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

Prishtina, on 13 January 2020
Ref. no.:AGJ 1498/20

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JUDGMENT

in

Case No. KI07/18

Applicant

"Çeliku Rollers" l.l.c.

Constitutional review of Judgment E. Rev. No. 14/2017 of the Supreme Court of Kosovo, of 14 September 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by "Çeliku Rollers" l.l.c. with its seat in the Municipality of Gjilan, represented by Rudi Metaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges constitutionality of Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ae. No. 133/2016] of 14 April 2017 of the Court of Appeals and Judgment [IC. No. 660/2013] of 31 March 2016 of the Department of Commercial Affairs of the Basic Court in Prishtina (hereinafter: the Basic 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 Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] and 57 [Decision on Interim Measure] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

6. 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 (fifteen) 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 Court

7. On 12 January 2018, the Applicant submitted the Referral to the Court.

8. On 16 January 2018, 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 Bekim Sejdiu.

9. On 29 January 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

10. On 7 February 2018, the Applicant submitted an additional document to the Court specifying the Referral, requesting the replacement of the Referral originally filed and also submitting the request for interim measure.

11. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the term of office of the judges: Altay Suroy and Ivan Čukalović ended.

12. 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.

13. On 1 April 2019, as the term of office to the four abovementioned judges as Judges of the Court ended, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision KSH. KI07/18, on the appointment of the new Review Panel and the latter was composed of judges: Bekim Sejdiu (Presiding), Radomir Laban and Remzije Istrefi-Peci.

14. On 18 December 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

15. On the same date, the Court unanimously held that (i) the Referral is admissible; and that (ii) Judgment [E. Rev. No. 14/2017] of 14 September 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

16. In April 2012, the Applicant, which conducts the commercial activity mainly in the construction of residential and non-residential buildings, reached a verbal agreement with N.P. "Vali AL-PVC", an individual business, which main activity is the production and assembly of metal doors and windows, related to the furnishing of the residential building's doors and windows, "Plisi".

17. On 2 October 2012, the foregoing entered into a contract for the supply and construction of doors and windows of plastic and aluminum profiles in the total contracted value of € 37,000.00 (hereinafter: the Contract). The latter determined that half of this value, namely € 18,560.00, be compensated in cash, while the other half through a flat of 58 m^2 surface area in the amount of EUR 320 per m^2.

18. On 7 June 2013, the parties agreed to additional work in the amount of € 42,127.40. This work was agreed upon through a document entitled "Bid", which contains the additional work to be performed and the respective prices for each. Through this "Bid", the total liability between the parties amounted to € 79,247.40. The Applicant had originally paid to N.P. "Vali AL-PVC" the amount of € 38,000 in order for the works to commence, and also, according to the case file, transferred to the actual possession of a residential apartment,

which ownership would be transferred after completion of the additional works and its registration with the relevant cadastral office.

19. On 10 June 2013, the Applicant proposed to N.P. "Vali AL-PVC", that the compensation by apartment be converted into cash compensation and that the total value of the debt of € 79,247 set forth in the "Bid" should be converted into a liability of the total value of € 42,247.00 after deducting the payment of 38,000 euro already made. According to the case file, no such agreement was signed.

20. According to the Applicant, in carrying out works by N.P. "Vali AL-PVC", delays arose as a result of the lack of quality aluminum profiles/glass holders, and which allegedly could not safely maintain the type of glass agreed upon by the parties. After a delay, allegedly, of 9 (nine) months and following several notifications by the Applicant, the latter engaged another company to carry out the works and which dismantled the profiles/glass holders and began placing new ones upon the request of the Applicant.

21. On 3 September 2013, N.P. "Vali AL-PVC" submitted a proposal for imposition of a security measure to the Basic Court in Gjilan requesting that the Applicant be prohibited from mounting new profiles, restoring the situation to its former state.

22. On 24 December 2013, N.P. "Vali AL-PVC" filed a lawsuit with the Municipal Court in Gjilan, seeking the full performance of the Contract and compensation for the works completed. On 16 October 2013, the Basic Court in Gjilan by Decision [C. No. 548/13] declared itself incompetent, referring the case to the Basic Court in Prishtina.

23. Based on the case file, the lawsuit was also filed by N.P. "Vali AL-PVC" and Çeliku Rolls" l.l.c. It follows from the latter that the Applicant's claim was withdrawn. However, the latter on 9 July 2015, filed a counterclaim in which, *inter alia*, stated that (i) the "Bid" had not replaced the Contract and, consequently, the compensation agreement of 50% of the cash value of liability and 50% of the compensation through the apartment remained in force; (ii) with the increase in the value of the obligation, the Applicant has replaced the original residence with another 152 m2, namely € 95,000; (iii) as a result, the value of the claimant's compensation had amounted to EUR 133,000; and (iv) having in mind the delay in completing the works and the quality of the profiles/glass holders, was forced to replace them.

24. On 31 March 2016, the Basic Court by Judgment [IC. No. 660/2013] decided to: (i) uphold the claimant's statement of claim, namely N.P. "Vali AL-PVC", forcing the Applicant to compensate the claimant in the name of debt for construction works in the amount of € 81,279.50, with legal interest in the amount applied by commercial banks, including the costs of the proceedings; and (ii) reject as ungrounded the Applicant's counterclaim.

25. The decision of the Basic Court was based on the expert report of the forensic expert, who found that the value of the respondent's obligation towards the claimant was € 120,975.00, which would have been deducted from the amount

of € 38,000 already paid to the claimant. The Applicant challenged this expertise and proposed the extraction of another construction expertise, but the Basic Court rejected the Applicant's request to appoint a second expertise.

26. On 27 April 2016, the Applicant filed an appeal with the Court of Appeals alleging violation of the provisions of the challenged procedure, erroneous or incomplete determination of factual situation and erroneous application of substantive law, with the proposal that the Judgment of the Basic Court is modified by either approving the Applicant's counterclaim or annulling it and remanding the case for retrial. The Applicant, *inter alia*, specifically challenged (i) the expertise's report alleging that it had failed to assess the quality of the glass profiles/holders; and (ii) the rejection of the Basic Court to approve the additional expertise in order to establish the quality of the glass profiles / holders. In challenging the expertise reports, the Applicant referred to the letter of the general representative of the Greek "*Alumil*" in Albania of 26 June 2016 and the opinion of the expert I.M. of 27 April 2016.

27. On 14 April 2017, the Court of Appeals by Judgment [Ae. No. 133/2016] rejected as ungrounded the appeal of the Applicant, thereby upholding the abovementioned Judgment of the Basic Court.

28. On 8 June 2017, the Applicant filed a request for revision with the Supreme Court, alleging an essential violation of the provisions of the contested procedure and erroneous application of substantive law, with the proposal that the revision be upheld as grounded and after the two judgments of the lower courts were annulled, the case be remanded. The Applicant specifically challenged the expertise report, focusing on the quality of the glass profiles/holders and the value of the obligation. With regard to the former, the Applicant reiterated that the expertise report fails to make an accurate assessment of the quality of the glass profiles/holders and that this is substantiated by the documents of "*Alumil-Albania*", the opinion of the expert I.M. and the report of the company "*ENI Design*", evidence which the Applicant allegedly was obliged to provide after the Basic Court rejected his proposal for additional expertise by three experts in the relevant field, including the possibility to engage the Technical Faculty of the University of Prishtina. Moreover, the Applicant alleges that the Basic Court did not justify the rejection of this proposal. Whereas, regarding the latter, namely the value of the obligation, the Applicant, *inter alia*, challenged the fact that the value of the obligation determined through the expertise report exceeded the overall value of the obligations taken by the claimant through the Contract and the "Bid" between the parties.

29. On 14 September 2017, the Supreme Court by Judgment [E. Rev. No. 14/2017] rejected as ungrounded the Applicant's revision and upheld the Judgments of the lower courts.

Applicant's allegations

30. The Applicant alleges that the challenged Judgment, namely Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court, is rendered in

violation of his rights guaranteed by Article 6 (Right to a fair trial) of the ECHR.

31. In this respect, the Applicant specifically alleges a violation of (i) the principle of equality of arms, because of the expert's bias; (ii) his right to be heard; and (iii) his right to a reasoned court decision.

32. With regard to the former, the Applicant focuses his argument on the bias of the judicial expert. According to the allegation, and among others, the latter (i) has exceeded the scope of expertise; (ii) did not assess the quality of the glass profiles/holders in relation to the criteria set out in the Contract, namely did not clarify whether the placed aluminum profiles/glass holders are capable of holding the contracted glass, but assessed whether they are in accordance with "*standards applicable in the Republic of Kosovo*" and "*generally in line with modern construction standards*"; (iii) erroneously held that "*with the agreement of both parties the apartament has not been taken in compensation*"; and (iv) did not base its findings on the facts. In support of his allegations of violation of the principle of equality of arms as a result of the bias of the judicial expert, the Applicant refers to the decisions of the European Court of Human Rights (hereinafter: the ECtHR), *Dombo Beheer B.V. v. the Netherlands* (Judgment of 27 October 1993) and *Sara Lind Eggersdottir v. Iceland* (Judgment of 5 July 2007).

33. With respect to the second, the Applicant alleges that his right to be heard has been violated because the Court of Appeals failed to consider the evidence submitted by the Applicant, namely the statement of the general representative of "*Alumil*". According to the Applicant, this evidence proved the inaccuracies of the expertise report and proved that the glass profiles/holders were not of the proper quality. Moreover, through the request for revision, an additional privately conducted expertise was submitted to the Supreme Court, and the latter allegedly did not review or refer to it in its reasoning. In this context of the courts' obligation to consider evidence and submissions, the Applicant refers to the ECtHR judgments, *Kraska v. Switzerland* (Judgment of 19 April 1993) and *Perez v. France* (Judgment of 12 February 2004).

34. As to the third, namely the allegations of lack of a reasoned court decision, the Applicant alleges that the Basic Court did not justify the Applicant's rejection of the request to assign a second expert opinion, and that despite the Basic Court's reasoning, paragraph 2 of Article 366 of Law no. 03/L-006 on Contested Procedure (hereinafter: the LCP) does not prevent the relevant court from appointing a second expert opinion.

35. The Applicant also alleges that the courts have failed to substantiate (i) the Applicant's allegations in the counterclaim concerning the delay of the claimant, causing the loss of profit and the requirement to appoint an economic expert to calculate the damage in the question; (ii) the assessment of the evidence submitted to the Court of Appeals, namely the opinion of '*Alumil*' and that of expert I.M. submitted to the Court of Appeals and private expertise submitted to the Supreme Court; (iii) the amount of the obligation set out in the expert report, which in the amount of € 120,975.00 exceeds the obligation set out in the Contract and the "Bid" in the amount of € 79,247.40; and (iv)

finding that the compensation with the apartment for half of the value of the contracted works has been converted into cash compensation, despite the fact that this finding is in breach of the Contract agreed between the parties. In support of his allegations of the lack of a reasoned court decision, the Applicant refers to the decisions of the ECtHR, *Hirvisaari v. Finland* (Judgment of 25 September 2001) and *Donadze v. Georgia* (Judgment of 7 March 2006);

36. Finally, the Applicant requests the Court to declare his Referral admissible and to declare invalid the three Judgments of the regular courts and to remand to the Basic Court for retrial in a new panel; or to declare invalid the Judgment of the Supreme Court and the Court of Appeals, remanding the case to the appeal level; or declare invalid only the Judgment of the Supreme Court, remanding the case for retrial to the Supreme Court in a new composition of the panel. The Applicant specifically states that the restoration of the Applicant's constitutional rights can only be achieved through a first or second instance retrial.

37. The Applicant also requests the imposition of interim measure claiming, *inter alia*, that its imposition is in the public interest. The Applicant justifies the latter by producing the legal effects of Judgments which, according to him, are not in accordance with the Constitution.

Assessment of the admissibility of the Referral

38. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.

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

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

40. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which establishes that: *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

41. In addition, the Court also refers to the admissibility requirements as prescribed by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

42. Regarding the fulfillment of the admissibility requirements, as stated above, the Court initially notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, applicable both to individuals and to legal persons (See case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14). Accordingly, the Court finds that the Applicant is an authorized party challenging an act of public authority, namely Judgment [E. Rev. No. 14/2017] of the Supreme Court of 14 September 2017, after the exhaustion of all legal remedies provided by law.

43. The Applicant also clarified the rights and freedoms it claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

44. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the criteria set out in paragraph 3 of Rule 39 of the Rules of Procedure.

45. Moreover and finally, the Court considers that this Referral is not manifestly ill-founded pursuant to paragraph 2 of Rule 39 of the Rules of Procedure and, accordingly, is to be declared admissible. (See also, in this context, the case of the ECtHR, *Alimuçaj v. Albania*, Judgment of 9 July 2012, paragraph 144).

Relevant Constitutional and Legal Provisions:

The Constitution of the Republic of Kosovo

Article 31

[Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

European Convention on Human Rights

Article 6

(Right to a fair trial)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[...]

Relevant provisions of Law No. 03/L-006 on Contested Procedure

Article 356

The court can do an expertise if interested parties propose so. This will be done any time if there is a need to specify facts or circumstances that the judge does not have sufficient knowledge for.

Article 357

357.1 The party that proposes an expertise has to state why that expertise is needed for as well as its goal. The person for an expertise should also be proposed.

357.2 The opponent party should be given a chance to say its opinion regarding proposed expert.

357.3 If the involved parties can not bring a decision regarding the person who will conduct the expertise, or regarding the object or volume, then the court will decide about it.

Article 361

The evidence taken by expertise is specified by an order issued by court and it consists of:

a) name, family name, and the expert's profession;
b) the subject that is contested;
c) volume and the subject of the expertise;
d) deadline for the written opinion and conclusion.

Article 366

366.1 The court can ask for further explanations if the expertise is not clear or when it has a deficiency, as well as when there are different opinions within experts, either itself or if a party requests it. In this case, a deadline is set for the submission of the supplemental opinion in written.

366.2 If experts opinion is not clear or if the opinion is not submitted after the court order, the court will assign another expert after the declaration of both parties involved.

Article 367

The court sends written conclusion and the opinion at least eight (8) days before the main hearing session.

Merits

46. The Court recalls that in 2012, the parties to the dispute signed a Contract and to which, a year later, they attached an additional document called "Bid", specifying the list and corresponding prices of doors and windows which N.P. "Vali AL-PVC" was obliged to supply and install them for the Applicant in the respective residential building "Plisi". The initial contract stipulated that half of the compensation would be made through cash, and the other half through an apartment at the relevant construction site. During the implementation of this Contract, the quality of the profiles/glass holders contracted and settled by N.P. "Vali AL-PVC" became disputable. The Applicant allegedly, after delays in the execution of works, engaged another company and removed the profiles/glass holders placed by N.P. "Vali AL-PVC". This action by the Applicant resulted in the initiation of court proceedings, which, by three Judgments of the regular courts, ended in the favor of the claimant, namely N.P. "Vali AL-PVC".

47. The most disputable issue in the regular court proceedings and the Applicant's main allegation before the Court is the expertise report made at the Basic Court level. The expertise made at the level of this court was charged with (i) assessing whether claimant's aluminum mounted profiles were in compliance

with construction standards; and (ii) calculation of the value of the works performed by the claimant. With regard to the former, the professional expertise found that "*plastic windows and doors placed in the apartments of this building are in accordance with the norms and standards of construction applicable in the Republic of Kosovo,*" and that "*the mounted aluminum profiles and those demolished from the facility complied with the construction standards*"; whereas with respect to the latter, it initially held that, with the agreement of the parties, the apartment was not compensated, while the value of the work performed on the premises was 120,975.00 euro, and accordingly the remained debt was 81,279.50 euro, because an amount € 38,000 had already been paid.

48. The Applicant challenged the findings of this expertise at the Basic Court level, proposing to issue additional expertise. This request was rejected by the Basic Court. At the Court of Appeal, the Applicant again challenged the findings of expertise, submitting two additional pieces of evidence, the letter of the general representative of "*Alumili*" of Greece in Albania and the opinion of the expert I.M., and which, according to the Applicant, corroborate the inaccuracy of the expert report on which the Basic Court decision was based, in its entirety. The Court of Appeal upheld the position of the Basic Court that no additional expertise was needed. In the Supreme Court, the Applicant again challenged the findings of the expert report, submitting in favor of his arguments a private expertise. The Supreme Court upheld the position of the lower courts.

49. The Applicant continues to challenge the findings of the expert report also to the Court, alleging that the respective expert was biased and, moreover, that the regular courts have not examined his evidence and testimonies, contrary to the principle of equality of arms and its right to be heard, the guarantees enshrined in Article 6 of the ECHR. Moreover, and as noted above, the Applicant also alleges that the decisions of the regular courts did not address and reason his substantive allegations.

50. In considering these allegations, the Court first notes that (i) based on Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, the rights guaranteed by international agreements and instruments through it, including the ECHR, are the rights also guaranteed by the Constitution, and apply directly to the Republic of Kosovo and have priority, in case of conflict, to the provisions and laws and other acts of public institutions. In this context, the guarantees of Article 6 of the ECHR, which the Applicant claims to have been infringed by the challenged Judgment, are directly applicable in the legal order of the Republic of Kosovo, and furthermore, in their entirety are also guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution; and (ii) based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret the fundamental rights and freedoms in accordance with the ECtHR case law and consequently, in assessing the Applicant's allegations, the Court will apply the relevant principles embedded in the ECtHR case law.

51. The Court further notes that in dealing with the Applicant's allegations, the essential issue relates to the challenged expertise report and that, further allegations, the courts' obligation to examine the evidence and the right to a

reasoned court decision, are closely linked to the essential allegation, namely the challenged expertise report and the rejection of the Basic Court to approve the Applicant's request for a second expertise.

52. Therefore, the following Court will initially elaborate (i) the general principles of ECtHR case law with regard to expert reports, expert bias and relevant effects on the principle of equality of arms, applying them at the same time in the circumstances of the present case, to proceed with dealing with other allegations of the Applicant, namely (ii) the obligation of the regular courts to assess the testimonies and evidence; and (iii) the right to a reasoned court decision.

I. With regard to allegations related to the expertise report and bias of the judicial expert

(i) General principles of the ECtHR in relation to expert reports

53. The ECtHR, through its case-law, maintains that their admissibility and/or refusal is in principle a matter of domestic courts. (For more details on the expert opinions, see the Guide on Article 6 of the ECHR, Right to a Fair Trial (civil limb) of 31 December 2018, IV. Procedural requirements; A. Fairness; 6. Administration of evidence; b. Expert opinions). In addition and in principle, the ECtHR case-law maintains that the refusal to order an expert opinion is not, in itself, unfair. However, the reasons given for the refusal must be reasonable. (See the ECtHR case, *H. v. France*, Judgment of 24 October 1989, paragraphs 61 and 70). Nevertheless, the ECtHR through its case-law, has also developed a number of principles pertaining to expert opinions, the adherence of which is important for the compatibility of the process with the ECHR. In principle, the ECtHR maintains that (i) the litigants must be afforded a possibility to challenge the expert evidence effectively (see the ECtHR case, *Letinčić v. Croatia*, Judgment of 3 May 2016, paragraph 50); and (ii) where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or her or to be shown the documents he or she has taken into account. What is essential is that the parties should be able to participate properly in the proceedings. (See the ECtHR cases *Letinčić v. Croatia*, cited above, paragraph 50; and *Devinar v. Slovenia*, Judgment of 22 May 2018, paragraph 46).

54. In addition, the ECtHR case-law is also developed pertaining to the following aspects (i) the neutrality/impartiality of the expert; and (ii) the predominance of the expert opinion. Pertaining to the first, it maintains that paragraph 1 of Article 6 of the ECHR, does not expressly require an expert heard by a "*tribunal*" to fulfill the same independence and impartiality requirements as the tribunal itself. (See the ECtHR cases, *Sara Lind Eggertsdóttir v. Iceland*, Judgment of 5 July 2007, paragraph 47; and *Letinčić v. Croatia*, cited above, paragraph 51). However, it also maintains that the lack of neutrality on the part of an expert, together with his or her position and role in the proceedings, can tip the balance of the proceedings in favor of one party to the detriment of the other, in violation of the equality of arms principle. (See the ECtHR cases, *Sara Lind Eggertsdóttir v. Iceland*, cited above, paragraph 53; and *Letinčić v. Croatia*, cited above, paragraph 51). While, pertaining to the second, it

maintains that when the expert opinion occupies a preponderant position in the proceedings and exerts a considerable influence on the court's assessment, the position occupied by the expert throughout the proceedings, the manner in which his or her duties are performed and the way the judges assess his or her opinion are relevant factors to be taken into account in assessing whether the principle of equality of arms has been complied with. (See the ECtHR cases *Devinar v. Slovenia*, cited above, paragraph 47; *Yvon v. France*, Judgment of 24 July 2003, paragraph 37; *Letinčić v. Croatia*, cited above, paragraph 51; and *Mantovanelli v. France*, Judgment of 18 March 1997, paragraph 36).

55. The Court notes that the issues that have arisen most frequently within the ECtHR case-law pertaining to the expert reports in administrative and judicial proceedings, relate to their neutrality and the process through which their opinions/reports were issued. Taking into account that these issues are also the most relevant for the particular case at stake, the Court will also dwell deeper into the ECtHR case-law in order to determine a common denominator relevant and applicable pertaining to the allegations of the Applicant. In this respect, the Court will further elaborate cases (i) *Letinčić v. Croatia* which reflects questions of both neutrality and process, finding a violation on the second but not the first; (ii) *Sara Lind Eggertsdottir v. Iceland*, reflecting questions of neutrality of an expert, finding violation of Article 6 of the ECHR in this respect; (iii) *Mantovanelli v. France*, which reflects questions of process, finding violation of Article 6 of the ECHR in this respect; and for comparison (iv) *Devinar v. Slovenia*, which also reflects questions of process, not finding violation of Article 6 of the ECHR in this respect.

56. Case *Letinčić v. Croatia* involves an Applicant whose father, a war veteran, killed the Applicant's mother and her parents and then committed suicide. The family sought disability benefits in connection with the suicide of his father, arguing that the suicide was a consequence of mental derangement caused by his participation in the war. Throughout the proceedings, an expert report was commissioned from a public health care institution authorized to give expert opinions on matters related to war veterans' psychiatric disorders. The report concluded that his suicide could not be attributed to his wartime service. This expert report was not forwarded to the Applicant. The Applicant has contested the findings of the report throughout all the administrative and judicial proceedings, all of whom rejected his claims, with the Croatian Constitutional Court finally declaring the case manifestly ill-founded. (For the facts of the case, refer to paragraphs 5 to 22 of the *Letinčić v. Croatia* case). The ECtHR reviewed the case and found violation of Article 6 of the ECHR. The ECtHR reviewed two particular issues in this respect (i) the fact that the Applicant could not participate effectively through the process of the expert report; and (ii) the neutrality of the expert, namely whether the fact that the expert opinion was prepared by a public authority, affected his neutrality.

57. In developing the general principles in this particular case, the ECtHR as usual, maintained that while Article 6 of the ECHR guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national courts. (See paragraph 47 in case *Letinčić versus Croatia*, and the

references therein). It added however that the principle of equality of arms which, with respect to litigation involving opposing private interests, 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* his opponent. (See paragraph 48 of the ECtHR case *Letinčić versus Croatia*, and the references therein). In particular, it noted that where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or her or to be shown the documents he or she has taken into account. (See paragraph 50 of the ECtHR case *Letinčić versus Croatia*, and the references therein). It also added, that the lack of neutrality on the part of a court-appointed expert may in certain circumstances give rise to a breach of the principle of equality of arms inherent in the concept of a fair trial. (See paragraph 51 of the ECtHR case *Letinčić versus Croatia* and the references therein).

58. Specifically pertaining to the case, the ECtHR recognized that the experts' findings had a preponderant influence on the assessment of the facts by that court since it pertained to a medical field that was not within the judges' knowledge. It also recognized that it is understandable that doubts could have arisen in the mind of the Applicant as to the experts report impartiality given that the experts were designated by the state, namely his opponent in the administrative and judicial proceedings at issue. However, it maintained that the very fact that an expert is employed in a public medical institution, does not in itself justify the fear that the experts employed in such institutions will be unable to act neutrally and impartially in providing their expert opinions. Therefore, the ECtHR did not find the violation pertaining to the allegations related to the lack of neutrality of the experts' report. However, the ECtHR noted that the Applicant was excluded from the procedure of commissioning and obtaining the experts report and he learned of its substance only after the adoption of the decision dismissing his claim for family disability benefit. In such circumstances, the ECtHR concluded that the Applicant's position in the proceedings was seriously hampered by the fact that he was excluded from the procedure of commissioning and obtaining the expert report, and thus found violation of Article 6 of the ECHR. (For the reasoning of the ECtHR pertaining to this case, see paragraphs 44 to 68).

59. On the other hand, case of *Sara Lind Eggertsdottir versus Iceland*, involves an Applicant born with disabilities, which resulted into a process of proceedings led by her parents complaining that her disability was a result of improper treatment at the hospital. The respective district court found the state liable to pay compensation. The decision was overturned by the Supreme Court however, after having requested and heard the opinion of a State Medico-Legal Board (hereinafter: the Board). The applicants had consistently contested the opinion. (For the facts of the case, refer to paragraphs 5 to 25 of the case of *Sara Lind Eggertsdottir versus Iceland*). The allegations of the Applicant were summarized by the ECtHR into two categories: impartiality of the Supreme Court and that of the Board, the expertise respectively. The ECtHR did not find violation pertaining to the Supreme Court's decision to request an expert opinion from the Board, even without the parties consent. However, it found violation pertaining to the second, specifically the composition of the Board, taking into account that four of its members were also doctors at the

hospital were the medical negligence allegedly happened, in addition to their hierarchical superior, having taken a clear stance against the District Court's judgment. Furthermore, in the ECtHR view, the board members were tasked to analyze and assess the performance of their colleagues at the hospital with the aim of assisting the Supreme Court in determining the question of their employer's liability. Therefore, the ECtHR maintained that the fears of the Applicant for the impartiality of the Board were objectively justified in this circumstances of this case. (For the reasoning of the ECtHR pertaining to this case, see paragraphs 31 to 55).

60. Case *Mantovanelli versus France* involves applicants who alleged that the respective hospital was liable for their daughters' death. Throughout the administrative proceedings against the hospital they requested the appointment of an expert to determine the circumstances of the death and liability of the hospital. The expert was appointed and the report was presented to the respective court, however the applicants alleged that neither they nor their lawyer had been informed of the dates of the steps taken by the expert and that his report referred to documents which they had not been able to inspect. They alleged that the process was in breach of the equality of arms principle and requested that a new expert be appointed. The regular courts refused such a request. (For the facts of the case, refer to paragraphs 8 to 23 of the *Mantovanelli versus France* case). The ECtHR found a violation of Article 6 of the ECHR in this particular case. It pointed out, among others, that the applicants had been unable to attend the expert's interviews with the witnesses and the report referred to documents which they had not seen. In this respect, it also noted that "*where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or to be shown the documents he has taken into account*". What is essential is that the parties should be able to participate properly in the proceedings before the "*tribunal*" and that in the respective case, the ECtHR emphasized that it "*is not convinced that this afforded them a real opportunity to comment effectively on it* [the expert report]". (For the reasoning of the case, refer to paragraphs 30 to 36 of the *Mantovanelli versus France* case).

61. On the other hand, and for comparison, the ECtHR found no violation in case *Devinar versus Slovenia*. The case involved an applicant that alleged to have developed a partial disability while working as a cleaning lady. A disability commission issued a report not maintaining the same. The applicant contested the commission's findings and proposed a medical expert to be appointed. The courts refused the applicant's request for the appointment of a medical expert as unnecessary. The decisions of the regular courts were approved by the Constitutional Court. (For the facts of the case, refer to paragraphs 5 to 21 of the *Devinar versus Slovenia* case). In initiating her case before the ECtHR, the applicant maintained that the principle of equality of arms was violated in her case, because she was denied the opportunity to obtain an independent court-appointed expert. She also maintained that the Commission releasing the report was not independent as it was appointed by the opposing party, namely the state. In reviewing the applicant's allegations, the ECtHR initially maintained that it must be considered that the expert opinions provided by the disability commission had a decisive role in the court's assessment of the merits of the case. The ECtHR also recognized that while legitimate doubts

could have arisen in the mind of the applicant as to the impartiality of the medical experts, given that they were appointed and employed by the Institute – her opponent in the proceedings, in the circumstances of the case, these doubts were not objectively justified. As it pertains to the request for an independent expert, namely a new expertise, the ECtHR observed that the applicant had an opportunity to challenge the commission's opinion before the courts; she was made aware of them and did have an opportunity to challenge them in writing, as well as at an oral hearing before the court. The Court also noted that she could have submitted specific objections concerning the findings of the expertise report, but the applicant failed to submit any argument questioning the disability commissions' findings, other than disputing them. The applicant hence failed to substantiate to the minimum necessary degree her request for the appointment of a new expert. (For the reasoning of the case, refer to paragraphs 37 to 59 of the *Devinar versus Slovenia* case).

62. Having said the above, the Court also notes however, that in certain circumstances, the ECtHR has also found violation, when the court rejected the requests for appointment of a new expert, and therefore the ECtHR also maintains that in certain circumstances, the refusal to allow further or an alternative expert examination of experts may be regarded as a breach of paragraph 1 of Article 6 of the ECHR. (See the ECtHR case *Van Kück versus Germany,* Judgment of 12 June 2003*)*. Case *Van Kuck versus Germany* is an example in this respect. It involves a claim of transsexual against a health insurance company for reimbursement of medical expenses, including the gender reassignment operation. The respective German court ordered an expert report on the questions of the applicant's transsexuality and the necessity of gender reassignment measures. The expert report was not conclusive on the gender reassignment surgery. The courts, both regional and appeals, therefore rejected the applicant's claims, noting that the operation was not the only possible treatment and that the expertise did not clearly affirm the "*necessity*" of an operation. (For the facts of the case, refer to paragraphs 8 to 38 of the *Van Kuck v. Germany* case). The ECtHR found violation of Article 6 of the ECHR in this particular case, focusing on the need for additional clarifications pertaining to the respective expertise based on which the regular courts made their decisions. The ECtHR concluded that the expertise based on which the courts rejected the applicants claims was not conclusive on the main question of "necessity" of the respective medical treatment, and therefore clarifications must have been requested and/or a new expertise on the specific question must have been ordered. (For the reasoning of the case, refer to paragraphs 38 to 65 of the *Van Kuck v. Germany* case).

63. Having elaborated the main principles developed by the ECtHR case-law pertaining to the expert reports ordered in administrative and judicial proceedings, the Court emphasizes again that the ECtHR, in principle, maintains that the proceedings have to be evaluated in their entirety in order to determine their compatibility with Article 6 of the ECtHR. More specifically pertaining to the expert reports, it in principle maintains that (i) the refusal to order an expert opinion is not, in itself, unfair; (ii) this refusal must be reasoned and reasonable; (iii) if ordered, the litigants must be afforded a possibility to challenge the expert evidence effectively and must in all instances be able to attend the interviews held by him or her or to be shown the

documents he or she has taken into account. This is particularly important when the expert report is considered to have a dominant effect for the final decision; and that (iv) the lack of neutrality on the part of an expert, together with his or her position and role in the proceedings, can tip the balance of the proceedings in favor of one party to the detriment of the other, in violation of the equality of arms principle. The Court will in continuation apply these principles, to the circumstances of the present case and the applicant's allegations.

(ii) Application of these principles to the circumstances of the present case

64. The Court recalls that the Applicant essentially alleges that expert S.B. was biased; that his report had a dominant impact on proceedings before the regular courts, and that his request for new expertise should have been approved, on the contrary, according to the Applicant, the principle of equality of arms was violated to its detriment, thus resulting in a violation of paragraph 1 of Article 6 of the ECHR.

65. With regard to the expertise, the Court first recalls that based on Judgment [IC. No. 660/2013] of 31 March 2016 of the Basic Court, it was scheduled for a hearing of 15 July 2015. The relevant judgment reflects that (i) the decision to issue proof of construction expertise was rendered upon the proposal of the litigants; (ii) it has appointed S.B. a judicial expert for this expertise; and that (iii) his report was presented at the hearing and the parties had the opportunity to ask questions and provide additional explanations. According to the case file, it results that the relevant expert was assigned the task of (i) the finding that "*claimant-mounted aluminum profiles have complied with construction standards*"; and (ii) "*of the calculation of the value of the works performed in the collective residential-business facility*".

66. The abovementioned judgment of the Basic Court, in this context, states:

> "*At the hearing on 15.07.2015, the court, upon the proposal of the parties, decided to issue evidence of construction expertise. For construction expertise, the court has appointed the judicial expert Mr. Selman Buqolli. The forensic expert carried out the forensic report and was heard at the hearing where he answered questions put by the parties and provided additional clarification on the issues raised during the trial*".

67. It appears from the case file that the expertise was challenged by the Applicant at the hearing of 3 February 2016 and it was proposed to extract another construction expert. This proposal was rejected by the court through the relevant Decision pursuant to Article 366 of the LCP. The latter specifies two options on the basis of which additional clarification may be required or a new expert is appointed - if in the court's assessment the expert's report is "*deficient or unclear*" or has "*difference of opinions among experts*". In the court's assessment this was not the case in the circumstances of the present case. In this respect, the Basic Court explained:

> "*At the hearing of 03.02.2016, the authorized representative of the counter-claimant proposed to extract another construction expertise,*

through the group of construction experts, but the court rejected such a proposal. Article 366 of the LCP stipulates that if the expertise report is incomplete or unclear, and the expert fails even after the court's summons to eliminate the shortcomings of the expertise report, the court appoints another expert. So the legal requirement for other expertise is that the finished expertise is incomplete or unclear. In the present case, the court held that the content of the construction expertise report and the expert's explanations made during the hearing, have made clear judicial expertise, without deficiencies and without any flaws that would call into question its accuracy. Therefore, there were no legal requirements and it was unnecessary for the process to assign another expertise".

68. The Basic Court further clarified that based on Article 356 of the LCP, it is at its discretion, assessing the circumstances of each case, whether there is a need for expertise or even for its repetition, stating that in the circumstances of the present case "*the court has held that the construction expertise employed in this litigation has met the legal criteria to be treated as evidence, whereas as to its content, the court made its free assessment pursuant to Article 8.2 of the LCP. For the aforementioned reasons and circumstances, the court has concluded that another construction expertise proposed by the claimant is unnecessary, redundant, and only delays the contested process*".

69. The Court of Appeals and the Supreme Court examined the issue of expertise raised before them through the appeal and the request for the protection of legality, and both upheld the position of the Basic Court. The Court of Appeals confirmed the latter's position that the expertise was not "*deficient or unclear*" and that on all contentious issues, the relevant expert provided his explanations beyond his expertise, both at the hearing on 24 December 2015 and in the submission of 28 January 2016, where according to the Court of Appeals "*has sufficiently and convincingly explained its findings, which findings support the evidence contained in the case file*". On the other hand, the Supreme Court has also specifically addressed the Applicant's allegations regarding the Basic Court's refusal to assign new expertise. It, through the Judgment [IC. No. 660/2013] of 31 March 2016, in this respect, *inter alia*, stated:

"The allegations of the revision of substantive procedural violations which, according to the respondent, lie in the fact that the first instance court did not accept the respondent's proposal to extract new evidence by three experts in the relevant field, the court of revision rejected it as ungrounded, because in this legal matter the court of first instance has rightly rejected the proposal to present the expertise of three experts as new evidence, as the construction expertise in the case file was not unclear and incomplete. That the content of the construction expertise report and the expert explanations given at the court hearing made the forensic expertise in the field of construction clear, without deficiencies and without any flaws that would call into question its approval, and consequently, the same court rightly concluded that there were no legal requirements, and that it was unnecessary extract a new expertise for the same issue. For the purposes of Article 319.3 LCP, only the court decides what evidence will be taken in order to establish the decisive facts. In this

legal case, the construction expert was summoned to a court hearing in which he provided further explanations for his opinion and findings, which were sufficient to establish and clarify the facts and circumstances for which the trial of the case does not have professional knowledge".

70. The Court in this context first recalls that, as a general principle, based on the ECtHR case law, refusal to grant a request for an expertise is not necessarily unfair and does not in itself result in a breach of paragraph 1 of Article 6 of the ECHR. However, such a refusal must be justified and the Court, in the light of the foregoing, considers that this is the case in the circumstances of the present case. Referring to Article 366 of the LCP, the Basic Court, also supported by the Court of Appeals and the Supreme Court, held that in the circumstances of the present case, and taking into account that the challenged expert report is not "*deficient and unclear*", the circumstances for assigning a new expertise are not met.

71. However, and as noted above, based on the ECtHR case law, the bias of the expert concerned and the impossibility of one party to effectively challenge the expert's report may, in certain circumstances, result in a violation of paragraph 1 of Article 6 of the ECHR.

72. In the context of the former, namely the impartiality of the expert, which constitutes one of the main allegations of the Applicant in this case, the Court recalls the ECtHR case law, based on which the lack of expert's neutrality/impartiality, analyzed in the entirety of its role in the process, may favor one party to the detriment of the other. In this context, the ECtHR also states that paragraph 1 of Article 6 of the ECHR does not expressly state that an expert heard by a court, must necessarily meet the criteria of independence and impartiality required for the court itself. However, similar to the case law of the ECtHR regarding the impartiality of a court, even in the context of experts engaged in the court process, the ECtHR assesses whether there are legitimate doubts about the expert's impartiality and whether these doubts are objectively justified.

73. The ECtHR case-law on allegations related to expert impartiality is also reflected in the ECtHR cases cited above, and in particular the case *Letinčić v. Croatia* and *Sara Lind Eggertsdottir v. Iceland*. In the first case, the ECtHR found no violation of paragraph 1 of Article 6 of the ECtHR with regard to the expert's impartiality, emphasizing, *inter alia*, that the mere fact that the expert was employed by a public institution, and that in the circumstances of the case, he was the Applicant's opposing party, does not result in a violation of the ECHR. The ECtHR emphasized that while such a fact may raise legitimate doubts about his impartiality, it is not sufficient to be objectively justified. On the other hand, and in contrast, the ECtHR found violations of the expert's impartiality in the case *Sara Lind Eggertsdottir v. Iceland*, but because, as explained above, the majority of the Board members who had given their opinion/report to the relevant court were part and subordinate of the opposing party to the court process.

74. The Applicant, in the circumstances of the present case, does not raise any concrete argument relating to the alleged bias of the expert concerned. The

Applicant does not substantiate his legitimate doubts as to his impartiality and why they may be objectively justified. The Applicant's arguments regarding the expert's bias are in fact related to the content of the expertise report. The latter, based on the case law of the ECtHR, cannot serve to establish that the expert concerned was not impartial in the judicial process. However, they can be used to substantiate that the Applicant was not able to participate effectively in the process of drafting the report nor to effectively challenge its findings.

75. In this context, the Court relates to the second case identified above, namely whether the Applicant had the opportunity to participate and effectively challenge the findings of the contested expert report in accordance with the guarantees embodied in Article 6 of the ECHR.

76. The Court reiterates once more that the Applicant challenges the content of the expertise report and the fact that a new expertise was not approved by the regular courts. Furthermore, the Applicant's substantive allegation relates to the subject matter of the expertise. He alleges that the disputed expertise fails to establish the substantive fact regarding the disputed issue and, namely, whether the aluminum profiles/glass holders are suitable for contracted glass and not their compliance with the construction standards in the Republic of Kosovo.

77. The Court in this regard emphasizes the importance of the parties' participation in the process of assigning, drawing and examining an expert report. This is also guaranteed by the LCP, the ECHR, the ECtHR case law and the Constitution.

78. With regard to the LCP, the Court highlights Articles 357, 361 and 367 thereof. According to them, the parties beyond the possibility of proposing the expertise also have the opportunity to propose the object, volume and person responsible for the expertise. From the case file and the allegations of the Applicant, it does not appear that the Applicant has challenged the subject matter of the expertise. On the contrary, the Judgment of the Basic Court reflects that the parties had agreed in this respect at the hearing on 15 July 2015. Furthermore, it appears from the case file and the expertise report itself that the parties were involved in the process of drafting it. Further, based on Article 367 of the LCP, the court is obliged to send the parties a written finding and opinion at least 8 (eight) days before the main hearing begins. The Applicant does not allege to have had no access to the expertise report or to have not received it in a timely manner.

79. Furthermore, based on the case file, it follows that (i) a review session regarding this report was held on 24 December 2015, in which the expertise report was discussed and the parties were able to ask questions and provide explanations; (ii) an additional submission was submitted by the expert on 28 January 2016; and (iii) on 3 February 2016, another review session was held in which the relevant expert's report was discussed.

80. In this regard, the Court notes that the Applicant had a reasonable and effective opportunity to challenge the findings of the expert report. Such an opportunity relates to the determination of expertise, including its scope, the

process of drafting this expertise, and its discussion in the review sessions of the Basic Court. Accordingly, the Court must find that the Applicant had an effective opportunity to participate in the process of drafting it and an effective opportunity to challenge the latter.

81. The Court in support of this finding recalls the ECtHR case law. The latter found a violation of paragraph 1 of Article 6 of the ECHR in the case *Letinčić v. Croatia*, not because the Applicant's arguments were considered in relation to the expert report during the court proceedings, but because the Applicant had no access to the expert report at all. Similarly, in the case *Mantovanelli v. France*, the ECtHR found a violation of Article 6 of the ECHR because the respective Applicants did not have access to the expert report before it was presented to the court. On the contrary, the ECtHR did not find a violation of Article 6 of the ECHR in case *Devinar v. Slovenia*, because in that case the Applicant had access to the relevant report but did not agree with its findings, and requested the appointment of a new expert, a request which was rejected. In this case, the ECtHR emphasized that the Applicant was able to challenge the findings of the expert report before the court, in writing and orally at the court hearing. The ECtHR stated that the latter challenged the expertise report but had not sufficiently substantiated the objection to the existing report and the rationale for appointing a new expert. The Applicant's circumstances coincide with the case *Devinar v. Slovenia* in this respect, and not with those of *Letinčić v. Croatia* and *Mantovanelli v. France* in which the ECtHR found a violation of Article 6 of the ECHR, because the Applicants concerned had no access to the relevant expert reports at all and therefore, they were unable to challenge the findings of the expert reports effectively.

82. The Court also emphasizes that, based on the case law of the ECtHR, the non-approval of the request for a new expertise may result in a violation of paragraph 1 of Article 6 of the ECHR. Beyond cases of lack of decision on judicial reasoning, an example of such a circumstance is the case explained above, *Van Kück v. Germany*. The Court notes, however, that in this case, the expertise had failed to provide a definitive answer to one of the issues involved in its object, namely "*the need for a gender reassignment surgery*", the issue that was crucial in the rejection of the Applicant's claim for compensation.

83. The Court notes that this case differs from the circumstances of the present case. This is because despite the Applicant's allegations that the essence of the dispute in its case is whether the aluminum profiles/glass holders were suitable for contracted glasses, and not if the same were consistent with "*standards applicable in the Republic of Kosovo*" and "*generally in line with modern construction standards*", based on the case file it turns out that the latter are exactly the task assigned to the relevant expert, a task which, based on the case file, was not contested at the hearing on the determination of the subject matter of expertise and the expert concerned at the Basic Court. More specifically, and as noted above, the case file shows that the expert was assigned two tasks: (i) "*ascertain whether the claimant's mounted aluminum profiles have complied with construction standards*", and "*calculation of the value of the works performed in the collective residential-business premise where the investor was N.T. "CEIKU ROLLERS" (the Respondent – Counterclaimant), whereas the Executor - Contractor was the Claimant-*

Counter-respondent (N.P. "VAll AL-PVC")". Consequently, the disputing of the expertise's report relates to the subject matter of the expertise, and which the Applicant, based on the above provisions of the LCP, was able to challenge at the stage of its determination by the court.

84. In addition, case *Dombo Beheer B.V v. the Netherland*, cited above, and to which the Applicant refers in support of his arguments, is not applicable to the circumstances of the present case. Case *Dombo Beheer B.V v. the Netherland*, is a case in which the ECtHR found a violation of Article 6 of the ECHR on the basis of the principle of equality of arms, but not on matters related to expertise, but because only the key witness of only one party was heard before the court, placing the other party at a distinctive disadvantage. (See the reasoning of the relevant case in paragraphs 30 to 35 of the case *Dombo Beheer B.V v. the Netherland* in relation to its facts in paragraphs 7 to 22).

85. Therefore, and finally, the Court finds that in the context of (i) the impartiality of the expert, the Applicant does not substantiate the legitimate doubts about the expert's impartiality, although they may be objectively justified in the circumstances of the present case, moreover, based on the case law of the ECtHR, it cannot be concluded that the expert concerned was not netural or impartial; (ii) the procedure followed for the drafting of the expert report, the Applicant had the effective opportunity to participate and contest the findings; and (iii) in determining the new expertise, the Applicant has not sufficiently substantiated the deficiencies and uncertainties of the contested report during the review sessions and has not sufficiently substantiated his request to determine a new expertise.

I. As to allegations related to the examination of evidence and the lack of a reasoned judicial decision

86. The Court will further examine the Applicant's allegations related to (i) the violation of his right to be heard; and (ii) the lack of a reasoned court decision.

(i) As to allegations of a violation of the right to be heard

87. The Applicant alleges, in essence, that his right to be heard has been violated as a result of the courts' failure to examine the evidence presented by it during the proceedings. In this context, the Applicant emphasizes the obligation of the courts to properly assess the submissions, arguments and evidence submitted by the parties. As explained above, it alleges that the Court of Appeals and the Supreme Court failed to consider the evidence submitted by the Applicant in support of the deficiencies and uncertainties of the contested report of expertise made in the Basic Court, and consequently their request for a new expertise. The Applicant specifically refers to the statement of the general representative of "*Alumil*" and of the opinion of expert I.M. submitted to the Court of Appeals and private expertise submitted to the Supreme Court.

88. In this respect, the Court notes first of all that the ECtHR case law emphasizes that the ECHR does not lay down rules on evidence as such and that the admissibility of evidence and the way it should be assessed are primarily matters for regulation by national law and the national courts. Nevertheless,

the case law of ECtHR also determines that the Court's task under the ECHR is to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken. The purpose of the ECHR, according to the ECtHR, is to guarantee not rights that are "*theoretical or illusory*" but rights that are "*practical and effective*" and that this right can only be seen to be effective if the observations are actually "*heard*", that is duly considered by the trial court. It must therefore establish whether the evidence was presented in such a way as to guarantee a fair trial. The ECtHR also emphasizes that it is duty of the national courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties. (For more pertaining to the administration of evidence, see the ECtHR Guide on Article 6 of ECHR, Right to a fair trial (civil limb) of 31 December 2018; IV. Procedural requirements; 6. Administration of evidence).

89. The Court notes that the duty of the regular courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties was also emphasized, among others, on two cases of the ECtHR, *Kraska versus Switzerland* and *Perez versus France*, respectively, judgments these that have also been referred to by the Applicant. The Court notes however, that while these two cases, establish the basic principles pertaining to the administration of evidence and the duty of the regular courts to properly examine this evidence, the ECtHR did not find a violation in any of these two cases.

90. More specifically, the ECtHR case *Perez versus France*, involves an applicant who alleges to have been assaulted by her two children as a consequence of a non-payment of maintenance to which she was entitled because of her ill-health. In the first instance proceedings, the investigating judge determined that there was insufficient evidence pertaining to her allegations and determined that it was not practical to interview her son, including but not limited to the fact that he lived abroad. The applicant appealed. The Court of Appeals ruled that her appeal was inadmissible on the grounds that she had missed the legal deadline for an appeal and had failed to sign the notice of appeal. Her further appeal was also dismissed from the Court of Cassation. (For the facts of the case see paragraphs 8 – 17 of the ECtHR case *Perez versus France*).

91. In reviewing the case, the ECtHR noted that the right to a fair trial as guaranteed by paragraph 1 of Article 6 of the ECHR includes the right of the parties to the trial to submit any evidence/observations that they consider relevant to their case. The purpose of the ECHR, according to the reasoning of this case, is to guarantee not rights that are "*theoretical or illusory*" but rights that are "*practical and effective*" emphasizing that the effect of Article 6 of the ECHR is, among others, to place the "*tribunal*" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant (See paragraph 80 and the references therein in case *Perez versus France*). Nevertheless, the ECtHR found no violation in this particular case. It emphasized that in the circumstance of the case, it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the ECHR and

found that the Court of Cassation took due account of and effectively addressed all of the applicant's grounds of appeal. (For the reasoning of the case see paragraphs 76 to 84 of the case *Perez v. France*).

92. Similarly, in case *Kraska versus Switzerland*, involves an applicant, whose authorization to practice his medical profession was withdrawn because he no longer lived in the respective canton. He had treated a patient in the meantime and a prosecution was subsequently brought against him for, among others, fraud, charges which were subsequently dropped. However, his next application for an authorization was rejected, because he was not considered "*trustworthy*" within the meaning of the applicable law. In the proceedings before the Court, his claims were dismissed. However, during the deliberations in the court hearing, one of the judges stated among others, that he was not able to read and analyze the entire file. Nevertheless, the judgments was delivered. The applicant subsequently requested four times the reopening of proceedings, complaining that the judgment against him was delivered without the judges' sufficient knowledge of the file. (For the facts of the case see paragraphs 6 to 17 of *Kraska versus Switzerland*). In reviewing the case, the ECtHR emphasized that the effect of paragraph 1 of Article 6 entails the intention to place the "*tribunal*" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision. Nevertheless, it also held that in the circumstance of the particular case there was no evidence to suggest that the members of the Court failed to examine the appeal with due care before taking their decision and, therefore, dismissed the applicants complaint for not having proven to be well-founded, finding no violation of paragraph 1 of Article 6 of the ECHR. (For the reasoning of the case see paragraphs 28 to 34 of *Kraska versus Switzerland*).

93. In the context of the Applicant's allegations, the Court first notes that it does not appear from the case file that, despite challenging the report, it had presented evidence before the Basic Court, to counter argue the expertise report. The Court notes that from the hearing of 15 July 2015, the hearing of 16 October 2015, that of 24 December 2015, pending the issuance of the Basic Court's decision of 31 March 2016 from the case file and based on the Applicant's allegations, it does not appear that the Applicant has provided concrete evidence of disputing the expert report. In the appeal submitted to the Court of Appeals, the Applicant included two evidence in contradiction to the expertise's report, the opinion of expert I.M. of 27 April 2016 and the letter of the general representative of "*Alumil*" of Greece in Albania of 26 June 2016and through revision submitted to the Supreme Court submitted the private expertise on 2 June 2017.

94. The Court of Appeals by Judgment [Ae. No. 133/2016] of 14 April 2017, held that the Basic Court acted correctly when it based its decision on the expert report, the explanations given at the hearing on 24 December 2015 and the submission of 28 January 2016. In this context, the Court of Appeals, among other things, emphasized:

> "*This court assesses that the first instance court correctly applied the substantive law because, from the evidence in the case file, it is not*

disputed that the claimant has performed the contracted works for which the amount of the debt was approved by the first instance court. This amount is also confirmed by the opinion and findings of the construction expert Mr. Selman Boqolli, given in his expertise of 27.09.2015, and the explanations of the latter in the session of 24.12.2015 and the submission of 28.01.2016, where he has sufficiently and convincingly explained his findings, which conclusions are based on the evidence contained in the case file".

95. On the other hand, the Supreme Court, by its Judgment, [E. Rev. No 14/2017] of 14 September 2017, clarified three issues: (i) upheld the lower court decisions that the expertise report was not "*incomplete nor unclear*" and that the same, including the explanations given in the review sessions was sufficient to establish the factual situation; and (ii) other evidence as to the accuracy and conclusions of the expert report not obtained at the hearing of the case could not be considered under Articles 324 and 214 of the LCP because, the revision cannot be filed due to an incorrect or incomplete determination of the factual situation.

96. More precisely, with regard to the first case, the Supreme Court stated:

"The allegations in the revision of substantive procedural violations which, according to the respondent, lie in the fact that the first instance court did not accept the respondent's proposal to extract new evidence by three experts in the relevant field, the court of revision rejected it as unfounded, because in this legal case the court of first instance has rightly rejected the proposal to present the expertise of three experts as new evidence, as the construction expertise in the case file was not unclear and incomplete. That the content of the construction expertise report and expert explanations given at the court hearing, have made the judicial expertise in the field of construction clear, without deficiencies and without any flaws that would call into question its approval, and consequently, the same court has rightly concluded that there were no legal requirements, and that it was unnecessary to extract new expertise in the same matter. For the purposes of Article 319.3 of the LCP, only the court decides what evidence will be taken with a view to establishing the decisive facts. In this legal matter, the construction expert was summoned to a court hearing in which he provided further explanations for his opinion and finding, which were sufficient to establish and clarify the facts and circumstances of which the trial judge has no professional knowledge".

97. As to the second issue, it emphasized:

"In this regard, always regarding this expertise, the Supreme Court also rejected other claims of the revision concerning the accuracy of the findings of that expertise and its approval, the accuracy of which the respondent attempts to call into question with other expertise performed on a private basis and out of court session , as the court upholds its decision only on the basis of the evidence administered at the hearing, in accordance with Article 324.1 of the LCP".

"Other claims about this expertise pertain to the factual situation, so as such these claims of the revision were not assessed at all, as, within the meaning of Article 214.2 of the LCP, the revision may not be filed on the grounds of an erroneous or incomplete determination of the factual situation".

98. In this respect, and having regard to the explanations given above, the Court cannot find that the Applicant's submissions, arguments and evidence were not properly examined by the regular courts. The court has already held that (i) the rejection of the Applicant's request in the Basic Court was reasoned; (ii) it cannot be held, based on the ECtHR case law, that there were legitimate doubts as to the impartiality of the expert concerned; and (iii) the Applicant was not prevented from effectively participating and contesting the expertise's report during the court proceedings. The Court further notes that the circumstances of the present case do not support a finding of a violation of the Applicant's right to be heard because his submissions and evidence were not examined by the court. Such a finding is not supported by the applicable law nor by the case law of the ECtHR. As noted above, the relevant ECtHR cases referred to in the Referral in support of its arguments do not support such a finding. Both have found no violation of Article 6 of the ECHR with regard to the proper assessment of the respective Applicants' submissions, including the case *Kraska v. Switzerland*, where one judge had expressly stated that he had not assessed the case file in its entirety. The ECtHR, within the meaning of paragraph 1 of Article 6 of the ECHR, assesses the proceedings in their entirety, and in the circumstances of the case, in the context of the examination of evidence, the court proceedings in the Applicant's case, in their entirety, in the Court's assessment, do not appear to be contrary to paragraph 1 of Article 6 of the ECHR.

(i) As to the allegations of lack of a reasoned court decision

99. In this respect, the Court initially reiterates that it has already established a consolidated case law with regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. This 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*, of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned judicial decision have also been elaborated in the cases of this Court, including but not limited to KI72/12, Applicant *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant "*IKK Classic*", Judgment of 9 January 2018; and KI143/16, *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; and KI124/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019.

100. In principle, the case law of the ECtHR and that 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 each 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.

101. In addition, the ECtHR uses also the concept of "*sufficiency of reasoning*" even where desirable could be a wider and more detailed reasoning is a concept developed and also used by the ECtHR itself. (See case *Merabishvili v. Georgia*, No. 72508/13, Judgment of the Grand Chamber of 28 November 2017, paragraph 227). Although the circumstances of the present case are not the same as those of the ECtHR case, the concept of "*sufficiency of reasoning*" through this case of the Grand Chamber of the ECtHR implies that the reasoning of the relevant decisions of the regular courts, in certain circumstances, though not desirable, may be sufficient. In this respect, in the abovementioned Judgment of the ECtHR, the latter stated the following: "*Whilst more detailed reasoning would have been desirable, the Court* [the ECtHR] *is satisfied that this* [reasoning] *was enough in these circumstances*". (See, also case No. KI48/18, Applicant, *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 4 February 2019, paragraph 186).

102. The Court recalls the Applicant's specific allegations concerning the lack of a reasoned court decision as reflected in paragraph 35 of this Judgment. The Court notes that the allegations relating to the expert report, namely the amount of the obligation set out in this report; finding that the compensation by apartment for half of the value of the contracted works has been converted into cash compensation; and the opinion of '*Alumil*" and that of expert I.M. submitted to the Court of Appeals and the private expertise submitted to the Supreme Court, relate to the contents and procedure of extracting the expertise report. The Court has already dealt with all the Applicant's allegations related to the disputed expertise, however, further, it will also address the Applicant's remaining allegations concerning the alleged lack of a reasoned court decision.

103. In this context, and with regard to the extent of the obligation, based on the expert's report, the Basic Court found and reasoned, *inter alia*, as follows:

> "*From the data cited in this judgment, it was found that the claimant in the capacity of a contractor has completed all construction works obtained by the date agreement of 10.06.2013, dealing with the placement of plastic windows in the counter-claimant's business premises. The claimant also carried out work on the installation of aluminum facade and profiles, on the ground floor and the first floor, as well as on the demolition and reassembly of aluminum profiles. The total value of the works performed by the claimant is in the amount of 120,975.00 €. The counter-claimant paid the claimant the amount of € 38,000.00. Also on behalf of unrepaired remarks, this amount is deducted by 2%, amounting to 1,659.50 €. Therefore, the court has concluded that the counter-claimant owes the*

claimant a total amount of € 81,279.50, which amount was obliged to pay to the claimant in this judgment".

"The counter-claimant's allegations filed by the counter-claim that the counter-claimant paid the claimant the amount of 133,000.00 €, are not proven by material evidence, since the evidence examined during the course of the main trial found that the counter-claimant paid the claimant the amount of 38,000.00 €. While the value of the works performed by the claimant is in the amount of 120,875.00 €. The Court also finds that the allegations in the counter-claim that the material used were of poor quality, and not in accordance with the dimensions used of the aluminum profiles, have not been tested by any test. The expertise report showed that the material used complies with professional standards in the field of construction".

104. Such a position of the Basic Court was also confirmed by the Court of Appeals and the Supreme Court. Consequently, the Court emphasizes that the allegations concerning the amount of compensation, namely the Applicant's obligation, were sufficiently reasoned by the regular courts.

105. As to the Applicant's allegations that the regular courts had not established that the compensation by apartment for half of the value of the contracted works was converted into cash compensation, The Court recalls the reasoning of the Basic Court in this regard, which states:

"On 10.06.2013, the counter-claimant, has provided written agreement to the claimant whereby:

- *The counter-claimant is free to sell the apartment (thus canceling the flat compensation as per contract);*
- *It is found that the works performed by the claimant amount to 79,247.00 €;*
- *It is found that the counter-claimant paid the claimant the amount of 38,000.00, so there is debt in the amount of 41,247.00 €.*

The agreement was not signed by the parties to the proceedings but was conclusively accepted by the parties and its facts were not contested by either party. The claimant has, among other things, renounced the apartment, exactly as provided by this document".

106. The Court also notes in this respect that this case was not specifically raised by the Applicant either through the appeal before the Court of Appeals or through the revision before the Supreme Court. Whereas issues related to the opinion of '*Alumil*", that of the expert I.M. and private expertise, The Court has already dealt with them in the preliminary parts of this Judgment. Consequently, the Court notes that the allegations concerning the compensation in cash in relation to the compensation by the apartment, they were sufficiently reasoned by the regular courts in relation to the Applicant's allegations submitted through the appeal and the relevant revision.

107. The Court also recalls that the Applicant alleges that there was no reasoning in the regular courts' decisions with regard to the allegations raised in the

counterclaim, with respect to the claimant's delay, regarding the lack of profit, and the request to appoint an economic expert to calculate the damage in question.

108. In this respect, the Court notes that the aforementioned issues were raised by the Applicant only through a counterclaim in the Basic Court and which the latter rejected. The latter were not filed either before the Court of Appeals through an appeal or before the Supreme Court by a request for revision.

109. The Court notes in this context that the courts are required to reason the Applicants' substantive allegations, but this obligation does not imply that the courts must respond to each argument put forward by the respective Applicants. This obligation furthermore does not apply to the allegations which have not been brought before the regular courts by appropriate legal remedies. In the circumstances of the present case, the Court considers that the Applicant's substantive allegations throughout the regular courts' decisions, in their entirety, were sufficiently reasoned.

Conclusions

110. In the circumstances of the present case, the Court found that Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court is in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR and more specifically in compliance with (i) principle of equality of arms; (ii) the right of the Applicant to be heard; and (iii) general principles regarding the right to a reasoned court decision.

111. The Court, when assessing the Applicant's allegations, based on the case law of the ECtHR, found that (i) the contested expertise report was not extracted by a biased expert, because with regard to his bias neither legitimate doubts were substantiated nor why the latter may be objectively justified; (ii) the Applicant had an effective opportunity to participate in the process of drafting an expertise report and an effective opportunity to contest it; (iii) the rejection of the request for assigning new expertise is sufficiently reasoned and reasonable; (iv) the regular courts have examined the Applicant's evidence; (v) the decisions of the regular courts are sufficiently reasoned; and (vi) based on the case law of the ECtHR, the proceedings in their entirety were fair.

112. Therefore, the Court finds that the Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court in conjunction with the Judgment [Ae. No. 133/2016] of 14 April 2017 of the Court of Appeals and the Judgment [IC. No. 660/2013] of 31 March 2016 of the Basic Court are in compliance with the Constitution and remain in force.

Request for interim measure

113. The Court recalls that the Applicant requests the imposition of interim measure by the Court, stating that the imposition of the interim measure is "*in the public interest*" and arguing among other things that, the legal effects of the Judgments, allegedly contrary to the Constitution, and their consequences for the party to the proceedings, should be prevented.

114. The Court notes in the first place that based on the Law, the Rules of Procedure, and the consolidated case law of the Court, the requests for interim measures shall be rejected in cases the referrals are declared inadmissible or even when cases are decided on merits by the Court, finding no violation of the constitutional provisions, as is the case in the circumstances of the present case.

115. Therefore, in accordance with paragraph 1 of Article 27 of the Law and Rule 57 of the Rules of Procedure, the Applicant's request for interim measure is to be rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113. 1 and 7 of the Constitution, Articles 20, 27 and 47 of the Law and Rules 39, 57 and 59 of the Rules of Procedure, in the session held on 18 December 2019, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR;

III. TO NOTIFY this Judgment to the parties;

IV. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law;

V. 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.