public authority, namely the judgment of the Supreme Court Plm. no. 76/2020 of 8 April 2020; 3) that he has exhausted all available legal remedies, within the meaning of the second sentence of Article 113.7 of the Constitution and paragraph 2 of Article 47 of the Law; 4) that he has clearly specified the rights guaranteed by the Constitution and the ECHR, which he claims to have been violated, and has specified the act of the public authority, which constitutionality he is challenging, in accordance with the requirements of Article 48 of the Law; and 5) has submitted the referral within the legal deadline of four (4) months provided by Article 49 of the Law.

45. However, the Court also takes into account Rule 39 [Admissibility Criteria], namely paragraph (2) of the Rules of Procedure, which provides:

Rule 39
(Admissibility Criteria)

"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim ".

46. The Court notes that the abovementioned rule, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR) and of the Court, enables the latter to declare inadmissible referrals for reasons related to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after the assessment of its merits, namely if the latter deems that the content of the referral is manifestly ill-founded on constitutional basis, as defined in paragraph (2) of Rule 39 of the Rules of Procedure.

47. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as "*manifestly ill-founded*" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as

"*manifestly ill-founded claims*". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of "*fourth instance*"; (ii) claims that are categorized as "*clear or apparent absence of a violation*"; (iii) "*unsubstantiated or unsupported*" claims; and finally, (iv) "*confused or far-fetched*" claims" (see, ECtHR cases *Kemmachev v. France*, application no. 17621/91, category (i), *Mentzen v. Lithuania*, application no. 71074/01, category (ii) and *Trofimchuk v. Ukraine*, application no. 4241/03, category (iii).

48. In the assessment of the abovementioned allegations, the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

49. The Court recalls that the circumstances of the present case relate to the criminal proceedings against the Applicant in relation to tax evasion or non-presentation of the actual turnover realized within the activities of the economic entity NTP Marigona, which is co-owned by the Applicant. In relation to this case, first an administrative procedure was initiated with TAK, due to non-presentation of the actual turnover realized in the framework of carrying out activities, it obliged him to pay that part of income tax and fined the economic entity NTP "Marigona" in co-ownership of the Applicant, and then due to the same offence, the Basic Prosecution in Gjakova filed an indictment against the Applicant and his business partner for the criminal offense of Tax Evasion in Co-perpetration. This criminal procedure, which was the subject of judicial control, where initially, the Basic Court found the Applicant and his business partner guilty of committing a criminal offense, for which it imposed a fine and suspended sentence of imprisonment. In the appeal procedure, the Court of Appeals rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court in its entirety. The Supreme Court also rejected the Applicant's request for protection of legality, in which case it found that the judgments of the lower instance courts were fair and lawful.

50. The Court recalls that the Applicant raises allegations regarding: *i.* violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle *ne bis idem*; *ii.* violation of the right under Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle of equality of arms; *iii.* violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the erroneous or arbitrary manner

of application of legal provisions and *iv*. violation of the rights guaranteed by Article 1 of Protocol no. 1 of the ECHR.

i. The Court's assessment regarding allegations of violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle ne bis in idem

51. The Court recalls that principle *ne bis in idem* is guaranteed by Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution, which establishes:

> *"No one shall be tried more than once for the same criminal act"*.

52. Analyzing the first part of the Applicant's allegations regarding the principle *ne bis in idem*, the Court notes that with regard to this claim of the Applicant as to the filing of the indictment after the legal deadline, these allegations have been dealt also by the Supreme Court, which in its judgment stated, "*based on article 69 of Law no. 03-1-222 on tax administration and procedures it is foreseen that the duration of the investigation of criminal offenses in the field of taxes for the completion of investigations for the criminal offense is one year with the possibility of further extension of such additional time necessary and justified by the complexity of the case"*.

53. Taking into account the fact that by these allegations the Applicant has raised the issue of legality of the decisions of the regular courts, the Court notes that the reasoning of this part of the Applicant's allegations will be given in the part regarding the part of the allegations of the Applicant related to the other allegations of the Applicant in respect of erroneous application and interpretation of the law.

54. With regard to the second part of the Applicant's allegation concerning the violation of the principle *ne bis in idem* because he had already been fined once in the administrative proceedings for the same offense. The Court finds that in this case it is about two different procedures which were initiated due to non-reporing of real turnover or tax evasion.

55. In the administrative and criminal proceedings, the liability of the Applicant for illegal conduct was established on the basis of different legal norms and legal qualification. The obligation to pay the tax which was imposed on the Applicant in the administrative procedure and the punishment imposed on the Applicant in the criminal

procedure have different purposes, the determination of the obligation to pay the tax (public debt) in the administrative procedure cannot be considered a penalty, but a public debt of the Applicant to the State, for which the Supreme Court reasoned that "*that criminal law was correctly applied when the convicts E.B. and L.K. have been found guilty of the criminal offense of tax evasion under Article 249 paragraph 2 in conjunction with paragraph 1 2 in conjunction with Article 23 of the CCK, because in the actions of the convicts are formed all the essential elements of the criminal offense for which they have been found guilty, therefore the allegations of the defense counsels of the convicts of the violations of the criminal law turn out to be ungrounded*".

56. The conduct of these two proceedings was foreseen for the Applicant and the Applicant from the beginning knew or should have known that the declaration of profits and consequently the payment of tax (payment of public debt) as well as the criminal prosecution were possible.

57. Therefore, the Court finds that, although the act of illegal conduct of the Applicant in both administrative and criminal proceedings derives from the same facts and events, the Applicant's allegations of violation of the principle *ne bis in idem* on the basis of what is said above are manifestly ill-founded, because, as can be concluded from the above, for the same case two proceedings have been conducted, administrative and criminal, while in relation to the illegal conduct of the Applicant, based on legal norms and various legal qualifications.

58. Therefore, the Court concludes that the Applicant's allegations of a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution due to a violation of the principle *ne bis in idem* are (ii) claims that qualify as claims characterized by "*clear or apparent absence of a violation*"; and as such, these allegations of the Applicant are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

ii. The Court's assessment regarding the allegations of violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR as to the principle of equality of arms

59. The Court recalls that the Applicants allegations concerning the principle of equality of arms are related by the Applicant to *„the*

challenged report was issued by a partial expert, because the Applicant did not have an effective opportunity to participate in the expertise preparation process, the rejection of the request for the appointment of a new expert was not justified at all, therefore, the violation of the principle of "equality of arms" against the Applicant was committed".

60. In the present case, the Court considers that under Article 6 paragraph 3 item d) of the ECHR, the party is not given an unrestricted right to hear witnesses or to present other evidence before the Court, but , as a rule, it is the duty of the regular courts to assess whether it is necessary to summon specific witnesses, and whether the statements of the proposed witnesses or the presentation of other proposed evidence and actions would be relevant and sufficient for deciding in a specific case (See, ECtHR partial Decision on Admissibility of 5 July 2005, *Harutyunyan v. Armenia*, No. 36549/03).

61. In that regard, the Court notes that the Basic Court, in its Judgment A. No. 540/13 reasoned that, *„ for the determination of the factual situation during the court hearing it heard the witnesses: Fadil Alaj and Arsim Spahija as well as the financial expert Ali Shunjaku, as well as administered the material evidence proposed by the parties, namely: TAK control report dated 23.01.2011 in business name NPT "Marigona" Gjakova, purchase book, sales book, cash book, bank details, balance and receipts as well as invoices that are mentioned in the control report dated 23.01.2011, bank cards mentioned in the report of the control situation dated 23.01.2011, the situation of the siktasi dated 11.06.2012 in which the total debt divided on the basis of tax penalties and interest is ascertained, the decision of the independent board for reconsiderations with number A. no. 277 dated 15.06.2006; expertise of the financial expert Ali Shunjaku dated 21.08.2013, decision of the Tax Administration of Kosovo-Complaints Department with number 5712012 dated 02.05.2012, Decision of the Independent Review Board in Prishtina with number A. no. 66/2012 TAK dated 09.07.2014, and heard the defense of the accused Et 'hem Bokshi and Luan Kazazi".*

62. Moreover, the Court notes that the Court of Appeals and the Supreme Court, in their judgments, provided clear and detailed reasoning as to the issue of the evidence that the Basic Court accepted, as well as on the issue of evidence which it rejected. The Supreme Court reasoned this allegation of the Applicant, *"Regarding the allegtaion of the defense counsels that the court rejected their proposal for the appointment of a financial expertise, this court considers that the*

first instance court has presented the reasoning in this regard and has given sufficient reasons, because the defense counsels have not given reasons that will ascertain the contradictions of the expertise of the expert and his contradictions with the evidence as claimed by the defense, From this court rightly found that the appointment of another expert was unnecessary for this criminal case, and in accordance with Article 142 of the CPCK, the court may appoint another expert if the data and findings of the experts differ substantially or when their findings are unclear, incomplete or contradictory to themselves or to the circumstances under consideration and if these flaws cannot be remedied with the re-examination of the experts, the opinion of other experts may be sought, and in the present case the court has rightly assessed that the defense has not given sufficient reasons regarding the contradictions or findings of the expert Ali Shunjaku and there was no other expert on this issue and therefore rejected the defense proposal as ungrounded, and the allegation that the principle of "equality of arms" has been violated turns out to be ungrounded, as there can be no question of any violation of equality".

63. The Court has already noted that the regular courts have conducted an extensive and comprehensive procedure in which evidence was presented by the Applicant and the TAK. Furthermore, the regular courts considered the Applicant's request for another independent expertise of another financial expert, reasoning that, *"pursuant to Article 142 of the CPCK, the court may appoint another expert if the data and findings of the experts differ substantially or when their findings are unclear, incomplete or in contradiction with themselves or with the circumstances examined and in case these flaws cannot be avoided by re-examination of experts the opinion of other experts may be sought, and in this case the court rightly assessed that the defense did not provide sufficient reasons regarding the contradictions or findings of expert Ali Shunjaku and there was no other expert on the matter and therefore rejected the defense proposal as ungrounded".*

64. In view of the above, the Court considers that the regular courts have provided clear and accurate arguments to support all their findings and conclusions. Therefore, the Court cannot assess the proceedings in the regular courts as arbitrary.

65. In the circumstances of the present case, the Court considers that the Applicant has not sufficiently substantiated his allegations that during the court proceedings he had not the benefit of the conduct of

the proceedings based on adversarial principle; that he was not able to present the allegations and evidence he considered relevant to its case at the various stages of those proceedings; he was not given the opportunity to challenge effectively the allegations and evidence presented by the responding party; that the courts have not heard and considered all his allegations, and which, viewed objectively, were relevant for the resolution of his case, and that the factual and legal reasons against the challenged decision were not presented in detail by the Basic Court, the Court of Appeals and the Supreme Court. Therefore, the Court considers that the proceedings, viewed in entirety, were fair (See the ECtHR case, *Khan v. the United Kingdom* no. 35394/97, Decision of 4 October 2000).

66. The Court further reiterates that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, cannot of itself raise an arguable claim of the violation of the right to fair and impartial trial (see, *mutatis mutandis*, ECtHR case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Decision of 26 July 2005, paragraph 21).

67. As a result, the Court considers that the Applicant did not substantiate the allegations that the relevant proceedings were in any way unfair or arbitrary and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR (See, *mutatis mutandis,* the ECtHR case, *Shub v. Lithuania,* No. 17064/06, Decision of 30 June 2009).

68. Therefore, the Court concludes that the Applicant's allegations of a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle of equality of arms are (iii) allegations which qualify as "*unsubstantiated or unsupported*"; and as such, these allegations of the Applicant are manifestly ill-founded on constitutional basis, as set out in paragraph (2) of Rule 39.

iii. The Court's assessment regarding the allegations of violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to erroneous or arbitrary application of legal provisions

69. In reviewing these allegations regarding the erroneous interpretation of the law, where the Applicant alleges that during the investigations conducted by the State Prosecutors Office, no action was taken within the meaning of Article 122, paragraphs 2 and 132, paragraph 5.7 of the CPCRK paragraph 5 of the CPCRK, and that the norms of Article 69 of Law no. 03-1-222 on the duration of the investigation of criminal offenses in the field of tax administration have not been respected. The Court initially points out that this allegation is essentially related to the erroneous determination of the factual situation and the erroneous application of the applicable law, allegations which the Court, in accordance with its case law as well as the case law of the ECtHR, considers as *"fourth instance allegations"*.

70. In the context of this category of claims, the Court emphasizes that based on the case law of the ECtHR, but also taking into account its peculiarities, as are determined through the ECHR (see in this context, clarification in the Practical Guide of the ECtHR of 30 April 2020 on Admissibility Criteria; part I. Admissibility Based on Merit; A. Manifestly ill-founded claims; 2. "Fourth instance" paragraphs 281 to 288), the principle of subsidiarity and the fourth instance doctrine, it has consistently emphasized the difference between *"constitutionality"* and *"legality"* and has asserted that it is not its duty to deal with errors of facts or law, allegedly committed by a regular court, unless and insofar such errors may have violated the rights and freedoms protected by the Constitution and/or the ECHR (see, in this context, *inter alia*, the cases of Court KI179/18, Applicant *Belgjyzar Latifi*, Resolution on Inadmissibility of 23 July 2020, paragraph 68; KI49/19, Applicant *Limak Kosovo Joint Stock Company International Airport JSC, "Adem Jashari",* Resolution of 31 October 2019, paragraph 47; KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 35; and KI154/17 and KI05/18, Applicants, *Basri Deva, Afërdita Deva and the Limited Liability Company "Barbas"*, Resolution on Inadmissibility, of 12 August 2019, paragraph 60).

71. The Court has consistently reiterated that it is not the role of this Court to review the conclusions of the regular courts concerning the factual situation and the application of the substantive law and that it cannot itself assess the facts which have led a regular court to adopt one decision rather than another. Otherwise, the Court would act as a court of *"fourth instance*", which would result in exceeding the limits imposed on its jurisdiction (See, in this context, the case of the ECtHR *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28 and the references used therein; and see also the cases

of the Court, Kl49/19, cited above, paragraph 48, and Kl154/17 and KI05/18, cited above, paragraph 61).

72. The Court, however, states that the case law of the ECtHR and the Court also provide for the circumstances under which exceptions from this position must be made. As stated above, while it is primarily for the regular courts, to resolve the problems in respect of interpretation of the applicable law, the role of the Court is to ensure and verify whether the effects of such interpretation are compatible with the Constitution and the ECHR (See, the ECtHR case, *Miragall Escolano and Others v. Spain*, Judgment of 25 May 2000, paragraphs 33-39; and see also the case of Courts KI154/17 and KI05/18, cited above, paragraph 63). In principle, such an exception relates to cases which result to be apparently arbitrary, including those in which a court has "*applied the law in manifestly erroneous manner"* in a particular case and which may have resulted in "*arbitrary conclusions*" or "*manifestly unreasoned*" for the respective applicant (for a more detailed explanation regarding the concept of "*application of law in a manifestly erroneous manner*", see, *inter alia*, the ECtHR Guide on Article 6 of the European Convention (civil limb), of 31 August 2020, part IV. Procedural requirements; 3. Fourth instance; b. Scope and limits of the Court's supervision, paragraphs 329-333; and the case of Court KI154/17 and KI05/18, cited above, paragraphs 60 to 65 and the references used therein).

73. The Court notes that in relation to these allegations of the Applicant, the Court of Appeals reasoned that in the Applicant's case there were no two indictments as he claims, but that on 25.03.2015 *only the technical error regarding the legal qualification of the criminal offense was rectified*.

74. The Court also notes that in the light of these allegations, the Supreme Court reasoned that as regards the duration of the investigation, the duration of the investigation for the tax offense is one year, with the possibility of further extension of that additional time required and justified by the complexity of the case.

75. In the part of the reasoning of the judgment of the Court of Appeals, which has to do with the time limit of the investigation period, it is stated, *"The indictment was filed within 1 year as provided by Article 69 of the special law, Law no. 03/L-222 on Tax Administration and Procedures, because the decision to initiate investigations PP/II. no. 756/2012 was served on 14.05.2013, while the indictment PP/II. no.*

756/2012 was submitted to the court on 14.11.2013, which means within a period of one year, in accordance with Article 69 of Law no. 03/L-222 on Tax Administration and Procedures, while regarding the indictment PP/II. no. 756/2012 of 25.03.2015, this court considers that we are not dealing with two indictments as claimed by the defense counsels of the accused with complaints, because according to the letter of the prosecution of 25.03.2015 it is confirmed that only the technical error regarding the legal qualification of the criminal offense was corrected, therefore the appealing allegations regarding essential violations of the provisions of the criminal procedure are ungrounded".

76. In these circumstances, taking into account the Applicant's allegations and the facts presented, as well as the reasoning of the regular courts elaborated above, the Court considers that the Applicant does not prove and sufficiently substantiate his allegation that the regular courts may "*have applied the law in manifestly erroneous manner*", resulting in "*arbitrary*" or "*manifestly unreasonable*" conclusions for the Applicant and, accordingly, his allegations of erroneous application and interpretation of the applicable law qualify as "*fourth instance*" allegations and as such, reflect allegations at the level of "*legality*" and are not argued at the level of „*constitutionality*". Consequently, the latter are manifestly ill-founded on constitutional basis, as provided for in paragraph (2) of Rule 39 of the Rules of Procedure.

iv. The Court's assessment regarding the allegations of violation of the rights guaranteed by Article 1 of Protocol no. 1 of the ECHR

77. In addition, the Court notes that the Applicant alleges that his rights guaranteed by Article 1 of Protocol No. 1 of the ECHR have been violated by the challenged decision of the Supreme Court. In the present case, the Applicant only mentions the relevant article of the ECHR, but does not further elaborate on how and why the violation of this relevant Article of the ECHR occurred. The violation of this article is essentially related by the Applicant to the alleged erroneous application of the law, namely the violations of Article 31 of the Constitution, Article 6 of the Convention, while these allegations of the Applicant have already been assessed by the Court as manifestly ill-founded in accordance with the Constitution (see, the case of Court KI166/20, Applicant: *Ministry of Labor and Social Welfare*, Resolution on Inadmissibility of 17 December 2020, paragraph 52).

78. The Court recalls that it has consistently reiterated that the mere reference to Articles of the Constitution and the Convention and their mention is not sufficient to build an arguable allegation for a constitutional violation. When alleging such violations of the Constitution, the applicants must provide reasoned allegations and compelling arguments (see, in this context, the cases of the Court KI175/20, Applicant: Privatization Agency of Kosovo, Resolution on Inadmissibility, of 27 April 2021, paragraph 81; see the case of Court KI166/20, cited above, paragraph 51). Therefore, with respect to these allegations, the Court in accordance with its practice declares the Applicant's Referral as manifestly ill-founded and consequently inadmissible.

79. Therefore, the Court concludes that the Applicant's allegations of a violation of Article 1 of Protocol no. 1 of the ECHR, must be declared inadmissible as manifestly ill-founded as these allegations fall into category (iii) of the "*unsubstantiated or unsupported*" allegations because the Applicant has not sufficiently substantiated and supported his allegations in relation to the violations of his rights, he merely mentioned only one or more provisions of the ECHR or the Constitution, without explaining how they were violated, therefore, the latter are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

Conclusion

80. In conclusion, the Court with respect to the Applicant's allegations of violation *i.* of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle *ne bis in idem* qualifies the latter as allegations of (ii) the second category characterized by "*clear or apparent absence of violation*"; *ii.* violation of the right from Article 31 of the Constitution and Article 6 of the ECHR in relation to the principle of equality of arms qualifies the same as allegations of the third category (iii) "*unsubstantiated or unsupported*" allegations; *iii* violation of the right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR in relation to erroneous or arbitrary application of legal provisions qualifies the latter as allegations of the first category (i) the "*fourth instance*" allegations; and *iv*. violation of the rights guaranteed by Article 1 of Protocol no. 1 of the ECHR, the Court classifies the latter as allegations of the third category (iii) category which is characterized by "*unsubstantiated or unsupported*" allegations and as such, they are manifestly ill-founded on constitutional basis.

81. Therefore, the Court concludes that the Applicant's Referral must be declared as manifestly ill-founded on constitutional basis in its entirety, and therefore inadmissible, as established in Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.1 and 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (1) of the Rules of Procedure, in the session held on 3 November 2021, by majority of votes

DECIDES

V. TO DECLARE the Referral inadmissible;

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**
Bajram Ljatifi	Gresa Caka-Nimani

KI114/20, Applicant: Aziz Sefedini, Constitutional review of non-enforcement: a) of Judgment C1. No. 190/07, of the Basic Court in Prishtina of 19 October 2010, and, b) of Judgment C1. No. 686/2009, of the Basic Court in Prishtina of 17 November 2011

KI114/20, Resolution on Inadmissibility of 20 October 2021, published on……

Key words: *individual referral, non-exhaustion of legal remedies and without subject matter*

It follows from the case file that the essence of the Applicant's Referral referred to two court (contested) proceedings initiated by the Applicant regarding,

i) annulment of the decision on termination of employment relationship and payment of unpaid monthly personal income for the period from 17 July 1991 to 16 June 1999, where "SOE Auto Prishtina" also appears as the responding party",

i

ii) unpaid personal income for the period from 10 October 1999 to 31 December 2003, whereby the Socially-Owned Enterprise „Auto Prishtina" (hereinafter: „SOE Auto Prishtina") appears as respondent.

Both of these proceedings ended with final judgments of the Basic Courts. However, the problem arose during the procedure of their enforcement. The Applicant first initiated the procedure of enforcement of Judgment **C1. No. 190/07 of the Basic Court** in the Privatization Agency, which was rejected, by considering that the request was out of time. The Applicant filed appeal with the Special Chamber of the Supreme Court against the decision of the Privatization Agency, requesting a reconsideration of the decision of the Privatization Agency. The Specialized Panel of the SCSC approved the Applicant's appeal as grounded. The Privatization Agency filed an appeal with the Appellate Panel of the SCSC against the decision of the Specialized Panel. The Appellate Panel rejected the Agency's appeal as ungrounded and ordered the Privatization Agency to enforce the judgment in accordance with the established priority.

The second enforcement procedure was initiated by the Applicant before the Privatization Agency in order to enforce final judgment C1. No. 686/2009 of the Basic Court. The Privatization Agency rejected the request for enforcement of the Applicant, stating that the request was out of time. The Applicant filed an appeal with the Special Chamber of the Supreme Court

against the decision of the Privatization Agency and requested that the decision of the Privatization Agency be reconsidered. On 9 March 2021, the Specialized Panel of the SCSC rendered Judgment C-II-15-0310-C0001, rejecting the Applicant's request for review of the decision of the Privatization Agency PRN126-0242, of 18 May 2015, as ungrounded.

On 12 April 2021, the Applicant filed an appeal with the SCSC Appellate Panel against Judgment C-II-15-0310-C0001 of the SCSC Specialized Panel, alleging violations of procedural provisions, erroneous determination of factual situation and erroneous application of substantive law. The Court found that the proceedings concerning the Applicant's appeal were still pending before the SCSC Appellate Panel. The Court came to this conclusion on the basis of a letter from the Special Chamber of the Supreme Court dated 15 July 2021, which arose as a result of a response to a letter sent by the Court to the Special Chamber of the Supreme Court on 14 July 2021.

The Applicant alleged before the Court that the courts violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 (Right to a fair trial) of the ECHR, by failing to enforce final judgments. In support of these allegations, the Applicant stated that in addition to the "*existence of res judicata judgments, only the enforcement was stopped by unlawful actions, which is contrary to the Constitution of the country*".

The Court, considering the case file as well as the allegations of the Applicant, concluded the following. Having in mind that the procedure regarding the enforcement of Judgment C1. No. 686/2009 of the Basic Court is currently before the Appellate Panel of the SCSC, concluded that this part of the request is premature.

Regarding the enforcement of final Judgment C1. No. 190/07 of the Basic Court, the Court concluded that all decisions were in favor of the Applicant, that the decisions of regular courts have already established his rights and the competent authority that is obliged to enforce them, and accordingly, this part of the Referral was declared by the Court without subject matter.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI114/20

Applicant

Aziz Sefedini

Constitutional review of non-enforcement: a) of Judgment C1. No. 190/07 of the Basic Court in Prishtina of 19 October 2010, and, b) of Judgment C1. No. 686/2009, of the Basic Court in Prishtina of 17 November 2011

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 Aziz Sefedini, from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the non-enforcement of two final judgments of the Basic Court in Prishtina (hereinafter: the Basic Court), namely: a) Judgment C1. No. 190/07 of the Basic Court of 19 October 2010 and, b) Judgment C1. No. 686/2009 of the Basic Court of 17 November 2011.

Subject matter

3. The subject matter is the constitutional review of the non-enforcement procedure of two judgments of the Basic Court, which according to the Applicant's allegations have violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Court

5. On 20 July 2020, the Constitutional Court (hereinafter: the Court) received the Applicant's Referral.

6. On 21 July 2020, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka- Nimani (Presiding), Bajram Ljatifi and Safet Hoxha.

7. On 24 August 2020, the Court notified the Applicant about the registration of the Referral.

8. On 1 February 2021, the Applicant sent an urgency to the Court requesting that the Court renders a decision on his Referral as soon as possible, citing his serious health condition.

9. On 4 February 2021, the Court notified the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber of the Supreme Court) about the registration of the Referral. In addition, the Court requested from the Special Chamber of the Supreme Court: *a) specific information regarding the Applicant's case, and, b) to submit to the Court all*

relevant decisions regarding the proceedings conducted by the Applicant before the Special Chamber.

10. On the same date, the Court also sent a letter to the Applicant requesting additional information regarding his Referral.
11. On 8 February 2021, the Special Chamber of the Supreme Court sent its replies as well as the requested decisions.

12. On 18 February 2021, the Applicant also sent his responses to the Court's request.

13. On 28 April 2021, the Court notified the Privatization Agency about the registration of the Referral and also requested information regarding the Applicant's proceedings conducted before it.

14. On 11 May 2021, the Applicant sent the urgency to the Court requesting that his referral be resolved as soon as possible due to his serious health condition.

15. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 25 June 2021.

16. On 19 May 2021, the Privatization Agency sent its responses to the Court's request.

17. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

18. On 27 May 2021, the President of the Court, Arta Rama-Hajrizi, by Decision No. KI48/21, appointed Judge Radomir Laban as Judge Rapporteur replacing Judge Bekim Sejdiu following his resignation.

19. On 15 June 2021, the Court sent a new letter to the Special Chamber of the Supreme Court for further clarifications and information.

20. On 26 June 2021, pursuant to paragraph 4, of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1, of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

21. On 1 July 2021, the Special Chamber of the Supreme Court sent clarifications and information regarding the Court's letter of 10 June 2021.

22. On 6 July 2021, the Court sent a new letter to the Special Chamber of the Supreme Court to obtain other necessary documents and judgments.

23. On 8 July 2021, the Court received the requested documents and judgments from the Special Chamber of the Supreme Court by electronic mail.

24. On 14 July 2021, the Court sent a new letter to the Special Chamber of the Supreme Court requesting that the Special Chamber regularly notifies the Court about all proceedings taken in connection with the Applicant's Referral, as well about all decisions of the panels of the Special Chamber taken in the meantime. in connection with the present Referral.

25. On 15 July 2021, the Special Chamber of the Supreme Court sent a reply via electronic mail to the Court's letter of 14 July 2021.

26. On 20 October 2021, the Review Panel considered the report of the Judge Rapporteur, and with majority of votes made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

27. Based on the case file, the Court notes that the essence of the Applicant's Referral referrs to two court (contested) proceedings initiated by the Applicant regarding,

iii) annulment of the decision on termination of employment relationship and payment of unpaid monthly personal income for the period from 17 July 1991 to 16 June 1999, where "SOE Auto Prishtina" also appears as responding party", and

iv) unpaid personal income for the period from 10 October 1999 to 31 December 2003, whereby the Socially-Owned Enterprise „Auto Prishtina" (hereinafter: „SOE Auto Prishtina") appears as respondent.

28. In view of this, the Court will further present separately in the report the court proceedings conducted by the Applicant before the Basic Courts in the procedure of deciding on statements of claims, as well as the court proceedings initiated by him for the purpose of enforcement of judgments, both before the Privatization Agency and before the Special Chamber of the Supreme Court.

First court proceedings of the Applicant, regarding the statement of claim for annulment of the decision on termination of employment relationship with "SOE Auto-Prishtina" and the payment of unpaid monthly personal income for the period from 17 July 1991 to 16 June 1999

29. On an unspecified date, the Applicant filed the statement of claim with the Basic Court against the abovementioned *"SOE "Auto-Prishtina"*, in which it requested the annulment of the decision on termination of employment relationship and payment of unpaid salaries by "SOE", for the period from 17 July 1991 to 16 June 1999.

30. On 17 November 2011, the Basic Court held a main hearing session which was not attended by the respondent *SOE "Auto-Prishtina"*, despite the fact, as stated in the reasoning of the Basic Court, *„that it was summoned in the proper manner in terms of Article 423.4 of the Law on Contested Procedure (hereinafter: LCP) by the court."*

31. On the same date, the Basic Court, by Judgment C1. No. 686/2009, by which: I. approved the statement of claim of the Applicant as grounded, II. annulled as unlawful decision of the respondent *SOE "Auto-Prishtina"* 02-414 of 17 July 1991, which terminated the employment relationship of the Applicant, III. Obliged the respondent *SOE "Auto-Prishtina"* to compensate the Applicant for unpaid monthly salaries during the time he was dismissed from employment relationship, namely from 17 July 1991 to 16 May 1999, in the amount

of 29,556.08 euro with legal interest of 3.5% starting from 01 October 2006.

32. The reasoning of Judgment C1. No. 686/2009 of the Basic Court states:

> *„The respondent by decision no. 02-414 of 17 July 1991 terminated his employment relationship with the claimant because he voluntarily terminated his job and voluntarily left his working place […]*
>
> *In the present case, the challenged decision, which terminated his employment relationship with the respondent was unlawful […]*
>
> *The court found that the claimant had not committed a serious work misconduct on the day he left the working place, the claimant* (Applicant) *had a certificate from a doctor that he was incapable for that working day when he got out during working hours, but the aim was to terminate the employment relationship of the claimant on the basis of legal provisions that were in force, which were discriminatory and contrary to the provisions of the Regulation of the respondent and the Law on Fundamental Rights from Employment, Article 59 […]"*

33. As to the amount of monetary compensation awarded to the Applicant, the reasoning of the judgment of the Basic Court reads*:*

> *„[…] as a result of termination of employment relationship, the court, at the suggestion of the authorized claimant, ordered a financial expertise performed by an authorized expert in this field Sh.B from Prishtina of 02.10.2006, which determines that the amount of salaries for the job position of material accountant with the respondent, for the disputed time, namely from 17.07.1991. until 16.06.1999, is in the amount of 29,556.08 euro, including interest".*

34. From the case file, the Court finds that the respondent *"SOE Auto Prishtina"* did not file appeal with the District Court against Judgment C1. No. 686/2009, of the Municipal Court, therefore, it has become final.

Enforcement proceedings of Judgment C1. No. 686/2009 of the Basic Court, against *"SOE Auto Prishtina"*, represented by the Privatization Agency

35. The Applicant, through an authorized representative, initiated the procedure of enforcement of Judgment C1. No. 686/2009 of the Basic Court of 17 November 2011, against *"SOE Auto Prishtina"* represented by the Privatization Agency.

36. On 31 December 2012, the Basic Court rendered Decision E. No. 2394/12, which allows the enforcement of Judgment C1. No. 686/2009, of the Basic Court of 17 November 2011.

37. The case file shows that on 29 July 2014, the Privatization Agency published a notice in the daily newspapers "*Kosova Sot"* and "*Tribuna"*, as well as on the official website of the Privatization Agency, stating *„that the liquidation procedure of "SOE Auto Prishtina" has commenced and that the deadlines for submitting requests for claims related to liquidation are until 11 September 2014"*. The Privatization Agency published the same notice on 8 August 2014.

38. On 19 October 2014, the Applicant submitted to the Privatization Agency, as a representative of *"SOE Auto Prishtina"* a request for payment of *"Claims for unpaid salaries"* pursuant to Judgment C1. No. 686/2009 of the Basic Court.

39. On 18 May 2015, the Privatization Agency rendered Decision PRN126-0242, regarding the request for enforcement of Judgment C1. No. 686/2009, in which it stated: *"request claiming compensation for unpaid salaries in the amount of 29,556.08 euro for the period from 17.07.1991 until 16.06.1999. with legal interest of 3.5% until the final payment and costs of the procedure in the amount of 632.00 euro, is rejected as invalid, due to the fact that the request was submitted on 19.09.2014, which is after the deadline for submission of requests. The deadline for submitting requests was 11 September 2014@.*

40. For such reasoning of Decision PRN126-0242, the Privatization Agency stated:

> *"[...] that the applicant has submitted a statement along with the accompanying documentation stating that the reason for submitting the request after the deadline is that he has been having serious health problems lately [...]*
>
> *The Liquidation Administration, after reviewing the medical reports submitted by the Applicant, first determines that the Applicant does not at any time diagnose any disease that would*

completely prevent the latter from submitting the request within the deadlines.

In addition, these reports cannot be considered a convincing justification because the reporting dates differ from the reports issued in May 2014, when the SOE was not yet in liquidation until the last report submitted here, dated 26.08.2014. From this date until 11 September 2014, which was the deadline for submitting the request for liquidation, the applicant had another 16 days to submit the request within the set deadlines..

On the other hand, the Applicant's explanation that he should have been personally informed by the Kosovo Privatization Agency is also unconvincing. This is because the liquidation authority considers that it has taken all necessary steps to inform potential stakeholders, including the applicant.

Article 35.3 of the Annex to Law no. 04/L-034 provides: "If the alleged creditor or interest holder provides compelling justification for late filing, the Liquidation Authority may in its sole discretion accept a Proof of Claim or Interest submitted after the Claims Submission Deadline, if the proof of Claim or Interest is filed not later than thirty (30) days after the Claims Submission Deadline".

41. On 12 June 2015, the Applicant sent to the Special Chamber of the Supreme Court a request for reconsideration of Decision PRN126-0243, of the Privatization Agency of 18 May 2015.

42. On 6 October 2015, the Privatization Agency sent to the Special Chamber of the Supreme Court *„Request for legal instruction",* where it requested *„that the Special Chamber issue instructions as to whether the executive court or the Private Enforcement Agent, as well as the banking institutions in Kosovo, have the legal right to make payments of trust funds as regards Socially Owned Enterprises in liquidation by PAK."*

43. On 15 October 2015, at the request of the Privatization Agency, the Special Chamber of the Supreme Court issued Instruction C-IV-15-1607, which states:

„I. From the day of submitting the notification of the Liquidation Decision until the end of the Liquidation, any court, administrative or arbitration proceedings against the company

and its assets subject to the Liquidation Decision, including enforcement proceedings of final decisions regarding monetary claims, shall be SUSPENDED.

II. Suspension of proceedings shall not apply in cases provided for in paragraph 3 of Article 10 of the Annex to the Law (No. 04 L-034) on PAK

III. Suspended proceedings may be allowed to continue only by the adoption of a request by the Special Chamber."

44. The Special Chamber of the Supreme Court explained its position as follows:

„[...] the Chamber finds that the proper interpretation of these provisions means, in the case of judicial, administrative and arbitration proceedings, but also enforcement proceedings, which are directed against companies and their property that are the subject of the liquidation decision, these proceedings are suspended from the date of notification until the end of the liquidation procedure.

The implementation of this law is binding not only on PAK and the courts but also on all other institutions, including banks as well as private executors.

When receiving such proposals against SOEs that are in liquidation in the cases attached to the request, PAK is obliged to react within the legal powers and competencies it has.

The Law on PAK is a special law (Lex Specales) that is implemented in such cases and excludes the implementation of all other general laws (Article 31, paragraph 1 of this law)."

45. On 23 October 2015, the Privatization Agency, following the issuance of Instruction C-IV-15-1607 of Special Chamber of the Supreme Court, sent a submission to the Basic Court requesting to suspend the enforcement of Judgment C1. No. 686/2009 , stating *„that the enforcement debtor SOE "Auto-Prishtina" in Prishtina is a socially-owned enterprise and is in the process of liquidation, which is why the Special Chamber of the Supreme Court of Kosovo issued Instruction no. C-IV-15-1607 of 15 October 2015, stating that: "From the date of submission of the liquidation decision until the end of the liquidation, any court, administrative or arbitration proceedings are*

SUSPENDED, and they are initiated against the company and its property which is the subject of the liquidation decision, including final decisions of the enforcement proceedings relating to monetary claims" and that the taking of enforcement actions over trust funds would constitute a violation of the legal provisions in force".

46. The Court could not find in the case file whether the Basic Court acted upon the request of the Privatization Agency to suspend the enforcement of Judgment C1. No. 686/2009.

47. On 16 October 2017, the Privatization Agency submitted to the Special Chamber of the Supreme Court an objection to the Applicant's request for review of Decision PRN126-0242, of the Privatization Agency of 18 May 2015, stating *„that the deadline for submitting requests in the liquidation procedure was 11.09.2014, while the claimant filed the request on 19.09.2014, thus the request was unspecified. In this regard, the decision of the Liquidation Authority was fair and based on law […]".*

48. On 9 March 2021, the Special Chamber of the SCSC issued Judgment C-II-15-0310-C0001, whereby, the Applicant's request to reconsider the decision of the Privatization Agency PRN126-0242, of 18 May 2015, rejected as ungrounded.

49. In the reasoning of the judgment, the Special Panel of the SCSC stated:

> *„[…] The Applicant submitted the request to the Liquidation Authority on 19.09.2014, where he requested compensation in the amount of 29,556.08 euro, on behalf of unpaid salaries, relating to the period from 17.07.1991 to 16.06.1999. This request was submitted out of the legal deadline for submitting the request, however, the claiming party stated that he submitted the request after the deadline because he had health problems..*
>
> *Article 35.3 of the Annex to Law No. 04/L-034 stipulates that if the alleged creditor or interest holder provides compelling justification for late filing, the Liquidation Authority may in its sole discretion accept a Proof of Claim or Interest submitted after the Claims Submission Deadline, if the proof of Claim or Interest is filed not later than thirty (30) days after the claims submission deadline. In this case, the applicant submitted a request for compensation of salaries after the deadline for submitting the request, together with several medical evidence, and stated that he could not submit the request on time due to health problems.*

The liquidation authority considered the request submitted by him and determined that the submitted reasons are not the basis for approving the request submitted by Aziz Sefedini, therefore, it rejected the request for salary compensation because it was submitted outside the deadline for submitting the request".

50. On 12 April 2021, the Applicant filed an appeal with the Appellate Panel of the SCSC against Judgment C-II-15-0310-C0001 of the Special Chamber of the SCSC, alleging violations of procedural provisions, erroneous determination of factual situation and erroneous application of substantive law.

51. The Court finds that the proceedings concerning the Applicant's appeal are still pending before the SCSC Appellate Panel.

52. The Court explains that such a conclusion was reached on the basis of a letter from the Special Chamber of the Supreme Court of 15 July 2021, resulting from a reply to a letter sent by the Court to the Special Chamber of the Supreme Court on 14 July 2021.

53. In a letter of 15 July 2021, the Special Chamber of the Supreme Court stated *„that the Applicant filed an appeal with the Appellate Panel against Judgment C-II-15-0310, of 09.03.2021, which is registered with the SCSC AC-I-21-0232-A0001. The case under number AC-I-21-0232-A0001, was subject to a lot on 12.05.2021 and was sent to the judge and the case will be handled as a priority of the SCSC".*

The second court proceedings of the Applicant, regarding the statement of claim for payment of unpaid monthly personal income for the period from 10 October 1999 until 31 December 2003

54. On an unspecified date, the Applicant filed a statement of claim with the Basic Court against "*SOE Auto Prishtina"*, requesting payment of unpaid personal income, for the period from 10 October 1999 to 31 December 2003.

55. On 19 October 2010, the Basic Court held a main hearing which was not attended by the respondent "*SOE Auto Prishtina"*, despite the fact, as stated in the reasoning of the Basic Court, *„that it was duly summoned by the court, but that it did not respond to the summons, nor did it justify its absence, thus holding the main hearing in its absence".*

56. On the same date, the Basic Court, by Judgment C1. No. 190/07 approved the statement of claim of the Applicant and determined that the Applicant is in employment relationship with the respondent "*SOE Auto Prishtina"*. At the same time, the Basic Court ordered the respondent "*SOE Auto Prishtina"* to pay the Applicant an amount of money in the amount of 35,726.16 euro on behalf of unpaid personal income for the responding period from 10 October 1999 to 31 December 2003.

57. The reasoning of Judgment C1. No. 190/07 of the Basic Court states:

> *„It is not disputed between the parties that the claimant* (the Applicant) *established an employment relationship with the respondent from 1983 on the duties and tasks of the director until 1991, […]*
>
> *It is also not disputed between the parties that the claimant immediately after the war applied for a job with the respondent and started a job, which means that he must be considered to be in a relationship with the respondent. This court finds that the parties do not dispute the fact that the claimant was not issued any written decision on termination of employment relationship and also no disciplinary proceedings was conducted, but it was ordered by the director - administrator, S.Z., that he no longer has to go to work and that he he is not the employee of the respondent without any explanation.*
>
> *According to Article 175 of the Law on Associated Labor applicable in Kosovo, the employee must be served with a written decision on employment relationship with the employer, which must also contain the reasons for his decision and must contain instructions on the right to object to that decision".*

58. As to the amount of monetary compensation awarded to the Applicant, the reasoning of the Basic Court states:

> *„According to the expertise of the financial expert Sh.B., it follows that the liabilities in the name of personal income and interest for the period from 18.10.1999 until 31.12.2003 of the respondent to the claimant, is a total of 35,725.16 euro".*

59. From the case file, the Court finds that the respondent "*SOE Auto Prishtina"*, did not file appeal with the District Court against

Judgment Court C1. No. 190/07 of the Municipal, whereby it became final.

Enforcement proceedings of Judgment C1. No. 190/07 of the Basic Court against "*SOE Auto Prishtina"*, represented by the Privatization Agency

60. The Applicant, through an authorized representative, initiated the enforcement proceedings of Judgment C1. No. 190/07 of the Basic Court of 19 October 2010, against "*SOE Auto Prishtina"*, represented by the Privatization Agency.

61. On 26 February 2013, the Basic Court rendered Decision E. No. 791/12, which allowed the enforcement of Judgment C1. No. 190/07, of 19 October 2010.

62. The case file shows that on 29 July 2014, the Privatization Agency published a notice in the daily newspapers "*Kosova Sot*" and "*Tribuna"*, as well as on the official website of the Privatization Agency, stating *„that the liquidation procedure of "SOE Auto Prishtina" has commenced and that the deadlines for submitting requests for claims related to liquidation are until 11 September 2014"*. The Privatization Agency published the same notice on 8 August 2014.

63. On 19 October 2014, the Applicant submitted to the Privatization Agency, as a representative of *"SOE Auto Prishtina"* a request for payment of *"Claims for unpaid salaries"* pursuant to Judgment C1. No. 190/07 of the Basic Court.

64. On 18 May 2015, the Privatization Agency rendered Decision PRN126-0243, regarding the request for enforcement of Judgment C1. No. 190/07, regarding the payment of unpaid salaries in the amount of 35,725.16 euro, for the period from 18 October 1999 to 31 December 2003, as well as the costs of proceedings in the amount of 969.20 euro, is rejected as invalid with explanation: *" The Applicant's request was rejected because it was submitted on 19 September 2014, which is after the deadline for submission of requests. The deadline for submitting requests was 11.09.2014"*.

65. For such a position in the decision PRN126-0243, the Privatization Agency stated the following arguments:

"[...] that the applicant has submitted a statement along with the accompanying documentation stating that the reason for submitting the request after the deadline is that he has been having serious health problems lately [...]

The Liquidation Administration, after reviewing the medical reports submitted by the Applicant, first determines that the Applicant does not at any time diagnose any disease that would completely prevent the latter from submitting the request within the deadlines.

In addition, these reports cannot be considered a convincing justification because the reporting dates differ from the reports issued in May 2014, when the SOE was not yet in liquidation until the last report submitted here, dated 26.08.2014. From this date until 11 September 2014, which was the deadline for submitting the request for liquidation, the applicant had another 16 days to submit the request within the set deadlines..

On the other hand, the Applicant's explanation that he should have been personally informed by the Kosovo Privatization Agency is also unconvincing. This is because the liquidation authority considers that it has taken all necessary steps to inform potential stakeholders, including the applicant.

Article 35.3 of the Annex to Law no. 04/L-034 provides: "If the alleged creditor or interest holder provides compelling justification for late filing, the Liquidation Authority may in its sole discretion accept a Proof of Claim or Interest submitted after the Claims Submission Deadline, if the proof of Claim or Interest is filed not later than thirty (30) days after the Claims Submission Deadline".

66. On 12 June 2015, the Applicant sent to the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber) a request for reconsideration of Decision PRN126-0243 of the Privatization Agency of 18 May 2015.

67. On 6 October 2015, the Privatization Agency sent to the Special Chamber of the Supreme Court *„Request for legal instruction",* whereby it requested *„that the Special Chamber issues instructions as to whether the executive court or the Private Enforcement Agent, as well as the banking institutions in Kosovo, have the legal right to*

make payments of trust funds as regards Socially Owned Enterprises in liquidation by PAK".

68. On 15 October 2015, at the request of the Privatization Agency, the Special Chamber of the Supreme Court issued Instruction C-IV-15-1607, which states:

> *„I. From the day of submitting the notification of the Liquidation Decision until the end of the Liquidation, any court, administrative or arbitration proceedings against the company and its assets subject to the Liquidation Decision, including enforcement proceedings of final decisions regarding monetary claims, shall be SUSPENDED.*
>
> *II. Suspension of proceedings shall not apply in cases provided for in paragraph 3 of Article 10 of the Annex to the Law (No. 04 L-034) on PAK*
>
> *III. Suspended proceedings may be allowed to continue only by the adoption of a request by the Special Chamber".*

69. The Special Chamber of the Supreme Court explained its position as follows:

> *„[...] the Chamber finds that the proper interpretation of these provisions means, in the case of judicial, administrative and arbitration proceedings, but also enforcement proceedings, which are directed against companies and their property that are the subject of the liquidation decision, these proceedings are suspended from the date of notification until the end of the liquidation procedure.*
>
> *The implementation of this law is binding not only on PAK and the courts but also on all other institutions, including banks as well as private executors.*
>
> *When receiving such proposals against SOEs that are in liquidation in the cases attached to the request, PAK is obliged to react within the legal powers and competencies it has.*
>
> *The Law on PAK is a special law (Lex Specialis) that is implemented in such cases and excludes the implementation of all other general laws (Article 31, paragraph 1 of this law)".*

70. On 23 October 2015, the Privatization Agency, following the issuance of Instruction C-IV-15-1607 of Special Chamber of the Supreme Court, sent a submission to the Basic Court requesting to suspend the enforcement of Judgment C1. No. 190/07, stating *„that the enforcement debtor SOE "Auto-Prishtina" in Prishtina is a socially-owned enterprise and is in the process of liquidation, which is why the Special Chamber of the Supreme Court of Kosovo issued Instruction no. C-IV-15-1607 of 15 October 2015, stating that: "From the date of submission of the liquidation decision until the end of the liquidation, any court, administrative or arbitration proceedings are SUSPENDED, and they are initiated against the company and its property which is the subject of the liquidation decision, including final decisions of the enforcement proceedings relating to monetary claims" and that the taking of enforcement actions over trust funds would constitute a violation of the legal provisions in force".*

71. On 16 October 2017, the Privatization Agency submitted to the Special Chamber of the Supreme Court an objection to the Applicant's request for review of Decision PRN126-0243, of the Privatization Agency of 18 May 2015, stating *„that the deadline for submitting requests in the liquidation procedure was 11.09.2014, while the claimant filed the request on 19.09.2014, thus the request was unspecified. In this regard, the decision of the Liquidation Authority was fair and based on law […]".*

72. On 14 March 2018, the Specialized Panel of the SCSC rendered Judgment C-IV-15-1027, by which it I. approved as grounded the Applicant's request for review of Decision PRN126-0243 of the Privatization Agency of 18 May 2015, regarding the enforcement of Judgment C1. No. 686/2009 as grounded, II. annulled Decision PRN126-243 of 18 May 2018, and III. obliged the Liquidation Authority of the Privatization Agency *„„to pay on behalf of compensation for unpaid salaries for the period from 18.10.1999 to 31.12.2003, to pay the claimant the amount of 35,725.16 euro, as well as the costs of proceedings in the amount of 969.20 euro".*

73. In its reasoning, the Special Panel of the SCSC stated *„that in this case there is no dispute over claims for unpaid salaries in the liquidation proceedings, as this issue was considered in another court proceeding initiated in 2001 and resulted in the final Judgment of the Municipal Court in Prishtina on 19 October 2010, which approved the request of the claimant for unpaid salaries by the SOE in the amount of 35,725.16 euro.*
[ ]

The Specialized Panel found that PAK has not fulfilled its obligation to the Applicant, therefore it cannot claim that the Applicant missed the deadline for submitting the request.

74. On 26 March 2018, the Privatization Agency filed an appeal with the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: SCSC Appellate Panel) against Judgment C-IV-15-1027 of the SCSC Specialized Panel. In the appeal, the Privatization Agency stated, "*that the argument that the request was submitted after a certain deadline is sufficient to reject the applicant's appeal as ungrounded and to support the decision of the Liquidation Authority. The Privatization Agency also adds that the Specialized panel of the SCSC, in many cases of its jurisprudence, stressed the importance of respecting the deadline for submitting requests to the Liquidation Authority, referring to some cases, so this Judgment is contrary to the case law".*

75. On 28 March 2018, the Basic Court adopted the request of the Privatization Agency of 23 October 2015 to suspend the enforcement of Judgment C1. No. 190/07. Also, the Basic Court rendered Conclusion E. No. 2394/12, in which it *„I. Suspends the proceedings in this matter of enforcement until the liquidation proceedings against the enforcement debtor SOE "Auto-Prishtina" are completed:. II. The procedure will continue in this matter, after the notification that the liquidation procedure against the enforcement debtor SOE "Auto-Pristina" is completed. III. The enforcement creditor undertakes to inform the court in writing that the liquidation procedure against the enforcement debtor has been completed, so that the court continues with the enforcement".*

76. In the reasoning of Conclusion E. No. 2394/12 of the Basic Court is stated:

> *„[...] after the assessment of the submission of 28.10.2015, other documents in the case file and on the basis of the above, came to the conclusion that the proceedings in this enforcement matter should be suspended until the completion of the liquidation proceedings against the enforcement debtor..."*

77. On 5 December 2019, the Appellate Panel of the SCSC rendered Judgment AC-I-18-0184, whereby in Item I. rejected the appeal of the Privatization Agency as ungrounded, upheld Judgment C-IV-15-1027 of the Specialized Panel of the SCSC, in item II. of the enacting clause

of Judgment C-IV-15-1027, the Appellate Panel of the SCSC added the text, where at the end of the sentence, the text of the following content is added ex officio: *„according to the priorities established by law in the liquidation procedure".*

78. In the reasoning of Judgment AC-I-18-0184, the Appellate Panel of the SCSC stated:

> *„The Appellate Panel finds the conclusion of the Specialized Panel of the SCSC given in the appealed Judgment that the duty of the PAK, in accordance with Article 7.4 of the Annex to the Law on PAK, to notify the claimant regarding the liquidation notice, and the deadline for submitting the claim based on the published notice, in the liquidation procedure, in particular when the PAK already knew that the claimant had a final Judgment on his claim filed earlier against the SOE. Therefore, it can be concluded that the Agency did not fulfill the legal obligation it already had towards the claimant after the publication of the notice for submission of the claims.*
>
> *The Appellate Panel further notes that the claimant has proved with evidence that he had and still has health problems, so in such circumstances his submission to the Liquidation Authority with a few days delay is not a valid and legitimate reason for rejecting the request due to the deadline. The own failure of PAK to inform the claimant about the possibility of submitting a request cannot be covered by the allegation that the claimant did not meet the deadline, when he already knew that the claimant had a legitimate request for salary based on a final judgment, which is binding and must be enforced.*
>
> *The Appellate Panel, in Judgment C-IV-15-1027 of the Specialized Panel of the SCSC, of 14 March 2018, in item II of the enacting clause, after the end of the sentence of this item, ex officio added a sentence with the following text: "according to priorities defined by law in the liquidation procedure".*

Applicant's allegations

79. The Applicant alleges that the courts by non-enforcement of final judgments violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 (Right to a fair trial) of the ECHR.

80. In support of these allegations, the Applicant adds that besides the "*existence of res judicata judgments, only the enforcement was stopped by unlawful actions, which is contrary to the Constitution of the country*".

81. In the context of the above, the Applicant adds *„that his right to fair and effective trial guaranteed by the Constitution and the ECHR has been violated due to non-enforcement of res judicata judgments for a long period of time, although the competent court was notified about the Applicant's very serious health condition"*.

82. Accordingly, the Applicant considers that *„It is unacceptable and unlawful for the competent court, in this case the Basic Court in Prishtina, to prolong the enforcement of the case in the dispute, although, as it can be seen from the attached files, the same court previously allowed the enforcement"*.

83. Finally, the Applicant requests the Court to *„i) assess the constitutionality of non-enforcement of a case in dispute for a longer period of time, ii) that the court concludes that the right to a fair and effective trial guaranteed by the Constitution has been violated, iii) that the Court must act in accordance with the Constitution of the country and allows the enforcement of the case in dispute"*.

Admissibility of the Referral

84. The Court first examines whether the admissibility requirements established by the Constitution, foreseen by Law and further specified in the Rules of Procedure have been met.

85. 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"*.

86. In addition, the Court also refers to the admissibility requirements as prescribed by the Law. In this regard, the Court first refers to Articles

48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]".

87. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, who is challenging the non-enforcement of the two-final judgments of the Basic Court, namely: a) Judgment C1. No. 190/07, of 19 October 2010 and, b) Judgment C1. No. 686/2009, of 17 November 2011. The Applicant has also specified the rights and freedoms for which he claims to have been violated, pursuant to the requirements of Article 48 of the Law, and has submitted the Referral in accordance with the deadline set out in Article 49 of the Law.

88. In the context of the assessment of the admissibility of the referral, namely, the assessment of whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the merits of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

89. Returning to the very essence of the Applicant's allegations, bearing in mind that these are two contested proceedings, which have the same esence, but different procedural paths, as well as different outcomes in the current circumstances defining them and different court judgments, the Court will assess individually the admissibility requirements, whether the Applicant has met the requirement of exhaustion of legal remedies in relation to both contested

proceedings. Finally, the Court will particularly assess the Applicant's allegations of non-enforcement of *"res judicata judgments for a longer period of time "*.

(i) in relation to the court proceedings regarding the enforcement of final Judgment C1. No. 686/2009 of the Basic Court, which arose as a result of the court proceedings initiated by the Applicant with the statement of claim for annulment of the decision on termination of employment relationship with "SOE "Auto-Prishtina" and the payment of unpaid monthly income for the period from 17 July 1991 to 16 June 1999

90. In relation to the court proceedings concerning the enforcement of final Judgment C1. No. 686/2009 of the Basic Court, the Court on the basis of the general principles relating to the exhaustion of legal remedies, as elaborated in the case law of the ECtHR and of the Court, will first assess whether the Applicant has exhausted all legal remedies provided by law. The same principles are also elaborated in a certain number of cases of the Court, including but not limited to the cases of the Court, KI108/18, Applicant *Blerta Morina*, Resolution on Inadmissibility, of 30 September 2019; KI147/18, Applicant *Artan Hadri*, Resolution on Inadmissibility, of 11 October 2019; KI211/19, Applicants *Hashim Gashi, Selajdin Isufi, B.K., H.Z., M.H., R.S., R.E., S.O., S.H., H.I., N.S., S.l., and S.R*, Resolution on Inadmissibility, of 11 November 2020; KI43/20, Applicant *Fitore Sadikaj*, Resolution on Inadmissibility, of 31 August 2020; and KI42/20, Applicant *Armend Hamiti*, Resolution on Inadmissibility, of 31 August 2020.

91. With regard to these contested proceedings, the Court first refers to the admissibility requirements, as laid down in the Law. In this regard, the Court first refers to Article 47 (Individual Requests) of the Law, which stipulates:

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".

92. In addition, the Court refers to Rule 39 (1) (b) and (2) of the Rules of Procedure, which establishes:

> *(1) "The Court may consider a referral as admissible if:*
>
> *[...]*
>
> (*b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted,*

93. The Court further finds that in the proceedings of enforcement of final Judgment C1. No. 686/2009 of the Basic Court, the Applicant initiated enforcement proceedings before the competent authority, namely the Privatization Agency of Kosovo, which by Decision PRN126-0242 challenged the enforcement of Judgment C1. No. 686/2009, considering that the Applicant initiated the procedure of its enforcement out of time. In order to exercise his rights under the final judgments, the Applicant submitted a request for review of Decision PRN126-0242 of the Privatization Agency of Kosovo before the Special Chamber of the Supreme Court, as a competent court instance with exclusive jurisdiction to deal with decisions of the Privatization Agency of Kosovo.

94. The Court finds that the Specialized Panel of the SCSC, as the first instance of the Special Chamber of the Supreme Court, on 9 March 2021, rendered Judgment C-II-15-0310-C0001, whereby it rejected as ungrounded the request of the Applicant to reconsider Decision PRN126-0242 of the Privatization Agency of Kosovo.

95. As to the Applicant's further procedural path, the Court must recall here that in order to collect all documents and court decisions on 14 July 2021, it sent an additional letter to the Special Chamber of the Supreme Court, to which the latter responded on 15 July 2021. The Court recalls that in the response of the Special Chamber of the Supreme Court of 15 July 2021, it decisively reads:

> *„[...] the Applicant filed an appeal with the Appellate Panel against Judgment C-II-15-0310, of 09.03.2021, which is registered with the SCSC AC-I-21-0232-A0001. The case under number AC-I-21-0232-A0001, was subject to a lot on 12.05.2021 and was sent to the judge and the case will be handled as a priority of the SCSC ".*

96. Based on the response of the Special Chamber of the Supreme Court, the Court can only conclude that the Applicant's proceedings regarding the enforcement of Judgment C1. No. 686/2009 of the Basic Court of 17 November 2011 are pending before the SCSC Appellate Panel for a decision. The Court wishes in particular to state the conclusion of the Special Chamber of the Supreme Court from the response of 15 July 2021, which states "*that the case will be treated as a priority by the Special Chamber of the Supreme Court*", and the Court has no reason to doubt that this will not be the case.

97. Based on the above, the Court concludes that the Applicant's request regarding non-enforcement of Judgment C1. No. 686/2009 of the Basic Court, which arose as a result of court proceedings initiated by the Applicant by the statement of claim for annulment of the decision on termination of employment relationship with "*SOE "Auto-Prishtina*", and the payment of unpaid monthly income for the period from 17 July 1991 to 16 June 1999, is premature.

98. The Court recalls that the rule for exhaustion of legal remedies under Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, obliges those who wish to bring their case before the Constitutional Court, that they must first use the effective legal remedies available to them in accordance with law, against a challenged judgment or decision.

99. In that way, the regular courts must be afforded the opportunity to correct their errors through a regular judicial proceeding before the case arrives to the Constitutional Court. The rule is based on the assumption, reflected in Article 32 of the Constitution and Article 13 of ECHR, that under the domestic legislation there are available legal remedies to be used before the regular courts in respect of an alleged breach, regardless whether or not the provisions of the ECHR are incorporated in national law (see, *inter alia,* case *Aksoy v. Turkey,* Judgment of 18 December 1996, paragraph 51, Judgment of ECtHR of 18 December 1996).

100. The principle is that that the protection mechanism established by the Constitutional Court is subsidiary to the regular system of judiciary safeguarding human rights (see, *inter alia, Handyside v. United Kingdom,* paragraph 48, ECtHR Judgment of 7 December 1976).

101. Under Article 113.7 of the Constitution, the Applicant should have a regular way to the legal remedies which are available and sufficient to ensure the possibility to put right the alleged violation. The existence of such legal remedies must be sufficiently certain, not only in theory but also in practice, and if this is not so, those legal remedies will lack the requisite accessibility and effectiveness (see, *inter alia*, case *Vernillo v. France* paragraph 27, ECtHR Judgment of 20 February 1991, and *Dalia v. France*, paragraph 38, ECtHR Judgment of 19 February 1998). The Court emphasizes that this conclusion of the court regarding this court proceeding regarding the enforcement of Judgment C1. No. 686/2009 of the Basic Court does not prevent the Applicant from submitting again the constitutional request in the future within the legal deadline of 4 (four) months from the date he receives the decision of the Appellate Panel of the SCSC. This decision of the Court found that for the time being the Applicant's Referral is premature, because the current laws provide effective legal remedies by which the Applicant can seek protection of his legal and constitutional rights.

102. Therefore, the Court concludes that the part of the Referral concerning the proceedings initiated by the Applicant for the enforcement of final Judgment C1. No. 686/2009 of the Basic Court, which arose as a result of the court proceedings initiated by the Applicant by statement of claim for annulment of the decision on termination of employment relationship with "*SOE "Auto-Prishtina*", and the payment of unpaid monthly salaries for the period from 17 July 1991 to 16 June 1999, inadmissible, on constitutional basis, as prescribed by Article 113.7 of the Constitution, provided for in Article 47 of the Law and further specified in Rule 39 (1) (b) of the Rules of Procedure.

(ii) in relation to the court proceedings regarding the enforcement of final Judgment C1. No. 190/07 of the Basic Court, which arose as a result of the court proceedings initiated by the Applicant with the statement of claim for payment of unpaid monthly personal income for the period from 10 October1999 to 31 December 2003

103. The Court recalls that the Applicant initiated contested proceedings before the Basic Court in order to exercise his rights to the payment of personal income for the period from 10 October 1999 to 31 December 2003. The Court finds that the Basic Court approved the Applicant's

request and on 19 October 2010, rendered Judgment C1. No. 190/7, which became final, bearing in mind that the respondent did not file an appeal with the District Court.

104. The Court further finds that in the enforcement proceedings of final Judgment C1. No. 190/7 of the Basic Court, the Applicant also initiated enforcement proceedings before the competent authority, namely the Privatization Agency of Kosovo, which, by Decision PRN126-0243, challenged the enforceability of Judgment C1. No. 190/7, considering that the Applicant initiated the enforcement procedure untimely. In order to exercise his rights under the final judgment, the Applicant submitted a request for review of Decision PRN126-0243 of the Privatization Agency of Kosovo to the Special Chamber of the Supreme Court, as a competent court instance with exclusive jurisdiction to deal with decisions of the Privatization Agency of Kosovo.

105. The Court finds that the Specialized Panel of the SCSC, as the first instance panel of the Specialized Panel of the Supreme Court, rendered Judgment C-IV-15-1027 on 14 March 2018, by which in item I. approved the Applicant's request for reconsideration of Decision PRN126- 0243 of the Privatization Agency of 18 May 2015, in item II. annulled Decision PRN126-243 of 18 May 2018, and in item III. obliged the Liquidation Authority of the Privatization Agency, „*that on behalf of compensation for unpaid salaries for the period from 18 October 1999 to 31 December 2003, to pay the claimant the amount of 35,725.16 euro, as well as the costs of proceedings in the amount of 969.20 euro"*.

106. The Court further finds that the dissatisfied party, in this case the Privatization Agency, filed appeal with the SCSC Appellate Panel against Judgment C-IV-15-1027 of the SCSC Specialized Panel, which the Appellate Panel on 5 December 2019 by Judgment AC-I-18-0184, rejected as ungrounded, by which the Applicant has exhausted all legal remedies in the enforcement proceedings of final Judgment C1. No. 190/7 of the Basic Court.

107. Having this in mind, the Court will further consider and analyze the Applicant's allegations of violation of Article 31 of the Constitution and Article 6 of the ECHR, regarding the non-enforcement of final Judgment C1. No. 190/7, of the Basic Court, which arose as a result of the court proceedings initiated by the Applicant with a statement of

claim for payment of unpaid monthly salaries for the period from 10 October 1999 to 31 December 2003.

108. Returning to the present case, the Court recalls that the Applicant's main allegation regarding the Referral relates to the fact that he has a final judgment of the Basic Court of 19 October 2010, which is also *res judicata*, and which he cannot enforce for a "*long period of time*".

109. Bringing the Applicant's allegations in connection with the facts of the present Referral, the Court recalls that Article 6 of the ECHR, in its relevant part, reads as follows,

> *„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. ..."*

110. From the above, it is evident that the requirement for the application of Article 31 of the Constitution and Article 6 of the ECHR, in the case in question were determined *„civil rights and obligations"*. Therefore, in this case, the question arises as to whether in the Applicant's case his *"civil rights and obligations*" were determined and, accordingly, Articles 31 of the Constitution and 6 of the ECHR are applicable.

111. In this regard, the Court recalls the case law of the ECtHR, which provides for Article 6 paragraph 1 in its "civil" limb to be applicable, there must be a "dispute" (*in French „contestation")*. Secondly, there must be a "dispute" regarding a "right" which can be said, at least on arguable grounds, to be recognized under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise, Finally, the result of the proceedings must be directly decisive for the "civil" right in question, because mere tenuous connections or remote consequences not being sufficient to bring Article 6 paragraph 1 into play (see ECtHR cases *Denisov v. Ukraine*, paragraph 44; *Regner v. Czech Republic*, paragraph 99; *Károly Nagy v. Hungary*, paragraph 60; *Naït-Liman v. Switzerland* paragraph 106, *Benthem v. The Netherlands*, no. 8848/80, dated 23 October 1985).

112. Accordingly, the Court finds that the Applicant has conducted two disputes of civil nature, one of which concerns the definition of his

civil rights. That dispute ended by final judgment C1. No. 190/07 of the Basic Court, which is in favor of the Applicant, thus defining his civil rights.

113. The second dispute was initiated by the Applicant before the Special Chamber of the Supreme Court for the purpose of realization, namely the execution of civil rights which he obtained by final judgment C1. No. 190/07 of the Basic Court. This dispute ended by final judgment AC-I-18-0184 of the Appellate Panel of the SCSC, which became enforceable, and thus specified, ***a)*** *the Applicant's civil rights to be enforced, and* ***b)*** *the authority which is competent to exercise the Applicant's acquired civil rights.*

114. Accordingly, it is not disputed for the Court that the Applicant has a final and enforceable judgment, which the Privatization Agency, as the competent authority, should enforce, "*according to the priorities defined by law in liquidation proceedings"*, as determined by Judgment AC-I-18-0184 of the Appellate Panel of the SCSC, thus concluding that the matter was resolved in favor of the Applicant.

115. Bearing in mind that the Court has just found that the Applicant's subject matter has been resolved, it recalls the ECtHR's case law, which it applies in cases where it concludes that "*the matter has been resolved*". In the present case, the Court refers to the judgment of the ECtHR in the case *Konstantin Markin v. Russia*, where in paragraph 87 it states: *"The Court reiterates that, under Article 37 paragraph 1 (b) of the Convention, it may "at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that ...the matter has been resolved..". To be able to conclude that this provision applies to the instant case, the Court must answer two questions in turn: firstly, it must ask whether the circumstances complained of by the applicant still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed* (see ECtHR judgments *Konstantin Markin v. Russia* application no. 30078/06 of 22 March 2012, paragraph 87, *Keftailova v. Latvia* (deletion) [GC] no. 59643/00 paragraph 48, 7 December *2007)."*

116. However, in the context of the above-mentioned case law of the ECtHR, the Court notes that such a decision can be taken by the Court only if it has previously answered two questions, which are *i) whether the circumstances in respect of which the Applicant filed the claim*

still exist, and ii) whether the effects of a possible violation of the ECHR on account of those circumstances have been redressed.

117. Referring to the first principle of the ECtHR case law regarding the issue of *i) whether the circumstances in which the Applicant filed the claim still exist*, the Court recalls that the essence of the Applicant's Referral was a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the fact that he could not enforce the judgment of the Basic Court, which has become final. However, the Court, analyzing this part of the allegations, concluded that the judgment of the Basic Court became enforceable in entirety only after issuance of Judgment AC-I-18-0184 of the Appellate Panel of the SCSC in the enforcement proceedings, whereby defining the rights to be exercised and the competent authority, which following a certain dynamic, must also enforce it. Therefore, it can be concluded that the circumstances related to the initiation of the appealing allegation of non-enforcement of the judgment in the given circumstances have ceased to exist, bearing in mind that all obstacles to its enforcement have been removed, thus enabling the Applicant to exercise his rights defined by it.

118. As to the answer to the second question *(ii) whether the effects of a possible violation of the ECHR on account of those circumstances were redressed*, the Court can only find in the circumstances of the present case that the effects of a possible violation of the Convention have been remedied by the fact that the Appellate Panel of the SCSC, by rendering Judgment AC-I-18-0184, changed the circumstances and enabled a final judgment to be enforceable.

119. It is evident from the above that the Court answered both questions, and the answers which unequivocally lead to the conclusion that this is *a resolved matter*, and thus, in the Court's view, all requirements have been met for it to refer both to ECtHR case law and to Rule 35 (Withdrawal, Dismissal and Rejection of Referrals) of the Rules of Procedure, which stipulates:

> *„(4) The Court may dismiss a referral when the Court determines that a claim is no longer an active controversy, does not present a justiciable case, and there are no special human rights issues present in the case (...)".*

120. The Court considers that the Applicant's Referral in the current circumstances is without subject matter, given that Judgment AC-I-18-0184 of the SCSC Appellate Panel, resolves his legal status in its enforcement form in entirety.

121. Therefore, the Court finds that the Applicant's issue was decided in his favor and there is no longer unresolved dispute, and accordingly, the subject matter does no longer present a case or controversy before the Court (see: *A.Y. vs. Slovakia*, ECHR decision, paragraph 49, No. 37146/12 of 24 March 2016, see also, case: KI143/15, Applicant: *Donika Kadaj-Bujupi*, the Constitutional Court, Decision to Dismiss the Referral of 26 February 2016).

Conclusion

122. Therefore, the Court concludes,

i) that the part of the Referral regarding the proceedings initiated by the Applicant by the request for enforcement of final Judgment C1. No. 686/2009 of the Basic Court is inadmissible on the grounds of non-exhaustion of legal remedies, as established in Article 113.7 of the Constitution, foreseen by Article 47 of the Law and further specified by Rule 39 (1) (b) of the Rules of Procedure,

ii) that the part of the Referral for the enforcement of final Judgment C1. No. 190/07 of the Basic Court is without subject matter, and as such, this part of the Referral is dismissed, in accordance with Rule 35 (4) of the Rules of Procedure, because all decisions of regular courts are in favor of the Applicant and recognize his right which the Applicant claims to have been violated.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Articles 20 and 47 of the Law and Rules 35 (4) and 39 (1) (b) and (2) of the Rules of Procedure, in its session held on 20 October 2021, by majority of votes

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka Nimani

KI173/20, Applicant: Yusuf Timurhan, Constitutional review of Judgment Rev.no.392/19 of the Supreme Court, of 2 June 2020

KI173/20, resolution of 10 November 2021, published on 01.12.2021

Keywords: compensation of salary allowances, suspension from work with pay, right to a fair and impartial trial, judicial protection of rights, statute of limitations, revision

On the basis of the case file it results that the Applicant, a member of the Kosovo Police, was suspended from work with full pay as a result of an Indictment being filed by the Municipal Prosecution in Prizren due to the criminal offence "Failure to report criminal offences or perpetrators" from Article 304 paragraph 1 of the Criminal Code of Kosovo. During the time he was suspended, the Applicant did not receive the salary allowances. Following the Decision of the Municipal Court in Prizren to terminate the criminal proceedings against the Applicant, the latter was reinstated to his job position and submitted a request for compensation of salary allowances for the time period during which he had been suspended. The Applicant's request was rejected on the grounds that by Decision of the General Director of the Kosovo Police it was determined that the suspended police officers do not enjoy additional allowances other than the basic salary. The Applicant filed a complaint with the Kosovo Police Complaints and Compensation Commission this decision, a complaint which was rejected on the grounds that it was submitted out of the legal deadline, respectively 4 months late. The Applicant filed a claim with the Basic Court in Prizren against the Kosovo Police, Ministry of Internal Affairs-Government of Kosovo, seeking compensation and payment of all deductions in personal income at the time of suspension, respectively allowances on the basic salary. The Basic Court partially approved the claim of the Applicant, by obliging the respondent to compensate and pay the difference in personal income for the time period of suspension, amounting to the total of 3,303.58 euros, along with the legal interest, as well as procedural costs in the amount of 675.40 euros. The judgment of the Basic Court was confirmed by the Court of Appeals. However, the Supreme Court, deciding upon the respondent's revision, accepted the revision as grounded, modified the Judgment of the Court of Appeals and the Basic Court and rejected as unfounded the Applicant's claim for compensation of the difference in personal income, after having found that the Applicant had requested judicial protection out of the legal deadline provided in Article 87 of the Law on Labour.

As the main allegation raised by the Applicant before the Constitutional Court, was the violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution, focusing on erroneous determination of the

factual situation and erroneous interpretation of the law, for the fact that he (i) had not received the request for revision filed by the respondent; (ii) the revision was not permitted in his case; and (iii) the Supreme Court itself had raised the issue of statute barring without this issue being invoked by the respondent. Further, the Applicant also alleged a violation of Article 54 of the Constitution, by stating that the decision of the Supreme Court had "arbitrarily" violated his individual rights.

In examining the Applicant's allegations of a violation of his right to a fair and impartial trial, the Court first elaborated on the principles of its case law and of the European Court of Human Rights, with regard to the doctrine of the fourth instance and thereupon applied the same to the circumstances of the concrete case. The Court considered as unfounded the allegation of the Applicant regarding the non-receipt of the request for revision submitted by the respondent, since its receipt was confirmed by the acknowledgment of receipt. Whereas, the Applicant's allegation that the revision was inadmissible since the value of the dispute according to the claim was 500 Euros, was assessed as unfounded by the Court by referring to Article 212 of the Law on Contested Procedure, given that it found that the value of the dispute was 3,303.58 euros, on which occasion the requirement of the value of dispute to be over 3,000 euros for submitting the revision is met. Further, as regards the allegation that the Supreme Court had decided to reject the Applicant's claim due to the statute barring, without this issue being raised by the interested party, the Court found that the issue of the legal deadline to seek judicial protection had been previously raised before the courts of the lower instance and that in the present case, as found by the Supreme Court, the judicial protection sought by the Applicant was filed out of the legal deadline. Finally, as regards the Applicant's allegations of violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution, the Court concluded that they pertain to the category of the *"fourth instance"* claims; consequently, the allegations are manifestly ill-founded. On the other hand, the Applicant's allegation of a violation of Article 54 of the Constitution, was qualified as unfounded by the Court, due to the fact that it pertains to the category of *"unsubstantiated or unjustified"* claims, since the Applicant has not elaborated how the violation of this right has resulted.

Consequently, the Court decided that the Referral must be declared inadmissible as manifestly ill-founded on constitutional basis, in its entirety, as provided in paragraph (2) of Rule 39 of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI173/20

Applicant

Yusuf Timurhan

Constitutional review of Judgment Rev.no.392/19 of the Supreme Court of Kosovo, of 2 June 2020

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 Yusuf Timurhan from the Municipality of Prizren, who is represented by Miftar Qelaj, a lawyer from Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [Rev. no. 392/19] of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) of 2 June 2020, in conjunction with Judgment [Ac. no.3309/16] of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) of 3 July 2019, and Judgment [C.no.329/15] of the Basic Court in Prizren (hereinafter: the Basic Court) of 8 June 2016.

3. The challenged Judgment was received by the Applicant on 10 July 2020.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Judgment, which as alleged by the Applicant has violated his fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

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

Proceedings before the Constitutional Court

6. On 10 November 2020, the Applicant submitted the Referral via e-mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 17 November 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani (members).

8. On 1 December 2020, the Court notified the Applicant about the registration of the Referral.

9. On 1 December 2020, the Court notified the Supreme Court about the registration of the Referral and sent a copy thereof to it.

10. On 15 April 2021, the Court requested from the Basic Court to be provided with the acknowledgment of the receipt, which proves the date/time when the Applicant had received the challenged Judgment.

11. On 29 April 2021, the Basic Court submitted to the Court the acknowledgment of receipt, which proves that the Applicant had received the challenged Judgment on 10 July 2020.

12. On 29 April 2021, the Court requested from the Basic Court to be provided with the complete case file.

13. On 12 May 2021, the Basic Court submitted the case file to the Court.

14. On 27 May 2021, the President of the Court appointed Judge Nexhmi Rexhepi as a member of the Review Panel instead of Judge Bekim Sejdiu, who resigned on 25 May 2021.

15. On 4 June 2021, the Court notified the State Advocacy Office, the Government of Kosovo, the Ministry of Internal Affairs, and the Kosovo Police in the capacity of an interested party, about the registration of the Referral and sent a copy of the Referral to it.

16. 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 the 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.

17. On 22 July 2021, the Review Panel considered the report of the Judge Rapporteur and by majority vote recommended the supplementation of the case.

18. On 10 November 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

19. On 15 May 2009, the General Director of the Kosovo Police, by Decision [11/ SP/DP/2009], determined that the police officers who were suspended with pay do not enjoy allowances other than the basic salary.

20. On 22 August 2009, the Kosovo Police through Notification [KRH-02-086/ 09] suspended with full pay the Applicant who was a police

officer in the Kosovo Police. The Applicant's suspension lasted until 15 May 2011.

21. Based on the case file it results that the Municipal Prosecution had filed the indictment [PP.nr. 874/12] of 28 December 2009, against the Applicant due to the criminal offence of failure to report criminal offences or the perpetrators as per Article 304, paragraph 1 of the Criminal Code of Kosovo.

22. On 3 May 2011, the Kosovo Police through Notification [09/NSP/DP/2011] terminated the Applicant's suspension with pay, on the grounds that it had been established that there was no reasonable suspicion of a criminal offence being committed, and therefore requested from him to report in the workplace starting from 16 May 2011.

23. From the case file it results that during the period of suspension with pay, the Applicant had several deductions in personal income which included payments in the name of job hazard, allowances, as well as compensation for annual leave.

24. On 14 June 2012, the Municipal Court in Prizren through Decision [P.no. 554/11] terminated the criminal procedure against the Applicant regarding the criminal offence of failure to report criminal offences or perpetrators as per Article 304, paragraph 1 of the Criminal Code of Kosovo, following the withdrawal of the Prosecution from the criminal prosecution.

25. On 20 February 2014, the Applicant had submitted to the Kosovo Police Human Resources Directorate a request for compensation of salary allowances from 22 August 2009 until 15 May 2011, with regard to the time period of suspension with pay according to the decision of the Director General of the Kosovo Police.

26. On 22 September 2014, the Human Resources Directorate of the Kosovo Police through *"response to the request of 20.02.2014"* [07/1/421/20147], rejected the Applicant's request on the grounds that the deduction of salary allowances was made according to the decision of the General Director of the Kosovo Police [11/SP/DP/2009] of 15 May 2009, which stated that all police officers who are suspended with pay do not enjoy additional allowances other than the basic salary.

27. On 11 February 2015, the Applicant had submitted a complaint to the Kosovo Police Complaints and Compensation Commission seeking approval of the payment of all benefits during the period of suspension with pay. He emphasized that this right belonged to him because by the Decision [P.nr.554/11] of the Municipal Court in Prizren, of 14 June 2012, the criminal procedure against him was terminated and consequently he was declared innocent.

28. On 26 February 2015, the Kosovo Police Complaints and Compensation Commission by Decision [010-KA-A-2015] dismissed the Applicant's complaint as being filed out of the legal deadline. In the reasoning of the Decision, the Kosovo Police Complaints and Compensation Commission stated that on 22 September 2014, the Applicant had received the response from the Human Resources Directorate, whilst the complaint he had addressed to the Complaints and Compensation Commission on 11 February 2015, approximately four months late, in contradiction with Article 96, paragraph 1, point 1.2, of the Administrative Instruction no.07/2012 on Work Relationships in the Kosovo Police, which states: *"Police personnel who consider that an administrative decision has violated any of their employment rights, are entitled to file a complaint to the second instance body, which is sent directly to the Complaints and Compensation Commission or through the chain of command within a term of 15 days"*.

29. On 20 March 2015, the Applicant had filed a claim with the Basic Court in Prizren (hereinafter: the Basic Court) against the respondent Government of Kosovo, Ministry of Internal Affairs - Kosovo Police, stating that he claims compensation and payment of all personal income deductions for the time period of suspension, respectively from 22 August 2009 to 15 May 2011 and specifically the income in the name of additional allowances on the basic salary.

30. On 27 March 2015, the Kosovo Police submitted a response to the claim requesting from the Basic Court to deny the Applicant's claim as inadmissible, because he had requested judicial protection after the expiration of the legal deadline.

31. On 8 June 2016, the Basic Court through Judgment [C.no.329/15] (i) partially approved the Applicant's statement of claim, and obliged the Government of Kosovo, the Ministry of Internal Affairs - Kosovo Police, to compensate and pay the difference in personal income for the time period from 22 August 2009 to 15 May 2011, amounting to a total of 3,303.58 euros, along with the legal interest as per the time

deposited funds deposited for more than one year without a specific destination, starting from the day of receipt of the present judgment, until the definitive payment, all this within 15 days after that this judgment becomes final; (ii) obliged the respondent to pay the procedural costs of the Applicant in the amount of 675.40 euros, within 15 days after that this Judgment becomes final, under the threat of forcible execution; (iii) rejected as ungrounded the rest of the Applicant's statement of claim, on the amounts approved as under point I of the enacting clause, up to the total amount sought, that is 4,523.35 euros.

32. On 15 August 2016, the State Advocacy Office, which represented the Kosovo Police in the capacity of an interested party, filed a complaint due to (i) essential violation of the provisions of the contested procedure; (ii) erroneous and incomplete determination of the factual situation; and (iii) erroneous application of the substantive law, by proposing to have the Judgment of the Basic Court amended, by dismissing the Applicant's claim as inadmissible.

33. On 3 July 2019, the Court of Appeals through Judgment [Ac.no.3309/16] rejected the appeal of the interested party: Government of Kosovo, Ministry of Internal Affairs - Kosovo Police as unfounded, whilst it upheld the Judgment [C.no.329/15] of the Basic Court.

34. On 28 August 2019, the interested party - Government of Kosovo, Ministry of Internal Affairs - Kosovo Police, filed a request for revision against the Judgment of the Court of Appeals, due to: (i) essential violations of the provisions of the contested procedure. ; and (ii) erroneous application of the substantive law, by proposing that the judgments of the Basic Court and the Court of Appeal be amended so that the Applicant's claim is dismissed as inadmissible. In the request for revision, the interested party stated that the Applicant had requested judicial protection after the legal deadline; respectively he had filed the complaint against the response to the request [07/1/421/20147] of 22 September 2014, of the Human Resources Directorate of the Kosovo Police, on 11 February 2015, namely around four (4) months late.

35. On the basis of the case file, respectively the acknowledgment of receipt it results that on 16 October 2019 the Applicant had received the request for revision submitted by the interested party. The Applicant did not submit a response to the request for revision.

36. On 2 June 2020, the Supreme Court by Judgment [Rev.no.392/19] accepted as grounded the revision of the interested party, the Government of Kosovo, the Ministry of Internal Affairs-Kosovo Police and amended the Judgment of the Basic Court [C.nr.329 / 2015] of 8 June 2016 and the Judgment [AC.nr.3309/ 2016] of the Court of Appeals, of 3 July 2019, by adjudicating as follows: Rejected as ungrounded the Applicant's statement claim, whereby it was requested to oblige the interested party, the Government of Kosovo, the Ministry of Internal Affairs-Kosovo Police, to pay the difference in the Applicant's personal income, for the time period from 22 August 2009 until 15 May 2011, amounting to a total of 3,303.58 euros, along with the interest as per the time deposited savings funds deposited for more than one year, without a specific destination, starting from the day of receipt of the judgment (8 June 2016) until the definitive payment, as well as the costs of proceedings in the amount of 675.40 euros; each party bears its own costs of the contested procedure.

37. In its judgment, the Supreme Court had reasoned as follows:

> *"According to this Court, the substantive law and specifically the Law on Labour Law were erroneously applied, for the fact that on 22 August 2009 the claimant was suspended and this suspension has lasted until 15 May 2011, when the respondent terminated the claimant's suspension and reinstated him to his job position and previous duties, whilst he has filed the claim on 20 March 2015. Judicial protection in the present case is out of time for the reasons relating to Article 87 of the Law on Labour No. 03/L-212, where it is envisaged that all requests(claims!) from the employment relationship involving money, are statute barred within three (3) years, from the date of submission of the request, which means that on the basis of the above mentioned article in this case the deadline has expired, hence according to the assessment of the Supreme Court, the courts of lower instance have erroneously applied the provisions of Article 78 para.1 and 2 and Article 79 of the Kosovo Law on Labour relating to judicial protection from the employment relationship. Therefore, the instruction on legal remedy given at the end of the procedure before the respondent is wrong and does not justify the claimant's delay. Article 87 of the Law on Labour provides that requests relating to the employment relationship and involving money are statute barred within 3 years from the date of submission of the request. In the present case from the moment of the claimant being reinstated to job position until the day of the claim being filed, have passed more than 3 years, therefore it turns out that*

the claimant's request(claim) for compensation of personal income is statute barred."

"The Supreme Court does not accept as lawful the position of both courts because considering that the non-payment of personal income is a profit lost, which also represents damage caused to the claimant by the respondent, and considers that such a claim of the claimant based on the provision of article 376 para.1 of the LOR which provides that "Compensation claims for damage inflicted shall become statute-barred three (3) years after the injured party learnt of the damage and the person that inflicted it." In the present case from the day of suspension, that is 20 August 2009 until 20 March 2015 when the claimant has filed a claim with the court, have passed more than five years and since that time the claimant has been aware of the damage and the person who caused it. Hence, on this basis the request is statute barred and the judicial protection is belated, because the claimant has had the opportunity to seek judicial protection regardless of the delays in responding to his request."

Applicant's allegations

38. The Applicant alleges that the Judgment [Rev.no.392/19] of the Supreme Court, of 2 June 2020, was issued in violation of the fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution.

39. Initially, the Applicant alleges that: (i) he was not notified about the conduct of the proceedings before the Supreme Court of Kosovo, and consequently he was not given the opportunity to present his allegations and objections regarding the request for revision filed by the interested party.

40. In the following, the Applicant alleges that: (ii) in this case the revision was examined even though it was not permitted by law under Article 211 of the Law on Contested Procedure, because the value of the dispute according to the claim was 500 euros, while the dispute was not initiated against the decision on termination of employment relationship, therefore in this case the revision was not permitted.

41. The Applicant also alleges that the Supreme Court decided to reject the claim (iii) due to the statute barring of the request, but the interested party did not refer to it in the response to the claim during

the entire course of the proceedings in the first instance or in the appeal filed against the judgment of the first instance. So, he further claims that he had no knowledge what the request for revision submitted by the interested party contained, since according to him he did not possess it, as a result of being not submitted. Despite this, the Applicant states that on the basis of the provisions of the Law on Obligational Relationships, namely Article 341, paragraph 3 *"The court may not take notice of statute barring if the debtor makes no reference thereto."* Consequently, the Applicant alleges that in no case in the court proceedings that preceded the issuance of the challenged judgment, has the interested party referred to the statute barring, consequently the court decided on the statute barring without this issue being raised to by the interested party.

42. Finally, the Applicant requests from the Constitutional Court to (i) declare the Referral admissible; (ii) to find that the Supreme Court of Kosovo by Judgment [Rev.no.392/19] of 2 June 2020, has violated the Applicant's fundamental rights and freedoms, respectively Article 31 of the Constitution and Article 6 of the European Convention on Human Rights and Article 54 (Judicial Protection of Rights) of the Constitution; as well as to (iii) declare invalid the Judgment [Rev.no.392/19] of the Supreme Court of Kosovo, of 2 June 2020.

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.

[...]

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.
(...)

Law No. 03/L-006 on Contested Procedure

CHAPTER XIV
EXTRAORDINARY MEANS OF STRIKE (ADDRESSING)

REVISION

Article 211

211.1 Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought.

211.2 Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, handing items or fulfillment of a proposal if the value of the object of contest in the attacked part of the decision does not exceed 3, 000 €.

211.3 Revision is not permitted in the property-judicial contests, in which the charge request doesn't involve money requests, handing items or fulfillment of other proposal, if the value of the object of contest shown in the charge doesn't exceed 3,000 €.

211.4 Excluding, when dealt with the charge claim from the paragraph 2 and 3 of this article, the revision is always permitted:

a) food contests;

b) contests for damage claim for food lost due to the death of the donator of fond;

c) contests in work relations initiated by the employee against the decision for break of work contract.

Law of Contract and Torts 1978

SECTION 4
UNENFORCEABILITY DUE TO STATUTE OF LIMITATIONS
Subsection 1
GENERAL PROVISIONS

General Rule

Article 360

A right to request fulfilment of an obligation shall come to an end if time barred by statute of limitations.

Unenforceability due to the statute of limitations shall follow the expiration of the period specified by statute during which the creditor was entitled to request fulfilment of the obligation.

The court shall not consider the fact of an obligation being time barred should the debtor fail to invoke it.

Claiming damages for Loss
Article 376

A claim for damages for loss caused shall expire three years after the party sustaining injury or loss became aware of the injury and loss and of the tort-feasor.

In any event, such claim shall expire five years after the occurrence of injury or loss.

A claim for damages for loss caused by violation of a contractual obligation shall expire within the time specified for unenforceability due to the statute of limitations of such obligation.

Law No. 04/L-077 on Obligational Relationships (published on 19.06.2012 and entered into force on 19.12.2012)

CHAPTER 4
STATUTE BARRING

SUB-CHAPTER 1

GENERAL PROVISIONS

Article 341
General rule

1. The right to demand performance of an obligation shall expire through statute-barring.

2. Statute-barring occurs when the period stipulated in the statute of limitations during which the creditor could demand performance of the obligation expires.

3. The court may not take notice of statute-barring if the debtor makes no reference thereto.

Filing of suit

Article 388

Statute-barring shall discontinue with the filing of a suit or any other act by the creditor against the debtor before the court or other relevant authority to determine, secure or collect a claim.

Law No. 03/L-212 on Labour

CHAPTER IX
Procedures for the exercise of rights deriving from employment relationship

Article 78
Protection of Employees' Rights

1. An employee considering that the employer has violated labour rights may submit a request to the employer or relevant bodies of the employer, if they exist, for the exercise of rights violated.

2. Employer is obliged to decide on the request of the employee within fifteen (15) days from the day the request was submitted.

3. The decision from paragraph 2 of this Article shall be delivered in a written form to the employee within the term of eight (8) days.

Article 79
Protection of en Employee by the Court

Every employee who is not satisfied with the decision by which he/she thinks that there are breached his/her rights, or does not receives an answer within the term from Article 78 paragraph 2 of this Law, in the following term of thirty (30) days may initiate a work dispute at the Competent Court.

Article 87
Timeline for Submission

All requests involving money from employment relationship shall be submitted within three (3) years from the day the request was submitted.

Assessment of the admissibility of Referral

43. 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.

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

45. The Court further refers to the admissibility criteria, as specified in the Law. In this respect, the Court first refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which establish:

Article 47
[Individual Requests]

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of the Referral]

> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*

Article 49
[Deadlines]

> *"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]."*

46. As to the fulfillment of these criteria, the Court first notes that the Applicant is an authorized party, who is challenging an act of a public authority, namely the Judgment [Rev.no.392/19] of The Supreme Court, of 2 June 2020, after having exhausted all legal remedies provided by law. The Applicant has also specified the rights and freedoms which he alleges to have been violated, pursuant to the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

47. In addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement for the Referral not to be manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

> *"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".*

48. The above rule, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR) and of the Court, enables the latter to declare inadmissible referrals for reasons relating to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after assessing its merits, namely if it deems that the content of the referral is manifestly ill-founded on constitutional basis, as provided in paragraph (2) of Rule 39 of the Rules of Procedure.

49. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as *"manifestly ill-founded"* in its entirety or only with respect to any specific claim that a referral may contain. In this respect, it is more accurate to refer to the same as *"manifestly ill-founded claims"*. The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as *"fourth instance"* claims; (ii) claims that are categorized as *"clear or apparent absence of a violation"*; (iii) *"unsubstantiated or unjustified"* claims; and finally, (iv) *"confused or far- fetched"* claims. (See, more precisely, on the concept of inadmissibility on the basis of a referral assessed as *"manifestly ill-founded"*, and the specifics of the four above-mentioned categories of claims qualified as *"manifestly ill-founded"*, the Practical Guide to the ECtHR on Admissibility Criteria of 28 February 2021; Part III. Inadmissibility

based on the merits; A. Manifestly ill-founded applications, paragraphs from 275 to 304).

50. In this context, and in the following, in order to assess the admissibility of the Referral, namely, in the circumstances of the present case to assess whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the substance of the case that this Referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

51. The Court recalls that the Applicant alleges a violation of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.

52. In this context, the Court initially recalls that the circumstances of the case relate to the Applicant's request for compensation of salary allowances for the time period during which he has been suspended (from 22 August 2009 to 15 May 2011) addressed to the Kosovo Police Human Resources Directorate, since the Prosecution had withdrawn from the criminal prosecution and the Municipal Court through a decision had terminated the proceedings against him. This request of the Applicant was rejected by the Kosovo Police Human Resources Directorate on 22 September 2014. Subsequently, on 15 February 2015, the Applicant filed a complaint with the Complaints and Compensation Commission of the Kosovo Police, a complaint which was rejected by the said Commission on the grounds that it was filed out of the legal deadline. Subsequently, the Basic Court had partially approved the Applicant’s statement of claim, filed against the interested party, namely the Government of Kosovo, the Ministry of Internal Affairs - Kosovo Police, seeking compensation and payment of the difference in the personal income for the time period from 22 August 2009 to 15 May 2011, amounting to a total of 3,303.58 euros, along with the legal interest as per the time deposited funds deposited for a period over one year without a specific destination. Acting upon the respective appeal of the interested party, the Court of Appeals rejected its appeal as unfounded, while it confirmed the Judgment of the Basic Court. The interested party filed a request for revision against the Judgment of the Court of Appeals, which is accepted by the Supreme Court as grounded, whilst the Judgment of the Basic Court

and the Judgment of the Court of Appeals are amended, by adjudicating as follows: The Applicant's statement of claim whereby he had requested obliging of the interested party, the Government of Kosovo, the Ministry of Internal Affairs-Kosovo Police, to pay to him the difference in the personal income, for the time period from 22 August 2009 to 15 May 2011, amounting to a total of 3,303.58 euros, is rejected as unfounded.

53. Consequently, the Applicant alleges before the Court that the challenged Decision violates his rights guaranteed by: (i) Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [Right to a fair trial] of the ECHR; as well as allegations of violation of Article 54 [Judicial Protection of Rights] of the Constitution.

I) In relation to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

54. The Applicant has raised three main allegations before the Court regarding the alleged violations of Article 31 of the Constitution: (i) that he has not received the request for revision filed by the interested party, and consequently he was not able to present his objections regarding the content of this request; (ii) Based on Article 211 of the Law on Contested Procedure, the revision was not permitted in this case, because the value of the dispute as per the claim was 500 euros, whereas the dispute was not initiated against the decision on termination of the employment relationship; and (iii) the allegation that the Supreme Court has decided to reject his claim due to the statute of limitations, without this issue being raised by the interested party.

55. In this respect, the Court, based on the case law of the ECHR, but also taking into account its characteristics, as defined in the ECHR, as well as the principle of subsidiarity and the doctrine of the fourth instance, has consistently pointed out the difference between *"constitutionality"* and *"legality"* and has emphasized that it is not its duty to deal with errors of fact or erroneous interpretation and application of laws allegedly committed by a regular court, unless and in so far as such errors may have violated the rights and freedoms protected by the Constitution and/or the ECHR (see in this context 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).

56. The Court has also consistently reiterated that it is not the role of this Court to review the findings of the regular courts in respect of the factual situation and application of the substantive law and that it may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of *"fourth instance"*, which would result in exceeding the limits set on its jurisdiction. (See: in this respect, the ECtHR case *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28 and the references used therein; and see also the cases KI128/18, cited above, paragraph 56; and KI62/19, cited above, paragraph 58).

57. The Court notes that the substance of the Applicant's allegations relates to the erroneous determination of the factual situation and the erroneous interpretation of the applicable laws by the Supreme Court. The Court notes that the Supreme Court has reasoned in detail the evidence and the substantive provisions on the basis of which it has rendered the respective judgment, thus responding to the Applicant's allegations concerning the erroneous application of the substantive law.

(i) In relation to the allegation of non-receipt of the request for revision submitted by the interested party

58. The Court recalls that the Applicant alleges that he was not notified about the conduct of the proceedings before the Supreme Court of Kosovo, consequently he was not given the opportunity to present allegations and objections concerning the request for revision filed by the interested party.

59. As regards the above allegation, the Court notes that in the reasoning of the Judgment of the Supreme Court it was stated that there was no response to the revision. Moreover, the Court notes that in the case file there is the acknowledgment of receipt which proves that the request for revision was received by the Applicant's representative, on 16 October 2019.

60. Consequently, while the Applicant has duly received the revision, he did not use his right to file a response to the revision before the Supreme Court; therefore this allegation of the Applicant's is manifestly ill-founded.

(ii) **In relation to the allegation that the revision was not permitted in the present case**

61. In the following, the Court recalls that the Applicant alleged that in the present case the revision was examined even though it was not permitted under Article 211 of the Law on Contested Procedure, because the value of the dispute according to the claim was 500 euros, whereas the dispute was not initiated against the decision on termination of the employment relationship, therefore according to him in this case the revision was not permitted.

62. Further, in relation to the above allegation of the Applicant, the Court notes that paragraph 2 of Article 211 of the Law on Contested Procedure provides that: "*Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, handing items or fulfillment of a proposal if the value of the object of contest in the attacked part of the decision does not exceed 3, 000 €".*

63. Consequently, in the present case the Court notes that the revision filed by the interested party was exercised in the procedure in which the value of the subject matter of the dispute in the stricken part of the Judgment was 3,303.58 euros. Consequently, the Court finds that the minimum limit required by this legal provision has been met. Therefore, also this allegation of the Applicant is manifestly ill-founded.

(iii) **In relation to the allegation that the Supreme Court has decided on the rejection of the statement of claim due to the statute barring of the request, without this issue being raised by the interested party**

64. The Applicant also alleges that the Supreme Court decided to accept the revision of the interested party, on which occasion it resulted with the rejection of his statement claim due to the statute barring of the request, but the interested party has not referred to this in the response to the claim during the entire procedure in the first instance nor in the appeal filed against the judgment of the first instance. So, he further claims that he had no knowledge about what the request for revision submitted by the interested party contained, since according to him he did not possess the same, as a result of this request being not submitted to him.

65. With regard to this Applicant's allegation, the Court initially recalls that the issue of statute barring had been dealt with by the regular courts since the rendering of the Judgment [C.no.329/15] of the Basic Court, which in its reasoning stated:

"Also in Article 87 of the Law on Labour it is provided that all requests from the employment relationship involving money are statute barred within three (3) years, from the day of submission of the request, while in the court's assessment, the claimants' request has been filed within the legal deadline foreseen under this provision and therefore it decided as in the enacting clause."

66. The Court notes that the State Advocacy Office in the request for revision, requested from the Supreme Court to reject the Applicant's statement of claim as inadmissible by law: since through it the Applicant sought judicial protection after the expiration of the provided legal deadline, within which he could have sought judicial protection.

67. The Court also recalls Article 341 of the Law No.04/L-077 on Obligational Relationships which stipulates that *"the court may not take notice of statute-barring if the debtor makes no reference thereto."* In this respect, the Court notes that the State Advocacy Office in the request for revision, did not call upon the rejection of the Applicant's claim on the basis of statute barring, but nevertheless it had specifically raised the issue of judicial protection after the expiration of the legal deadline.

68. Consequently, the Supreme Court through Judgment [Rev.no.392/19] of 2 June 2020, accepted the revision of the respondent as founded, by ascertaining that the substantive law had been erroneously applied by the lower instance courts, given that the Applicant had submitted the judicial protection out of the legal deadline. Among other things, the Supreme Court has stated the following reasons for accepting the revision:

"According to this Court, the substantive law, more specifically the Law on Labour Law was erroneously applied, for the fact that on 22 August 2009 the claimant was suspended from work and this suspension has lasted until 15 May 2011, when the respondent terminated the claimant's suspension and reinstated him to his job position and previous duties, whilst he has filed the claim on 20 March 2015. Judicial protection in the present case is out of

time for the reasons relating to Article 87 of the Law on Labour No. 03/L-212, where it is envisaged that all requests(claims!) from the employment relationship involving money, are statute barred within three (3) years, from the date of submission of the request, which means that on the basis of the above mentioned article in this case the deadline has expired, hence according to the assessment of the Supreme Court, the courts of lower instance have erroneously applied the provisions of Article 78 para.1 and 2 and Article 79 of the Kosovo Law on Labour relating to judicial protection from the employment relationship. Therefore, the instruction on legal remedy given at the end of the procedure before the respondent is wrong and does not justify the claimant's delay. Article 87 of the Law on Labour provides that requests related to the employment relationship involving money are statute barred within 3 years from the date of submission of the request. In the present case from the moment of the claimant being reinstated to job position until the day of the claim being filed, have passed more than 3 years, therefore it turns out that the claimant's request(claim) for compensation of personal income is statute barred."

69. Therefore, in view of the above, the Court finds that the Applicant has had the opportunity to benefit from the adversarial proceedings as well as the opportunity to present the arguments and evidence which he considered relevant to his case, at the various stages of the proceedings; he has had the opportunity to effectively challenge the arguments and evidence presented by the opposing party; all his allegations, which viewed objectively, were relevant for the resolution of the case have been heard and reviewed by the regular courts, and the factual and legal reasons for the challenged decision have been presented in detail; therefore, the proceedings , viewed in their entirety, were fair (see: *mutatis mutandis*, the ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, paragraphs 29 and 30; see also the case of Court KI22/19, Applicant *Sabit Ilazi*, Resolution of 7 June 2019, paragraph 42 and the case of Court KI128/18, cited above, paragraph 58).

70. The Court notes that in the circumstances of the present case, the Applicant, beyond the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as a result of erroneous interpretation of the law, because the regular courts have applied the law *"to the detriment of this Applicant"*, does not sufficiently substantiate or argue before the Court how this interpretation of the applicable law by the regular courts may have

been *"manifestly erroneous"*, resulting in *"arbitrary conclusions"* or *"manifestly unreasonable"* for the Applicant, or how the proceedings before the regular courts, viewed in their entirety, may have not been fair or even arbitrary. In addition, the Court finds that the regular courts have taken into account all the facts and circumstances of the case, the allegations of the Applicant and have clearly reasoned the same (See: in this respect, the case of Court KI64/20, Applicant: *Asllan Meka*, Resolution on Inadmissibility of 3 August 2020, paragraph 41 and KI22/19, cited above, paragraph 43).

71. Finally, the Court concludes that the Applicant's allegations of a violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR due to erroneous interpretation and application of the applicable law are (i) claims that pertain to the category of *"fourth instance"* claims and as such, these claims of the Applicant are manifestly ill-founded on constitutional basis, as provided in paragraph (2) of Rule 39 of the Rules of Procedure.

72. Therefore, these allegations are manifestly ill-founded on constitutional basis and are declared inadmissible, as provided in Article 113.7 of the Constitution and further specified in Rule 39 (2) of the Rules of Procedure.

(II) In relation to the allegation of violation of Article 54 of the Constitution

73. The Court recalls that the Applicant also states that the challenged decision was issued in violation of the rights guaranteed by Article 54[Judicial Protection of Rights] of the Constitution.

74. In the present case, the Applicant alleges that the Judgment of the Supreme Court has *"arbitrarily"* violated his individual rights thus resulting in a violation of Article 54 of the Constitution, but he does not specifically explain how the violation of this article of the Constitution resulted. In this respect, the Court recalls that it has consistently emphasized that the mere reference to the Articles of the Constitution and the ECHR is not sufficient to build an arguable allegation of a constitutional violation. When alleging such violations of the Constitution, the applicants must provide reasoned allegations and compelling arguments (see, in this context, cases KI175/20, with Applicant: *Privatization Agency of Kosovo*, Resolution on Inadmissibility of 22 April 2021, paragraph 81; KI166/20 cited above,

paragraph 52; KI04/21, with Applicant: *Nexhmije Makolli*, Resolution on Inadmissibility of 11 May 2021, paragraphs 38- 39).

75. Therefore, the Court finds that as regards the Applicant's allegation of a violation of Article 54 of the Constitution, the Referral must be declared inadmissible as manifestly ill-founded, because this allegation is considered as a claim which pertains to the category of *"unsubstantiated or unjustified"* claims, since the Applicant has merely cited a provision of the Constitution and the ECHR, without explaining how it was violated. Therefore, this allegation is manifestly ill-founded on constitutional basis, as provided in paragraph (2) of Rule 39 of the Rules of Procedure.

Conclusion

76. Finally, the Court finds that the Applicant's Referral is inadmissible because (I) the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR with respect to the Applicant's allegations (i) that he has not received the request for revision submitted by the interested party, and consequently had no opportunity to present his objections regarding the content of this request; (ii) the revision, according to Article 211 of the Law on Contested Procedure, was not permitted in this case, because the value of the dispute according to the claim was 500 euros, while the dispute was not initiated against the decision on termination of the employment relationship; and (iii) the allegation that the Supreme Court has decided to reject his statement of claim due to the statute barring, without this issue being raised by the interested party; are claims that qualify as *"fourth instance"* claims; and as such these allegations of the Applicant are manifestly ill-founded on constitutional basis; and (II) the Applicant's allegation of a violation of Article 54 of the Constitution is manifestly ill-founded, because it is qualified as a claim pertaining to the category of *"unsubstantiated or unjustified" claims*. Therefore, the Referral must be declared inadmissible as manifestly ill-founded on constitutional basis, in its entirety, as provided in paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 and 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, in the session held on 10 November 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka Nimani

KI123/21, Applicant: Luan Telak, Constitutional review of Judgment Pml. No. 69/2021 of the Supreme Court of 18 March 2021

KI123/21, Resolution of 10 November 2021, published on 03.12.2021

Keywords: interruption of court hearing, procedural violations with the impact on the judgment, finding guilty

It results from the case file that the substance of the case contained in this Referral relates to the fact that the Basic Court in Prishtina found the Applicant and the person F.K. guilty of the criminal offense "u*nauthorized purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues under Article 273, paragraph 2 in conjunction with Article 31 of the CCK*" since during the routine control at the border crossing point in Merdare, found a certain amount of narcotic substances belonging to the Applicant and F. K., in the vehicle "Peugeot 308" which was driven by the Applicant. The Court of Appeals, deciding on the appeals, approved the appeal of the Basic Prosecution in Prishtina, modifying the sentence of imprisonment imposed on the Applicant to imprisonment for a term of 3 (three) years and 6 (six) months, whereas rejected the appeal of the Applicant and F. K. as ungrounded. Regarding the latter, the Applicant filed a request for protection of legality with the Supreme Court, *inter alia*, on the grounds of essential violations of Article 311 [Change of Composition of Trial Panel during Adjournment], paragraph 3 of the CPCK, because from the hearing of 27 May 2019 until the next hearing of 24 October 2019, no hearing was held, and more than 3 (three) months have passed, so the court had to take into account this delay and start the court hearing anew, for the fact that more than 3 (three) months have passed since the last hearing, as provided by Article 311 of the CPCK. The Supreme Court rendered Judgment Pml. No. 69/2021, which rejected as ungrounded the request for protection of legality of the Applicant, upholding the Judgments of the Court of Appeals and of the Basic Court in entirety, reasoning that the procedural flaw did not constitute an essential violation of the criminal procedure as it did not had an impact on the legality of the Judgment of the Basic Court.

The Applicant alleged before the Constitutional Court that his fundamental rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 7 [Values], Article 31 [Right to Fair and Impartial Trial]. Article 46 [Protection of Property], and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have been violated. He claimed that the Basic Court had adjourned the court hearing for more than 3 (three) months and despite the provision of the CPCK, namely Article 311, paragraph 3 which stipulates that if the court hearing is interrupted for more than 3 (three) months, a new hearing must

begin where this evidence will be assessed, the Basic Court has continued with the court hearing and has rendered a Judgment without considering the court hearing.

In dealing with the allegation of procedural violation which he relates to the right to a fair trial, the Court initially emphasized, *inter alia*, in 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 lower instance court, unless and insofar, as it may have violated the rights and freedoms protected by the Constitution (constitutionality). The Court further reiterated that it is not its duty, according to the Constitution, to act as a "fourth instance" court in relation to decisions taken by the regular courts. In fact, it is the role of the regular courts to interpret and apply the relevant rules of procedural and substantive law. In dealing with the Applicant's allegations, the Court recalled the finding of the Supreme Court that these allegations fell into the category of relative procedural violations under paragraph 2 of Article 384 of the CPCK. Therefore, in such cases, the procedural violation would affect the legality of such a decision, only if it had an impact on the lawful decision. According to the Supreme Court, this procedural flaw had no impact on the legality of the Judgment of the Basic Court. In this finding, the Supreme Court also assessed the issue of erroneous interpretation of the statements and evidence that had been examined by the Basic Court, referring also to the evidence that the Applicant had given before the police in the presence of his defense counsel and other facts. Therefore, the Court found that with regard to the right to a fair trial guaranteed by Article 31 of the Constitution, the Applicant before the regular courts had the benefits of the adversarial proceedings; he had the opportunity to present at the various stages of the proceedings the allegations and evidence which he considered relevant to his case, he had the opportunity to effectively challenge the allegations and evidence presented by the opposing party, the regular courts have heard and examined all his allegations, which, viewed objectively, have been relevant to the resolution of the case, the factual and legal reasons for the challenged decision have been presented in detail and that the proceedings taken in their entirety were fair. Regarding the violations of the rights guaranteed by Articles 3, 7, 46 and 54 of the Constitution, the Court found that these allegations were not accurately clarified and the facts and allegations of violation of the rights or constitutional provisions were not adequately presented.

Therefore, the Referral must be declared inadmissible as manifestly ill-founded on constitutional basis in its entirety, as established in Rule 39 (1) (d) and (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI123/21

Applicant

Luan Telaku

Constitutional Review of Judgment Pml. No. 69/2021 of the Supreme Court, of 18 March 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 Luan Telak, from Prizren, represented by Florent Latifaj, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Pml. no. 69/2021 of the Supreme Court, of 18 March 2021, in conjunction with Judgment PAKR. no. 360/2020 of the Court of Appeals, of 26 October 2020, and Judgment PKR. no. 235/2018 of the Basic Court in Prizren, of 24 October 2019.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which has allegedly violated Applicant's fundamental rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 7 [Values], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], and Article 54 [Judicial Protection of

Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

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

Proceedings before the Constitutional Court

5. On 5 July 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 July 2021, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and Review Panel composed of Judges Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

7. On 27 July 2021, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 10 November 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts of the case

9. On 28 March 2018, the Kosovo Police and the Kosovo Customs Service during the routine control at the border crossing in Merdar, found a certain amount of narcotic substances belonging to the Applicant and F.K., in the vehicle with model "Peugeot 308" which was driven by the Applicant.

10. On 19 September 2018, the Basic Prosecution in Prishtina filed the indictment, PP/I. no. 81/2018, at the Basic Court in Prishtina, against the Applicant and F.K., due to reasonable suspicion that they, as co-perpetrators, have committed the criminal offense under Article 273,

paragraph 2 [Unauthorised purchase, possession, distribution and sale of narcotic drugs, psychotropic substances and analogues] of the Criminal Code of Kosovo, No. 04/L-082 (hereinafter: CCK) in conjunction with Article 31 [Co-perpetration] of the CCK".

11. On 24 October 2019, the Basic Court in Prishtina issued Judgment PKR. No. 235/18, by which the Applicant and the person F.K. were found guilty of the criminal offense *"Unauthorized purchase, possession, distribution and sale of narcotics, psychotropic substances and analogues under Article 273, paragraph 2 in conjunction with Article 31 of the CCK*" and were sentenced each with imprisonment for a period of 2 (two) years, as well as with a fine in the amount of 5,000.00 Euros and with accessory punishment, confiscation of the vehicle "Peugeot 308", confiscation of a quantity of narcotic substances and some other items. The Applicant regarding the criminal offense under Article 273 of the CCK had pleaded guilty, while he pleaded not guilty for the criminal offense under Article 31 [Co-perpetration] of the CCK. However, the Basic Court did not approve the guilty plea, as the plea was partial.

12. The Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court due to the decision on punishment, proposing that the Court of Appeals approves the appeal and imposes a lenient punishment on the Applicant.

13. F. K. filed an appeal with the Court of Appeals against the Judgment of the Basic Court due to serious violations of the provisions of the criminal procedure, erroneous determination of the factual situation and erroneous application of the substantive law.

14. The Appellate Prosecutor also filed an appeal against the Judgment of the Basic Court due to the decision on the criminal sanction, with the proposal that the appealed Judgment be amended and the accused sentenced to higher amount of punishments, while the appeal of Applicant and F.K., be rejected as ungrounded.

15. On 26 October 2020, the Court of Appeals rendered Judgment PAKR. no. 360/2020, approving the appeal of the Basic Prosecution in Prishtina, amending the sentence of imprisonment imposed on the Applicant to imprisonment for a period of 3 (three) years and 6 (six) months, while rejecting the appeal of the Applicant and F.K. as ungrounded. The Court of Appeals concluded that the sentence imposed by the Basic Court was lenient and that it could not achieve

the purpose of imposing a criminal sanction in the segment of individual and general prevention, and that the Basic Court had not assessed all the aggravating circumstances, which are evident in the present case. Therefore, it decided to impose a more severe punishment on the convicted persons. In the reasoning of the Judgment which refers to the appeal of the Basic Prosecution in Prishtina, the Court of Appeals stated:

> *"[...] in this case the first instance court does not take into account the manner of committing the criminal offense as the accused have previously prepared the vehicle for transporting narcotics so that they went to Serbia, where they stayed until modified and prepared for the concealment of narcotics, but also the amount of 26,855.34 grams that was found hidden in the modified part of the vehicle at the border crossing in Merdar (Kosovo-Serbia border) which once shows the high degree of the intention and their determination to commit the criminal offense, while their actions were carried out with high social risk, as also the Prosecutor rightly warns in his appeal. Therefore, in the presence of these aggravating circumstances, according to the assessment of this Court, the sentence imposed on the accused is lenient, for which the Prosecution rightly draws attention to his appeal. For this reason, the Court of Appeals amended the appealed judgment and adjudicated on the accused as in the enacting clause of this judgment, with the conviction that the sentence is in line with the intensity of damage to the protected value, with the degree of criminal liability of the accused, as perpetrators, and that with these punishments the purpose of the punishment provided by Article 41 of the [Criminal Procedure Code] CPCK will be achieved".*

16. The Applicant has filed against the Judgment PAKR. no. 360/2020, of the Court of Appeals, of 26 October 2020 and Judgment PKR. no. 235/18 of the Basic Court, of 24 October 2019, a request for protection of legality with the Supreme Court, inter alia, due to essential violations of Article 311 [Change of Composition of Trial Panel during Adjournment], paragraph 3 of the CPCK, because from the hearing of 27 May 2019 until the next hearing of 24 October 2019 no hearing was held, and that more than 3 (three) months have passed, so the court had to take into account this delay and recommence the main trial from the beginning, due to the fact that more than 3 (three) months have passed since the last hearing, as provided by Article 311 of the CPCK.

17. On 18 March 2021, the Supreme Court rendered Judgment Pml. no. 69/2021, by which it rejected as ungrounded the request for protection of legality of the Applicant, supporting in entirety the Judgments of the Court of Appeals and the Basic Court. In the reasoning of the Judgment regarding the allegation of the Applicant about not holding of new main trial due to the expiration of the time limit of more than 3 (three) months, the Supreme Court stated that for this allegation, applies the reasoning given to the accused F.K., where it was stated that:

> *"[...] from the last court session, from the first instance court, this court assessed that such action of the court represents a relative violation of the provisions of criminal procedure from Article 384, par. 2 of the CPCK, and this action did not affect the taking of a lawful decision and it did not approve the allegation".*

Applicant's allegations

18. The Applicant alleges that with the challenged Judgments his rights guaranteed by Article 3 [Equality Before the Law], Article 7 [Values], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], and Article 54 [Judicial Protection of Rights] of the Constitution have been violated.

19. The Applicant states that as a result of the procedural violations of the Basic Court where in paragraph 3 of this Article, it is specified that *"If [the main trial] has been adjourned for more than three (3) months or if it is held before a new presiding trial judge, the main trial shall recommence from the beginning and all the evidence shall be examined again".* Therefore, the Applicant maintains that the Basic Court committed an essential violation of the criminal procedure, which has resulted in violation of the right to a fair trial, as more than 3 (three) months have passed from one hearing to the next, respectively it turns out that for almost 5 (five) months no trial was held. Consequently, this recess of the criminal procedure for a long time, has led to the error of the main facts in the respective case and the legislator has rightly determined that after a period of time, the case should recommence from the beginning. For this reason, in order not to come to the wrong conclusion of the facts, the CPCK has clearly provided that if the adjournment of the hearings lasts more than 3 (three) months, the main trial shall recommence from the beginning. Therefore, also his punishment was based on erroneously established facts and contrary to procedural provisions.

20. In this regard, the Applicant complains to the Court that the Basic Court has also misinterpreted the statements of the Applicant and F. K., regarding the ownership of the vehicle "Peugeot 308"; statements about travel planning in Serbia; as well as to whether F. K. was aware of the presence of narcotic substances in the vehicle driven by the Applicant. The Applicant states that he did not provide evidence where he stated that F. K., was aware of the narcotic substances, but the latter has only accompanied the Applicant on his trip to Serbia. He adds that; *"In fact the whole statement of Luan Telaku is about [person E.] and [person A.] [F.K.] only at the end it was paraphrased in the statement where he ascertained that he called him in the morning and asked him "are you coming with me to Serbia' ... with the vehicle of [person E.] where the drugs were".* He also says that his statement was that he was aware of the "bunker" of drugs in the vehicle, referring to person E. and not F. K.

21. Therefore, all these misinterpretations of the statements of the Applicant, he states to have resulted as a consequence of the procedural violation of the provision of Article 311 [Change of Composition of Trial Panel during Adjournment of the CPCK], and which result in essential violations of criminal proceedings under Article 384 [Substantial Violation of the Provisions of Criminal Procedure] of the CPCK.

22. Consequently, contrary to the procedural provisions, the first instance Court found the facts to be substantiated, which are contradictory and was based on statements that were misinterpreted and which led to criminal liability.

23. Therefore, he refers to the decision of the Supreme Court stating that the finding of the latter that the allegation that the court hearings were adjournment for more than 3 (three) months is correct, but this violation did not affect the legality of the court decision. Regarding this finding of the Supreme Court, he states, *"the Supreme Court is a Court that controls the legality of the decisions of the courts of lower instances, in the respective case, on the contrary this Court is protecting unlawfulness [...]".*

24. The Applicant also refers to the provisions of the CPCK which stipulate that an adjournment of the main trial which has lasted more than 3 (three) months, the main trial must recommence from the beginning and the evidence shall be examined again. Therefore, he reiterates that in his case, we have a main trial *"without a court hearing"* as Article 311 of the CPCK obliges the court that if the adjournment has lasted

more than 3 (three) months, the main trial shall recommence from the beginning.

25. Finally, the Applicant requests the Court to decide as follows:

> *"I. The request for constitutionality submitted by the Applicant Av. Florent Latifaj, with the information as in the introductory part of this referral is APPROVED as grounded.*
>
> *II. It is FOUND that the same as Judgment PKR. no. 235/18, rendered by the Basic Court of Prishtina, Judgment of the Court of Appeals and Judgment of the Supreme Court of Kosovo, have violated the Right to Fair and Impartial Trial provided in Article 31 of the Constitution of the Republic of Kosovo.*
>
> *III. It is FOUND that in relation to point II, Articles 3, 7, 46 and 54 of the Constitution of the Republic of Kosovo have also been violated.*
>
> *IV. Judgment PKR. no. 235/18, rendered by the Basic Court of Prishtina, of 24.10.2019, as well as Judgment PAKR. no. 360/2020 of the Court of Appeals of Kosovo, of 26.10.2020 and Judgment Pml. no. 69/2021 rendered by the Supreme Court of Kosovo, of 18.03.2021, are DECLARED INVALID and the case is REMANDED FOR RECONSIDERATION to the Basic Court in Prishtina".*

Relevant constitutional and legal provisions

Constitution

> *"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.
[...]"

Provisional Criminal Code of Kosovo

"Article 31
Co-perpetration
When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense.
[...]

Article 273
Organizing, managing or financing trafficking in narcotic drugs or psychotropic substances

1. Whoever organizes, manages or finances any of the offenses in this Chapter shall be punished by imprisonment of two (2) to ten (10) years.

2. When the offense in paragraph 1. of this Article involves a large quantity of narcotic drugs or psychotropic substances, the perpetrator shall be punished by imprisonment of three (3) to fifteen (15) years.

Criminal Procedure Code of the Republic of Kosovo

Article 311
Change of Composition of Trial Panel during Adjournment

1. When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the trial panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, if one was done, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection.
2. If the composition of the trial panel has not changed, the adjourned main trial shall be continued and the presiding trial judge shall give a short account of the course of the previous main

trial. However, the trial panel may in this case also decide to recommence the main trial from the beginning.
3. If the main trial has been adjourned for more than three (3) months or if it is held before a new presiding trial judge, the main trial shall recommence from the beginning and all the evidence shall be examined again.

[...]

Article 384
Substantial Violation of the Provisions of Criminal Procedure

1. There is a substantial violation of the provisions of criminal procedure if:
1.1. the court was not properly constituted or the participants in the rendering of the judgment included a judge who did not attend the main trial or was excluded from adjudication under a final decision;
1.2. a judge who should be excluded from participation in the main trial participated therein;
1.3. the main trial was conducted in the absence of persons whose presence at the main trial is required by law or the accused or defence counsel was, notwithstanding his or her request, denied the right to use his or her own language in the main trial and to follow the course of the main trial in his or her language;
1.4. the public was excluded from the main trial in violation of the law;
1.5. the court violated the provisions of the criminal procedure relating to the issue of whether there exists a charge by an authorized state prosecutor, a motion of the injured party or the approval of the competent public entity;
1.6. the judgment was rendered by a court which lacked subject matter jurisdiction to hear the case.
1.7. the court in its judgment did not fully adjudicate the substance of the charge;
1.8. the judgment was based on inadmissible evidence;
1.9. the accused, when asked to enter his or her plea, pleaded not guilty on all or certain counts of the charge and was examined before the presentation of evidence was completed;
1.10. the judgment exceeded the scope of the charge;
1.11. the judgment was rendered in violation of Article 395 of the present Code; or

1.12. the judgment was not drawn up in accordance with Article 370 of the present Code.

2. Substantial violation of provisions of criminal procedure shall be considered if during the course of criminal proceedings, including pretrial proceedings, the court, the state prosecutor or the police:

2. 1. omitted to apply a provision of the present Code or applied it incorrectly; or

2.2. violated the rights of the defense; and this influenced or might have influenced the rendering of a lawful and fair judgment."

Assessment of the admissibility of the Referral

26. 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.

27. The Court notes that the challenged Judgment of the Supreme Court, Plm.no. 69/2021, of 18 March 2021, was also challenged through the Referral KI124/21, which is addressed by the Court separately.

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

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

[...]

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

29. The Court also examines whether the applicants have fulfilled the admissibility 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..."

30. As to the fulfilment of the above criteria, the Court finds that the Applicant is an authorized party; who has exhausted the available legal remedies; clarified the act of the public authority the constitutionality of which he is challenging, more specifically the Judgment Pml. no. 69/2021 of the Supreme Court of Kosovo, of 18 March 2021; and has specified the constitutional rights which he claims to have been violated; as well as has submitted the Referral within the legal deadline.

31. In addition, the Court must also examine whether the Applicant has fulfilled the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure, stipulates that:

"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."

32. The Court initially notes that the abovementioned rule, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR) and of the Court, enables the latter to declare inadmissible referrals for reasons relating to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based

on and after assessing its merits, namely if it deems that the content of the referral is manifestly ill-founded on constitutional basis, as defined in paragraph 2 of Rule 39 of the Rules of Procedure (see, the case KI04/21, Applicant *Nexhmije Makolli*, Resolution on Inadmissibility, of 12 May 2021, paragraph 26, see also the case KI175/21, Applicant Privatization Agency of Kosovo, Resolution on Inadmissibility, of 27 April 2021, paragraph 37).

33. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as "manifestly ill-founded" in its entirety or only with respect to any specific claim that a referral may contain. In this respect, it is more accurate to refer to the same as "manifestly ill-founded claims". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of *"fourth instance"*; (ii) claims that are categorized as *"clear or apparent absence of a violation"*; (iii) *"unsubstantiated or unsupported"* claims; and finally, (iv) *"confused or farfetched"* claims. (See, more precisely, the concept of inadmissibility on the basis of a referral assessed as "manifestly ill-founded", and the specifics of the four above-mentioned categories of claims qualified as "manifestly ill founded", The Practical Guide to the ECtHR on Admissibility Criteria of 31 August 2019; Part III. Inadmissibility Based on the Merits; A. Manifestly ill-founded applications, paragraphs 255 to 284, see also the case KI04/21, cited above, paragraph 27 and the case KI175/21, cited above, paragraph 38).

34. In the context of the assessment of the admissibility of the referral, namely, the assessment of whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the substance of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution(see, the case KI04/21, cited above, paragraph 28, as well as the case KI175/21, cited above, paragraph 39).

In relation to the right to a fair trial guaranteed by Article 31 of the Constitution and Article 5 of the ECHR

35. The Court notes that the Applicant's allegations for a violation of the right to a fair trial guaranteed by Article 31 [Right to Fair and Impartial

Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR, relate to the way the regular courts have interpreted the CPCK in his case. In this respect, he alleges that the Basic Court adjourned the main trial for more than 3 (three) months and despite the provision of the CPCK, namely Article 311, paragraph 3 which stipulates that if the main trial is adjourned for more than 3 (three) months, the main trial shall recommence from the beginning and all the evidence shall be examined again, the Basic Court has continued with the main trial and has issued a Judgment by disregarding the main trial. As a result of the termination of the main trial, there arose a misinterpretation of the Applicant's statements given in the main trial, which affected the sentence of the Applicant. This procedural violation was not avoided either by the Court of Appeals or the Supreme Court. In fact, the Supreme Court, despite having found that such a procedural violation had occurred, stated that it did not affect the legality of the Judgment of the Basic Court.

36. In this connection, the Court initially recalls that the Constitutional Court has no jurisdiction to decide whether an Applicant was guilty of committing a criminal offense or not. It also has no jurisdiction to assess whether the factual situation has been correctly determined or to assess whether the judges of the regular courts have had sufficient evidence to establish the guilt of an Applicant. (see, in this context and 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).

37. The Court points out that it is not its duty to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed the rights and freedoms of protected by the Constitution (constitutionality). The Court further reiterates that it is not its duty, according to the Constitution, to act as a court of '"fourth instance" in respect of decisions taken by the regular courts. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, in this context, the ECtHR case *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28, and references therein; and see also the cases of Court KII28/18, cited above, paragraph 56; and KI62/19, cited above, paragraph 58).

38. In this context, the Constitutional Court can only examine whether the evidence were presented in a fair manner and whether the proceedings before the regular courts, viewed in their entirety, were conducted in such a way that the Applicant had a fair and non-arbitrary trial (see, inter alia, the case *Edwards v. United Kingdom*, no. 13071/87, Report of the European Commission of Human Rights, adopted on 10 July 1991 and see also the case of Court KI110/19, cited above, paragraph 41).

39. In the following, the Court will address the Applicant's allegations, by applying its case law and that of the ECHR, in accordance with which, and pursuant to Article 53 of the Constitution [Interpretation of the Provisions on Rights of Man], the Constitutional Court is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

40. In relation to the Applicant's allegations, the Court initially notes that the Applicant before the Supreme Court had alleged that in his case there has been a procedural violation, because even though the main trial was adjourned for more than 3 (three) months, the main trial did not recommence from the beginning as required by Article 311 of the CPCK.

41. In regard to the Applicant's allegation concerning the non-holding of a new main trial due to the expiration of the deadline of more than 3 (three) months, the Supreme Court stated that for this allegation, applies the reasoning given to the accused F.K., wherein it was stated that:

> *"[...]from the last court session, from the first instance court, this court assessed that such action of the court represents a relative violation of the provisions of criminal procedure from Article 384, para.2 of the CPCK, and this action did not affect the rendering of a lawful decision and it did not approve the allegation"*.

42. The Supreme Court came to this finding by basing upon the evidence taken as basis in the Applicant's guilty plea, on which occasion, the Supreme Court, inter alia, reasoned that *"the allegation of the defence that the [Basic] Court has based its judgment on inadmissible evidence is an unfounded allegation, for the fact that the court has based the judgment also upon the statement of the convict Luan given to the police (in the presence of the defence counsel) who claimed that*

[F.K.] was aware of the modification of the "bunker", and that he had agreed with [person A.], this finding is a very important fact for the court, that the convict [F.K.] has been aware of the bunker and knew [the person A.] and spent time with him, and this makes the allegation from the request for protection of legality, to be unfounded."

43. Consequently, the Supreme Court ascertained that even though there were procedural omissions by the Basic Court as a result of the adjournment of the trial for more than three (3) months, the Supreme Court nevertheless found that these allegations fell into the category of relative procedural violations under paragraph 2 of Article 384 of the CPCK. Therefore, in such cases, the procedural violation would affect the legality of such a decision, only if it would have affected the lawful decision. Whereas according to the Supreme Court, this procedural omission had no impact on the lawfulness of the Judgment of the Basic Court. When reaching this finding, the Supreme Court also assessed the issue of misinterpretation of the statements and evidence that had been examined by the Basic Court, by referring also to the evidence that the Applicant had given before the police in the presence of his defence counsel as well as other facts. Therefore, the Supreme Court having addressed these allegations on the basis of the above facts had stated that such allegations of the Applicant were unfounded, as the procedural omission did not affect the legality of the Judgment of the Basic Court.

44. The Court finds that the Applicant has had the benefit of the adversarial proceedings; During the various stages of the proceedings he has had the opportunity to present the allegations and evidence which he considered relevant to his case, he has had the opportunity to effectively challenge the allegations and evidence presented by the opposing party; all his allegations, which viewed objectively have been relevant for the resolution of his case were heard and reviewed by the regular court; the factual and legal reasons for the challenged decision have been presented in detail. (see, *mutatis mutandis*, ECtHR Judgment 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).

45. Therefore, the Court by reiterating, once again, 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 lower instance court, unless and in so far as they may have

infringed the rights and freedoms protected by the Constitution (constitutionality), and that it can examine whether the proceedings before the regular courts, viewed in their entirety, were conducted in such a way that the Applicant had a fair and non-arbitrary trial, notes that the reasoning of the Supreme Court, referring to the Applicant's allegations of violation of criminal law, is clear and, after having examined all the proceedings, the Court also finds that the proceedings before the regular courts, viewed in their entirety, have not been unfair or arbitrary. (see, the ECtHR Judgment, *Pekinel v. Turkey*, of 18 March 2008, no. 9939/02, paragraph 55; see also: in this context, inter alia, the case KI22/19, cited above, paragraph 43).

46. The Court recalls that the mere fact that the Applicant is not satisfied with the outcome of the decisions of the regular courts or the mention of Articles of the Constitution is not sufficient to build an allegation of a constitutional violation. When alleging violations of the Constitution, the Applicants must provide reasoned allegations and compelling arguments (see the cases of Court KI128/18, cited above, paragraph 61; and KI62/19, cited above, paragraph 59).

47. Therefore, the Court finds that the Applicant has failed to prove that the challenged decision has violated his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

48. In the end, the Court concludes that the Applicant's allegations of a violation of the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR due to erroneous determination of the factual situation and erroneous interpretation and application of the applicable law are (i) claims that qualify as claims of the "fourth instance"; and as such, these allegations of the Applicant are manifestly ill-founded on constitutional basis, as set out in paragraph (2) of Rule 39 of the Rules of Procedure.

In relation to the alleged violations of Article 3 [Equality before the Law], Article 7 [Values], Article 46 [Protection of Property], and Article 54 [Judicial Protection of Rights] of the Constitution

49. As regards the violations of the rights guaranteed by Articles 3, 7, 46 and 54 of the Constitution, the Court recalls, once again, the admissibility criteria established in paragraph (1) (d) of Rule 39 (Admissibility Criteria) of the Rules of Procedure.. Rule 39 (1) (d) of

the Rules of Procedure provides for the criteria based on which the Court may examine the Referral, including the criterion for the Referral to not be manifestly ill-founded. Rule 39 (1) (d) specifically provides that:

Rule 39
(Admissibility Criteria)

"(1) The Court may consider a referral as admissible if:
[...]
(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provision."

50. The Court recalls that, on the basis of Article 48 of the Law and paragraphs (1) (d) of Rule 39 of its Rules of Procedure and its case-law, it has consistently stated that: (i) the parties have an obligation to accurately clarify and adequately set forth the facts and allegations; and also (ii) to prove and sufficiently substantiate their allegations for violation of constitutional rights or provisions.

51. In the present case, the Applicant only alleges a violation of Articles 3, 7, 46 and 54 of the Constitution, but does not justify or explain how the violation of these Articles occurred. The Court recalls that it has consistently emphasized that the mere reference to the Articles of the Constitution and the ECHR is not sufficient to build an arguable allegation of a constitutional violation. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and compelling arguments (see, in this context, cases KI175/20, cited above, paragraph 81; KI166/20 cited above, paragraph 52; and KI04/21 cited above, paragraphs 38- 39).

52. The Court therefore finds that as regards the Applicant's allegations of violation of the rights guaranteed by Articles 3, 7, 46 and 54 of the Constitution, the Referral must be declared inadmissible as manifestly ill-founded as established in paragraph (1) (d) of Rule 39 of the Rules of Procedure.

Conclusion

53. Therefore, the Court concludes that the Applicant's allegations of violation of the rights guaranteed by Articles 3, 7, 31, 46 and 54 of the Constitution must be declared inadmissible in their entirety as

manifestly ill-founded because these allegations of the Applicant qualify as claims that pertain to the category of "fourth instance" claims or claims which have not been accurately clarified and the facts and allegations of violation of constitutional rights or provisions have not been adequately presented. Consequently, the Referral as a whole must be declared inadmissible as manifestly ill-founded on constitutional basis, as set out in paragraph 39 (1) (d) and (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 48 of the Law and in accordance with Rule 39 (1) (d) and (2) of the Rules of Procedure, on 10 November 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Gresa Caka-Nimani

KI54/21, Applicant: Kamber Hoxha, Constitutional review of Decision Rev. no. 393/2020 of the Supreme Court of Kosovo, of 1 February 2021

KI54/21, Judgment of 4 November 2021, published on 8 December 2021

Keywords: *individual referral, right to fair and impartial trial, right of access to a court*

The circumstances of the present case relate to a decision of 2004 of the Employer, namely the Correctional Service, Detention Center in Lipjan, on termination of an employment relationship as a result of disciplinary violations during working hours. The Applicant had initially challenged this decision in the second instance body of the Employer, which 6 (six) months later, had rejected the Applicant's complaint. The Applicant had initiated proceedings before the regular courts against this decision. The Municipal Court in Lipjan, had decided in favour of the respective Applicant, by obliging the Employer to reinstate the Applicant to his previous job position, and recognize all his rights deriving from this employment relationship.

However, as a result of the Employer's appeal related to the Applicant's statement of claim during the period from 2006 to 2015, proceedings were conducted in the District Court, the Independent Oversight Board for the Civil Service, the Court of Appeals and the Supreme Court, in which this statement of claim was examined both from the procedural point of view and that of the merits of the statement of claim. Finally, the case was remanded for reconsideration to the Basic Court, which had again upheld the Applicant's claim in its entirety. However, and deciding upon the appeal of the Employer, the Court of Appeals, had quashed the Judgment of the Basic Court, by rejecting the Applicant's statement of claim, this time after finding that the initial claim was filed out of the legal deadline as defined in the Law on Basic Rights from Employment Relationship of the SFRY, of 28 September 1989. Acting upon the request for revision, the Supreme Court upheld the position of the Court of Appeals

The Applicant challenged before the Court the above findings of the Supreme Court including those of the Court of Appeals, by alleging that they were issued in contradiction with the guarantees embodied in his constitutional rights that relate to his right to a legal remedy and judicial protection of rights as provided by Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution, respectively.

When assessing the Applicant's allegation, the Court initially assessed that the factual and legal circumstances of the present case incorporate elements

of the *"right of access to a court"*, as an integral part of the right to a fair and impartial trial, guaranteed by Article 31 [Right to Fair and Impartial trial] of the Constitution and Article 6[Right to a fair trial] of the European Convention on Human Rights, and consequently concluded that it would address the Applicant's allegations from the point of view of these rights.

In this respect, the Court after having elaborated on and applied the principles established through its case law and the case law of the European Court of Human Rights, found that:

(i) a highly formalistic interpretation and finding in respect of the applicability of the provisions of the Law on Basic Rights from Employment Relationship of the SFRY, of 28 September 1989 by the Supreme Court, resulting in the finding that the initial claim of the Applicant was filed out of time, because in essence, he should have not waited for the decision of the second instance, but act on its silence, following a decade of proceedings in which the Applicant's claim was decided and re-decided on the basis of the merits, is not proportionate to the goal pursued to ensure legal certainty and the proper administration of justice, as one of the basic principles of the rule of law in a democratic society; and
(ii) as a result of this interpretation and the finding of the Supreme Court, the Applicant has been denied his *"right of access to a court"*, a right which is embodied in the procedural guarantees established through the right to a fair and impartial trial guaranteed by the Constitution and the European Convention on Human Rights.

Consequently and on the basis of the clarifications provided in the published Judgment, the Court found that the challenged Decision [Rev.no.393/2020] of the Supreme Court, of 1 February 2021, was issued contrary to the procedural guarantees guaranteed through Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial)) of the European Convention on Human Rights, and consequently, declared the same invalid, by remanding it for reconsideration in accordance with the findings of the Constitutional Court.

JUDGMENT

in

Case No. KI54/21

Applicant

Kamber Hoxha

Constitutional review of Decision Rev. No. 393/2020 of the Supreme Court of Kosovo, of 1 February 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 Kamber Hoxha, residing in Podujeva, who is represented by Xhavit Bici, lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision [Rev. no. 393/2020] of 1 February 2021 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) in conjunction with Decision [Ac. no. 2980/2016] of 19 May 2020 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals).

3. The Applicant received the challenged Decision of the Supreme Court on 2 March 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision, whereby the Applicant alleges that his fundamental rights and freedoms guaranteed by Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 (Processing Referrals) and 47 (Individual Requests) of the Law and Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 16 March 2021, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral, which he submitted by mail service on 16 March 2021.

7. On 22 March 2021, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama - Hajrizi, (Presiding), Gresa Caka-Nimani and Safet Hoxha.

8. On 24 March 2021, the Court notified the Applicant's legal representative about the registration of the Referral and requested him to submit to the Court: (i) the power of attorney for representation and (ii) copies of the decisions of the regular courts.

9. On 2 April 2021, legal representative submitted the power of attorney for representation and the documents requested by the Court.

10. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court of 17 May 2021, it was determined that Judge Gresa Caka-Nimani will take over the

duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi, on 26 June 2021.

11. On 20 May 2021, the Court notified the Supreme Court about the registration of the Referral.

12. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu submitted his resignation from the position of judge in the Constitutional Court.

13. On 31 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision no. KK160/21, determined that Judge Gresa Caka-Nimani be appointed Presiding judge of the Review Panels in cases where she was appointed as a member of the Panel, including the current case.

14. On 26 June 2021, pursuant to paragraph (4) of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, of 17 May 2021, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

15. On 28 June 2021, the President of the Court Gresa Caka-Nimani, by Decision KSH.KI54/21 appointed Judge Selvete Gërxhaliu-Krasniqi a member of the Review Panel instead of Arta Rama-Hajrizi, whose term as a judge had ended on 26 June 2021.

16. On 4 November 2021, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the admissibility of the Referral. On the same day, the Court unanimously decided that the Applicant's Referral is admissible and that the Decision [Rev. no. 393/2020] of the Supreme Court, of 1 February 2021, is not in accordance with Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Summary of facts

17. Starting from 1999, the Applicant was in employment relationship, as correctional officer in the Correctional Service, Detention Center in Lipjan (hereinafter: the Employer).

18. On 17 June 2004, the Employer issued a Decision on termination of the employment relationship as a result of a disciplinary violation during working hours established by the Internal Disciplinary Code of the Correctional Service. The notice on termination of employment relationship by the Employer specified that as a result of the Applicant's sleeping during working hours, one of the prisoners had committed suicide. The abovementioned decision on termination of the employment relationship was based on UNMIK Regulation 2001/36 on the Kosovo Civil Service. It is noted from the case file also that at the time of termination of the Applicant's employment relationship, the Detention Centre in Lipjan was under the administration of the UNMIK Department of Justice.

19. On 13 July 2004, the Applicant filed an appeal with the second instance body of the Employer against the abovementioned decision of the Employer on the termination of the employment relationship.

20. On 26 January 2005, the second instance body of the Employer had rejected the Applicant's appeal. The decision of the second instance body of the Employer, based on UNMIK Regulation 2001/36, and signed by the chairperson of the appeals board did not contain legal advice.

21. On 2 February 2005, the Applicant filed a statement of claim with the Municipal Court in Lipjan (hereinafter: the Municipal Court) requesting the annulment of the decision of 17 June 2004 of the Employer on termination of the employment relationship and the Decision of 26 January 2005, of the Employer's second instance body for the rejection of his appeal.

22. On 29 March 2005, the Municipal Court by Judgment [C. no. 27/2005]: (i) approved the Applicant's statement of claim; (ii) annulled the abovementioned decisions of 17 June 2004 and 26 January 2005, respectively of the Employer; and (iii) obliged the Employer to reinstate the Applicant to his previous place of work by recognizing him all rights deriving from this employment relationship from 30 June 2004 until his reinstatement to his previous place of work.

23. On an unspecified date, the Employer filed an appeal against the abovementioned Judgment of the Municipal Court, with the District Court in Prishtina (hereinafter: the District Court).

24. On 24 November 2006, the District Court by Decision [Ac. no. 990/2005] approved the Employer's appeal as grounded and quashed the Judgment of the Municipal Court, C. no. 27/2005 of 29 March 2005, remanding the case for retrial to the first instance court. The District Court found that the Applicant has the status of a civil servant, and in this context, the Municipal Court has erroneously found and determined the factual situation. Subsequently, the District Court found that the Applicant against the Decision of 17 June 2004, of the Employer for termination of employment relationship, should file an appeal to the Independent Oversight Board of Kosovo (hereinafter: IOBK) as a second instance body.

25. As a result of the abovementioned instruction of the District Court, on 14 April 2007, the Municipal Court by Decision [C. no. 1/2007] decided to terminate the procedure regarding the Applicant's statement of claim, in this court, until the issuance of the decision by the IOBK.

26. On 10 December 2007, the IOBK by Decision [no. 02/344/2007] dismissed the Applicant's appeal and found that the instruction of the District Court given by the Decision [Ac. no. 990/2005] of 24 November 2006 does not stand, because at the time when the Applicant had committed the disciplinary violation, the IOBK has not yet been established.

27. On 25 September 2008, the Municipal Court by Decision [C. no. 1/2007], decided to suspend the procedure related to the Applicant's statement of claim filed in this court, as a result of the Employer's request for the annulment of the decision in duration of six (6) months.

28. Based on the case file, it is noted that the Municipal Court, on 21 January 2010, by Judgment [C. no. 1/2007] decided to: (i) approve the Applicant's statement of claim; and (ii) oblige the Employer to reinstate the Applicant to his previous place of work by recognizing all of his rights deriving from his employment relationship.

29. On an unspecified date, the Employer filed an appeal against the abovementioned Judgment of the Municipal Court.

30. On 7 March 2014, the Court of Appeals by Judgment [Ac. no. 1580/2012] partially accepted the Employer's appeal and quashed the Judgment of the Municipal Court only as regards to the enacting clause by which the Employer was obliged to recognize to the Applicant all the rights deriving from his employment relationship.

31. On an unspecified date, the Employer filed a revision with the Supreme Court against the second point of the enacting clause of the abovementioned Judgment of the Court of Appeals.

32. On 6 January 2015, the Supreme Court by Decision [Rev. no. 270/2014] accepted the Employer's revision and quashed the second point of the enacting clause of the Judgment of the Court of Appeals [Ac. no. 1580/2012] of 3 March 2014 and pertinent to this point remanded the case for retrial at the first instance court.

33. On 3 March 2016, the Basic Court in Prishtina, Branch in Lipjan (hereinafter: the Basic Court) by Judgment [C. no. 170/14] approved the Applicant's claim in entirety obliging the Employer to reinstate the Applicant to his work position as correctional officer with all rights from the employment relationship, compensating the monthly income from 30 June 2004 until the date of his reinstatement at his work place.

34. On an unspecified date, the Employer filed an appeal against Judgment [C. no. 170/14] of the Basic Court due to violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation, and erroneous application of substantive law.

35. On 19 May 2020, the Court of Appeals by Decision [Ac. no. 2980/16]: (i) approved the Employer's appeal; (ii) quashed Judgment C. no. 170/14, of 3 March 2016 of the Basic Court; and (iii) dismissed the Applicant's claim after finding that the Applicant's claim based on Article 83, paragraph 1 of the Law on Basic Rights from Employment Relationship, of 28 September 1989 of the SFRY (hereinafter: LBRER) was filed out of the legal timeline set by this provision. Paragraph 1 of Article 83 of the LBRER stipulated that if an employee who is not satisfied with the final decision of the competent authority or if this authority does not render a decision within 30 (thirty) days from the date of submission of the request, he has the right to seek the protection of his rights before the competent court within a time limit of 15 (fifteen) days.

36. In this case the Court of Appeals found that *"[...] the claim of [the Applicant] for the annulment of the decision and reinstatement to his work place with other rights from the employment relationship, is out of time, since from the case file is found that the claimant filed the claim with the first instance court for the annulment of the decision*

and for his reinstatement at his work place, on 02.02.2005, while the claimant filed the appeal against the decision of 17.06.2004, on 13.07.2004, from which it results that the claim was filed after the legal timeline for filing the claim has passed, the fact that the body according to the appeal has decided out of the prescribed legal timelines (26.01.2005) cannot reset the timelines provided by law for filing a claim, because the claimant had to wait 30 days from filing the appeal, if within this period the relevant body has not taken a decision on the appeal, he was obliged to have filed the claim within the next 15 days".

37. The Court of Appeals justified its reasoning for the application of Article 83 of the LBRER by stating that this law was in force at the time when the Applicant's employment relationship has been terminated.

38. On an unspecified date, against the Decision [Ac. no. 2980/16] of 19 May 2020, of the Court of Appeals, the Applicant filed a revision with the Supreme Court due to substantial violations of the provisions of the contested procedure and erroneous application of the substantive law, proposing that the Decision of the Court of Appeals be quashed and uphold the judgment of the first instance, namely the Judgment [C. no. 174/14] of 3 March 2016, of the Basic Court. In his revision, the Applicant regarding the finding of the Court of Appeals that his statement of claim filed in the Municipal Court, among other things had specified that *"the issue of filing a claim has been previously assessed by the first instance court with the Judgment C. no. 27/2005, of 29.03.2005, the District Court in Prishtina with Decision AC. No. 990/2005 of 24.11.2006, the Basic Court in Prishtina-Branch in Lipjan with Judgment C. no. 170/14 of 03.03.2016, the Court of Appeals of Kosovo with Judgment Ac. no. 1580/2012 of 07.03.2014, the Supreme Court of Kosovo with the Decision Rev. No. 270/2014 of 06.01.2015, and by many judges of all instances have reviewed this case and all have assessed the claim as timely, while the current panel after decades has found that the claim is out of time".*

39. On 1 February 2021, the Supreme Court by Decision [Rev. no. 393/2020] rejected the Applicant's revision as ungrounded.

40. The Supreme Court found that the Court of Appeals had *"correctly applied the provisions of the contested procedure and the substantive law, when it approved the appeal of [the Employer] and decided to dismiss the claim of [the Applicant] as out of time, and that the court of second instance has given sufficient reasoning for the relevant*

facts for a fair trial of this legal matter, which is also accepted by this Court".

41. The Supreme Court found that the Applicant filed his claim of 2 February 2005 with the Municipal Court, against the Decision of the second instance body of the Employer of 26 January 2005, out of time, on the grounds that the second instance body had decided outside the legal time limit of thirty (30) days. According to the Supreme Court, the time limit set forth in paragraph 1 of Article 83 of the LBRER *"is a preclusive time limit, and with the expiration of the timeline the judicial right is lost"* and that consequently this time limit cannot be restored.

Applicant's allegations

42. The Applicant alleges that the challenged Decision violated his fundamental rights and freedoms guaranteed by Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution.

43. The Applicant in his Referral states that *"the Supreme Court has violated the provisions of Articles 32 and 54 of the Constitution of Kosovo, denying him the right to file a claim according to the deadline given to the claimant when deciding by the body of the second instance, hence the claim was filed on time because the body of the second instance decided on 26.01.2005, while the claim was filed on 02.02.2005, respectively six days after it was decided as per the appeal".*

44. Consequently, the Applicant specifies that the non-acceptance of the deadline of the claim by the Supreme Court constitutes *"a violation of the rights to appeal, file a claim or defence, hence the law has been violated to the detriment of the Applicant".*

45. Finally, the Applicant requests the Court to: (i) declare the Referral admissible; (ii) annul the Decision of the Supreme Court [Rev. no. 393/2020] of 1 February 2021 and the Decision [Ac. no. 2980/2016] of the Court of Appeals of 19 May 2020.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 31

[Right to Fair and Impartial Trial]

"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law".

Article 32
[Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

Article 54
[Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

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".

UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo, amended by Regulation 2000/592000/59

"Section 1
Applicable Law

1.1 The law applicable in Kosovo shall be:
(a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder and

(b) The law in force in Kosovo on 22 March 1989.

In case of conflicts, the regulations and subsidiary instruments issued thereunder shall take precedence.

1.2. If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.

1.3. In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards [...]."

Law on Basic Rights from Employment Relationship, of the SFRY of 28 September 1989

"An employee who is not satisfied with the final decision of the competent authority or if this authority does not render a decision within 30 (thirty) days from the date of submission of the request, he/she has the right to seek the protection of his rights before the competent court within a time limit of 15 days..."

Assessment of the admissibility of Referral

46. The Court first examines whether there are fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure.

47. In this respect, the Court refers to 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."*

48. In addition, the Court also refers to the admissibility criteria, as further specified in the Law. In this respect, the Court first refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

> Article 47
> (Individual Requests)
>
> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*
>
> Article 48
> (Accuracy of the Referral)
>
> *"(In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*
>
> Article 49
> (Deadlines)
>
> *"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision [...]."*

49. As to the fulfilment of these criteria, the Court first states that the Applicant is an authorized party, who is challenging an act of a public authority, namely the Decision [Rev. no. 393/2020] of the Supreme

Court, of 1 February 2021, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which he alleges to have been violated pursuant to the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure.

50. The Court also finds that the Applicant's Referral has fulfilled the admissibility criteria set out in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the conditions set out in paragraph (3) of Rule 39 of the Rules of Procedure.

51. Furthermore and finally, the Court considers that this Referral is not manifestly ill-founded as set out in paragraph (2) of Rule 39 of the Rules of Procedure and, consequently, it must be declared admissible and its merits examined.

Merits of the Referral

52. The Court recalls that on 17 June 2004, the Applicant's Employer issued a Decision on termination of his employment relationship as a result of a disciplinary violation during working hours. As a result, on 13 July 2004, the Applicant filed an appeal with the second instance body of the Employer against the Employer's decision on termination of the employment relationship. On 26 January 2005, respectively, more than six (6) months later, the second instance body rejected the Applicant's appeal. As a result of the decision of the second instance body of the Employer, the Applicant filed a claim in the Municipal Court, requesting the annulment of the Decision of 17 June 2004 of the Employer for termination of employment relationship. The Municipal Court by Judgment [C. no. 27/2005] of 29 March 2005 had: (i) approved the Applicant's statement of claim; (ii) annulled the abovementioned decisions of 17 June 2004 and 26 January 2005, respectively of the Employer; and (iii) obliged the Employer to reinstate the Applicant to his previous place of work, acknowledging to him all the rights deriving from this employment relationship starting from 30 June 2004, until his return to his previous place of work. As a result of the Employer's appeal against the Judgment of the Municipal Court, the District Court by the Decision [Ac. No. 990/2005] of 24 November 2006, approved the Employer's appeal as grounded and remanded the case for retrial to the Municipal Court, finding that the Applicant had the status of a civil servant and was therefore obliged to file an appeal at the IOBK as a second instance

body. As a result of the abovementioned instruction of the District Court, the Municipal Court, on 14 April 2007, terminated the procedure with regard to the Applicant's statement of claim, until the issuance of the decision by the IOBK. However, on 10 December 2007, the IOBK rejected the Applicant's appeal with the reasoning that the instruction of the District Court was erroneous and that the Applicant is not entitled to file an appeal with the IOBK, as the latter had not been established at the time when the Applicant committed the disciplinary violation. Based on the case file, it results that the matter of the Applicant's statement of claim was remanded to the Municipal Court for trial, and the latter by Judgment [C. no. 1/2007] of 21 January 2010 approved the Applicant's statement of claim and had decided to reinstate the latter to his previous place of work. As a result of the appeal filed by the Employer, the Court of Appeals by Judgment [Ac. no. 1580/2012] of 7 March 2014 has partially approved the appeal of the latter, and quashed the Judgment of the Municipal Court, of 21 January 2010, only with regard to the second point of the enacting clause which was related to the obligation of the Employer to recognize all his rights deriving from his employment relationship. The Employer had submitted a revision against this Judgment of the Court of Appeals, to the Supreme Court and the latter by Decision [Rev. no. 270/2014] of 6 January 2015, had accepted his revision as grounded and had quashed the second point of the enacting clause of the Judgment of the Court of Appeals [Ac. no. 1580/2012] of 7 March 2014 remanding the case with regard to this point for retrial to the first instance. The Basic Court again, by Judgment [C. no. 174/14] of 3 March 2016, had approved the Applicant's statement of claim in its entirety and had obliged the Employer to reinstate the Applicant to his previous place of work with all rights from his employment relationship. The Court of Appeals by Decision [Ac. no. 2980/16] of 19 May 2020: (i) approved the Employer's appeal; (ii) quashed Judgment [C. no. 170/14] of 3 March 2016 of the Basic Court; (iii) dismissed the Applicant's claim after finding that the Applicant's claim, pursuant to Article 83, paragraph 1 of the LBRER of 28 September 1989 of the SFRY, had been filed out of the legal time limit set by this provision. Respectively, based on this provision, the Court of Appeals had interpreted and subsequently found that if the employee, respectively the Applicant is not satisfied with the final decision of the competent body, namely the Decision of 17 June 2004, or if this authority does not issue a decision, namely the second instance body, within 30 (thirty) days from the date of submission of the request, he/she has the right to seek the protection of his rights before the competent court within a time limit of 15 days. Consequently, the Court of Appeals found that the Applicant based on this provision had to submit the request to the Municipal Court within fifteen days from the expiration

of the thirty-day period from the day of filing his appeal with the second instance body of the Employer. As a result, the Applicant filed a revision against the Decision of the Court of Appeals, in the Supreme Court, and the latter by Decision [Rev. no. 393/2020] of 1 February 2021 had rejected his revision as ungrounded. Similar to the Court of Appeals, the Supreme Court found that the Applicant filed his statement of claim of 2 February 2005 in the Municipal Court, against the decision of the second instance body of the Employer of 26 January 2005, out of the time limit set out in paragraph 1 of Article 83 of LBRER. The Supreme Court also confirmed that the LBRER was the law in force at the time when the Applicant had established his employment relationship with the Employer, and according to the aforementioned provision of this law, the time limit set out in this provision, namely paragraph 1 of Article 83 of LBRER *"is a preclusive deadline, and after the deadline the judicial right is lost"* and consequently this deadline cannot be restored.

53. The Applicant challenges the abovementioned findings by the Decisions of the Court of Appeals and the Supreme Court alleging violation of Article 32 of the Constitution, in conjunction with Article 54 of the Constitution. The Applicant in his Referral specifies that he was *"[...] denied [the right] to file a claim according to the deadline given to the claimant when deciding by the body of the second instance, hence the claim was filed on time because the body of the second instance decided on 26.01.2005, while the claim was filed on 02.02.2005, respectively six days after it was decided as per the appeal*". Consequently, the Applicant specifies that the non-acceptance of the deadline of the claim by the Supreme Court constitutes a violation of his right *"to appeal, file a claim or defence, hence the law has been violated to the detriment of the Applicant"*.

54. The Court further notes that the Applicant has not alleged a violation of his right to a fair and impartial trial, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. However, based on the factual and legal circumstances of the case, the Court notes that in addition to his allegation of violation of Article 32 of the Constitution, in conjunction with Article 54 of the Constitution, the allegations raised by the Applicant in his Referral incorporate elements of the right of "access to court" as an integral part of the rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

55. In terms of dealing with the allegations of the Applicant within the scope of Article 36 of the Constitution in conjunction with Article 6 of the ECHR, the Court, referring to its case law and that of the European Court of Human Rights (hereinafter: the ECtHR) emphasizes that it does not consider itself bound by the characterisation of the alleged violations given by the Applicant. By virtue of the *juria novit curia* principle, the Court is the master of the characterisation of the constitutional issues that a case may include, and may consider of its own motion the respective complaints, relying on provisions or paragraphs which the parties have not expressly invoked (see in this context the case of the Court, KI48/18, Applicant *Ahmet Frangu*, Judgment of 22 July 2020, paragraph 81).

56. In addition, based also on the case law of the ECtHR, a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments expressly relied on by the parties (see the case of the ECtHR *Talpis v. Italy*, Judgment of 18 September 2017, paragraph 77 and references cited therein).

57. Therefore, and in the following, the Court will address the Applicant's allegations from the point of view of the rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, applying the principles established with the case law of the ECtHR, in which case the Court in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged 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"*.

58. In this regard, the Court first notes that the case law of the ECtHR and of the Court has consistently considered that the fairness of the proceedings is assessed based on the proceedings as a whole (see case of the Court KI62/17, Applicant: *Emine Simnica*, Judgment of 29 May 2018, paragraph 41; and KI20/21, Applicant *Violeta Todorović*, Judgment of 13 April 2021, paragraph 38; see also, ECtHR Judgment, *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6 October 1988, paragraph 68). Therefore, in the procedure of assessing the grounds of the Applicant's allegations, the Court will adhere to these principles.

59. In this regard and in order to address the Applicant's allegations, the Court will elaborate on the general principles regarding the right of "access to a court" guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, insofar as they are relevant to

the circumstances of the present case, in order to assess the applicability of these Articles, and then to proceed with the application of these general principles, in the circumstances of the present case.

I. General principles regarding the right of "access to a court" guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR as well as the relevant case law

(i) General principles

60. With regard to the right of "access to a court", a right guaranteed by paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR, the Court first notes that it already has a case law, which is built on the principles established by the case law of the ECtHR (including but not limited to cases *Golder v. The United Kingdom,* Judgment of 21 February 1975; *Běleš and Others v. Czech Republic,* Judgment of 12 November 2002; *Miragall Escolano and Others v. Spain,* Judgment, 25 January 2000; and *Naït-Liman v. Switzerland,* Judgment of 15 March 2018.) Having said that, the cases of the Court in which the Court has affirmed the principles established by the ECtHR and has applied the same in the cases for review before the Court, including but not limited to cases KI62/17, Applicant *Emine Simnica* [Judgment of 29 May 2018]; KI224/19 Applicant *Islam Krasniqi* [Judgment of 10 December 2020] and KI20/21 Applicant *Violeta Todorović* [Judgment of 13 April 2021].

61. In this regard, the Court first refers to the case law of the ECtHR, respectively case *Golder v. the United Kingdom*, where was emphasized that *"the right of access to the court constitutes an element which is inherent in the right stated by Article 6 paragraph 1 [of the ECHR]. Article 6 paragraph 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way this Article embodies the "right to a court", of which the right of access, respectively the right to institute proceedings before courts in civil matters, constitutes one aspect of this right only". (See the case of the ECtHR, Golder v. the United Kingdom*, cited above, paragraphs 28-36).

62. In this context the Court emphasizes that the "right of access to a court" as an integral part of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, stipulates that the parties to the proceedings must have an effective legal remedy that enables them to protect their civil rights (see cases of the Court K224/19, Applicant

Islam Krasniqi, cited above, paragraph 35; and KI20/21, Applicant *Violeta Todorović*, cited above, paragraph 41; see in this context also the cases of the ECtHR, *Běleš and Others v. Czech Republic,* cited above, paragraph 49; and *Naït-Liman v. Switzerland*, cited above, paragraph 112).

63. The Court further states the right of access to a court is not absolute, but it can be subject to limitations, since by its very nature it calls for regulation by the state, which enjoys a certain margin of appreciation in this regard (see in this regard the case of the Court KI20/21, Applicant *Violeta Todorović*, cited above, paragraph 44).

64. However, any limitations on the right of access to a court must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the "right to a court" is impaired. Such limitations will not be compatible if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see case of the Court KI20/21, Applicant *Violeta Todorović*, cited above, paragraph 45, and the ECtHR cases: *Sotiris and Nikos Koutras, ATTEE v. Greece*, Judgment of 16 November 2000, paragraph 15, and *Běleš and Others v. the Czech Republic,* Judgment of 12 November 2002, paragraph, 61).

(ii) The case law of the ECtHR

65. The Court, based on the circumstances of the present case, also refers to the relevant case law of the ECtHR, which refers to the right of access to a court, from the point of view of guaranteeing the principle of legal certainty and proper administration of justice, as basic principles of rule of law of law in a democratic society.

66. In its case law the ECtHR had specified that the rules which set out the formal steps to be taken and the time limit to be observed in filing a complaint were intended to ensure a proper administration of justice and were to be examined accordingly, and in particular the principles of legal certainty (see the case of *Cañete de Goñi v. Spain*, Judgment of 15 October 2002, paragraph 36). That being so, the ECtHR had specified that rules in question, or their application, should not prevent litigants from using an available legal remedy (see in this context the case of the ECtHR *Miragall Escolano and Others v. Spain*, Judgment of 25 January 2000, paragraph 36). The ECtHR also noted that each case should be considered in the light of the circumstances and specific elements of the proceedings in that case (see case *Kurşun*

v. Turkey, Judgment of 30 October 2018, paragraphs 103-104). In this context, the ECtHR further emphasized that in applying the procedural rules, the courts should avoid both excessive formalism that would preclude fair process and excessive flexibility that would make the procedural criteria set by law as invalid (see the case of *Hasan Tunç and Others v. Turkey*, Judgment of 31 January 2017, paragraphs 32-33).

67. In summary, the ECtHR in the case of *Zubac v. Croatia* stated that *"observance of formalised rules of civil procedure [...] is valuable and important as it is capable of limiting discretion, securing equality of arms, preventing arbitrariness, securing the effective determination of a dispute and adjudication within a reasonable time, and ensuring legal certainty and respect for the court* (see the case of *Zubac v. Croatia* [GC], Judgment of 5 April 2018, paragraph 96). The ECtHR in this case had also underlined that "*however, the right of access to court is considered to have been violated at the moment when the rules cease to be in the service of legal certainty and proper administration of justice and consequently create a barrier which prevents the litigants from having their case tried on their merits by the competent court* (paragraph 98 of the Judgment in case *Zubac v. Croatia*). In the context of the latter, the ECtHR noted that in cases where public authorities have provided inaccurate or incomplete information, local courts should sufficiently take into account the specific circumstances of the case in order not to apply rules and their practice very rigidly (see in this context also the case of the ECtHR *Clavien v. Switzerland*, Judgment of 12 September 2017, paragraph 27 and *Gajtani v. Switzerland*, Judgment of 9 September 2014, paragraph 75).

68. On the other hand, the ECtHR in the case *Ivanova and Ivashova v. Russia* [Judgment of 26 January 2017] found that domestic courts should not interpret the law in an inflexible manner, which results in the imposition of an obligation which the litigants find unable to comply with. According to the ECtHR requesting that an appeal be lodged within one month of the date on which the registry office drafted a complete copy of the court decision - instead of the date from which the plaintiff was notified of the decision - resulted in that, that the expiration of the appeal period depended on a factor completely beyond the control of the plaintiff. Consequently, the ECtHR found that the right of appeal had to be effective from the day the plaintiff was informed about the complete text of the decision. In this case, the ECtHR had concluded that the challenged action was not proportionate to the aim of ensuring legal certainty and the proper

administration of justice, and consequently found that it was her right of access to a court guaranteed by Article 6, paragraph 1 of the ECHR (see paragraphs 52-58 of the Judgment in case *Ivanova and Ivashova v. Russia*).

(iii) The case law of the Constitutional Court regarding the right of access to a court

69. The Court, as specified above, has applied the abovementioned principles established by the case law of the ECtHR in its case law. Specifically, the Court, same as above, referred to three cases of the Court, namely cases KI62/17 Applicant *Emine Simnica*, KI224/19 Applicant *Islam Krasniqi*, and KI20/21 Applicant *Violeta Todorović*, in which cases, the Court found violation of the right of access to a court guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

70. In this context, the Court refers to its last case, in which the latter, referring to and applying the abovementioned principles established by the case law of the ECtHR, found violation of the right of access to a court, as one of the principles of a fair trial in accordance with Article 31 of the Constitution and Article 6 of the ECHR. The circumstances of the Applicant's case in case KI20/21 are related to the fact that on 21 October 2019, the Applicant filed a request with the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, for the correction of a clear technical error of the Judgment of the Appellate Panel of 4 October 2019, claiming that she received the Judgment of the Specialized Panel of 24 May 2016, on 3 June 2016, whilst she filed the appeal against this Judgment to the Appellate Panel on 15 June 2016, within the timeline of 21 days. On 1 October 2020, the Appellate Panel by the Decision had dismissed the Applicant's request as inadmissible, adding that the Judgment of the Appellate Panel of 4 October 2019 is final, although it concluded that the Applicant's statement that the Applicant received the Judgment of the Specialized Panel on 3 June 2016 was correct. The Court in examining the Applicant's allegation regarding the right of "access to a court" found that the Appellate Panel despite the fact that it found that the Applicant's allegations were correct, and consequently that her appeal has been filed according to the time limits defined by the law in force, the latter rejected the Applicant's request for the correction of error of the Appellate Panel with the Judgment of 4 October 2019, considering her request as a request for reconsideration of the court decision. As a result, the Constitutional Court found that the challenged Decision of the Appellate Panel made

unable for the Applicant from having her appeal against the Judgment of the Specialized Panel handled on the merits despite the fact that her appeal was filed within the legal timeline. Consequently, the Court found that the Appellate Panel had restricted the Applicant's access to a court, which restriction had resulted in violation of paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR.

II. Application of the abovementioned principles in the circumstances of the present case

71. The Court recalls that on 13 July 2004 the Applicant filed an appeal with the second instance body of the Employer against the Employer's decision on termination of the employment relationship of 17 June 2004. On 26 January 2005, respectively, more than six (6) months later, the second instance body issued a decision, by which it rejected the Applicant's appeal, and as a result of the decision of the second instance body of the Employer, the Applicant within fifteen (15) days had filed a claim in the Municipal Court, requesting the annulment of the Decision of 17 June 2004 of the Employer on the termination of employment relationship. The court in this case points out that the decision of the second instance body of the Employer did not contain legal advice regarding legal remedies. In addition, the Court also notes that the legal basis for the issuance of this Decision, which was mentioned in the preamble to this Decision, was UNMIK Regulation 2001/36 on the Civil Service. As a consequence of the Applicant's statement of claim, the Municipal Court considering his statement of claim on merits by Judgment C. no. 27/2005, of 29 March 2005, approved his statement of claim, obliging the Employer to reinstate the Applicant to his previous place of work. From the moment of filing the appeal against this Judgment of the Municipal Court by the Employer at the District Court respectively in 2005 until the issuance of the challenged Decisions [Ac. no. 2980/16] of 19 May 2020 of the Court of Appeals and [Rev. no. 393/2020] of 1 February 2021 of the Supreme Court, the issue of the Applicant's statement of claim as elaborated in detail as above for fifteen (15) years was handled before the regular courts both in terms of permissibility and in terms of the merits of the statement of claim.

72. In this context, the Court, based on the procedural chronology of this case before the regular courts, and in terms of the "right of access" to a court, notes that the Applicant has had access to the court throughout this period, up to the time of issuance of the Decision [Ac. no. 2980/16] of 19 May 2020, of the Court of Appeals by which it was

decided that the Applicant's statement of claim be dismissed as out of time as this court based on Article 83, paragraph 1 of the LBRER, of 28 September 1989 of the SFRY had found that his statement of claim had been filed outside the legal time limit set by this provision. Respectively, the Court of Appeals, based on this provision, found that the Applicant had to file his statement of claim in the Municipal Court within fifteen (15) days from the expiration of the time limit of thirty (30) days, from the moment of filing his appeal to the second instance body of the Employer. In addition, the Supreme Court in rejecting the revision filed by the Applicant had confirmed the finding of the Court of Appeals by the abovementioned Decision of 19 May 2020.

73. The Court reiterates that the main reason for the rejection of the Applicant's statement of claim by the Court of Appeals and the Supreme Court, respectively, was because the latter interpreting and applying Article 83, paragraph 1 of the LBRER, of 28 September 1989 of the SFRY had concluded that his statement of claim had been filed outside the time limit set by this provision. According to the interpretation of the Court of Appeals and the Supreme Court, the Applicant should have filed his statement of claim in the Municipal Court within fifteen (15) days from the expiration of the time limit of thirty (30) days for submitting his appeal to the second instance body.

74. Having said that, the Court recalls that in the Applicant's circumstances: (i) the second instance body of the Employer had not issued a decision within thirty (30) days from the date of filing the Applicant's appeal against the Decision on termination of employment relationship, of 17 June 2004 of the Employer; (ii) but had issued a decision on 26 January 2005, respectively six (6) months after the submission of the Applicant's appeal to this body; and (iii) the Applicant against this Decision of the second instance body, issued on 26 January 2005 within fifteen (15) days, respectively on 2 February 2005 had filed a statement of claim with the Municipal Court.

75. Having said that, it remains to be determined whether the Decision [Ac. no. 2980/16] of 19 May 2020, of the Court of Appeals and the Decision [Rev. no. 393/2020] of 1 February 2021 of the Supreme Court, by which his statement of claim was found as out of time, effectively denying the Applicant the "right of access to a court" from the point of view of the principle of the rule of law in a democratic society, as well as the guarantees set out in Article 31 of the Constitution and Article 6 of the ECHR. In this regard and based on the circumstances of the present case, the Court will assess whether the interpretation and application of paragraph 1 of Article 83 of the

LBRER by the Court of Appeals and the Supreme Court to dismiss the Applicant's statement of claim after fifteen (15) years of conduct of the contested procedure with regard to his statement of claim in this case (i) have denied him the right of access to a court and consequently (ii) have made unable for the Applicant from continuing the review of his case on the merits of Referral.

76. In this context, the Court refers to the findings made by the ECtHR by its case law, which, inter alia, stated that: (i) the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring a proper administration of justice and the same are to be reviewed in compliance, in particular, with the principle of legal certainty (see the case of the ECtHR *Cañete de Goñi v. Spain*, cited above, paragraph 36); (ii) each case should be considered in the light of the circumstances and specific elements of the proceedings in that case (see case *Kurşun v. Turkey*, cited above, paragraphs 103-104); and (iii) courts should avoid both excessive formalism that would preclude fair process and excessive flexibility that would make the procedural criteria set by law as invalid (see case *Hasan Tunç and Others v. Turkey*, Judgment, cited above, paragraphs 32-33).

77. In addition, the Court, based on the views expressed by the case law of the ECtHR, will assess whether the Supreme Court from the point of view of proper administration of justice and respect for the principle of legal certainty in interpreting and applying the relevant provisions, respectively paragraph 1 of Article 83 of the LBRER regarding the time limit of the statement of claim: (i) has taken into account the specific circumstances of the case, namely the circumstances of the procedure conducted before the regular courts, and in terms of the latter (ii) has avoided excessive formalism.

78. The Court referring initially to the case file, notes that the Decision on termination of the employment relationship of 17 June 2004 of the Employer was based on the Law on Civil Service [UNMIK Regulation 2001/36], and also notes that the Decision of the second instance body which was also based on this law did not contain a legal advice. Moreover, during the proceedings conducted before the regular courts, as far as it can be concluded from the case file, the regular courts had not previously found that in the Applicant's case the law in force was the LBRER. The finding of the regular courts that the law applicable in the Applicant's case is the LBRER, was first provided by the Decision [Ac. no. 2980/16] of 19 May 2020, of the Court of

Appeals, which finding was also confirmed by the Supreme Court by Decision [Rev. no. 393/2020] of 1 February 2021.

79. In this context, the Court refers to the Decision [Ac. no. 2980/16] of 19 May 2020, of the Court of Appeals, by which it was initially (i) found that paragraph 1 of Article 83 of the LBRER was applicable in the case of the Applicant, as this law was in force at the time of termination of his employment relationship and as a result (ii) had concluded that *"[...] the claim of [the Applicant] for the annulment of the decision and reinstatement to his work place with other rights from the employment relationship, is out of time, since from the case file is found that the claimant filed the claim with the first instance court for the annulment of the decision and for his reinstatement at his work place, on 02.02.2005, while the claimant filed the appeal against the decision of 17.06.2004, on 13.07.2004, from which it results that the claim was filed after the legal timeline for filing the claim has passed, the fact that the body according to the appeal has decided out of the prescribed legal timelines (26.01.2005) cannot reset the timelines provided by law for filing a claim, because the claimant had to wait 30 days from filing the appeal, if within this period the relevant body has not taken a decision on the appeal, he was obliged to have filed the claim within the next 15 days.*

80. In the following, the Court also recalls the finding given in the Decision [Rev. no. 393/2020] of 1 February 2021, of the Supreme Court, by which it was established that the Court of Appeals has *"correctly applied the provisions of the contested procedure and the substantive law, when it approved the appeal of [the Employer] and decided to dismiss the claim of [the Applicant] as out of time, and that the court of second instance has given sufficient reasons for the relevant facts for a fair trial of this legal matter, which are also accepted by this Court"*. The Supreme Court found that the Applicant has filed his claim of 2 February 2005 with the Municipal Court, against the Decision of the second instance body of the Employer of 26 January 2005, outside the timeline, on the grounds that the second instance body had decided outside the legal time limit of thirty (30) days. According to the Supreme Court, the time limit set forth in paragraph 1 of Article 83 of the LBRER *"is a preclusive time limit, and with the expiration of the timeline the judicial right is lost"* and that consequently this time limit cannot be restored.

81. With regard to the findings of the Court of Appeals and the Supreme Court, the Court states that it does not challenge or question the content of the relevant legal provision, as well as the finding of these

courts in relation to the application of this law, which finding falls within the scope of legality.

82. Furthermore, the Court in terms of proper administration of justice emphasizes that the application of formal and procedural rules related to the permissibility of the case is of such importance that it serves to legal certainty during the conduct of the court proceedings before the regular courts.

83. However, as interpreted in the case law of the ECtHR, the Court considers that when the interpretation of the procedural rules results in excessive formalism then this interpretation ceases to be in the service of legal certainty and proper administration of justice and consequently may jeopardize the Applicants' access to a court.

84. The Court further notes that in cases where public authorities have provided inaccurate or incomplete information, the regular courts in interpreting and applying formal and procedural rules sufficiently need to take this into account this fact or specific circumstances related to the conduct of the proceedings. In the context of the Applicant's case, the Court must assess whether the regular courts, namely the Court of Appeals and the Supreme Court have taken into account (i) the specific circumstances of the Applicant's case, respectively have taken into account the fact that the Decision on the termination of employment relationship of 17 June 2004 and the Decision of the second instance body of the Employer of 26 January 2005, respectively were based on UNMIK Regulation 2001/36 on the Civil Service, and the latter did not contain neither legal advice; and (ii) the proceeding conducted during the fifteen (15) years, in which proceeding the Applicant's case was reviewed in procedural aspect and that of the merits of the case, but in which proceeding the issue of the time limit of his statement of claim has not been considered until the issuance of the Decision of the Court of Appeals of 19 May 2020.

85. In the light of the above, the Court, applying the positions and findings of the ECtHR, notes that the regular courts, respectively the Court of Appeals and the Supreme Court during the interpretation and application of Article 83, paragraph 1 of the LBRER from the point of view of proper administration of justice should have taken into account in the present case: (i) the specific circumstances of the Applicant's case, respectively to take into account the fact that the Decision on termination of employment relationship of 17 June 2004 and the Decision of the second instance body of the Employer, of 26 January 2005, were based on UNMIK Regulation 2001/36, and the

latter did not contain a legal advice; (ii) that the proceedings conducted before the regular courts had lasted more than fifteen (15) years from the filing of his statement of claim in the Municipal Court and that during these proceedings his case had been examined both in terms of permissibility and on the merits of the statement of claim; (iii) that the permissibility of this statement of claim in terms of time limit, namely the applicability of the LBRER was not raised until the issuance of the Decision [Ac. no. 2980/2016] of 19 May 2020 of the Court of Appeals; and as a result of the latter (iv) they should have avoided excessive formalism in interpreting the relevant provision of the LBRER in the Applicant's circumstances.

86. As a result of the above, the Court finds that due to the formalistic interpretation and application of paragraph 1 of Article 83 of the LBRER, their finding with regard to the time limit of the statement of claim has ceased to be in the service of the principle of legal certainty, which consequently violated the Applicant's "right of access" to a court.

87. The Court further notes that the interpretation and application of the provisions of the LBRER of 1989 by the Court of Appeals and the Supreme Court in the Applicant's circumstances is not proportionate to the purpose pursued to ensure legal certainty, and proper administration of justice, as one of the basic principles of the rule of law in a democratic society.

88. Therefore, based on the above, the Court considers that the Court of Appeals and the Supreme Court, interpreting and applying paragraph 1 of Article 83 of the LBRER of 1989, in relation to the Applicant: (i) have denied him "the right of access to a court" within the meaning of paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR; and (ii) consequently made unable for his case to continue to be considered on the merits of the Referral.

89. Finally, the Court finds that the finding of the Court of Appeals and the Supreme Court by the abovementioned decisions for dismissing the Applicant's statement of claim as out of time have been issued in violation of the Applicant's right of access to a court. Consequently, the Court finds that the Decision [Rev. no. 393/2020] of 1 February 2021 of the Supreme Court is not in accordance with paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR.

90. The Court further recalls that the Applicant in his Referral also alleged violation of Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution. In this regard, as elaborated above, the Court found that the circumstances of the Applicant's case contain elements related to the Applicant's right of access to a court, as one of the principles guaranteed by paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR and consequently after elaborating and reviewing his allegations and the proceedings conducted before the regular courts, found that the challenged Judgment of the Supreme Court violated his right of access to a court. Consequently, as a result of this finding, the Court does not consider it necessary to separately review the allegations of violation of the rights guaranteed by Articles 32 and 54 of the Constitution.

Conclusions

91. The Court has treated the allegations of the Applicant, and despite the fact that the Applicant in his Referral had alleged violation of Article 32 and Article 54 of the Constitution, found that the circumstances of the present case contain elements related to the alleged violation of his right of access to a court, as one of the principles guaranteed by paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR. The Court subsequently, and for the purpose of assessing and reviewing this allegation, has applied for assessment, the case law of the Court and that of the ECtHR in the circumstances of the Applicant's case.

92. The Court, after elaborating and reviewing the procedure conducted and reasoning of the decisions of the regular courts, respectively the Court of Appeals and the Supreme Court, found that: (i) the very formalistic interpretation and the finding regarding the applicability of paragraph 1 of Article 83 of the LBRER in the circumstances of the Applicant and their finding that his statement of claim is out of time, by the challenged Judgment of the Supreme Court in the circumstances of the Applicant is not proportionate to the purpose pursued to ensure legal certainty and proper administration of justice, as one of the basic principles of the rule of law in a democratic society; (ii) as a result of this interpretation and finding of the Supreme Court, by its challenged Decision, the Applicant has been denied "the right of access to a court" within the meaning of paragraph 1 of Article 31 of the Constitution, in conjunction with paragraph 1 of Article 6 of the ECHR making it unable for his case to continue to be considered on the merits of the Referral.

93. Finally, the Court found that the challenged Decision [Rev. no. 393/2020] of 1 February 2021, of the Supreme Court was issued in violation of the Applicant's right of access to a court, guaranteed by Article 31, paragraph 1 of the Constitution, in conjunction with Article 6, paragraph 1 of the ECHR.

94. Finally, the Court, as a result of its finding of violation of the Applicant's right of access to a court, guaranteed by Article 31, paragraph 1 of the Constitution, in conjunction with Article 6, paragraph 1 of the ECHR, has not considered as necessary to examine separately the allegations of violation of his rights guaranteed by Articles 32 and 54 of the Constitution.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 4 November 2021, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Decision [Rev. no. 393/2020] of the Supreme Court of 1 February 2021, is not in compliance with paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE invalid the Decision [Rev. no. 393/2020] of the Supreme Court of Kosovo, of 1 February 2021;

IV. TO REMAND the Decision [Rev. no. 393/2020] of the Supreme Court of Kosovo, of 1 February 2021, for reconsideration in compliance with the Judgment of this Court;

V. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court, not later than 4 May 2022;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO NOTIFY this Decision to the Parties, and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Gresa Caka-Nimani

KI143/21, Applicant: Avdyl Bajgora, constitutional review of Decision Rev. 558/2020 of the Supreme Court, of 22 February 2020

KI143/21, Judgment of 25 November 2021, published on 14 December 2021

Keywords: *individual referral, right of access to court, admissible referral, violation of the right to a fair trial*

The main issue in this case relates to the Applicant's statement of claim, filed against the publicly owned enterprise KEK, for compensation of three jubilee salaries and payment of the difference in salary, for three accompanying pension salaries, based on Article 52, paragraph 1, item 3, and Article 53 of the General Collective Agreement, which was in force from 1 January 2015, until 1 January 2018. The Basic Court of Prishtina (i) approved the respective statement of claim for the part related to the compensation of three jubilee salaries in the amount of 2,739.00 euro, whereas (ii) rejected the statement of claim in the part related to the payment of the difference in salary in the amount of 547.80 euro. The Court of Appeals, acting upon the appeal of KEK, modified the Judgment of the first instance and referring to the relevant provisions related to the statute of limitation, completely rejected the Applicant's statement of claim. In reviewing the request for revision of the latter, the Supreme Court found that the revision in this case is not allowed, because the value of the dispute did not exceed the amount of 3,000.00, as defined in the relevant provisions of the Law on Contested Procedure.

Challenging the finding of the Supreme Court, the Applicant in the Constitutional Court alleged a violation of the right to fair and impartial trial, as a result of violation of the principle of access to court and also of the right to effective legal remedies and judicial protection of rights, as guaranteed by the Constitution and the European Convention on Human Rights. In essence, the Applicant alleged before the Court that the Supreme Court rejected his request for revision by erroneously assessing the amount of the dispute.

In assessing the Applicant's allegations, the Court initially (i) elaborated on the general principles of its case law and that of the European Court of Human Rights, on the principle of "*access to court*", and (ii) then, applied the latter in the circumstances of the present case. The Court recalls, *inter alia*, in principle, that the right to fair and impartial trial reflects not only the right to initiate proceedings, but also the right to receive a resolution of the relevant dispute by a court.

The Court, after analyzing the case file, considered that the value of the subject of dispute should take into account the causing of the total damage and that the assessment of the value of the damage for the purposes of the admissibility of the legal remedy cannot be subject to a highly formalistic approach, whereas in the circumstances of the present case, the value of the dispute was significantly above the value on the basis of which the revision is allowed. The Court based on the explanations given in the published Judgment, stated that the rejection of the review of the Applicant's request on
merits by the Supreme Court constitutes an insurmountable procedural flaw, which is contrary to the right of access to court as an integral part of a fair and impartial trial.

Therefore and based on the clarifications given in the published Judgment, the Court found that the challenged Judgment [Rev. no. 558/2020] of 22 February 2020 of the Supreme Court, was rendered contrary to the procedural guarantees, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights, and therefore, declared it invalid, remanding the latter to retrial, in compliance with the findings of the Constitutional Court.

JUDGMENT

in

case no. KI143/21

Applicant

Avdyl Bajgora

Constitutional review of Decision Rev. 558/2020, of the Supreme Court of 22 February 2020

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 is submitted by Avdyl Bajgora (hereinafter: the Applicant), residing in Prishtina, who is represented by Jeton Osmani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decision Rev. No. 558/2020 of the Supreme Court of 22 February 2020, in conjunction with Judgment Ac. No. 5071/2019 of the Court of Appeals of 17 January 2020.

3. The Applicant was served with the challenged Decision of the Supreme Court, on 8 April 2021.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision of the Supreme Court, which allegedly violates the

Applicant's rights, guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6.1 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), Article 32 [Right to Legal Remedies], in conjunction with Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 13 (Right to an effective remedy) of the ECHR.

Legal basis

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

Proceedings before the Constitutional Court

6. On 7 August 2021, the Applicant submitted the Referral to the Post of the Republic of Kosovo.

7. On 8 August 2021, the Referral was registered in the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 19 August 2021, the President of the Court, Gresa Caka-Nimani, appointed Judge Radomir Laban, as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Safet Hoxha and Nexhmi Rexhepi (members).

9. On 9 September 2021, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral in accordance with the Law was sent to the Supreme Court.

10. On 9 September 2021, the Court requested from the Basic Court in Prishtina information regarding the date when the challenged decision was served on the Applicant.

11. On 14 September 2021, the Basic Court in Prishtina notified the Court that the challenged Judgment was served on the Applicant on 8 April 2021.

12. On 15 October 2021, the Court requested the case file from the Basic Court in Prishtina.

13. On 20 October 2021, the Basic Court in Prishtina submitted to the Court the complete case file.

14. On 25 November 2021, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court to declare the Referral admissible for review and to find a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

Summary of the facts of the case

15. The Applicant since 1975 has worked in the publicly owned enterprise Kosovo Energy Corporation J.S.C. (hereinafter: the publicly owned enterprise KEK), until reaching the retirement age, namely until 29 May 2018.

16. On 10 December 2018, the Applicant filed a request for three jubilee salaries with the publicly owned enterprise KEK based on Article 52, paragraph 1, item (3) of the General Collective Agreement, which was in force from 1 January 2015, until 1 January 2018. The request reads: *"I consider that my request is more than reasonable and based on the reasons that the jubilee salary had to be paid within one month, after the fulfillment of the conditions from this paragraph by the employer himself, without the need to make a request at all (Article 52 para. .3) of the General Collective Agreement".*

17. On 14 December 2018, the publicly owned enterprise KEK, through letter no. 1527, rejected the Applicant's request for payment of three jubilee salaries, on the grounds that: *" The right to jubilee salary is not defined by Law and that this right is provided by the General Collective Agreement and our Labor Code, but not as an imperative right".*

18. On 24 December 2018, the Applicant filed a statement of claim with the Basic Court in Prishtina, requesting the Court to oblige the respondent (publicly owned enterprise KEK) to pay an unspecified amount to the claimant (Applicant) on behalf of three jubilee salaries and in the name of the salary difference and the experience for three pension salaries, the amounts to be determined after the financial expertise, together with the legal interest. The claimant based his request on the General Collective Agreement of Kosovo, namely Article 52, paragraph 3 and Articles 44 and 48 of the Agreement, considering that the claimant has worked as chief engineer for the

implementation of mechanical projects and has more than 40 years of work experience.

19. The publicly owned enterprise KEK (respondent) filed a response to the statement of claim with the Basic Court in Prishtina, challenging in its entirety the case requested in the statement of claim, claiming that the latter was statute-barred.

20. During the court hearing, the Applicant, in capacity of the claimant, by his authorized representative specified the statement of claim based on the last salary received by the respondent (publicly owned enterprise KEK) before filing the claim, thus requesting the amount of € 2,739.00 on behalf of the three jubilee salaries and on behalf of the difference the amount of € 547.80, in a total value of € 3,286.80. He also added that since the claimant has worked for the respondent for more than 40 years and since the issue of compensation of jubilee salaries was not regulated for this category, but as no other provision prohibited the remuneration of the salary at the age of 40, because it is not considered as a jubilee year, considered that the most approximate legal provision should be applied, which is Article 52, paragraph 3, of the GCAK.

21. On 7 May 2019, the Basic Court in Prishtina, by Judgment C. No. 3845/18, I. partially approved the statement of claim of the Applicant, II obliged the respondent (publicly owned enterprise KEK) to pay to the Applicant the amount of 2,739.00 € on behalf of three jubilee salaries, with legal interest of 8%, by starting from the receipt of this Judgment, III, rejected a part of the statement of claim regarding the difference in salary in the amount of € 547.80, and IV obliged the respondent (publicly owned enterprise KEK) to pay the Applicant the amount of € 260 on behalf of the court expenses.

22. The Basic Court in Prishtina, *inter alia*, held that the respondent, after gaining the necessary work experience, was obliged to pay the claimant three jubilee salaries, and found that the Applicant's statement of claim was grounded regarding three jubilee salaries and ungrounded as to the difference in salaries, by reasoning;

> *"…The Court, referring to the GCAK, specifically Article 52, found that the latter is applicable in this case and that the respondent had the obligation to pay the claimant three salaries in the name of jubilee compensation in the amount of € 2,739.00, and not even the amount required for, I payment of the salary difference in, name of allowance for experience for three retirement salaries. […]*

As can be seen from all the evidence administered above, it turns out that the claimant has not substantiated with sufficient evidence the amount of the statement of claim for payment specified in the salary difference on behalf of the allowance for experience for three retirement salaries in the amount of € 547.80, and for this reason the court could not- prove the amount of this request and applied the rules on the burden of proof. Therefore, the party that claims to have a right has the duty to prove the fact that is essential for its creation or realization, according to the legal provision of Article 322 of the LCP…"

23. On an unspecified date, the respondent (publicly owned enterprise KEK) filed an appeal with the Court of Appeals against the Judgment of the Basic Court in Prishtina, of 7 May 2019, on the grounds of violation of the provisions of the contested procedure, erroneous determination of the factual situation. and erroneous application of substantive law, proposing that the statement of claim be rejected in its entirety as statute-barred.

24. The Applicant against the appeal of the respondent (publicly owned enterprise KEK) submitted a response to the Court of Appeals, by which he requested to reject the appeal of the respondent (publicly owned enterprise KEK), to modify the Judgment of the Basic Court in Prishtina, of 7 May 2019, in point III of the enacting clause, so that the court approves as grounded the statement of claim regarding the difference in salary in the amount of € 547.80. The Applicant also requested that the Judgment be modified in part IV of the enacting clause regarding the costs of the proceedings, adding to the approved value of € 260, in the first instance also the costs of the proceedings before the Court of Appeals, in the amount of € 208, and in total value of € 468.

25. On 17 January 2020, the Court of Appeals, by Judgment Ac. No. 5071/2019, approved the appeal of the respondent (publicly owned enterprise KEK) and modified the Judgment of the Basic Court in Prishtina, of 7 May 2019, in item I, II and IV of the enacting clause, thus rejecting the claimant's statement of claim in items I, II and IV of the enacting clause and upholding the Judgment of the Basic Court in Prishtina, in item III of the enacting clause by which the statement of claim was previously rejected regarding the difference in salary in the amount of € 547.80. Thus, in essence, following the Judgment of the Court of Appeals, the Applicant's statement of claim was rejected in its entirety in the total amount of € 3,286.80.

26. The Applicant, within the legal deadline, filed a request for revision with the Supreme Court against the Judgment of the Court of Appeals of 17 January 2020, on the grounds of violation of the provisions of the contested procedure and erroneous application of the substantive law, alleging that the Court of Appeals has correctly assessed the factual situation and has not applied the applicable law (Law on Labor) as well as the General Collective Agreement, when it has decided to reject the statement of claim in its entirety, referring to the description of the right requested by the statement of claim.

27. On 22 February 2022, the Supreme Court rendered Decision Rev. No. 558/2020, rejecting as inadmissible the request for revision, filed by the Applicant, against the Judgment of the Court of Appeals, reasoning that based on Article 211.2 of the Law on Contested Procedure, the value of the subject of the dispute in the challenged part of the judgment must be above the amount of € 3000, in order to allow the revision.

Applicant's allegations

28. The Applicant alleges that the challenged decisions of the regular courts have violated his rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], in conjunction with Article 6.1 (Right to a fair trial) of the ECHR, Article 32 [Right to Legal Remedies], in conjunction with Article 54 [Judicial Protection of Rights] of the Constitution, and Article 13 (Right to an effective remedy) of the ECHR.

i. Allegations of violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR

29. In particular, the Applicant alleges that the finding of the Supreme Court that the request for revision is inadmissible is ungrounded and consequently unlawful and contradicts the requirements of Article 6 of the ECHR, because the failure to decide on the merits of the case, namely the dismissal of the request for revision in violation of Article 211 of the LCP, has resulted that the decision-making of this court results in violation of his right to a fair trial, which is guaranteed by Article 31 of the Constitution.

30. The Applicant further states that it is indisputable fact that in his case not only the principle of administration of justice has been violated, but also the equality of arms, which has subsequently consisted of the impossibility of using the legal remedy effectively in the Supreme Court. The Supreme Court, according to the Applicant, has

erroneously assessed that we are not dealing with a civil dispute in the amount above € 3000 and that the request for revision is not allowed in this case, because by Judgment Ac. No. 5071/2019 of the Court of Appeals of 17 January 2020, Judgment C. No. 3845/18, of the Basic Court in Prishtina, of 7 May 2019 was modified in entirety. Therefore, as the Court of Appeals has rejected his statement of claim in its entirety, it implies that the value of the dispute, as specified in the enacting clause of Judgment Ac. No. 5070/2029 of the Court of Appeals was € 3,286.80. Therefore, the Applicant alleges that the Supreme Court had to decide on the entire statement of claim, as with the entire rejection of the statement of claim by the Court of Appeals, the dispute was returned to zero point, the value of which is the total amount of € 3,286.80 and not the amount of 2793.00 €, as considered by the Supreme Court.

31. Based on this, the Applicant alleges that he was placed in an unfavorable position vis-a-vis the respondent in violation of the principle of equality of arms, which stipulates that each party to the proceedings must have a reasonable opportunity to present his case in conditions that do not put him at disadvantage in front of his opponent.

32. In addition, the Applicant alleges that the Judgment of the Court of Appeals, by which his statement of claim was rejected in its entirety, was rendered contrary to the factual situation and the application of the erroneous substantive law, and that in the present case the internal acts of the respondent by which the awarding of the jubilee salary had been continued were not at all taken into account. In this context, the Applicant alleges that his statement of claim is not statute-barred and the latter is in time within the meaning of the Law on Labor and the General Collective Agreement, because he was entitled to the jubilee remuneration for three jubilee salaries during the time the General Collective Agreement was still in force and that the request for jubilee salaries was submitted within the deadline provided by Article 87 of the Law on Labor, and that after fulfilling the requirements set out in Article 52.1.3 of the General Collective Agreement, namely after he completed 40 (forty) years of work experience with the employer. The Applicant further states that since the respondent, the publicly owned enterprise KEK, had not paid him three salaries, in the name of the jubilee remuneration, which he was entitled to, he filed a statement of claim with the first instance court within the legal deadline. Furthermore, the Applicant states that his request for payment of three salaries, in the name of jubilee remuneration is also based on Article 53.4 of the Labor Code and Decision No. 2224 of the publicly owned enterprise KEK, of 10 April 2019 and its supplementation with

Decision no. 8261, on 23 August 2019 by the publicly owned enterprise KEK, by which the awarding of the jubilee salary was continued, until 31 December 2019.

33. Therefore, the Applicant alleges that the request for jubilee remuneration for the three jubilee rewards requested by the statement of claim within the legal deadlines, because he acquired the right to reward at the time when the General Collective Agreement was in force, while the deadline for filing monetary claims has continued for another 3 years, according to Article 87 of the Law on Labor. The Applicant alleges that he enjoys the right to compensation also within the meaning of Article 193 of the Law on Obligations (LOR), since according to this article, in his case we are dealing with ungrounded enrichment, as the respondent by denying his right to jubilee reward, has damaged him, depriving him of the legal amount specified in the statement of claim.

34. Furthermore, the Applicant alleges that the Supreme Court and the Court of Appeals decided on cases in completely similar factual and legal circumstances as his, approving the statement of claims of the respondent's employees of the publicly owned enterprise KEK, therefore the Applicant alleges that he was put in an unequal position before the law. The Applicant further argues that Article 31 of the Constitution emphasizes that everyone is guaranteed equal protection of rights in proceedings before courts, other state authorities and holders of public powers.

35. In support of this allegation the Applicant attached to the Referral the Judgments of the Supreme Court; CML. No. 7/2020 of 15 April 2021 and Rev. No. 90/2020 of 4 May 2020, as well as the judgments of the Court of Appeals, Ac. No. 4367/2020 of 17 July 2020 and A.c. No. 2016/2020 of 24 June 2020. The Applicant alleges that there are hundreds of such judgments, in which the Court of Appeals has recognized these rights to the claimants in the same factual and legal conditions and circumstances as his own.

ii. Allegations of violation of Article 32, in conjunction with Article 54 of the Constitution, as well as Article 13 of the ECHR

36. The Applicant, in relation to these allegations, states that the Supreme Court, by rejecting the revision as inadmissible, contrary to the applicable law, namely Article 211 of the LCP, has violated his rights to effective legal remedies as guaranteed by Article 32, in conjunction with Article 54 of the Constitution, because he has been deprived of the judicial protection of rights and the review of the merits of the case.

iii. Regarding violation of Article 24 of the Constitution

37. With regard to this allegation, the Applicant states, based on the fact that the regular courts on similar matters have come up with different positions, he was discriminated against within the meaning of Article 24 of the Constitution, because he has been placed in an unequal position compared other claimants, whose statements of claims were approved under similar conditions. Furthermore, the Applicant considers that the regular courts have also violated Article 102 of the Constitution, by not acting and deciding on the basis of the applicable law and as required by the Constitution.

Relevant provisions

LAW No.03/L-006 ON CONTESTED PROCEDURE

Article 211

211.1 Against the decision of the court of second instance, sides can present a revision within a period of thirty (30) days from the day the decision was brought.

211.2 Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, handing items or fulfillment of a proposal if the value of the object of contest in the attacked part of the decision does not exceed 3, 000 €
(...)

LAW No.03/L-212 ON LABOUR

Article 87
[Time line for Submission]
All requests involving money from employment relationship shall be submitted within three (3) years from the day the request was submitted.

LAW No. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

Article 193
Right to Demand Compensation Expires

After the right to demand compensation expires the injured party may, according to the rules applying to the case of unjust acquisition demand that the liable person cede that which was acquired by the act through which the damage was inflicted to the injured party

THE GENERAL COLLECTIVE AGREEMENT IN KOSOVO

Article 3
Application and inclusion

Provisions of the GCAK are applied throughout the territory of the Republic of Kosovo.

Article 52
Jubilee rewards

1. Employee is entitled to jubilee rewards in following cases:
1.1. for 10 years of continuous experience at the last employer, equal to one monthly wage;
1.2. for 20 years of continuous experience, for the last employer, equal to two monthly wages,;
1.3. 3.for 30 years of continuous experience, for the last employer, equal to three monthly wages.
2. The last employer is the one who provides jubilee rewards.
3. Jubilee reward, is paid in a timeframe of one month, after meeting the conditions from the present paragraph.

Article 53
Retirement reimbursement

When retiring, employee is entitled to a reimbursement equal to three (3) monthly wages, he/she received during the last three (3) months.

Decision no. 8261 of KEK- j.s.c., rendered on 24 August 2019

Decision

I. The recognition of the obligation to pay the jubilee salaries for all employees who have met the condition until 31.12.2019, namely who have achieved 10, 20 or 30 years of work experience, from 01.01.2015 and onwards.
(...)
III. Employees who have 40 years of work experience enjoy the same right as workers who have 30 years of work experience.

Admissibility of the Referral

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

39. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, in conjunction with paragraph 4 of Article 21 [General Principles] of the Constitution, which establish:

Article 113
[Jurisdiction and Authorized Parties]

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

[...]

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

[...]

40. The Court further considers whether the Applicant has fulfilled the admissibility requirements as specified by the Law, namely Articles 47, 48 and 49 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced…".

41. Regarding the fulfillment of the abovementioned criteria, the Court considers that the Applicant: i. is an authorized party within the meaning of Article 113.7 of the Constitution; ii. he challenges the constitutionality of Decision Rev. No. 558/2020 of the Supreme Court, of 22 February 2020; iii. He has exhausted all available legal remedies, within the meaning of of Article 113.7 of the Constitution and Article 47.2 of the Law; iv. has clearly specified the rights guaranteed by the Constitution, which he claims to have been violated, in accordance with the requirements of Article 48 of the Law; and v. has submitted the Referral within the legal deadline of 4 (four) months, as established by Article 49 of the Law.

42. However, the Court examines whether the Applicant has fulfilled the admissibility criteria set out in Rule 39 [Admissibility Criteria], namely provisions (1) (d) and (2) of Rule 39 of the Rules of Procedure, which establish:

(1) "The Court may consider a referral as admissible if:
(…)
(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".

43. The Court considers that the Referral raises serious constitutional allegations reasoned *prima facie* and that it is not manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure. Therefore, the Court finds that the Applicant's Referral meets the requirements for assessment on merits.

Merits of the Referral

44. Initially, the Court reiterates that the requirement of Article 53 of the Constitution stipulates that the interpretation of human rights and fundamental freedoms guaranteed by this Constitution be consistent with the judgments of the European Court of Human Rights (hereinafter: the ECtHR).

45. The Court recalls that the Applicant challenges the constitutionality of Decision Rev. No. 558/2020 of the Supreme Court of 22 February 2020, alleging a violation of his rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], in conjunction with Article 6.1 of the ECHR, Article 32 [Right to Legal Remedies], in conjunction with Article 54 [Judicial Protection of Rights] of the Constitution and Article 13 of the ECHR.

Regarding allegations of violation of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR

46. In the following, the Court will analyze the Applicant's allegations of violation of the right to a "fair trial" in accordance with the case law of the ECtHR and the Court itself.

47. In this regard, the Court recalls that Article 31 of the Constitution and Article 6.1 of the ECHR establish:

Article 31
[Right to Fair and Impartial Trial]]

1. "Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law".
[...]

Article 6.1
(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".
[...]

48. The Court notes on the basis of the case file that the substance of the allegations of violation of constitutional rights by the challenged Decision [Rev. No. 558/2020] of the Supreme Court, relates to the denial of the right of access to court, which allegedly has been caused by the arbitrary conclusions of the Supreme Court, considering that the value of the subject of the dispute, in the challenged part of the Judgment of the Court of Appeals, has not exceeded the value of € 3,000.00.

49. From such a finding, the Applicant alleges that the Supreme Court, rejecting the request for revision, has prevented him from examining the case on merits (access to court), against the violations caused by the Court of Appeals by Judgment Ac. No . 5070/2020, of 17 January 2020.

General principles regarding the right of "access to justice"

50. In this regard, the Court recalls that the right of access to court for the purposes of Article 6 of the ECHR is defined in case *Golder v. the United Kingdom* (see case of ECtHR, *Golder v. the United Kingdom,* Judgment of 21 February 1975, paragraphs 28-36). Referring to the principle of the rule of law and the avoidance of arbitrary power, the ECtHR found that the "right of access to court" is an essential aspect of the procedural guarantees enshrined in Article 6 of the ECHR (on the general principles of right to a court, see also ECtHR Guide of 31 December 2018 to Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, Part II, Right to a court and also, the case of the ECtHR, *Zubac v. Croatia*, Judgment of 5 April 2018, paragraph 76). According to the ECtHR, this right provides everyone with the right to address respective issue related to "civil rights and obligations" before a court (See ECtHR case, *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 84 and references therein).

51. The Court in this regard notes that the right to a court, as an integral part of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, provides that all litigants should have an effective legal remedy enabling them to protect their civil rights (See cases of the ECtHR, *Běleš and Others v. the Czech Republic*, Judgment of 12 November 2002, paragraph 49; and *Nait-Liman v. Switzerland*, Judgment of 15 March 2018, paragraph 112).

52. Therefore, based on the case law of the ECtHR, everyone has the right to file a 'lawsuit' related to their respective "civil rights and obligations" with a court. Article 31 of the Constitution in conjunction with Article 6

of the ECHR embody the "right to a court", that is, "the right of access to a court", which implies the right to institute proceedings before the courts in civil matters (see ECtHR case *Golder v. the United Kingdom*, cited above, paragraph 36). Therefore, anyone who considers that there has been unlawful interference with the exercise of his/her civil rights and claims to have been denied the opportunity to challenge such a claim before a court, may refer to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, invoking the relevant right of access to a court.

53. More specifically, according to the ECtHR case law, there must first be "a civil right" and second, a "dispute" as to the legality of an interference that affects the very existence or scope of "a civil right" protected. The definition of both of these concepts should be substantial and informal (See, in this regard, the cases of ECtHR *Le Compte, Van Leuven and De Meyere v. Belgium*, Judgment of 23 June 1981, paragraph 45; *Moreira de Azevedo v. Portugal*, Judgment of 23 October 1990, paragraph 66; *Gorou v. Greece* (no. 2), Judgment of 20 March 2009, paragraph 29; and *Boulois v. Luxembourg*, Judgment of 3 April 2012, paragraph 92). The "dispute", however, based on the ECtHR case law, must be (i) "genuine and serious" (see, in this context, the ECtHR cases *Sporrong and Lonnroth v. Sweden*, Judgment of 23 September 1982, paragraph 81; and *Cipolletta v. Italy*, Judgment of 11 January 2018, paragraph 31); and (ii) the outcome of the proceedings before the courts must be "decisive" for the civil right in question (see, in this context, the case of the ECtHR, *Ulyanov v. Ukraine*, Judgment of 5 October 2010). According to the 1990, ECtHR case law, the "tenuous links" or "remote consequences" between the civil right in question and the outcome of these proceedings are not sufficient to fall within the scope of Article 6 of the ECHR (see, in this context, ECtHR cases, *Lovrić v. Croatia*, Judgment of 4 April 2017, paragraph 51 and *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 71 and references therein).

54. In such cases, when it is found that there is a "civil right" and a "dispute", Article 31 of the Constitution in conjunction with Article 6 of the ECHR guarantee to the individual the right "to have the question determined by a tribunal, namely the court" (See ECtHR case, *Z and Others v. the United Kingdom*, Judgment of 10 May 2001, paragraph 92). A court's refusal to consider the parties' claims as to the compatibility of a procedure with the basic procedural guarantees of fair and impartial trial, limits their access to the court (See the case of ECtHR *Al Dulimi and Montana Management Inc. v. Switzerland*, Judgment of 21 June 2016, paragraph 131).

55. Moreover, according to the ECtHR case law, the Convention does not aim at guaranteeing the rights that are "*theoretical and false*", but the rights that are "*practical and effective*" (see, for more on "practical and effective" rights, ECtHR Guide of 31 December 2018 to Article 6 of the ECHR, The Right to Fair and Impartial Trial, Civil Aspects, Part II. Right to Court, A. Right and Access to Court, 1. A practical and effective right; and the ECHR cases *Kutić v. Croatia*, cited above, paragraph 25 and the references cited therein; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein).

56. Therefore, within the meaning of these rights, Article 31 of the Constitution in conjunction with Article 6 of the ECHR, guarantee not only the right to institute proceedings but also the right to obtain a determination of the "dispute" by a court (See ECHR cases, *Kutić v. Croatia*, Judgment of 1 March 2002, paragraphs 25-32; *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein; *Aćimović v. Croatia*, Judgment of 9 October 2003, paragraph 41; and *Beneficio Cappella Paolini v. San Marino*, Judgment of 13 July 2004, paragraph 29).

57. The abovementioned principles, however, do not imply that the right to court and the right of access to court are absolute rights. They may be subject to limitations, which are clearly defined by the ECtHR case law (See ECHR Guide of 31 December 2018, Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, and specifically with respect to limitations on the right to court, Part II. Right to Court, A. Right and Access to Court 2. Limitations). However, these limitations cannot go so far as to restrict the individual's access so as to impair the very essence of the right (see, in this context, ECtHR case, *Baka v. Hungary*, Judgment of 23 June 2016, paragraph 120; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 89 and references therein). Whenever access to the court is limited by the relevant law or respective case law, the Court examines whether the limitations touches on the essence of the law and, in particular, whether that limitation has pursued a "legitimate aim" and whether there is "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (see ECHR cases, *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, paragraph 57; *Lupeni Greek Catholic Parish v. Romania*, cited above, paragraph 89; *Nait-Liman v. Switzerland*, cited above, paragraph 115; *Fayed v. the United Kingdom*, Judgment of 21 September 1990, paragraph 65; and *Marković and Others v. Italy*, Judgment of 14 December 2006, paragraph 99).

Application of general principles to the circumstances of the present case

58. Before assessing the allegations of the Applicant of violation of the right to a fair trial, namely for "access to justice" and to review the procedure in its entirety, the Court first refers to Judgment [C. No. 3845/18] of the Basic Court in Prishtina, and noted that the Applicant, during the court hearing specified the statement of claim, requesting that in the name of three jubilee salaries be compensated the amount of € 2,739.00, and in the name of the difference in accompanying the pension salaries, to be compensated the amount of € 547.80 and the total amount in the monetary value of € 3,286.80. However, the court in question approved the statement of claim in item I. regarding the amount of € 2,739.00, with legal interest of 8%; rejected the statement of claim in item III, regarding the salary difference in the amount of € 547.80, and approved the statement of claim in item IV regarding the obligation of the respondent KEK-J.S.C., which in the name of the costs of proceedings to pay the Applicant the amount of € 260.

59. The Court further notes that the Court of Appeals by Judgment [Ac. No. 5071/2019] of 17 January 2020, rejected the Applicant's statement of claim in its entirety, reasoning that: *"The Court of Appeals finds that the appealed judgment of the Basic Court in Prishtina ..., which approved the statement of claim of the claimant and obliged the respondent to pay three salaries to the claimant in the name of the jubilee reward is contrary to legal provisions, regarding the incorrect application of Article 52 of the General Collective Agreement of Kosovo, since this agreement has started to be implemented from 01.01.2015 with a duration of implementation for three years, namely until 01.01.2018, when the implementation deadline has expired, respectively ceased to have legal effect".* Finally, the Court notes that the Supreme Court by Decision [Rev. no. 558/2020], rejected as inadmissible the request for revision exercised by the Applicant, against the Judgment of the Court of Appeals of 17 January 2020, reasoning that the value of the dispute does not exceed the amount of € 3000, to enable the exercise of this legal remedy.

60. Therefore, from the description above, the Court recalls once again that the essence of the allegations of violation of the right to a fair trial by the challenged Decision of the Supreme Court is related to the denial of the right of access to court, and consequently the denial of the effective legal remedy and judicial protection of rights, which allegedly have been caused by the arbitrary conclusions of the Supreme Court, regarding the assessment of the value of the subject of the dispute, as a precondition for assessing the merits of the case.

61. The Court, based on the case law of the ECtHR and its case law, reiterates that anyone who considers that there has been an unlawful interference with the exercise of his/her civil rights and claims that he/she has been deprived of the opportunity to challenge a specific claim before a court, may refer to Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, invoking the relevant right of access to a court.

62. Based on the above, and insofar as it is relevant to the circumstances of the present case, the Court notes that the right of access to a court is, in principle, guaranteed in relation to "*disputes"* over a "*civil right*". In this regard, the Court considers that in order to determine the applicability of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, it must be borne in mind that we are dealing with two essential issues, the first relating to "civil *law*" and the second to the existence of a "*contest*".

63. With regard to the first requirement, the Court recalls that the subject that the Applicant had claimed in the claim before the first instance court is the request for compensation of three jubilee salaries, in the name of the jubilee reward for gaining work experience and compensation of the salary difference, for the three accompanying pension salaries. Therefore, in the light of the circumstances of the case, the Court finds that the claim for monetary compensation falls within the scope of rights and obligations, from the employment relationship and enters into civil law.

64. As to the second requirement, the Court finds that in the case before us we are dealing with a "dispute" between the Applicant, as an injured party and the publicly owned enterprise KEK, as the cause of the damage, which allegedly has a legal obligation (monetary obligation) to fulfil to the Applicant.

65. Therefore, as both of the abovementioned requirements have been met, the Court will further to analyze whether the Supreme Court, in rejecting the request for revision as inadmissible, denied the Applicant the right of "access to court" and the resolution of the substance of the case on merits.

66. In this regard, the Court refers to the relevant parts of the challenged Decision [Rev. No. 558/2020] and notes that the Supreme Court reasoned the conclusion for rejection of the request for revision as inadmissible as follows: "*Taking into account the fact that the claimant has not filed an appeal against the judgment of the first instance, nor*

in its rejecting part, as in item three (III) of the enacting clause, and while only the respondent filed an appeal, in this part the decision of the first instance court has remained not reviewed, and the claimant until this part has not exercised the regular remedy - appeal, cannot filed the revision as an extraordinary remedy, in terms of the rejected claim on behalf of the difference in the amount of € 547.80.

67. In this regard, the Court notes that the Applicant in his submission filed with the Court of Appeals, has expressly requested that the Judgment [C. No. 3845/18] of the Basic Court in Prishtina be modified, in item III of the enacting clause, on the grounds that the Basic Court in Prishtina: "*...has erroneously decided to reject the part of the statement of claim in the name of the difference in salary for allowance, for three accompanying salaries for pension, and since the respondent in the case of giving three salaries, on the occasion of retirement has calculated only the part of the basic salary of the claimant, while it had to calculate the three monthly salaries that the claimant received before retirement, based on Article 53 of the GCAK. Therefore, for these reasons, the claimant has requested to be recognized the right to the difference for three accompanying salaries in the name of pension. The claimant based on the case file and the above statements as well as statements during the hearings, proposes to the Court of Appeals to REJECT the claimant's appeal as ungrounded in entirety, while Judgment C. No. 3845/18 of 07.05.2019 of the Basic Court in Prishtina, to modify it in such a way as to approve the claimant's statement of claim and to modify the part of the enacting clause, regarding the costs by recognizing also the costs for this response to the appeal in the amount of € 208, to recognize on behalf of the costs to the claimant the value in total € 468".*

68. The Court above considers that the Applicant has never waived the right to the amount of € 547.80, which he requested in the name of the difference in salary, of the three accompanying pension salaries, as erroneously stated by the Court of Appeals in the Judgment of 17 January 2020, on which the Supreme Court is based. The Applicant was clear in his request to the Court of Appeals from which he requested to reject the appeal of the respondent KEK-j.s.c., and to approve his statement of claim in its entirety, which means that he requested that Judgment [C . No. 3845/18] of the Basic Court in Prishtina be modified in item III of the enacting clause, approving the difference of salaries in the amount of € 547.80, as well as to modify the judgment in question in item IV of the enacting clause, regarding the costs of proceedings, requesting that the approved value of € 260, from the first instance, be added also the costs of the proceedings before the Court of Appeals, in

the amount of € 208, and in its entirety be approved the amount of € 468.

69. The Court further notes that the Supreme Court reasoned its decision: *"...despite the fact that the Court of Appeals has decided as in item two, of the enacting clause of the judgment, to reject the statement of claim in the name of the request for three salaries for jubilee compensation in the amount of € 2739.00 and in the name of the difference in the amount of 547.80 €, in the total amount of* ***€ 3,286.80****, this does not change the value of the dispute that can be challenged by revision, as the subject of revision can be only the request for three salaries for jubilee reward in the amount of € 2739.00, in which part the revision is not allowed, due to the value of the claim, which has been challenged by revision, which is in the amount of only € 2739.00".*

70. The Court, before reaching its conclusion, recalls the content of Article 211.2 of the Law on Contested Procedure, which stipulates: *"211.2 Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, handing items or fulfillment of a proposal if the value of the object of contest in the attacked part of the decision does not exceed 3, 000 €".*

71. From the reading of the norm it is clear that the value of the subject of the dispute, in the affected part of the Judgment of the Court of Appeals, is specified by the injured party, through the exercise of revision. It is therefore the discretionary right of the injured party to decide whether he wants to challenge in whole or in part the judgment of the second instance, by exercising the revision in the Supreme Court.

72. The Court further refers to the enacting clause of the Judgment of the Court of Appeals, which establishes: *"The statement of claim of the claimant is REJECTED...by which he requested to oblige the respondent to pay the claimant on behalf of the three salaries for the jubilee reward the amount of 2,739.00 euro, and on behalf of the difference the amount of 547.80, in the total amount of 3,286.80 euro and costs of the proceedings, within 7 days after receiving the judgment...".*

73. In the present case, it is clear that the Applicant has challenged in entirety the Judgment of the Court of Appeals, which rejected his statement of claim in its entirety. Consequently, he was denied the total value of € 3,286.80, requested by the statement of claim, which in this case constitutes the value of the subject of dispute within the meaning of Article 211.2 of the LCP.

74. In this context, the Court, referring also to the request for revision, notes that the Applicant has challenged all items of the enacting clause the Judgment of the Court of Appeals, which rejected the total value of € 3,286.80, which includes also the payment of the difference in salary, in the amount of € 547.80, but in terms of assessing the value of the subject of dispute, nowhere is mentioned the figure of € 468 which was requested by the Applicant in the Court of Appeals on behalf of the costs of the proceedings, which in this case also constitutes the value of the subject of the dispute challenged by the revision. In this regard, the Court finds that the real value of the subject of dispute (damage suffered) that has been challenged, against the Judgment of the Court of Appeals, within the meaning of Article 211.2, of the LCP turns out to be the total amount of € 3,694.80.

75. In addition, the value of the subject of the dispute must take into account the full damage that can be done to an Applicant in a court proceeding and not just the value approved in his favor by the court. In this case, the Supreme Court has prejudged in advance the decision-making of the first and second instance, regarding item III of the enacting clause, which rejected the amount of € 547.80, in the name of the difference in salary, concluding that this has not been challenged in the Court of Appeals by the Applicant. However, the Court found that the Applicant had continuously and throughout the procedure requested that this amount be approved, for the reasons stated in the submission submitted to the Court of Appeals (see above, paragraphs 24 and 67 of this document).

76. The Court considers that the Applicant, faced with such factual and legal circumstances, had legitimate expectations that the request for revision would be approved and considered on merits and that his allegations would receive a reasoned response from the Supreme Court.

77. Having said that, the Court considers that the conclusions of the Supreme Court on the rejection of the request for revision as inadmissible, are manifestly ill-founded and manifestly arbitrary, which have resulted in the inability of the Applicant to access the court, and consequently in denial of the right to an effective legal remedy and judicial protection of rights.

78. The Court reiterates that it is not its duty to assess whether the regular courts have correctly interpreted and applied the relevant rules of substantive and procedural law. However, in cases where a claim raises constitutional issues, namely irregularities in the judicial process, the Court is obliged to intervene and correct the violations caused by the regular courts, in order to ensure the individual a fair trial in

accordance with Article 31 of the Constitution and Article 6.1 of the ECHR.

79. Referring to the circumstances of the present case, the Court finds that the refusal of the Supreme Court to review the Applicant's request on merits constitutes an insurmountable procedural flaw which is contrary to the right of access to a court.

80. Therefore, from the analysis above, the Court concludes that the challenged Decision of the Supreme Court of 22 February 2020 violates the Applicant's rights guaranteed by Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

81. With regard to the other allegations of the Applicant, which he raised in the request for revision, against the Judgment of the Court of Appeals, which were related to the provision of the right to request compensation of jubilee salaries and the difference in salaries accompanying the pension, the Court finds that it cannot deal with them at this stage as the challenged decision must be remanded for reconsideration to the Supreme Court, where it is expected that the latter, in accordance with the findings of the Constitutional Court in this Judgment, to approve the request for revision and to review the merits of the claim regarding the statute of limitations, based on its case law.

82. In addition, the Court notes that the Applicant has attached to his Referral, several decisions of the Supreme Court, namely Judgments, CML. No. 7/2020 of 15 April 2021 and Rev. No. 90/2020 of 4 May 2020, as well as the judgments of the Court of Appeals, Ac. No. 4367/2020 of 17 July 2020 and Ac. No. 2016/2020 of 24 June 2020, claiming that there are hundreds of such judgments, in which the Court of Appeals has recognized these rights to the claimants in the same factual and legal conditions and circumstances as his. The Court, having found that in the Applicant's case there has been a violation of the respective Articles of the Constitution and the ECHR, does not consider it necessary to further examine the Applicant's allegations regarding the divergence of case law and equality before the law.

Conclusion

83. In sum, the Court based on the analysis above, concluded that the challenged Decision [Rev. No. 558/2020] of the Supreme Court of 22 February 2020, violates the constitutional rights of the Applicant guaranteed by Article 31 [Right to Fair and Impartial Trial] of the

Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 116.1 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, on 25 November 2021, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with Article 6.1 [Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE invalid Decision [Rev. No. 558/2020] of the Supreme Court of 22 February 2020 and REMANDS the latter for reconsideration, in accordance with findings of the Court in this Judgment;

IV. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of this Court, not later than 25 May 2022;

V. TO REMAIN seized of the matter pending compliance with that order;

VI. TO ORDER that this Judgment be notified to the parties;

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

VIII. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Gresa Caka-Nimani

KI84/21, Applicant: Kosovo Telecom J.S.C., Constitutional review of Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021

KI84/21, Judgment of 24 November 2021, published on 17 December 2021

Keywords: *individual referral, principle of "equality of arms", enforcement procedure, "full jurisdiction"*

The circumstances of the present case relate to the Support Services Agreement of the Virtual Mobile Network Operator (Agreement), concluded between the Applicant, namely Kosovo Telecom and "Dardafon" Company, regarding the provision of mobile telephony services. The abovementioned agreement resulted in a dispute between the parties and as a result, the "Dardafon" company initiated three (3) different proceedings, as follows: (i) the proceedings before the Arbitration Tribunal at the International Chamber of Commerce (ICC) regarding the settlement of the dispute from the above-mentioned Agreement, which resulted in the issuance of a Decision by which, among other things, the Applicant was obliged to pay a certain amount of money to the company "Dardafon" due to non-compliance with the Agreement; (ii) the proceedings concerning the recognition of the ICC Arbitral Tribunal Decision, which resulted in the recognition of this Decision by the Basic Court, which was also confirmed by the Court of Appeals and consequently became final; and (iii) the proceedings relating to the enforcement of the Decision of the ICC Arbitral Tribunal.

The subject matter of the case before the Court relates only to the third procedure, namely the procedure related to the enforcement of the Decision of the ICC Arbitration Tribunal. The dispute in the enforcement procedure started after the Applicant filed an objection with the Basic Court in Prishtina against the Enforcement Order issued by the Private Enforcement Agent at the request of the company "Dardafon".

Between the parties in the proceedings conducted before the Basic Court was disputed, among others, the total amount of the main debt, namely the amount which would be subject to the enforcement. Therefore, the Basic Court rendered a Conclusion by which it obliged the company "Dardafon", within three (3) days, to specify the proposal for enforcement regarding the total amount of the main debt. In response to the abovementioned Conclusion, the company "Dardafon" submitted to the Basic Court the completion of the proposal for enforcement and an own expertise. These documents were submitted by the Court to the Applicant, who received them on 6 July 2020, while his response to the Court was submitted the next day, namely, on 7 July.

However, on 6 July 2020, the Basic Court rendered its decision, by which rejected as ungrounded the Applicant's objection regarding the amount of 24,684,003.15 euro, while it had partially approved as grounded the objection regarding the amount of 315,99.85 euro. Against this Decision, the Applicant filed an appeal with the Court of Appeals alleging that the Basic Court, among other things, did not take into account his submission at all, because the Decision of the Basic Court was rendered one day earlier, on 6 July 2020, without waiting and without reviewing the Applicant's response to the specification of the enforcement proposal of the company "Dardafon" and other documents, including expertise, in violation of his rights guaranteed by law and in violation of the principle of "equality of arms" guaranteed by the Constitution. The Court of Appeals rejected as ungrounded the Applicant's appeal, not addressing the allegation regarding the inability of the Applicant to declare the specification of the enforcement proposal of the company "Dardafon". The State Prosecutor's Office filed a request for protection of legality with the Supreme Court. The latter also rejected the request as ungrounded.

The Applicant before the Constitutional Court, inter alia, alleged that the decisions of the regular courts in the enforcement proceedings were rendered in violation of the principle of "equality of arms" guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights because (i) the Basic Court denied the Applicant the right to present his opinion regarding the specification of the debt of the company "Dardafon" and additional documents and evidence, including expertise, because the Decision of the Basic Court was rendered on the day when the Applicant received the relevant documents and the court did not wait even one day for the Applicant's response; and (ii) the Court of Appeals did not address at all the Applicant's allegation of a violation of the principle of "equality of arms".

In examining the Applicant's allegations, the Court first elaborated on the principles of its case law and the European Court of Human Rights regarding the principle of "equality of arms" and then applied them to the circumstances of the present case. The Court, inter alia, recalled that, according to the principle of "equality of arms", it is inadmissible for a party to the proceedings to submit remarks or comments before the regular courts, which aim at influencing the decision-making of the court, without the knowledge of the other party or without giving the other party the opportunity to respond to them. The Court also noted that, the procedural flaws in the first instance could be remedied through an appeal, provided that the institution deciding on the respective appeal has "full jurisdiction" for the case before it.

The Court, after analyzing the case file and as explained in detail in the published Judgment, found that: (i) in violation of the principle of "equality of arms", the Basic Court denied the Applicant the right to state his opinion on the submission of the company "Dardafon" regarding the specification of the proposal for enforcement and additional documents and evidence, since the Decision of the Basic Court was rendered on the same date when the Applicant received the documents and without waiting for his response; and (ii) the Supreme Court, and in particular the Court of Appeals, which although had "full jurisdiction" to decide the case, including the competence to remedy the shortcomings of the proceedings before the Basic Court, failed to address the latter, and consequently not remedying the violation of the principle of "equality of arms".

Therefore and based on the explanations given in the published Judgment, the Court found that the challenged Decision of the Supreme Court and the Decision of the Court of Appeals were rendered contrary to the procedural guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, remanding it to the Court of Appeals, given that the latter, as explained in the Judgment, has "full jurisdiction" to address the procedural shortcomings which resulted in challenging the Decision of the Basic Court.

JUDGMENT

in

case no. KI84/21

Applicant

Kosovo Telecom J.S.C.

Constitutional review of Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 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 is submitted by Kosovo Telecom J.S.C., represented by Sebahedin Ramaxhiku and Gazmend Nushi (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision CML. No. 12/20 of the Supreme Court of Kosovo [hereinafter: the Supreme Court] of 20 January 2021, in conjunction with Decision Ac. No. 3610/20 of the Court of Appeals of Kosovo [hereinafter: the Court of Appeals] of 8 October 2020, and Decision PPP. No. 1486/19 of the Basic Court in Prishtina [hereinafter: the Basic Court] of 6 July 2020.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Decision of the Supreme Court, which allegedly violates the

Applicant's rights, guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

4. The Applicant has also requested the imposition of the interim measure in order to immediately suspend the implementation of the enforcement against the Applicant according to the Enforcement Order [P. No. 491/19] of 15 July 2019 of the Private Enforcement Agent Ilir Mulhaxha (hereinafter: Private Enforcement Agent), and Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court; Decision Ac. No. 3610/20 of the Court of Appeals of Kosovo of 8 October 2020; and Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 6 May 2021, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 17 May 2021, pursuant to paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of President and Deputy President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Constitutional Court. Based on paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, it was determined that Judge Gresa Caka-Nimani will take over the duty of the President of the Court after the end of the mandate of the current President of the Court Arta Rama-Hajrizi on 26 June 2021.

8. On 18 May 2021, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

9. On 21 May 2021, the Court notified the Applicant about the registration of the Referral. On the same date, a copy of the Referral was sent to the Supreme Court of Kosovo.

10. On the same date, the Court notified Company "Dardafon.net" L.L.C (hereinafter: company "Dardafon") about the registration of the Referral, in capacity of the interested party, and the Private Enforcement Agent, and notified them that they can submit their comments, if any, to the Court, within the deadline of 7 (seven) days, from the day of receipt of the letter.

11. On 25 May 2021, based on item 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu resigned as a judge before the Constitutional Court.

12. On 2 June 2021, company "Dardafon" submitted to the Court its response regarding the Referral.

13. On 26 June 2021, pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision KK-SP 71-2/21 of the Court, Judge Gresa Caka-Nimani took over the duty of the President of the Court, while based on item 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi ended the mandate of the President and Judge of the Constitutional Court.

14. On 14 July 2021, the Court notified the Applicant and the Supreme Court regarding the comments submitted by company "Dardafon".

15. On 16 July 2021, the Court requested information from the Applicant regarding the Applicant's assertion that the Ministry of Economy has shown readiness to provide its assistance in resolving the issue related to the execution of the decision that is the subject of the dispute before the Court.

16. On 27 July 2021, the Court received the Applicant's response to the Referral notifying the Court that *"so far Telecom has not received any concrete material assistance from [the Ministry of Economy] ME*

regarding the execution of the Arbitral Tribunal Decision at ICC no. 2099/MHM of 09 December 2016".

17. On 8 September 2021, the Review Panel decided that the Referral be considered at a forthcoming session.

18. On 27 September 2021, the Court requested the Private Enforcement Agent to submit the complete case file.

19. On 7 October 2021, the Private Enforcement Agent submitted to the Court the complete case file.

20. On 24 November 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

21. On the same date, the Court unanimously decided that the Referral is admissible and: *i)* by a majority of votes, that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the European Convention on Human Rights; *ii)* by a majority of votes, declared invalid Decision CML. No. 12/20 of the Supreme Court of Kosovo of 20 January 2021 and Decision Ac. No. 3610/20 of the Court of Appeals of 8 October 2020; *iii)* by a majority of votes, remanded Decision Ac. No. 3610/20 of the Court of Appeals, of 8 October 2020, for reconsideration in accordance with the Judgment of this Court, and iv) unanimously, rejected the request for interim measure.

Summary of facts

22. The Court notes that the Applicant regarding this case also addressed the Court with Referral KI179/20, in connection with which the Court rendered the Resolution on Inadmissibility of 27 January 2021, Applicant *Kosovo Telecom J.S.C.* (hereinafter: case KI179/20). In case KI179/20, the Court unanimously decided that the Referral is inadmissible on constitutional basis because it is premature as provided by Article 113 paragraph 7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure. This is because the Court found that in relation to the Applicant's case, in parallel with the Applicant's Referral submitted to the Constitutional Court, the court proceedings were being conducted before the Supreme Court, which had not yet rendered a decision on the request for protection of legality against Decision [Ac. No. 3610/20] of the Court of Appeals and

Decision [PPP. No. 1486/19] of the Basic Court, filed by the Office of the Chief State Prosecutor. Therefore, the Court also, in accordance with Article 27 paragraph 1 of the Law and Rule 57 paragraph (1) of the Rules of Procedure, decided that the request for interim measure should be rejected because it could no longer be the subject of review.

23. In the following, the Court refers to the facts presented as in case KI179/20, followed by the new proceedings conducted after the issuance of the Court's Resolution in case KI179/20.

24. The Court recalls that three proceedings were conducted in respect of the Applicant's case:

1) Arbitral proceedings regarding the resolution of the dispute from the Agreement for Support Services of the Virtual Mobile Network Operator, signed between the Applicant and the company "Dardafon";

2) Proceedings regarding the recognition of the Decision of the Arbitral Tribunal in Kosovo after the dispute from the Agreement for Support Services of the Virtual Mobile Network Operator; and

3) Proceedings regarding the enforcement of the Decision of the Arbitral Tribunal regarding the dispute from the Agreement for Support Services of the Virtual Mobile Network Operator.

25. The Applicant, as in case KI179/20, specifically challenges before the Court the third proceedings, related to the enforcement proceedings of the Arbitral Tribunal Decision regarding the dispute from the Agreement for Support Services of the Virtual Mobile Network Operator. However, in the following, the Court will present the facts regarding the abovementioned three proceedings.

1) Proceedings conducted regarding the dispute from the Agreement for Support Services of the Virtual Mobile Operator

26. On 16 January 2009, the Applicant and the interested party - company "Dardafon" signed "Mobile Virtual Operator Support Services Agreement" (hereinafter: the MSA) on the basis of which the company "Dardafon" agreed to provide mobile services to the Applicant under a profit sharing model.

27. On 13 April 2015, following disputes between the Applicant and the company "Dardafon", regarding the implementation of the MSA, as well as after the failure of attempts to resolve disputes through conciliation, the company "Dardafon" initiated the arbitral

proceedings before the Arbitral Tribunal of the International Chamber of Commerce - ICC (hereinafter: the Arbitral Tribunal).

28. The possibility of resolving disputes by arbitration was defined in the MSA signed by the Applicant and the company "Dardafon", which determined that: *"Any dispute by the parties under this Agreement shall be subject to an internal dispute settlement procedure to be agreed. If the matter cannot be settled through that procedure, either party may initiate arbitration in London, England, under the rules of the International Chamber of Commerce ("ICC"). If the parties cannot agree on a single arbitrator, then each party will appoint one arbitrator and the two arbitrators will appoint the third arbitrator. All arbitral decisions are final and cannot be challenged in court. The party initiating the arbitration shall bear the costs of such an initiative."*

29. On 9 December 2016, the Arbitral Tribunal rendered the Final Decision [No. 20990/MHM] by which: (1) The Arbitral Tribunal ordered the Applicant to immediately: (a) Allocate to the Company "Dardafon" mobile numbers required in accordance with Section 2.6.1 of the Support Agreement; b) To offer to the company "Dardafon" required 3G and 4G services in accordance with Section 2.4.1 of the Support Agreement; (2) The Arbitral Tribunal declares that in accordance with the Support Agreement, the company "Dardafon" must be delivered that amount of SIM cards as requested by the latter from time to time; (3) The Arbitral Tribunal shall order the Applicant to pay the Company "Dardafon" a contractual penalty in the total amount of € 8,785,000 plus interest rate of 8% as of 14 April 2015. This amount included the contractual penalty that is calculated up to the date of this Final Decision as follows: (a) € 1,315,000 for late delivery of required SIM cards; (b) € 3,800,000 for non-provision of required mobile numbers; (c) € 3,670,000 for non-provision of required 3G and 4G services; (4) The Arbitral Tribunal shall order the Applicant to pay to the Company "Dardafon" for the damage in the name of loss of profits in the total amount of € 17,315,000 plus interest rate of 8% as of 14 April 2015; (5) The Arbitral Tribunal shall order the Applicant to pay the Company "Dardafon" the contractual penalty of € 5,000 for each case of further delay calculated in days from the date of issuance of this decision until the fulfillment by the Respondent of Orders 1) a) and b) above, but only if and to the extent that the total amount of these penalties exceeds the amount of € 17,315,000 under Order 4, above; 6) All other claims for compensation are rejected; 7) The Applicant is obliged to pay the company "Dardafon" the amount of 75% of the costs incurred in this arbitral proceeding, with the

exception of the costs incurred by the internal staff of the company "Dardafon", namely the amount of 972,121.22 € and 534,000.00 USD.

2) Proceedings related to the recognition of the decision of the Arbitral Tribunal

30. On 7 March 2017, the company "Dardafon" submitted to the Basic Court in Prishtina - Department for Economic Matters (hereinafter: the Basic Court) a proposal for the recognition and execution of the Final Decision [No. 20990/MHM] of 9 December 2016, of the Arbitral Tribunal.

31. On 24 May 2017, between the Applicant and the company "Dardafon" an Agreement was reached for the Execution of the Final Decision [No. 20990/MHM] of 9 December 2016, of the Arbitral Tribunal.

32. On 2 June 2017, the company "Dardafon" withdrew the proposal for the recognition and execution of the Final Decision of the Arbitral Tribunal, based on the agreement reached. Consequently, on 19 June 2017, the Basic Court by the Decision [IV. C. 118/17] found the withdrawal of the proposal for the recognition and final execution of the Decision of the Arbitral Tribunal.

33. On 27 April 2018, the company "Dardafon" by letter [01–1562/18] notified the Applicant about the termination of the Agreement for the Execution of the Final Decision of the Arbitral Tribunal, based on the inadequate implementation of this Agreement set forth in Article 8.3 thereof. Also, the company "Dardafon" states that based on Article 8.3 of this Agreement, in case of termination of the Agreement by the company "Dardafon", the provisions of the Final Decision [no.20990/MHM] of 9 December 2016, of the Arbitral Tribunal shall be effective.

34. On 16 July 2018, the company "Dardafon" submitted to the Basic Court the Proposal for the recognition and execution of the Final Decision [20990/MHM] of 9 December 2016, of the Arbitral Tribunal.

35. On 11 February 2019, the Basic Court by the Decision [IV. C. No. 388/18] decided to: (i) recognize and declare enforceable the decision of the Arbitral Tribunal, at the International Chamber of Commerce (ICC), ICC case, No. 20990/MHM, Place of Arbitration: London, England, The final decision of 9 December 2016, in the legal case in DARDAFON.NET LLC, [...], as claimant and Kosovo Telecom j.s.c. (former PTK j.s.c.) [...] as the respondent, in entirety, as in the

enacting clause of the abovementioned Decision; (ii) The Applicant is obliged to pay the costs of the proceedings for the recognition and execution of the decision of the Arbitral Tribunal to the company "Dardafon" in the amount of 2.150.00 €.

36. On 19 February 2019, the Applicant filed an appeal with the Court of Appeals against the abovementioned Decision of the Basic Court, on the grounds of (i) erroneous application of the substantive law, proposing that the appealed Decision be annulled and the case be remanded to the first instance court for retrial.

37. On 1 April 2019, the Court of Appeals by Decision [Ae. No. 88/2019] dismissed as inadmissible the Applicant's appeal filed against the Decision [IV. C. No. 388/18] of 11 February 2019, of the Basic Court. Consequently, this Decision became final and enforceable.

3) Proceedings conducted regarding the enforcement of the Decision of the Arbitral Tribunal, which proceedings is challenged before the Court by the Applicant

38. On 8 July 2019, the company "Dardafon" submitted the Proposal for Enforcement of the final Decision [No. 20990/MHM] of 9 December 2016, of the Arbitral Tribunal of the Chamber of Commerce and Industry in Paris.

39. On 15 July 2019, the Private Enforcement Agent issued the Enforcement Order [P. No. 491/19] by which it allowed the enforcement proposed by the company "Dardafon", based on the enforcement document, namely the final Decision of the Arbitration [No. 20990/MHM] of 9 December 2016, in the amount of *"25,000,000.00 euro (for confirmation from the financial expertise after the calculation of the interest)"*.

40. On 18 July 2019, the Applicant filed Objection against Enforcement Order [P. No. 491/19] with the proposal that: (i) the Objection of the Applicant be approved in entirety as grounded; and (ii) to annul the Enforcement Order [P. No. 491/19] of 15 July 2019, of the Private Enforcement Agent; (iii) to reject the Proposal for Enforcement of the Company "Dardafon". In his objection, the Applicant alleged that (i) the document on the basis of which the Enforcement Order was issued has no executive title and has no features of enforceability, in accordance with Article 71.1.1 of Law No. 04/L-139 on Enforcement Procedure (hereinafter: LEP); (ii) by a public document or a document certified in accordance with the law, the parties have agreed not to request enforcement on the basis of the enforcement document, in

accordance with Article 71.1.1.3 of the LEP; and (iii) requested from the Basic Court to hold a public hearing based on article 73 of the LEP.

41. On 24 July 2019, the company "Dardafon" filed a response to the debtor's objection stating that the debtor's claims filed in the objection are not based on law and that the enforcement order is challenged on unjustified legal basis and in order to prolong the enforcement proceedings.

42. On 22 June 2020, a hearing to review the validity of the debtor's objection within the Basic Court was held, in which case the latter issued a Conclusion obliging the company "Dardafon" to submit to the Basic Court within (three) 3 days a submission for the specification of the proposal for enforcement and that regarding the total amount of the main debt.

43. On 25 June 2020, the company "Dardafon" submitted the supplementation to the proposal (the supplementation to the proposal was registered with the Basic Court on 29 June 2020), specifying the exact amount of the total debt, requesting to oblige the Applicant to pay on behalf of the debt the total amount of € 24,684,003.15, with an interest rate of 8% per year which would be calculated from 8 July 2019 until the final payment. The company "Dardafon" also submitted a Report of the Legal Auditor, regarding the calculation of the abovementioned amount and evidence regarding the payments made to the Applicant. In the abovementioned report of the auditor it was established that *"The total amount of the remaining obligation is subject to verification and ascertainment through expertise assigned by the private enforcement agent during the calculation of interest ordered by the Final Arbitration Decision"*.

44. On 6 July 2020, the Basic Court by the Decision [PPP. No. 1486/19]: (i) approved as partially grounded the Applicant's objection, regarding the amount of € 315,996.85, thus repealing the Enforcement Order [P. No. 491/2019] of 15 July 2019, in relation to this amount issued by the Private Enforcement Agent; and (ii) rejected the Applicant's objection regarding the amount of € 24,684,003.15 as ungrounded, and for this part the Enforcement Order [P. No. 491/2019] of 15 July 2019, issued by the Private Enforcement Agent, remains effective.

45. On 7 July 2020, the Applicant submitted the Declaration on the Completion of the Enforcement Proposal of the company "Dardafon", mentioned above, requesting, *inter alia*, that the Applicant's Objection be approved as grounded, while the proposal for enforcement be

considered withdrawn. The Applicant stated that he opposes the Creditor's Complaint [Dardafon Company], both formally and materially. From the formal point of view, the Applicant considered that the submission submitted on 29 June 2020 by the creditor was submitted with a delay of 4 days, therefore requested that the proposal for enforcement be considered withdrawn. With regard to the material objection, the Applicant considered that the Conclusion of the Basic Court of 22 June 2020, does not find the provisions of the LEP grounded and represents an excess of authority giving the Creditor the opportunity to deviate the value of the enforcement for which he already received the Enforcement Order. The Applicant regarding the new value € 24,684,003.15, challenged the latter with the reasoning that (i) it does not appear in the final Decision of the Arbitration Tribunal of ICC 20990/MHM of 9 December 2016; (ii) it does not appear in the Creditor's Enforcement Proposal of 15 July 2019; (iii) for this value no enforcement order was issued P. No. 491/19 of 15 July 2019; and (iv) for this value the debtor's objection has not been filed.

46. On 9 July 2020, the company "Dardafon" by the letter requests the Applicant to fulfill the debt voluntarily by 10 July 2020.

47. On 9 and 10 July 2020, the Applicant, by the submissions, requests the enforcement authority to postpone the enforcement until the case is decided by the Court of Appeals, a request which was rejected by the company "Dardafon", which requested from the enforcement authority to act in accordance with the Decision [PPP. No. 1486/19] of the Basic Court, as the legal requirements for such a request have not been met and the debtor has not deposited any evidence or guarantee.

48. On 10 July 2020, the Applicant filed an appeal with the Court of Appeals against the Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court in the rejecting part of the Enforcement, namely against its point (ii), due to violation of the provisions of the enforcement procedure and erroneous application of substantive law, with the proposal to approve the appeal of the debtor as grounded and to annul the abovementioned Decision of the Basic Court. The Applicant alleged before the Court of Appeals that the Basic Court, *inter alia*, did not take into account the Applicant's submission as, according to it, the Decision [PPP. No. 1486/19] of the Basic Court was ready the day before, namely on 6 July 2020, without considering the Applicant's position on the specification of the Enforcement Proposal of the company "Dardafon" and other accompanying documents, and thus violating the legal provisions and denying the Applicant's right to state about the claims of the company "Dardafon", in accordance with

Article 182.2 (i) of the Law No. 03/l-006 on the Contested Procedure (hereinafter: LCP), especially when it comes to new allegations and documents.

49. The Applicant also raised the issue of admissibility of the Specification of the Enforcement Proposal as it considered that the submission submitted on 29 June 2020 by the creditor was submitted with a delay of 4 days, therefore, requested that the enforcement proposal be considered withdrawn.

50. On an unspecified date, the company "Dardafon" filed a response to the appeal, challenging the Applicant's appealing allegations, with the proposal that the Court of Appeals considers this appeal inadmissible, or reject the latter in its entirety as ungrounded.

51. On 14 July 2020, the Private Enforcement Agent, by the Conclusion [P. No. 491/19] rejected the Applicant's request for postponement of enforcement as ungrounded.

52. On 15 July 2020, the Private Enforcement Agent by the Order [P. No. 491/19] ordered the Commercial Banks in Kosovo: PCB, RBKO, BKT, NLB, BPB, TEB, Banka Ekonomike, IsBank, ZiraatBank, that within the deadline of twenty four (24) hours after the receipt of this order, to provide the private enforcement agent with the data (i) whether the Applicant has an account in these banks; and (ii) if the latter has funds in the bank account to block the funds in the name of the principal debt, legal interest, costs of contested proceedings and enforcement costs in the total amount of 26,789,532.62 euro.

53. On 20 July 2020, the third party - namely the Applicant's Shareholder (Government of Kosovo, Ministry of Economy and Environment, Policy and Monitoring Unit of Publicly Owned Enterprises) submitted a request for suspension of actions taken by the enforcement authority as well as the postponement of the enforcement procedure.

54. On 20 July 2020, following the request of the enforcement agent addressed to the company "Dardafon" to declare regarding the request of the third person, namely the Government of Kosovo, the latter opposes this request for postponement of the enforcement as it has no legal support, and that requires the enforcement authority to reject it as ungrounded.

55. On 21 July 2020, the Private Enforcement Agent, by the Conclusion [P. No. 491/19] rejected as ungrounded the request of the third person,

the Shareholder Government of Kosovo-Ministry of Economy and Environment, Policy and Monitoring Unit of Publicly Owned Enterprises to postpone the enforcement procedure.

56. On 21 July 2020, the Private Enforcement Agent, through the Transfer Order [P. No. 491/19] obliged Raiffeisen Bank, to execute from the Applicant, within (60) minutes after receiving this order, the main debt, legal interest, costs of the enforcement procedure, costs of the contested procedure and the implementation of efficiency of the Enforcement Office, in the following values: Total: 26,789,532.62 euro.

57. On 29 July 2020, the Applicant and the company "Dardafon" in the presence of the Applicant's shareholder in the capacity of guarantor, reached an agreement for the temporary release of current bank accounts.

58. On the same date, the Private Enforcement Agent by order [P. No. 491/19] obliged the commercial banks in Kosovo to unblock the Applicant's bank account, as a result of the creation of new circumstances, namely the reaching of an agreement between the Applicant and company "Dardafon".

59. On 8 October 2020, the Court of Appeals by Decision [Ac. No. 3610/20] rejected the Applicant's appeal as ungrounded, and upheld the Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court. The Court of Appeals considered that the Court of First Instance has rendered a fair decision based on the evidence found in the case file. The Court of Appeals was based on Article 21 of the LEP and 22 of the LEP, which define the enforcement documents and based on this the Court of Appeals considered that the enforcement is allowed based on the final Decision of the Arbitration, ICC No. 20990/MHM of 9 December 2016, recognized by the Decision of the Basic Court IV. C. No. 388/18 of 11 February 2018, which document meets the requirements according to the provisions of the LEP. Regarding the Applicant's allegation that the final arbitral award does not possess the enforcement clause, the Court of Appeals stated that according to the LEP, as enforcement documents are provided the decisions of foreign arbitral tribunals and settlements within these courts, which have been accepted for enforcement in the territory of Kosovo.

60. Regarding the allegation for the Agreement for the execution of the final decision of the Arbitration, signed between the company "Dardafon" and the Applicant on 14 May 2017, which has the status of

an enforcement document because it represents a Notarial Deed, which cannot be separated from the creditor, the Court of Appeals clarified that with this notary deed, the Agreement on the execution of the final decision of the Arbitration was certified and taking into account that the Applicant was not able to pay and fulfill the obligations arising from the decision of the Arbitration and based on Article 8.3 of the Agreement, the Applicant has agreed that in case of failure to fulfill the obligations under item 1.6 of the Agreement, the company "Dardafon" may terminate this agreement and automatically enter into force the provisions of the final decision of the Arbitration.

61. As to the Applicant's allegation that with the specification requested by the creditor, a new enforcement value has been created, and that such value is not contained even in the decision of Arbitration 20990/MHM, the Court stated that in this decision, namely in item 3, is set the value of 8,785,000 euro, plus interest of 8% since 14 April 2015, then in item 4, is set the value of 17, 315,000 euro, plus interest of 8% since 14 April 2015 Also in item 5 is defined the contractual penalty of 5000 euro, for each case of delay from item 1, a) and b), while in item 7, the value of 972,121.22 euro and the value of 534,000.00 USD. Regarding these values, the Court of Appeals stated that the specification of the debt was made in accordance with the decision of the Arbitration, as well as the payments made by the Applicant. Therefore, the Court of Appeals stated that *"With regard to the Applicant's claims for the amount of debt, the private enforcement agent must, during the enforcement procedure, calculate the interest and the contractual penalty specified in the enforcement document, until the fulfillment of the obligation in full based on the provision of article 43, paragraph 3 of the LEP" [...].* The Judgment of the Court of Appeals did not contain a specific reasoning regarding the Applicant's allegation that the Basic Court denied the Applicant's right to state about the claims of the company "Dardafon", regarding the specification of the debt.

62. On 3 November 2020, the Applicant addressed the Office of the Chief State Prosecutor with a proposal to initiate a request for protection of legality in the Supreme Court against the Decision [PPP. No. 1486/19] of the Basic Court and the Decision [Ac. No. 3610/20] of the Court of Appeals. The Applicant in his request stated that regarding the submission submitted by the creditor, and the decision issued on 6 July 2020, by the Basic Court by Decision PPP. No. 1486/19, it was denied the right to state about this submission and the new value of the enforcement that differed from his initial request. Regarding the latter, the Applicant stated that the new value of the request was not

the subject of the enforcement proposal and in this regard no enforcement order was issued by the private enforcement agent. The Applicant also considered that the expertise of 22 June 2020 prepared by the auditor as well as the considerable number of invoices and debit notes, had not been submitted earlier and in this evidence, the Applicant was not enabled to declare. The Applicant considers that the Basic Court should schedule a new hearing, through which the Applicant would have the opportunity to declare the value of the proposal. Therefore, the Applicant considered that the two lower courts have violated his legal and constitutional rights, because they have not given the Applicant the opportunity to review the case, as without receiving the position of the Applicant regarding the specification of the order for enforcement, the decision of the Basic Court was issued.

63. On 10 November 2020, the Office of the Chief State Prosecutor filed a request for protection of legality [KMLC. No. 152/2020] with the Supreme Court against the Decision [PPP. No. 1486/19] of the Basic Court and the Decision [Ac. No. 3610/20] of the Court of Appeals. The Office of the Chief State Prosecutor was based on Article 247, paragraph 1 point a) of the LCP, stating that the Applicant in the request for protection of legality, did not have the opportunity to state in writing or at the hearing about the specified proposal for enforcement, and based on Article 5 item 5.1 of the LCP, the court should have enabled the Applicant to state on the allegations presented in the submission of the company "Dardafon".

64. On 18 December 2020, in the office of Private Enforcement Agent I.M. a hearing was held convened by the Applicant and the company "Dardafon", regarding the debt in the amount of 17,281,141, 98 euro, which is reflected in the Minutes of this hearing, signed by the representatives of the company "Dardafon" and Applicants, the following Conclusion was issued:

> *1. The agreement reached between the parties for the payment of the debt and expenses specified above is approved and this agreement will enter into force after its signing.*
> *2. The debtor is obliged to pay the monthly debt installments in the amount of € 749,973.60 according to the amortization plan of the payments specified above (from 15 January 2021).*
> *3. The debtor is obliged to pay the monthly installments of expenses in the amount of € 10,619.62 for each month according to the payments specified as above (from 15 January 2021).*

4. In case of failure of the agreement by the debtor in the fulfillment of the obligations of the debt installments and the expenses according to the dynamics of payments, the creditor's request for the complete fulfillment of the debt, default interest and expenses will be acted upon.

A copy of this agreement is delivered to both parties"

65. On 20 January 2021 the Supreme Court held a hearing in which the Applicant and the company "Dardafon" were present. At this hearing the creditor [company "Dardafon"], considered that with regard to the allegation that the debtor [Applicant], was not given the opportunity to declare, does not stand. According to the creditor, it did not calculate the interest on his request for enforcement. The creditor stated that on 25 June 2020, it also calculated the interest along with the certification of an auditor. The creditor consequently considered that the Applicant did not challenge the respective submission. The creditor at the hearing also considered that the debtor and the prosecutor had never considered that the interest rates were erroneously calculated and therefore considered that there was no need for a separate hearing. The Applicant, on the other hand, stated at this hearing, in which case he reiterated his allegations as in the request for protection of legality, stating that it was not given the opportunity to make a statement regarding the creditor's submission, as it had accepted submissions on 6 July 2020 while the response related to those submissions was submitted on 7 July 2020, however, the Basic Court issued its decision on the case on 6 July 2020, without waiting for the Applicant's response, and moreover without holding hearing. Therefore, the Applicant stated that the regular courts have violated the principle of adversarial proceedings and equality of arms.
66. On 20 January 2021, the Supreme Court, by Decision CML. No. 12/20, rejected as ungrounded the request for protection of legality of the State Prosecutor. The Supreme Court noted that with regard to the case raised by the State Prosecutor, the Applicant was not given the opportunity for clarification regarding the allegations filed on 29 June 2020, and in the attached expertise of F.P. The Supreme Court initially referred to Article 247 paragraph 1 of the LCP, which sets out the conditions for filing a request for protection of legality, and considered the allegation of holding a hearing ungrounded. The Supreme Court further reasoned that in the enforcement proceedings when deciding on the objection as a means of challenging, the court has the discretion to assess the need to hold a hearing. The Supreme Court stated that Article 247 paragraph 1 of the LCP refers to the case when the court of first instance rendered the judgment without a main hearing.

67. The Supreme Court, stating that it assesses the Applicant's allegation in the spirit of the provision of Article 247 paragraph 1 of the LCP and taking into account the specifics of the enforcement procedure, stated that the lower instance courts did not violate the rights of the Applicant. In this case, the Supreme Court stressed that the issuance of a judgment without a main hearing as a violation refers to cases where it is necessary to obtain evidence to establish substantive facts and thus denied such a possibility to the parties, while in the enforcement procedure the causes of objection are mainly assessed without holding the hearing. However in this case, the Supreme Court considered that the Basic Court in objection after holding a hearing has consumed any possible violations related to the allegations of holding the hearing. Furthermore, the Supreme Court emphasized that holding a hearing is a legal possibility that the court considers in cases where it accepts in consideration and decides the objection of the party if the nature of the objections is such that implies clarification of some allegations that occur after hearing the parties. Therefore, the Supreme Court considered that it does not mean that the court in the enforcement procedure will schedule several hearings and in this way to take into consideration the issues that have been consumed in the procedure of issuing the enforcement document.

68. The Supreme Court considered that the nature of the allegations made by the state prosecutor were such that they could be made by the debtor [the applicant], in the procedure of correcting irregularities of the enforcement agent, and according to the Supreme Court, the first instance court has rightly assessed the allegations that have referred to the admissibility of the enforcement, including the suitability of the enforcement document and all other allegations as defined by the LEP.

69. The Supreme Court further reasoned that the State Prosecutor's allegation for giving the possibility of a statement regarding the creditor's submission and the expertise of F.P. is ungrounded and without influence on the decision otherwise because *"neither by the submission nor by the alleged expertise has the content of the loan/request specified in the enforcement document been changed, which has previously passed the recognition procedure. Thus, if the debtor has assessed that with the referred expertise any irregularities have been made in the implementing enforcement procedure, he has had the opportunity to request in a special procedure from the court the correction of irregularities, otherwise in the case of the hearing summoned by the Supreme Court on 20.01.2021, no substantial claim has been made, explanations of how*

the submission and the expertise influenced the change of the loan assigned by the enforcement document.

Obtaining an expertise in the enforcement procedure is common especially when it is necessary to calculate a periodically adjudicated claim, or even interests and other successive claims, but the standard in practice means that such an expertise can not be obtained in the phase before the execution is allowed, but can be taken after the stage of enforcement permit is completed. The fact that the Creditor has submitted an expertise has not affected the legality of the procedure because the enforcement body after the enforcement order has become final, has taken the evidence for the calculation of claims and thus the impact of the expertise submitted by the creditor does not have any impact."

Applicant's allegations

70. The Applicant alleges that the challenged decision of the Supreme Court violates his rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

71. The Applicant reiterates that on 22 June 2020, in the hearing held regarding the validity of the Applicant's Objection, the Basic Court issued '*Conclusion'* whereby it obliged the company "Dardafon" to submit the submission for specification of the proposal for enforcement within 3 (three) days.

72. According to the Applicant, this submission was submitted by the company "Dardafon" on 29 June 2020, which the Applicant received on 6 July 2020. According to the Applicant, on 7 July 2020, the latter filed "Statement on the Creditor's Submissions (company "Dardafon")".

73. Therefore, according to the allegation, before the Applicant declared himself, or according to it, at the same time when the Applicant received the Specification of the Proposal for Enforcement of the company "Dardafon" on 6 July 2020, the Basic Court had already prepared and rendered the Decision [PPP. No. 1486/19], denying it the legal right to declare about the Submission of the company "Dardafon" for the Specification of the Proposal for Enforcement and

the new value of the enforcement which differed from the initial value, which means that it was a new Request.

74. According to the Applicant, the new value of the proposal of the company "Dardafon" according to the Submission of 6 July 2020, (i) was not a subject of his initial Proposal for Enforcement; (ii) regarding this value no Enforcement Order was issued by the Private Enforcement Agent; and (iii) in relation to this value the Debtor's Objection was not made nor was the hearing of 22 June 2020 scheduled.

75. Further, the Applicant states that in addition to the new Proposal and the new value of the enforcement, the Submission of the company "Dardafon" also contained a "Financial Expertise" of 22 June 2020, prepared by Auditor F.P and a significant number of invoices and debit notes which were never submitted at any earlier stage of the procedure and that the company "Dardafon" has never been notified about them.

76. Regarding this point, the Applicant refers to Article 5 paragraph 1, Article 7 paragraph 3 and Article 357 paragraph 2 of the LCP, which according to it, are applied in the enforcement procedure and underlines the following *"The Basic Court in Prishtina has decided regarding the debtor's objection to hold a court hearing, at the moment when the creditor, before the court hearing was over, has changed the Proposal, the value of the Proposal and at the moment when he has submitted new evidence which he had not submitted. until then and were never seen by the Debtor, the Court was obliged to schedule a new hearing in order to give the Debtor the opportunity to state about these issues and changed circumstances".*

77. Therefore, according to the Applicant, these legal violations were also among his main allegations in the appeal filed with the Court of Appeals on 10 July 2020, and the Proposal for Protection of Legality and the Hearing at the Panel of the Supreme Court of 20 January 2021. According to the Applicant, neither the Court of Appeals nor the Supreme Court elaborated on this allegation.

78. According to the Applicant, the regular courts set a precedent by which the court decision became final without enabling the party to the proceedings to state regarding the claims of the other party. Consequently, the Applicant alleges that the regular courts have violated the provisions of the procedure and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, namely

"essential elements of the notion of "fair trial" [...] a) the principle of adversarial proceedings; b) the principle of "equality of arms"; and c) the right to a reasoned decision".

79. According to the Applicant, the regular courts have the responsibility to give each party (i) the opportunity to be present and heard; and (ii) be given the opportunity to present their case in such a manner as not be put at a disadvantage *vis-à-vis* the other party. Regarding this point, the Applicant refers to the cases of the European Court of Human Rights (hereinafter: ECtHR), (i) *Keçmar and Others v. Czech Republic,* Judgment of 3 March 2000*; (ii) Condron and Others v. the United Kingdom,* Judgment of 2 May 2000*;* and *(iii) VanOrshoven v. Belgium,* Judgment of 25 June 1997.

80. Therefore, the Applicant requests the Court to render a Judgment by which: (i) the Referral is declared admissible; (ii) to find that there has been a violation of Article 31 (Right to Fair and Impartial Trial) of the Constitution, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights; (iii) to declare the Judgment [CML. No. 12/20] of the Supreme Court of Kosovo of 20 January 2021 invalid and to remand the latter for reconsideration; (iv) To order the Supreme Court to notify the Constitutional Court about the measures taken in connection with the implementation of this Judgment; (vi) To declare that this Judgment is effective immediately.

Request for interim measure

81. In addition, the Applicant requests the imposition of an interim measure to postpone the enforcement process as the implementation of the enforcement would cause (i) irreparable damage to the Applicant and would (ii) violate the state and national interests, setting from the nature of Telecom activity, which, in the event of enforcement, would go bankrupt due to the extremely high value of the obligation.

82. The Applicant states that due to the blocking of bank accounts, where bankruptcy was at risk, the Applicant was forced to sign *"Debt execution agreement in enforcement proceedings"* with the company "Dardafon", and according to the Applicant, the only reason for signing this agreement is the de-blocking of bank accounts to avoid bankruptcy.

83. The Applicant also states that with the continuation of the execution procedure, there is a real risk that the activity of Telekom will be extinguished, producing unprecedented negative consequences in the wellbeing and functioning of all its subscribers, especially in the functioning and activity of state and security bodies in the form of disabling communication in the performance of their duties, as one of the main segments of their activity.

84. Consequently, the Applicant states that based on the premise of endangering the public interest, risk of causing irreparable damage and the fact that its shareholder - the Ministry of Economy and Environment has shown willingness to offer its assistance in resolving of this issue, in order to prevent these risks, submits a request for the imposition of an interim measure in accordance with Article 27 of the Law on the Constitutional Court. While through the letter of 27 July 2021, the Applicant clarified that *"so far Telecom has not received any concrete material assistance from [Ministry of Economy] ME regarding the execution of the Arbitral Tribunal Decision at ICC no. 20990/MHM of 09 December 2016."*

85. Finally, regarding the imposition of an interim measure, the Applicant requests the Court to render a Decision on the imposition of an interim measure, by which: (i) the interim measure is approved for the duration until a decision on merits is rendered on the case; (ii) The further implementation of the enforcement against the Applicant is immediately suspended, according to the Enforcement Order [P. No. 491/19] of 15 July 2019, issued by the Private Enforcement Agent Ilir Mulhaxha and Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court; Decision [Ac. No. 3610/20] of the Court of Appeals of 8 October 2020; Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021 as well as the Agreement for execution of the debt in the enforcement procedure no. 01-156/09 of 17 November 2020 concluded between the company "Dardafon" and the Applicant (iii) The Private Enforcement Agent is ordered to notify the Constitutional Court about the measures taken in connection with the implementation of this Decision; (iv) This Decision shall be notified to the parties, the Applicant and the company "Dardafon".

Comments of company "Dardafon"

86. Company "Dardafon", in its response to the Referral states that the Applicant's Referral is inadmissible because:
    - the Applicant's Referral does not contain the name of the person who signed it, so it is not clear that it submitted the Referral

to the Court, therefore the Referral was not submitted by the authorized person;

- The Applicant has not attached any evidence regarding his allegation that the Supreme Court has violated its constitutional rights;
- the decision of the Supreme Court is reasoned and that the Constitutional Court is not an instance *"revisionist and does not examine whether a court has decided a case correctly or not"*. The Applicant has enjoyed all rights before the Supreme Court;
- The Constitutional Court has no substantive jurisdiction to consider whether the First Instance Court in the Enforcement Procedure should organize an additional hearing to decide on a creditor's request to reduce the credit request;
- in the Applicant's case the legal remedies have not been exhausted as the Applicant complains about the amount of the enforcement but in order to request a change in the payment that was made incorrectly the Applicant had to file a lawsuit for unjust enrichment, which the Applicant has not done;
- It is unclear what the Applicant wants to achieve through this procedure as regarding the debt the agreement was signed for the execution of the decision of the Basic Court, on 18 December 2020, therefore, it is clearly indicated the intention to misuse legal remedies;
- The Referral is also ungrounded as the Decision of the Supreme Court does not in any way violate its fundamental constitutional rights as it only considers that the Supreme Court has committed a legal violation and that the Basic Court was not obliged to hold a hearing;
- the Applicant has not proved by any evidence that the calculation of the enforcement amount was done incorrectly;
- the reasons on which the Applicant is referred to for the issuance of the interim measure are not legal as the decision for enforcement is based on a final court decision.

Relevant constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 31
[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[...]

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE SUPPLEMENTED AND AMENDED BY LAW NO. 05/L-118 ON AMENDING AND SUPPLEMENTING LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE

Article 3
Enforcement Authority and Decisions

[...]
5. Conclusion shall be issued for implementation of some actions and to conduct the procedure.

6. Against conclusion as per paragraph 5. of Article 3 of the Law, no legal remedy is allowed.

Article 17
Application of the provisions of other laws

The provisions of the Law on Contested Procedure shall be accordingly are applied in the enforcement procedure, unless this law or any other law provides otherwise.

Article 43
Enforcement decision and writ

[...]
3. If the enforcement decision or writ assigns the payment of interest, the enforcement body shall calculate the expenses of the enforcement creditor, except if the collection of interest is to be done from the deposited money in bank account the bank shall make calculations at the expense of the debtor. In cases when the calculation is made by the bank, the enforcement body is obliged to mark in the writ of enforcement the degree of exact interest, the precise guidelines for calculating the time of the interest, and all other details necessary for the banks to enable calculation interest correctly. If in the writ of enforcement there are insufficient information, unclear or incomplete regarding the calculation of interest, the enforcement body is obliged to meet the writ of enforcement at the request of banks."

Article 73
Decision on objection

1. Court may decide on the objection out of court session. Alternatively, the court may schedule a public hearing if in the court's view it is necessary for a full understanding of the validity of the objection. The court shall notify all parties of the public hearing. If the court chooses to hold a public hearing, the hearing shall be held within five (5) days after the responses to the objection were required to be received by the court.

1a. The Court shall decide on the objection within a deadline of thirty (30) days from the date of receipt of objection.

2. The decision on objection shall be issued by a single judge.

3. Through the decision, the objection may be accepted, refused as untimely, or rejected as incomplete or not permitted.

4. In case of approval of objection, and depending on circumstances of the case, the Court completes the enforcement in entirety or partially, and shall annul any actions taken.

Article 77
Appeals against the decision on the objection

1. Against the decision on objection parties have the right on appeal
2. The appeal against the decision on objection shall be filed through the first instance court for the second instance court within seven (7) days from the day of acceptance.
3. Copy of the appeal shall be submitted to opposing party and other participants who may present response to the appeal within three (3) days.
4. Following receiving the response to appeal or following the deadline for response, the case with all submissions shall be sent to the second instance court within three (3) days. Regarding the appeal, the second instance court shall decide within fifteen (15) days.
5. The appeal on the decision on the objection does not halt the executive procedure unless guarantees have been provided for the full amount of the credit as described under Article 78 of this law.
6. In the event the debtor as appealing party is successful in its appeal, and if its assets have been enforced against upon pursuant to the enforcement decision, he may seek counter-enforcement under the provisions on counter enforcement of this law.

Article 79
Complaints against irregularities during the conduct of enforcement

1. A party or another participant in the procedure may file a complaint with a court concerning irregularities committed by the enforcement body during the conduct of enforcement procedure. The present delivery is made by a written submission to the competent court within seven (7) days of the alleged irregularity.
2. Upon request from paragraph 1 of this Article, if the submitter has proposed this, the court issues decision within three (3) days from the day of delivery of submission.
3. Against the decision provided in paragraph 2 of this Article, parties or other participants in the procedure are entitled to appeal. The provisions of article 77 of this Law on appeal against the decision are applicable.

LAW No. 03 / L-006 ON CONTESTED PROCEDURE

Article 5

5.1 The court shall enable each party to make a statement on the claims and allegations submitted by the contentious party.
5.2 Only for the cases determined by this law, the court has the power to settle the claim for which the contentious party was not enabled to make a statement.

Reasons on which the verdict could be strike
Article 181

181.1 The verdict can strike:

a) due to the violation of provisions of contestation procedures;

b) due to a wrong ascertainment or partial ascertainment of the factual state;

c) due to the wrong application of the material rights.

181.2 Decision based on confession and decision based on withdrawal from the charges can take place due to the violation of provisions of contestation procedures, or due to the confession statement, respectively withdrawal from statement of claim made by mistake or under violent impact or seduction.

Article 182

182.1 Basic violation of provisions of contested procedures exists in case when the court during the procedure didn't apply or wrong application of any of the provisions of this law, while this has or will impact a rightful legal decision.

182.2 2 Basic violation of provisions of contested procedures exists always:

[...]

h) if it's contrary to the provisions of this law, the court has issued a decision based on confession of the party, disobedience, absence, withdrawal from the claim or without holding of the main hearing;

i) if any of the parties through illegal activity, especially by not offering the opportunity for a hearing in the court;

[...]

n) if the decision has leaks due to which it' can't be examined, especially if the disposition of the decision is not understandable or contradictory in itself with the reasoning of the verdict, or when the verdict has no reason or which gives no justification for the final facts, or which reasoning

are unclear, contradictory, or if in the final facts there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding;
o) if the verdict overpass the claim for charges.
[...].

Decisions of the second instance court over complaint
Article 195

195.1 The complaint court in the college session or based on the case evaluation done directly in front of it can:
a) disregard the complaint that arrives after the deadline, it's incomplete or illegal;
b) disregard the case and reject the claim;
c) can disregard the decision and return the case for re-trial in the court of the first instance;
d) reject the complaint as an un-based one and verify the decision reached;
e) change the decision of the first instance.

195.2 The court of the second instance is not linked to the proposal submitted in the complaint.

[...]

Article 247

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

a) for basic violence of provisions of contested procedure, if the violence has to do with territorial competencies, if the court of the first instance has issued a verdict without main proceeding, while it was its duty to held a main proceeding, if decided for the request, on which the contest is continuing, or if is in contradiction with the law, the public is excluded from the main proceeding;
b) for wrong application of the material right.
[...]

Article 357

357.1 The party that proposes an expertise has to state why that expertise is needed for as well as its goal. The person for an expertise should also be proposed.

357.2 The opponent party should be given a chance to say its opinion regarding proposed expertise.
357.3 If the involved parties can not bring a decision regarding the person who will conduct the expertise, or regarding the object or volume, then the court will decide about it.

Admissibility of the Referral

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

88. 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".

89. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

90. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, invoking the alleged violations of its fundamental rights and freedoms, which apply to individuals and legal entities. (See Court case No. KI41/09, Applicant *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14; KI35/18, Applicant "*Bayerische Versicherungsverbrand*", Judgment of 11 December 2019, paragraph 40, and KI227/19, Applicant N.T. "*Spahia Petrol*", Judgment of 20 December 2020, paragraph 37).

91. The Court also reviews whether the Applicants have fulfilled the admissibility requirements 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…".

92. With regard to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party, which challenges an act of a public authority, namely the Decision [CML. No. 12/20] of 20 January 2020 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms it alleges to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

93. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure and that the latter cannot be declared inadmissible on the basis of the requirements set out 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 reviewed.

Merits of the Referral

94. The Court recalls that the Applicant challenges the Decision [CML. No. 12/20] of 20 January 2020 of the Supreme Court, which rejected as ungrounded the request for protection of legality of the State Prosecutor against the Decision [Ac. No. 3610/20] of 8 October 2020 of the Court of Appeals, which had rejected as ungrounded the Applicant's appeal and upheld the Decision [PPP. No. 1486/19] of the Basic Court.

95. The Court recalls that the Applicant's Referral relates to the enforcement proceedings conducted against the Applicant in connection with the enforcement of the decision of the Arbitration Tribunal [ICC no. 20990/MHM] mentioned above. In this regard, acting at the request of the company "Dardafon" private enforcement agent Ilir Mulhaxha, issued the Enforcmement Order [P. No. 491/19] of 15 July 2019, which ordered the enforcement of the final decision of the Arbitration Tribunal and other procedural costs. Against the Enforcement Order [P. No. 491/2019], the Applicant on 18 July 2019 filed an Objection with the Basic Court, where the latter on 22 June 2020 held a hearing in which it issued a Conclusion which obliged the company "Dardafon" that within the desdline of (three) 3 days to submit to the Basic Court a submission for the specification of the enforcement proposal regarding the total amount of the main debt. On 25 June 2020 (*registered in the Basic Court on 29 June 2020*), the company "Dardafon" submitted the Supplementation of the Enforcement Proposal to the Basic Court in the total amount of 24,684,003.15 euro, adding the legal interest. The company "Dardafon" also submitted a Report of the Legal Auditor, regarding the calculation of the above amount and evidence regarding the payments made to the Applicant. The Applicant states that he received the above mentioned documents on 6 July 2020. On 7 July 2020, the Applicant states that he submitted the Declaration in the Supplementation of the Enforcement Proposal of the company "Dardafon", mentioned above, requesting, *inter alia*, that the Objection of the Applicant be approved as grounded while the proposal for enforcement to be considered withdrawn. However, on 6 July 2020, the Basic Court by Decision [PPP. No. 1486/19] partially approved the objection regarding the amount of 315,99.85 euro and rejected the objection of the Applicant regarding the amount of 24,684,003.15 euro as ungrounded, and in connection with this amount, decided that the Enforcement Order P. No. 491/2019 remains in force.

96. The Applicant against the Decision of the Basic Court [PPP. No. 1486/19] of 6 July 2020 filed an appeal with the Court of Appeals on the grounds of violation of the provisions of the enforcement procedure and erroneous application of the substantive law, with the proposal that the Court of Appeals approves the Applicant's appeal and annuls Decision PPP. No. 1486/19 of the Basic Court of 6 July 2020, and remands the case for retrial to the Basic Court. The Applicant alleged that on 22 June 2020 regarding the review of the Objection submitted by the Applicant, the Court rendered a Conclusion which obliged the company "Dardafon" to specify the proposal for enforcement within (3) three days. On 6 July 2020, the Applicant stated that it had received the submission of the company "Dardafon" - Specification of the Proposal for Enforcement. The Applicant alleged that in addition to the Specification of the Enforcement Proposal, the company "Dardafon" submitted a financial expertise, which was not ordered by the courts, as well as a significant number of invoices and debit notes and which were never submitted to the Applicant for the purpose of eventual declaration about the findings in this expertise and declaration about invoices and debit notes. The Applicant on 7 July 2020, stated that he had submitted the "*Declaration on the Creditor's Submission*" for the Specification of the Enforcement Proposal. The Applicant alleged before the Court of Appeals that the Basic Court, *inter alia*, did not take into account at all the Applicant's submission as, according to it, the Decision [PPP. No. 1486/19] of the Basic Court was ready the day before, thus on 6 July 2020, without reviewing the Applicant's position regarding the Specification of the Enforcement Proposal of the company "Dardafon" and other accompanying documents, and thus violating the legal provisions and denying the Applicant the right to state about the allegations of the "Dardafon" company, in accordance with Article 182.2 (i) of the LCP, especially when it comes to new allegations and documents. The Court of Appeals by Decision [Ac. No. 3610/20] of 8 October 2020, rejected as unfounded the Applicant's appeal and upheld the Decision [PPP. No. 1486/19]of the Basic Court. Following the Applicant's proposal, the State Prosecutor's Office filed a request for protection of legality with the Supreme Court, in which case the latter rejected the request. Among other things, the Supreme Court reasoned that holding the hearing was not a legal obligation for the Basic Court and in this case it was not necessary to hold an additional court hearing after receiving the specification for the enforcement proposal of the "Dardafon" company. The Supreme Court also stated that the fact that the company "Dardafon" submitted an expertise when it specified the amount of the debt, did not affect the legality of

the procedure, especially when the parties signed an agreement for the fulfillment of the obligation with installments.

97. The Applicant alleges before the Constitutional Court that: a) The Basic Court in Decision [PPP. No. 1486/19], denied the Applicant the legal right guaranteed by Articles 5 (1) and 357 (2) of LCP to declare regarding the submission of the company "Dardafon" for the Specification of the Enforcement Proposal and additional documents and evidence submitted (expertise and debit notes invoices) after, according to him, the Decision of the Basic Court [PPP. No. 1486/19] was ready one day before the Applicant submitted his response; and b) The Basic Court, contrary to the law, did not hold a court hearing in order to give the Applicant the opportunity to state his opinion on the new proposal and the new evidence presented by the company "Dardafon".

98. In view of the above, the Applicant alleges that the regular courts have violated the provisions of the procedure and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, namely *"essential elements of the notion of "fair trial" [...] a) the principle of adversarial proceedings; b) the principle of "equality of arms"; and c) the right to a reasoned decision"*.

99. Therefore, the Court will examine the Applicant's allegations of (i) violation of the adversarial principle and of equality of arms, continuing with the allegation of (ii) failure to hold a hearing. The Court is based on case law of the ECtHR, in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. ALLEGATIONS RELATED TO THE ADVERSARIAL PRINCIPLE AND EQUALITY OF ARMS

i) General principles for adversarial principle and equality of arms

100. The Court initially explains that the principle of *"equality of arms"* is an element of a broader concept of a fair trial that 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 at a substantial disadvantage *vis-à-vis* the other party (see the case of the ECtHR *Yvon v. France*, Judgment of 24 July 2003, paragraph 31, and the case of the ECtHR *Dombo Beheer B.V. v.*

the Netherlands, Judgment of 27 October 1993, paragraph 33; see *mutatis mutandis*, also the case of Court KI31/17, Applicant *Shefqet Berisha*, Judgment of 30 May 2017, paragraph 70*)*.

101. On the other hand, the principle of adversarial proceedings implies that the parties to the proceedings should be aware of and have the opportunity to comment on and challenge the allegations and evidence presented during the main trial (see, *inter alia*, the ECtHR cases, *Brandstetter v. Austria*, no. 11170/84, Judgment of 29 August 1991; *Venneulen v. Belgium*, no. 19075/91, Judgment of 20 February 1996, KI193/19, Applicant *Salih Mekaj,* Judgment of 17 December 2020, paragraph 47).

102. Referring to the ECtHR case law, the Court emphasizes that the principle of equality of arms and the principle of adversarial proceedings are closely linked and in many cases the ECtHR has dealt with them altogether (see, *inter alia*, the ECtHR cases, *Rowe and Dawis v. the United Kingdom*, no. 18990/91; Judgment of 2000, *Jasper v. the United Kingdom*, no. 27052/95, Judgment of 2000; *Zahirovic v. Croatia*, no. 58590/, Judgment of 25 July 2013 KI193/19, Applicant *Salih Mekaj,* cited above, paragraph 48).

103. The requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to civil as well as to criminal cases (see case of Court KI10/14, Applicant, *Joint Stock Company Raiffeisen Bank Kosova J.S.C.*, Judgment of 20 May 2014, paragraph 42; and case of Court KI31/17, Applicant *Shefqet Berisha,* cited above, paragraph 71).

104. The ECtHR stated that under the principle of "equality of arms", it is inadmissible for a party to a proceeding to submit observations or comments before the regular courts, which are intended to influence the decision-making of the court, without the knowledge of the other party and without giving the other party the opportunity to respond to them. It is up to the party involved in the proceedings to then assess whether the remarks or comments submitted by the other party deserve a response. (see case of the ECtHR *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 January 2011, paragraph 42; see also case of the ECtHR *Guigue and SGEN-CFDT v. France*, Decision of 13 July 2000).

105. Therefore, according to the case law of the ECtHR, the principle of "equality of arms" is violated when the complaint of the opposing party has not been communicated to the Applicant and he has not been

informed about such a complaint by any other means (see the case of ECtHR *Beer v. Austria*, Judgment of 6 February 2001, paragraph 19; see also the case of ECtHR *Andersena* v. Latvia, Judgment of 19 September 2019, paragraph 87). Similarly, the ECtHR found a violation of this principle where only one of the two key witnesses was allowed to testify (see *Dombo Beheer B.V. v. The Netherlands*, cited above, *paragraphs 34 and 35).*

106. The ECtHR also found a violation of the principle of "equality of arms" due to the position of the General Prosecutor in the proceedings before the Court of Audit, which, unlike the parties to the proceedings, the Prosecutor General was present at the hearing, was informed in advance of the opinion of the Judge Rapporteur, participated fully in the debates and had the opportunity to express his views orally without being challenged by the litigants, and this lack of balance was highlighted by the fact that the hearing was not public. This for the ECtHR raised the issue of imbalance between the parties to the proceedings (see case of ECHR *Martinie v. France*, Judgment of 12 April 2006, paragraph 50).

107. The ECtHR had also found a violation of the principle of "equality of arms" in the case of *Yvon v. France* when the Commissioner of the Government participated in the court proceedings to determine the amount of the expropriation, together with the expropriation authority against the other party whose property was subject to expropriation. The ECtHR found in this case that the expropriated party faced not only the expropriation authority but also the Government Commissioner, where the latter enjoyed significant advantages as regards access to documents in relation to the expropriated party. In addition, the Government Commissioner, who is simultaneously both an expert and a party to the proceedings, occupied a dominant position in the proceedings and wields considerable influence with regard to the court's assessment. In the ECtHR opinion, all this creates an imbalance *vis a vis* the expropriated party that is incompatible with the principle of "*equality of arms"*. (see the case of the ECtHR *Yvon v. France*, Judgment of 24 July 2003, paragraph 37).

108. In addition, the ECtHR in case *De Haesand Gijsels v. Belgium* found a violation of the principle of "equality of arms" when the opposing party was in a position or function which favored it *vis-vis-vis* the other party, because of the possibility that only one party has access to the relevant documents which were related to the specific case. So in the case *De Haesand Gijsels v. Belgium*, two journalists of Humo

magazine were fined by a civil court after in some published articles, journalists accused some judges of being biased in a case where they had decided that care for a couple's children should belong to one parent. In their lawsuits against the journalists, the judges also referred to the case file regarding the custody of the child which they themselves had handled, but the documents in the file were not accessible to journalists. Therefore, the journalists had complained to the ECtHR, *inter alia*, about the violation of the principle of "equality of arms" claiming that the published articles were based on documents which were accessible to judges but that the regular Belgian courts, despite the request of journalists, had not allowed them access, especially in the opinion of three (3) professors, with whom the journalists would prove their claims that in fact the judges were biased and had not handled the case regarding the custody of the child in the proper manner. The ECtHR, having considered the allegations of the Applicants who requested the Belgian courts access to the opinion of three (3) professors, concluded that the Belgian court rejecting the journalists'request for access to the file in which the judges in question, had placed journalists in substantially unfavorable position *vis a vis* the other party, in this case judges in their capacity as claimants. For these reasons the ECtHR found a violation of the principle of equality of arms guaranteed by Article 6 of the ECHR. (see the case of the ECtHR *De Haes and Gijsels v. Belgium*, Judgment of 24 February 1997, paragraphs 54 to 58*).*

109. However, the ECtHR emphasized that the parties' right to a fair trial, including the principle of "equality of arms", is not absolute. States enjoy a certain margin of appreciation in this area. However, it is for the ECtHR to determine in the last instance whether these principles have been complied with (see, *mutatis mutandis*, the ECtHR case *Regner v. Czech Republic*, Judgment of 19 September 2017, paragraph 147).

110. In this respect, the ECtHR, through its case law, has determined that an irregularity in the proceedings may, under certain conditions, be remedied at a later stage or at the same level (see the case of the ECtHR, *Helle v. Finland*, Judgment of 19 December 1997, paragraph 54) or, by a higher court (see the cases of the ECHR, *Schuler-Zgraggen v. Switzerland*, Judgment of 24 June 1993, paragraph 52; and, on the other hand, *Albert et Le Compte v. Belgium* Judgment of 10 February 1983, paragraph 36, and *Feldbrugge v. The Netherlands*, Judgment of 29 May 1986, paragraphs 45-46).

111. In the case *Helle v. Finland*, Mr. Helle had argued in his submission that he had been placed at a disadvantage for the fact that the Cathedral Chapter was asked on two occasions by the Supreme Administrative Court to give its opinion on the grounds of his appeals. The ECtHR stated that it did not agree with the statement of Mr. Helle because any possible prejudice that might have been caused to the outcome of his appeal was compensated by the fact that he was given a genuine opportunity by the Supreme Administrative Court to submit his comments on the content of the Cathedral Body's opinions. Mr. Helle used this opportunity on two occasions and in these circumstances the ECtHR found that Mr. Helle cannot claim that there was a violation of the "equality of arms" requirement inherent in the concept of a fair trial (see ECtHR case, *Helle v. Finland*, Judgment of 19 December 1997, paragraph 54).

112. In case *Schuler-Zgraggen v. Switzerland*, the ECtHR finds that the proceedings before the Appeals Board did not enable Mrs. Schuler-Zgraggen to have a complete, detailed picture of the particulars supplied to the Board. It considers, however, that the Federal Insurance Court remedied this shortcoming by requesting the Board to make all the documents available to the applicant - who was able, among other things, to make copies - and then forwarding the file to the applicant's lawyer. Therefore, the ECtHR, found that since, taken as a whole, the impugned proceedings were therefore fair, there has not been a breach of Article 6 paragraph 1 of the ECtHR (see case of the ECtHR, *Schuler-Zgraggen v. Switzerland*, Judgment of 24 June 1993, paragraph 52).

113. In contrast, in case *Albert et Le Compte v. Belgium*, the ECtHR found a violation of Article 6 paragraph 1 of the ECHR, on the grounds that the public nature of the cassation proceedings was not sufficient to remedy the defect found to exist at the disciplinary stage. The Court of Cassation does not consider the merits of the case, which means that many aspects of "disputes" (misunderstandings) related to "*civil rights and obligations*", including the examination of facts and the assessment of the proportionality between guilt and sanction, falls outside its jurisdiction (see the case of the ECtHR, *Albert et Le Compte v. Belgium,* Judgment of 10 February 1983, paragraph 36). In case *Feldbrugge v. The Netherlands*, the ECtHR found a violation due to the fact that Ms. Feldbrugge did not have the conditions for access to the two respective Boards, thus she could not challenge the merits of the decision of the President of the Board of Appeal. Consequently, the shortcoming found in this aspect of the proceedings before the court

officer could not be remedied at a later stage. *Feldbrugge v. The Netherlands*, Judgment of 29 May 1986, paragraphs 45-46).

114. Therefore, the ECtHR found in its well-established case-law that a defect at first instance may be remedied on appeal, as long as the appeal body has "full jurisdiction". According to the ECtHR, a complaint is made of alleged non-communication of documents, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and either to take the decision or to remit the case for a new decision by an impartial body (See the cases of the ECtHR, *M.S. v. Finland*, Judgment of 22 June 2005, paragraph 35; *Köksoy v. Turkey*, Judgment of 13 January 2021, paragraph 36; *Bacaksiz v. Turkey*, Judgment of 10 December 2019, paragraph 59).

ii) Application of the principles elaborated above regarding the allegation that the Applicant was denied a statement regarding the submission of the company "Dardafon" for the Specification of the Enforcement Proposal and additional documents and evidence

115. The Court recalls that the Applicant alleges that in his case the "principle of adversarial proceedings" and "equality of arms" were not respected, as he was denied a statement regarding the submission for the Specification of the Enforcement Proposal and additional documents, including an expertise which was not ordered by the courts, submitted by the company "Dardafon".

116. The Applicant alleges that he received the submission for the specification of the debt by the creditor on 6 July 2020, and the latter filed a response on 7 July 2020. Despite the fact that according to the Applicant, the Court submitted the specification of the debt and other documents, his statement regarding the submission was not accepted and reviewed by the Basic Court, because the latter had already decided on its case.

117. In this regard, the Court notes from the case file that the Basic Court rendered Decision PPP. No. 1486/19, on 6 July 202, according to the Applicant one day before the Applicant submitted his response to the Creditor's submission. The Court notes that the Basic Court notified the Applicant about the submission, but did not include its arguments in its decision. Regarding the Applicant's arguments, presented at this

stage, the Court recalls that the latter complained about the Creditor's submission both formally and materially. The Applicant complained that the Specification of the Enforcement Proposal was submitted 4 days late therefore, the Proposal would have to be declared out of time. The Applicant does not raise the latter before the Constitutional Court. Regarding the objection in the material aspect, the Applicant regarding the new value € 24,684,003.15, challenged it with the reasoning that (i) it does not appear in the final Decision of the Arbitration Tribunal of ICC 20990/MHM of 9 December 2016; (ii)it dDoes not appear in the Creditor's Enforcement Proposal of 15 July 2019; (iii) for this value the enforcement order P. No. 491/19 of 15 July 2019 was not issued; and (iv) for this value the debtor's objection was not filed.

118. The Court notes that the Basic Court in its decision-making by Decision PPP. No. 1486/19, by not reviewing the Applicant's arguments regarding the Specification of the Proposal for Enforcement as well as other documents submitted by the other party in this case is problematic, taking into account its case law and of the ECtHR as well as the legal provisions of the LCP, specifically Article 5.1 which stipulates that *"The court shall enable each party to make a statement on the claims and allegations submitted by the contentious party"* and Article 357.2 of the LCP which establishes that *"The opponent party should be given a chance to say its opinion regarding proposed expertise."*

119. In this respect, according to the principles established by the case law of the Court and the ECtHR, which have been clarified above, but also according to the legislation in force, the regular courts (i) must give the parties the opportunity and (ii) must conduct a proper review of submissions, arguments and evidence presented by the parties and assess, without prejudice, whether they are relevant and weighty to its decision.

120. However, the Court also notes that after receiving the Decision of the Basic Court, the Applicant filed appeal with the Court of Appeals, specifically raising the issue of not addressing the Applicant's position regarding the Debt Specification and other documents of the opposing party regarding which the Applicant was not given the opportunity to have these allegations handled by the Basic Court, as the Judgment of the Basic Court did not mention at all the fact that the Applicant submitted its position regarding the Debt Specification and other documents of the opposing party.

121. In this context, the Court, based on the case law of the ECtHR, also recalls that defects in the first instance can be remedied in the second instance (appeal) if the appellate institution has "full jurisdiction" regarding the issue. In this regard, the Court reiterates that when an appeal is filed concerning the non-communication of documents, the concept of "full jurisdiction" includes not only the fact that the court of appeals has the right to examine the appeal, but also whether it has the jurisdiction to dismiss the impugned decision and/or make its own decision on the case or remand the case for a new decision by an impartial body (see *mutatis mutandis* the case of the ECHR, *Köksoy v. Turkey*, cited above, paragraph 36; the case of *M.S v. Finland*, cited above, paragraph 35)

122. In case *Köksoy v. Turkey,* the ECtHR stated that the fact that the documentary evidence obtained by the Court of Cassation on its own initiative was not communicated to the applicants raises a problem. Following the appeal, the Court of Cassation quashed the first-instance court's decision on appeal, and remitted the case to the latter for re-examination. The applicants did not claim that the documents and information in question relied on by the Court of Cassation were unavailable to them after they learned about their contents in the Court of Cassation's decision. Their complaint in that respect is limited to the fact that their views had not been sought by the Court of Cassation prior to its decision on appeal. The ECtHR stated that in the remittal proceedings of the case, which differs from the present case as it has not been returned for reconsideration, the applicants had the opportunity to raise their objections to the Court of Cassation's decision. The ECtHR found that the effects of the procedural shortcoming in the appeal proceedings were remedied in the remittal stage in so far as the applicants were able to acquaint themselves with the documents and information in question after the case was remitted to the trial court for reconsideration and further by the fact that they were able to respond to them before the trial court during a hearing. Consequently, the ECtHR found that there had been no violation of Article 6 paragraph 1 because the procedural shortcoming during the Court of Cassation's appeal review did not affect the adversarial principle to such an extent as to render the proceedings as a whole unfair (See ECtHR case, *Köksoy v. Turkey*, cited above, paragraphs 37-39).

123. Therefore, based on the case law of the ECtHR, the Court will further assess whether the court reviewing the appeal, in this case the Court of Appeals, had full jurisdiction over the case, namely, whether it had

the opportunity to quash the impugned decision, or make its own decision on the case or remand the case for a new decision by an impartial body, as well as decide on all issues raised by the Applicant in response to the Specification of the Proposal for Enforcement, before the Basic Court.

124. In this regard, the Court notes that based on Article 17 of the LEP, in case the LEP does not regulate certain issues, the provisions of the contested procedure apply where it is specifically stated *"The provisions of the Law on Contested Procedure shall be accordingly are applied in the enforcement procedure, unless this law or any other law provides otherwise".*

125. In the present case, Article 77 of the LEP stipulates that the parties have the right to appeal against the decision on objection, while paragraph 2 of this article stipulates that the appeal against the first instance decision is submitted to the second instance court, in this case the Court of Appeals. Since Article 77 of the LEP does not specify further regarding the appeal, the Court based on Article 17 of the LEP, notes that the LCP as a law that applies appropriately stipulates in its article 195 that the decisions taken by the court of second instance , in the present case the Court of Appeals, are:

(i) to dismiss the complaint as delayed, incomplete or inadmissible;
(ii) to quash the impugned judgment and dismiss the claim;
(iii) to quash the impugned judgment and remand the case for retrial in the first instance court;
(iv) to reject the appeal as ungrounded and uphold the impugned judgment;
(v) to modify the judgment of the first instance.

126. Furthermore, the Court notes that: based on Article 181.1 of the LCP, the Judgment may be challenged in the Court of Appeals:
a) due to the violation of provisions of contestation procedures;
b) due to a wrong ascertainment or partial ascertainment of the factual state;
c) due to the wrong application of the material rights."

127. Therefore, having regard to the provision above, the Court of Appeals has jurisdiction to conduct a full judicial review of the decisions of the Basic Court on the enforcement matters, and this includes issues of

violation of substantive provisions; procedural provisions; erroneous and incomplete determination of facts; as well as has the possibility to quash the challenged decision and render a decision or remand the case for a new decision by an impartial body.

128. The Court therefore concludes that the Court of Appeals had full jurisdiction to examine all matters of fact and law relating to the dispute before it, including the Applicant's views regarding the Specification of the Proposal for Enforcement, and had jurisdiction to annul the decision of the Basic Court in all aspects, including the issues of fact and law. Therefore, the Court of Appeals qualifies as a "judicial body having full jurisdiction", within the meaning of Article 6, paragraph 1, of the ECHR and Article 31 of the Constitution.

129. In this context, the Court will further assess whether the Court of Appeals has assessed the Applicant's arguments regarding the Specification of the Enforcement Proposal and other additional documents submitted by the company "Dardafon" and its allegation that the Basic Court did not give it the opportunity to respond to the specification of the debt which raises the question of the principle of equality of arms.

130. The Court first refers to the Decision of the Court of Appeals, which, as to the essential violations of the contested procedure, stated that the Decision of the Basic Court *"does not contain essential violation of the provisions of the contested procedure from Article 182, paragraph 1 and 2 of the LCP, and that the factual situation has been correctly determined, so that its legality can be assessed, violations which the second instance court investigates ex officio pursuant to Article 194 of the LCP"*.

131. The Court of Appeals also noted that "*Taking into account the other appealing allegations which consist against the challenged decision, the court of second instance considers that these appealing allegations are ungrounded, because, we are not dealing with an essential violation of the provisions of [LEP] nor [LCP], which violations this court considers ex officio within the meaning of Article 194 of the LCP.[...]"*

132. Based on the reasoning of the Court of Appeals, the Court notes that the latter with regard to the allegations related to that the Basic Court in the Decision [PPP. No. 1486/19], denied the Applicant the legal right under the LCP to declare regarding the submission of the

company "Dardafon" for the Specification of the Enforcement Proposal and additional documents and evidence submitted (expertise and debit notes invoices) as, according to it, the Decision [PPP. No. 1486/19] of the Basic Court was ready one day before the Applicant submitted its response, the Court of Appeals did not provide any specific response to its decision. Although it had 'full jurisdiction' over the case before it, as set out above, it had not specifically considered the allegations filed in its response to the debt specification, including the issue whether the principle of "equality of arms" has been violated in this case.

133. While the Supreme Court, regarding the impossibility of the Applicant to make statement regarding the creditor's submission and the expertise, stated that this allegation is ungrounded. Therefore, taking into account the Applicant's specific allegation related to non-reasoning of the Basic Court's decision and violation of the principle of "equality of arms" and the "principle of adversarial proceedings" as a result of not dealing with this allegation, the latter did not give a specific answer, if this procedural flaw of the Basic Court and that of the Court of Appeals resulted in a substantial violation of the procedural provisions, including the principle of "equality of arms".

134. In the circumstances of the present case, the Court notes that the issues raised by the Applicant such as the allegation that the Basic Court in the Decision [PPP. No. 1486/19], denied the Applicant a legal right under Article 5 (1) and 357 (2) of the LCP to make a statement regarding the submission of the company "Dardafon" on specification of the proposal of enforcement and additional documents and evidence submitted (expertise and debit notes invoices) as, according to it, the Decision of the Basic Court [PPP. No. 1486/19] was ready one day before the Applicant submitted his response, the Court of Appeals did not provide any specific response to its decision. Therefore, the non-correction of this procedural flaw by the Court of Appeals raises important issues of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, which enshrines the principle of "equality of arms" as one of the basic principles of a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, having regard to the Applicant being denied the legal right under Articles 5 (1) and 357 (2) of the LCP- to declare regarding the submission of the company "Dardafon" for the specification of the enforcement proposal and additional documents and evidence submitted (expertise and invoices of debit notes), and this procedural flaw was not remedied by the Court of Appeals as neither the latter had specifically considered these allegations.

135. In this case the Applicant was placed in an unequal position in relation to the opposing party as the latter presented the Debt Specification and other supporting documents as essential issues in an enforcement procedure, as is the case here, as the monetary amount to be paid by the Applicant also depended on it, while the Applicant's response to the latter was not specifically considered by the Basic Court. The Court of Appeals did not specifically address or remedy this procedural shortcoming of the Basic Court, although this was among the main allegations of the Applicant before the Court of Appeals.

136. Also, the Supreme Court, despite the limited list of cases that the Public Prosecutor may raise before the Supreme Court by a request for protection of legality, pursuant to Article 247 of the LCP, the latter did not address this allegation of the Applicant for procedural violations, including Article 5 item 5.1 and Article 357, paragraph 2 of the LCP which stipulates that *"The opponent party should be given a chance to say its opinion regarding proposed expertise"* and in this respect this may violate the "principle of equality" of arms, guaranteed by Article 31 of the Constitution. Regarding the impossibility of the Applicant to make a statement on the debtor's submission and the expertise, the Supreme Court was satisfied with the reasoning that this allegation is ungrounded, because, among other things, *"neither by the submission nor by the alleged expertise has the content of the loan/request specified in the enforcement document been changed, which has previously passed the recognition procedure"*.

137. 1In this context, the Court reiterates that according to the principle of "equality of arms", it is inadmissible for a party to the proceedings to submit observations or comments before the regular courts, which are intended to influence the decision-making of the court, without the knowledge of the other party and without giving the other party the opportunity to respond to them. It is up to the party involved to the proceedings to then assess whether the remarks or comments submitted by the other party deserve a response. (see the case of the ECtHR *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 January 2011, paragraph 42; see also the case of the ECtHR *Guigue and SGEN-CFDT v. France*, Decision of 13 July 2000).

138. Therefore, in the present case, taking into account the reasons above, the Court considers that the Decision of the Supreme Court of Kosovo, and the Decision of the Court of Appeals, were rendered in violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because they failed to remedy the procedural shortcoming that raises the issue of

the principle of "equality of arms" with regard to the fact that the Basic Court in Decision [PPP. No. 1486/19] denied the Applicant the right to declare himself regarding the submission of the company "Dardafon" for the specification of the enforcement proposal and additional documents and evidence submitted (expertise which was not ordered by the courts) and debit notes invoices). This is because the Decision of the Basic Court [PPP. No. 1486/19] was ready one day before the Applicant submitted his response and for this he had not given any specific answer in its decision.

139. In this regard, in addition to other principles, importance is given to the appearance and sensitivity of the proper administration of justice. Therefore, given these procedural flaws and the importance of addressing the Applicant's substantive allegations, the Court finds that in the Applicant's case, due to this procedural flaw against the Applicant, the proceedings, viewed in its entirety, were not fair.

140. The Court also notes that this finding refers to the alleged constitutional violation. Thus, the Court confirms that the findings contained in this Judgment do not prejudge in any way the outcome of the proceedings in relation to the Applicant's case.

141. Given that the Court has just found a violation of the Applicant's right to a fair trial and the case needs to be reconsidered by the Court of Appeals, it is not necessary to address the Applicant's other allegations..

Request for interim measure

142. The Court recalls that the Applicant also requests the Court to render a decision imposing an interim measure in order to immediately suspend the implementation of the enforcement against the Applicant under the Enforcement Order [P. No. 491/19] of 15 July 2019 of the Private Enforcement Agent, and Decision [PPP. No. 1486/19] of 6 July 2020, of the Basic Court; Decision Ac. No. 3610/20 of the Court of Appeals of Kosovo of 8 October 2020; and Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021.

143. In this regard it argued that implementation of the enforcement would cause (i) irreparable harm to the Applicant; and (i) would infringe on state and national interests given the nature of Telekom's activity which, in the event of enforcement, would go bankrupt due to the extremely high value of the obligation.

144. Given that the Court declared the Referral admissible and found the violations specified in the enacting clause of this Judgment, this decision-making makes it further unnecessary to consider the request for an interim measure.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and pursuant to Rule 59 (1) of the Rules of Procedure, on 24 November 2021

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, by majority of votes, that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE INVALID, by majority of votes, Decision CML. No. 12/20 of the Supreme Court of Kosovo, of 20 January 2021 and Decision Ac. No. 3610/20 of the Court of Appeals of 8 October 2020;

IV. TO REMAND, by majority of votes, Decision Ac. No. 3610/20 of the Court of Appeals of 8 October 2020, for reconsideration in accordance with the Judgment of this Court;

V. TO ORDER the Court of Appeals to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 15 March 2022 about the measures taken to implement the Judgment of the Court;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO REJECT, unanimously, the request for interim measure;

VIII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20 (4) of the Law, to publish it in the Official Gazette;
IX. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Gresa Caka-Nimani

KO127/21, Applicant, Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo, Constitutional review of Decision No. 08-V-029 of the Assembly of the Republic of Kosovo, of 30 June 2021, for the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo

KO127/21, Judgment, of 9 December 2021, published on 22 December 2021

Keywords: *Institutional Referral, Independent Oversight Board for Civil Service, institutional independence, independence of members, oversight of the Assembly, dismissal, decision-making, immunity;*

In the circumstances of this case, the Court has assessed the constitutionality of the Decision [no. 08-V-029] of 30 June 2021, of the Assembly of the Republic of Kosovo, by which five (5) members of the Independent Oversight Board for the Civil Service of Kosovo have been dismissed. The Referral for constitutional review of this act has been submitted to the Court by eleven (11) deputies of the Assembly, based on the authorizations defined by paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution. In assessing the constitutionality of the challenged Decision of the Assembly, the Court unanimously decided that (i) the Referral is admissible; (ii) Decision [no. 08/V-029] of 30 June 2021 of the Assembly is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution; (iii) to repeal the abovementioned Decision; (iv) to repeal the Interim Measure determined by the Court Decision of 21 October 2021; and (v) to reject the request for a hearing.

The Court recalls that on 30 June 2021, based on the recommendation of the Assembly's Committee on Public Administration, the Assembly voted for the dismissal of five (5) members of the Independent Oversight Board. Challenging the constitutionality of this act, the Applicants alleged before the Court that the challenged Decision of the Assembly infringes the independence of the Board guaranteed by Article 101 [Civil Service] and Article 142 [Independent Agencies] of the Constitution, emphasizing that the Board, as an independent constitutional body, cannot be subject to interference by the Assembly and that for the collective dismissal of members of the Independent Oversight Board, none of the legal criteria set out by the Law on the Independent Oversight Board for the Civil Service of Kosovo have been met. The counter-arguments submitted to the Court by the respective deputy of the Parliamentary Group of Lëvizja Vetëvendosje!, in essence, emphasize that the Assembly in issuing the challenged Decision has acted in accordance with its oversight function, whilst the case raised before the Court does not involve constitutional matters, because the Constitution does not

determine the procedure for the election and dismissal of members of the Independent Oversight Board.

In assessing the relevant arguments and counter-arguments and the circumstances of the case, the Court (i) initially elaborated on the status of the Independent Oversight Board for the Civil Service and its members, with reference to the Constitution, applicable laws and in the case law of the Court; (ii) elaborated on the competence of the Assembly and the relevant restrictions on the exercise of the oversight function of the Independent Oversight Board; and finally (iii) applied these principles in assessing the constitutionality of the challenged Decision of the Assembly.

With regard to the institutional independence of the Independent Oversight Board, the Court, *inter alia*, noted that (i) the Independent Oversight Board is an institution established by Article 101 of the Constitution; (ii) the Constitution has defined to the Board the status of an *"independent"* institution in the exercise of its constitutional function, respectively, to *"ensure the respect of the rules and principles governing the civil service"*; (iii) based on the consolidated case law of the Court, it was determined that the Independent Oversight Board enjoys the prerogatives of a *"tribunal"* in terms of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the European Convention on Human Rights and that the decisions of the Independent Oversight Board are *"final, binding and enforceable"*; and (iv) the control of the legality of the decisions of the Independent Oversight Board is done by the initiation of an administrative dispute in the competent court, consequently, they are subject to the control of the judicial power.

With regard to the independence of the members of the Independent Oversight Board, the Court noted that (i) the independence of the Independent Oversight Board in exercising its constitutional function to *"ensure the respect of the rules and principles governing the civil service"* also implies the independence of its members in decision-making; and (ii) for the same purpose, the Assembly itself, by the Law on the Independent Oversight Board for the Civil Service, has determined the immunity of members of the Independent Oversight Board from prosecution, civil lawsuit or dismissal *"regarding the decision-making within the constitutional and legal functions of the Board"*; respectively, for the point of views expressed, the manner of voting or the decisions taken during their work as members of the Independent Oversight Board.

With regard to the competence of the Assembly to oversee the Independent Oversight Board, the Court noted that (i) the competence of the Assembly to oversee the work of the Government and other public institutions, which, in accordance with the Constitution and laws, report to the Assembly is defined

in paragraph 9 of Article 65 [Competencies of the Assembly] of the Constitution; and (ii) in the case of the Independent Oversight Board, this competence of the Assembly is further detailed in the Law on the Independent Oversight Board for the Civil Service and includes, *inter alia*, also the authorization of the Assembly to terminate the mandate of the members of the Board in the circumstances set forth in Article 15 (Termination of the Board's member mandate) of this Law. However, the Court further noted that, the exercise of the competence to terminate the mandate precludes the termination of the same due to the *"decision-making"* of the members of the Independent Oversight Board, because such circumstances, (i) would infringe the institutional independence of the Board and its members, as it is defined by paragraph 2 of Article 101 of the Constitution; and (ii) would be contrary to the Assembly's own determination that Board members enjoy immunity from dismissal for decision-making, as defined by the relevant provisions of the Law on the Independent Oversight Board for the Civil Service.

In assessing the constitutionality of the challenged Decision of the Assembly, the Court recalled that the same is referred to items 1.3 and 1.1 of paragraph 1 of Article 15 of the Law on the Independent Oversight Board for the Civil Service. The first, namely item 1.3 of Article 15 of this Law, defines the possibility of termination of the mandate *"in case of exercising duties that are not in accordance with his function"*. However, the challenged decision of the Assembly does not contain any fact/reasoning as to how five (5) members of the Independent Oversight Board collectively may have exercised their duties of member of Independent Oversight Board in incompatibility with their function. Whereas, the second, respectively item 1.1 of Article 15 of the Law on the Independent Oversight Board for the Civil Service, determines the possibility of termination of the mandate for *"violation of this law's provisions"*. In the context of the latter, the challenged decision of the Assembly states that, *"it is assessed that the Board has acted in violation of Article 12 of the Law on the IOBCSK, because it has not implemented the applicable laws during decision-making."* The Court emphasized that the challenged decision of the Assembly does not refer to any fact/reasoning in support of the alleged violation of this provision by five (5) members of the Independent Oversight Board collectively, except for emphasizing the *"decision-making"* of the members of the Independent Oversight Board. This moreover results from the fact that the challenged Decision was preceded by a series of actions and questions of the relevant Committee of the Assembly addressed to the Independent Oversight Board regarding the decision-making in respective cases.

In this context, the Court reiterated that (i) the Assembly has the constitutional competence to oversee the Independent Oversight Board, including the possibility of terminating the mandate of its members in the

cases provided for in the Law on the Independent Board for the Civil Service; but that (ii) members of the Independent Oversight Board may not be dismissed solely due to their *"decision-making"* because pertinent to the same, they have constitutional and legal independence as well as immunity from dismissal, as defined in the law itself adopted by the Assembly. Moreover, based on the same law, the legality of the decisions of the Independent Oversight Board is subject to the control of the judicial power and not the legislative one.

In this context, the Court noted that the Assembly by dismissing (5) five members of the Independent Oversight Board collectively, and without elaborating on any fact based on law, but only on the grounds that the Independent Oversight Board *"has not implemented the applicable laws during decision-making"*, respectively due to their decision-making in respective cases, for which the members of the Independent Oversight Board enjoy independence and immunity from dismissal and which decision-making, moreover, is subject to the control of the judicial power and not the legislative one, has exceeded the limits of the competence to oversee the work of public institutions, defined by paragraph 9 of Article 65 of the Constitution, in violation of the guarantees regarding the independence of the Independent Oversight Board in exercising its function defined by paragraph 2 of Article 101 of the Constitution. In this context, the Court noted that in exercising its constitutional competence to oversee the Independent Oversight Board, the Assembly also has the obligation to preserve the independence of the Board, which itself has attributed to it by the adoption of the Constitution and the Law on the Independent Oversight Board for the Civil Service.

Consequently and finally, the Court found that Decision [no. 08/V-029] of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo, is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution of the Republic of Kosovo.

JUDGMENT

in

case no. KO127/21

Applicant

Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decision no. 08-V-029, of the Assembly of the Republic of Kosovo of 30 June 2021, on dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo

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 is submitted by eleven (11) deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), namely: Abelard Tahiri, Eliza Hoxha, Ganimete Musliu, Blerta Deliu Kodra, Hajdar Beqa, Fadil Nura, Ardian Kastrati, Elmi Reçica, Floretë Zejnullahu, Ariana Musliu Shoshi, Bekim Haxhiu (hereinafter: the Applicants or the Applicant deputies).

2. The Applicants are represented in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), by the legal representative Faton Fetahu from Prishtina.

Challenged act

3. The Applicants challenge the Decision [No. 08-V-029] of 30 June 2021 of the Assembly of the Republic of Kosovo (hereinafter: the

challenged Decision) on dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: Independent Board).

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Decision, which according to the Applicant's allegations, is not in accordance with Article 101 [Civil Service] and Article 142 [Independent Agencies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

5. The Applicants state that based on Article 43 (Deadline) of the Law, the challenged Decision is subject to *ex-lege* suspensive effect. In this context, the Applicants also refer to (i) paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which stipulates that while the proceeding is pending before the Court, the Court may temporarily suspend the contested action or law, until the Court renders a decision, if it finds that the application of the challenged action or law would result in unrecoverable damages; and (ii) Article 27 (Interim Measures) of the Law, which stipulates that the Court may, *ex officio* or at the request of a party, impose interim measures in a case that is a subject of a proceedings, if such measures are necessary to avoid risks or unrecoverable damages, or if such an interim measures is in the public interest.

Legal basis

6. The Referral is based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties], of the Constitution, Articles 22 [Processing Referrals], 42 [Accuracy of the Referral] and 43 [Deadline] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law), as well as Rules 32 [Filing of Referrals and Replies], 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 7 July 2021, the Applicants submitted their Referral to the Court, whereby, they challenged the Decision of the Assembly on dismissal of (5) members of the Independent Board.

8. On 14 July 2021, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Radomir Laban and Remzije Istrefi-Peci (members).

9. On 16 July 2021, the Court notified the Secretary General of the Assembly about the registration of the Referral and requested that by 30 July 2021, to submit to the Court all relevant documents in relation to the challenged decision.

10. On 16 July 2021, the Applicants were notified about the registration of the Referral. On the same date, the Court notified about the registration of the Referral: the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), who was requested to submit a copy of the Referral to all deputies of the Assembly; the Ombudsperson and the Independent Board. The Court notified the interested parties mentioned above that their comments, if any, must be submitted to the Court, within fifteen (15) days, namely until 30 July 2021, at the e-mail address of the Court or by personal submission.

11. On the same date, the Court notified the President of the Republic of Kosovo (hereinafter: the President) and the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister) about the registration of the Referral.

12. On 21 July 2021, the Secretary of the Assembly submitted to the Court the complete file regarding the challenged Decision.

13. On 30 July 2021, the deputy Doarsa Kica-Xhelili, a deputy from the Parliamentary Group VETËVENDOSJE!, submitted comments regarding the Referral KO127/21.

14. On 3 August 2021, the Court notified the Applicants about the receipt of comments from the deputy Kica-Xhelili, and offered them the opportunity to submit their comments by 13 August 2021. The Applicants did not submit additional comments.

15. On 15 September 2021, the Court requested from the Independent Board additional documents, namely (i) a copy of the resignation of Mr. Eshref Shabani from the position of Chairperson of the Independent Board; and (ii) any other relevant documents of 8 September 2021, namely of the extraordinary meeting of this institution, related to the issue of resignation.

16. On 17 September 2021, the Independent Board attached (i) Decision of the Independent Board no. 7/2021 of 8 June 2021; (ii) A copy of the Minutes of the extraordinary meeting of the Board of 8 June 2021, in which the only item on the agenda was the consideration of the request of the Chairperson of the Independent Board to resign from this position; and (iii) the decision of the Assembly on the dismissal of 5 (five) members of the Independent Board.

17. On 6 October 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously requested to postpone the case for additional supplementation, while regarding the assessment of the interim measure, receiving information from the Assembly regarding the actions taken after the adoption of the challenged Decision.

18. On 12 October 2021, the Court requested from the Assembly additional information regarding the actions taken after the challenged Decision.

19. On 13 October 2021, the Assembly responded with the information requested by the Court, notifying the Court regarding the announcement of vacancies, namely the Decision of the Presidency of the Assembly to announce the vacancy for five (5) members of the Board from 23 August 2021; and the Decision of the Presidency of the Assembly for the re-announcement of the vacancy for five (5) members of the Board from the Albanian community and for two (2) members from of non-majority communities from 6 October 2021.

20. On 20 October 2021, the Review Panel considered the proposal of the Judge Rapporteur regarding the decision on the interim measure and unanimously requested the further supplementation of this proposal.

21. On 21 October 2021, the Judge Rapporteur recommended that the Court the approval of the interim measure. On the same date, the Court, unanimously, imposed the interim measure with respect to the challenged Decision until 15 December 2021.

22. On 24 November 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously requested the postponment of the case for further supplementation.

23. On 9 December 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral. On the same date, the Court voted and unanimously decided that Decision [no. 08-V-029] of 30 June 2021 of

the Assembly of the Republic of Kosovo is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution.

Summary of facts

24. On 8 October 2020, after three rounds of secret voting, the Assembly, by Decision [No. 07-V-063], decided to elect five (5) members of the Independent Board. This decision was based on Article 65 [Competencies of the Assembly] and 142 [Independent Agencies] of the Constitution, Articles 8 (Composition of the Board), 10 (Appointment procedures of the members of the Board) and 11 (Term of office for members of Board) of Law no. 06/L-048 on Independent Oversight Board for Civil Service of Kosovo (hereinafter: the Law on the IOBCSK), as well as Articles 51 and 84 of the Rules of Procedure of the Assembly of the Republic of Kosovo.

25. On 31 March 2021, based on paragraph 1 of Article 28 (Annual report of the Board) of the Law on the IOBCSK, the Independent Board submitted to the Assembly its Annual Work Report for 2020.

26. On 28 April 2021, the President of the Assembly: (i) forwarded the Annual Report of the Independent Board to the deputies of the Assembly, and (ii) charged the Committee on Public Administration, Local Government, Media and Regional Development (hereinafter: the Committee of the Assembly for Public Administration) and the Committee on Budget, labor and Transfers, to review this report and submit the respective reports and recommendations to the Assembly.

27. On 1 June 2021, the meeting of the Assembly Committee on Public Administration was held, where with six (6) votes against, it was voted against the approval of the Annual Report of the Independent Board for 2020.

28. On 2 and 3 June 2021, the Assembly Committee on Public Administration through the Coordination Office of the Committee requested the following information from the Independent Board: (i) data on all pending cases before the Independent Board decided on the case that was discussed in the Committee (case of N.K.), including but not limited to recording the number of previous cases before deciding on this case; and (ii) the accurate number of all pending cases, the exact filing dates of each complaint/claim/submission that was pending and submitted before case of N.K., which however was not addressed before this case. This Committee also requested the following information: (i) have all the cases that were identified as pending in the previous question were handled within forty-five (45)

days; and (ii) to confirm whether all of these cases did not need to be granted additional time to dal with but that the period in question or what was left of that period in the case of transfer was sufficient. Upon submission of this clarification, the Coordination Office of the Committee requested that (i) the date of the decision be sent to the cases that were identified as pending in the preliminary question; and (ii) attach the complete case file of N.K..

29. On 7 June 2021, the Chairman of the Board, Eshref Shabani, responded to the above request by stating that: (i) The Independent Board provided under paragraph 2 of Article 101 of the Constitution, which stipulates that "*An independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo"*; (ii) provided information on the manner of allocation of cases to the members of the Independent Board, as well as the placement of cases in the panels composed of three members that were decided by the IOBCSK Decision [No. 2] of 14 October 2020, as defined by paragraph 3 of Article 16 (Review of the Complaints) of the Law on IOBCSK; and (iii) provided information regarding the case of complainant N.K., stating that the latter's complaint was received on 7 February 2019 and was the 77th complaint received in 2019. He further clarified how this complaint had been allocated to him and that the case was handled based on the order of 2019 cases assigned to him, therefore no priority was given to handling the case, also explaining how the extension of the decision-making deadline for another ten (10) days was proposed, based on paragraph 2 of Article 17 (Decision-making deadline in the Board) of the Law on the IOBCSK.

30. On 8 June 2021, the Independent Board held an extraordinary meeting and rendered Decision no. 7/2021, whereby it is emphasized that Mr. Eshref Shabani has irrevocably resigned from the position of the Chairman of the Independent Board by which it is decided that Mr. Arben Mehmeti chairs the Board until the election of a new chairman. According to the comments of the Independent Board of 15 September 2021, the minutes remained unapproved by the Board because the members were dismissed. The Court notes that based on the case file, Mr. Shabani had resigned from the position of Chairman of the Independent Board, not from the position of member.

31. On 10 June 2021, the Independent Board notified the Assembly Committee on Public Administration that: (i) Eshref Shabani had resigned from the position of Chairman of the Board; and that (ii) at the extraordinary meeting of the Independent Board of 8 June 2021, his resignation was approved and pursuant to the provisions of Rules

of Procedure 01/2018 on the IOBCSK, it was decided that until the election of a new Chairman, the Chairman should be Arben Mehmeti.

32. On 15 June 2021, the Assembly Committee on Public Administration issued the Recommendation [08/314/Ra-11]: *"1. Not to approve the Annual Report of the Independent Oversight Board for the Civil Service of Kosovo, for 2020,"* on the grounds that the Report does not fulfill its legal obligations for reporting and recommends to the Assembly its non-approval.

33. On the same date, the Assembly Committee on Public Administration, by six (6) votes "*for*" and four (4) "*against*" by Recommendation [08/315/Do-213], recommended to the Assembly to dismiss five (5) members of the Independent Board. In the reasoning of the recommendation it was stated that the initiation of the dismissal procedure was done according to paragraph 1, items 1 and 3 of Article 15 (Termination of the Board's member mandate) of the Law on IOBCSK as follows, namely (i) for violation the provisions of the Law on the IOBCSK; and (ii) in cases of performance of duties incompatible with his function. Furthermore, the relevant recommendation stated that: *"it was assessed that the Board acted in violation of Article 12 of the Law on the IOBCSK, because it did not implement the applicable laws during the decision-making"*.

34. On 17 June 2021, the Independent Board addressed the Assembly by a submission expressing the concern of the members of the Board regarding the initiative to dismiss the members of the IOBCSK on the grounds that: (i) the Independent Board is an independent institution as defined in Article 101 of the Constitution; (ii) members of the Independent Board in relation to decision-making within the constitutional and legal functions of the Board enjoy immunity from prosecution, civil suit or dismissal; (iii) emphasize that the Assembly Committee on Public Administration does not have the necessary expertise and knowledge to review concrete cases as the members of this Committee have done; and (iv) in accordance with Law no. 03/L-176 on Parliamentary Investigation, to initiate the establishment of the Parliamentary Investigation Committee and this Committee to deal with the detailed analysis of the evaluation of the work of the members of the Independent Board.

35. On 30 June 2021, the plenary session of the Assembly voted on the recommendation of the Assembly Committee on Public Administration for the dismissal of five (5) members of the Independent Board. The result of the voting was as follows: sixty two (62) votes "*for*" the dismissal of the members of the Independent

Board, three (3) votes "*against*" and eleven (11) "*abstentions*". Therefore, the Assembly, by Decision [No. 08-V-029], voted to dismiss five (5) members of the IOBCSK.

36. On 19 July 2021, the Presidency of the Assembly by Decision [no. 08-V-049] decided that from 23 August 2021, to announce the vacancy for five (5) members of the Independent Board, from the Albanian community. While, within the period of twenty one (21) days, until 13 September 2021, no sufficient number of candidates had applied, the Presidency of the Assembly, on 29 September 2021, by Decision [No. 08-V-065], re-announced the public vacancy for five (5) members of the Independent Board from the Albanian community and for two (2) members from the non-majority communities. The vacancy was announced on 6 October 2021 and remained open until 25 October 2021.

Applicant's allegations

37. The Applicants allege that the challenged decision of the Assembly, in substantive and procedural aspect, is contrary to Articles 101 [Civil Service] and 142 [Independent Agencies] of the Constitution.

(i) *Allegations regarding the admissibility of the Referral*

38. The Applicants state that based on Judgment KO73/16, and in particular paragraphs 43 and 49 thereof, the challenged Decision raises constitutional issues because it falls within the background of the norms set out in Articles 101 [Civil Service] and 142 [Independent Agencies] of the Constitution.

39. The Applicants argue that the Constitutional Court should interpret the constitutional norms whenever a case is addressed to the Court by the institutions mandated for referral and in the present case, according to the Applicants, in order to protect the civil service system, represented by the Board *"members whose system, indirectly by the challenged decision, their legal security provided by the Independent Oversight Board for the Kosovo Civil Service has been violated, which has an independent responsibility from the Government to protect the principles of public service and the rights of the servants (employees) of this system"*. Consequently, the Applicants request that the challenged Decision be reviewed on its merits.

(ii) Allegations of violation of Article 101 and 142 of the Constitution

40. The Applicants initially state that paragraph 2 of Article 101 of the Constitution establishes the Independent Board in the function of an independent institution which must ensure that the standards of merit, professionalism, policy neutrality and of a civil character of the civil service are reflected in the work and activity of the state civil service. Therefore, the Applicants state that the Assembly, the Government and other political bodies are stripped of their competencies to interfere with the maintenance of the professional integrity of the civil service, because this competence has been transferred to an independent institution.

41. The Applicants further refer to several Judgments of the Court, arguing that (i) the decisions of the Independent Board are final and, as such, constitute a valid executive title; and (ii) proceedings before this quasi-court (*quasi-judicial*) body must comply with the rules on fair and impartial trial, including the procedure for the execution of decisions of the Independent Board.

42. The Applicants also refer to Article 142 of the Constitution, stating that it regulates the form and manner of establishment of Independent Agencies and sets out four basic principles that should accompany the establishment and functioning of Independent Agencies, namelt highlight the arguments as in the following: (i) The Assembly of Kosovo is the constitutional authority which retains the right to establish Independent Agencies, and for their establishment, Article 142 of the Constitution stipulates that the Assembly must issue relevant laws, which govern, *inter alia*, the functioning, and their legal scope; (ii) The Constitution stipulates that Independent Agencies must be guaranteed that the exercise of their legal function is exercised without influence and independently of any instruction or interference of other state authorities, including the body that has established it; (iii) to guarantee the independence of Independent Agencies, Article 142 of the Constitution stipulates that they must possess their own separate budget, and administer it independently; and (iv) the constitutional principle which should accompany the establishment of Independent Agencies, relates to the constitutional guarantee that other state bodies shall preserve their independence, cooperate and respond to the requests of the Independent Agencies in the exercise of their constitutional and legal powers.

43. The Applicants also refer to the Law on the IOBCSK, stating that: (i) by the challenged Decision in the plenary session by a majority of votes it was decided to dismiss five (5) members of the Independent Board, consequently terminating their constitutional mandate; (ii) have been

collectively dismissed, despite the indisputable fact that the members of this institution are elected individually in a procedure clearly defined in the Assembly, and that according to the Applicants, in this case, there has been a violation of the procedure followed regarding their dismissal.

44. The Applicants further refer to Article 15 (Termination of the Board's member mandate) of the Law on the IOBCSK, stating that the decision to dismiss (terminate) the mandate of the members of the Independent Board is unconstitutional because in the case of dismissal none of the requirements of this article are met. The Applicants also refer to the reasoning given by the challenged Decision on *"violation of the provisions of the law on the Board; in case of performance of duties in incompatibility of his function"* and the reasoning in the Recommendation where it reads *"(...) it was assessed that the Board acted in violation of Article 12 of the Law on the IOBCSK, because it did not implement the applicable laws during the decision-making"*. For these reasons, in essence the Applicants emphasize that the expression "*violation of the provisions of the law on the Board",* consumes all, and in fact the reasons of Article 15 of the IOBCSK Law have not been met.

45. Furthermore, the Applicants allege that there is no fact presented in the recommendation of the Parliamentary Committee on Public Administration: (i) that proves that the members of the Independent Board have violated the Law on IOBCSK; and (ii) which proves that the dismissed members of the Independent Board have carried out activities that constitute a conflict of interest, as defined in Article 15 of the Law on the IOBCSK; (iii) proving that the dismissed members of the Independent Board have performed their duties not in accordance with their function, as defined in Article 15 of the Law on the IOBCSK; and (iv) proving that the dismissed members of the Independent Board have been absent from work for more than five (5) days for reasons that are not foreseen by the law, as established in Article 15 of the Law on the IOBCSK.

46. The Applicants allege that the members of the Independent Board and the Independent Board itself as an independent constitutional body have been subjected to pressure and interference by the Parliamentary Committee on Public Administration, which according to the Applicants demonstrates the tendency to interfere with the independence of this institution. The Applicants also refer to an official e-mail sent on 2 June 2021, to the official address of the Independent Board, through which additional information was requested for a specific case that was in the process of being resolved

by the Independent Board, which a day later the full file of the relevant case was requested.

47. The Applicants state that even according to the Judgment in case KO171/18, the decisive article in the circumstances of the present case was assessed in full compliance with the Constitution, namely paragraph 3 of Article 11 (Term of office for members of Board) of the IOBCSK Law who states that: *"3. Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge"*.

48. Referring to the Judgment of the Court in case KO171/18 and especially paragraph 247, the Applicants also emphasize paragraph 3 of Article 11 (Term of office for members of Board) of the Law on the IOBCSK, emphasizing the issue of immunity and citing that *"[...] The purpose of immunity is for the members of the Board to be free to exercise their functions independently and without fear of repercussions for the performance of their functions. [...]"*. The Applicants state that this Judgment already has the status of a legal norm. Furthermore, as a comparative example, they cite the decision of the Constitutional Court of Hungary 29/2011, of 7 April 2011, arguing that the civil servants cannot be dismissed without providing a detailed reasoning regarding such a thing.

49. Finally, the Applicants request the Court to (i) declare the Referral admissible; and (ii) declare the challenged Decision in violation of the Constitution, and consequently, to declare the latter invalid.

(iii) Request for interim measure

50. The Applicants, with regard to the interim measure, request that the Court accepts Article 43 of the Law, thus referring to the suspensive effect *ex-lege* of the implementation of the law or the decision of the Assembly. The Applicants also refer to paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which stipulates that until the proceedings is completed before the Court, it may temporarily suspend the contested action or law until the Court decides, if it considers that the application of the contested action or law may cause irreparable damage. The Applicants also emphasize Article 27 (Interim Measures) of the Law.

51. Consequently, the Applicants: (i) request the Court to inform the parties involved that the challenged Decision is suspended *ex-lege* and cannot be enforced until the final decision of the Court; and (ii) consider that it is not necessary to expressly seek the suspension of

the application of the challenged act, since it should by law be subject to the suspensive effect, since it has been challenged before this Court, pursuant to paragraph 5 of Article 113 of the Constitution.

(iv) Request for a hearing

52. The Applicants regarding the review of the case, based on Article 42 of the Rules of Procedure, request the holding of a hearing regarding the challenged Decision on dismissal of five (5) members of the IOBCSK.

53. In this regard, the Applicants state that it is in the public interest to hold this public hearing, because the content of the challenged Decision violates the constitutional order and specific constitutional provisions related to the legal security of state and public administration employees and the independence of an independent institution at the constitutional level.

Summary of Comments of Deputy Doarsa Kica Xhelili

54. Deputy Kica-Xhelili in the comments submitted regarding the Referrla KO127/21, states that Article 101 of the Constitution in regarding the Independent Board, defines only the general role of the Independent board in the context of regulating the civil service in Kosovo, but does not talk about the composition or manner of election and dismissal of its members.

55. Deputy Kica-Xhelili also emphasizes that Article 142 of the Constitution, speaks in a general way about Independent Agencies. Reference to the fact that these agencies perform their functions *"independently of any other body or authority in the Republic of Kosovo*", according to the comments, does not expand the scope of this article in the interpretation of the discretion of the Assembly in assessing the legal requirements for the appointment and dismissal of members of the Independent Board. Therefore, according to deputy Kica-Xhelili, it is a completely deviant argument to say that the exercise of the function of the discretionary role of the deputies of the Assembly of the Republic of Kosovo, in relation to the legal interpretation of the provisions of the Law on IOBCSK, falls in some way in the spectrum of the constitutional rights. Finally, she emphasizes that the reference to Articles 101 and 142 of the Constitution does not comply with the provisions which set out the criteria for the dismissal of members of the Independent Board or Independent Agencies.

56. In the following, deputy Kica-Xhelili states that the Constitutional Court deals with the unconstitutional aspect of the Applicant's allegations, and not with the unlawfulness that is the duty of the regular courts. Respectively, according to the deputy, the legality of a decision, including an administrative decision of a public body, is a subject matter jurisdiction of the regular courts. Therefore, she emphasizes that in case the members of the Independent Board assess the decision of the Assembly as unlawful, they would have to go to the regular courts to ascertain the alleged illegality of the Decision. Meanwhile, the deputies of the Assembly have no legitimacy to address the regular courts on behalf of the already former members of the IOBCSK, through administrative conflict.

57. In addition, the deputy also refers to the case of Court KI79/19, Resolution on Inadmissibility of 10 August 2020, where in paragraph 56, it is stated as follows: "*(...) the Court has consistently reiterated that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). (...) In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law. (See, ECtHR case Garcia Ruiz v. Spain, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court: KI70/11, Applicant: Faik Hima, Magbule Hima and Besart Hima, Resolution on Inadmissibility of 16 December 2011, paragraph 29; KI06/17, Applicant: L.G. and five others, Resolution on Inadmissibility of 20 December 2017, paragraph 37; and KI122/16, Applicant Riza Dembogaj, Resolution on Inadmissibility of 19 June 2018, paragraph 57).*"

58. Through the comments submitted to the Court, the deputy also states that the Court has a duty to make a final interpretation of the provisions of the Constitution. Whereas, jurisdiction based on paragraph 5 of Article 113 of the Constitution implies the constitutional review of any law or decision. According to the allegation, the decisions of the Assembly may be subject to constitutional review in procedural and substantive terms, but only within the meaning of constitutionality.

59. In addition, according to the relevant comments, the Applicants do not clearly or intentionally confuse the legislative process and the oversight function of the Assembly, because they deliberately do not specify (accurate the Referral) whether they challenge the procedure or the content of the act. According to her, in this way they avoid arguing, because in order to assess an act of the Assembly in the

constitutional aspect, the Constitution would have to explicitly define at least what is the procedure for the election of members of the Independent Board, and even the procedure for dismissal. In the present case, the composition, functioning, responsibilities, manner of election and manner of dismissal are determined by special law. Thus, the decision of the Assembly to dismiss the members of the Independent Board, although an act of a public body, is not subject to constitutional review.

60. Finally, the deputy states that the Applicants' Referral is not related to a constitutional right and therefore cannot be a subject of review in the Constitutional Court.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 101
[Civil Service]

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

[...]

Article 142
[Independent Agencies]

1. Independent agencies of the Republic of Kosovo are institutions established by the Assembly based on the respective laws that regulate their establishment, operation and competencies. Independent agencies exercise their functions independently from any other body or authority in the Republic of Kosovo.
2. Independent agencies have their own budget that shall be administered independently in accordance with the law.
3. Every organ, institution or other entity exercising legal authority in the Republic of Kosovo is bound to cooperate with and respond to the requests of the independent agencies during

the exercise of their legal competencies in a manner provided by law.

LAW No. 06/L-048 ON INDEPENDENT OVERSIGHT BOARD FOR CIVIL SERVICE OF KOSOVO

Article 4
Independent Oversight Board of the Civil Service of Kosovo

[...]
2. The Board reports to the Assembly of Kosovo Republic for its work at least once a year and whenever requested by the Assembly.

Article 6
Functions of the Board

1. For the supervision of the implementation of rules and principles of the Civil Service legislation, the Board shall have the following functions:
1.1. . reviews and determines appeals filed by civil servants and candidates for admission to the civil service;
1.2. supervises the selection procedure and determines whether the appointments of civil servants of high executive and management level have been conducted in accordance with the rules and principles of civil service legislation; (repealed by Judgment of the Court KO171/18)
1.3. monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation

Article 11
Term of office for members of Board

1. Members of the Board shall be appointed for a term of office of seven (7) years, without the possibility of reappointment for another additional term of office.

2. During the term of office, the member of the Board is not entitled to exercise any other state function, be a member of a political party nor participate in political activities.

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

Article 12
Duties of the members of the Board

1. The members of the Board are obliged to exercise the function of the member impartially and to decide in accordance with the Constitution and the law.

2. . Members of the Board are obliged to preserve the authority and image of the Board.

3. Each member shall be obliged to participate in the work and decision-making process of the Board, and to carry out other duties set forth by law, Rules of Procedure and other sub-legal acts of the Board.

Article 15
Termination of the Board's member mandate

1. Kosovo Assembly may discharge a member of the Board through the majority of votes on the following grounds:

1.1. violation of this law's provisions;

1.2. when engaged in actions, that present a conflict of interest and despite the warning from the competent body does not eliminate the conflict of interest pursuant to the respective law;

1.3. in case of exercising duties that are not in accordance with his function;

1.4. in case he is absent without a reason from work for longer than (5) days for reasons that are not foreseen by the law.

2. Proposal for discharge of the Board member, can be done by:

2.1. majority of the Board members;

2.2. relevant Committee of the Assembly for Public Administration.

Article 16
Review of the Complaints

3. On behalf of the Board, complaints are reviewed and decided upon by the College composed out of three (3) members, which is determined with the decision of the Board.

Article 17
Decision-making deadline in the Board

1. Within forty-five days (45) from the receipt of your complaint, the Board issues a decision by justifying the legal and factual basis of the decision taken.

2. In exclusion from paragraph 1. of this Article, in cases when the subject is of a specific nature, Chairperson of the Board has the right to extend the decision-making deadline for another ten (10) working days.

Admissibility of the Referral

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

62. Initially, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

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

63. In addition, the Court also refers to paragraph 5 of Article 113 of the Constitution, which provides:

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

64. The Court first recalls that the Applicants challenge the constitutionality of the challenged Decision in relation to (i) the procedure followed and (ii) its content, as set out in paragraph 5 of Article 113 of the Constitution.

65. In this regard, the Court notes that the Referral was submitted by eleven (11) deputies of the Assembly, in accordance with paragraph 5 of Article 113 of the Constitution. Therefore, the Applicants are authorized party.

66. In addition, the Court takes into account Article 42 [Accuracy of the Referral] of the Law, which establishes:

> *"1. In a referral made pursuant to Article 113, Paragraph 5 of the Constitution the following information shall, inter alia, be submitted:*
>
> *1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*
>
> *1.2. provisions of the Constitution or other act or legislation relevant to this referral; and*
>
> *1.3. presentation of evidence that supports the contest".*

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

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

and the authorization of the person representing them before the Court".

68. The Court notes that the Applicants: (i) entered the names of the deputies and their signatures and submitted the power of attorney for the person representing them before the Court; (ii) specified the challenged decision, and submitted a copy; (iii) referred to specific constitutional provisions, which they claim that the challenged Decision is not in compliance with; and (iv) presented their evidence in support of the respective allegations. Therefore, the Court considers that the criteria set out in Article 42 of the Law and further specified in Rule 74 of the Rules of Procedure have been met.

69. The Court further assesses whether the Referral was filed within the time limit *"of eight (8) days from the date of adoption"*, as established in paragraph 5 of Article 113 of the Constitution. In this regard, the Court notes that the challenged Decision was adopted on 30 June 2021, while the Referral was filed with the Court on 7 July 2021. Therefore, the Court finds that the Referral was filed within the time limit set by the Constitution..

70. Based on the above, the Court finds that the Applicants have met the admissibility criteria set out in the Constitution and further specified by law and set out in the Rules of Procedure. The Court also considers that the Referral raises important constitutional issues related to the institutional independence of the Independent Board, as an independent institution under the Constitution, which ensures compliance with the rules and principles governing the Civil Service. Therefore, the Referral must be declared admissible and its merits assessed.

Merits of the Referral

71. The Court initially reiterates that the circumstances of the present case relate to Decision [No. 08-V-029] of 30 June 2021 of the Assembly, by which, based on the Recommendation of the Assembly Committee on Public Administration, five (5) members of the Independent Council were collectively dismissed.

72. In this regard, the Court recalls that the Applicants allege that the challenged Decision of the Assembly in substantive and procedural terms is contrary to Articles 101 [Civil Service] and 142 [Independent Agencies] of the Constitution.

73. With regard to their Referral, the Court recalls that the Applicants, in essence, in relation to their constitutional allegations refer to: (i) Article 101 of the Constitution, noting that the latter places the Independent Board in the function of an independent institution, in which the Assembly, the Government and other political bodies are stripped of their powers to interfere with the maintenance of the professional and civil integrity of the civil service; (ii) Article 142 of the Constitution, stating that the latter regulates the form and manner of establishment of Independent Agencies, in essence categorizing the Independent Board in this part, also emphasizing that agencies exercise their legal functions without influence and independently of any instruction or interference of other state bodies, including the body that established it.

74. The Court further recalls that in elaborating on the alleged constitutional violations as above, the Applicants: (i) refer to the Law on the IOBCSK stating that in this case there has been a violation of the procedure followed for the dismissal of members of the Independent Board because they have been collectively dismissed even though they were individually elected to their position; (ii) refer to Article 15 (Termination of the Board's member mandate) of the Law on the IOBCSK, stating that the decision to dismiss/terminate the mandate of members of the Independent Board is unconstitutional because in the case of dismissal any of the conditions of this article have not been and that there is no fact presented in the recommendation claiming that the members of the Independent Board have violated the law; (iii) allege that the members of the Board and the Board itself as an independent constitutional body have been subjected to pressure and interference by the Assembly Committee on Public Administration, which according to the Applicants proves the tendency to interfere with the independence of this institution; and (iv) referring to the Judgment of the Court in case KO171/18, in particular paragraph 247 thereof, and paragraph 3 of Article 11 (Term of office for members of Board) of the IOBCSK Law, highlight the issue of immunity from dismissal for decision-making.

75. Having regard to the Applicants' allegations and the circumstances of the case, the Court notes that it is important to first elaborate on the status of the Independent Board and its independence as an institution based on the Constitution, applicable laws and the Judgments of the Court; as well as the competence of the Assembly to oversee the work of the Independent Board, then proceeding to assess the constitutionality of the challenged decision to dismiss five (5) members of the Independent Board. Consequently, the Court will further elaborate on the general principles regarding (i) the

applicability of Article 142 of the Constitution; (ii) the status and independence of the Independent Board and its members, based on paragraph 2 of Article 101 of the Constitution; to proceed further with (iii) the competence of the Assembly to oversee the Independent Board; and will ultimately apply these principles in (iv) assessing the constitutionality of the challenged Decision.

I. As to the applicability of Article 142 [Independent Agencies] of the Constitution

76. The Court initially recalls that the Applicants refer*, inter alia*, to Article 142 of the Constitution, in support of their arguments regarding the violation of the independence of the Independent Board.

77. In this regard, the Court first recalls its Judgment KO171/18, in which it assessed the constitutionality of the Law on the IOBCSK, a law which regulates the functions, competencies, organization and functioning of the Independent Board (see, case of the Court KO171/18, Applicant *The Ombudsperson,* Constitutional review of articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3), 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo, Judgment of 25 April 2019). By this Judgment, the Court noted, *inter alia*, that Chapter XII [Independent Institutions] of the Constitution specifically regulates the following independent institutions: (i) the Ombudsperson (Articles 132-135 of the Constitution); (ii) the Auditor General of Kosovo (Articles 136-138 of the Constitution); (iii) the Central Election Commission (Article 139 of the Constitution); (iv) the Central Bank of Kosovo (Article 140 of the Constitution), and (v) the Independent Media Commission (Article 141 of the Constitution). Also, Article 142 [Independent Agencies] of the Constitution, within the same chapter, determines the possibility of establishing Independent Agencies by the Assembly, based on the relevant laws, which regulate their establishment, functioning and competencies. According to this article, these agencies, (i) perform their functions independently from any other body or authority in the Republic of Kosovo; and (ii) any other body, institution or authority exercising legitimate power in the Republic of Kosovo is obliged to cooperate and respond to the requests of independent agencies in the exercise of their legal powers, in accordance with the relevant law.

78. In addition, the Constitution has established several other institutions, *inter alia*, the Constitutional Court in its Chapter VIII, as well as the Independent Oversight Board for the Civil Service in its

Article 101. In its Judgment in KO171/18, the Court found that the Independent Board could not be categorized as an independent constitutional institution under Chapter XII of the Constitution nor as an independent agency under Article 142 of the Constitution, because (i) the Constitution has expressly defined in its Chapter XII, the independent constitutional institutions, defining also their role and status; and (ii) in Chapter XII, Article 142 of the Constitution, has established the constitutional basis for the establishment of independent agencies, defining that they are institutions established by the Assembly, based on the relevant laws which regulate their establishment, functioning and competencies (see case KO171/18, cited above, paragraphs 155-159).

79. The Court notes that while the establishment of independent agencies under Article 142 of the Constitution is a competence of the Assembly, and which by the relevant laws regulates their establishment, functioning and competencies, the Assembly does not have the same competence with respect to institutions established by the constitutional provisions, including the Independent Board, because its establishment, functioning and competencies, insofar as they are regulated by the Constitution, cannot be changed by the Assembly, except through constitutional amendments.

80. Taking into account the above, the Court reiterates that unlike the Independent Agencies which, based on Article 142 of the Constitution, are established by the Assembly, the Independent Board is an institution which is established by Article 101 of the Constitution, and as such the institutional independence attributed to it goes beyond what is guaranteed to Independent Agencies by Article 142 of the Constitution. Therefore, the Court will examine the Applicants' allegations within the scope of Article 101 of the Constitution.

II. Regarding the status and independence of the Independent Board and its members, based on paragraph 2 of Article 101 of the Constitution

81. The Court recalls that paragraph 2 of Article 101 provides that *"An independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo"*.

82. Based on this constitutional norm, the Court will initially address the independence of the Independent Board based on (i) general principles regarding the Board under the Constitution, the IOBCSK

Law and the case law of the Court; and (ii) the individual independence of the members of the Independent Board.

(i) General principles regarding the independence of the Board under the Constitution and the case law of the Court

83. The Court first notes that the Independent Board is an institution established by the Constitution. The latter has attributed to the Independent Board (i) the designation of the "*independent*" institution in relation to (ii) the exercise of its constitutional function, namely, "*ensuring the respect of the rules and principles governing the civil service*". More specifically, paragraph 2 of Article 101 of the Constitution, (i) precisely defines the designation of the Oversight Board as "*independent*"; and (ii) attributed this "*independence*" for the purpose of "*ensuring the respect of the rules and principles governing the civil service*". Consequently, the purpose of the relevant constitutional provision reflects the institutional independence of the Independent Board in order to exercise its function of "*ensuring the respect of the principles and rules governing the civil service*". The independent exercise of this function is ensured through the independent decision-making of its members of the Independent Board.

84. The Court also notes that the same independence was conferred on the Independent Board by the Law on the IOBCSK. Article 6 (Functions of the Board) of the Law on the IOBCSK, *inter alia*, stipulates that: "*For the supervision of the implementation of rules and principles of the Civil Service legislation, the Board shall have the following functions: 1.1. reviews and determines appeals filed by civil servants and candidates for admission to the civil service; 1.3. monitors public administration institutions employing civil servants regarding the implementation of the rules and principles of civil service legislation"*. Therefore, the independent function of the Independent Board with respect to "*ensuring the respect of the rules and principles governing the civil service"* is exercised through its competence, namely its members, for taking decisions regarding the complaints of civil servants and candidates for admission to the civil service.

85. In this context, and through a number of its decisions, the Court has addressed the nature of the decisions of the Independent Board, emphasizing through its case law, including its case KI33/16, that the Independent Board enjoys the prerogatives of a court within the meaning of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR. Through this case law, the Court stated that a *"tribunal"* is categorized in the

substantive sense of the term by its judicial function, that is to say determining of matters within its competence on the basis of the rules of law and following the proceedings conducted in a prescribed manner [...]", stating that the decisions of the Board are "*final, binding and enforceable*" and that the Independent Board, from the point of view of Article 31 of the Constitution and Article 6 of the ECHR, is independent as, *inter alia,* (a) it is independent of the executive and (b) has full jurisdiction to decide on the issues before them as required by Article 31 of the Constitution and Article 6 of the ECHR (See, *mutatis mutandis*, case KI33/16, *Minire Zeka*, cited above, paragraph 59; whereas regarding the independence of an "*independent tribunal*" see case K012/17, Applicant *The Ombudsperson*, Judgment of the Constitutional Court of 9 May 2017, paragraph 75; and case KO171/18, cited above, paragraph 163).

86. In addition, the Court in its case-law has stated that the Independent Board is regarded as a "*quasi-judicial*" institution, namely as a tribunal regarding the civil service (the name "tribunal" is widely used in the ECtHR discourse). As such it enjoys the prerogatives of a court precisely because of the independence of the executive, and as an institution having full jurisdiction and issuing binding decisions in relation to the dispute between civil servants or civil servants or the candidates on one hand, and institutions employing civil servants on the other. (see, case of the Court KO171/18, cited above, paragraph 165).

87. Certainly the legality of the decisions of the Independent Board is further subject to the control of the judiciary, through the initiation of an administrative dispute in the competent court, within the conditions and deadlines set by the provisions of the Law on Administrative Conflict, as set out in paragraph 1 of Article 22 (Initiation of the administration conflict) of the Law on IOBCSK. Therefore, the control, namely the assessment of the legality of the decisions of the Independent Board, is the competence of the judiciary.

88. Having regard to the above, namely the constitutional, legal provisions, and the case law of the Court, as regards the independence of the Independent Board in the exercise of its functions and the nature of the decisions rendered by the latter, the Court will further elaborate on the relevant principles, related to the independence of the members of the Independent Board.

(ii) Individual independence of the members of the Independent Board

89. The Court reiterates that the Independent Board is an institution established by the Constitution and to which the latter has determined (i) the designation of an "*independent*" institution in relation to (ii) the exercise of its constitutional function, namely, "*ensuring the respect of the rules and principles governing the civil service*". Ensuring compliance with these rules and principles is realized through the decision-making of the members of the Independent Board. As a result of this function that the Constitution has attributed to the Independent Board, through its case law, the Court has emphasized (i) the qualification of the Board as a "*quasi-judicial*" institution, namely as a tribunal regarding the resolution of disputes arising from the civil service; and (ii) the fact that the decisions of the Independent Board are "*final, binding and enforceable*". Of course, the constitutional independence of the Independent Board in relation to its constitutional function in "*ensuring the respect of the rules and principles governing the civil service*" also includes the independence of the members of the Independent Board in relation to their decision-making.

90. In the context of this independence, the Assembly, through the adoption of the Law on the IOBCSK, has granted the members of the Independent Board immunity in respect of their decision-making. More precisely, paragraph 3 of Article 11 (Term of office for members of Board) of the Law on IOBCSK, establishes that "*Regarding the decision-making within the constitutional and legal functions of the Board, the Chairperson and members of the Board enjoy immunity from prosecution, civil lawsuit or discharge*". This provision was also assessed by the Court by Judgment in case KO171/18, and after reviewing the relevant court practices but also the relevant reports of the Venice Commission, it was assessed *"in accordance with the Constitution"*.

91. Certainly, based on the same Judgment, the functional immunity guaranteed to members of the Independent Board under the Law on hte IOBCSK is limited and does not include actions beyond their scope as members of the Independent Board, including if they are accused of criminal offenses that are not simply related with the fact that they have exercised their functions in relation to the views expressed, the manner of voting or the decisions taken during their work as members of the Independent Board. They also have no immunity from arrest. (see the case of Court KO171/18, cited above, paragraph 244). The Court notes that the purpose of the immunity is that the members of the Board are free to exercise their functions with independence and without fear of the consequences for the performance of their

functions, with emphasis on decision-making (see case of the Court KO171/18, cited above, paragraph 247).

92. Furthermore, the individual independence of the members of the Independent Board in terms of decision-making includes the expression of this independence not only in the face of external influences that the members of the Independent Board may have, but also in the face of influences from the body which has appointed them to the respective positions, namely the Assembly. The Court recalls that such independence, the Constitution has attributed to independent agencies, which are in fact established by the Assembly itself by Article 142 of the Constitution. The Court emphasizes that this independence includes the intention that the members of the respective agencies be free to exercise their functions without fear of consequences for the performance of their constitutional and legal functions.

93. The Court further notes that the Law on the IOBCSK, namely Article 15 (Termination of the Board's member mandate), sets out the cases of termination of the mandate of a member of the Independent Board by the Assembly on the proposal of the relevant Committee Assembly on public administration or a majority of the members of the Board, limited to the following reasons: (i) for violation of the provisions of the Law on the IOBCSK; (ii) when it carries out an activity that creates a conflict of interest and, despite a warning from the competent body, does not eliminate the conflict of interest under the relevant law; (iii) in cases of performance of duties inconsistent with its function; and (iv) in case of unjustified absence from work for more than five (5) days for reasons not provided by law.

94. However, having regard to the wording of (i) paragraph 2 of Article 101 of the Constitution; (ii) the case law of the Court and as explained above; and (iii) the joint reading of Article 15 and paragraph 3 of Article 11 of the Law on the IOBCSK, namely the possibility of termination of the mandate of a member of the Independent Board by the Assembly and the immunity the latter has determined for dismissal regarding the decision-making within the constitutional and legal functions of the Independent Board, the Court notes that the member of the Board cannot be dismissed for reasons of decision-making, namely the manner of voting during the review of concrete cases. The legality of such decision-making in fact and as explained above, belongs to the judiciary, through the procedure of the administrative conlict as established in Article 22 of the Law on the IOBCSK.

III. Regarding the competence of the Assembly to oversee the Independent Board

95. The competence of the Assembly to oversee the work of the Government and other public institutions, which, in accordance with the Constitution and laws, report to the Assembly, is defined in paragraph 9 of Article 65 [Competencies of the Assembly] of the Constitution. In the case of the Independent Board, this competence of the Assembly is further detailed through the Law on the IOBCSK. More precisely, by (i) Article 4 (Independent Oversight Board for the Civil Service of Kosovo) and Article 28 (Annual report of the Board), according to which the obligation of the Independent Board to report on its work to the Assembly is determined, at least once a year, and whenever required by the Assembly and related procedures; (ii) paragraph 1 of Article 8 (Composition of the Board) and Article 10 (Appointment procedures of the members of the Board), which define the competence of the Assembly to appoint the members of the Independent Board and the relevant procedure; (iii) Article 15 (Termination of the Board's member mandate), which sets out the legal grounds on which the term of office of a member of the Independent Board may be terminated and the procedure to be followed; and (iv) Article 27 (Funding of the Board), which sets out the budgetary independence of the Independent Board, but also its obligation to notify the Assembly of contributions received from donors. Furthermore, the Court notes that the Assembly itself, by the Law on the IOBCSK, namely Articles 23 (Procedure in case of non-implementation of the Board decision) and 24 (Administrative sanctions for non-implementation of the Board decision), has emphasized the importance of implementation of the decisions of the Independent Board, defining the procedure to be followed in case one is not implemented, the relevant sanctions and the obligation of the Independent Board to notify the Assembly in such cases.

96. Based on these constitutional and legal norms, the Court first emphasizes that the authority of the Assembly to oversee the Independent Board based on paragraph 9 of Article 65 of the Constitution is indisputable. The mechanisms of this oversight are further defined in the Law on the IOBCSK and it is materialized through parliamentary bodies such as standing committees, functional committees and *ad hoc* committees, which according to paragraph 1 of Article 77 [Committees] of the Constitution, the Assembly appoints them, which in this case, turns out to be the Assembly Committee on Public Administration.

97. In this context, the Court also recalls that the Venice Commission has also dealt with the oversight role of the Assembly, in particular the work of the Committees and in its Opinion, has emphasized that permanent committees should exercise efficient control in their area of competency, which should not be restricted to the examination of reports submitted by the State bodies and officials, but should also include a more pro-active scrutiny of the actions of the executive and of the independent agencies (see, Opinion no. 845/2016 of the Venice Commission entitled "Parameters on the Relationship between the Parliamentary Majority and the Opposition in Democracy", CDL-AD (2019) 015 of 24 June 2019, paragraph 92).

98. The Court therefore notes that the competence of oversight of the Independent Board by the Assembly is not limited to simple periodic reporting, but it can also decide on the dismissal of certain members of the Independent Board, pursuant to Article 15 (Termination of the Board's member mandate) of the Law on the IOBCSK, which stipulates that the the right to make the proposal for dismissal of a member of the Independent Board has the majority of members of the Independent Board or the relevant Committee on Public Administration, and determines that the Assembly may dismiss the member of the Independent Board by a majority of votes for the following reasons: (i) for violation of the provisions of the Law on the IOBCSK, as defined in point 1.1 of paragraph 1 of Article 15; (ii) when it carries out an activity that creates a conflict of interest and, despite the warning from the competent body, does not eliminate the conflict of interest under the relevant law, as defined in point 1.2 of paragraph 1 of Article 15; (iii) in cases of exercising its duties inconsistent with its function, as defined in point 1.3 of paragraph 1 of Article 15; and (iv) is absent without reason from work for more than five (5) days for reasons that are not provided by law, as defined in point 1.4 of paragraph 1 of Article 15 of the Law on the IOBCSK.

99. However, the exercise of the competence of oversight by the Assembly, as defined in paragraph 9 of Article 65 of the Constitution, is limited by the relevant relation to paragraph 2 of Article 101 of the Constitution in terms of the independence of the Independent Board in exercising its constitutional function, while the exercise of the power to dismiss members of the Independent Board by the Assembly, disputable in the circumstances of the present case, is also limited by the relationship between (i) paragraph 2 of Article 101 of the Constitution and the Law on the IOBCSK; and (ii) Article 15 of the Law on the IOBCSK, which defines the possibility of termination of the mandate, and paragraph 3 of Article 11 of the Law on the IOBCSK,

which establishes immunity from dismissal with regard to the decision-making of the members of the Independent Board.

100. The Court recalls that in the circumstances of the present case, the Recommendation of the Assembly Committee on Public Administration for the dismissal of the members of the Independent Board and consequently the Decision of the Assembly on the dismissal of the latter, is based on points 1.1. and 1.3 of paragraph 1 of Article 15 (Termination of the Board's member mandate) of the Law on the IOBCSK. Whereas, the Law on the IOBCSK defines the competence of the Assembly to terminate the mandate of members of the Independent Board in cases and under the conditions provided by this law, the Court, based on the principles elaborated above, should assess whether the manner of exercising such competence of the Assembly, may have resulted in (i) exceeding the powers set forth in paragraph 9 of Article 65 of the Constitution; and (ii) breach of the guarantees set forth in paragraph 2 of Article 101 of the Constitution.

Application of the above principles in the present case

101. The Court first recalls that the Applicants, *inter alia*, and in the context of the challenged Decision, state that based on paragraph 2 of Article 101 of the Constitution, the Board is an independent body and the only one competent to maintain the professional integrity of the civil service, and that by the challenged Decision, the Assembly has interfered in an unconstitutional manner with the independence of the function of the Independent Board. Furthermore, they also point out that based on the reasoning of the challenged Decision, there is no evidence presented: (i) that proves that the members of the Independent Board have violated the IOBCSK Law; (ii) proving that the dismissed members of the Independent Board have carried out activities which give rise to a conflict of interest; (iii) proving that the dismissed members of the Independent Board have performed their duties in a manner inconsistent with their function; or (iv) proving that the dismissed members of the Independent Board were absent from work for more than five (5) days for reasons not provided by law, as provided by Article 15 of the Law on the IOBCSK. The Court recalls the arguments of deputy Xhelili-Kica, who states that the Applicants are not clear about the legislative process and the oversight function of the Assembly, because in order to assess an act of the Assembly in the constitutional aspect, the Constitution would have to explicitly define at least what is the procedure for electing members of the Independent Board, and even the procedure for dismissal.

102. In the context of these allegations, the Court has already noted that (i) the independence of the Independent Board is defined by paragraph 2 of Article 101 of the Constitution, in the sense of its constitutional function to "*ensure the respect of the rules and principles governing the civil service*"; (ii) the constitutional function of "*ensuring the respect of the rules and principles governing the civil service*", is realized through the independent decision-making of the members of the Independent Board, namely the independence of their individual function; (iii) based on the consolidated case law of the Court, the Independent Board is defined as a "*quasi-judicial*" institution and that its decisions are "*final, binding and enforceable*", a qualification attributed to it by the Assembly itself, among others, through the Law on the IOBCSK, including Articles 23 and 24 thereof; (iv) the Assembly based on paragraph 9 of Article 65 of the Constitution and based on the provisions of the Law on the IOBCSK, has the competence to oversee the Independent Board, through the mechanisms set out in the above law, including the power to terminate the mandate of members of the Independent Board; and (v) the competence of the Assembly to oversee the Independent Board and its members shall be exercised in accordance with the institutional guarantees of the Independent Board set forth in paragraph 2 of Article 101 of the Constitution and the relevant provisions of the Law on IOBCSK.

103. In assessing whether, in the circumstances of the present case, the exercise of the oversight power of the Assembly, as defined in paragraph 9 of Article 65 of the Constitution, has exceeded the relevant powers in violation of the institutional guarantees of the Independent Board, as set out in paragraph 2 of Article 101 of the Constitution, the Court recalls that by the challenged Decision, five (5) members of the Independent Board were collectively dismissed. The relevant recommendation of the Committee on Public Administration, which preceded the challenged Decision, reasoned as follows:

> *[...] The recommendation for initiating the dismissal of the members of the Independent Oversight Board for the Civil Service is made according to Article 15, paragraph 1, point 1 and 3, as follows:*
>
> *1.1 for violation of the provisions of the law on the IOBCSK;*
> *1.3 in cases of performance of duties that are incompatible with its function;*

> *The Committee in its meeting held on 01.06.2021, reviewed the annual work report of the IOBCSK, and recommended to the Assembly its non-approval.*
> *At the meeting held on 15.06.2021, the violations of the members of the [Board] were discussed. In this case, it was assessed that the Board acted in violation of Article 12 of the Law on the IOBCSK, because it did not implement the applicable laws during the decision-making [...]".*

104. The Court recalls that on the basis of this Recommendation, the Assembly has issued a Decision dismissing the members of the Independent Board. This Decision of the Assembly contains two points. First, it provides that "*five (5) members of the Independent Oversight Board for the Civil Service of Kosovo are dismissed*", listing five (5) respective names. Whereas, the second, simply defines that "*The decision is effective on the day of approval*".

105. 106. Considering that the challenged Decision of the Assembly does not contain any additional clarification regarding the dismissal of five (5) members of the Independent Board, the Court, referring to the content of the Recommendation of the Assembly Committee on Public Administration, notes that the members of the Independent Board were dismissed collectively, on the grounds that (i) they have violated the provisions of the Law on the IOBCSK, as established in point 1.1 of paragraph 1 of Article 15 thereof; and (ii) have performed tasks inconsistent with their function, as defined in point 1.3 of paragraph 1 of Article 15 thereof. The relevant Recommendation further states that "*it was assessed that the Board acted in violation of Article 12 of the Law on the IOBCSK, because it did not implement the applicable laws during the decision-making.*"

106. In the following, the Court will analyze the challenged Decision of the Assembly on the collective dismissal of five (5) members of the Independent Board, referring to the legal basis on which it was issued, starting with (i) point 1.3 of paragraph 1 of Article 15 of the Law on IOBCSK; to proceed with (ii) point 1.1 of paragraph 1 of Article 15 of the Law on the IOBCSK.

107. With regard to the reasoning of the Assembly, namely the reasoning contained in the Recommendation of the Assembly Committee on Public Administration, the Court notes that point 1.3 of paragraph 1 of Article 15 of the Law on the IOBCSK determines the possibility of termination of the mandate "*in cases of performance of duties incompatible with its function*". Cases of incompatibility of the function of a member of the Independent Board are explicitly provided

in the Law on the IOBCSK, namely in paragraph 2 of Article 11 thereof, and which stipulates that "*the member of the Board is not entitled to exercise any other state, function, be a member of a political party nor participate in political activities*". The Recommendation, namely, the challenged Decision of the Assembly, does not contain (i) any reference to paragraph 2 of Article 11 of the Law on the IOBCSK; and (ii) no facts or justifications as to how five (5) members of the Independent Board may have exercised the duties of a member of the Independent Board in a manner inconsistent with their function, or may have exercised any other state function, may have exercised the function of a member of a political party or may have participated in political activities.

108. Whereas, regarding the reasoning of the Assembly, namely the reasoning embedded in the Recommendation of the Assembly Committee on Public Administration, the Court notes that point 1.1 of paragraph 1 of Article 15 of the Law on the IOBCSK determines the possibility of termination of the mandate "for violation of provisions of this law ". The Recommendation, namely the challenged Decision, does not contain any fact or justification on how five (5) members of the Independent Board may have exercised the duties of a member of the Independent Board "in violation of the provisions of this law".

109. The Court notes, however, that the Recommendation of the Assembly Committee on Public Administration, which resulted in the challenged Decision of the Assembly, states that "*it was assessed that the Board acted in violation of Article 12 of the Law on IOBCSK, because it did not implement the applicable laws during the decision-making.*" In this regard, the Court refers to the content of Article 12 of the Law on the IOBCSK, which sets out the duties of the members of the Independent Board, as follows: (i) to exercise the function of member impartially and to decide in accordance with the Constitution and the law; (ii) preserve the authority and image of the Independent Board; and that (iii) each member is obliged to participate in the work and decision-making process of the Independent Board, as well as to perform other duties assigned by law, by the Rules of Procedure and other sub-legal acts of the Independent Board. The Court notes that the abovementioned Recommendation on the basis of which the challenged Decision of the Assembly was rendered, does not refer to any fact or reasoning in support of the alleged violation of this provision by five (5) members of the Independent Board collectively.

110. Furthermore, the Court notes that the content of Article 12 of the Law on IOBCSK merely establishes the obligation of members of the Independent Board to (i) exercise the function of member impartially

and to decide in accordance with the Constitution; and the law while preserving the authority and image of the Board; (ii) each member has a duty to participate in the work and decision-making process of the Independent Board; and (iii) each member has the duty to perform other tasks assigned by law, by the rules of procedure and other sub-legal acts of the Independent Board. The only reasoning of the Recommendation that has resulted in the challenged Decision of the Assembly, in terms of "*violation of the provisions of this law*", as defined in point 1.1 of paragraph 1 of Article 15, is that five (5) members of the Independent Board collectively "*have not implemented the applicable laws in decision-making*". Considering that the challenged Recommendation/Decision of the Assembly does not contain any additional facts and justifications regarding the violation of the provisions of the law, in addition to the reference to the "*decision-making*" of the members of the Independent Board, namely the allegation of non-implementation of *"applicable laws during decision-making*", it turns out that five (5) members of the Independent Board have been dismissed regarding their decision-making in the exercise of the function to "*ensure respect of the rules and principles governing the civil service*", as provided by paragraph 2 of Article 101 of the Constitution.

111. Beyond the content of the challenged Recommendation/Decision, according to which the members of the Independent Board have been dismissed for "*decision-making*", the Court also recalls that the actions of the Assembly Committee on Public Administration, through specific questions in specific cases and the files, which preceded the challenged Decision, consist of a control of the work of the Independent Board in their role as decision-makers in the cases submitted to it.

112. More specifically, the above-mentioned Recommendation of the Assembly Committee on Public Administration for the dismissal of the members of the Independent Board continued after (i) non-approval of the annual report of the Independent Board; (ii) questions posed by the deputies of the Assembly at the session of the Parliamentary Committee on Public Administration regarding the performance of the Board; and (iii) communication through the Secretariat of the Assembly Committee on Public Administration, requesting additional information and access to specific case files of the Independent Board. In this context, the Court recalls that the Assembly Committee on Public Administration raised specific questions regarding decision-making of the members of the Independent Board and specifically regarding: (i) all pending cases before the Independent Board decided on the case discussed in the Committee (the case of N.K.), including

but not limited to the number of preliminary cases before deciding on this case; and (ii) the accurate number of all pending cases, the exact filing date of each complaint/claim/submission that was pending and submitted before the N.K. case, which however has not been handled before this case. This Committee also requested the following information: (i) whether all cases that were identified as pending in the preliminary question were dealt with within forty-five (45) days, and to confirm if all of these the cases did not need to be given additional time for treatment, but the deadline in question or what was left of this deadline in case of transfer was sufficient; and on the occasion of sending this clarification, the Coordination Office of the Committee also requested that (ii) the date of decision-making be sent to the cases that were identified as pending in the preliminary question; and (iii) attach the complete case file of N.K..

113. In the context of the above, the Board recalls the general principles within the meaning of paragraph 2 of Article 101 of the Constitution and that based on the latter, the Independent Board is an independent body, which must ensure compliance with the rules and principles of civil service, the observance of which he makes through decision-making in the cases submitted to it, and which implies the individual independence of the members of the Independent Board in reviewing concrete cases.

114. In addition, the Court recalls that (i) the members of the Independent Board enjoy independence in their decision-making in "*ensuring the respecy of the rules and principles governing the civil service*", as defined in paragraph 2 of Article 101 of the Constitution; (ii) this independence is further established through the case law of the Court in case KO171/18 and the legal provisions, namely paragraph 3 of Article 11 of the Law on the IOBCSK, which attributes immunity to members of the Independent Board in relation to decision-making within the constitutional and legal functions of the Independent Board, from prosecution, civil suit or dismissal, which enables them to be free to exercise their functions independently and without fear of consequences for the exercise of their functions in relation to "*the views expressed, the manner of voting or the decisions taken during their work*"; (iii) as long as the Assembly has the constitutional authority to oversee the Independent Board, including the possibility of terminating the mandate of its members in the cases set forth in the Law on IOBCSK, members of the Independent Board may not be dismissed solely for decision-making because the latter enjoy immunity from dismissal, as defined in the law itself adopted by the Assembly. Moreover, based on the same law, the legality of the

decisions of the Independent Board is subject to the control of the judicial power and not the legislative power.

115. The Court, based on the independence of the Independent Board, the nature of the decisions taken by the Independent Board and the functional immunity enjoyed by the members of the Independent Board, considers that they cannot be held accountable for the manner of voting or the decisions taken during their work, because this would infringe on their independence in exercising their competencies as members of the Independent Board, as guaranteed by the principles embodied in paragraph 2 of Article 101 of the Constitution.

116. The Court recalls that a member of the Independent Board cannot be controlled by the Assembly for the rationality of decision-making as they are protected by the principle of independence of decision-making of the Independent Board, which is related to "*ensuring respect for the principles and rules of civil service*" in accordance with paragraph 2 of Article 101 of the Constitution, and protected through immunity from dismissal in accordance with paragraph 3 of Article 11 of the Law on the IOBCSK.

117. It is the duty of the Assembly to oversee, but also to preserve the independence of the Independent Board, as provided for in the Constitution and the Law on the IOBCSK. This means, among other things, not only the duty of selecting members through an open, transparent and merit-based process, but also the eventual termination of the respective mandate on an individual basis, arguing precisely the facts and reasons for such a proposal, based on those circumstances for which the law allows the termination of the mandate, and not certain expectations or interventions of the legislator for the decisions that the member of the Independent Board took or should have taken. The Court reiterates that the decision-making of the members of the Independent Board in concrete cases can be challenged by the dissatisfied party, which claims that the decision of the Independent Board is not lawful, initiating administrative conflict in the competent court, within the time limit set by the provisions of Law on Administrative Conflicts as stipulated by paragraph 1 of Article 22 of the Law on IOBCSK.

118. Therefore, the Court finds that the Assembly, by dismissing the members of the Independent Board pursuant to paragraph 1, points 1.1. and 1.3. of Article 15 of the Law on the IOBCSK, without the inclusion in the Recommendation of the relevant Committee and the challenged Decision of the Assembly, of any fact and based on law, regarding the dismissal of five (5) members of the Independent Board

collectively, but only on the grounds that the Independent Board "*has not implemented the applicable laws in decision-making*", namely because of their decision-making in concrete cases, for which the members of the Independent Board enjoy immunity from dismissal, as defined in paragraph 3 of Article 11 of the Law on the IOBCSK and which decision-making, moreover, is subject to the assessment of legality by the judiciary in the procedure of administrative conflict, as provided by Article 22 of the Law on the IOBCSK, has exceeded the limits of the competence of overseeing the work of public institutions, defined by paragraph 9 of Article 65 of the Constitution in violation of guarantees regarding the independence of the Independent Board in exercising its function foreseen in paragraph 2 of Article 101 of the Constitution.

119. Consequently and finally, the Court finds that Decision [no. 08/V-029] of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo, is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution of the Republic of Kosovo. Therefore, the Court concludes that Decision [No. 07-V-063] of the Assembly on the election of five (5) members of the Independent Board, of 8 October 2020, remains in force.

Request for interim measure

120. The Court recalls that the Applicants also request the Court to accept Article 43 of the Law, thus referring to the *ex-lege* suspensive effect of the implementation of the law or the decision of the Assembly. The Applicants, in this context, (i) request the Court to inform the parties involved that the challenged Decision is *ex-lege* suspended and is not submitted for enforcement until the final decision of the Court; and (ii) consider that it is not necessary to expressly request the suspension of the implementation of the act, since the latter should by law be subject to the suspensive effect in the implementation, as it was challenged before this Court, pursuant to paragraph 5 of Article 113 of the Constitution.

121. On 21 October 2021, the Court *ex officio* imposed the interim measure until 15 December 2021, reasoning that the latter is in the public interest, thus immediately suspending the challenged Decision, and stipulating that the Assembly should refrain from any action related to the issue of the election of new members until the final decision of the Court (for a detailed reasoning on the rationality of the Interim Measure, see the Decision on the Interim Measure in case KO127/21, of 21 October 2021).

122. On 9 December 2021, the Court declared the Referral admissible and decided on its merits. On the same date, the Court also decided to repeal the Interim Measure.

Request to hold a hearing

123. The Court also recalls that the Applicants requested that a hearing be held.

124. The Court recalls paragraph 2 of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure, which establishes that *"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law."*

125. The Court notes that the abovementioned Rule of the Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file are sufficient, beyond any doubt, to reach a decision on merits in the case under consideration (see, *inter alia*, case of the Court, KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110).

126. In the present case, the Court does not consider that there is any uncertainty regarding the *"evidence or law"* and therefore does not consider it necessary to hold a hearing. The documents that are part of the Referral are sufficient to decide the merits of this case.

127. Therefore, the Court, unanimously, rejects the Applicants' request to hold a hearing.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.5 and 116.2 of the Constitution, Articles 20 and 27 of the Law, and pursuant to Rule 59 (1) of the Rules of Procedure, on 9 December 2021:

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that Decision No. 08/V-029 of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo, is not in accordance with paragraph 2 of Article 101 [Civil Service] of the Constitution of the Republic of Kosovo;

III. TO REPEAL, unanimously, Decision No. 08/V-029 of the Assembly of the Republic of Kosovo regarding the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo;

IV. TO REPEAL, unanimously, Decision on Interim Measure, of 21 October 2021;

V. TO REJECT, unanimously, the request for a hearing;

VI. TO NOTIFY this Judgment to the Applicants, the President of the Republic of Kosovo, the President of the Assembly of Kosovo, the Government of Kosovo, the Ombudsperson and the Independent Oversight Board for the Civil Service of Kosovo;

VII. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20, paragraph 4 of the Law; and

VIII. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka-Nimani

KI120/19, Applicant: Mursel Gashi, request for constitutional review of Decision AC-I-17-0568 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 14 March 2019

KI120/19, judgment of 25 November 2021 published on 30 December 2021

Keywords: individual referral, right to fair and impartial trial

The circumstances of this case refer to a number of properties whose recognition was sought by the Applicant through a claim. More precisely, he has sought recognition of property rights over 4 (four) cadastral parcels, specifically over parcels [no.588/1], [no. 598], [no.601] and [no. 604], which, he has bought according to the relevant sale- purchase contract from 1971, but based on the case file, he did not manage to have them registered in his name in the cadastral register. In 2007, 2 (two) of the 4 (four) above-mentioned parcels, namely cadastral parcels (no. 588] and [no. 598], by the judgment of the Municipal Court, became the property of the S. family, following the adoption of the claim of the latter filed against the social enterprise AIC „Kosova-Export". Once the above-mentioned judgment of the Municipal Court becamse final, the relevant cadastral parcels were registered in the cadastral register as the property of the S. family.

In 2011, the Applicant filed a claim with the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, (i) initially he sought a proof of ownership over the 4 (four) abovementioned parcels; while then (ii) by specifying the statement of claim, he requested that in relation to 2 (two) cadastral parcels that were registered in the name of family S as a result of the 2007 judgment, he be compensated with other parcels of the socially owned enterprise AIC „Kosova-Export".

The Specialized Panel of the Special Chamber rejected the Applicant's claim, while after the appeal of the latter, in 2017, the Appellate Panel modified the decision of the Specialized Panel, by recognizing the Applicant's ownership over the 4 (four) abovementioned parcels. However, the Appellate Panel (i) did not address the issue of compensation of cadastral parcels with other parcels, despite the fact that according to the specification of the claim it was clarified that 2 (two) disputable parcels were registered in the name of the S. family as a result of a final judgment in 2007; and (ii) in determining the Applicant's ownership over the relevant parcels, it used identification numbers under the old cadastral registry system which led to inconsistencies with the current cadastral system. Therefore, the Applicant again addressed the Appellate Panel with a request (i) to rectify the Judgment in respect of the correct identification of the cadastral parcels; and (ii) to supplement the

Judgment, namely requesting from the Appellate Panel to decide on all claims included in the appeal, more exactly to decide on the claim for compensation with other parcels of the above-mentioned socially-owned enterprise, as a result of the 2 (two) abovementioned parcels being registered in the name of family S.

In 2019, the Appellate Panel, by decision (i), approved the request for correction of the judgment in connection with the specification of 2 (two) parcels in accordance with the new cadastral system; while (ii) in connection with the request for compensation for 2 (two) abovementioned parcels, which were already owned by the S. family, the Appellate Panel rejected it, as inadmissible, stating that, in essence, that *„there are no unresolved issues left"*, because the Applicant has been recognized the ownership over the 4 (four) disputable parcels, but did not resolve the fact that 2 (two) parcels, the ownership of which was recognized to the applicant, had already been registered as the property of the S. family, as a result of a final judgment.

The Applicant stated before the Court that the challenged decision of the Appellate Panel was rendered in violation of his rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46[Protection of Property] of the Constitution and Article 6 (Right to a fair Trial) and Article 1 (Protection of property) of Protocol no. 1 of the European Convention on Human Rights, stating, inter alia, that the Appellate Panel rejected his request for supplementation of the Judgment through point (V) of the Judgment, without considering or reeasoning his allegation submitted through specification of the claim in relation to the compensation for 2(two) parcels, which have already been registered in the name of the S. family, with other parcels in the ownership of the AIC „Kosova Export".

Considering the Applicant's allegations for violation of his right to a fair and impartial trial, as a result of the lack of a reasoned court decision, the Court first elaborated and then applied the principles of its case law and of the case law of the European Court of Human Rights. Having assessed the circumstances in this case, the Court emphasized that it was not disputable that 2 (two) of the 4 (four) disputed parcels were owned by two different owners, namely (i) the S. family, according to the Judgemt of Municipal Court, of 2017; and (ii) the Applicant according to the Judgment of Appellate Panel of 2017, itself. However, despite the Applicant's specificic claim to have this issue resolved first through the specification of the claim and then through the request to supplement the judgment, the Appellate Panel did not address this issue either in the Judgment of 2017 or the Judgment of 2019.

On the basis of its consolidated case law relating to the right to a reasoned judgment, the Court has emphasized that, even though the obligation to

provide reasons on the relevant parties' allegations may vary depending on the nature of the case under consideration, the essential parties' allegations must be resolved and reasoned, therefore, on the basis of the reasoning provided in the Court's published judgment, in the circumstances of the present case, this was not done.

Accordingly, the Court found that point (V) of the challenged Decision [AC-I-17-0568] of the Appellate Panel of the Special Chamber of the Supreme Court, of 14 March 2019 was rendered contrary to the procedural guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, and therefore, declared the same null and void, by remanding it for deciding in accordance with the conclusions of the judgment of the Constitutional Court.

JUDGMENT

in

Case No. KI120/19

Applicant

Mursel Gashi

Request for constitutional review of Decision AC-I-17-0568 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters, of 14 March 2019

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 Mursel Gashi from Prishtina (hereinafter: the Applicant). The Applicant is represented by Visar Vehapi, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the Decision AC-I-17-0568 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC), of 14 March 2019.

3. The challenged Decision AC-I-17-0568 of the Appellate Panel of the SCSC was served on the Applicant on 19 March 2019.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decision of the Appellate Panel of the SCSC which allegedly violates the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial), Article 1 of Protocol No. 1 (Protection of Property) of the European Convention on Human Rights (hereinafter: the ECHR), and Articles 8, 14 and 17 of the Universal Declaration of Human Rights.

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48[Accuracy of the Referral), and 49 [Deadlines] of the Law on the Constitutional Court of the Republic of Kosovo No. 03/L-121 (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 17 July 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 18 July 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi (members).

8. On 1 August 2019, the Court notified the Applicant and the the Appellate Panel of the SCSC about the registration of the Referral.

9. On 5 December 2019, the Court sent an additional letter to the Applicant's lawyer requesting additional documentation, as well as the proof on the date/time when the challenged Decision AC-I-17-0568 of the Appellate Panel of the SCSC was served on the Applicant, or his representative.

10. On 9 December 2019, the Applicant's lawyer submitted to the court the requested additional documentation, as well as the proof of service of the challenged decision.

11. On 26 November 2020, the Court requested from the SCSC to be provided with the complete case file.

12. On 1 December 2020, the SCSC submitted the original file to the Court.

13. On 17 May 2021, on the basis of paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of the President and Deputy-President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Court Constitutional. Pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and Decision of the Court, it was determined that Judge Gresa Caka-Nimani, shall assume the duty of the President of the Court after the conclusion of the mandate of the current President of the Court Arta Rama-Hajrizi, on 25 June 2021.

14. On 25 May 2021, based on point 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu submitted his resignation from the position of a judge at the Constitutional Court.

15. On 27 May 2021, the President of the Court Arta Rama-Hajrizi, by Decision KSH 120/19, appointed Judge Safet Hoxha as a member of the Review Panel instead of Judge Bekim Sejdiu.

16. 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 the 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.

17. On 6 October 2021, the Review Panel considered the report of the Judge Rapporteur and requested the supplementation of the report.

18. On 25 November 2021, the Review Panel considered the report of the Judge Rapporteur and, by a majority vote, made a recommendation to the Court on the admissibility of the Referral.

Summary of facts

19. On 23 July 1971, the Applicant entered into a written contract on sale and purchase with the owner-seller L.N. from Matiqan, for the purchase of four (4) parcels, which were marked as:
Parcel no. 2/257/28, at the location called „Gavrilova Njiva“, 5th class, covering an area of 1.56.00 ha,
Parcel no. 2/257/37, at the location called „Vasina Njiva“, 5th class, with a surface of 1.05.00 ha,
Parcel no. 2/257/40, at the location called „Slanishte“, 5th class, with a surface of 0.41.00 ha,
Parcel no. 2/257/43, at the location called „Slanishte“, 5th class, with a surface of 1.03.00 ha.
All parcels were registered according to the possession list no. 45, Cadastral Zone of Matiqan.

20. According to the statements of the Applicant, after 1999, there was made a change in the way of marking and recording parcels in the Kosovo Cadastral System, and cosequently the parcels in question were marked as no. 588/1, no. 598, no. 601 and no. 604.

21. At the same time, in the Municipal Court in Prishtina, the family S. initiated the contested procedure against the Socially-Owned Enterprise KBI(Agroindustrial Combine)--Kosova-Export from Fushë Kosovë. In that statement of claim, the family S. requested from the Socially-Owned Enterprise KBI (Agroindustrial Combine)-Kosova Export to allocate to them two parcels as a form of compensation for their two parcels that could not be returned to them because they were already allocated to third parties.

22. On 20 February 2007, the Municipal Court in Prishtina approved the statement of claim of the family S. as founded, and rendered the Decision C.no.645/04. By this decision, the Municipal Court allocated cadastral parcel no.588 and cadastral parcel no.598 to the family S., as a form of compensation for their two parcels. In the meantime, the decision C.no. 645/04 of the Municipal Court became final, and consqeuently parcels no. 588 and no. 598 were registered in the Cadastre as property of the family S.

23. On 26 February 2007, the Applicant filed a statement of claim with the Municipal Court in Prishtina seeking confirmation of his property right over the parcels in question. In the statement of claim, the Applicant stated the fact *“that as the new owner he entered into possession of the property on the day of purchase, but he failed to*

have the property registered in his name in the Cadastral Directorate in Prishtina, due to political circumstances at that period of time".

24. On 2 March 2007, the Applicant submitted a proposal to the Municipal Court in Prishtina requesting from the court to impose interim measures on cadastral parcels no. 588/1, no. 598, no. 601 and no. 604, in order to prevent the alienation or legal burden on the parcels in question.

25. On 16 April 2007, the Municipal Court issued the Decision E. no.317/07, whereby it imposed the security measure over cadastral parcels no. 588/1, no. 598, no.601 and no.604. By this decision, the court imposed a prohibition on encumbrance, mortgaging and the sale of the parcels in question, by emphasizing that this measure is valid until the conclusion of the contested procedure C. No. 414/07 before the Municipal Court.

Proceedings before the Basic Court regarding the claimant's statement of claim for confirmation of the property right over the parcels in question

26. On the basis of the case file, and according to the Decision of the Municipal Court in Prishtina (Case C. No.414/07) during July 2007, the geodetic expert A.A. gave his conclusion and written opinion regarding the determination of the Applicant's ownership. The expert of the geodetic profession A.A., in his conclusion emphasized that on the basis of valid documentation available to the Directorate for Cadastre and Geodesy in Pristina, for the Zone of Matiqan *"cadastral parcels no. 588/1, plan and sketch 3/43, location called "Gavrilove njive", land culture- arable land of the 5th class, with a surface of = 01.56.45 ha, then cadastral parcel no. 598, plan and sketch 3/17, location called "Vasina njiva", land culture- arable land of the 5th class, with a surface of = 01.04.98ha, cadastral parcel no. 601, plan and sketch 4/11, location called "Slanishete", land culture –arable land of the 5th class, with a surface of = 01.30.70ha, rural land, type of ownership "social ownership", are registered to: PIK(Agroindustrial Combine) "Kosova Export" based in Fushë Kosovë, specifically on the basis of aerial photography from 1972, which came into effect in 1980.*

Prior to this measurement coming into effect, a cadastral description, where detailed plans and sketches were not available, was in force in the Cadastral Zone of Matiqan; hence the parcels were calculated in an approximate manner [...]

The expert A.A., by referring to the old numbers of cadastral parcels (see the numbers in paragraph 13 above), emphasized that: *"it is*

difficult to determine exactly whether these parcels are the subject of this case, but there are some characteristic elements that correspond to the aerial photography".

27. On 17 September 2010, the Municipal Court in Prishtina held a session according to the Applicant's statement of claim for confirmation of the property right over the property that has been the subject of the contract on sale and purchase of 1971. The trial session was also attended by the representative of the Privatization Agency of Kosovo (hereinafter: the PAK), who challenged the jurisdiction of the Basic Court to deal with the property in question, given that it is registered as a socially owned property and as such it is under its administration.

28. On 29 December 2010, the Basic Court issued the Decision C.no.414/07 whereby it declared itself incompetent in the proceedings in question, while it instructed the Applicant to pursue his clam at the Special Chamber of the Supreme Court of Kosovo as the competent court to deal with matters relating to the Privatization Agency of Kosovo.

Proceedings before the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters in connection with the Applicant's claim for confirmation of property rights over the parcels in question

29. On 4 March 2011, the Applicant filed a claim with the Special Chamber of the Supreme Court of Kosovo, requesting confirmation of ownership over the: **I.** Cadastral parcel no. 588/1, at the location called "Gavrilove Njive", land culture – arable land of the 5th class, with a surface of 1.56.45 ha; **II.** Cadastral parcel no. 598, at the location called "Vasina njiva", land culture- arable land of the 5th class, with a surface of 1.04.98 ha; **III.** Cadastral parcel no. 601, at the location called "Slanishte", land culture – arable land of the 5th class, with a surface of 0.41.66 ha; as well as **IV.** Cadastral parcel no. 604, at the location called "Slanishte", land culture- arable land of the 5th class, with a surface of 1.30.70 ha, registered in the possession list no.389, Cadastral Zone of Matiqan. In his claim, the Applicant has emphasized that he has paid the purchase price in the presence of two witnesses, and ever since he has been in possession and has used the immovable property without any hindrance. He pointed out that he could not perform the transfer due to the high tax at the time, and claims that the said immovable property was registered in the name of PIK (Agroindustrial Combine) "Kosova Export" without legal basis.

30. On 17 November 2011, the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the "SCSC") issued the Decision SCC-11-0085, on the continuation of the court proceedings. Accordingly, the SCSC forwarded the Applicant's statement of claim to the PAK as the respondent, by giving it a deadline of 30 days to respond to the claim.

31. On 12 December 2011, the PAK sent its response to the Applicant's claim, wherein it denied the Applicant's property rights over the parcels in question, by claiming, inter alia, that "*such an agreement has not been legalized in court and therefore does not meet legal requirements and cannot be accepted as evidence*". In its letter, the PAK also emphasized that *"regardless of the circumstances in which the respondent became the owner, be it without a legal basis, the PAK supports its defence by referring to the legal provisions of Article 268 of the Law on Associated Labour, which explicitly states that if the immovable property was transferred into social ownership without legal basis, its recovery may be requested within a period of 5 years, from the day of learning about it, but no later than within 10 years"*. The PAK also stated that the ownership over the social property cannot be acquired on the basis of the postulate of adverse possession.

32. On 9 January 2013, the judge of the Specialized Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel of the SCSC) issued the order SCC-11-0085, whereby the response of the respondent PAK, of 12 December 2011, was forwarded to the Applicant, by giving him a deadline of 15 days to respond to it.

33. On 24 January 2013, the Applicant sent a reply to the Specialized Panel of the SCSC, by stating the same arguments which he had stated in his statement of claim.

34. On 5 December 2014, the Applicant submitted to the SCSC a new specified statement of claim wherein he stated that *"Based on the Judgment P.no. 645/04, of 20 February 2007, two cadastral parcels were taken from him and given to Serbs (family S.) as compensation, specifically parcel no.588/1, at the location called "Gavrilova njiva", land culture- arable land of the 5th class, with a surface of 1.56.45 ha, and parcel no. 598, at the location called "Vasina njiva", land culture- arable land of the 5th class, with a surface of 1.04.98 ha, which means that the claimant was damaged in a total surface of 2.61.43 ha due to the former Municipal Court in Prishtina having not been aware, and issuing a belated decision on security measure and now due to the delay in the proceedings in this matter caused by the SCSC"*.

35. Accordingly, in the specified statement of claim, the Applicant requests from the Specialized Panel of the SCSC to:

i) *„Accept the claimant's statement of claim and confirm that he is the owner of cadastral parcels no. 601, at the location called "Njelmesina", land culture-arable land of the 5th class, with a surface of 0.41.66 ha and no. 604, a place called "Njelmesina", land culture- arable land of the 5th class, with a surface of 1.03.70 ha, which are recorded in the possession list no. 398, CZ of Matiqan.*

ii) *To oblige the respondent PIK (Agroindustrial Combine) "Kosova Export" from Fushë Kosovë, by a judgment, to provide to the Applicant as compensation for cadastral parcels: no.588/1, at the location called "Gavrilova njiva", land culture-arable land of the 5th class, with a surfaceof 1.56.45 ha, no. 598, at the location called "Vasina njiva" , land culture-arable land of the 5th class, with a surface of 1.04.98 ha, total surface of 2.61.43 ha, which have been given to third parties in unlawful manner by the judgment of the Municipal Court in Prishtina, P.no.645/04, of 20 February 2007 , the below listed parcels:*

No. 523, plan 3, sketch 7, at the location called "Urtina", land culture- pasture of the 3rd class, with a surface of 0.38.09 ha
No. 524, plan 3, sketch 7, at the location called "Urtina D. Potok", land culture-arable land of the 7th class, with a surface of 0.62.98 ha
No. 525, plan 3, sketch 7, at the location called "Urtina D. Potok", land culture-pastue of the 2nd class, with a surface of 0.10.03 ha
No. 526, plan 3, sketch 7, at the location called "Urtina D. Potok", land culture-arable land of the 6th class, with a surface of 0.21.96 ha,
No. 536, plan 3, sketch 7, at the location called "Urtina Vina Lojze", land culture- pasture of the 3rd class, with a surface of 1.06.44 ha,
No. 552/2, plan 3, sketch 9, at the location called "Urtina Veternik", land culture-arable land of the 7th class, with a surface of 0.57.60 ha, which are located in the Cadastral Zone of Qagllavica, and are recorded in the possession list no. 222".

36. On 27 July 2017, the Specialized Panel of the SCSC held a hearing session in which the Applicant stated, inter alia, that *"[...] we did not request the acquisition of property rights through adverse possession, because for this someone else should have had the ownership, in this case PIK (Agroindustrial Combine) [...]. We wanted to confirm the fact that the property was registered by chance to PIK (Agroindustrial Combine), where the claimant has bought this property, paid the contract price and has been in possession of it for several decades.* On the other hand, in the same session, it emphasized that it disputes the claim in its entirety because (i) the Respondent PIK *(Agroindustrial Combine)* "Kosova Export" has never entered into a civil-legal relationship with the Applicant; (ii) the property of PIK *(Agroindustrial Combine)* "Kosova Export" was not transferred by chance, and this is based on the conclusions of the expert A.A., given in the case CNR. 414/07, where it was concluded that the property has been registered in the name of PIK *(Agroindustrial Combine)* "Kosova Export" since 1972; and (iii) the Applicant's contract has not been concluded before the Court, and therefore cannot produce legal effect.

37. On 22 August 2017, the Specialized Panel of the SCSC issued the Judgment SCC-11-0085, whereby it dismissed the Applicant's statement of claim as unfounded. The reasoning of the judgment reads:

> *„The claimant bases his property claim on a single purchase through a contract on sale and purchase of 1971. It is not disputable that this contract does not correspond to the formal requirements. The claimant has no other evidence to support his property claim. Given the fact that the Applicant has no other basis on which he can base his property claim over the property, the claim is unfounded. At no time has he been the owner of the land in question. Therefore, his argument that the respondent was registered as the owner in arbitrary manner is irrelevant in the present case".*

38. On 15 September 2017, the Applicant filed an apepal with the Appellate Panel of the SCSC claiming that "*the court failed to determine the factual situation correctly, that he has used the said property without hindrance since 1971, and that after 1999 he has learned that the property was in the ownership of the Socially-Owned Enterprise, and that in 2007 he had filed a claim with the Municipal Court in Prishtina requesting the return of the property."*

39. On 2 November 2017, the Appellate Panel of the SCSC rendered the Judgment AC-I-17-0568, whereby:

> under **point I**, it accepted the Applicant's appeal as founded,
> under **point II**, modified the Judgment SCC-11-0085 of the Specialized Panel, of 22 August 2017,
> under **point III**, upheld the Applicant's claim as founded, and
> under **point IV**, it determined that the claimant is the owner in connection with the cadastral parcels no. 2/257/28, at the location called "Gavrilova njiva", land culture- arable land of the 5th class, with a surface of 1.56.00 ha, no. 2/257/37 at the location called "Vasina njiva", land culture-arable land of the 5th class, with a surface of 1.05.00 ha, no. 2/257/40 at the location called "Slanishte", land culture- arable land of the 5th class, with a surface of 0.41.00 ha, and no. 2/257/43, at the location called "Slanishte", land culture- arable land of the 5th class, with a surface of 1.03.00 ha, which are recorded in the possession list no. 45, CZ of Matiqan.

40. In the reasoning of Judgment AC-I-17-0568, the Appellate Panel of the SCSC has stated,

> *„The Appellate Panel notes that the claimant supports his property rights with the Contract on sale and purchase of immovable property concluded on 23.07. 1971, between him and the natural person L (Ç) N from Matiqan.The contract on sale and purchase concerns the disputable parcels. The respondent does not object the existence of this written contract and does not question the allegation of the claimant that immediately after the contract was signed, the property in question was handed over to him and that he has owned it ever since.*
>
> *It is true that the contract in question was not confirmed in the competent court. But this was not a legal condition at the time of its conclusion.* At that time, a contract on sale and purchase in connection with the disputable parcel was signed and the land was handed over to the claimant, a necessary legal requirement for acquiring the ownership of immovable property *through a legal transaction, was approved by the Law on Transactions with Real Estate and Buildings (Official Gazette SFRY No. 43/65). In relation to the transactions between citizens, the law stipulates only one requirement: The contract must be in writing (Article 9 of the relevant Law).*

The missing registration of the immovable property transaction did not prevent the transfer of property rights in 1971, since the registration was not an integral element of the real estate property rights transaction until the Law on Basic Property Relations (Official Gazette of the SFRY No. 6/80) entered into force on 1 September 1980 ".

In the mentioned case, it remains for the defendant to provide sufficient facts that would show a valid exchange of property rights [...]. The respondent ... should know on what grounds it has obtained the said right [...]

Applicant's request for rectification of the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC, of 2 November 2017

41. On 4 December 2017, the Applicant's lawyer filed a submission with the SCSC for rectification of the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC, of 2 November 2017, requesting,

a) to make the correction of the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC regarding the number of the following cadastral parcels: for the cadastral parcel no.2/257/37, at the location called "Vasina njiva", land culture-arable land of the 5th class, with a surface of 1.05.00 ha, requests correction as cadastral parcel no.**604**, at the location called "Njelmesina", land culture-arable land, with surface of 1.03.70 ha, recorded according to the possession list no. 389, CZ of Matiqan, while for the cadastral parcel no.2/257/40, at the location called "Slanishte", land culture-arable land of the 5th class , with a surface of of 0.41.00 ha, requests correction as cadastral parcel no.**601**, at the location called "Njelmesina", land culture-arable land of the 5th class, with a surface of 0.41.66 ha, recorded according to the possession list no. 389, CZ of Matiqan.

b) that the Appellate Panel of the SCSC issue a supplemental judgment, whereby the respondent would be obliged to provide to the Applicant, in the name of compensation for cadastral parcels no.**588/1**, at the location called "Gavrlova Njiva", land culture-arable land of the 5th class, with a surface of 1.56.45 ha, and cadastral parcel no. **598**, at the location called "Vasina njiva", land culture-arable land of the 5th class, with a surface of 1.04.98 ha, in the total surface of 2.61.43 ha, which were by the judgment of the Municipal Court in Prishtina P.no.645/04, of 20 February 2007, given to third parties (family S.) the following parcels:

- No. **523**, plan 3, sketch 7, at the location called “Utrina”, land culture- pasture of the 3rd class, with a surface of 0.38.09 ha
- No. **524**, plan 3, sketch 7, at the location called “Utrina D. Potok”, land culture-arable land of the 7th class, with a surface of 0.62.98 ha
- No. **525**, plan 3, sketch 7, at the location called “Urtina D. Potok”, land culture-pastue of the 2nd class, with a surface of 0.10.03 ha
No. **526**, plan 3, sketch 7, at the location called "Utrina D. Potok", land culture-arable land of the 6th class, with a surface of 0.21.96 ha,
No. **536**, plan 3, sketch 7, at the location called “Utrina Vina Lojze”, land culture- pasture of the 3rd class, with a surface of 1.06.44 ha,
No. **552/2**, plan 3, sketch 9, at the location called “Utrina Veternik”, land culture-arable land of the 7th class, with a surface of 0.57.60 ha, which are located in the cadastral zone of Qagllavica, and are recorded in the possession list no. 222.

42. On 13 December 2017, the Appellate Panel issued an order to the Applicant's lawyer requesting that within five (5) days from the date of receipt of the order, he submit to the court the cadastral documents including cadastral history in order to establish the allegations made in the submission submitted on 7 December 2017, in connection with the change of the numbers of the cadastral parcels in question, listed under point IV of the Judgment AC-I-17-0568 of the Appellate Panel, of 2 November 2017.

43. On 21 December 2017, the Applicant's lawyer submitted a request to the Municipality of Prishtina – Directorate of Cadastre, requesting that a document with data be issued to him, pursuant to the order of the SCSC, of 13 December 2017.

44. On 26 December 2017, the Applicant's lawyer submitted the submission to the Appellate Panel of the SCSC informing it that he had requested the information from the Cadastral Administration of the Municipality of Prishtina according to the court order, but that he had not received any response.

45. On 16 January 2018, the Appellate Panel of the SCSC issued the Decision AC-I-17-0568, whereby the Applicant's submission for correction and supplementation of the Judgment AC-I-17-0568 of the

Appellate Panel of the SCSC, of 2 November In 2017, was rejected it as unacceptable, by stating:

> *„Pursuant to Article 49 of the Annex to the Law on SCSC, corrections of administrative errors at the request of a party shall be made within 2 weeks after the delivery of the judgment, while pursuant to Article 50 of the Annex to the LAW on SCSC, at the request of a party, the judgment is supplemented within 15 days of receipt of the judgment. In this concrete case the Judgment AC-I-17-0568 of the Appellate Panel, of 02.11.2017, was received by the claimant on 17.11.2017, whereas the deadline for correction and supplementation was until 4 December 2017. The Appellate Panel notes that the claimant's lawyer has filed the submission for correction and supplementation of the Judgment of the Appellate Panel on 5 December 2017, namely, one day late…"*

46. On 23 January 2018, the Applicant's lawyer filed another submission with the SCSC requesting the annulment of the Decision ACP I-17-0568 of the Appellate Panel of the SCSC, of 16 January 2018. At the same time, he requested that the proceedings be repeated in connection with the request of 4 December 2017, concerning the correction and supplementation of the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC, of 2 November 2017, because his submission for correction and supplementation of the judgment of the Appellate Panel was sent by post on 4 December 2017, on the basis of which it can be concluded that it was filed within the deadline.

47. The Court finds that in the time period from 2 February 2018 to 14 March 2019, the Appellate Panel of the SCSC has undertaken a number of procedural actions in order to determine and identify the disputable parcels, all in order to decide on the Applicant's request for correction of Judgment AC-I-17-0568 of the Appellate Panel of the SCSC, of 2 November 2017, concerning the numbers of cadastral parcels and the issue of possible compensation.

48. On 2 February 2018, the Appellate Panel of the SCSC issued an order to the Directorate of Cadastre in Prishtina requesting that it send to the court within 5 days the history of cadastral parcels 2/25728, 2/257/37, 2/257/40 and 2/257/43, registered according to the possession list no.45, issued by the Directorate of Cadastre on 21 July 1969.

49. On the basis of the case file it results that the Directorate of Cadastre in Prishtina did not respond within the envisaged time limit.

50. In this respect, on 22 February 2018, the Appellate Panel of the SCSC issued a new order to the Directorate of Cadastre in Prishtina, requesting that it clarify to the court within 5 days whether the cadastral parcel no. 2/257/43 is the same as parcel with no. 604, and whether the parcel no. 2/257/40 is the same as parcel with no.604, as claimed by the claimant, as well as to clarify in whose name are the new cadastral parcels no. 604 and no. 601 recorded in the cadastral registers.

51. On the same day, the Appellate Panel of the SCSC issued an order to the PAK requesting the PAK provide its comments on the Applicant's submission of 4 December 2017, regarding the correction of the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC, of 2 November 2017, as well as regarding the claimant's submission filed with the SCSC on 23 January 2018, seeking the annulment of the Decision AC-I-17-0568 of the the Appellate Panel, of 16 January 2018.

52. On 2 March 2018, the Kosovo Cadastral Agency replied to the Appellate Panel of the SCSC, stating that they have data for the time period from 1983 to 1988, but not from the earlier period. The numbers of the cadastral units of the cadastre are not the same as cadastral numbers that exist today in the cadastral operate and for the verification and comparison of numbers one should possess cadastral documents until 1983, which the Cadastral Agency of Kosovo does not possess. Further, the Cadastral Agency in its response stated that it was impossible to determine whether we are talkin about the same property with unit numbers listed in the order of the Appellate Panel of the SCSC, and that the parcels no.601/0 and 604/0, CZ of Matiqan, are in the ownership of the SOE PIK(Agroindustrial Combine) "Kosova Export", D.P.S. Kosovo Export.

53. On the same day, the PAK filed a submission with the Appellate Panel of the SCSC, claiming that there were no elements for technical corrections of the Judgment AC-I-17-0568 as claimed by the Applicant. The PAK also claims that parcels no. 601 and 604, recorded in the possession list no. 389, CZ of Matiqan, were not even considered by the judgment of the the Appellate Panel. Further, the PAK claimed that the claimant's proposal for rendering a supplemental judgment obliging the PAK to compensate cadastral parcels no. 588/1 and 598 with other indicated cadastral parcels, which the Applicant has indicated in his submission, is not allowed on the basis of the Law on SCSC. In the submission, the PAK also states that the the Appellate Panel of the SCSC by Decision AC-I-17-0568 of 16 January 2018 has rejected the Applicant's submission - proposal for correction and

supprlementation of the Judgment, therefore this issue was decided by a final decision, and is considered a judged matter.

54. On 7 March 2018, the Applicant's lawyer filed a new submission with the Appellate Panel of the SCSC, stating, inter alia, that he *had hired a licensed geodesy expert for cadastral surveying services, and that according to his expertise the parcel as per the descriptive cadastre 2/257/40 is the same as the cadastral parcel as per the land cadastre no. 601, while the cadastral parcel no. 2/257/43 as per the descriptive cadastre is the same as the cadastral parcel as per the land cadastre no.604, which means that we are dealing with the the same immovable property.*

55. Further as regards the parcel no. 2/257/28 as per the descriptive cadastre, the Applicant's lawyer claims that according to the land cadastre it is the same as the cadastral parcel, which bears the number 588/1, while the parcel as per the descriptive cadastre 2/257/37 is the same as the cadastral parcel as per the land cadastre no.598. These are the parcels that were given to the family S., and for which they request other parcels and rendering of a new judgment.

56. On 29 March 2018, the judge in charge of the case submitted a request to the Ministry of Justice of the Republic of Kosovo, which was addressed to the Ministry of Justice of the Republic of Serbia, in order to provide relevant cadastral information for the possession list no.45, issued on 21.07.1969, in connection with the following cadastral parcels: parcel no. 2/257/43, at the location called “Vasina Njiva”, land culture- arable land, with a surface of 1.03.00 ha and parcel no. 2/257/40 at the location called “Slanishte”, land culture- arable land, with a surface of 0.41.00 ha, Cadastral Zone of Matiqan.

57. On 30 November 2018, the Republic Geodetic Authority of the Republic of Serbia sent a response to the Appellate Panel of the SCSC. In the submission, the Geodetic Authority of the Republic of Serbia, stated that after a full search of data of the Cadastral Municipality of Matiqan, parcels no. 2/257/43 and no. 2/257/40, which were registered in the name of the holder N. Č. L., following a new measurement of the parclers bear the numbers 601 and 604 and are registered in the registration list 389. In addition, the Geodetic Authority of the Republic of Serbia states that the branch of the archives of the Republic of Serbia in Belgrade - Pristina Branch, neither upon a physical search by hand, nor even during scanning and digitilization for Kosovo, found any of the requested documentation.

58. On 20 December 2018, the Appellate Panel of the SCSC issued the Decision AC-I-17-0568, appointing a geodesy expert, Sh.P., from Prishtina to perform the requested expertise.

59. On 21 December 2018, the Appellate Panel of the SCSC issued an order to the PAK and the Applicant requesting their comments, if any, in relation to the submission of the Republic Geodetic Authority of the Republic of Serbia.

60. On 28 December 2018, the PAK submitted its response wherein it stated, *"that it is not clear why such a submission was submitted for a matter that has now already been closed."*

61. The Applicant did not respond to the order of the Appellate Panel of the SCSC, of 21 December 2018.

62. On 23 January 2019, the PAK submitted another submission to the Appellate Panel of the SCSC, requesting from it not to take any procedural action in this case after that the Judgment AC-I-17-0568 of the Appellate Panel, of 02 November 2017, has became final, and it took the form of a judged matter (res judicata).

63. On 24 January 2019, the Appellate Panel of the SCSC sent the submission of the PAK, of 23 January 2019 to the Applicant, giving him 7 days to respond to it.

64. Acting within the legal deadline, the Applicant's lawyer responded to the PAK's comments, by stating that the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 16 January 2018, could not be *res judicata*, as it had to do with an ommission of the court, which as such is also annulled. As to the property in question, the Applicant states that it was specified by the claimant's submission, of 5 December 2014.

65. On 4 March 2019, the geodetic expert appointed by order of the Appellate Panel of the SCSC submitted a report on the geodetic expertise in relation to the parcels in question. In this report, the geodetic expert concludes that on 26 January 2019, he has beein in the field [...] and that according to the valid documentation in his possession obtained from the Directorate of Cadastre, the disputable parcels no. 601-0 and no. 604.0, are recorded as socially owned property of PIK (Agroindustrial Combine) "Kosova Export", having its headquarters in Fushë Kosovë on the basis of the aerial photography from 1972, which came into effect on 31.12.1980. [...] this report, it is stated that the parcel no.601-0 acording to the descriptivee cadastre is the same with the parcel number no. 2/257/40, while the parcel no.

604-0 according to the descriptive cadastre is the same with the cadastral parcel no. 2/257/43.

66. On 5 March 2019, the Appellate Panel of the SCSC issued an order to the Applicant and the PAK, by giving them the opportunity to submit their comments regarding the expert report, within 7 days.

67. On 12 March 2019, the claimant's lawyer filed a submission with the Appellate Panel of the SCSC, stating that he has no objections regarding the expertise of the geodetic experts in the part that was the subject of the expertise in relation to parcels no.601 and no.604, but has objections in relation to the fact that the Appellate Panel of the SCSC has fully approved the Applicant's statement of claim, so that the request for correction of the Judgment has to do also with other cadastral parcels no. 523, no. 524, no. 526 and no. 552/2.

68. On 13 March 2019, the PAK sent a submission to the Appellate Panel of the SCSC, stating: [ ] to identify one parcel of the descriptive cadastre and to have it compared with the number of the parcel in the measurement cadastre, the expert should have had two studies, described and measurements (stereo photogrammetric aerial image). In this submission, the PAK proposes to the court not to take as a basis such a conclusion of experts and proposes a super expertise where the objections of the PAK and the clarification of the case as a whole would be taken into account.

69. On 14 March 2019, the Appellate Panel of the SCSC issued the Decision AC-I-17-0568, whereby it decided that:

I. Claimant's request of 23 January 2018 seeking the annulment of the Decision AC-I-17-0568 of the Appellate Panel, of 16 January 2018, is founded.
II. The Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 16 January 2018, is annulled.
III. Claimant's request for correction of the Judgment AC-I-17-0568 of the Appellate Panel, of 2 November 2017 in relation to the numbers of the parcels indicated under point IV of the enacting clause of this judgment, is approved.
IV. The number of parcels under point IV of the enacting clause of the Judgment AC-I-17-0568 of the Appellate Panel, of 2 November 2017, are corrected as follows: for the cadastral parcel 27257/43, the correct number should be no.604, at the location called "Njelmesina", land culture- arable land of the 5th class V, with a surface of 1.03.00 ha, recorded according to

the possession list no. 389, CZ of Matiqan; while for the parcel no. 2/257/40, the correct number must be no. 601, at the location called "Njelmesina", land culture- arable land of the 5th class, with a surface of 0.41.00 ha, recorded according to the possession list no. 389, CZ of Matiqan. The remaining part of point IV of the enacting clause remains unchanged.

V. Claimant's request in the submission filed with the SCSC on 4 December 2017 concerning the issuance of a supplemental judgment and recognition of property rights for the following parcels: no. 523, at the location called "Utrina", with a surface of 0.32.09 ha, no. 524, at the location called "Utrina D. Potok", with a surface of 0.62.98 ha, no. 525, at the location called "Utrina D. Potok", with a surface of 0.10.03 ha, no. 526, at the location called "Utrina D. Potok", with a surface of 0.21.96 ha, no. 536, at the location called "Utrina Vina Lozje", with a surface of 1.06.44 ha, no. 552/2, at the location called "Utrina Veternik" with a surface of 0.57.60 ha, which are located in the Cadastral Zone Qagllavica, recorded in the possession list 222, which the claimant requests to be given to him as compensation instead of parcel no. 2/257/28, which as claimed by him according to the cadastre in force bears the no. 588/1, at the location called "Gavrilova Njiva", with a surface of 1.56.45 ha, and cadastral parcel no. 2/257/37 which as claimed by him according to the cadastre in force bears the no. 598, at the location called "Vasina Njiva", with a surface of 1.04.98 ha, is dismissed as unacceptable.

70. As regards to the **point I, and point II** of the enacting clause of the Decision AC-I-17-0568, on the annulment of the Decision AC-I-17-0568 the Appellate Panel, of 16 January 2018, the Appellate Panel of the SCSC stated:

> *"The Appellate Panel of the SCSC concluded that the Applicant's allegation that he has submitted his request for correction and supplementation of the Judgment of the Appellate Panel on 04.12.2017 is founded, as this allegation is confirmed by the acknowledgment of receipt of mail, which bears a stamp with the same date. Moreover, the Appellate Panel also notes that the claimant has sent his submission for correction and supplementation of the judgmentt by mail, as the case file contains the envelope of this delivery, which bears the stamp of the post office with date 04.12.2017, a fact which the Appellate Panel failed to notice when it rendered the Decision AC-I-17-0568, of 16 January 2018."*

71. As regards to the **point III and IV** of the enacting clause of the Decision AC-I-17-0568, on the correction and supplementation of the Judgment AC-I-17-0568 of the Appellate Panel, of 2 November 2017, concerning the numbers of the said parcels, the Appellate Panel of the SCSC concluded:

> *"The Appellate Panel of the SCSC has also considered the allegations of the claimant made in his last submission, which was submitted to the SCSC on 12 March 2019, and did not accept those allegations as founded. The Appellate Panel made the correction of the number of parcels 2/257/43 and 2/257/40 which were the subject of the contract on sale and purchase from 1971, on which the Judgment AC-I-17-0568 of the Appellate Panel, of 02.11.2017, is based. While for the other two parcels 2/257/28 and 2/257/37, which were the subject of the contract on sale and purchase from 1971, the claimant himself in his submission for correction and supplementation of the judgment, which was submitted to the SCSC on 4 December 2017, has claimed that on the basis of the Judgment C.no. 645/04 of the Municipal Court in Prishtina, of 20 February 2007, these two parcels stand in the name of private persons and instead of these two parcels he has asked for compensation with other parcels, the request for supplementation of the judgment of 02.11.2017, based on the reasons that follow, is rejected as inadmissible."*

72. As regards the **point V** of the enacting clause of the Decision AC-I-17-0568, on the request for issuing a supplemental judgment, whereby to the Applicant would be allocated the parcels no. 552/2, no. 523, no. 524, no. 525, no. 526, no. 536, as a type of compensation for two cadastral parcels no. 588/1 and no. 598, which according to him, were taken from him in unlawful manner by the Judgment P.no.645/04 of the Municipal Court in Prishtina, of 20 February 2007 , the Appellate Panel of the SCSC concluded:

> *"The Appellate Panel of the SCSC notes that it has addressed the Applicant's allegations filed in the appeal of 18 September 2017 according to the Judgment SCC-11-0085 of the Specialized Panel of 22.08.2017, therefore, in connection with his appeal, it has now provided certain decisions in the enacting clause of the Judgment AC-I-17-0568 of the Court of Appeals, of 02.11.2017.*
> *Therefore, the Appellate Panel considers that there is no unresolved issue; hence it does not consider that there are legal bases for rendering a supplemental judgment, at this stage of proceedings, in order to resolve the claimant's requests for*

compensation with other parcels indicated in the submission of 4 December 2017.
Moreover, pursuant to Article 10.14 of the Law on SCSC, the judgments of the Appellate Panel are final, and may not be subject to extraordinary legal remedies.
The claimant's submission of 4 December 2017 concerning the issuance of a supplemental judgment, at this stage of the procedure, cannot be treated as a request for repetititon of proceedings in the sense of Article 232 of the LCP.
Hence, for these reasons, the claimant's request for rendering a supplemental judgment and obliging the respondent to compensate the claimant for the lost parcels with the above indicated parcels must be rejected as inadmissible."

Applicant's allegations

73. The Applicant alleges that the decisions of the regular courts have violated his rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] of the Constitution, and Article 6 (Right to a fair Trial), Article 1 of Protocol 1 (Protection of property) of the ECHR, as well as Articles 8, 14 and 17 of the Universal Declaration of Human Rights.

74. The Court notes that the Applicant raises allegations which concern **i)** the court proceedings conducted with regard to the request for the imposition of the security measure on the property in question by the Municipal Court, and **ii)** the court proceedings resolving the subject matter related to the disputable property.

75. As regards the court proceedings concerning the imposition of the security measure, the Applicant alleges that his rights under Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR have been violated, *"because despite the fact that the Municipal Court on 20 February 2007 has imposed the security measure, prohibition of alienation of the parcels in question, the said measure was not respected by the Municipal authorities of Prishtina, namely the Cadastre, and thus the Applicant was not provided with legal certainty, because the goal of the security measure is to preserve the unchanged state of the immovable property until the statement of claim is decided based on the merits."*

76. In the context of what is stated above, the Applicant adds that the Municipal Court has issued the Decision C.no. 645/04 whereby it

allocated two cadastral parcels no. 588 and no. 598, over which he has had the right of ownership, to the family S. Such actions, according to the Applicant, "*violate his property rights guaranteed by Article 46 of the Constitution of the Republic of Kosovo, as well as by Article 1 of Protocol 1 of the European Convention, and Article 17 of the Universal Declaration of Human Rights.*"

77. As regards the court proceedings in which the courts had ruled on property rights over the property in question, the Applicant alleges, *"that his rights to a reasoned court decision guaranteed by Article 31 of the Constitution and Article 6 of the ECHR have been violated"*, by stating as arguments for that violation "*On 5 December 2014, he had submitted to the SCSC, a specified statement of claim, whereby he requested that instead of the two cadastral parcels allocated to the family S., he be allocated 6 other parcels as a form of compensation. However, that specified statement of claim was rejected by the Specialized Panel of the SCSC as unfounded by Judgment SCC-II-0085, of 22 August 2017, while it did not deal with this specified statement of claim.*"

78. In this respect, the Applicant adds that *"The fundamental principle of civil proceedings is the principle of accessibility of claims and in the spirit of this fundamental principle, Article 2 of the Law on Contested Procedure simply defines that in the proceedings the courts may decide within the limits of the claims filed by litigants. The courts may not decide out of the subject matter of the claim submitted by the parties or recognize other or different rights out of its accessibility and outside the subject matter of the claim filed by the party and which was the subject of the claim, which the courts did not do.*"

79. Further, the Applicant states that *"The Appellate Panel of the SCSC, when deciding upon his appeal, has rendered the Judgment AC-I-17-0568, of 2 November 2017, under* ***point III*** *of which it has decided that the Applicant's claim is founded, therefore, from the fact that the claim was approved in its entirety as founded, it is clear and understandable what was approved from the statement of claim, which means the entirety of the specified statement of claim along with the submission of 05.12.2014, based on on which it can be concluded that the Judgment AC-I-17-0568 of the Appeallate Panel of the SCSC, of 2 November 2017, has become final and definitive, therefore as such it is a RES JUDICATA matter".*

80. The Applicant also states that the Appellate Panel of the SCSC under **point IV** of the Judgment AC-I-17-0568, of 2 November 2017, has made a technical error in relation to the number of cadastral parcels,

which as such can not be enforceable. In this respect, pursuant to Articles 162 and 165 of the Law on Contested Procedure of Kosovo No.03/L-006, submitted a new request seeking the correction of the technical error, as well as the issuance of a new judgment in relation to the specified request of 5 December 2014.

81. The Appellate Panel os the SCSC, according to the Applicant, acting upon the request for correction of the technical error and rendering a new Judgment, *"continued to conduct legal proceeding as if this claim was a new claim, and began to present evidence and determine expertises as if this issue was a new subject matter of the dispute, instead of treating the matter as RES JUDICATA."*

82. The Applicant considers that the Appellate Panel of the SCSC should have only reviewed the enacting clause of point IV of the Judgment AC-I-17-0568, and have it compiled in accordance with the subject matter of the claim, as provided by the provisions of the Law of Contested Procedure.

83. Further, the Applicant considers that the Decision AC-I-17-0568 of the Appellate Panel of the SCSC approving the request for correction is unconstitutional, because under point III of the enacting clause of the decision, it decided to approve his request for correction of the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC, of 2 November 2017, concerning the correction of the numbers of cadastral parcel. However, at the same point, it decided to approve the correction for only two parcels, namely for parcel number 604 and parcel number 601, while the other part of point IV of the enacting clause of the judgment of 2 November 2017 was left unchanged. Furthermore under point V of the enacting clause of the decision of 14 March 2019, the Appellate Panel of the SCSC completely rejected the alternative request for rendering a supplemental judgment, without providing any reason.

84. The Applicant states that *"it is clear that the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 14 March 2019 contains several shortcomings regarding the reasoning which is not sufficiently expressed and elaborated, thus violating Article 31 of the Constitution and Article 6 of the ECHR (see, the case KI120/10, judgment of 8 March 2013, and KI71/12, judgment of 7 December 2012)."*

85. In conclusion, the Applicant considers that, on the basis of the above arguments, the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 14 March 2019 is in contradiction with Article 31 of the

Constitution and Article 6 of the ECHR, because it violates the RES JUDICATA principle.

86. The Applicant addresses the court with the request,

i) "the Court to find a violation of the RES JUDICATA principle, as well as a violation of Articles 31 and 46 of the Constitution, Articles 8 and 17 of the Universal Declaration of Human Rights and Articles 6 and 1 of Protocol No. 1 of the ECHR.

ii) To declare partially invalid point IV of the enacting clause of the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 14 March 2019, specifically the part of point IV of the enacting clause which remains unchanged (without changing the part of point IV of the enacting clause whereby the cadastral parcels no.604 and 601 were corrected as a gained right), and declare invalid point V of the enacting clause of the above-mentioned decisions, and return the unchanged part of the enacting clause IV of the decision and point V of the above-mentioned enacting clause, to the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo."

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.
[...]"

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

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

4. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.

5. Intellectual property is protected by law.

European Convention on Human Rights

Article 6
(Right to a fair trial)

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

Article 1 of Protocol 1 (Protection of property)

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to

control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

LAW No. 03/L-006 on Contested Procedure

Supplemental Verdict,
Article 162

"162.1 If the court hasn't decided over all requests that should have been included in the verdict, or when only one part of the requests was not included than the party can suggest its supplementation through a proposal in a period of fifteen (15) days since the day of the verdict was issued.
162.2 If the party doesn't propose its appending it will be considered that the charges were withdrawn for the part which was not included in the decision issued.
162.3 A proposal coming later or with no basis for supplementing the decision will be dropped, respectively rejected by the court without setting a hearing.

Article 163

163.1 When the court ascertains that proposal to supplement the decision has grounds, it sets a session for main hearing of the case, aiming at issuing a decision for the part of the request that hasn't been resolved (a supplemental decision).
163.2Supplemental decision can be issued without reopening of the main hearing, if this decision is issued by the same judge who issued the first decision but only after it is ascertained that the request proposing the supplement is examined enough.
163.3 If the proposal for supplementing the decision is related to the expenditures of the procedure, the verdict over the proposal is issued by the court without setting a court session.

Article 164

164.1 In cases where except proposal for supplementing the decision there is an appeal against it, the appeal is not sent to the court of the second instance until there is a decision on the supplement proposal and until the deadline for addressing it isn't due.
164.2 If there is a complaint against the verdict for supplementing a decision, this complaint together with first decision will be sent to the court of second instance.

164.3 In case the decision is attacked by a complaint only because the court hasn't used it for all requests of parties that are subject of the court process, the complaint will be regarded as a proposal for issuing a supplemental decision.

Correction of the decision
Article 165

165.1 Mistakes on the names and numbers as well as other written and calculating mistakes, absence in a aspect of ways of decision and discrepancies of copies with the original are corrected by the court in every time.
165.2 The correction of mistakes is dome through a special verdict written in the form of the original verdict while the parties receive copies of such verdict.
165.3 If there are discrepancies between original and the copy of a restrained verdict in a sense of decision per request, the parties receive the corrected copy of the decision by showing that this copy replaces the previous copy of the decision. In this case the deadline for complaint against the corrected part of the decision starts from the moment of issuance of the corrected copy of the decision.
165.4 The correction of the decision is decided by the court without hearing of parties.

LAW NO.06/L-086 ON THE SPECIAL CHAMBER OF THE SUPREME COURT ON PRIVATIZATION AGENCY OF KOSOVO RELATED MATTERS

Article 55
Rectification of the judgment

In case of errors in names and numbers, as well as other errors in writing and calculation, missing in the aspect of the form of judgement and non-compliance of the copy with the original of the judgement, the Special Chamber shall, upon its own initiative or upon the request by the parties, rectify the judgement in any time. In case of the rectification of the judgement, the single judge, respectively the panel, shall apply the provisions of the Law on Contested Procedure mutatis mutandis.

Article 56
Omissions

1. If the Special Chamber omits to give a decision on a specific part of a claim or on costs, any party may, within fifteen (15) days of service of the judgment, apply to the Special Chamber to supplement its judgment.

2. The application for a supplement to the judgment shall be served on the opposing parties, and the Single Judge or Presiding Judge shall prescribe a period within which the parties may file opposing arguments in writing, if any. After the expiry of the prescribed period, the Special Chamber shall decide on the application."

Assessment of the admissibility of Referral

87. Having in mind that the Applicant challenges **i)** the court proceedings conducted regarding the request for the imposition of the security measure, and **ii)** the court proceedings resolving the subject matter related to the dispute concerning the property in question, the Court should determine whether all admissibility requirements established in the Constitution, the Law, and further specified in the Rules of Procedure, are met.

88. 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".

89. The Court further examines whether the Applicant has fulfilled the admissibility criteria, as provided by Law. In this respect, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision..."

90. As to the fulfillment of other admissibility requirements which concern i) the proceedings conducted regarding the request for imposing the security measure, the Court emphasizes that the Applicant is an authorized party who is challenging an act of a public authority, namely the Decision E.no. 317/07 of the Municipal Court, of 16 April 2007. Accordingly, the Court should determine whether the Applicant's Referral was submitted in accordance with the aforementioned Article 49 of the Law, as well as Rule 39 (Admissibility Criteria), paragraph 1. c) of the Rules of Procedure, which states:

1. The Court may consider a referral as admissible if:

(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant.

91. In this respect, as regards the allegations concerning the proceedings related to the imposition of the security measure, the Court first finds that these allegations relate to the proceedings before the Municipal Court in 2007. The Court also finds that this part of the court proceedings was concluded on 29 December 2010, when the Basic Court issued the Decision C.no.414/07, declaring itself incompetent in the case in question, and referred the Applicant to the Special Chamber of the Supreme Court of Kosovo as the competent court to deal with matters concerning the Privatization Agency of Kosovo. Thus, all legal actions taken by the Municipal Court according to this request and claim have formally-legally ceased to exist.

92. Accordingly, considering the date of conclusion of this court procedure, that is 29 December 2010, and the date on which this Referral was submitted to the Court, which is 17 July 2019, the Court concludes that all these allegations are out of the legal deadline of 4 months as provided for by Article 49 of the Law and Rule 39 1.c) of the Rules of Procedure.

93. The Court recalls that the objective of the 4 (four) month legal deadline, under Article 49 of the Law and Rule 36 (1) (c) of the Rules of Procedure is to promote legal certainty by ensuring that cases raising constitutional issues are dealt with within a reasonable time and that the past decisions are not continually open to challenge (See the case, *O'Loughlin and Others v. the United Kingdom*, Application no. 23274/04, ECtHR, Decision of 25 August 2005, see also: the case No.KI140/13, *Ramadan Cakiqi*, Resolution on Inadmissibility, of 17 March 2014, paragraph 24).

94. As regards the fulfillment of other admissibility requirements which concern **ii)** the court proceedings resolving the subject matter related of the dispute over the property in question, the Court emphasizes that the Applicant is an authorized party challenging an act of a public authority, namely the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of March 14, 2019, after having exhausted all legal remedies provided by law. The Applicant has also specified the fundamental rights and freedoms which he claims to have been violated, pursuant to the requirements of Article 48 and has submitted the Referral in accordance with Article 49 of the Law.

95. The Court further ascertains that the Applicant's Referral meets the admissibility requirements set out in paragraph (1) of Rule 39 of the Rules of Procedure and cannot be declared inadmissible on the basis of the requirements established in paragraph (3) of Rule 39. The Court also points out that the Referral is not manifestly ill-founded on constitutional basis, as provided in paragraph (2) of Rule 39, and must therefore be declared admissible and have its merits examined.

Merits

96. The Court recalls that the circumstances of this case relate to the determination of the property right over a property, namely over the four parcels in question no.2/257/28, no.2/257/37, no.2/257/40 and no.2/257/43, which the Applicant has bought on 23 July 1971, for which he had concluded a contract on sale and purchase with the seller. In order to realize the property right over the said parcels, the Applicant had submitted two requests in 2007, namely: a) a statement

of claim for recognition of the property right over the property in question, and b) a request for the imposition of the security measure on the said property.

97. However, having in mind that the court has concluded that the part of the Referral relates to **i)** the proceedings conducted regarding the request for the imposition of the security measure does not meet the admissibility requirements pursuant to Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, it concludes that in the following it shall deal exclusively with the merits which concern **ii)** the court proceedings in which the property rights over the property in question were determined.

Merits in relation to ii) the court proceedings in which the property rights of the claimant over the property in question were determined.

98. As regards the merits in relation to the court proceedings in which the property rights over the property in question were determined, the Court notes that the jurisdiction to decide the said legal dispute on 17 September 2010 was transferred from the Municipal Court to the SCSC. On 4 March 2011, the Applicant filed a claim with the SCSC, seeking confirmation of ownership of the property in question. During the proceedings before the SCSC, on 5 December 2014, the Applicant filed a supplemented and specified statement of claim whereby he requested that instead of the two parcels already allocated to the family S., he be allocated 6 other parcels, with numbers and in the surface as indicated by him that in the specified statement of claim.

99. The Specialized Panel of the SCSC rendered the Judgment SCC-11-0085, rejecting the Applicant's claim in relation to the confirmation of the right over the said property, of 4 March 2011. In the appeal proceedings, the Appellate Panel of the SCSC rendered the Judgment CI-17-0568, whereby it i) accepted the Applicant's appeal, ii) annulled the Judgment SCC-11-0085 of the Specialized Panel, iii) accepted the Applicant's statement of claim as founded, and iv) determined that the Applicant is the owner in connection with the cadastral parcels no.2/257/28, no.2/257/37, no.2/257/40, no.2/257/43, which are recorded in the possession list no. 45, CZ of Matiqan.

100. It is exactly this fact that was problematic for the Applicant, because the Appellate Panel of the SCSC, under point IV) of the enacting clause of the Judgment CI-17-0568, recognized the property right over 4 parcels, which are registered under the old cadastral system, which in

fact and in reality could not be registered as such in the current Cadastre records as Applicant's property.

101. Having in mind this fact, on 4 December 2017, the Applicant submitted two requests to the Appellate Panel of the SCSC,

a) a request for technical correction of the numbers for the two parcels in question, in order to obtain a decision listing the parcels in the manner and under the numbers of the Kosovo cadastral record system, on the basis of which he could be registered as the owner,
b) a request for a supplemental judgment, on the basis of which he would be allocated 6 other parcels as compensation, in accordance with the specified request of 5 December 2014.

102. Taking into consideration the merits of the Applicant's Referral, the Appellate Panel of the SCSC, on 14 March 2019, rendered the Decision AC-I-17-0568 whereby it, i) approved the Applicant's request for correction of the Judgment AC-I- 17-0568 of the Appellate Panel of the SCSC , ii) approved the request for correction of the numbers of two cadastral parcels in such a way that, cadastral parcel no.2/257/43, becomes parcel no. 604, while parcel no. 2/257/40, becomes parcel no. 601.

103. As regards the request for a supplemental judgment, whereby the Applicant would be allocated the parcels no. 552/2, no. 523, no. 524, no. 525, no. 526, no. 536, as a type of compensation for the two cadastral parcels no. 588/1 and no. 598, which according to him, were taken from him in unlawful manner by the Decision P.no.645/04 of the Municipal Court, of 20 February 2007, the Appellate Panel of the SCSC concluded that this request is to be rejected, because the matter *"in respect of this request has been resolved by the Judgment AC-I-17-0568 the Appellate Panel of the SCSC, of 02.11.2017."*

104. As a matter of fact, the Applicant is facing the situation when,

i) he has the final Judgment AC-I-17-0568, of the the Appellate Panel, of 2 November 2017, whereby he was recognized his property right over four parcels no. 2/257/28, no. 2/257/37, no. 2/257/40, no. 2/257/43, which were the subject of the contract from 1971, and which as such cannot be enforced,
ii) on 14 March 14, 2019, the Appellate Panel of the SCSC issued a new Decision AC-I-17-0568, whereby it made

a technical correction, for two parcels, no.2/257/43 and no.2/257/40, which have gotten new numbers (no. 588, and no. 598), which enabled him to be registered as the owner in the property cadastre, and

iii) by the same Decision AC-I-17-0568, the Appellate Panel of the SCSC, decided to reject as inadmissible the request for compensation for the other two parcels 2/257/28 and 2/257/37 on the grounds that the *Juddgment AC I-17-0568, of the Appellate Panel of the SCSC, of 2 November 2017, provides certain solutions regarding this matter*.

Allegations in relation to the court proceedings in which the courts have decided on the Applicant's property rights over the property in question

105. Having in mind the Applicant's allegations regarding non-reasoned court decisions, as well as the specifics of the decisions of the Appellate Panel of the SCSC (judgments and decisions) in which, according to the Applicant's allegation, it did not specifically address all important elements of the petitum of the statement of claim, the Court considers that there is a need for this part of the Applicant's allegations to be examined on the basis of the case law of the European Court of Human Rights (hereinafter: ECtHR), according to which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret fundamental rights and freedoms guaranteed by the Constitution. Accordingly, and in the following, the Court will consider the Applicant's allegations regarding the absence of a reasoned judgment and in doing so the Court will first (i) elaborate on general principles; and then (ii) apply the same to the circumstances of this case.

106. The Court finds that the part of the court proceedings in which the Applicant's property rights were determined consisted of the main court procedure in which the Appellate Panel of the SCSC rendered the Judgment CI-17-0568, as well as the proceedings relating to the request for correction of the Judgment, in which the Appellate Panel of the SCSC issued the Decision CI-17-0568. For the Applicant is problematic, precisely, the relationship between the enacting clause and the reasoning of these two court decisions, which according to him are not in accordance with the principles and do not meet the principles and criteria related to reasoned court decisions, thus violating his rights from Article 31 of the Constitution in conjunction

with Article 6 of the ECHR, as well as Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the ECHR.

107. With that in mind, the Court will consider below the Applicant's allegations, by taking into account both its case-law and that of the ECtHR with respect to non-reasoned court decisions.

(i) General principles regarding the right to a reasoned court decision

108. As regards the right to a reasoned judicial decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first emphasizes that it already has a consolidated case-law. This case law is based upon the case law of the ECtHR, including, but not limited to, the cases of *Hadjianastassiou v. Greece*, judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the basic principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including, but not limited to KI22/16, with Applicant: *Naser Husaj*, Judgment of 9 June 2017; KI97/16, with Applicant: "*IKK Classic"*, Judgment of 9 January 2018; KI143/16, with Applicant: *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI24/17, with Applicant: *Bedri Salihu*, Judgment of 27 May 2019; and KI35/18, with Applicant *"Bayerische Versicherungsverbrand"*, cited above, and KI227/19 , Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 45).

109. In principle, based the case law of the ECtHR, the guarantees embodied in Article 6 of the ECHR include the obligation for the courts to provide sufficient reasons for their decisions (see: ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53; also, for more details on the right to a reasoned judgment, see the ECtHR Guide to Article 6 of the ECHR of 30 April 2020, The Right to a fair trial (civil limb), IV.Procedural Requirements, 7. Reasons for Judgments, paragraphs 369 to 380 and references used therein). A reasoned decision shows the parties that their case has indeed been heard, and consequently contributes to a greater admissibility of the decisions (see the ECtHR case *Magnin v. France*, Judgment of 10

May 2012, paragraph 29). This case law also stipulates that despite the fact that a court has a certain discretion regarding the selection of arguments and evidence, it is obliged to justify its activities and decision-making by giving the relevant reasons (see the ECtHR cases: *Suominen v. Finland*, cited above, para. 36; and *Carmel Saliba v. Malta*, Judgment of 24 April 2017, paragraph 73, and see also the case KI227/19, with Applicant: *N.T. "Spahia Petrol"*, cited above, paragraph 46). In addition, decisions must be reasoned in such a way as to enable the parties to effectively exercise any existing right of appeal (see: ECtHR Hiroisaari v. Finland, cited above, paragraph 30).

110. Having said that, Article 6 of the ECHR obliges courts to give reasons for their decisions, but this does not mean that a detailed response is required for each argument (see the ECtHR cases *Van de Hurk v. The Netherlands*, cited above, paragraph 61; *Garcia Ruiz v. Spain*, cited above, paragraph 26; *Jahnke and Lenoble v. France*, Decision of 29 August 2000; and *Perez v. France*, Judgment of 12 February 2004, paragraph 81; see also the case of Court KI227/19, with Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 47. The extent to which this obligation applies may vary depending on the nature of the decision and should be determined in the light of the circumstances of each case (see the ECtHR cases: *Ruiz Torija v. Spain*, Judgment of 9 December 1994, paragraph 29; and *Hiro Balani v. Spain*, cited above, paragraph 27; and see also the case of Court KI227/19, with Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 47. An appellate court, for example, may, in principle, reject an appeal by upholding the reasons for the lower court's decision, however even such a decision must contain sufficient reasoning to show that the relevant court has not upheld the findings reached by a lower court without sufficient consideration (see, *inter alia*, the ECtHR case, *Tatishvili v. Russia*, cited above, paragraph 62; and see also the case of Court, KI227/19, with Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 47).

111. However, based on the case law of the ECtHR, courts are required to consider and provide specific and clear answers regarding (i) the substantive allegations and arguments of the party (see the ECtHR cases, *Buzescu v. Romania*, cited above, paragraph 67; and *Donadze v. Georgia*, Judgment of 3 March 2006, paragraph 35); (ii) the allegations and arguments which are decisive for the outcome of the proceedings (see the ECtHR cases: *Ruiz Torija v. Spain*, cited above, paragraph 30; and *Hiro Balani v. Spain*, cited above, paragraph 28); or (iii) the allegations concerning the rights and freedoms guaranteed by the Constitution and the ECHR (see the ECtHR case, Wagner *and JMWL v. Luxembourg*, Judgment of 28 June 2007, paragraph 96 and

the references used therein; see also the case of Court, KI227/19, with Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 48).

(ii) Application of these principles to the circumstances of this case

112. The Court first recalls that the Applicant, having in mind that the relevant jurisdiction to decide on his claim was transferred to the SCSC, on 4 March 2011 filed a claim with the SCSC, seeking confirmation of ownership over four cadastral parcels. On 5 December 2014, the Applicant also filed a specified statement of claim with the SCSC in order to realize his rights under the contract on sale and purchase of 1971.

113. Based on the case file, the Court finds that the Appellate Panel of the SCSC in the present case has rendered two decisions, namely the Judgment C-I-17-0568, as well as the Decision C-I-17-0568 on the technical correction of the said Judgment.

114. Accordingly, the Court considers that there are two court decisions before it, by the analysis of which it is to determine whether they meet the standards of a reasoned court decision, namely whether they reflect the Applicant's statement of claim, respectively its petitum, and consequently whether they are sufficiently reasoned as established in the general principles of the case law of the Court and the ECtHR, which are elaborated above.

115. The Court finds that the petitum of the Applicant's statement of claim of 4 March 2011 was confirmation of ownership over the 4 parcels which were marked as **I.** Cadastral parcel no. 588/1, at the location called "Gavrilova Njiva", with culture- arable land after the 5th, and a surface of 1.56.45 ha; **II.** Cadastral parcel no. 598, at the location called "Vasina njiva", with culture- arable land of the 5th class, and a surface of 1.04.98 ha; **III.** Cadastral parcel no. 601, at the location "Slanishte", with culture- arable land of the 5th class, and a surface of 0.41.66 ha; as well as **IV.** Cadastral parcel no. 604, at the location called "Slanishte", with culture-arable land of the 5th class, and a surface of 1.30.70 ha, registered according to the possession list no.389, Cadastral Zone of Matiqan.

116. The Court also notes that on 5 December 2014, the Applicant supplemented his petitum with a specified statement of claim, wherein he pointed out that the land parcels 1 no. 2/257/28, 2. 2/257/37, 3. no.2/257/40, 4. no. 2/257/43, have gotten new numbers as follows: 1. no. 581/1, 2. no. 598, 3. no.601, 4 no. 604. In this respect he to be

established that he is the owner of the land parcels: 1. no. 602, 2. no. 604. In addition, the KBI (Agroindustrial Combine) "Kosova Export" to be obliged that in the name of compensation of land parcels: 1. no. 588, 2. no. 598, which were allocated to the family S., allocate to him 6 other cadastral parcels, specifically, land parcels: 523, 524, 525, 526, 536, 552/2, with the same surface as those two parcels that were allocated to the family S.

117. In this regard, the Court notes that the petitum of the claim before the Appeals Chamber of the SCSC was the recognition of the right of ownership over the two parcels 1 no. 602, no. 604, as well as the issue of possible compensation for two plots that were awarded to the family S by the decision of the Municipal Court from 2007.

118. The Court recalls that the courts are obliged to decide on the subject matters, namely the petitum of the statement of claim in accordance with the claims of the parties, by taking care at all times to keep their jurisdiction within those limits. Such a legal solution is envisaged by Article 2 of the Law No. 03/L-006, on Contested Procedure , which reads,

> *"Article 2*
> *2.1 The court of the contentious procedure decided within the limits of claims submitted by litigants."*

119. Returning to the present case, the Court finds that on 2 November 2017, the Appellate Panel of the SCSC issued the Judgment AC-I-17-0568, whereby it decided that the Applicant's claim was founded, while under point IV of the enacting clause of the judgment concluded that; "*the claimant is the owner in connection with the cadastral parcels number 2/257/28, at the location called "Gavrilova njiva", land culture- arable land of the 5th class, with a surface of 1.56.00 ha, number 2/257/37 at the location called "Vasina njiva", land culture-arable land of the 5th class, with a surface of 1.905.00 ha, number 2/257/40 at the location called "Slanishte", land culture-arable land of the 5th class, with a surface of 0.41.00 ha, and number 2/257/43, at the location called "Slanishte", land culture- arable land of the 5th class, with a surface of 1.03.00 ha, which are recorded in the possession list no. 45, Cadastral Zone of Matiqan "*.

120. The Court, having considered the petitum of the Applicant's claim, as well as the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC, finds that there is a discrepancy. More specifically, the Court finds that the Applicant filed a statement of claim stating the numbers of

cadastral parcels as registered in the current cadastral system, while the Appellate Panel of the SCSC issued a judgment whereby it recognized the Applicant's ownership over 4 parcels, by indicating the numbers of cadastral parcels in the manner and by numbers as they were marked in the contract on sale and purchase of 1971.

121. Accordingly, the Court does not dispute the fact that by Judgment AC-I-17-0568 of the Appellate Panel of the SCSC that the Applicant has been recognized certain rights over the 4 parcels in question. Likewise, for the Court is not disputable the fact that the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC is in itself unenforceable, bearing in mind that the Judgment lists cadastral parcels from the contract on sale and purchase of 1971, which as such cannot be registered in the existing cadastre of property records, due to changes that have occurred in the meantime related to the method of marking and recording parcels.

122. Further, the Court also finds that the Judgment AC-I-17-0568 of the Appellate Panel of the SCSC, of 2 November 2017, does not address the Applicant's petitum on the specified claim of 5 December 2014, in which, we recall that the Applicant has sought compensation for two parcels allocated to the family S. by a decision of the Municipal Court.

123. Following the further course of the procedural way of this case, the Court finds that on 5 February 2019 the Applicant filed two requests with the Appellate Panel of the SCSC against the Judgment AC-I-17-0568 of the Appellate Panel Chamber. One request concerned the correction of the judgment, namely the correction of point IV of the enacting clause of the Judgment AC-I-17-0568. By his second request, the Applicant requested from the Appellate Panel of the SCSC to issue a supplemental judgment regarding the compensation, as specified in the request of 5 December 2014.

124. The Court finds that the Appellate Panel of the SCSC, on 14 March 2019, rendered a new decision AC-I-17-0568, accepting the Applicant's request for correction of point IV of the enacting clause of the Judgment AC-I-17-0568, of 02. November 2017, concerning the cadastral numbers of the two parcels, by stating "*for the cadastral parcel 27257/43, the correct number should be no.604, at the location called "Njelmesina", land culture- arable land of the 5th class V, with a surface of 1.03.00 ha, recorded according to the possession list no. 389, CZ of Matiqan; while for the parcel no. 2/257/40, the correct number must be no. 601, at the location called "Njelmesina", land*

culture- arable land of the 5th class, with a surface of 0.41.00 ha, recorded according to the possession list no. 389, CZ of Matiqan."

125. However, the Court finds that the Appellate Panel of the SCSC has rejected as unfounded the Applicant's request for a supplemental judgment whereby the Applicant would be allocated the parcels no. 552/2, no. 523, Br. 524 Br. 525 Br. 526, Br. 536, as a type of compensation for the two cadastral parcels no. 588/1 and no. 598, which according to him, were unlawfully taken from him by the Decision P.no. 645/04 of the Municipal Court, of 20 February 2007. The Appellate Panel of the SCSC, under point V of the enacting clause of the decision rejected as unfounded by stating, " *the Appellate Panel of the SCSC concluded that it has now provided certain decisions in connection to his appeal in the enacting clause of the Judgment AC-I-17-0568 of the Court of Appeals, of 02.11.2017 ."*

126. Having in mind suchlike decision of the Appeals Chamber in the request for correction of the Judgment, the Court gets the impression that only one part of the reasoning lacks the clarity, especially with regard to decisive facts that would contribute to the Applicant to understand the essence of his rights.

127. More precisely, the Court does not find the part of the Decision AC-I-17-0568 concerning the correction of the judgment of 2 November 2017, in relation to the point IV of the enacting clause to be problematic, because thereby the two parcels are marked in the way as prescribed by the current system of marking cadastral parcels, which provides the possibility for the Applicant to realize his property rights over two out of the four parcels by having them registered in the cadastre, the parcels which were allocated to him by the Judgment of the Appellate Panel of the SCSC, of 2 December 2017.

128. However, the Court had itself had great difficulties in understanding the essence and the logic of the explanation of point V of the enacting clause of the decision of the Appellate Panel of the SCSC, of 14 March 2019, due to the fact that the Appellate Panel of the SCSC, rejects the request for a supplemental judgment in relation to the compensation for the reason that the Appellate Panel of the SCSC, by a judgment of 2 December 2017, has already offered a solution for the property in question as indicated in the judgment. However, the Court has in fact found that the Judgment AC-I-17-0568, of 2 November 2017, is entirely unenforceable given that the judgment has indicated parcels with non-existent cadastral numbers which do not correspond to the current cadastral system.

129. The Court is of the opinion that the Appellate Panel of the SCSC, in one part of its decision, of 14 March 2019, has missed the opportunity to clearly explain the important issues raised by the Applicant in the request for technical correction of Judgment AC-I-17-0568, of 2. November 2017, by creating a situation where the judgment itself cannot be enforceable in a formalistic sense.

130. What the Court can agree with, is that one part of the Judgment AC-I-17-0568, of 2 November 2017, became final, specifically following the issuance of the Decision AC-I-17-0568, of March 14, 2019, which gives to the judgment of 2 November 2017 a finality character, but only in the part concerning the correction of cadastral parcel no. 27257/43, which became the parcel no. 604, and the parcel no. 2/257/40, which upon the correction became the parcel no. 601, whereby the Applicant became the owner in the legal sense.

131. However, as regards the issue in connection with the parcel no. 2/257/28, and parcel no. 2/257/37, over which the Applicant was recognized the right of property by Judgment AC-I-17-0568, of 2 November 2017, as well as the issue of possible compensation, the Court is of the opinion that in order to determine the full scope of the right, the competent court should be given the opportunity to pronounce itself in that respect by considering all the circumstances that were created following the decision on the correction AC-I-17-0568, of March 14, 2019. The Court also adds that it is not in the interest of the parties to the proceedings or of the competent courts to render decisions that cannot have a legal effect on the outcome of the proceedings, and thus be unenforceable in the aspect of the rights and obligations of the parties.

132. Accordingly, the Court is of the opinion that the decision of 14 March 2019 on correction of the judgment of 2 November 2017 does not contain the necessary explanation whereby the issue of the Applicant's property rights in relation to two cadastral parcels or a possible compensation, would be clarified. More specifically, with such reasoning in the judgment and decision, the Appellate Panel of the SCSC raises reasonable doubts of the Applicant to ask questions, what is the status of the two parcels allocated to him by the Judgment, of 2 November 2017, namely whether he has the rights granted by the Judgment, and if so, how should he realize them, and if not, why does he not have them or, whether he has the right to compensation in a way as requested by him in the specified claim of 5 December 2014.

133. Without prejudice to the outcome of the proceedings before the Appellate Panel concerning the said property rights over the two

parcels no. 2/257/28, and No. 2/257/37, and without elaborating on other appellate allegations of the Applicant, the Court considers that the decision of the Appellate Panel of the SCSC on the correction, of 14 March 2019 should be annulled, specifically only in the part of point V of the enacting clause of the decision rejecting the request for the issuance of a supplemental judgment. That this part of point V of the decision be remanded to the Appellate Panel of the SCSC, which will logically and validly explain and reason the Applicant's request, both in terms of the two parcels in question and the right to compensation pursuant to the petitum of the statement of claim, in a manner and to the extent which will meet the requirements of a reasoned court decision in accordance with the standards and principles of the Constitutional Court and the ECtHR.

134. The Court, based on its case law and the case law of the ECtHR, reiterates that Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in terms of a reasoned judgment, obliges the courts to reason the (i) substantive claims and arguments of the party; (ii) claims and arguments that may be decisive for the outcome of the proceedings; or (iii) claims relating to the rights and freedoms guaranteed by the Constitution.

135. In the circumstances of the present case, the Applicant's allegations regarding the possible violation of constitutional rights guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, with regard to a non-reasoned judgment, are substantive allegations of the Applicant and as such burden the relevant court, in this case the Appellate Panel of the SCSC, with the obligation to reason important issues relating to the property rights.

136. The Court also notes that when assessing a decision of a lower court, the higher court is also obliged to assess the Applicant’s allegations, and not just to assess whether the lower court has correctly assessed the relevant appeal before it. Moreover, the Court also notes that the primary purpose of a reasoned court decision is to show the parties that their case has indeed been heard, thus resulting in a greater admissibility of court decisions. In this respect, it is not necessarily relevant whether the claims of the parties are meritorious for a case pending before a court. Depending on the nature of the case before it, the relevant court is obliged to address at least those allegations which are essential or decisive for the merits of a case.

137. The silence of the courts regarding the relevant allegations of the respective Applicants has been specifically examined through the case law of the ECtHR. For example, in the following cases: *Ruiz Torija v.*

Spain, cited above, and *Hiro Balani v. Spain,* cited above, the ECtHR, beyond the general principles regarding the right to a reasoned judicial decision, also addressed the circumstances in which the relevant courts had remained silent on the arguments, which the ECtHR deemed essential. In both cases, the ECtHR considered whether the silence of the relevant court could reasonably be interpreted as an implicit rejection of the parties' arguments. (See: the ECtHR case, *Hiro Balani v. Spain,* cited above, paragraph 28). However, in the absence of a proper reasoning, the ECtHR stated that it was impossible to ascertain whether the respective courts had simply neglected to deal with the respective claims or implied their rejection and, if that was its purpose, what were its reasons for such an approach. (See: the ECtHR cases: *Hiro Balani v. Spain,* cited above, paragraph 28; and *Ruiz Torija v. Spain,* cited above, paragraphs 29 and 30). In both cases, the ECHR found a violation of Article 6 of the ECHR.

138. In the circumstances of the present case, taking into consideration the fact that the Appellate Panel of the SCSC failed to address and reason the substantive allegations of the Applicant in the judgment as well as in the decision, which the Applicant has constantly raised in the statement of claim, the specified statement of claim and in the request seeking technical correction of the judgment, of 2 November 2017, creates ambiguities regarding the outcome of the statement of claim for recognition of property rights. Such court decisions may not be compatible with the standards of a reasoned court decision, as provided by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the relevant case law of the Court and the ECtHR.

139. Therefore, having regard to the above observations and the procedure as a whole, the Court considers that a part of the reasoning under point V of the enacting clause of the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 14 March 2019, concerning the issue of compensation , and a part of the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 2 November 2017 also concerning the issue of compensation, were rendered in violation of the Applicant's right to a reasoned court decision, as an integral part of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

140. Finally, the Court also notes that, it has already found that a part of the decision and a part of the judgment of the Appellate Panel of the SCSC is not in accordance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of reasoning,

it considers it unnecessary to examine other allegations of the Applicant. The Applicant's respective allegations must be considered by the Appellate Panel of the SCSC during the revision of a part of the Decision and a part of the Judgment regarding the issue of compensation for the two parcels no. 2/257/28, and no. 2/257/37. In this connection, the Court also points out that its finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the lack of reasoning of the court decision, as explained in this judgment, and in no way does it relate to or prejudice the outcome of the case merits.

Conclusions

141. The Court has examined all the allegations of the Applicant, by applying in this assessment the case law of the Court and the ECtHR regarding the lack of a reasoned court decision, a guarantee which is provided for by Article 31 of the Constitution and Article 6 of the ECHR.

142. In this assessment, the Court found that, in rendering the Judgment AC-I-17-0568, of 2 November 2017, as well as the Decision AC-I-17-0568, of 14 March 2019, the Appellate Panel of SCSC has failed to explain in detail the substantive allegations of the Applicant which directly relate to the issue and outcome of the proceedings concerning the issue of **i)** the statement of claim regarding the property in questions as a whole, but only in a part, **ii)** the issue of possible compensation as an alternative request.

143. The Court, based on the case law of the ECtHR, has emphasized, inter alia, the fact that the courts are obliged to reason the claims of the parties which are substantial or may determine the merits of a case. In the circumstances of the present case, the Court, on the basis of all explanations given in this judgment, considers that this is not the case.

144. Accordingly, the Court finds that a part of the above-mentioned Judgment AC-I-17-0568 of the Appellate Panel of the SCSC and a part of the Decision AC-I-17-0568 of the Appellate Panel of the SCSC are not in accordance with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a reasoned court decision and that consequently, must be declared void and remanded for reconsideration purposes to the Appellate Panel of the SCSC in the manner and in a part, as set out in the present judgment.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 21.4 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 25 November 2021 :

DECIDES

I. TO DECLARE unanimously the Referral admissible;

II. TO FIND that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE void, by majority vote, point V of the enacting clause of the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 14 March 2019;

IV. TO REMAND, by majority vote, the Decision AC-I-17-0568 of the Appellate Panel of the SCSC, of 14 March 2019, for reconsideration purposes in respect of point V of the enacting clause, in accordance with the judgment of this Court;

V. TO ORDER the Appellate Panel of the SCSC to notify the Constitutional Court, pursuant to Rule 66 (5) of the Rules of Procedure, as soon as possible, and no later than within 6 (six) months, namely on 25 May 2022, about the measures taken to implement the judgment of this Court;

VI. TO REMAIN seized of this matter, pending compliance with this order;

VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to have it published in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Gresa Caka-Nimani

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