



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

Prishtina, on 15 April 2019
Ref. no.:AGJ 1347/19

JUDGMENT

in

Case No. KI87/18

Applicant

„IF Skadeforsikring“

**Constitutional review of Judgment E. Rev. No. 27/2017 of the Supreme
Court of 24 January 2018**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by the insurance company „IF Skadeforsikring“ (hereinafter: „IF Skadeforsikring“), from Norway (hereinafter: the Applicant), represented by Visar Morina from Prishtina and lawyer Besnik Z. Nikqi from Prishtina.

Challenged decision

2. The Applicant challenges Judgment E. Rev. No. 27/2017 of the Supreme Court of 24 January 2018, which was served on him on 7 March 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged judgment, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 4, of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 27 June 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
7. On 16 August 2018, the President of the Court appointed Judge Bekim Sejdiu as the Judge Rapporteur and the Review Panel, composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban (members).
8. On 27 August 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 27 February 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the full Court to declare the Referral admissible and to find a violation.
10. The full Court, by a majority of votes, approved the Referral as admissible.

Summary of facts

11. On 26 July 2009, a car accident occurred involving two passenger vehicles, in which the Mercedes vehicle bearing Kosovo registration plates and car insurance of the insurance company SIGMA (hereinafter: SIGMA), caused damage to the passenger Audi vehicle, with Norwegian license plates and CASCO auto insurance „IF Skadeforsikring“.

12. On 19 October 2010, the Applicant sent a request to SIGMA requesting the payment of damage based on compensation, which resulted from a traffic accident, to which SIGMA did not respond.
13. On 9 July 2012, the Applicant filed an appeal against SIGMA with the Basic Court, in which he requested that the amount of 23,609.24 € be paid in the name of the damage incurred, with a penalty interest rate of 12%, from 19 October 2010.
14. On 23 November 2015, the Basic Court rendered Judgment I. C. No. 281/2012, which approved the Applicant's statement of claim in entirety. The reasoning of the judgment reads:

„Article 939, paragraph 1, of the LOR, defined that by paying the compensation from insurance pass on the insurer, based on the Law itself, until the amount of paid compensation, all the rights of the insurer against person who is responsible in any ground for the damage, whereas Article 3 of the Law on Compulsory Motor Liability Insurance defines that the insurer is responsible for the compensation of the damage caused to third persons from the use of the vehicle insured based on motor liability.

From the above mentioned legal provisions, it follows that the claimant as insurer of the vehicle that took part in the accident based on motor casco insurance was obliged to compensate the damage caused to the insured vehicle, which he did and in the meantime it enjoys the right to regress the amount paid by the respondent as insurer of the vehicle “Audi A6” based on motor liability insurance for the damage caused to third persons.

The Court approved the statement of claim regarding the requested penalty interest in the amount of 12 % per year, deciding in this way in accordance to Article 26.6 of the Law on Compulsory Motor Liability Insurance“.

15. SIGMA filed an appeal with the Court of Appeals against the judgment of the Basic Court for violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, the decision on the interest, the decision on the costs of the proceedings and erroneous application of the substantive law.
16. On 31 October 2017, the Court of Appeals rendered Judgment Ae. No. 191/2015, rejecting the appeal of SIGMA as ungrounded. The reasoning of the judgment reads:

„This Court assesses that the Court of the first instance correctly applied the substantive law, namely Article 939 of the LOR because from the case files and examined evidence it results that the insured person of the respondent was responsible for the caused damage, the respondent paid to its insurer the compensation of the suffered damage and by paying the compensation, all the rights of the insurer passed to the claimant.

For the Court of the second instance the appealing allegations of the respondent regarding the gravity of the interest and time period of calculation do not stand because the interest is calculated from the moment of submission of the claim to the Court which in the present case the

calculation of the interest was calculated correctly based on Article 26, paragraph 6, of the Law on Compulsory Motor Liability Insurance.

The Court assessed the other allegations of the respondent, but found that they were ungrounded because the Court of the first instance completely confirmed the factual situation and correctly applied the substantive law while the allegations of the respondent are contrary to the evidence that are contained in the case files“.

17. SIGMA submitted a request for revision to the Supreme Court against the judgment of the Court of Appeals, on the grounds of erroneous determination of factual situation, erroneous application of the substantive law, the monetary amount, as well as the amount of interest and the time period of its calculation.
18. The Applicant also responded to the Applicant's request for revision, stating *“that the revision as inadmissible within the meaning of Article 214.2 of Law 04/L-118 (on amending and supplementing Law 04/L-006 on Contested Procedure), by the reasoning that the revision refers entirely and only to the erroneous determination of the factual situation, namely that the allegations of the respondent deriving from the revision do not deal with any violations of the provisions of LCP or erroneous application of the substantive law.“*
19. On 24 January 2018, the Supreme Court rendered Judgment E. Rev. No. 27/2017, by which:

„I. The revision of the respondent submitted against Judgment Ae. No. 191/2015, of the Court of Appeals of Kosovo, of 31 October 2017, is rejected in the part that is related to the obligation of the respondent for paying to the claimant the amount of 23.609.24 Euros in the name of regress from the base of motor casco insurance, within a time limit of 7 days from the receipt of the Judgment.

II. The revision of the respondent is approved, the challenged Judgment is modified regarding the interest so that the respondent is obliged to pay to the claimant the amount of 23.609.24 Euros with interest in the amount of saving deposits without term, which are paid by the business banks in Kosovo, without certain destination for more than one year, from the submission of the claim on 19 November 2010 until the complete payment.“

20. In the first paragraph of the enacting clause, regarding the rejection of the respondent's appeal, the Supreme Court stated:

„According to the assessment of the Supreme Court of Kosovo, the courts of lower instance have correctly applied the provisions of the contested procedure and substantive law, when they found that the statement of claim of the claimant is grounded. In their judgments, they gave sufficient reasons for the decisive facts recognized by this court of revision too.“

21. In the second paragraph of the enacting clause, regarding the approval of the respondent's revision and modification of the judgment, the Supreme Court stated:

„Regarding the determination of the interest, the judgments of the courts of lower instance have been rendered with erroneous application of the substantive law; therefore, as a consequence they were modified so that the respondent shall pay to the claimant the amount of 23.609.24 Euros with interest rate in the amount of saving deposits without term which are paid by the business banks in Kosovo, without certain destination for more than one year, from 19 November 2010 until the complete payment, this happens because Law on Compulsory Auto Liability Insurance entered in force in 2011 while the case happened in 2009 and as such, it is not applied in the present case“.

Applicant's allegations

22. The Applicant alleges that Judgment E. Rev. No. 27/2017 violated Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.
23. The Applicant alleges that Article 31 of the Constitution and Article 6 of the ECHR have been violated due to the lack of reasoning of the judgment, namely that the Supreme Court did not provide sufficient and adequate reasoning regarding the modification of the judgment of the Court of Appeals Ae. No. 191/2015, with a penalty interest rate, by which he considers that the principle of the right to a reasoned court decision has been violated.
24. The Applicant states in particular that it is not clear *“what is the legal basis on which the Supreme Court concludes:*
 - *that the courts of lower instance committed erroneous application of the substantive law and the respective reasoning on this, as well as*
 - *what is a legal provision that this court considers to be meritorious for adjudication of this matter.“*
25. In addition, the Applicant further alleges *„that the Judgment of the Supreme Court, which it alleges, is contrary to its own case law, since by referring to its case law in similar situations it results that the Supreme Court without any reserve referred and applied the respective rule “lex specialis” in this field (CBK, Rule No. 3 on Compulsory Motor Liability Insurance and Law 04/L-018 on Compulsory Motor Liability Insurance) on the occasion of treating the institute of penalty interest“.* According to the Applicant's allegations, the right to legal certainty is violated.
26. In support of his allegations, the Applicant submitted to the Court several other judgments of the Supreme Court to show that the Supreme Court did not follow its case-law: The submitted decision of the Supreme Court's are: *„[E. Rev. No. 23/2017 of 23 December 2017], [E. Rev. No. 48/ 2014 of 13 May 2014], [E. Rev. No. 62/ 2014 of 21 January 2015], [E. Rev. No. 14/2016 of 24 March 2016], [E. Rev. No. 06/2015 of 19 March 2015], [E. Rev. No. 55/2014 of 03 November 2014], [E. Rev. No. 20/2014 of 14 April 2014]“.*
27. The Applicant requests the Court to annul Judgment E. Rev. No. 27/2017 of the Supreme Court due to violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR, and to remand the case for reconsideration.

Relevant law

LAW No. 04/L-018 ON COMPULSORY MOTOR LIABILITY INSURANCE, of 29 July 2011

Article 26 Compensation claims procedure

„[...]”

6. *In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim”.*

Admissibility of the Referral

28. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure.
29. In this respect, the Court refers to paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

Article 21 [General principles]

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

Article 113 [Jurisdiction and Authorized Parties]

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

(...)

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”

30. At the outset, the Court notes that pursuant to Article 21.4 of the Constitution, the Applicant has the right to file a constitutional complaint, referring to alleged violations of his fundamental rights and freedoms applicable both to individuals and to legal persons (case of the Constitutional Court No. KI41/09, Applicant: AAB-RIINVEST University LLC, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

31. Therefore, the Court notes that the Applicant fulfilled the requirements established in Article 113.7 of the Constitution, as it is an authorized party that challenges the act of a public authority, that is, Judgment E. Rev. No. 27/2017 of the Supreme Court, of 24 January 2018, and exhausted all legal remedies provided by law.
32. The Court further examines whether the Applicant fulfilled the admissibility requirements as further specified in the Law and the Rules of Procedure. In that regard, the Court first refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

*Article 48
Accuracy of the Referral*

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

*Article 49
Deadlines*

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced... .”

33. As regards the fulfillment of these requirements, the Court notes that the Applicant has clearly specified the rights guaranteed by the Constitution and the ECHR, which were allegedly violated, as well as a concrete act of a public authority which he challenges pursuant to Article 48 of the Law and submitted the Referral within a period of four (4) months stipulated in Article 49 of the Law.
34. The Court also refers to Rule 39 (2) of the Rules of Procedure,

Rule 39
[Admissibility Criteria]

„(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim “.

35. The Court concludes that this Referral initiates a constitutionally reasoned allegation *prima facie* and is not manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure. The Referral must therefore be declared admissible for consideration of the merits of the case.

Merits of the Referral

36. The Court recalls that the Applicant claims a violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant claims that the challenged judgment of the Supreme Court violates its right to a reasoned decision, which in itself leads to a violation of the right to legal certainty. These

violations, according to the allegations of the Applicant, were committed because the Supreme Court did not provide sufficient and adequate reasoning for the modification of the position regarding the calculation of the penalty interest, a position which it had consistently applied in its practice until then.

37. The Applicant specifically refers to the fact that the Supreme Court in previous identical cases of determining the amount of interest followed a different case law that was reasoned on a different legal basis. In this regard, the Applicant submitted to the Court several judgments of the Supreme Court.
38. Consequently, according to the Applicant, the fact on which legal basis the Supreme Court based its decision for modification of the penalty interest adjudicated by the lower instance courts, has remained unexplained and unreasonable.
39. The Applicant further alleges that the Judgment of the Supreme Court lacks an adequate reasoning for the new approach it has taken in this case, concerning the institute of the penalty interest in the legal relations of compulsory motor liability insurance, as in its practice so far, the Supreme Court decided in completely different manner in the similar cases.
40. In the light of these clarifications, the Court in the present case examines the merits of the Referral regarding the allegations in relation to Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.
41. In this regard, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:
 - “1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
 2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law”.
42. In addition, the Court refers to Article 6.1 (Right to a fair trial) of the ECHR, which stipulates:
 - “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”
43. The Court states that under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution in accordance with the ECtHR case law. accordingly, as regards the interpretation of the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR (in the part relating to the right to a reasoned court decision), the Court will refer to ECtHR case law.

General principles on the right to a reasoned decision developed by ECtHR case law

44. The Court notes, first of all, that the guarantees contained in Article 6 paragraph 1 of the ECHR include the obligation of the courts to provide a reasoning for their decisions. The reasoned court decision, to the parties, shows that their case has really been examined. (see judgment of the ECtHR *H. v. Belgium*, application 8950/80, paragraph 53 of 30 November 1987).
45. The Court also states that, according to the ECtHR case law, Article 6 paragraph 1 obliges the courts to give reasons for their judgments, but this cannot be understood as requiring a detailed answer to every argument (see ECtHR cases *Van de Hurk v. Netherlands*, judgment of 19 April 1994, *Garcia Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, paragraph 26, *Jahnke and Lenoble v. France*, *Perez v. France* [VV], paragraph 81.).
46. In this regard, the Court adds that the domestic court has a certain margin of appreciation when choosing arguments and admitting evidence in support of the parties' submissions, a domestic court is also obliged to justify its proceedings by giving reasons for its decisions (see ECtHR judgment *Suominen v. Finland*, Application 37801/97, from 1 July 2003, para 36.).
47. The Court also states that, in accordance with the ECtHR case law, when examining whether the reasoning of a court decision meets the standards of the right to a fair trial, the circumstances of the particular case should be taken into account. The court decision cannot be without any reasoning, nor will the reasoning be unclear. This applies in particular to the reasoning of the court decision deciding upon the legal remedy in which the legal position presented in the lower instance court decision has been changed (see: case of ECtHR *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61).
48. The Court emphasizes that the notion of a fair procedure, according to the ECtHR case law, requires that a national court which has given sparse reasons for its decisions, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings. (See ECtHR judgment *Helle v. Finland*, application 157/1996/776/977, of 19 December 1997, paragraph 60).
49. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; br. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic* Judgment of 8 December 2017).

Application of the abovementioned principles to the right to a reasoned decision on this case

50. The Court first notes that the Applicant claims that the Supreme Court in the first paragraph of its judgment E. Rev. No. 27/2017, rejected as ungrounded the revision of the respondent filed against the judgment of the Court of Appeals, for which it gave clear and sufficient reasoning.
51. However, the Court further notes that the Applicant states that, by the same judgment in paragraph two of the enacting clause of the judgment, the Supreme Court approved the revision of the respondent and modified the judgments of the lower instance courts related solely to the manner of determining the interest, which has already been adjudicated by the Basic Court and the Court of Appeals. The Applicant states that the Supreme Court did not provide a clear and sufficient reasoning for such a decision, relating to the manner of determining the interest.
52. In this regard, the Court notes that the Applicant solely challenges the Judgment of the Supreme Court in relation to the reasoning in item 2 of the enacting clause of Judgment E. Rev. No. 27/2017, which the Applicant brings in connection with the alleged violations of Article 31 of the Constitution and Article 6 of the ECHR, namely with the right to a reasoned judgment.
53. Accordingly, having regard to the Applicant's main allegation, the Court considers it necessary to analyze whether the Supreme Court provided clear and sufficient reasons to substantiate its decision on modification of the judgment of the lower instance courts on the amount of interest in the case of the Applicant.
54. The Court reiterates that the Supreme Court partially approved the revision of the respondent, and rendered Judgment E. Rev. No. 27/2017, in item 2 of the enacting clause reads:

“II. The revision of the respondent is approved, the challenged Judgment is modified regarding the interest so that the respondent is obliged to pay to the claimant the amount of 23.609.24 Euros with interest in the amount of saving deposits without term, which are paid by the business banks in Kosovo, without certain destination for more than one year, from the submission of the claim on 19 November 2010 until the complete payment.”

55. The Court further notes that, as regards the reasoning for the approval of the revision regarding the question of interest and the modification of judgments of lower instance courts, the Supreme Court stated in the reasoning:

„Regarding the determination of the interest, the judgments of the courts of lower instance have been rendered with erroneous application of the substantive law; therefore, as a consequence they were modified so that the respondent shall pay to the claimant the amount of 23.609.24 Euros with interest rate in the amount of saving deposits without term which are paid by the business banks in Kosovo, without certain destination for more than one year, from 19 November 2010 until the complete payment this happens because Law on Compulsory Motor Liability Insurance entered in force in 2011 while the case happened in 2009 and as such, it is not applied in the present case.“

56. In this regard, the Court notes that the Supreme Court in Judgment E. Rev. No. 27/2017, found that “*when determining the interest rates, the courts of lower instance rendered judgments based on erroneous application of the substantive law...*”.
57. However, the Court notes that the Supreme Court did not state in its reasoning what substantive law was applied by the lower instance courts, and that the application of such a law in determining the interest affected the violation of the substantive law.
58. Furthermore, the Court notes that the Supreme Court did not state in the reasoning what law or its article was erroneously applied by the lower instance regular courts.
59. Furthermore, the Court notes that, as a reason for modification of the decision regarding the determination of interest, the Supreme Court stated in the reasoning only the fact that the case happened in 2009 and that the Law on Compulsory Motor Liability Insurance came into force in 2011 which, in the opinion of the Supreme Court, leads to the conclusion that as such, is not applied in the present case.
60. In this regard, the Court does not consider disputable the Supreme Court's views as to its interpretation what law will be applied in the present case, since it is within the jurisdiction of that court. However, what the Supreme Court failed to explain is precisely the relationship between the presented facts and the application of the law to which it referred, namely in what manner they correlate with each other, and how they affected the decision of the Supreme Court to modify the decisions of the lower instance courts related to the way of determining the interest.
61. With regard to this view of the Supreme Court, the Court reiterates that the ECtHR in Judgment *Hadjianastassiou v. Greece*, in paragraph 33, took the view that the national court must “*indicate with sufficient clarity the grounds on which they based their decision*” namely that the party has the right to be informed about the reasons for the court decision.
62. In this connection, in view of the previous paragraph of the ECtHR, it remains unclear to the Court on which legal provision the Supreme Court specifically substantiated its reasoning on modification of the judgments of the lower instance courts regarding the manner of determining interest. In its judgment, the Supreme Court did not state the arguments and sufficiently elaborated the modified legal position of the lower instance courts (see: *mutatis mutandis*, the ECtHR case, *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61).

General principles on the right to legal certainty developed by ECtHR case law

63. Having regard to the Applicant's allegations that the Supreme Court, by challenged judgment, decided on the same factual and legal issue as in the present case, when it rendered an entirely different decision in relation to its previous case law, the Court finds that the Applicant also raises the question of respect for the guarantees established by the right to a fair trial under Article 31 of the

Constitution and Article 6 paragraph 1 of the European Convention in respect of the segment of legal certainty.

64. In this regard, the Court will also examine the Applicant's allegations of the lack of consistency of the case law of the Supreme Court, which, in its opinion, affects legal certainty.
65. The Court recalls that it is not the function of the Court to deal with the errors of facts or law allegedly committed by the national court, unless in so far as they may have violated the rights and freedoms protected by the European Convention (see Judgment of ECtHR, *García Ruiz v. Spain* [GC] no. 30544/96, para. 28, ECHR 1999-I). Similarly, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings, it must respect the independence of those courts (see ECtHR judgment *Ādamsons v. Latvia*, no. 3669/03, paragraph 118, 24 June 2008).
66. The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see ECtHR *Santos Pinto v. Portugal*, no. 39005/04, paragraph 41, 20 May 2008, and *Tudor Tudor v. Romania*, no. 21911/03, paragraph 29, 24 March 2009).
67. The Court adds that the ECtHR has established the criteria which it uses to assess whether the contradictory decisions of the national courts, adjudicating in the last instance, violate the requirement of a fair trial provided for by Article 6 paragraph 1 of the European Convention, and those criteria are: **i)** *whether “profound and long-standing differences” exist in the case-law of the national courts; ii)* *whether the domestic law provides for a mechanism to overcome these divergences, and iii)* *whether that mechanism has been applied and, if so, to what extent.* (see ECtHR Judgments, *Iordan Iordanov and Others v. Bulgaria*, Nr. 23530/02, paragraphs 48-50, of 2 July 2009, *Beian v. Romania* (number 1) no.30658/05 paragraphs 34-40, ECHR 2007-V (extracts); *Ştefan and Ştef v. Romania*, nos. 24428/03 and 26977/03, paragraphs 33-36, of 27 January 2009; *Schwarzkopf and Taussik v the Czech Republic* (decision), no. 42162/02, of 2 December 2008, *Tudor Tudor v Romania*, cited above, paragraph 31; and, *Ştefănică and Others v Romania*, no. 38155/02, paragraph 36, 2 November 2010).

Applying the aforementioned principles of legal certainty to this case

68. The Court reiterates that the Applicant considers that the Supreme Court in the previous similar or identical, and in almost identical factual and legal situations, rendered entirely different judgments, which he submitted to the court as a reference. The Applicant refers to the specific cases of the Supreme Court, which he submitted to the Court by way of a request as an example:

“[E. Rev. 23/2017 of 14 December 2017], [E. Rev. 14/2016 of 24 March 2016], [E. Rev. no. 62/2014, 21 January 2015], [E. Rev. no. 48/2014 of 27 October 2014], [E. Rev. no. 55/2014 of 10 May 2014], and [E. Rev. no. 20/2014 of 14 April 2014]”.

69. In that regard, this Court, in the light of those principles, must examine whether there has been a violation of the principle of legal certainty as a segment of the right to a fair trial under Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR, and accordingly the Court will, by a comparative analysis of the judgments of the Supreme Court, try to establish whether there are “*profound and long-standing differences*” in the case law of the national courts, whether the domestic law provides for a mechanism to overcome these divergences, and whether that mechanism has been applied and, if so, to what extent..

i) Determining whether there are “profound and long-standing differences” in the case law of the national courts

70. At the outset, the Court wishes to reiterate that it has conducted an analysis of all judgments of the Supreme Court submitted to the Court by the Applicant. The Court noted that, in all the above cases, all traffic accidents occurred in the same time period as the traffic accident occurred in the present case, which is 2009. Also in all comparative cases, claims for compensation and lawsuits due to the damage caused, were filed by the claimants with the responding parties and courts in 2010.

71. The Court further notes that the Supreme Court, despite these facts, rendered judgments with various legal reasoning, which directly affected the change in the amount of interest granted.

A comparative analysis of the judgments of the Supreme Court submitted by the Applicant to the court

Judgment E. Rev. No. 48/2014 of the Supreme Court, of 27 October 2014

72. The Court notes that in Judgment E. Rev. No. 48/2014, of 27 October 2014, the Supreme Court took the position in which it:

“obliged the respondent Kosovo Office of Insurance in Prishtina to pay back the funds to the claimant - to pay a regress in the amount of € 87,000 with an annual interest rate of 20% starting from 19.11.2010 and until 28.07.2011 and of 12% starting from 29.07.2011 until the final payment as well as to compensate it for the costs of the proceeding in the amount of € 963, all within seven days of receiving this judgment under the threat of forced execution”.

73. This view, the Supreme Court reasoned in the following way:

“This Court notes that the lower instance courts also correctly applied the substantive law when recognized to the claimant the right to interest on the principal amount of 20% per annum starting from 19.11.2010 until 28.07.2011, and the interest rate of 12% starting from 29.07.2011 until the final payment, because according to the provisions of Article 277 LOR and Article 26 of the Law on Compulsory Motor Liability Insurance no. 04/L - 018, which stipulates that in the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable

insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim.

Judgment E. Rev. 23/2017 of the Supreme Court of 14 December 2017

74. The Court further notes that the same practice was taken by the Supreme Court also in Judgment E. Rev. 23/2017 of 14 December 2017, in which it concluded,

“[...] as far as interest rate is concerned, the challenged judgment of the Court of Appeals of Kosovo Ac. No. 53/2016 of 21.09.2017 and the respondent is obliged to pay the interest in the amount of 20% in the amount approved from the statement of claim from 22.04.2010 as the day of submission of the claim for return of funds for damage and all from 29.07.2011 until 30.07.2011 and up to the final payment the interest at the rate of 12% on the amount due.”

Judgment of the Supreme Court E. Rev. No. 62/2014, of 21 January 2015

75. The Court found that the Supreme Court in Judgment E. Rev. No. 62/2014, of 21 January 2015, took a different legal position on the issue of the amount of interest granted by the Basic Court in the amount of 3.5%. This position was reasoned by the Supreme Court in the following way:

“The Court notes that the second instance court has correctly applied substantive law when it recognized to the claimant the right to interest on the amount of the main debt at 12% from 14 June 2010 and until the final payment under the provisions of Article 277 of LOR in conjunction with Article 26 of the Law on Compulsory Motor Liability Insurance no. 04/L - 018, which stipulates that the interest is 12% per annum and is calculated for each day of delay until the damages caused by the liable insurer, starting from the date of submission of the compensation claim. From the case file it follows that the claimant filed a claim for compensation for damage with the respondent as of 14 June 2010”.

Judgment E. Rev. No. 27/2017 of the Supreme Court challenged by the Applicant, of 24 January 2018

76. The Court also recalls the reasoning of the Supreme Court in Judgment Rev. No.27/2017, which is challenged by the Applicant, whereby the Supreme Court regarding the approval of the revision related to 12% interest, concluded:

“[...] the respondent is obliged to pay to the claimant the amount of 23.609.24 Euros with interest in the amount of saving deposits without term, which are paid by the business banks in Kosovo, without certain destination for more than one year, from the submission of the claim on 19 November 2010 until the complete payment.”

77. It follows that the Supreme Court rendered the judgment in which it modified the interest of 12% granted in the judgments of the Basic Court and the Court of Appeals, replacing by the interest rate paid by the commercial banks in Kosovo.
78. The Court also recalls the reasoning that the Supreme Court took for its “new” approach:

„Regarding the determination of the interest, the judgments of the courts of lower instances have been rendered with erroneous application of the substantive law; therefore, as a consequence they were modified so that the respondent shall pay to the claimant the amount of 23.609.24 Euros with interest rate in the amount of saving deposits without term which are paid by the business banks in Kosovo, without certain destination for more than one year, from 19 November 2010 until the complete payment this happens because Law on Compulsory Motor Liability Insurance entered in force in 2011 while the case happened in 2009 and as such, it is not applied in the present case.“

79. The Court, based on the analysis of the abovementioned judgments of the Supreme Court, finds that there are profound and long-standing differences in the case law of the national courts, which decided on the amount of interest to be granted to claimants. Also, the Court cannot fail to note that in all judgments of the Supreme Court there are differences and inconsistencies in multi-year case law.

ii) whether the domestic law provides for a mechanism to overcome these divergences and iii) whether that mechanism has been applied and, if so, to what extent

80. As regards these criteria, the Court refers to the Law on Courts No. 06/L-054, which in Article 14 foresees the mechanism under which jurisdiction is the issue of harmonization of the case law.

Article 14 Competences and Responsibilities of the President and Vice-President of the Court

[...]

2.10. the President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices...”

81. It follows that the mechanism for the harmonization of the case law is foreseen in the legal provision itself. In addition, the functioning of the mechanism of harmonization of the case law itself is neither impossible nor limited, and which would directly reduce its application and efficiency in the practice itself.

Conclusion

82. Taking into account all the circumstances of the case, the Court concludes that the Supreme Court, in comparative judgments, which fully correspond with the legal and factual situation of the judgment in question, rendered the judgments with legal reasoning differing from the challenged judgment, both as regards the

calculation of the interest rate and the calculation of time limits, as well as the question of the applicability of the law.

83. Moreover, the Court cannot, fail to mention in particular that the Supreme Court in comparative judgments, did not take a consistent position regarding the calculation of interest rates, giving different legal reasoning. As such, it leads to the conclusion that the case law of the Supreme Court in this matter is not consistent, which directly affects the legal certainty.
84. The Constitutional Court is aware of the fact, and takes into account that the regular courts, when establishing case law, may render different decisions reflecting the development of the case law. However, divergences from the consistency of the case law must have objective and reasonable justifications and explanations, which in the present case was absent in the judgment of the Supreme Court.
85. The Constitutional Court particularly emphasizes the fact that in the present case the the challenged decision of the Supreme Court is a final decision against which there are no other effective legal remedies available under the law. In that regard, the Court notes that the Supreme Court as the highest court in the judicial hierarchy had a special responsibility to reason a decision that would explain all the reasons for the divergence from the previous case law.
86. Bearing in mind the above, the Court concludes that the existing mechanisms of unification of the case law in the present case were not effective.
87. Therefore, the Constitutional Court finds that the Supreme Court, as the court of last instance for deciding in the present case of the Applicant, taking a different position in the challenged judgment in a case that is completely identical or similar to other cases, and for this did not give a clear and sufficient reasoning, violated the right of the Applicant to a reasoned court decision which led to violation of principles of legal certainty, as one of the essential components of the rule of law, which is also an inseparable element of the right to a fair trial under Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR.
88. Therefore, the Court concludes that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 27 February 2019, by majority

DECIDES

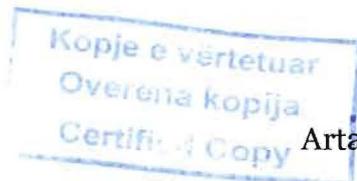
- I. TO DECLARE the Referral admissible;
- II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the European Convention on Human Rights;
- III. TO DECLARE invalid Judgment E. Rev. No. 27/2017 of the Supreme Court of 24 January 2018;
- IV. TO REMAND the Judgment of the Supreme Court for reconsideration in accordance with the judgment of this Court;
- V. TO ORDER the Supreme Court to submit information to the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the judgment of the Court;
- VI. TO REMAIN seized of the matter, pending compliance with that order;
- VII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;
- VIII. This Judgment is effective immediately.

Judge Rapporteur

Bekim Sejdiu

President of the Constitutional Court

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.