Prishtina, on 2 May 2024
Ref. no.: MM 2427/24

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DISSENTING OPINION

of Judge

RADOMIR LABAN

in

case no. KI115/23

Applicant

Bratislav Nikolić

Constitutional review of Decision [PN1. no. 422/2023] of the Court of Appeals of Kosovo of 28 April 2023

Expressing from the beginning my respect to the opinion of the majority of judges in this case, who established by majority of votes that the Decision [PN1. no. 422/2023] of the Court of Appeals of Kosovo of 28 April 2023, is no longer an active controversy, because it was annulled by the Judgment [Pml. no. 251/2023] of the Supreme Court of 30 May 2023, and the issue of extension of detention was remanded to the Basic Court for retrial. As a result, the contested decision before this court is no longer in force and as such does not produce any legal effect for the applicant.

However, I as an individual judge, have a dissenting opinion regarding the conclusion of the majority and I do not agree with the opinion of the majority.

As a judge, I agree with the factual situation as stated and presented in the decision on dismissal of referral and I find the same factual situation correct. I as a judge also agree with the way the applicant's allegations were submitted and presented in the decision on dismissal and I accept them as correct.

However, I do not agree with the legal analysis and the opinion of the majority that the case is no longer an active dispute. I consider that this legal analysis is in direct contradiction with the practice of the Constitutional Court itself, that is, with cases: (Judgment KI129-22 of 17 August 2023 with applicant *Saša Milosavljević*, Judgment KI55-22 of 5 July 2023 with applicant *Saša Spasić*, Judgment KI85-22 of 23 May 2023 with applicant *Jadran Kostić* as well as the joined cases KI146-23 and KI163-23 of 12 March 2024 with applicant *Nagip Krasniqi*).

I also consider that this analysis and conclusion of the majority is in direct contradiction with the Court's obligation, in accordance with Article 53 of the Constitution, which obliges the Court that "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*." In emphasizing this, I do not want to refer to an individual case of the ECtHR, but to the whole practical guide article 5 of the ECtR in which there is not a single case in which the ECtHR declared cases submitted based on Article 5 of the ECHR, without subject matter, on the contrary, the practice of the ECtHR indicates the opposite and there is a large number of cases where the ECtHR found a violation of Article 5 of the ECHR precisely because of this analysis of the regular courts and the Constitutional Courts of the member states (see the guide to Article 5 of the ECHR).

Due to the above, in accordance with Rule 56 of the Rules of Procedure of the Constitutional Court, in order to make it as easy and clear as possible to follow and reason My dissenting opinion, i will initially, elaborate: (i) general principles of the ECtHR and the Court regarding the exhaustion of legal remedies; and (ii) the relevant case law of the Court regarding the exhaustion of legal remedies; (iii) I will apply the same to the circumstances of the present case, then (iv) I will assess other criteria regarding the admissibility of the referral.

After that, I will recall the applicant's allegations and consider them on their merits, assess the applicant's allegations and present my conclusion regarding the applicant's allegations.

(i) General principles of the ECtHR and the Court regarding the exhaustion of legal remedies

1. Based on the case law of the ECtHR and the Court, in principle, the exhaustion rule must be applied with a "*degree of flexibility and without excessive formalism*", having regard to the context of the protection of human rights and fundamental freedoms (see, *inter alia*, cases of the ECtHR: *Ringeisen v. Austria*, no. 2614/65, judgment of 16 July 1971, paragraph 89; *Vučković and others v. Serbia [GC], no. 17153/11 and 21 other applications*, judgment of 25 March 2014, paragraph 76; and *Akdivar and others v. Turkey*, no. 21893/93, judgment of 1 April 1998, paragraph 69, see also the case of the Court: KI57/22 and KI79/22, applicant: *Shqipdon Fazliu and Armend Hamiti,* resolution on inadmissibility of 4 July 2022, paragraph 73).

2. However, in the application of this principle with flexibility and lack of excessive formalism, some criteria must be assessed and met, which are determined through the respective case laws. In all cases, when legal remedies have not been exhausted, to determine whether the latter, under the circumstances of the respective cases, would not be "*effective*", it must be assessed whether (i) the existence of legal remedies is "*sufficiently certain not only in theory, but also in practice*" because the latter, must be able to "*provide resolutions to an Applicant's allegations*" and "*offer a reasonable*

prospect of success"; and (ii) whether the respective legal remedies are "*available, accessible and effective*", these characteristics which must be sufficiently consolidated in the case law of the relevant legal system (see, cases of the ECtHR: *Akdivar and others v. Turkey*, cited above, *Öcalan v. Turkey*, no. 46221/99, judgment of 12 May 2005, paragraphs 63-72; and *Kleyn and others v. The Netherlands*, no. 39343/98 and 3 others, Judgment ofi 6 May 2003, paragraphs 155-162).

3. Arguments about the "*effectiveness*" or lack of "*effectiveness*" of the legal remedy must also be supported by the case-law, or namely its absence (see, in this context, the ECtHR case *Kornakovs v. Latvia*, no. 61005/00, Judgment of 15 June 2006, paragraphs 83-85). The importance of the case-law is also evidenced in the case of the ECtHR *Vinčić and others v. Serbia*, in which the appeal to the Constitutional Court of Serbia was not considered effective, since that court had not yet heard cases related to the relevant violations of human rights and until that court had issued and published such decisions on the merits (see, the ECtHR case: *Vinčić and others v. Serbia*, no. 44700/06 and 30 others, Judgment of 1 December 2009, paragraph 51). Thus, although in theory there was a possibility for the Applicants to refer to the Constitutional Court of Serbia, at the ECtHR level, in the absence of case-law, such a legal remedy was considered ineffective until it was proved otherwise. At a later stage and only after concrete evidence on the effectiveness of the legal remedy in practice, the ECtHR had accepted the arguments presented for the created effectiveness of the legal remedy by accepting and requesting that the exhaustion of such legal remedy must take place before an application is filed before the ECtHR (see, case of the Court: KI57/22 and 79/22, applicant: *Shqipdon Fazliu and Armend Hamiti,* cited above, paragraph 75).

4. That said, based on the same consolidated case law, the Applicant must prove that they "*did everything that could reasonably be expected of them to exhaust domestic remedies*", or the Applicants must demonstrate, by providing relevant case-law or other appropriate evidence that a legal remedy available to them, which they have not used, would fail. Moreover, "*mere doubts*" of an Applicant about the ineffectiveness of a legal remedy does not serve as a reason to exempt an Applicant from the obligation to exhaust legal remedies (See ECtHR case: *D.H. and others v. Cezch Republic*, no. 57325/00, Judgment of 13 November 2007, paragraph 116 and the references therein). The ECtHR emphasizes that it is in the Applicant's interests to apply to the appropriate court to give it the opportunity to exercise existing rights through its power of interpretation (see, among other cases, the ECtHR case *Ciupercescu v. Romania*, no. 35555/03, judgment of 15 June 2010, paragraph 169; and case of the Court: KI57/22 and 79/22, applicant: *Shqipdon Fazliu and Armend Hamiti,* cited above, paragraph 76).

5. Finally, the flexible assessment of the necessary characteristics of the legal remedy must be made taking into account the circumstances of each individual case. In conducting this assessment, the ECtHR takes into account also (i) overall „*legal and political*" context and (ii) „*special/individual circumstances*" of the applicant (for the concept of "*special circumstances*", among others, see ECtHR cases: *Van Oosterijck v. Belgium*, no. 7654/76, Judgment of 1 March 1979, paragraphs 36-40, and the relevant references therein; *Öcalan v. Turkey*, cited above, paragraph 67; and *Akdivar and Others v. Turkey*, cited above, paragraphs 67-68 and references therein. Further, for overall "*legal and political*" context, *inter alia*, see *Akdivar and Others v. Turkey*, cited above, paragraphs 68-69; and case of the Court: KI57/22 and 79/22, applicant: *Shqipdon Fazliu and Armend Hamiti,* cited above, paragraph 77).

(i) Case law of the Constitutional Court

6. I recall the case law in cases where the Court decided on inadmissibility because legal remedies related to extraordinary remedies of challenge have not been exhausted, a practice that is not consolidated and will be elaborated below.

7. In this respect, I refer to the case KI30/17, applicant: *Muharrem Nuridini,* resolution on inadmissibility of 4 July 2017, which refers to the fact that the applicant is against the decision of the Court of Appeals, which partially accepted his appeal and, as a result, the amount of compensation determined by the judgment of the Basic Court was reduced. In this case, the applicant did not file a revision against the judgment of the Court of Appeals regarding his request to change the amount that the Court of Appeals ruled in his favor, but only the respondent submitted the revision for the second point of the judgment of the Court of Appeals, which was in favor of the applicant. The applicant submitted a response to the revision of the respondent. In this case, the Court found that the Supreme Court did not consider the judgment of the Court of Appeals regarding the applicant's request to change the amount decided by the Court of Appeals because he did not submit a revision against this last decision and that the response to the revision alone is not sufficient to consider that the latter has exhausted all legal remedies to submit a referral to the Court. Accordingly, the Court declared the applicant's referral inadmissible on the grounds of non-exhaustion of legal remedies established in the Constitution, the Law and the Rules of Procedure.

8. Furthermore, I refer to the case KI01/10, applicant: *Gani Ibërdemaj*, resolution on inadmissibility of 20 Appril 2010. In this case, the applicant challenged the judgment 'of the District Court rendered in civil proceedings. The Court declared the applicant's referral inadmissible, because the legal remedies prescribed by the Constitution, the Law and the Rules of Procedure had not been exhausted.

9. I also emphasize the case law in assessing the acts of public authorities based on paragraph 7, article 113 of the Constitution, whereby has consistently assessed the credibility of the referrals of individuals who alleged violations of their fundamental rights and freedoms guaranteed by the Constitution, as a result of failure to be elected and/or appointed to public positions by the institutions of the Republic, including legislative and executive acts. All these referrals were declared inadmissible as a result of non-exhaustion of legal remedies (see, *inter alia*, Court case: KI09/21, applicant: *Sadat Lekiqi*, resolution on inadmissibility of 28 April 2021, Court case KI114/10 (applicant: *Vahide Badivuku*, resolution on inadmissibility of 18 May 2010); KI139/11 (*Ali Latifi,* resolution on inadmissibility of 20 March 2012); KI130/12 (*Xhymshit Xhymshiti*, resolution on inadmissibility of 13 March 2013). KI145/15 (applicant: *Florent Muçaj*, resolution on inadmissibility dated 14 March 2016); KI42/20, applicant: *Armend Hamiti*, resolution on inadmissibility of 29 July 2020); KI43/20 (*Fitore Sadikaj*, resolution on inadmissibility of 29 July 2020); KI164/20 (*Rafet Haxhaj*, resolution on inadmissibility of 20 January 2021), as well as joined cases KI57/22 and KI79/22 (applicant: *Shqipdon Fazliu and Armend Hamiti*, resolution on inadmissibility of 4 July 2022, resolution on inadmissibility, because the legal remedies established by law were not exhausted (see for more, Court case: KI57/22 and KI79/22, applicant: *Shqipdon Fazliu and Armend Hamiti*, cited above, paragraph 80).

10. I also underline that in the current practice the Court made exceptions to the exhaustion of legal remedies only in 6 (six) cases, namely (i) KI56/09, applicant*: Fadil Hoxha and 59 others*, judgment of 22 December 2010 ; (ii) KI06/10, applicant: *Valon Bislimi*, judgment of 30 October 2010; (iii) KI41/12, applicant: *Gëzim and Makfire Kastrati*, judgment of 25 January 2013; (iv) KI99/14 and KI100/14, applicant: *Shyqri Syla and Laura Pula*, judgment of 3 July 2014; (v) KI34/17, applicant: *Valdete Daka*, judgment of 1 June 2017; and (vi) KI55/17, applicant: *Tonka Berisha*, judgment of 5

July 2017. The last three judgments refer to challenging election procedures, namely the proposal for the position of Chief State Prosecutor in 2014 and the proposal for the position of President of the Supreme Court and the Court of Appeals in 2017. From the last mentioned, the case law of the Court has no exception regarding the obligation to exhaust legal remedies, established in paragraph 7, of Article 113 of the Constitution.

11. I recall that its abovementioned case law in the cases KI99/14 and KI100/14, KI34/17 and KI55/17 [contesting the decisions of the KPC and the KJC, which refer to the proposal for the position of Chief State Prosecutor and appointment to the position of the President of the Supreme Court and the Court of Appeals], is no longer current, due to the fact that in cases KI57/22 and KI79/22 [applicant: *Shqipdon Fazliu and Armend Hamiti*], the latter, unlike its previous position, decided that the applicants, who applied for the position of chief state prosecutor and contested the decision of the KPC, which proposed another candidate for this position, did not exhaust legal remedies, and accordingly decided to declare the relevant referral inadmissible on procedural grounds.

12. Taking into account the circumstances of the present case, I will further present only the case law in the context of the assessment of the admissibility of cases related to challenging the decisions of the first and second instance courts and the extension of detention, namely the cases KI85/22 [applicant: *Jadran Kostić*, judgment of 26 April 2023], KI55/22 [applicant: *Saša Spasić*, judgment of 23 May 2023) and KI129/22 [applicant: *Saša Milosavljević*, judgment of 28 July 2023], which is unconsolidated case law.

13. First, I recall case KI85/22, in which the applicant challenged before the Court the decision of the Court of Appeals upholding the extension of detention and at the same time submitted a request for the protection of legality to the Supreme Court. The Court declared the present case admissible, because in the present circumstances of this case, the referral of the applicant in case KI85/22 for the protection of legality, submitted to the Supreme Court in terms of an effective legal remedy, was unsuccessful, because the latter did not consider the merits of his allegations presented in his request for protection of legality, rejecting his request as irrelevant (see Court case: KI85/22, applicant: *Jadran Kostić*, cited above, paragraph 56).

14. In case KI55/22, the applicant contested the constitutionality of the decision of the Basic Court on the extension of detention, and then, as a result of submitting additional documentation and filling out the Court's form, specified that he contested the decision of the Court of Appeals upholding the extension of detention. The Court declared this case admissible, taking into account the allegation of the applicant that he contested the decision of the Basic Court before the Court of Appeals, but that he did not receive a reply from the latter for more than 30 (thirty) days and therefore decided to submit a referral to the Constitutional Court, in which case the latter determined that the applicant has exhausted legal remedies and that the decision of the Court of Appeals in conjunction with the decision of the Basic Court will be subject to constitutional review (see Court case: KI55/22, applicant: *Saša Spasić*, cited above, paragraphs 78-80).

15. In case KI129/22, the applicant challenged the constitutionality of the decision of the Court of Appeals in conjunction with the decision of the Basic Court on the extension of detention and in the meantime submitted a request for protection of legality, which the Supreme Court also rejected, as moot. Similar to case KI85/22, the Court decided in case KI129/22 to declare the case admissible, after finding that the applicant had

raised his allegations in three court instances (see Court case: KI129/22, applicant: *Saša Milosavljević*, cited above, paragraphs 66-68).

16. In this regard, I would like to point out that the Court declared three of the previously elaborated cases admissible due to the special circumstances that characterized the appeal procedures in present cases.

(ii) Application of the above principles in the present case

17. Before proceeding with the assessment of the requirements for the exhaustion of legal remedies, I recall that the circumstances of the present case refer to the procedure for imposing and extending the measure of detention after the indictment has been filed. I recall that the subject of consideration of the applicant's referral is the decision [PN1. no. 422/2023] of 28 April 2023 of the Court of Appeals, which upheld the decision [PKR. no. 239/22] of 7 April 2023 of the Basic Court, and the applicant's detention was extended from 8 April to 7 June 2023.

18. I recall that based on its principles, the ECtHR and the comparative analysis of the exhaustion of legal remedies, elaborated above, during their application in the circumstances of the present case, I consider that it must be assessed whether (i) the legal remedies that the applicant has not exhausted, are not „*sufficiently certain not only in theory, but also in practice*" because they cannot „*offer a solution regarding the applicant's requirements*" and „*provide reasonable prospects of success*"; (ii) are not „*available, accessible and effective*"; and (iii) whether the applicant „*has done everything that can reasonably be expected of him to exhaust the legal remedies*", also taking into account that the applicant's „*mere suspicions*" about the ineffectiveness of the legal remedy cannot be a reason to release the applicant from obligation of exhaustion of legal remedies provided by the Constitution (see, *inter alia*, Court cases: KI211/19, applicant: *Hashim Gashi, Selajdin Isufi, B.K., H.Z., M.H., R.S., R.E., S.O., S.H., H.I., S.S., N.S. and S.R.*, above cited, paragraphs 56 and 57; KI108/18, cited above, paragraph 157; KI57/22 and KI79/22, applicant: *Shqipdon Fazliu and Armend Hamiti*, cited above, paragraph 104, and see also ECtHR cases: *Akdivar et al. v. Turkey*, cited above, *Öcalan v. Turkey*, cited above, paragraphs 63-72, *Kleyn and others v. the Netherlands*, cited above, paragraphs 155-162; and *Vučković and others v. Serbia*, cited above, paragraph 74).

19. Regarding the first two requirements, it notes that the applicant states that he has exhausted all available legal remedies, because he considers that the request for protection of legality in the Supreme Court does not represent an effective legal remedy, and in this regard, he refers to the Court's case KI85/22, with the applicant *Jadran Kostić*, who is cited above. I clarify that in the above-mentioned judgment, the Court considered that in the specific circumstances of the applicant in case KI85/22, the Court took as a basis the decision of the Court of Appeals, as the last decision, which considered the issue of the extension of his detention, since the request for protection of legality in terms of an effective legal remedy proved to be unsuccessful because the Supreme Court rejected it, as without subject matter (see Court case: KI85/22, applicant: *Jadran Kostić*, cited above, paragraph 56).

20. In this context, I highlight the provisions that regulate the appeal procedure in criminal proceedings for the extension of detention, namely paragraph 4, of Article 432 (Grounds for filing a request for protection of legality) of the CPCRK, which stipulates: „4. *Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during criminal proceedings which have not been completed in a final form only against final decisions ordering or extending detention on remand*".

21. I also refer to the provisions on the legal effect of requests for the protection of legality upon review by the Supreme Court, where it is prescribed in paragraph 2, of Article 435 (Consideration of Request for Protection of Legality by Panel of Supreme Court) of the CPCRK: „*The Supreme Court of Kosovo shall dismiss a request for protection of legality by a ruling if the request is prohibited or belated under Article 434, paragraph 2, of the present Code, otherwise it shall send a copy of the request to the opposing party who may reply thereto within fifteen (15) days of receipt of the request*", while Article 437 (Rejection of Request for Protection of Legality) of the CPCRK and paragraph 1, of Article 438 (Judgment on Request for Protection of Legality) of the CPCRK prescribe when the Supreme Court decides on the merits of the request for protection of legality.

22. More specifically, I emphasize that Article 437 of the CPCRK foresees that: „*The Supreme Court of Kosovo shall, by a judgment, reject a request for protection of legality as unfounded if it determines that the violation of law alleged by the requesting party does not exist or that a request for protection of legality is filed on grounds of an erroneous or incomplete determination of the factual situation under Article 386 and Article 432, paragraph 2, of the present Code*", whereas paragraph 1, of Article 438 of the CPCRK establishes that: „*If the Supreme Court of Kosovo determines that a request for protection of legality is grounded it shall render a judgment by which, depending on the nature of the violation, it shall: 1.1. modify the final decision; 1.2. annul in whole or in part the decision of both the Basic Court and the higher court or the decision of the higher court only, and remand the case for a new decision or retrial to the Basic Court or the higher court; or 1.3. confine itself only to establishing the existence of a violation of law*".

23. It follows from this elaboration that the legal remedy, namely the request for protection of legality, is (i) prescribed by the provisions of the CPCRK and clearly defined by the applicable laws, and (ii) that this legal remedy is directly available to the applicants as established in Article 432 of this Code. Accordingly, I assess that a request for protection of legality, as an extraordinary legal remedy in criminal proceedings and submitted to the Supreme Court, can (i) offer a solution in relation to the allegations of the applicant, and (ii) offer a reasonable prospect of success.

24. In the circumstances of this case, I recall that the previous decision on the extension of detention of the Basic Court was also upheld by the Court of Appeals, that is, Decision [PN1. no. 239/2023] of 8 March 2023 of the Court of Appeals, the applicant challenged in the Supreme Court with a request for protection of legality, where the Supreme Court, unlike the case KI85/22, decided on the merits with the judgment [PML. no. 138/2023] of 6 April 2023, that is, it rejected it as „*ungrounded*". The same applies to the Decision [PKR. no. 239/2022] of 7 June 2023 of the Court of Appeals on the confirmation of the extension of detention, which the applicant, after submitting the current referral before the Court, challenged before the Supreme Court through a request for protection of legality, which this time was successful. This is because the Supreme Court on 26 July 2023 by Judgment [Pml. no. 359/2023] approved the request for protection of the legality of the applicant by remanding the case to the first instance court for retrial.

25. The Court also notes, based on additional case file, that J.K., one of the other co-defendants of the applicant, whose detention was extended by the same decision and for the same period as the applicant, namely by the Decision of the Court of Appeals [PN1. no. 422/2023] of 28 April 2023, submitted a request for protection of legality to

the Supreme Court against the contested decision, which the Supreme Court approved and remanded the relevant case for retrial.

26. In this regard, I find that based on the applicable legislation and the circumstances of the present case, where in the three cases mentioned above, it turns out that the request for protection of legality was effective, because it resolved the allegations of the applicants on the merits, this legal remedy is „*sufficiently certain not only in theory but also in practice*", the latter can „*provide a solution to the applicant's allegations*" and „*provide a reasonable prospect of success*"' and that it is „*available, available and effective*".

27. Furthermore, I note that based on ECtHR case law, the applicant should argue that „*they have done everything that can reasonably be expected of them to exhaust legal remedies*". In the circumstances of the present case, this is not the case, because the applicant expressly notifies the Court that he has not exhausted the request for protection of legality against the contested decision, as an extraordinary legal remedy in cases of challenging the decision of the Court of Appeals to uphold the extension of detention on remand.

28. Through these cases of the applicants, I clearly explain these principles and consolidates its case law regarding the exhaustion of legal remedies in the context of individual control, namely the referrals submitted within the scope of paragraph 7 of Article 113 of the Constitution. Moreover, the Court, in rare cases and only when it has deemed it extremely necessary, beyond consolidating and clarifying its case law, has also changed its case law, such as the case KO79/18 regarding its jurisdiction to deal with "*constitutional questions*" outside the limits of Article 113 of the Constitution (see Court case KO79/18, Applicant: *President of the Republic of Kosovo*, Resolution on inadmissibility, of 21 November 2018). Such an approach is also in accordance with the case law of other Constitutional Courts and the ECtHR. In this context and among others, the ECtHR, through its case law, has clarified that while it is not formally obliged to follow its prior case law, in the interest of the principle of legal certainty and predictability, it should not depart from its case law, without any strong reason. However, in certain cases it has also clarified, consolidated and amended its case law (see, inter alia, *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, Judgment of 14 April 2009, paragraph 35; *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment of 6 February 2003, paragraph 121; *Chapman v. The United Kingdom*, No. 27238/95, Judgment of 18 January 2011, paragraph 70; and *Micallef v. Malta*, No. 17056/06 , Judgment of 15 October 2009, paras 74-82). The Court took such a position in the cases KI57/22 and KI79/22, the applicant: *Shqipdon Fazliu and Armend Hamiti*, when it modified the case law regarding the exhaustion of legal remedies in cases related to contesting election procedures, namely the proposal for the position of head of chief state prosecutor in 2014 and a proposal for the position of president of the Supreme Court and the Court of Appeals in 2017.

29. Therefore, based on the above, also relying on the standards established in the case law of the Constitutional Court and the case law of the ECtHR and relying on the principle of subsidiarity to offer the competent bodies, including the courts, the opportunity to prevent or correct the alleged violation of the Constitution, finds that in the detention procedure natural persons should exhaust all legal remedies that are: (i) available; (ii) accessible; (iii) effective; (iv) provide some reasonable prospect of success; and (v) to do everything that can reasonably be expected of them to exhaust legal remedies, so that, as established in paragraph 7, of article 113 of the Constitution, paragraph 2, article 47 of the Law and item (b) of paragraph (1) of rule 34 of the Rules of Procedure, or otherwise such referrals must be declared inadmissible.

30. I recall that the case law of the Court, which is not consolidated in cases of exhaustion of legal remedies in the procedure of extension of detention, also reiterates that the previous exceptions to the exhaustion of this criterion, namely cases KI85/22, KI55/22 and KI129/22 refer to specific circumstances of the applicants of these referrals and concern very similar factual circumstances with the present case before the Court.

31. However, taking into account these three exceptions, which also refer to the circumstances of the present case, the Court, exceptionally, declares the applicant's referral admissible, while from the moment of publication of this judgment, it consolidates its case law as regards the fulfillment of the criteria of exhaustion of legal remedies in the procedure of imposing and extending detention in accordance with the criteria and general principles outlined in the text above.

32. Therefore, in the light of the above, I consider that the Court should have taken as a basis the decision of the Court of Appeals, as the last decision, through which the question of extension of the applicant's detention will be examined.

(iv) Assessment of other criteria related to the admissibility of the referral

33. Furthermore, I will proceed with examination whether the applicant's referral was submitted within the time limit set by the Law on Labor and the Rules of Procedure. Setting from the fact that the subject of the assessment of referral is the constitutional review of the Decision [PN1. no. 422/2023], of the Court of Appeals of 28 April 2023, in conjunction with Decision [PKR. no. 239/22] of the Basic Court of 7 April 2023, therefore, I state that the mentioned decision of the Court of Appeals was made on 28 April 2023, while the applicant submitted the referral to the Court on 5 June 2023. Accordingly, I assess that the applicant submitted his referral within the deadline prescribed by the Law and the Rules of Procedure.

34. I also find that the applicant's referral meets the admissibility criteria prescribed in paragraph (1) of rule 34 (Admissibility Criteria) of the Rules of Procedure. It cannot be declared inadmissible based on the requirements prescribed in paragraph (3) of rule 34 of the Rules of Procedure.

35. In addition, and finally, I assess that this referral is not manifestly ill-founded as established in paragraph (2) of rule 34 of the Rules of Procedure, and therefore, it should be declared admissible and its merits should be examined.

Merits

36. In terms of assessing the admissibility of the referral, that is, I will first recall the essence of the case contained in this referral and the relevant allegations of the applicant, in the assessment of which I will apply the standards of the case law of the ECtHR, in accordance with which, according to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

37. In this regard, and at the beginning, I recall that the circumstances of the present case are related to Decision [PN1. no. 422/2023] of 3 May 2023 of the Court of Appeals, which upheld Decision [PKR. no. 239/22] of 7 April 2023, of the Basic Court to extend the detention of the applicant and of the other defendants, from 8 April to 7 June 2023. Based on the case file, the applicant has been in detention since 23 December 2021, at least until the time of submitting this referral to the Court, on the grounds of

reasonable suspicion that he committed the following criminal offences during the issuance of building permits in the „*Shari*“ National Park: „*Abusing official position or authority*“ under paragraph 1, of Article 422 of the CCRK“, „*Accepting bribes*“ under paragraph 2, of Article 428 of the CCRK, „*Trading in influence*“ from paragraph 1, Article 431 of the CCRK and „*Unauthorized ownership, control or possession of weapons*“ from paragraph 1 of Article 366 of the current CCRK. The Basic Court in Ferizaj, and then the one in Peja, due to the transfer of the case, extended the detention of the applicant a total of 8 (eight) times before the indictment was filed. On 9 December 2022, the Basic Prosecutor's Office in Ferizaj filed an indictment against the applicant and the other defendants, which it supplemented on 24 February 2023. From the filing of the indictment to the moment of submitting this referral to the Court, the applicant's detention was extended 3 (three) more times, including the contested decision. After receiving additional information, it turns out that the Basic Court, upon submitting a referral to the Court, extended his detention 2 (twice) until 1 September 2023, when by Decision [PKR. 239/22], released the applicant from detention and set him bail in the amount of 50,000 (fifty thousand) euro.

38. Furthermore, I note that the applicant challenges Decision [PN1. no. 422/2023] of 3 May 2023 of the Court of Appeals in conjunction with Decision [PKR. no. 239/ 22] of 7 April 2023 of the Basic Court to extend the detention of the applicant and of the other defendants. The Court notes that the applicant essentially states that (i) the contested decision does not meet the standards of a reasoned court decision and does not deal with his allegations in violation of paragraph 2, of article 29 of the Constitution in conjunction with paragraph 3, of article 5 of the ECHR; and (ii) his extended detention is not „*lawful*“ within the meaning of paragraph 4, of article 29 of the Constitution in conjunction with paragraph 4, of article 5 of the ECHR.

39. In this sense, I will consider and elaborate: (i) principles and conditions related to the imposition of detention; (ii) principles and conditions related to the lack of reasoning of the court decision in terms of paragraph 2, of article 29 of the Constitution in conjunction with paragraph 3, of article 5 of the ECHR; (iii) principles and conditions related to the legality of extended detention within the meaning of paragraph 2, of article 29 of the Constitution in conjunction with paragraph 4, of article 5 of the ECHR, and apply the latter in the case of the applicant separately. In this regard, the Court notes that the contested decision upholds the extension of detention of the applicant and other defendants for the third time after the indictment was filed, therefore the Court will focus on the consideration of the applicant's allegations regarding the extension of detention after the indictment, namely from 9 December 2022. This is because according to the CPCRK, after the indictment has been filed, there are no maximum terms for the accused to remain in detention, namely according to Article 190 (*Imposition, Extension and Termination of Detention after Filling of the Indictment*) of the CPCRK, *after the indictment has been filed and until the announcement of the judgment or sentencing hearing, if there is any, detention on remand may only be ordered, extended or terminated by a ruling of the single trial judge or presiding trial judge or the trial panel when it is in session […]“.*

I. Regarding the imposition of detention

40. In this regard, I recall that, in order to be in accordance with the Constitution and the ECHR, the arrest or deprivation of liberty must be based on one of the grounds for deprivation of liberty from paragraph 1, Article 29 of the Constitution in conjunction with Article 5 of the ECHR.

41. First, I recall item 2 of paragraph 1 of Article 29 of the Constitution, which establishes:

"1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:

[...]
(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;
[...]".

42. Second, I also refer to item c) of paragraph 1 of Article 5 of the ECHR, which prescribes:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...] c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

43. As for the principles and conditions for determining custody, guaranteed by Article 29 of the Constitution in conjunction with Article 5 of the ECHR, I first emphasize that there has already been a case law, which is built on the principles established through the case law of the ECtHR (including , but not limited to: KI10/18, applicant: *Fahri Deçani*, judgment of 21 October 2019; KI73/20, applicant: *Esat Bajrami*, resolution on inadmissibility of 5 November 2020; KI63/17, applicant: *Lutfi Dervishi*, resolution on inadmissibility of 16 November 2017; KI07/22, applicant: *Miljan Košhanin*, resolution on inadmissibility of 8 June 2022; KI85/22, applicant: *Jadran Kostić*, judgment of April 27, 2023; KI55/22, applicant: *Saša Spasić*, judgment of 23 May 2023; and KI129/22, applicant: *Saša Milosavljević*, judgment of 28 July 2023). Having said that, the Court's cases by which the Court confirmed the principles established by the ECtHR and applied them to the cases before it include, but are not limited to: *Merabishvili v. Georgia* , [GC] no. 72508/13, judgment of 28 November 2017; *Ostendorf v. Germany,* no. 15598/08, judgment of 7 March 2013; *Douiyeb v. The Netherlands,* [GC], no. 31464/96, judgment of 4 August 1999; *Idalov v. Russia,* [GC], no. 5826/03, judgment of 22 May 2022; *Reinprecht v. Austria*, no. 67175/01, judgment of 15 November 2005; *Suso Musa v. Malta*, no. 42337/12, judgment of 23 July 2013; *Koendjbiharie v. The Netherlands*, no. 11487/85, judgment of 25 October 1990.

44. In this regard, I note that based on Article 29 paragraph 1, item 2 of the Constitution and item c of paragraph 1 of Article 5 of the ECHR, the deprivation of liberty may be conducted in the case of a grounded suspicion of committing the criminal offence, and when such a thing is considered necessary to prevent the commission of another offense or escaping after its commission (see case of the Court, KI10/18, Applicant *Fahri Deqani,* Judgment, of 8 October 2019, paragraph 65, KI85/22, applicant: *Jadran Kostić*, cited above, paragraph 68).

45. Therefore, I note that in order to comply with the Constitution and the ECHR, the detention on remand must be based on one of the grounds for deprivation of liberty set forth in Article 29 of the Constitution in conjunction with item c of paragraph 1 of Article 5 of the ECHR.

46. The ECtHR, in its case law, has identified three basic criteria to be examined to assess whether deprivation of liberty is lawful and non-arbitrary (see ECHR case, *Merabishvili v. Georgia*, cited above, paragraph 183, see also the cases of the Court, KI10/18, Applicant *Fahri Deqani*, cited above, paragraph 67, and KI85/22, applicant: *Jadran Kostić*, cited above, paragraph 70).

47. First, there must exist a "*reasonable suspicion*" that the person deprived of liberty has committed the criminal offense (see ECHR case, *Merabishvili v. Georgia*, cited above paragraph 184). Secondly, the purpose of deprivation of liberty "*is that it should in principle be in the function of the conduct of criminal proceedings*" (see, case of the Court KI63/17, Applicant *Lutfi Dervishi*, Resolution on Inadmissibility of 16 November 2017, paragraph 57, and KI10/18, Applicant *Fahri Deqani*, cited above, paragraph 68; see also the case of the ECtHR, *Ostendorf v. Germany*, No. 15598/08, Judgment of 7 March 2013, paragraph 68), and moreover, it must be proportionate in the sense that it should be necessary "*to ensure the appearance of the person affected by the relevant competent authorities*" (see, case of the Court KI63/17, Applicant *Lutfi Dervishi*, Resolution on Inadmissibility of 16 November 2017, paragraph 57, see also the abovementioned ECtHR case *Merabishvili v. Georgia*, paragraph 185). Third, the deprivation of liberty or the detention on remand must have been done following the procedure prescribed by law (see abovementioned case of the Court, KI10/18, Applicant *Fahri Deqani*, paragraph 68, and KI85/22, applicant: *Jadran Kostić*, cited above, paragraph 71, and case of the ECtHR: *Merabishvili v. Georgia*, cited above, paragraph 186).

II. Regarding the allegation of the lack of reasoning of the court decision in terms of paragraph 2, article 29 of the Constitution in conjunction with paragraph 3, of article 5 of the ECHR

48. In terms of the allegation of the lack of reasoning of the court decision, I recall that the applicant emphasizes that the Court of Appeals has arbitrarily interpreted the provisions of the CPCRK in relation to the procedural risks that serve as a basis for imposing and extending detention.

49. In the following, I will consider the principles and conditions established by the Court and the ECtHR in connection with this allegation, and then apply them to the circumstances of the present case.

(i) Principles and conditions on the lack of reasoning of the court decision in the sense of paragraph 2, of article 29 of the Constitution in conjunction with paragraph 3, of article 5 of the ECHR

50. Initially, I would like to emphasize that with regard to the basic legal requirements regarding the detention pending trial, I will refer to the principles and standards established in the case law of the ECtHR, which the Court applied in its abovementioned case: KI10/18, applicant: *Fahri Deqani*, in terms of paragraph 2, article 29 of the Constitution and paragraph 3, article 5 of the ECHR.

51. The Court notes that in determining the length of detention pending trial under paragraphs 2 of Article 29 of the Constitution, in conjunction with paragraph 3 of Article 5, of the ECHR, the period of detention on remand begins on the date the accused is taken in detention, and ends on the day he is released or when the court of first instance decided regarding the indictment (see ECHR cases, *Štvrtecký v. Slovakia*, No. 55844/12, Judgment of 5 June 2018, paragraph 55; *Solmaz v. Turkey*,

application No. 27561/02, Judgment of 16 January 2017, paragraphs 23 and 24, and case of the Court: KI10/18, applicant: *Fahri Deqani,* cited above, paragraph 71).

52. Referring to paragraph 2, of article 29 of the Constitution and paragraph 3, of article 5 of the ECHR, I emphasize that the grounded suspicion that a person deprived of his liberty has committed a criminal offense is regarded as an essential element in determining the detention on remand, and/or the extension of detention pending trial.

53. In its case law, the ECtHR has highlighted that the reasonableness of a period spent in detention on remand cannot be assessed in abstract terms, but must be assessed on the basis of the facts of each individual case and the specific characteristics of the case. The extension of detention on remand may be justified in a particular case only if there is evidence of a genuine public interest claim which, despite the presumption of innocence, is of greater weight than the norm of respect for individual liberty set out in Article 5 of the ECHR (see, ECtHR case, *Buzadji v. Moldova*, no. 23755/07, Judgment of 5 July 2016, paragraph 90; see also *Labita v. Italy*, [GC], No. 26772/95, paragraph 152, and case *Kudła v. Poland,* ,[GC], no. 30210/96, paragraph 110).

54. According to the practice and assessment of the Constitutional Court and the ECtHR, there is no fixed timeframe applicable to each case (see, case of the Court: KI10/18, applicant: *Fahri Deqani,* cited above, paragraph 74, see, *mutatis mutandis*, and ECtHR case: *McKay v. The United Kingdom,* [GC] application no. 543/03, Judgment of October 3,2006, paragraphs 41-45, and case of the Court: KI10/18, applicant: *Fahri Deqani,* cited above, paragraph 74).

55. Furthermore, the case law of the Constitutional Court is that the domestic courts must review and establish whether in addition to the grounded suspicion, there other grounds which justify the deprivation of liberty pending trial (see, the case of the Court: KI10/18, applicant: Fahri Deqani, cited above, paragraph 75, and ECtHR cases *Letellier v. France,* No. 12369/86, Judgment of 26 June 1991, paragraph 35; and case: *Yağcı and Sargın v. Turkey,* Application nos. 16419/90 and 16426/90, Judgment of 8 June 1995, paragraph 50).

56. Consequently, the ECtHR in its case law has determined four basic reasons as relevant for extending a persons' pre-trial detention, namely: 1) the risk of flight; 2) interference with the court of justice; 3) prevention of crime; and iv) the need to preserve public order (See ECtHR cases *Tiron v. Romania*, No. 17689/03, Judgment of 7 April 2009, paragraph 37; *Smirnova v. Russia,* nos. 46133/99 and 48183/99, Judgment of 24 July 2003, paragraph 59; *Piruzyan v. Armenia*, No. 33376/07, Judgment of 26 September 2012, paragraph 94). The Court has applied those principles in its case law, including but not limited to its cases: KI10/18, Applicant: *Fahri Deqani*, cited above, paragraph 77, and KI73/20, Applicant: *Esat Bajrami,* resolution on inadmissibility, paragraph 50).

57. In this regard, and in accordance with the principles developed by the ECtHR, the reasoning of the courts' decision to extend detention pending trial should always be evident, namely a detailed and well-founded reasoning on all facts and circumstances of the case. In this context, the ECtHR has consistently emphasized that "*it is only by giving a reasoned decision that there can be public scrutiny of the administration of justice*" (See ECtHR cases: *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003, paragraph 37, *Tase v. Romania,* application no. 29761/02, Judgment of 10 June 2008, paragraph 41, and case of the Court KI10/18, applicant *Fahri Deqani*, cited above, paragraph 80).

58. In the light of the foregoing, the ECtHR also found that "*quasi-automatic prolongation of detention contravenes the guarantees set forth*" in Article 5 paragraph 3 of the ECHR (see, *mutatis mutandis,* the aforementioned case *Tase v. Romania*, paragraph 40). Therefore, the ECtHR held that even if the aforementioned reasons existed at the time of the pre-trial detention, the nature of those reasons or circumstances may change over time (see ECtHR case cited above, *Merabishvili v. Georgia*, paragraph 234 and case of the Court, KI10/18, applicant *Fahri Deqani*, cited above, paragraph 81)

59. The Court and the ECtHR also emphasize that paragraph 3 of Article 5 of the ECHR cannot be seen as granting unconditional detention provided that it does not last longer than a certain minimum period. State authorities must convincingly demonstrate the justification of any period of detention, no matter how short (see Court case: KI10/18, Applicant: *Fahri Deqani*, cited above, paragraph 80, and ECtHR cases: *Idalov v. Russia* [GC] , cited above, paragraph 140; *Tase v. Romania*, cited above, paragraph 40; *Castravet v. Moldova* , no. 23393/05, judgment of 13 March 2007, paragraph 33; *Belchev v. Bulgaria*, no. 39270/98, judgment of 8 April 2004, paragraph 82).

(ii) Application of the ECtHR criteria with regard to the extension of detention pending trial in the Applicant's case

60. Relying on what was stated above, I note that the imposing of the said detention was based on item 2, paragraph 1 of Article 29 of the Constitution, in conjunction with item c, paragraph 1 of Article 5 of the ECHR.

61. Then, based on the above explanation of the basic principles of ECtHR case law, I will consider whether the applicant has sufficiently proved and substantiated the claims of violation of procedural guarantees defined by the Constitution and the ECtHR regarding the extension of his detention.

62. First, I repeat that the applicant's detention is based on item 2, paragraph 1, of article 29 of the Constitution and paragraph 5 of the ECHR, namely, on detention pending trial.

63. I would like to remind you that the applicant states that the contested decision on the extension of detention violated Article 29 of the Constitution in conjunction with Article 5 of the ECHR, and in particular the Court of Appeals has arbitrarily interpreted the provisions of the Criminal Procedure Code in relation to procedural risks that serve as a basis for imposing and extending detention, and in this regard notes that the court: (a) refers to the potentially high sentence of the applicant if his guilt is established in violation of the principle of presumption of innocence; (b) did not justify his social and family ties to the Republic of Serbia in connection with his potential escape, and the investigations cannot be hindered because they were conducted before the indictment; (c) did not take into account the fact that he had spent more than 17 (seventeen) months in detention, which according to ECtHR case law reduces the risk of escape; (c) in the context of the influence on the witnesses, the applicant states that knowing them does not represent a specific risk because they have been heard and otherwise they would have to be related to addiction or fear and that the same applies to the court's conclusion that the defendants live in a small town and that they know each other; (e) the applicant was deprived of a certain amount of financial resources that exceeds twice the financial value of the alleged abuse of official duties by the defendant, therefore there is no risk of flight; (f) failed to reason why

lenient measures are less appropriate than detention; and (g) despite the seizure of a significant amount of money (3.5 million euro), the applicant is able to offer an additional guarantee (surety) in the form of a mortgage or other appropriate property, that he will not avoid criminal proceedings.

64. Therefore, with regard to the Applicant's allegation that decisions concerning the extension of his detention on remand were rendered in violation of Article 29 of the Constitution, the Court will first refer to the period of the Applicant's detention on remand pending trial, within the meaning item 2, paragraph 1, of Article 29 of the Constitution, in conjunction with paragraph 3 of Article 5, of the ECHR and the criteria set forth in the case law of the ECHR.

(a) Applicant's detention on remand pending trial

65. In the present case, I recall that the applicant, after his arrest on 23 December 2021, was placed in detention at least until the time of submitting the referral to the Court. The applicant's detention was extended in the period from 23 December 2021 to 9 December 2022 a total of 8 (eight) times, while from the time the indictment has been filed on 9 December 2022 to 7 June 2023, his detention was extended 3 (three) times.

66. I recall that against Decision [PKR. no. 239/22] of 7 April 2023 of the Basic Court on the extension of detention from 8 April 2023 to 7 June 2023, the applicant filed an appeal. The Court of Appeals by Decision [PN1. no. 422/2023] of 3 May 2023, rejected the applicant's appeal and upheld the decision of the Basic Court.

67. In this regard, I note that from the arrest of the applicant to the filing of the indictment, he was in detention for 11 (eleven) months and 17 (seventeen) days, and then from the filing of the indictment to the filing of the referral before the Court for a total of 5 (five) months and 30 (thirty) days. I emphasize that the applicant spent a total of 17 (seventeen) months and 10 (ten) days in detention until 7 June 2023, when the detention determined by the contested decision expires, however, bearing in mind that the applicant is contesting the extension of detention by the decision of the Court of Appeals before the Court from 3 May 2023, the Court will only take into account the time period after the indictment was filed to assess the reasoning of the decision to extend detention until the trial, namely 5 (five) months and 30 (thirty) days.

(b) Assessment regarding the rationale for continued detention pending trial

68. In the case of the applicant, I recall that the Basic Court, referring to Article 184 of the CPCRK, found that in addition to the existence of reasonable suspicion of the commission of a criminal offense, which was supported by a lot of evidence, it also concluded that there was a legal basis for the extension of detention for the following reasons: (i) the gravity of the criminal offense, that is, the threat of a severe punishment in the event of a finding of guilt for a total of 28 (twenty-eight) criminal offenses which the applicant is charged with ; (ii) the connections of the applicant and other defendants with the state of Serbia through dual citizenship, family and social ties and the fact that the Republic of Kosovo does not cooperate with the latter to ensure their presence in case of escape; (iii) an attempt to obstruct the criminal proceedings in the investigation phase by means of intimidation or interference with witnesses, which resulted in two more criminal cases for the criminal offenses of "*Obstruction of evidence or official proceedings*" and "*Intimidation during criminal proceedings*"; (iv) the fugitive state of the other defendants who know the applicant and live in a relatively small town, as well as the fact that they worked in the institution and knew the witnesses and cooperating witnesses who are already known after the indictment was filed; and (v) other alternative measures for securing the

applicant's presence are assessed to be less appropriate than detention. This reasoning of the decision [PKR. no. 239/22] of 7 April 2023 of the Basic Court was also confirmed by Decision [PN1. no. 422/2023] of 3 May 2023 of the Court of Appeals.

69. Furthermore, I recall the contested judgment of the Court of Appeals, in which a collective reasoning was given for the applicant and 6 (six) other defendants as follows:

"[...] The Criminal Panel of the Court of Appeals of Kosovo assesses that the first-instance court has correctly acted when it extended the measure of detention to the defendants in accordance with Article 190, paragraph 1 and 2, in conjunction with Article 184, paragraph. paragraph 1, points 1.1 and 1.2 point 1.2.1. of the CPC, since there is a grounded suspicion that the defendants are perpetrators of these criminal offences for which, if proven guilty, high prison sentences are foreseen, taking into account their connection with the state of Serbia through citizenship, and then family and social ties, contributes to the grounded suspicion that they may flee or leave the country in such a way that they are inaccessible to the prosecutor's office and thereby hinder the investigation and determination of the factual situation, therefore it is necessary to extend the measure of detention against the defendants for the successful conduct of this criminal procedure.

[...] bearing in mind that in the investigations in the present case there were attempts to obstruct the criminal proceedings and influence the witnesses through intimidation or interference, and for this reason the investigations were launched in two other criminal cases against persons for the criminal acts of Obstruction of evidence or official proceedings and Intimidation during criminal proceedings, also some defendants are still on the run, and considering that the defendants know each other because they live in a relatively small town and were employed in the same place, they know the witnesses and cooperating witnesses in this case, this represents special circumstances that indicate the risk that as soon as the defendants are released or by the imposition of any other measure, they will influence the witnesses or they will be able to hide evidence of the property acquired by criminal offence and thus prevent the investigation and shedding light on the case to the end.

For the above-mentioned reasons, this court assesses that the first-instance court acted correctly when it extended the measure of detention of the above-mentioned defendants, because other measures provided for in Article 171 of the CPCRK are insufficient to ensure their presence in the proceedings. [...]".

70. In this regard, I note that the Court of Appeals upheld the reasoning of the Basic Court regarding the conditions for the extension of the detention of the applicant and 6 (six) other defendants, as well as that it reiterated the reasons for the fulfillment of such conditions.

71. In the present case, I first recall that the CPCRK, which entered into force on 17 February 2023, namely paragraph 1, article 184, establishes the procedure and legal criteria for imposition of the detention measure, including: 1) the existence "*the grounded suspicion*"; 2) fulfillment of the conditions for extension of detention on remand that based on the circumstances of the commission of the criminal offense there is a risk that the Applicant may repeat the criminal offense; as well as 3) the more lenient measures to ensure the presence of the defendant are insufficient to ensure the presence of such a person, to prevent the repetition of the criminal offense and ensure the successful conduct of the criminal proceedings (see also the case of the Court KI63/17, Applicant *Lutfi Dervishi*, Resolution on Inadmissibility of 16

November 2017, paragraph 68, and paragraph 59; and KI10/18, Applicant : *Fahri Deqani,* cited above, paragraph 93).

72. I recall that the Court and the ECtHR have established four important basic reasons for extending the detention of persons awaiting trial, namely: 1) the risk of escape; 2) obstructing the court; 3) crime prevention; 4) the need to maintain public order. However, according to it and the ECtHR, these grounds for detention must be considered and viewed together with the possibility of considering other measures provided for in the provisions of the Criminal Procedure Code .

73. I also highlight the arguments given in the decisions of the regular courts regarding (i) flight risk; (ii) obstruction of the court, that is, obstruction of the criminal proceedings, and (iii) insufficiency of other alternative measures to ensure the presence of the applicant in relation to detention.

74. In this context, the ECtHR underlines that the risk that the accused will hinder the proper conduct of the proceedings cannot be substantiated "*in abstracto*"', but must be substantiated by factual evidence (*Becciev v. Molodova,* no. 9190/03, judgment of 4 October 2005, paragraph 59), while in the present case regarding obstruction/interference with criminal proceedings, the Court recalls the fact that two criminal cases were initiated „*Obstruction of evidence or official proceedings" and "Intimidation during criminal proceedings".* However, in this connection, I note that in this argument it referred to the previous decisions of the Basic Court on the imposition and extension of detention, namely the decision of 10 December 2022 and the decision of 8 February 2023, which were confirmed by the corresponding decisions of the Court of Appeals.

75. I also recall that the regular courts also provided reasoning for the element "*risk of escape*" as a permanent one, where they refer to the dual citizenship of the applicant and the other defendants, to their social and family ties with the state of Serbia, where in case of flight there would be impossible to ensure their presence due to the lack of international cooperation in criminal cases with the same state, which argument was repeated in the previous decisions of the Basic Court on the imposition and extension of detention, namely the decision of 10 December 2022 and the decision of 8 February 2023, which were upheld by the respective decisions of the Court of Appeals.

76. Based on the above, I come to the conclusion that the Basic Court in its last three decisions (10 December 2022; 8 February 2023; and 7 April 2023) after the indictment was filed, consistently gave an almost identical reasoning regarding the risk of escape and interference with the court.

77. I also repeat the finding of the regular courts on the lack of other alternative measures to ensure the presence of the applicant regarding the detention, more precisely the Court of Appeals in the contested decision stated that: „[...] *other measures provided for in Article 171 of the Criminal Procedure Code are not sufficient to ensure their presence in the proceedings, in the regular course of the criminal proceedings and in preventing the commission of other criminal acts, therefore, in order to successfully conduct the criminal proceedings, it is considered necessary to extend the prohibition measure to offer to the abovementioned state or person, as well as the measure of attendance at the police station is considered necessary, while the appeals of the defense attorneys of the defendants are rejected as ungrounded*". In this regard, the Court considers that the finding is general and not individualized, given that it refers to 7 (seven) defendants, including the applicant, in this criminal proceeding.

78. Moreover, in connection with the assessment of regular courts in relation to other alternative measures, I point out the assessment of the Supreme Court, which in its judgment [Pml. no. 251/2023] of 30 May 2023 approved the request for protection of legality of the co-accused of applicant J.K., against the contested decision, which annulled the latter and remanded the case to first instance court , with the following reasoning:

According to the opinion of the Supreme Court of Kosovo, the aforementioned claims of the defendant's defenders are grounded, because the first and second instance courts did not give justification for non-application of alternative measures, providing a reasoning that is very general, stereotyped and patterned, when they gave a reasoning in the part that deals with the non-application of other alternative measures in relation to the defendant [J.K].
This, based on the fact that the defense emphasized that the defendant's family is ready to offer immovable property as collateral in the name of the defendant [J.K.] or in the amount determined by the court. Detention is the most severe measure and the last measure foreseen to ensure the presence of the defendant in criminal proceedings and as such should be applied only when other alternative measures cannot be applied. [...]"

79. In this regard, the Court notes that the ECtHR found a violation of Article 5 paragraph 3 of the ECHR in a large number of cases in which the domestic courts had used stereotypical wording to extend the detention on remand, without having regard and without convincingly substantiating the need to extend the detention on the basis of the specific facts and circumstances of the case (see, ECtHR cases, *Orban v. Croatia* , Judgment of 19 December 2013, paragraph 59; *Sulaojav. Estonia*, No. 55939/00, judgment of 15 February 2005, paragraph 64; *Tsarenko v. Russia,* No. 5235/09, judgment o 3 March 2011, paragraph 70, and see Court case, KI 10/18, *applicant Fahri Deqani*, cited above, paragraph 103).

80. Therefore, I assess that the reasoning of the Basic Court, which was upheld by the Court of Appeals in its contested judgment, is general and insufficiently reasoned, where a convincing analysis and assessment of the specific facts and circumstances in the case is clearly missing.

81. Furthermore, the regular courts did not provide a concrete and sufficient reasoning why the applicant's extended detention pending trial was necessary and why alternative measures were not applicable in the applicant's case.

82. Therefore, a detailed reasoning and elaboration of all specific circumstances, including a detailed reasoning of why other alternative measures cannot be applied in the applicant's case, would represent clear evidence of an individualized assessment in accordance with the specifics of the case, as well as solid justifications for the need to decide, as in the case of contested decisions of regular courts, regarding the extension of the applicant's detention pending trial.

83. Therefore, even if the reasons for the extension of detention are still present, I repeat that these reasons each time require a continuous and individualized examination in accordance with the specifics of the present case, since the nature of these reasons or the circumstances that initially justified the imposition and/or the extension of detention can change over time, which did not happen in this case before the Court.

84. In this regard, I recall the case law of the ECtHR which established that "*quasi-automatic prolongation of detention contravenes the guarantees set forth"* in

paragraph 3 of Article 5 of the ECHR (see, *mutatis mutandis*, the case of the ECtHR, *Tase v. Romania*, cited above, paragraph 40), assesses that the lack of a specific and detailed reasoning, as well as the extension of detention awaiting trial by regular courts with the same reasoning, is not in accordance with the principles and standards established by the ECtHR.

85. Therefore, I assess that the extension of the applicant's detention pending trial, which was upheld by the contested judgment of the Court of Appeals, namely Decision [PN1. no. 422/2023], of 28 April 2023, represents a violation of item (2) of paragraph 1 of Article 29 of the Constitution, in conjunction with paragraph 3 of Article 5 of the ECHR.

III. Conclusion regarding the alleged violations of the applicant's rights

86. Based on the above, and taking into account the considerations of the applicant's claims in his referral:

I. **I CONSIDER that** the Court should have **DECLARED** the referral admissible;

II. **I CONSIDER that** the Court should have **HELD** that Decision [Pn1. no. 422/2023], of the Court of Appeals of Kosovo of 28 April 2023, is not in compliance with item 2, paragraph 1 of Article 29 [Right to Liberty and Security] of the Constitution, in conjunction with paragraph 3 of Article 5 (Right to liberty and security) of the European Convention on Human Rights;

III. **I CONSIDER that** the Court should have **DECLARED** invalid contested Decision [Pn1. no. 422/2023], of the Court of Appeals of Kosovo of 28 April 2023.

Dissenting Opinion is submitted by Judge;

Radomir Laban, Judge

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On 27 March 2024 in Prishtina

This translation is unofficial and serves for informational purposes only.