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

Prishtina, on 8 May 2020
Ref. no.:RK 1559/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI58/18

Applicant

"IIC Assistance"

Request for constitutional review of Judgment ARJ. UZVP No. 69/ 2017 of the Supreme Court, of 25 January 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by "IIC Assistance" with its seat in Prishtina, which is represented by the authorized representative Mr. Besnik Nikqi and Visar Morina, the representatives of the Law Office "ICS Assistance" from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [ARJ. UZVP No. 69/2017] of the Supreme Court of 25 January 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which allegedly violates the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Fundamental Human Rights and Freedoms (hereinafter: the ECHR), and Article 49 [Right to Work and Exercise Profession] of the Constitution.

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] 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] 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 Constitutional Court of the Republic of Kosovo (hereinafter: 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 Constitutional Court

6. On 16 April 2018, the Applicant submitted the Referral to the Court.

7. On 18 April 2018, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel, composed of Judges: Ivan Čukalović (Presiding), Arta Rama-Hajrizi dhe Selvete Gërxhaliu-Krasniqi.

8. On 25 April 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

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

10. 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.

11. On 22 August 2018, the President of the Court rendered Decision on replacement of the Judge Rapporteur Almiro Rodrigues, and appointed Judge Remzije Istrefi-Peci as Judge Rapporteur instead.

12. On 11 December 2018, the Applicant submitted additional documents to the Court.

13. On 29 January 2019, the President of the Court rendered Decision on the appointment of the new Review panel, composed of judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

14. On 15 April 2020, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

15. On 25 July 2002, the Banking and Payments Authority of Kosovo, as the predecessor of the Central Bank of the Republic of Kosovo (hereinafter: the CBK) issued Decision No. 009, by which the Applicant (IIC Assistance) is licensed as an office for adjusting losses.

16. On 18 July 2012, the CBK Executive Board issued a Decision [No. 49-30/2012], which suspended the license of the Applicant (IIC Assistance) on the grounds that *"for the examined years it has not audited the annual financial statements, as required by Article 49.1 of Regulation no. 2001/25 on Licensing, has not installed an adequate system of internal controls and has treated cases for which the CBK examiners found that they have falsified and staged content"*. By this Decision, the CBK Executive Board obliged the Applicant to terminate any engagement related to the insurance activity.

17. On 23 April 2013, the CBK conducted the examination focused on the Applicant's office, as **"***the CBK has received information from financial institutions that "IIC Assistance" is acting as a loss adjuster with suspended license"*. During the examination, the CBK officials from the Management of "IIC Assistance" (i) have been presented with the decision for the suspension of the license as well as the notification of the associates of "IIC Assistance" regarding Decision No. 49-30/2012 of the CBK for suspension of the license; (ii) the CBK officials have been notified by the "IIC Assistance" Management that the office is now operating under a different name as "ICS Assistance"; (iii) that "ICS Assistance" has another organizational structure, and also deals with other activities; as well as that (iv) "ICS Assistance" is licensed by the Ministry of Trade and Industry.

18. Examiners from the CBK Licensing and Regulation Department examined "*ICS Assistance" and from the evaluation of the documentation received by the Kosovo Security Bureau, it was concluded that "ICS Assistance has exercised the activity of assessment of damage without being licensed by the CBK"*. The examiners of the Department for Licensing and Regulation of the CBK recommended to the Executive Board of the CBK that the Applicant, due to the violations found, the license for adjusting damages be revoked.

19. On 30 April 2013, the CBK Executive Board by the Decision [No. 26-08/2013] revoked the license of the Applicant for adjusting damages on the grounds that *""ICS Assistance", who are in fact close persons and who have also worked for "IIC Assistance", has presented to the CBK false facts regarding the activity they are exercising (according to them, legal advice, regress, etc..)". "IIC Assistance" and "ICS Assistance" are managed by persons of the same family and since they have presented false facts to the CBK, these persons according to the Licensing Manual used by the CBK are not further considered "fit and proper", as established in Article 52 of Regulation no. 2001/25".*

20. On 6 June 2013, the Applicant filed a lawsuit with the Basic Court in Prishtina-Department for Administrative Matters against the CBK, requesting the annulment of the Decision [No. 26-08/2013] of 30 April 2013, of the CBK, claiming that the CBK *"has not correctly determined the factual situation, which is a direct consequence of the erroneous and unstable conclusions that have resulted from rendering an unlawful decision".*

21. On 19 January 2016, the Basic Court in Prishtina - Department of Administrative Matters by Judgment [A. No. 767/13] rejected, as ungrounded, the Applicant's allegation, on the grounds that *"the decision of the respondent challenged by the lawsuit is fair and based on the law, because it was taken after the determination of all relevant facts and is based on the applicable legal provisions".*

22. On an unspecified date, the Applicant filed an appeal with the Court of Appeals - Department for Administrative Matters against Judgment [A. No. 767/13] of the Basic Court of 19 January 2016, on the grounds of *"essential violations of the provisions of the administrative-contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law".* With this appeal, the Applicant also requested the Court of Appeals to annul the Judgment [A. No. 767/13] of the Basic Court in Prishtina-Department for Administrative Matters and Decision [No. 26-08/2013] of the CBK.

23. On 26 April 2016, the Court of Appeals - Department for Administrative Matters rendered Judgment [AA. No. 757/2016], which approved, as grounded, the Applicant's appeal and annulled the Judgment [A. No. 767/2013, of 19.01.2016] of the Basic Court in Prishtina - Department for Administrative Matters and remanded the case to the same court for retrial and reconsideration. In its judgment, the Court of Appeals ordered the Basic Court: "*that the contested issue be examined in its entirety and that the relevant facts influencing the resolution of the dispute be conclusively determined, and that the contested facts be completely and comprehensively stated and that the causes be taken as proven or unproven, clearly emphasizing the reasons for the crucial facts in a comprehensible way which must also be justified. After the correct and complete determination of factual situation, the first instance court has the opportunity to render fair and lawful judgment in terms of the provisions of the Law on Administrative Conflicts*".

24. On 14 December 2016, the Basic Court in Prishtina - Department for Administrative Matters, in the repeated proceedings, by Judgment [A. No. 657/16], rejected the Applicant's lawsuit as ungrounded. In the part of the reasoning regarding the recommendation of the Court of Appeals, the Basic Court *inter alia* states:

> *"the allegation is also substantiated as in the reasoning of the challenged decision that the Applicant's representatives, on the occasion of the examination of 28.03.2013, presented to the respondent facts that consist false, stating that the ICS Assistance is an office for legal advice, regress and that the their activity is not the adjustment of damages, as long as the abovementioned communications prove that they have exercised their activity as a los adjustor".*

25. On an unspecified date, the Applicant filed an appeal with the Court of Appeals - Department for Administrative Matters against the Judgment of the Basic Court on the grounds of *"essential violations of the provisions of the administrative/contested procedure, erroneous determination of factual situation and erroneous application of substantive law"*. By this appeal, it requested the annulment of the Judgment [A. No. 657/16] of 14 December 2016 of the Basic Court in Prishtina.

26. On 5 October 2017, the Court of Appeals rendered Judgment [AA. No. 81/2017], which rejected, as ungrounded, the appeal of the Applicant and upheld the Judgment [A. No. 657/2016], of the first instance court of 14 December 2016.

27. In the reasoning of its Judgment, the Court of Appeals states that on the basis of:

> *"electronic communications of 28.01.2013, 29.01.2013 and 13.02.2013, between the representative of ICS Assistance and KIB which confirmed that the latter has been referred as a licensed loss adjuster, so such an action constitutes a violation of Article 9.1 of Regulation No. 2001/25 which stipulates that "no person shall engage in the business of an insurance company or an insurance intermediary in Kosovo unless it has been licensed by the BPK and Article 4.1 of Rule 5 a) for the licensing of regulators/supervisors of insurance damages dated 28.03.2002, according to which "No person shall engage in the activity provided by this rule, or claim to act as a licensed person, unless is licensed under this rule". Therefore, it is rightly stated that such an action constitutes the basis for the revocation of the license in accordance with paragraph (0) of Article 15.1 of Regulation No. 2001/25. Whereas, in view of Article 52.3 of the Regulation, these persons according to the licensing manual used by the CBK are not further considered "fit and proper". Therefore, as the claimant did not present to the court any evidence proving otherwise, the responding body correctly applied the provisions of the administrative procedure and the substantive law when revoking the license of the claimant, that the evidence administered proved that the claimant had not acted in accordance with applicable legal provisions. […] Also, the panel of this court considered as ungrounded the claims of the claimant in the appeal, that in the proceedings of this case we have a substantial violation*

of the provisions of the contested procedure under Article 182 par. 2 item n) and Article 182 par. 1 in conjunction with Article 199 of the LCP. That it has not committed any of the alleged violations under Articles 9.1 and 15.1 of the Regulation 2001/25. Then, that the first instance court did not act according to the suggestions of the second instance court that in the case of retrial to prove some of the decisive and contested facts between the litigants that there are still flaws, namely the violations and shortcomings in the proceedings of the case by the first instance court. The panel of this court considers that these appeals are ungrounded, because, the challenged judgment of the first instance court is clear and understandable, and in the reasoning of the latter the necessary reasons for the decisive facts are given, which this court also accepts".

28. On an unspecified date, the Applicant submitted to the Supreme Court the request for an extraordinary review of the Judgment [AA. No. 81/2017], of the Court of Appeals of 5 October 2017.

29. On 25 January 2018, the Supreme Court by Judgment [ARJ. UZVP No. 69/2017] rejected as ungrounded the request of the Applicant for extraordinary review of the Judgment [AA. No. 81/2017] of the Court of Appeals of 5 October 2017 stating that *"this Court considers as correct and based on law the legal position of the lower instance courts, in case of rejection of the claimant's lawsuit, filed against the decision of the CBK No. 26-28/2013 of 30.04.2013, as the administrative body –the respondent CBK in a regular legal process has revoked the license to the claimant, in accordance with Articles 9.1, 15.1 and 52 of Regulation No. 2001/25 on Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries and Law No. 03/L-209 on Central Bank of Kosovo. […] as the judgment of the second instance contains sufficient reasons and that all the facts in this legal matter have been assessed, that the decision of the second instance court is clear and understandable, and in the reasoning of the latter the necessary reasons for the decisive facts have been given, which this Court also accepts. The substantive law has been applied correctly and the law has not been violated to the detriment of the claimant".*

Applicant's allegations

30. The Applicant alleges that by the challenged decision, the Supreme Court violated its rights guaranteed by Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR, as well as the rights guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution, as well as the principle of proportionality in the case of imposition of the restrictions on the exercise of the constitutional right to work and exercise profession.

Applicant's allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

31. The Applicant alleges that the failure of the courts in all instances to consider the evidence and testimonies proposed by the Applicant is violation of: **(i)** the right to a reasoned decision; and **(ii)** the principle of equality of arms.

32. Regarding **(i)** the violations of the right to a reasoned decision the Applicant alleges that the challenged decision *"is characterized by the lack of adequate reasoning, namely that the Supreme Court has not given sufficient and adequate reasoning regarding the rejection of the Applicant's request for extraordinary review of the Judgment of the Court of Appeals of Kosovo* [AA. No. 81/2017], of 5 October 2017 and the Basic Court of Prishtina/Department for Administrative Matters [A. No. 657/16], of 14 December 2016.*"*

33. The Applicant emphasizes that "*the Supreme Court failed to address the key issues raised by the Applicant at all court levels, at the basic, appellate level and in the Supreme Court"*. According to the Applicant "*the Judgment of the Supreme Court of Kosovo only notarized the decisions of the lower courts and failed to provide full and adequate reasoning regarding the issues raised,* [...]*"*.

34. In particular, the Applicant alleges that "*the Supreme Court has completely ignored the allegations regarding the confirmation of the contested issue, namely whether IIC Assistance continued to act as a loss adjuster without license. The court relied only on presumptions and internal reports of the CBK (so-called focused examinations but did not establish which cases of damages identified by protocol number were handled without a license by the claimant).* According to the Applicant "*The fact that the Supreme Court has decided on the case only on the basis of internal reports and without assessing the documents of the respective cases which were administered as evidence or, if necessary, to seek the opinion of any independent expert in the field of insurance makes incomplete decision in terms of adequate reasoning"*.

35. With regard to these allegations regarding the lack of adequate reasoning, the Applicant emphasizes and cites the decisions of the Court KI55/09, KI135/14, KI138/15 and KI97/16, as well as the decisions of the ECtHR, *Hiro Balani v. Spain* [1994], *Ruiz Torija v. Spain* [1994], *Helle v. Finland* [1997], *Suominen v. Finland* [2003] and *Gradinar v. Moldova* [2008].

36. Regarding **(ii)** violation of the principle of equality of arms, the Applicant considers that *"the failure of the courts in all instances of proceedings to consider the evidence and testimonies proposed by the Applicant is contrary to the principle of equality of arms and the right to a reasoned decision, as essential elements of the right to fair and impartial trial"*.

37. With regard to these allegations of violation of the principle of equality of arms in his case, the Applicant emphasizes and cites the Court Decision KI31/17, as well as the decisions of the ECtHR, *Feldbrugge v. the Netherlands* [1986] and *Dombo Beheer B.V. v. the Netherlands* [1993], *Vand de Hurk v. the Netherlands* [1994].

38. The Applicant further stated that *"it raised concerns about the non-acceptance of evidence and allegations raised about the legality of revoking the license in all court instances, but the courts have not taken a stand on these concerns and have therefore violated the "right balance" which is a condition for*

equality of arms, between the litigating parties in the administrative proceedings".

39. The Applicant also considers that *"the very fact that the report on the basis of which the license was revoked was compiled by employees of a public institution (CBK) and is funded by the state budget, does not justify the fear that these officials may not have acted in a neutral and impartial manner in giving their professional opinions regarding this case".*

40. The Applicant alleges that the violation of the equality of arms in his case resulted in an unreasonable and inadequate decision by the Supreme Court. Specifically, the Applicant considers that "*any stand in the judgment of the court that is not accompanied by adequate reasoning based on the law should imply that the court (in this case the Supreme Court of the Republic of Kosovo) has not paid sufficient attention to the determination of the main facts based on the legislation".*

41. According to the Applicant "*in the judicial review proceedings, a stereotypical repetition of the reasons of the lower courts is not considered sufficient. Especially if the court assesses the limitation of an authority's interference in the exercise of human rights and freedoms (revocation of the license) it is very necessary to address all relevant claims of the referring party, and to examine and assess the extent of the interference and the imposition of restrictive measures in relation to the right of the party and the raised allegations".*

42. The Applicant emphasizes the importance that the Constitutional Court in its jurisprudence gives to the reasoned decision and emphasizes that *"The issue of the reasoning of the court decision becomes even more important if it is considered that the Supreme Court is a judicial body of the last instance, which decisions establish a precedent - which could be of special importance for the lower courts. The failure of the Supreme Court to provide adequate and sufficient reasoning under the law also violates the principle of legal certainty for the parties and makes it impossible to develop a consistent practice of judicial interpretation on similar issues".*

43. The Applicant alleges that non-application of the case law of the Constitutional Court and invokes and cites again the cases KI55/09, KI135/14, KI97/16 and KI138/15, considering that the findings of the Constitutional Court in the mentioned cases and in particular the findings of the Constitutional Court in case KI138/15 " *....applies also in the present case*". According to the Applicant "*...the case cited above corresponds to and is identical to this case in another segment, as it refers to the issue of contextual involvement for two different entities (here IIC Assistance and ICS Assistance) when the lower instance courts failed that the right to ascertain this fact, which was directly reflected in the challenged court decisions".*

44. The Applicant also states that *"The Supreme Court of the Republic of Kosovo in this case not only did not give an adequately reasoned decision but also failed to fulfill the constitutional obligation under Article 53 of the Constitution to address the case in the context of the relevant case law of the European Court,*

in particular, it did not conduct an analysis of whether administrative interference in limting the right to work in the event of revocation of a license are proportionate and necessary". In this regard, the Applicant refers again to the ECtHR cases *Boldea v. Romania* [2007], *Hiro Balani v. Spain* [1994] 45, paragraph 27, *Ruiz Torija v. Spain* [1994] 47, paragraph 29, *Helle v. Finland* [1997] 105, paragraph 55, *Suominen v. Finland* [2003] 330, paragraph 34, and *Gradinar v. Moldavia* [2008] 279, paragraph 107.

(iii) Applicant also alleges violation of Article 49 [Right to Work and Exercise Profession] of the Constitution and principle of proportionality in the case of imposing limitations on the exercise of the constitutional right to work and exercise profession

45. The Applicant alleges that Judgment ARJ. UZVP No. 69/2017 of the Supreme Court, of 25 January 2018 "*violates Article 49 of the Constitution of Kosovo, which guarantees the right to work and exercise profession, as well as the principle of proportionality in the case of imposing limitations on the exercise of the constitutional right to work and exercise profession"*.

46. The Applicant states that *"the failure of the Supreme Court to give an adequate reasoning of the court decision in the administrative issue that refers to the unlawful revocation of the license of the Applicant by the CBK constitutes an open violation of the right to work and free exercise of profession. […] "*.

47. Referring to the principle of proportionality, the Applicant states that *"in the present case it is clearly noted that this constitutional principle has not been respected either by the CBK or by the respective courts, including the Supreme Court as the IIC Assistance has been imposed the most severe measure in the framework of punitive measures (revocation of license) out of a total of 18 measures available to the CBK in accordance with Article 77 paragraph 1 (r) making it impossible to exercise the activities and services for which it was established"*.

48. According to the Applicant, "*the CBK and the respective courts have not acted in accordance with Articles 49 and 55 of the Constitution of the Republic of Kosovo … as they have failed to assess whether imposing such a restriction (revocation of the license as the most severe measure) is proportional to the achievement of legitimate and necessary aim in the present case.*" In this regard, the Applicant states and cites the ECtHR Decision, *Tre Traktorer Aktiebolag v. Sweden [1984].*

49. The Applicant further adds that "*the CBK and the respective Court, including the Supreme Court, have not acted in accordance with Article 67 of the Law on the CBK" as the criteria set by law and the constitutional criterion for proportional interference in imposing administrative restrictions on the exercise of constitutional rights have not been taken into account (freedom of work and choice of profession)"*.

50. Finally, the Applicant requests the Court to declare the challenged decision invalid and to remand the case for retrial and reconsideration.

51. In his additional request, the Applicant proposes to the Court *"that in case of annulment of the challenged decision of the Supreme Court of Kosovo, as the decision of the last court instance to refer that even the decisions of the lower instance courts, which have been rendered in violation of constitutional rights and freedoms, have no legal force from the moment of rendering the decision of the Constitutional Court of Kosovo".*

Relevant legal provisions

UNMIK Regulation 2001/25
of 5 October 2001

on Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries

[…]

Section 9
Prohibitions

9.1 No person shall engage in the business of an insurance company or an insurance intermediary in Kosovo unless it has been licensed by the BPK.

9. 2 No person shall use the word "insurance" or a derivative of the word "insurance" in respect of a business, trade name, product or service without a licence issued by the BPK. Moreover, no person shall make a misstatement of material fact or a false or misleading representation or do anything to create a false or misleading appearance or engage in any manipulative device or practice in relation to issuing insurance policies.

[…]

Section 15 Grounds for Revocation of an Insurance Company or Insurance Intermediary's Licence

15. 1 The BPK may revoke a licence without prior notice where it determines that:

[…]

(0) An insurance company or an insurance intermediary has provided false or misleading information to its policyholders or to the BPK;

[…]

Article 49
External Audit

1. *Insurance companies and insurance intermediaries shall have their financial statements audited annually by a licensed audit firm.*

[…]

CHAPTER VIII CORPORATE GOVERNANCE AND INTERNAL CONTROLS

Section 52 Governance principles

3 The directors and officers of an insurance company or insurance intermediary, and the representative officers of a branch, must be "fit and proper" persons to exercise their role. They shall not allow their relationships with an insurance company's or insurance intermediary's shareholders, other directors, other officers or employees to affect their fiduciary duty to policyholders in any way.

Admissibility of the Referral

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

53. In this respect, the Court refers to Articles 21.4 and 113.7 of the Constitution, which establish:

Article 21

"[...]
4. Fundamental rights and freedoms set forth in the Constitution are also validfor legal persons to the extent applicable.
[...]".

Article 113

"(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".

54. The Court also refers to Article 49 [Deadlines] of the Law, which establishes:

"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."

55. In this regard, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies and has submitted the Referral within the specified time limit.

56. However, the Court further refers to Article 48 of the Law, which stipulates:

"*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*".

57. In addition, the Court refers to Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which establishes:

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

58. The Court considers that the allegations of the Applicant may be summarized as follows:

(i) violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR regarding the right to a reasoned decision,

(ii) violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR regarding the principle of equality of arms, and

(iii) violation of Article 49 of the Constitution, as well as the principle of proportionality in the case of imposing restrictions on the exercise of the constitutional right to work and exercise profession.

(i) As to the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR regarding the right to a reasoned decision

59. Regarding the allegation of lack of the reasoned decision, the Court recalls that based on the case law of this Court and of the ECtHR, the right to a fair trial includes also the right to a reasoned decision. The Court notes that it has already 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, the right to a reasoned court decision has also been elaborated in cases of this Court (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; KI143/16, *Muharrem Blaku and others,* Resolution on Inadmissibility, of 13 June 2018; and KI24/17, Applicant *Bedri Salihu,* Judgment of 27 May 2019) and of the ECtHR (see the EtHR 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).

60. According to its established case law, the ECtHR considers that, based on the principle of the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (See

Tatishvili v. Russia, No. 1509/02, ECtHR Judgment of 22 February 2007, paragraph 58; *Hiro Balani v Spain*, ECtHR, application No. 18064/91, Judgment of 9 December 1994, para. 27; *Higgins and Others v. France*, ECtHR, case No. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42; *Papon v. France,* ECtHR, case No. 54210/00, Judgment of 7 June 2001).

61. In addition, the ECtHR found that the national authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (1) of the ECHR, but that courts must "*indicate with sufficient clarity the grounds on which they based their decision*" (See, *Hadjianastassiou v. Greece*, ECtHR Judgment of 16 December 1992, paragraph 33). 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.

62. According to the case law of the ECtHR, a basic function of a reasoned decision is to demonstrate to the parties that they have been heard. In addition, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice. (See *mutatis mutandis, Hirvisaari v. Finland*, no. 49684/99 Judgment of 27 September 2001; see also *Tatishvili v. Russia*, ECtHR, application no. 1509/02, Judgment of 22 February 2007, paragraph 58).

63. In accordance with the case law of the ECtHR, the Constitutional Court of Kosovo emphasized that, although the courts are not obliged to address all the allegations put forward by the Applicants, they should nevertheless address the allegations central to their cases (See *mutatis mutandis* case *IKK Classic*, Judgment of 9 February 2016, paragraph 53).

64. Therefore, the Court reiterates that the right to obtain a court decision in conformity with the law includes the obligation for the courts to provide reasons for their rulings, at both procedural and substantive level (See *mutatis mutandis* case *IKK Classic*, Judgment of 9 February 2016, paragraph 54).

Application of the aforementioned standards in the case of the Applicants

65. The Court recalls that the Applicant alleges that the challenged decision *"is characterized by the lack of adequate reasoning, namely that the Supreme Court has not given sufficient and adequate reasoning regarding the rejection of the Applicant's request for extraordinary review of the Judgment of the Court of Appeals of Kosovo* [AA. No. 81/2017, of 5 October 2017] *and of the Basic Court of Prishtina/Department for Administrative Matters* [A. No. 657/16, of 14 December 2016]*"*. Other specific allegations of the Applicant

regarding the lack of a reasoned court decision are reflected in paragraph 30-31 of this Resolution.

66. In the present case, the Court notes that the Court of Appeals [Judgment AA. No. 75/2016] approved as grounded the Applicant's appeal and annulled the Judgment [A. No. 767/ 2013] of the Basic Court and remanded the case for retrial. The Court of Appeals ordered the Basic Court "*that the contested issue be examined in its entirety and that the relevant facts influencing the resolution of the dispute be conclusively determined, and that the contested facts be completely and comprehensively stated and that the causes be taken as proven or unproven, clearly emphasizing the reasons for the crucial facts in a comprehensible way which must also be justified*".

67. The Court notes that after the case was remanded to the Court of Appeals for retrial, the Basic Court took steps to administer the documents proposed by the Applicant. In this regard, the Basic Court in Judgment A. No. 657/16, reasoned that:

> *"regarding the non-administration of the letter by which the claimant notified the partners about the suspension of the license, but this court, as in the first trial when administering this letter, still considers that this is not a basis for annulling the challenged decision, as the other evidence such as electronic communications of 28.01.2013, 29.01.2013, 07.02.2013 and 14.02.2013 between the representative of ICS Assistance and KIB, have confirmed the opposite.*
> *[...]*
> *Therefore, in this context and based on the abovementioned evidence, it has been established that the lawsuit is ungrounded, while the decision of the respondent CBK No. 26-08/2013 of 30 April 2013, is fair and based on the law and that by this decision the law has not been violated to the detriment of the claimant".*

68. With regard to the request of the Court of Appeals that the relevant facts be established with certainty, the Basic Court in its Judgment [A. No. 657/16], since on the basis of material evidence (electronic communications) confirmed that the Applicant was referred to as a person licensed for the adjustment of losses, reasoned that:

> *"The court accepted as correct the allegation of the claimant that for the companies dealing with legal advice and regress, it is not necessary to be licensed by the CBK, but did not accept as correct the allegation that the claimant's representatives in another company (ICS Assistance) have not exercised the activity as loss adjuster and have not used the title Licenced Loss Adjuster.*
>
> *In this respect, in a capacity of the material evidence, the court administered the electronic communications of 28.01.2013, 29.01.2013, 07.02.2013 and 14.02.2013, between the representative of ICS Assistance and KIB which confirmed that the latter has been referred as Licenced Loss Adjuster"*

69. On the other hand, the Supreme Court in the Judgment ARJ. UZVP. no. 69/2017, regarding the findings of the Basic Court, which have been also upheld by the Court of Appeals, reasoned its decision by emphasizing that:

> *"the lower instance courts have correctly determined that based on the electronic communications of 28.01.2013, 29.01.2013 and 14.02.2013, between the representative of ICS Assistance and KIB, referring in a capacity of a loss adjuster, which is in a violation of Article 9.1 of Regulation No. 2001/25 on Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries which stipulates that no person shall engage in the activity of the insurance company, or claim to act as a licensed person, therefore, it is rightly found that such an action constitutes the basis for the revocation of the license in accordance with Article 15.1 (paragraph 0) of Regulation No. 2001/25*
>
> *Also, this Court considers as correct and based on law the legal position of the lower instance courts, when rejecting the claimant's lawsuit, filed against the decision of the CBK No. 26-28/2013 of 30.04.2013, as the administrative body –the respondent CBK in a regular legal process has revoked the license to the claimant, in accordance with the articles 9.1, 15.1 and 52 of Regulation No. 2001/25 on Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries and Law No. 03/L-209 on Central Bank of Kosovo.*
>
> *Based on the above, the Supreme Court finds that the claimant's allegations are ungrounded as the judgment of the second instance contains sufficient reasons and that all the facts in this legal matter have been assessed, that the decision of the second instance court is clear and understandable, and in the reasoning of the latter the necessary reasons for the decisive facts have been given, which this Court also accepts. The substantive law has been applied correctly and the law has not been violated to the detriment of the claimant".*

70. In these circumstances, the Court considers that the conclusions of the regular courts, including the Supreme Court, have resulted after a detailed examination of all the arguments presented by the Applicant. In this way, the regular courts, taking into account the findings from the Judgment of the Supreme Court ARJ. UZVP. No. 69/2017, confirmed the relevant facts and provided their reasons regarding their positions.

71. Therefore, the Court finds that the Judgment of the Supreme Court ARJ. UZVP. No. 69/2017 is clear and properly addresses all allegations made by the Applicant regarding the determination of relevant facts related to the process of the revocation of the license. The reasoning given by the Supreme Court meets the standards of a reasoned decision examined above and therefore there has been no violation of Article 31 of the Constitution and Article 6 of the ECHR.

72. The Court highlights its principled position that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality),

unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See, *mutatis mutandis*, case *Garcia Ruiz v. Spain*, ECtHR, No. 30544/96, Judgment of 21 January 1999 paragraph 28). Therefore, the Constitutional Court cannot act as "a fourth-instance court" (See, *mutatis mutandis*, case of the Constitutional Court Kl86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

(ii) As to the allegations of violation of Article 31 in conjunction with Article 6 of the ECHR regarding the principle of equality of arms

73. The Court recalls that the allegations of the violation of the principle of equality of arms relates to *"the failure of the courts in all instances of the proceedings to consider the evidence and testimonies proposed by the Applicant, is contrary to the principle of equality of arms and the right to a reasoned decision, as essential elements of the right to fair and impartial trial"*.

74. In the present case, the Court considers that under Article 6 paragraph 3 item d) of the ECHR, the party is not given an unrestricted right to hear witnesses or to present other evidence before the Court, but , as a rule, it is the duty of the regular courts to assess whether it is necessary to summon specific witnesses, and whether the statements of the proposed witnesses or the presentation of other proposed evidence and actions would be relevant and sufficient for deciding in a specific case (See, ECtHR partial Decision on Admissibility of 5 July 2005, *Harutyunyan v. Armenia*, No. 36549/03).

75. In that regard, the Court notes that the Basic Court, in its Judgment A. No. 657/16, reasoned that its decision was reached *"after determination of all relevant facts and is based on the applicable legal provisions",* and this, in the opinion of this Court, has been pursued throughout the proceedings.

76. Moreover, the Court notes that the Court of Appeals and the Supreme Court, in their judgments, provided clear and detailed reasoning as to the issue of the evidence that the Basic Court accepted and administered, as well as on the issue of evidence which it rejected.

77. The Court considers that the challenged decisions of the regular courts reasoned in a clear and substantiated manner that no one may engage in the business of an insurance company unless he is licensed or claims to act as licensed, therefore it is rightly concluded that such an action is the basis for the revocation of the license in accordance with Article 15.1 (paragraph l) of Regulation No. 2001/ 25. […], the administrative body –the respondent CBK in a regular legal process has revoked the license to the claimant, in accordance with articles 9.1, 15.1 and 52 of Regulation No. 2001/25 on Licensing, Supervision and Regulation of Insurance Companies and Insurance Intermediaries and Law No. 03/L-209 on Central Bank of Kosovo.

78. The Court also recalls the second allegation of the Applicant that "*The fact that the Supreme Court has decided on the case only on the basis of internal*

reports and without assessing the documents of the respective cases which were administered as evidence or, if necessary, to seek the opinion of any independent expert of the field of insurance makes incomplete decision in terms of adequate reasoning".

79. The Court had already noted that the regular courts conducted an extensive and comprehensive procedure in which the evidence presented by the Applicant and the CBK were administered. Furthermore, the regular courts addressed the Applicant's request for the administration of the letter in which the Applicant notified the partners about the revocation of the license and reasoned that they did not consider this to be a ground for annulment of the challenged decision.

80. In view of the above, the Court considers that the regular courts have provided clear and accurate arguments to support all their findings and conclusions. Therefore, the Court cannot assess the proceedings in the regular courts as arbitrary.

81. In the circumstances of the present case, the Court considers that the Applicant has not sufficiently substantiated his allegations that during the court proceedings it had not the benefit of the conduct of the proceedings based on adversarial principle; that it was not able to present the allegations and evidence it considered relevant to its case at the various stages of those proceedings; it was not given the opportunity to challenge effectively the allegations and evidence presented by the responding party; that the courts have not heard and considered all its allegations, and which, viewed objectively, were relevant for the resolution of its case, and that the factual and legal reasons against the challenged decisions were not presented in detail by the Basic Court, the Court of Appeals and the Supreme Court. Therefore, the Court considers that the proceedings, viewed in entirety, were fair (See the ECtHR case, *Khan v. the United Kingdom* no. 35394/97, Decision of 4 October 2000).

82. The Court further reiterates that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, cannot of itself raise an arguable claim of the violation of the right to fair and impartial trial (See, *mutatis mutandis*, ECtHR case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Decision of 26 July 2005, paragraph 21).

83. As a result, the Court considers that the Applicant did not substantiate the allegations that the relevant proceedings were in any way unfair or arbitrary and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR (See, *mutatis mutandis,* the ECtHR case, *Shub v. Lithuania,* No. 17064/06, Decision of 30 June 2009).

(iii) As to the allegations of violation of Article 49 of the Constitution and the principle of proportionality in the case of imposing restrictions on the exercise of the constitutional right to work and exercise profession

84. The Court recalls that the Applicant alleges that Judgment ARJ. UZVP No. 69/2017 of the Supreme Court, of 25 January 2018 "*violates Article 49 of the Constitution of Kosovo, which guarantees the right to work and exercise profession, as well as the principle of proportionality in the case of imposing restrictions on the exercise of the constitutional right to work and exercise profession".* Referring to the principle of proportionality, the Applicant states that *"in the present case it is clearly noted that this constitutional principle has not been respected either by the CBK or by the respective courts, including the Supreme Court as the IIC Assistance has been imposed the most severe measure in the framework of punitive measures (revocation of license) out of a total of 18 measures available to the CBK in accordance with Article 77 paragraph 1 (r) making it impossible to exercise the activities and services for which it was established".*

85. The Court reiterates that Article 49 [Right to Work and Exercise Profession] of the Constitution, establishes:

> *"1. The right to work is guaranteed.*
>
> *2. Every person is free to choose his/her profession and occupation".*

86. In this regard, the Court emphasizes in the context of this specific right, Article 49 [Right to Work and Exercise Profession] of the Constitution provides a standard definition that specifies the guarantees and rights to work, the employment opportunities and the provision of equal working conditions without discrimination, as well as the right to choose freely the working place and exercise profession, without forced obligations. These rights are regulated by applicable laws in a specific manner (see, *inter alia*, cases of the Court KI46/15, Applicant *Zejna Qosaj*, Resolution on Inadmissibility of 20 October 2015, paragraph 26; and KI70/17, Applicant *Rrahim Ramadani*, Resolution on Inadmissibility, of 8 May 2018, paragraphs 49-50, Resolution on Inadmissibility in case KI 64/18 Applicant *Hasan Maxhuni,* published on 30 November 2018, paragraphs 74-76).

87. In this context, the Court considers that the Applicant's allegation of violation of the right to work must be understood in the light of the abovementioned interpretation. The protection of rights to work is specifically regulated by the provisions of applicable laws, the interpretation and application of which is the duty of the regular courts.

88. Therefore, and based on the above, the Court finds that the right to work is guaranteed as long as the individual acts in accordance with the legal requirements from the work license, as well as the applicable law which regulates this field.

89. The Court notes that in the present case the CBK Executive Board rendered Decision No. 49-30/2012, initially suspended the license of the Applicant (IIC Assistance) alleging violations of "Article *49.1 of Regulation No. 2001/25 on Licensing,"* then on 23 April 2013, the CBK conducted a focused examination of the Applicant's office, in which case the examiners of the CBK Licensing and Regulation Department recommended to the CBK Executive Board, due to the violation found, the revocation of the Applicant's license for adjusting the losses *(see paragraphs 15-19 of this report/judgment).*

90. In the present case, in the proceedings before the regular courts in some cases it has been established that the Applicant has not acted in accordance with the applicable law which regulates this field. Consequently, there is no evidence that the Applicant has been denied the right to legal work and the exercise of a profession within the meaning of Article 49 of the Constitution. In this case, the challenged decision of the Supreme Court does not prevent the Applicant from working or exercising profession in accordance with applicable laws and legal provisions.

91. According to the case law of this Court and of the ECtHR, the duty of this court is not to examine why no other measure has been imposed on the Applicant as alleged by the Applicant *"out of a total of 18 measures available to the CBK in accordance with Article 77 paragraph 1 (r) making it impossible to exercise the activities and services for which it was established"*. The Court notes that these Applicant's allegations relate to the erroneous application of substantive law, more specifically to the manner in which the CBK has selected the imposed punitive measure, namely the Court emphasizes that it is a general rule, according to which the role of regular courts is the interpretation and application of the provisions of the law, in the present case, the punitive measures selected by the CBK are related to the field of legality and as such these allegations are not within the jurisdiction of the Court, namely in principle, the Court cannot consider them (see: case Nr. KI06/17, Applicant: *L.G. and five others*, Resolution on Inadmissibility, of 25 October 2016, paragraph 36; and case KI122/16, Applicant: *Riza Dembogaj*, Judgment of 30 May 2018, paragraph 56).

92. In this regard, the Court finds the Applicant's allegations of violation of the rights and freedoms guaranteed by Article 49 as ungrounded, because there is nothing in the Applicant's allegation that would justify the conclusion that the its constitutional rights guaranteed by Article 49 of the Constitution have been violated.

93. The Court reiterates that it is the Applicant's obligation to substantiate its constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. (See, case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

94. Regarding the decisions of the Court and the decisions of the ECtHR cited by the Applicant in his Referral, the Court emphasizes that the circumstances of the cases referred to by the Applicant do not coincide with the circumstances of the present case.

Conclusion

95. In sum, the Court concludes that the arguments raised in the Referral by the Applicant do not in any way justify the alleged violations of the constitutional rights invoked by the Applicant, and that it has not substantiated its allegations of violation of the rights protected by the Constitution, namely by Articles 31 and 49 of the Constitution.

96. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible, in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113, paragraphs 1 and 7, and Article 21, paragraph 4 of the Constitution, Article 20 of the Law and Rule 39 (2) of the Rules of Procedure, on 15 April 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Remzije Istrefi-Peci Arta Rama-Hajrizi

This translation is unofficial and serves for information purposes only