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

Prishtina, on 19 July. 2019
Ref. no.:AGJ 1397/19

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JUDGMENT

in

Case No. KI24/17

Applicant

Bedri Salihu

Constitutional review of Judgment Rev. No. 308/2015 of the Supreme Court of Kosovo, of 12 January 2017

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 Mr. Bedri Salihu from Mitrovica, who is represented by Mr. Selman Bogiqi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by paragraph 4 of Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on 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).

5. On 31 May 2018, the Court adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 3 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 7 April 2017, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović.

8. On 20 April 2017, the Court notified the Applicant about the registration of the Referral and requested the power of attorney for the legal representative before the Court. On the same date, the Court also sent a copy of the Referral to the Supreme Court.

9. On 26 April 2017, the Court received the requested additional document.

10. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues was terminated. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović was terminated.

11. 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.

12. On 8 October 2018, as the mandate as judges of the Court of four abovementioned judges was over, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision KSH. KI24/17 on the appointment of the new Review Panel composed of judges: Arta Rama-Hajrizi (Presiding), Safet Hoxha and Radomir Laban.

13. On 27 May 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

14. On the same date, the Court unanimously found that (i) the Referral is admissible, and (ii) Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

15. On 9 April 2010, the Applicant suffered severe bodily harm in a traffic accident caused by the holder of insurance with the insurance company "SIGMA" in Prishtina (hereinafter: "SIGMA").

16. On 30 July 2014, the Basic Court in Prishtina (hereinafter: the Basic Court) by Judgment [C. No. 1234/10] partially approved the claim of the Applicant and obliged SIGMA to compensate the Applicant for the: (i) material damage in a total amount of 3,176 euro including the monthly rent in the amount of 250 euro, starting from 30 July 2014 until the existence of legal conditions; and (ii) the non-material damage in the total amount of 32,000 euro caused by the holder of the insurance.

17. On an unspecified date, SIGMA filed an appeal with the Court of Appeals against the Judgment of the Basic Court, alleging essential violation of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

18. On 29 June 2015, the Court of Appeals by Judgment [Ac. No. 4842/2014] partially approved the appeal of SIGMA by (i) quashing the Judgment of the Basic Court in the part related to the amounts of the compensation of the costs of physical therapy, the monthly rent and the costs of proceedings; whereas (ii) as to the part concerning the adjudication of the amount for non-material damage and a part of

the material damage, the Court of Appeals upheld the judgment of the Basic Court.

19. On an unspecified date, SIGMA submitted a request for revision to the Supreme Court against the abovementioned judgment of the Court of Appeals, alleging essential violation of the contested procedure and erroneous application of the substantive law, with the proposal that the Supreme Court of Kosovo approves the revision and decreases the amounts for non-material and material damage or to quash the challenged Judgment and remand the case to the first instance court for retrial.

20. On 12 November 2015, the Supreme Court by Judgment [Rev. No. 308/2015] partially approved as grounded the request for revision submitted by SIGMA and, accordingly, modified the Judgment of the Court of Appeals in conjunction with that of the Basic Court, by reducing the amount to about 20,000 euro of financial compensation for non-material damage caused to the Applicant and confirmed by the two previous courts.

21. On 27 January 2016, the Applicant submitted the first Referral to the Court alleging that the abovementioned Judgment of the Supreme Court was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of ECHR.

22. On 20 May 2016, the Court, by Judgment in case KI18/16 (See case of KI18/16, with Applicant *Bedri Salihu*, Constitutional review of Judgment Rev. No. 308/2015 of the Supreme Court of Kosovo of 12 November 2015) found violation of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, with the reasoning that the challenged Judgment of the Supreme Court did not meet the standards of a reasoned court decision.

23. On 12 January 2017, following the Judgment of the Court in Case KI18/16, the Supreme Court rendered new Judgment, namely, the second on the case, Judgment [Rev. No. 308/2015], by which it reiterated the findings of the first Judgment namely, Judgment [Rev. No. 308/2015] of 12 November 2015.

Applicant's allegations

24. The Applicant alleges that the challenged Judgment of the Supreme Court, namely its second Judgment, was rendered in violation of his fundamental rights and freedoms guaranteed by Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

25. The Applicant more specifically alleges that the Judgment of the Court in case KI18/16 was not implemented by the Supreme Court. According to the Applicant's allegations, the challenged Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 January 2017 is the same as its first Judgment, namely

Judgment [Rev. No. 308/2015] of 12 November 2015, and again fails to justify the reduction of the amount of 20,000 euro of the compensation of damage by Judgment [Ac. No. 4842/14] of 29 June 2015 of the Court of Appeals in conjunction with Judgment [C. n. 1234/10] of 30 July 2014 of the Basic Court.

26. The Applicant also alleges that in rendering the second Judgment of the Supreme Court, the latter was not impartial because the Presiding Judge was again the same judge, namely, Judge E.H.

27. Finally, the Applicant requests the Court to declare the Referral admissible; to declare invalid the challenged Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court by remanding the case to the Supreme Court; and that during the latter, Judge E.H. be excluded from the decision-making.

Admissibility of the Referral

28. The Court first examines whether the Referral 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 paragraphs 1 and 7, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

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

30. The Court further refers to the admissibility requirements as further specified in the Law. In that regard, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

> Article 47
> [Individual Requests]
>
> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

31. As to the fulfillment of these criteria, the Court considers that the Applicant is an authorized party and challenges an act of a public authority, namely Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which have allegedly been violated in accordance with Article 48 of the Law and has submitted the Referral in accordance with the deadlines foreseen in Article 49 of the Law.

32. The Court also finds that the Applicant's Referral meets the admissibility requirements established in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible based on the requirements laid down in paragraph 3 of Rule 39 of the Rules of Procedure.

33. Moreover, and finally, the Court considers that this Referral is not manifestly ill-founded on constitutional basis as established in paragraph 2 of Rule 39 of the Rules of Procedure and, therefore, it must be declared admissible. (See also case of ECtHR *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

Merits of the Referral

34. The Court initially recalls that the Basic Court adjudicated to the Applicant a certain compensation for material and non-material damage caused to him as a result of the accident of 9 April 2010. This compensation, with certain changes, was confirmed also by the Court of Appeals. The Supreme Court, on the other hand, acting upon the request for revision of the respondent, namely SIGMA, modified the judgments of the lower instance courts, reducing the compensation to the amount of about 20,000 euro. The Court declared invalid this Judgment of the Supreme Court stating that it was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it did not meet the standards of a reasoned court decision. The Supreme Court, by the challenged Judgment, namely the Judgment [Rev. No. 308/2015] of 12 January 2017, again upheld its first decision, namely Judgment [Rev. No. 308/2015] of 12 November

2015. This Judgment was again challenged by the Applicant, alleging a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because according to the Applicant, the Supreme Court (i) did not implement the Judgment of the Court in Case KI18/16 because its Judgment continues to be unreasoned; and (ii) it was partial because it had decided with the same composition of the panel in both cases.

35. The Court will deal with these allegations individually and by applying the case law of the European Court on Human Rights (hereinafter: the ECtHR), on the basis of which the Court, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution is required to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, as regards the assessment of the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECtHR.

As to the allegations regarding non-implementation of the Judgment of the Court in Case KI18/16 and the lack of a reasoned court decision

36. The Court emphasizes that it already has a consolidated practice with regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. This practice was built based on the ECtHR case law, including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned judicial decision have also been elaborated in the cases of this Court, including but not limited to KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant "*IKK Classic*", Judgment of 9 January 2018; and KI143/16, *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018.

37. In principle, the case law of the ECtHR and of the Court point out that the right to a fair trial includes the right to a reasoned decision and that the courts must "*indicate with sufficient clarity the reasons on which they base their decision*". However, this obligation of the courts cannot be understood as a requirement for a detailed answer to any argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicants are to be addressed and the reasons given must be based on the applicable law.

38. In this regard, the Court recalls that the first Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 November 2015, which was declared

invalid by the Court, contained the following reasoning regarding the modification of the decisions of the lower instance courts regarding the amount of compensation:

> *"Based on the assessment of the Supreme Court of Kosovo, the amounts adjudicated by the lower instance courts, related to the compensation of non-material damage due to physical pain and the fear suffered, and the decrease of daily life activities of Bedri Salihu are not adequate and harmonious with the nature of the non-material damage compensation, taking into account the importance degree of the good and purpose which this compensation serves, as foreseen by Article 200, paragraphs 1 and 2 of the Law on Obligations".*
> .....
>
> *"Setting from this and considering the age of the claimant at the time when he suffered the injuries from the accident, the nature of injuries, and the purpose of non-material damage compensation, the present Court considers that by the help of the determined amounts, the claimant may experience a significant satisfaction as a balance for the physical pain and fear he suffered".*

39. In this respect, the Court specifically concluded that the Supreme Court (i) had not clarified any of the facts it considered, nor any of the specific reasons it might have taken into account when significantly modifying and lowering the previously approved amounts by the lower instance courts (see, Judgment of the Court in Case KI18/16, paragraph 43); (ii) it does not refer to any factual and legal reasons related to the question on how and why it so significantly diverted from the decision of the lower instance courts on the amount of compensation for non-material damage (see, Judgment of the Court of case KI18/16, paragraph 46); and (iii) it did not specifically justify why the amount of compensation for non-material damage to the Applicant was modified and decreased in relation to the stand of lower instance courts on the same matter. (see, Judgment of the Court in Case KI18 / 16, para 50).

40. The second Judgment of the Supreme Court, rendered as a result of the Judgment of the Court in Case KI18/16, in addressing the observations of the Court, gave the following reasoning:

> *"In the case of the award of compensation for the non-material damage in the name of the physical pain suffered, the fear suffered, this court has taken into account the intensity of the pain and the fear of the injury, as provided by the provision of Article 200 par. 2 of LOR. In addition to these important elements in determining the amount of compensation, all other circumstances of the case, in particular unpleasant experiences and possible complications during the treatment, should be taken into account. When determining the compensation for non-material damage on behalf of the reduction of overall living activity, this court has taken into account their duration, the age of the claimant, his profession as a waiter, where long standing is required which*

persistently causes the pain due to the nature of the injury and the consequences that the claimant had, as well as the purpose of the award of this non-material damage. In this case, the personal characteristics of the claimant and the case law of this court have been taken into account in determining the amount of non-material damage."

41. The Court recalls in that regard that, based on the case law of the ECHR and of the Court, the essential arguments of the Applicants must be addressed and the reasons given must be based on the applicable law. In the present case, the Applicant's allegations relating to the substantial reduction of compensation were considered by the Court as essential in its first Judgment, specifically requesting the Supreme Court, that during the retrial, clarifies the reasons on which it was based for reduction of the amount of compensation.

42. The Court notes that the Supreme Court by its second Judgment failed again to provide a reasoning that meets the standards of a reasoned judicial decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR because (i) the decision of the court used a general reasoning and which was not based on the particular circumstances and factual circumstances of the concrete case, and (ii) while the court decision referred to Article 200 of the Law on Obligational Relationship of 30 March 1978, it does not clarify how this article or the case law of the Supreme Court, to which it itself refers, has been applied in the circumstances of the present case. The Court considers that the reasoning of the Supreme Court does not further clarify to the Applicant or to the public, for what factual and legal reasons it has significantly reduced the value of the compensation of damage, upheld by the two lower instance courts.

43. Therefore, taking into account the abovementioned observations and the proceedings as a whole, the Court considers that the second Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 January 2017, did not rectify the violations found by the Judgment of the Court in case KI18/16 and consequently did not give sufficient reasons to the Applicant for reducing the compensation of the damage determined by the lower instance courts, thus resulting in a violation of the Applicant's right to a reasoned judicial decision, as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. (See ECtHR case *Grădinar v. Moldova*, Judgment of 8 April 2008, paragraph 115).

Regarding the allegations related to the impartiality of the court

44. In assessing the allegations relating to the impartiality of the court, the Court first recalls that the impartiality of a tribunal under Article 31 of the Constitution in conjunction with Article 6 of ECHR, based on the consolidated case law of the ECtHR, must be determined according to (i) a subjective test, that is on the basis of the personal conviction and behaviour of a particular judge implying that a judge may have had personal prejudice or bias in a particular case; and (ii) an objective test, that is ascertaining whether the court, *inter alia,* its composition

offered guarantees sufficient to exclude any legitimate doubt in this respect (See, inter alia, ECtHR cases, *Miracle Europe KFT v. Hungary*, Judgment of 12 April 2015, paragraphs 54 and 55, *Gautrin and Others v. France*, Judgment of 20 May 1998, paragraph 58, *San Leonard Band Club v. Malta* Judgment of 29 July 2004, paragraph 58, *Thomann v. Switzerland*, Judgment of 10 June 1996, paragraph 30, *Wettstein v. Switzerland*, Judgment of 21 December 2000, paragraph 42, *Korzeniak v Poland*, Judgment of 10 January 2017, paragraph 46; and case of the Court KI06/12, with Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45).

45. More specifically, as regards the subjective test, based on the ECtHR case law, personal impartiality of a judge must be presumed until there is proof to the contrary. (See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, Judgment of 30 November 2005, paragraph 30; *Padovani v. Italy*, Judgment of 26 February 1993, para. 26; *Morel v. France*, paragraph 41; *San Leonard Band Club v. Malta*, cited above, paragraph 59; *Hauschildt v. Denmark*, Judgment of 24 May 1989, paragraph 47; *Driza v. Albania*, Judgment of 13 November 2007, paragraph 75; and *Korzeniak v. Poland*, cited above, paragraph 47). As regards the type of proof required to prove such a thing, the ECtHR, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons. (See, *inter alia*, ECtHR case, *De Cubber v. Belgium*, Judgment of 26 October 1984, para. 25). However, the principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the ECtHR. (See, ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v. Malta*, Judgment of 15 October 2009, paragraphs 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33).

46. Furthermore, according to the case law of the ECHR, while in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee. (See case of ECtHR *Micallef v. Malta*, cited above, paragraphs 95 and 101). It must be noted, that in the vast majority of cases raising impartiality issues the ECtHR has focused and found violations in the aspect of the objective test. (see also case of ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48).

47. As to the objective test, the Court notes that based on the ECtHR case law, when it is applied on a trial panel, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to impartiality of the court. In this respect even appearances may be of a certain importance or, in other words, *"justice must not only be done, it must also be seen to be done"*. (In this context, see, *inter alia*, ECtHR cases, *De Cubber v. Belgium*, cited above, paragraph 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. (See, *inter alia*, ECtHR cases, *Castillo Algar v. Spain*, Judgment of 28 October 1998, paragraph 45; *San Leonard Band Club v. Malta*, cited above, paragraph 60; and *Golubović v.*

Croatia, cited above, paragraph 49). Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. (See, ECtHR case, *Micallef v. Malta,* cited above, paragraph 98).

48. Furthermore, based on the case law of the ECtHR, the situations within which issues may arise regarding the lack of impartiality may be of (i) functional nature and (ii) personal.

49. The first one relates to the exercise of various functions within a judicial proceeding by the same person or hierarchical or other nature between the judge and other actors in the particular judicial process. With regard to the latter, the level and nature of this connection should be examined. These situations of a functional nature may include examples of cases in which were carried out (i) advisory and judicial functions (in this context, see, *inter alia*, cases of ECtHR *Procola v. Luxembourg*, Judgment of 8 September 1995 , paragraph 45, *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extra-judicial (in this context, see, *inter alia*, ECtHR case, *McGonnell v. the United Kingdom*, Judgment of 8 February 2000, para. 52-57); and (iii) various court cases. In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge at different stages of the trial may have resulted in a violation of the requirements related to the impartiality of the court, should be assessed case by case and depending on the circumstances of each case . The second, namely, issues of personal nature, are mainly related to the conduct of a judge regarding a case or the existence of links with one of the parties or his/her representative in one case.

50. The Court also notes that, based on the ECtHR case law, the assessment of court's impartiality under a subjective and objective test implies that, it must be determined whether in a given case there is a legitimate reason to fear that a particular trial panel lacks impartiality. However, to decide whether in a concrete case there is sufficient grounds to determine that a certain judge is not impartial, the standpoint of the applicant is important but not decisive. What is decisive is whether this fear can be held to be objectively justified. (See, *inter alia*, ECtHR cases, *Mežnarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; *San Leonard Band Club v. Malta*, cited above, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49 and *Tozicka v. Poland*, cited above, paragraph 33).

51. In applying those principles in the context of the circumstances of the present case, the Court recalls that the Applicant alleges that the participation of the judge of the Supreme Court, E.H., in both of his cases, as the Presiding Judge raises his fears and doubts of the impartiality of the court. However, the Court notes that, apart from the fact that Judge E.H, was the Presiding Judge in both cases of the Applicant, the composition of the panel at the Supreme Court was also the same. The first Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015]

of 12 November 2015, was decided by a panel composed of Judges E.H; G.S; and M.R. This Judgment was declared invalid by the Court in Case KI18/16. The second Judgment of the Supreme Court, namely Judgment [Rev. No. 308/2015] of 12 January 2017, rendered as a result of the Judgment of the Court, was again decided by the same composition of the panel, by Judges E.H; G.S; and M.R.

52. In light of these facts, the Court, based on the ECtHR case law, must assess the Applicant's allegations of the court's bias under the subjective and objective test.

53. As to the subjective test, the Court recalls that the personal impartiality of a judge must be presumed until proven otherwise. The Applicant has not submitted any evidence which could call into question the impartiality of the Presiding Judge at the Supreme Court. Consequently, the Court notes that in rendering Judgment [Rev. No. 308/2015] of 12 January 2017, no evidence can substantiate the finding that the court was not impartial under the subjective test.

54. Therefore, the Court should assess the impartiality of the court in terms of the objective test and, consequently, based on the ECHR case law, if (i) there are sufficient facts and circumstances which may raise legitimate doubts as to the court impartiality; and (ii) these doubts regarding the impartiality of the court in the circumstances of the present case may be objectively justified.

55. In the context of the Applicant's circumstances, namely in circumstances where the Supreme Court has twice decided by a panel of identical composition, to apply the objective test, beyond the general principles elaborated above, the Court is also referred to the concrete case law of ECtHR, through which it had essentially decided on similar matters, namely whether deciding twice by an identical composition of the relevant courts could violate the objective test of the impartiality of the court and under what circumstances.

56. In this regard, the ECtHR has consistently held that the same composition of the trial panels in examining a same issue at different stages of the proceedings results in a violation of the right to an impartial trial and that such possible violations depend on the specific circumstances of a case. According to the case law of the ECtHR, it cannot be stated as a general rule in cases when a superior court which remands the case for retrial is bound to send the case back to a different panel with another composition (See, ECtHR case, *Ringeisen v. Austria*, Judgment of 17 July 1971, paragraph 97).

57. Specifically, in cases *Ringeisen v. Austria* (ECtHR Judgment of 17 July 1971); *Diennet v. France* (Judgment of the ECtHR of 26 September 1995) and *Ilnseher v. Germany* (ECtHR Judgment of 4 December 2018), the Court held that "*for it cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority*". The Court reiterated that "*nor, finally, can any grounds of legitimate suspicion be found in the fact that the judges that had participated in the first decision, cannot*

participate in the second one". Such a position, the Court also held in the case of *Thomman v. Switzerland* (ECtHR Judgment of 21 May 1996). In this case, the Court did not find any violation in the composition of a panel that had ruled twice in relation to the same applicant. The court in this case stated that with the remand of the case for retrial, "*the judges made a fresh and thorough review of the case*". (See, for more, the case of ECtHR, *Thomman v. Switzerland*, cited above, paragraph 33 and references therein).

58. However, in the context of the same trial panels/decision-making panels, the ECtHR has found, in certain circumstances, a violation of the right to fair and impartial trial. ECtHR cases *Driza v. Albania* (ECtHR Judgment of 13 November 2007) and *San Leonard Band Club v. Malta* (ECtHR Judgment of 29 July 2004) fall into this category.

59. In the first case, namely in the case *Driza v. Albania*, the ECtHR *inter alia* examined the Applicant's allegations as to the lack of impartiality of the High Court because, according to the allegation (i), three of the judges of the High Court were two times members of the trial panel; and (ii) the President of the High Court had played a dual role during the recourse process. With regard to the first, the ECtHR found that the three judges who had participated in the trial panel had twice decided in disfavor of the complainant's and as a result, such a situation could have raised legitimate doubts on the complainant with regard to the impartiality of the High Court. The ECtHR further assessed whether those doubts were objectively justified. The ECtHR found this to be the case, because the three members of the trial panel had in fact decided on a law-related complaint and that the latter "*would decide whether they had made a mistake in their previous decision or not.*" As for the role of the President of the Court, the ECtHR had emphasized that the recourse procedures in the interest of the law begun at the request of the latter and who had already decided in disfavor of complainant, so it concluded that "*this practice was not compatible with the criterion of subjective impartiality of a judge*" because "*no one can be in the same case both the claimant and judge*".

60. While in the second case, namely in case *San Leonard Band Club v. Malta*, the ECtHR, *inter alia,* reviewed the Applicant's allegations as to the lack of impartiality of the Court of Appeals, that decided on the admissibility of his request for retrial. The Applicant claimed that the same panel of the Court of Appeals which had decided regarding the Judgment of 30 December 1994, by the Judgment of 13 March 1995, also rejected his request for retrial justified through allegations of manifestly erroneous application of the law. The compatibility with the Constitution and the ECHR of the Judgment of the Court of Appeals was also confirmed by the Maltese Constitutional Court, which annulled a Judgment of the Civil Court which had dealt with the constitutional allegations of the Applicant and found a violation of the right to impartial trial as a result of the same composition of the panel of the Court of Appeals. (See for more paragraphs 19 to 28 of the case *San Leonard Band Club v. Malta*).

61. In assessing the compatibility with the guarantees of Article 6 of the ECHR, the ECtHR first assessed whether the circumstances of the present case could raise legitimate doubts as to the impartiality of the court. In this regard, it found that the fact that the panel of the respective Court of Appeals had twice decided in the same composition constituted a situation which could raise legitimate doubts as to its impartiality (see the detailed reasoning in this context in paragraphs 60, 61 and 62 of this ECtHR case). Following this determination, the ECtHR secondly, assessed whether those doubts were objectively justified. The ECtHR found this to be the case. It reasoned this finding based on the fact that the judges of the panel of the Court of Appeals in the second time were called upon to decided on a complaint relating to the law enforcement issues and were therefore called upon to assess whether they had applied the law in manifestly erroneous manner, namely whether they themselves had the ability to apply the law in a fair manner. (see, in addition, paragraph 63 of the specific case).

62. The Court notes that in both cases, the ECtHR emphasized and admitted that in circumstances where the same panel of judges has decided twice on the same case, there may be legitimate doubts from the perspective of the parties to the proceedings on the impartiality of the court and that in such circumstances it is necessary to further assess whether these doubts may be objectively justified. According to the ECtHR, as stated above, this assessment must be made in each case separately. (See, ECHR cased *Driza v. Albania*, cited above, paragraph 80, and *San Leonard Band Club v. Malta*, cited above, paragraph 62).

63. In assessing whether, in such circumstances, the applicants' doubts may be objectively justified, the ECtHR held that the essential test is related to the nature of the legal remedy that has been used and, if the particulars of a case, the relevant trial panel of judges is called upon to evaluate and determine their own alleged mistakes of their prior decision or even more specifically, if the application that this trial panel had made in advance of the law, had been adequate and sufficient. (See, in this context, the ECtHR case, *San Leonard Band Club v. Malta*, cited above paragraph 64). In such circumstances, the ECtHR found that the fear of the parties as to the impartiality of the relevant courts is objectively justified.

64. In the context of the circumstances of the present case, the Court, based on the ECHR practice, notes that the fact that the panel in the Supreme Court had identical composition in both cases could raise legitimate doubts from the perspective of the parties to the proceedings regarding the impartiality of the court. Therefore, in such circumstances, it is necessary to proceed with the assessment of whether such allegations may be objectively justified.

65. In order for these doubts to be objectively justifiable, the Court must examine the nature of the case which this panel has decided for the second time. In this regard, the Court recalls that the Supreme Court rendered its second Judgment, namely Judgment [Rev. No. 308/2015] of 12 January 2017, after its first Judgment was declared invalid, namely, Judgment [Rev. No. 3018/2015] of 12 November 2015, by the Court in Case KI18/16. The latter, as noted above, found that the Supreme

Court, by its first Judgment, rendered a decision which did not meet the standards of a reasoned judicial decision.

66. In this regard, the Court emphasizes that the Judgment of the Court in Case KI18/16 exclusively pertained to the lack of reasoning of the Judgment of the Supreme Court, namely, Judgment [Rev. no. 308/2015] of 12 November 2015. The Court did not find a violation regarding manifestly erroneous or arbitrary application of the law. In the circumstances of the present case, in rendering the second Judgment, namely Judgment [Rev. no. 308/2015] of 12 January 2017, the members of the panel of the Supreme Court (i) were not called upon to assess and determine whether they have applied the law in manifestly erroneous manner, or even more specifically, to assess their ability to properly and adequately apply the law; but (ii) were obliged to further reason their decision based on the specifics and instructions of the Judgment of the Court in Case KI18/16.

67. Therefore, the circumstances of the present case differ from those of cases *Driza v. Albania* and *San Leonard Band Club v. Malta*. This is because in the first case, acting on the appeal, the same High Court panel was called upon to assess whether it had applied the law in manifestly erroneous manner in the first time, beyond the fact that the Presiding Judge of the respective panel had played a double role in the recourse process of the law. In the second case, similarly, a panel of the Court of Appeals that once decided on the Applicant's disfavor, also decided the second time to reject his request for retrial, being called upon that the second time assesses itself whether it has applied the law in a correct manner the first time.

68. Therefore, since the same composition of the panel in rendering the challenged Judgment in the circumstances of the present case, based on the case law of the ECtHR, is sufficient reason to (i) raise legitimate doubts of the Applicant on the impartiality of this court; however, (ii) these doubts, in the circumstances of the present case, are not objectively justified.

69. This is because, in the circumstances of the present case, as mentioned above, based on the finding of the Judgment of the Court in case KI18/16, the Supreme Court was only obliged to (i) further reason its previous decision based on the instructions of the Court in order for it to meet the standards of a reasoned judicial decision; and (ii) to assess whether that panel itself first time applied the law in a manifestly erroneous manner, or in other words, to assess whether it was able to apply the law correctly.

70. Finally, and as reasoned in this Judgment, the Court found that (i) the Supreme Court failed to reason its decision for the second time, stating that the second Judgment of the Supreme Court was also rendered in violation of the Applicant's right to a reasoned judicial decision contrary to the guarantees set forth in Article 31 of the Constitution in conjunction with Article 6 of the ECHR; but however, it has not found (ii) that this Judgment was rendered by a partial court under a subjective and objective test established by the ECtHR case law.

71. At the end, the Court notes that the Applicant also alleges a violation of paragraph 4 of Article 21 of the Constitution, and which he merely mentioned and quoted its content, without providing any explanation as to how and under what circumstances this provision was allegedly violated. Moreover, this constitutional provision in its substance specifically refers to "*legal persons*", stipulating that the fundamental rights also apply to them to the extent applicable, implying the possibility that even the legal persons may be affected with violations of fundamental rights and freedoms, when they have applicability in that specific case. In the present case, the Applicant filed an individual Referral and in this context, the Court finds that there is no connection between their Referral and the relevant constitutional provision. (See, *inter alia*, case of the Court KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 8 June 2018, paragraph 75).

Conclusion

72. The Court notes that (i) the right to a reasoned court decision and (ii) the independence and impartiality of the court, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the issues raised by the Applicant in the circumstances of the present case, are essential constitutional issues.

73. In the circumstances of the present case, the Court found that Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court did not remedy the flaws identified by the Judgment in the case KI18/16 and therefore continues not to satisfy the standards of a reasoned judicial decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

74. However, the Court has not found that Judgment [Rev. No. 308/2015] of 12 January 2017 of the Supreme Court was rendered by a partial court within the meaning of a subjective and objective test of the impartiality of the court established by the case law of the ECtHR, because although the latter was rendered by the identical composition of the panel and which had decided and rendered the preliminary Judgment, namely, Judgment [Rev. 308/2015] of 12 November 2015, thus resulting in legitimate doubts about the impartiality of the court, in the assessment of the Court, these doubts, in the circumstances of the present case, are not objectively justified.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and Rules 56 (1) and 74 (1) of the Rules of Procedure, unanimously, in its session of 17 May 2019:

I. DECLARES the Referral admissible.

II. HOLDS that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights.

III. DECLARES invalid Judgment Rev. No. 308/2015 of the Supreme Court of Kosovo of 12 January 2017.

IV. REMANDS the Judgment of the Supreme Court for reconsideration in accordance with the Judgment of this Court;

V. REMAINS seized of the matter, pending compliance with that order;

VI. ORDERS that this Judgment is notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VII. DECLARES that this Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Gresa Caka-Nimani Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.