



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

Prishtina, on 14 June 2017  
Ref. no.:AGJ 1096/17

## **JUDGMENT**

in

**Case no. KI31/17**

Applicant

**Shefqet Berisha**

**Constitutional review of Decision CLM No. 10/2016 of the Supreme Court  
of Kosovo, of 24 August 2016**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy President  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Bekim Sejdiu, Judge  
Selvete Gërzhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge

#### **Applicant**

1. The Referral was submitted by Shefqet Berisha from Pristina (hereinafter: the Applicant).

## **Challenged decision**

2. The Applicant challenges Decision CML No. 10/2016 of the Supreme Court, of 24 August 2016.
3. The above-mentioned decision is challenged in connection with Decision PPP.No.1216/15, of the Basic Court in Prishtina, of 21 November 2016; Decision Ac. no. 1347, of the Court of Appeals, of 24 April 2016; Judgment Rev. No. 50/2016, of the Supreme Court, of 4 April 2016; Decision C. No. 2929/2015, of the Basic Court in Prishtina, of 15 February 2016; Judgment Ac. No. 401/204, of the Court of Appeals, of 26 October 2015 and Judgment C. No. 162/09, of the Basic Court in Prishtina, of 29 October 2013.

## **Subject matter**

4. The subject matter is the constitutional review of the above-mentioned decisions which have allegedly violated his rights, as guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 22.2 [Direct Applicability of International Agreements and Instruments] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the Convention).
5. In addition, the Applicant requests the Court to impose an interim measure against Judgment C. No. 162/09, of the Basic Court in Prishtina, of 29 October 2013, and estop any judicial proceedings, enforcement proceedings, actions or decisions of public authorities which derive from that judgment until the final decision of the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. The object of the above-stated judgment and the ensuing enforcement proceedings is the seizure of the Applicant's private property and his invalidity pension which is necessary for his medical treatment.

## **Legal basis**

7. The Referral is based on Articles 113.7 and 116 (1) and (2) of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rules 29, 54 and 55 of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

## **Proceedings before the Court**

8. On 10 March 2017, the Applicant submitted the Referral to the Court.
9. On 22 March 2017, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues (member) and Ivan Čukalović (member).

10. On 22 March 2017, the Court notified the Applicant about the registration of the Referral. On the same date the Court informed the Supreme Court of the registration of the Referral.
11. On 27 March 2017, the Judge Rapporteur recommended to the Court to grant an interim measure. On the same date, the Court decided by majority to grant an interim measure until 20 June 2017.
12. On 28 March 2017, the Court published the above-mentioned Decision on Interim Measures, namely, against Judgment C. No. 162/09, of the Basic Court in Prishtina, of 29 October 2013 and ordered estoppel against any judicial proceedings, enforcement proceedings, actions or decisions of public authorities which derive from that judgment until the final decision of the Constitutional Court of the Republic of Kosovo. The Interim Measure was granted until 20 June 2017.
13. On 30 May 2017, the Review Panel deliberated on the report of Judge Rapporteur and recommended to the Court admissibility of the Referral, violation of Constitutional provisions and extension of the interim measures until the regular courts reconsider the matter as per enacting clause and reasoning of the Judgment of this Court.

### **Summary of the facts**

14. On 2 February 2009, the claimant K. Sh. filed a claim with the then Municipal Court in Prishtina requesting the Applicant to be obliged to pay to him the amount of € 20,337.40 including the interest from the day the claim was submitted.
15. On 23 June 2010, K. Sh. submitted another claim with the Basic Court replacing the previous one, requesting the Applicant to be obliged to pay him € 17,500 interest included.
16. On 1 January 2013 the Law No. 03/L-199 on Courts entered into force. Pursuant to Article 2 paragraph 1 sub-paragraph 1.2. of that Law: *“Basic Court- the court of first instance comprised of seven geographic areas as established by this Law”*.
17. On 6 February 2013, the Basic Court rendered a decision which obliged the Applicant to reply to the claim of K. Sh. within fifteen (15) days.
18. On 15 February 2013, the Applicant in his reply objected the allegations of K. Sh. and requested from the Basic Court to reject as ungrounded the statement of claim of K. Sh. in its entirety or to dismiss it as inadmissible.
19. On 19 April 2013 and 7 June 2013, two judicial sessions were held whereby witnesses were heard. The Applicant objected the way the evidence was taken and assessed, because, on one hand, the evidence and the witnesses proposed by the Applicant were rejected, while on the other hand, the evidence and the witnesses proposed by K. Sh. were admitted by the court.

20. On 29 October 2013, the Basic Court in Prishtina by Judgment C. no. 162/09 approved the statement of claim of the claimant K. Sh. and obliged the Applicant to pay the claimant the 'outstanding loan'. On the same date, the Applicant submitted new evidence alleging that: (i) the legitimacy and identity of K. Sh. was not accurately determined and that his identity was not known; and, (ii) proposed a witness to be heard. The evidence and the proposed witness were rejected by the court.
21. The Applicant filed an appeal with the Court of Appeals on the grounds of essential violation of the procedural provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law, with a proposal that the appealed judgment was annulled and the case be remanded for fresh consideration.
22. On 26 October 2015, the Court of Appeals by Judgment CA. no. 401/2014 rejected as ungrounded the appeal of the Applicant and upheld the Judgment of the Basic Court.
23. On 23 November 2015, the Applicant filed a request for revision with the Supreme Court on the grounds of essential violation of the procedural provisions, erroneous application of the substantive law and erroneous and incomplete determination of factual situation. The Applicant again reiterated that he raised through the lower instances the argument for alleged violations of his right to fair and impartial trial for not accepting to hear his witness and take into account his evidence.
24. On 30 November 2015, upon request of the claimant K. Sh., the Office of the Private Enforcement Agent issued an order (P. no. 784/15) of enforcement. The applicant objected to that order.
25. On 4 April 2016, the Supreme Court by Judgment Rev. No. 50/2016 rejected as ungrounded the request for revision of the Applicant, upheld his obligation to the claimant and modified the decisions of lower instance court only in terms of the interest rate. The Supreme Court reasoned that: (i) the decisions of the regular courts were sufficiently clear and well reasoned; (ii) the existence of a legal relationship between the litigants was confirmed by the testimony of witnesses; (iii) the witness proposed by the Applicant to be heard was irrelevant in the case at issue; and, (iv) the allegation questioning the identity and legitimacy of K. Sh. was ungrounded and that the Applicant did not raise that allegation before the courts of lower instance, inter alia, contrary to the facts and the minutes present in the courts files.
26. In the interim, the claimant K. Sh. filed a proposal for imposition of security measures against the immovable property of the Applicant.
27. On 15 February 2016, the Basic Court in Prishtina, by Decision C. no. 2929/2015 approved as grounded the proposal of the claimant K. Sh. to impose security measures. The Applicant was ordered not to construct anything, not to sell, and not to contract and certify the contract on the sale-purchase of the Applicant with the competent notary in Prishtina in the cadastral unit assigned

in Prishtina until another decision of the Basic Court in Prishtina was rendered.

28. The Applicant filed in due time an appeal with the Court of Appeals against the Decision imposing security measures.
29. On 24 April 2016, the Court of Appeals, by Decision Ac. no. 1347/16 rejected as ungrounded the Applicant's appeal and upheld the Decision of the Basic Court.
30. The Applicant submitted a request for protection of legality to the Office of the Chief State Prosecutor, claiming, *inter alia*, that the claimant K. Sh., during all the time was presented with a false identity and that this was not verified by the courts, despite numerous complaints of the Applicant.
31. On the question of identity and legitimacy of K. Sh., the Applicant attached as evidence a notification by the German prosecution authorities which in its relevant part read: "*...the Kosovar authorities have been notified via Interpol...that the accused Sch. (formerly known as K. Sh., in 1995, by naturalization became a German national and changed his name to A. C. R. Sch.)...up to what degree does the use of previous personal data constitute a criminal offence...it is a responsibility of Kosovar authorities*".
32. On 31 May 2016, the Office of the Chief State Prosecutor notified the Applicant that it received his initiative and had submitted a request for protection of legality with the Supreme Court. The State Prosecutor stated before the Supreme Court that the decisions of the courts had to be invalidated due to essential violations of the procedural law.
33. On 4 August 2016, the Applicant filed Referral KI 102/16 with the Court. The Court declared the Referral inadmissible on the grounds that it was premature as the proceedings were pending before the Supreme Court. The Court also noted that the Referral raised important constitutional questions as to the procedural legitimacy of the parties and hearing of witnesses (see Constitutional Court of the Republic of Kosovo, Case No. KI102/16, *Applicant Shefqet Berisha*, Resolution on Inadmissibility, of 7 March 2017, paragraph 41).
34. On 24 August 2016, the Supreme Court by Decision CLM. No. 10/2016 rejected as ungrounded the request for protection of legality of the State Prosecutor filed against the decisions of the trial and the appeal courts in the proceedings. The Supreme Court reasoned that the request for protection of legality could be filed only for violations pertaining to territorial competence, the obligation to hold public hearing or in situation when the public was kept out of a public hearing. The Supreme Court concluded that the request for protection of legality could not be filed for violations of the procedural legitimacy of the parties.
35. On 21 November 2016, the Basic Court in Prishtina by Decision PPP. no. 1216/15 rejected the objection of the Applicant against the order for enforcement (P. no. 784/15 of 30 November 2015) issued by the Office of Private Enforcement Agent. The Basic Court held that the enforcement order



was based on Judgment C. no. 162/09 of the Basic Court in Prishtina of 29 October 2013.

36. The object of the above-stated enforcement proceedings was the seizure of the Applicant's private property and the blockage of his invalidity pension which was necessary for his medical treatment.
37. The Applicant challenged the above-stated decision (PPP. no. 1216/15) of the Basic Court before the Court of Appeals.
38. The Court notes that the enforcement proceedings are ongoing before the Court of Appeals, but they cannot prevent the execution of the decision of the Basic Court for seizure of the property of the Applicant.

### **Applicant's allegations**

39. The Applicant alleges a violation of Articles 31 [Right to Fair and Impartial Trial], 22.2 [Direct Applicability of International Agreements and Instruments] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 (Right to a fair hearing) of the Convention.
40. The Applicant alleges that the regular courts at all instances did not take into account the evidence proposed by him, nor had they justified why they rejected such evidence. This included, *inter alia*, rejection to determine precisely the identity of K. Sh. and to hear the witness proposed by the Applicant. This witness, according to the Applicant, – was an important witness for the fair determination of his case, i.e. whether he owned the claimant money or not, whether the claimant really gave him "loan" or not.
41. The Applicant alleges that in his case, due to the rejection to submit his evidence and his witness to be heard and the lack of reasoning for that, the principle of equality of arms and the right to a reasoned decision were violated, as a core component of the right to fair and impartial trial. Furthermore, the Applicant stated that he never admitted that he took or owed any money to the claimant contrary to what the basic court stated.
42. The Applicant alleges that: *"The Supreme Court of Kosovo violated Article 6 of the Convention, because it did not deal at all with the request for participation in the session of revision submitted on the grounds of violation of human rights and freedoms - Article 6 of Convention. Through this request I requested the court to hold the hearing in which it would hear my allegations for violation of fundamental human rights and freedoms -Article 6 of Convention. The arguments for violation of fundamental human rights and freedoms by the previous courts (violations that have prevented fair and impartial trial) are attached to this letter and are justified by reference to the case law of the ECtHR"*.
43. The Applicant states that: *"The State Prosecution requested the annulment of the court decisions that were rendered in the proceedings of deciding on security measure– considering that there are elements of the criminal offence (falsified identity of the claimant), because he is not K. Sh. (Kosovo citizen),*

but he is A. C. R. Sch., German citizen, with permanent residence and emplacement in the Federal Republic of Germany. Taking into account that the FRG bans two citizenships, the existence of these criminal offences cannot be excluded. Even if two citizenships were allowed, the use of different identities in different countries is not allowed in any way, because the identity is not determined by personal name and in this respect is also determined the personality and legitimacy of a party. It is not about the same person – but about different personalities. How can it be considered a regular procedure, as long as the identity of the parties in the proceedings is not certain?”

44. The Applicant alleges that the Supreme Court and the Court of Appeals rendered unreasoned decisions: *“The Court of Appeals, except it did not reason its decisions/conclusions, it even did not reiterate the reasoning of the first instance court – and does not give justification as to why it agrees with the reasoning of the first instance court...the Supreme Court of Kosovo reiterated silently all violations of the previous instances, by turning them into continuous violation of human rights and fundamental freedoms by the state judiciary. The Court, inter alia, does not justify at all its decision that there has not been a violation of the formal law and that there has not been a violation of the substantive law.”*
45. The Applicant alleges that in his case the proceedings as a whole were unconstitutional, and therefore, must be declared unconstitutional *ab initio*. In this respect, he alleges that: *“Pursuant to this standard of ECHR, I inform the Constitutional Court that I request the constitutional review of the judicial proceedings (trial) and this Referral are not limited to the constitutional review of only the last Decision because some of the violations of fundamental human rights and freedoms, in fact, have been committed by the Court of the first instance since the beginning of the trial”*.
46. The Applicant asserts that the Supreme Court (Decision CLM. No. 10/2016 dated 24 August 2016) once again failed to address the central issues raised by him and the State Prosecutor namely: (i) the question of the identity and procedural legitimacy of K. Sh.; (ii) the way the evidence was taken; and, (iii) why the only witness proposed by him was rejected by the courts. The Applicant alleges that in his case in all court instances the principle of equality of arms was violated.
47. The Applicant requests the imposition of interim measures, in accordance with Article 27 of the Law and Rule 54 of the Rules of Procedure. *“In this respect, the Applicant emphasizes: “... I submit to the Constitutional Court of the Republic of Kosovo this request for imposition of the interim measure against all judgments and decisions rendered by the courts because they are in breach of the right to a fair trial and peaceful enjoyment of possessions.”*
48. Furthermore, the Applicant specifies these following reasons: (i) the immovable property which was subject to security measures was also subject of mortgage in favor of a third person; (ii) the imposition of security measures on property which was subject to mortgage constitutes a criminal offence; (iii) the Applicant’s account (the invalidity pension) through which he secures his medical treatment is blocked, and (iv) the Applicant since 1992 has been

diagnosed with 100% invalidity degree, and that therefore, blocking of his invalidity pension will cause him unrecoverable damage.

49. The Applicant stated that due to one sided stand of the courts in his case there has been created a situation of 'continuous violation'. The imposition of security measures against his property and blocking of his pension of invalidity violated moreover his right to property as guaranteed by Article 46 of the Constitution in connection with Article 1 of Protocol No. 1 of the Convention.
50. Furthermore, the Applicant states that: *"I consider that execution of a decision against an invalidity pension which is assistance for medical treatment and to save my life is resulting also in violation of Article 8 of the Convention"*.
51. Finally, the Applicant requests the Court: (i) to declare the Referral admissible, (ii) to hold that there is a violation of Articles 31 [Right to Fair and Impartial Trial], 22.2 [Direct Applicability of International Agreements and Instruments] and 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 6 (Right to fair trial) of the Convention, (iii) to declare invalid the judicial proceedings as a whole and to annul the challenged decisions; (iv) to impose interim measures; and (v) to remand the case before the Basic Court for fresh consideration in accordance with the Judgment of the Constitutional Court.

#### **Assessment of admissibility**

52. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
53. With respect to the Applicant's Referral, the Court refers to Article 113.7 of the Constitution which establishes: *"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*
54. In this respect, the Court notes that the Applicant has exhausted all legal remedies, provided for by law, and due to lack of any other available effective remedy, he has addressed his referral before the Court.
55. The Court also refers to Article 49 of the Law, which provides that: *"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..."*.
56. In this respect, the Court recalls that in its Decision on Interim Measures of 28 March 2017, it found as follows. *"Since its Resolution on Inadmissibility in Case no. KI102/16 which declared the Applicant's referral inadmissible due to it being premature, the Court notes that the situation of the Applicant was not remedied, but in fact it appears to become more aggravated and continuous"*.



57. The Court notes that the requirement for the submission of the Referral within the time limit of four (4) months does not apply in cases of an alleged continuous violation of fundamental human rights and freedoms (see, among other authorities, Constitutional Court of the Republic of Kosovo: Case No. KI50/12 Applicant, *Agush Lolluni*, Judgment of 20 July 2012).
58. The Court also refers to Article 48 of the Law, which provides that: "*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*".
59. Regarding the fulfillment of this requirement, the Court notes that the Applicant has accurately specified what rights, guaranteed by the Constitution and the Convention have been violated to his detriment, by the alleged unconstitutionality of judicial proceedings.
60. Having examined the Applicant's complaints and observations, the Court considers that the Referral raises serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded within the meaning of the Rule 36 (1) (d) of the Rules, and no other ground for declaring it inadmissible has been established (See, for example, the *Case of A and B v, Norway*, [GC], applications nos. 24130/11 and 29758/11, Judgment of 15 November 2016, paragraph 55 and also see *mutatis mutandis* Case No. KI132/15, *Visoki Decani Monastery*, Judgment of the Constitutional Court of the Republic of Kosovo of 20 May 2016).

### **Merits of the Referral**

61. The Court recalls that the Applicant alleges a violation of Articles 31 [Right to Fair and Impartial Trial], 22.2 [Direct Applicability of International Agreements and Instruments] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the Convention.
62. In the present case, the Court will examine the merits of the Referral, pursuant to Articles 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Articles 6.1 (Right to a fair trial) of the Convention.
63. In this regard, the Court refers to Article 31 [Right to a 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."*

64. In addition, Article 6.1 (Right to a fair trial) of the ECHR 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.”*

65. The Court notes that the main allegation of the Applicant is that judicial proceedings as a whole were unconstitutional because the courts from the beginning have violated his right to have his witness heard and evidence accepted and the question of identity and legitimacy of the opposing litigant.

66. In this respect, the Court notes that requirement of “fairness” as guaranteed by Article 31 of the Constitution in connection with Article 6 of the Convention covers proceedings as a whole, and the question whether a person has had a “fair” trial is looked at way by cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage (see, for example, *Monnell and Morris v. the United Kingdom*, §§55-70).

67. The Court notes that the Applicant also claims that he must rely on his invalidity pension for his medical treatment and in view of the courts decisions he cannot. The Applicant further claims that the imposition of security measures on his private property will also injure the rights of third persons and as such is unlawful and is a criminal offence.

68. In addition, the Court notes that the Referral raises serious doubts about the constitutionality of the judicial proceedings, related to: (i) the alleged arbitrariness in assessment of the facts; (ii) the question of identity and procedural legitimacy of K. Sh.; (iii) the allegation on violation of the Applicant’s right to have his witness heard and his evidence accepted; (iv) the potential adverse repercussions for the Applicant and the third parties in case of implementation of security measures against his property, as well as the blocking of his invalidity pension.

69. The Court refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution which establishes 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”*.

70. In this regard, the Court considers that the doubts raised by the referral under review shall primarily be assessed in the light of requirements of the principle of equality of arms. The court shall also examine whether the Applicant was injured with respect to other rights namely the peaceful enjoyment of possessions and private life; whose breach may have originated as a result of violation of the principle of equality of arms.

71. The principle of “equality of arms” is inherent in the broader concept of a fair trial. 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

the Case of *Feldbrugge v. Netherlands*, ECtHR, Application no. 8562/79, Judgment of 29 May 1986, paragraph 44).

72. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party (see the Case of *Dombo and Beheer B. V. v. the Netherlands*, ECtHR, application no. 14448/88, Judgment of 27 October 1993, paragraph 33).
73. On the question of administration of evidence, the Court notes that the Constitution and the Convention do not lay down rules on evidence as such (see the Case of *Mantovanelli v. France*, ECtHR, Application no. 21497/93, Judgment of 18 March 1997, paragraph 34). The admissibility of evidence and the way it should be assessed are primarily matters for regulation by national law and the national courts (see the Case of *Garcia Ruiz v. Spain* [GC], application no. 30544/96, Judgment of 21 January 1999, paragraph 28). The same applies to the probative value of evidence and the burden of proof (*Tiemann v. France and Germany* (dec)). It is also for the regular courts to assess the relevance of proposed evidence (see the Case of *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], application no. 38433/09, Judgment of 7 June 2012, paragraph 198).
74. However, the Court's task under the Constitution and the Convention is to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken (see the Case of *Elsholz v. Germany* [GC], application no. 25735/94, Judgment of 13 July 2000 at paragraph 66). It must therefore establish whether the evidence was presented in such a way as to guarantee a fair trial (see the Case of *Blücher v. the Czech Republic*, ECtHR, application no. 58580/00, Judgment of 11 January 2005, paragraph 65).
75. It is the duty of the regular courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (see the Case of *Vand de Hurk v. the Netherlands*, ECtHR, application no. 16034/90, Judgment of 19 April 1994, paragraph 59).
76. On the question of witness evidence, the Court notes that Article 31 of the Constitution in conjunction with Article 6 § 1 do not explicitly guarantee the right to have witnesses called, and the admissibility of witness evidence is in principle a matter of legality. However, the proceedings in their entirety, including the way in which evidence was permitted, must be “fair” within the meaning of Article 31 in conjunction with 6 § 1 (*Dombo and Beheer B. V. v. the Netherlands*, paragraph 31).
77. Where courts refuse requests to have witnesses called, they must give sufficient reasons and the refusal must not be tainted by arbitrariness; it must not amount to a disproportionate restriction of the litigant's ability to present arguments in support of his case (see the Case of *Wierzbicki v. Poland*, ECtHR, application no. 24541/94, Judgment of 18 June 2002, paragraph 45).
78. A difference of treatment in respect of the hearing of the parties' witnesses may be such as to infringe the “equality of arms” principle (*Dombo and Beheer B. V.*

*v. the Netherlands*, paragraph 35, where only one of the two participants in the events in issue was allowed to give evidence (violation).

79. In this respect, the Court considers that if it is established that a party to the proceedings had been placed at clear disadvantage vis-à-vis his opponent during the course of regular proceedings then, that is an indication that the principle of equality of arms has been breached.
80. The Court notes that the Applicant has raised fair trial concerns in all court instances, namely the non-admission of evidence about the legitimacy of K. Sh. and to have his witness heard, but the courts did not take a stand on those concerns, and as a consequence, have allegedly violated the 'fair balance' which is requisite of equality of arms between the litigants in civil proceedings.
81. As to the concrete case, the Court shall inquire into the allegations raised by the Applicant in each step of proceedings before the courts, and then, confront those allegations with the findings of the courts in order to determine the fairness of proceedings as a whole.
82. In this respect, the Court notes that the Applicant in his submission (C.nr. 162/2009 of 15 February 2013) addressed to the Basic Court in Prishtina, objected the allegation that he owes money to the plaintiff K. Sh., by stating that the lawsuit of the latter is completely baseless and "fictitious". Moreover, the Applicant added that even if he owed money to the plaintiff, such "hypothetical" debt would be subject to statutory limitation.
83. In the judicial record (C. no. 162/09 drawn-up on 7 June 2013) of the main hearing in the Basic Court in Prishtina it is stated, inter alia, that the Applicant objected the lawsuit of the plaintiff as to the alleged money he owes to the latter. That judicial record also shows that the Applicant's request to have witness I.S. heard was rejected without any explanation. The judicial record also shows that the Applicant notified the court that his final submission shall be in written and in more detail.
84. In his final submission (C. no. 162/2009 of 29 October 2013) addressed to the Basic Court in Prishtina, the Applicant, inter alia, reiterated that he objects the lawsuit of the plaintiff as baseless as to the money owed, pointed out the inconsistency of the plaintiff as to the amount of debt, requested that witness I.S. be heard, informed the court that he made a criminal report with the Kosovo Police due to the threats and intimidation incurred upon him and his family by the plaintiff. The Applicant also raised doubts as to the real identity and legitimacy of the plaintiff K. Sh.
85. In relation to having his witness heard, the Applicant stated that it is incomprehensible why the court would refuse such a witness, who would aid the court to ascertain the truth especially in light of contradictions of testimonies of the witnesses proposed by the plaintiff.
86. In relation of the identity and legitimacy of the plaintiff K. Sh., the Applicant suggested to the court to immediately suspend the proceeding and verify the identity of the plaintiff. In that regard, the Applicant added that in Germany,



criminal proceedings were instituted against the plaintiff precisely on the grounds of his different identities.

87. In his appeal (C. no. 162/2009) before the Court of Appeals, the Applicant reiterated his allegation about the invalidity of the legal affair between him and the plaintiff, the identity of the plaintiff and his right to have the witness I.S. heard. The Applicant complained before the Court of appeals about the partiality of the basic court in proceedings. The Applicant particularly emphasized that hearing witness I. S. is very important because it would explain whether he owes money to the plaintiff or not.
88. In this respect, the Court notes that the Court of Appeals held that it is not necessary to reply to the allegations raised by the Applicant.
89. In his request for revision (CA. nr. 411/2014 of 23 November 2015) before the Supreme Court, the Applicant asked the Supreme Court to approve the revision as grounded and remand the case for fresh consideration. The Applicant reiterated that his evidence as to the legitimacy of the plaintiff and his request to have the witness I. S. heard was rejected by the courts of lower instance and deemed irrelevant without explanation.
90. In this regard, the Court brings to the fore the response of the Supreme Court (Judgment Rev. Nr. 50/2016, of 4 April 2016) with respect to the Applicant's allegations. The reasoning of the Supreme Court may be summarized as follows. The Supreme Court held that (i) the legal affair .i.e., the debt the Applicant owes to the plaintiff was ascertained by the testimony of the witnesses; (ii) the allegations of the Applicant about rejection of his witness are groundless because the trial court ruled that that witness I.S. is irrelevant; and, (iii) the Applicant's allegation on the identity of the plaintiff is untenable because the trial court identified his passport, and that the Applicant did not raise this issue before the courts of lower instance.
91. On the question of the alleged legal affair established between the Applicant and the plaintiff, the Supreme Court stated the following. *"Based on the determined factual situation, it has been ascertained that the respondent owns to the claimant the amount of 35.000 DM, which converted in Euros is 17.500 Euros. The debt derives from a legal rapport of loan contract, wherein the claimant, as debt, gave to the respondent the amount of 35.000 DM. Based on the agreement on loan, in 1999, the respondent was obliged to return the loan until 31 December 2002, a time limit which was extended until 31 December 2008, the respondent did not pay its debt even after this time limit. The existence of a legal rapport of the loan contract between litigants has been confirmed based on the statements of heard witnesses I.J., A.B. and S.B."*
92. On the question of the witness proposed for by the Applicant, the Supreme Court reasoned as follows. *"The statements in the revision that the Court of the first instance did not allow to hear witness I.S., the imam of "Sofalia" mosque in Prishtina, are ungrounded due to the reason that the Court of the first instance assessed that the proposal for hearing the witness in question is not relevant for deciding on this legal matter. The statements in the revision that*



*the heard witnesses did not give statements for the relevant facts for deciding in this legal matter, do not stand because the Court of the first instance heard the witnesses in circumstances which are related to the existence of the legal rapport by the loan contract between litigants, a fact that was relevant for deciding correctly in the legal matter based on the reason the litigant parties reached a verbal contract on the loan”.*

93. On the question of identity of the plaintiff, the Supreme Court held as follows. *“In the revision, the respondent contests the fact of legitimacy and identity of the claimant party by highlighting that the claimant except the identity K.Sh. has the identity as ACRSch, as German citizen. However, in the minute of the main hearing with the Court of the first instance, on 19 April 2013, the Court identified the claimant based on passport no. K000432720 and the respondent and his authorized person H.R. were present who did not have any remarks on the identity of the claimant and they did not make any remark in the following hearings, therefore the statements of the revision that the identification of the claimant party was not done, do not stand”.*
94. The Court notes that, in the interim, there ensued several events with regard to the Applicant’s case, namely, the Resolution on Inadmissibility of the Court in Case No. KI102/16, Applicant Shefqet Berisha which was declared inadmissible on the grounds of it being premature. In that case, the Court noted that that referral raises important constitutional questions, and that, nothing precludes the Applicant to submit a new referral in the future.
95. In this light, the Applicant’s request for protection of legality was accepted by the State Prosecutor who submitted that request before the Supreme Court. The Applicant submitted with the State Prosecutor an official notice by the German prosecuting authorities concerning the identity of the plaintiff.
96. The State Prosecutor stated before the Supreme Court that the courts of lower instance have not replied to the Applicant’s allegations about the identity and legitimacy of the plaintiff K. Sh.
97. The Supreme Court (Decision CLM. No. 10/2016 of 24 August 2016) rejected the request for protection by reasoning that such a request could be filed only for violations pertaining to territorial competence, the obligation to hold public hearing or in situation when the public was kept out of a public hearing. The Supreme Court concluded that the request for protection of legality could not be filed for violations of the procedural legitimacy of the parties.
98. There also ensued other events with regard to the Applicants case, namely, the imposition of security measures by the Basic Court against the property of the Applicant and blocking of his invalidity pension. The Applicant repeated his allegations even in the course of enforcement proceedings (security measures) and blocking of his pension of invalidity proceedings.
99. The Applicant submitted a new Referral with the Court asking for imposition of interim measures in his favor by alleging violations of the right to fair and impartial trial, protection of property and private life.

100. The Court granted an interim measure in Case No. KI31/17 Applicant Shefqet Berisha, by noting, inter alia, that: *“since its Resolution on Inadmissibility in Case no. KI102/16 which declared the Applicant’s referral inadmissible due to it being premature, the situation of the Applicant was not remedied, but in fact it appears to become more aggravated and continuous”*.
101. On the strength of the aforesaid, the Court firstly notes that the findings of fact of the courts do not reflect the content of the case because the Applicant never admitted that he had established a legal affair with the plaintiff whereas the courts, without admitting the proposed evidence, stated that he did. (See Submission No. 162/2009, of 15 February 2009 and also Judicial Record C. No. 162/2009, of 7 June 2013).
102. Secondly, the courts rejected the proposal of the Applicant to hear his only witness without sufficient explanation on the one hand, and accepting the witnesses proposed for by the plaintiff, on the other, thus breaching the “fair balance” between the parties in civil litigation (see Submission No 162/2009 and Judicial Record C. No. 162/2009 cited above).
103. Thirdly, the courts held that the Applicant never raised the issue of identity of the plaintiff, whereas it is abundantly clear that he did raise that issue from the first until the final instance (see Submission No. C. No. 162/2009, of 29 October 2013).
104. Fourthly, the courts, on the one hand, assessed the Kosovo passport of the plaintiff, while on the other, rejected the Applicant’s evidence on the identity of the plaintiff, namely, the official notice of the German prosecuting authorities on the same question thereby, again, breaching the “fair balance” between litigants in civil proceedings (see the State Prosecutor request for protection of legality).
105. In connection with the Decision of the Supreme Court (CLM. No. 10/2016, of 24 August 2016), rejecting the State Prosecutor’s request for protection of legality, the Court notes that the Supreme Court did not pay any attention to the evidence adduced by the State Prosecutor, especially the official notice of the German prosecuting authorities related to the proceedings instituted against the plaintiff K. Sh.
106. The Court considers that judges in regular proceedings must pay close attention to the prevailing constitutional provisions, namely Articles 22 [Direct Applicability of International Agreements and Instruments] and 53 [Interpretation of Human Rights Provisions] of the Constitution. The interpretation of legal provisions must be done in the spirit of the Constitution and the Convention. Seen in this light, the Court considers that by not taking into account the evidence adduced by the State Prosecutor, the Supreme Court did not interpret and apply the law in the spirit of the Constitution and of the Convention.
107. Thus, the Court considers that the failure of the courts in all instances of proceedings to give due consideration to the evidence and witness proposed by

the Applicant is in breach of the principle of equality of arms and the right to a reasoned decision, as core components of the right to a fair and impartial trial.

108. Therefore, the Court finds that there is a violation of Article 31 [Right to a Fair and Impartial Trial] of the Constitution, in connection with paragraph 1 of Article 6 (Right to a fair trial) of the Convention.

### **Interim Measures**

109. As abovementioned, the Applicant requests the Court to impose an interim measure against Judgment C. No. 162/09, of the Basic Court in Prishtina, of 29 October 2013, and estop any judicial proceedings, enforcement proceedings, actions or decisions of public authorities which derive from that judgment until the final decision of the Court.
110. The Court also finds that the request on interim measure is grounded and justified in a subject matter dealing with immovable property and the invalidity pension of the Applicant. Furthermore, the Court considers that an eventual pecuniary compensation cannot redress irreparable damage done to the Applicant should his property be subject to security measures and invalidity pension blocked, because immovable property is unique and the invalidity pension has direct consequences in the livelihood of the Applicant, which is supreme value in international hierarchy of human rights (Constitutional Court of the Republic of Kosovo, Case No. KI72/12, *Applicants Veton Berisha and Ilfete Haziri, Constitutional review of the Supreme Court Judgment A. Nr.1053/2008, of 31 of May 2012*, Judgment of 17 December 2012, paragraphs 65-69)
111. The Court considers that as a result of a violation of the right to a fair and impartial trial, the Applicant also found himself in a precarious position with respect to his right for peaceful enjoyment of possession under Article 1 of Protocol No. 1 and the right to respect for private life under Article 8 of the Convention.
112. The Court reiterates that the Court of first instance breached the Applicant's rights as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in connection with Article 6 (Right to a fair trial) of the ECHR; however, the Court of Appeals as well as the Supreme Court did not remedy that breach.
113. Therefore, the Court, pursuant to Article 116 (2) of the Constitution, Article 27 of the Law and Rule 55 (9) of the Rules of Procedure without prejudging the final outcome of the disputed matter, decides to extend interim measures until final reconsideration by the courts.

### **Conclusion**

114. In conclusion, the Court finds that by not giving due consideration to the evidence proposed by the Applicant and the State prosecutor, unreasoned decisions as well as the refusal to hear the sole witness proposed for by the Applicant, the courts in all instances have violated the Applicant's right to a fair

and impartial trial as guaranteed by Article 31 of the Constitution in connection with paragraph 1 of Article 6 of the Convention. As a result of this violation, the Applicant could have been deprived from his right to peaceful enjoyment of possessions and the right to private life due to having his private property subject to security measures and his invalidity pension blocked.

115. The Court further 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 (Constitutional Court of the Republic of Kosovo, Case No. KI135/14, *Applicant IKK Classic*, Judgment of 9 February 2016, with further references). Thus, the Court is under constitutional obligation to make sure that proceedings developed before public authorities and especially the courts, must be respectful of the fundamental human rights as guaranteed by the Constitution.
116. In sum, in accordance with the Rule 74 (1) of the Rules, the Decision of the Supreme Court (CLM No. 10/2016 of 24 August 2016) is declared invalid and the case, in accordance with the subsidiarity principle, is remanded to the Supreme Court of Kosovo for fresh consideration.

### **FOR THESE REASONS**

The Constitutional Court, pursuant to Articles 113(7) and 116 (1) and (2) of the Constitution, Article 27 of the Law and Rule 55 (4), (5) and (9) and 74 (1) of the Rules of Procedure, on 30 May 2017,

### **DECIDES**

- I. TO DECLARE, by unanimity, the Referral admissible;
- II. TO HOLD, by majority, that there has been a breach 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 it is not necessary to examine whether there has been a violation of Article 54 [Judicial Protection of Rights] of the Constitution;
- IV. TO DECLARE invalid the Judgment of the Basic Court in Prishtina (C. No. 162/09 of 29 October 2013) and the ensuing rulings in appeal, security measures and enforcement proceedings, actions or decisions of public authorities which derive from that judgment;
- V. TO DECLARE invalid Decision (CLM No. 10/2016, of 24 August 2016) and Judgment (Rev. No. 50/2016, of 4 April 2016) of the Supreme Court of Kosovo;




- VI. TO REMAND the Decision of the Supreme Court of Kosovo (CLM No. 10/2016 of 24 August 2016) for reconsideration in conformity with the Judgment of this Court;
- VII. TO ORDER the Supreme Court to inform the Court, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;
- VIII. TO GRANT the request for interim measure until the time the Supreme Court of Kosovo reconsiders the matter as per reasoning and enacting clause of the Judgment of this Court;
- IX. TO REMAIN seized of the matter pending compliance with that order;
- X. 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;
- XI. TO DECLARE that this Judgment is effective immediately.

**Judge Rapporteur**



Snezhana Botusharova

**President of the Constitutional Court**



Arta Rama-Hajrizi