



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

Prishtina, on 22 February 2021
Ref. no.: AGJ1710/21

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JUDGMENT

in

Case no. KI24/20

APPLICANT

“PAMEX SH.P.K.”

**Constitutional review
of the Judgment Ae.no.179/2017 of the Court of Appeals of Kosovo
of 11 November 2019**

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 “PAMEX SH.P.K.”, with owner Vllaznim Shemsedini from the Municipality of Ferizaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [Ae.no.179/2017] of 11 November 2019 of the Department of Economic Affairs of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) regarding the Judgment [III.EK.nr.201/15] of 25 May 2017 of the Department of Economic Affairs of the Basic Court in Prishtina (hereinafter: the Basic Court).

Subject matter

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

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, 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).

Proceedings before the Constitutional Court

5. On 29 January 2020, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral, which he submitted by mail on 27 January 2020.
6. On 30 January 2020, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban.
7. On 11 February 2020, the Court notified the Applicant and the Court of Appeals of the registration of the Referral. The Court also requested the Applicant to inform the Court whether he had filed a revision against the challenged Judgment with the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) and if not, to clarify the reasons for non-exercise of this remedy.
8. On 20 February 2020, the Court received the Applicant's letter, delivered by mail on 18 February 2020, informing the Court that he had not appealed against the challenged Judgment to the Supreme Court, arguing that they (i) had filed a request for protection of legality in the State Prosecutor's Office because "*from previous experiences we know that the State Prosecutor's Office responds to these requests in a record time*"; and (ii) "*through the revision, we did not have the legal opportunity to invoke constitutional violations and we knew that the submission of the Revision will have many delays from the response of the Supreme Court*".
9. On 11 January 2021, the Court requested from the Basic Court the complete case file.

10. On 14 January 2021, the Basic Court submitted the complete case file to the Court.
11. On 3 February 2021, the Review Panel considered the report of the Judge Rapporteur and by a majority recommended to the Court the admissibility of the Referral.
12. On the same day, the Court by a majority found that (i) the Referral is admissible; and that (ii) Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals is not in accordance 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 the facts

13. On 21 June 2013, the Applicant requested from Banka për Biznes (Bank for Business) in Prishtina (hereinafter: the Bank) to transfer the amount of USD 76,210.00 to Shangshu Mingjia Kintting Co. Ltd. Guli Town Changshu Jiangsu from China (hereinafter: the Chinese company). The Bank had made the transfer of the respective payment, but made the same in euros and not in dollars, thus resulting in an additional payment of 17,436.85 euros or 23,290.00 dollars (hereinafter: the disputed amount), to the detriment of the Applicant as a result of exchange rate differences.
14. On 22 July 2013, the Bank sent the Applicant a confirmation of the payment dated 21 June 2013, explaining the mistake made by the Bank during the transfer of payment to the Chinese company. The confirmation in question also clarifies that the procedure for the return of the disputed amount by the Chinese company was suspended by the Bank, as the Applicant had agreed with the Chinese company to receive goods from the Chinese company in the value of the disputed amount. This confirmation was also signed by the Applicant.
15. On 30 July 2013, the Applicant signed a statement stating that he had requested the Bank to allow him an overdraft of 22,000.00 euros, out of which the Applicant would compensate the Bank for the technical error made by the Bank's payment officers, while the amount allowed for overdraft, would be paid according to the agreement reflected in this statement.
16. On 31 July 2013, the Applicant and the Bank had signed a Contract [No. KO413/498] for Overdraft for Legal Entities (hereinafter: Overdraft Contract), through which the Applicant is obliged to pay the disputed amount to the Bank within a certain deadline.
17. On 17 March 2015, the Applicant filed a claim to the Basic Court in Ferizaj against the Bank, requesting (i) the return of funds in the disputed amount, which were transferred on 21 June 2013 to the Chinese company by mistake by the Bank; (ii) compensation for losses incurred as a result of this transfer; and (iii) reimbursement of other expenses as a result of the Bank's actions.
18. On 17 April 2015, the Basic Court in Ferizaj declared itself incompetent to review the claim and transferred the case to the Basic Court.
19. On 12 May 2016, the Bank filed a response to the claim requesting the Basic Court to reject the Applicant's claim as unfounded, stating that (i) the Applicant did not request

the termination of the transfer and return of funds, but *“has stated that for the difference of funds from USD to EURO, he will receive goods from the supplier who had only planned such a thing earlier”*; (ii) consequently, the Applicant owed the Bank the disputed amount, therefore through the statement of 30 July 2013, has admitted that *“the amount of the difference is the obligation of the claimant, while begging the respondent to issue a loan in the form of OVD for the debt from the difference in question”*; and (iii) the Applicant has had the request approved and the Overdraft Contract signed.

20. On 26 May 2016, the Applicant addressed the Basic Court with a letter clarifying the claim, through which, he specified that (i) the Bank had notified the Applicant of the error made during the transfer only on 22 July 2013, respectively one month after erroneously making the transfer; (ii) the Bank *“has never sent a written or stamped confirmation that it is making an advance payment for the transfer recipient in China”*; (iii) the Bank has tried to unilaterally resolve the issue by blocking his bank accounts *“without warning”*; (iv) on 4 July 2013 and 5 July 2013, respectively, had deposited on his accounts 15,000 euros and *“these funds were withdrawn by the respondent without the signature and authorization of the claimant”*; (v) the Bank had made possible for him an overdraft of up to 20,000 euro, however *“the respondent withdrew from this amount the overpaid funds and informed the claimant that he can no longer withdraw funds from this allowed amount”*; (vi) on 28 April 2014, the Applicant, *“due to the financial difficulties already created”*, had applied for a loan in the amount of 20,000.00 euros and *“in order to a satisfactory solution for both parties returns € 8,000.00 of the damage caused to him by the respondent”*, while on 13 May 2014, a new loan was signed in the amount of 19,600.00 euros; and (vii) due to inability to make international transfers through the bank, *“Kosovo Customs re-evaluated the goods imported from Turkey in the amount of € 5,200.00, funds which it had to pay more”*.
21. Based on the case file, respectively the minutes of the sessions held before the Basic Court (i) on 15 September 2016, it results that the respondent, respectively the Bank, proposed the hearing of witnesses M.N. and S.Sh., while the Applicant proposed the hearing of witness A.B. and assignment of expertise with financial expert R.B. By Decision, the Basic Court approved the Applicant’s proposal for assignment of expertise by the proposed expert, stating that the same, *“if necessary”*, will also hear witnesses proposed by the parties; and (ii) on 12 May 2017, a Decision on the Administration of Evidence was issued, which the Applicant received, inter alia, stating that he agrees with the findings of the financial expert who also took into account his remarks; and there are no objections to the proposed evidence.
22. On 15 February 2017, expert R.B. had submitted his financial expertise to the Basic Court. This expertise states, inter alia, that (i) despite the fact that there is no data on whether the Applicant received the goods from the Chinese company, and consequently whether he was damaged in the amount of 76,212.00 euros and the amount erroneously transferred by the Bank in the amount of 17,436.68 euros, the Bank is responsible only for the latter; (ii) according to the agreement between the parties, the disputed amount has not been suspended, but the Applicant and the Bank have signed the Overdraft Contract of 31 July 2013 and the Applicant has agreed to compensate the Bank for the contested amount, initially in the amount of 12,000.00 euros, while the remaining part of 5,436.85 euros, no later than 15 August 2013; (iii) the total remaining liability of the

Applicant to the Bank until 8 August 2016 is 13,201.72 euros; and (iv) the fine of Kosovo Customs, in the case of revaluation of goods, is not related to the issue of disputed transfer.

23. On 25 May 2017, the Basic Court by Judgment [III.EK.nr.201/15] rejected the Applicant's claim as unfounded. The Basic Court, by the above Judgment, stated, inter alia, that it was not disputed that the Bank had erroneously transferred the disputed value to the Chinese company, but it was disputed whether the respondent, namely the Bank, owed the disputed amount to the claimant, respectively the Applicant. The Basic Court reasoned that this is not the case, based on (i) the statement signed by the Applicant on 30 July 2013; and (ii) the Overdraft Contract signed the next day, 31 July 2013, whereby he undertook to pay the disputed amount to the Bank, having agreed with the Chinese company to accept goods in exchange for the disputed amount. The Basic Court also stated that it could not establish the fact whether the Applicant actually received the goods from the Chinese company, but for the Basic Court only the legal relationship between the claimant and the respondent and the fact that the claimant, respectively the Applicant, voluntarily undertook to compensate the disputed amount to the respondent, namely the Bank.
24. On 15 June 2017, against the above Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals. The Applicant, through this appeal, inter alia, alleged that the Basic Court through its Judgment (i) erroneously found that he had confirmed that the Bank should terminate the procedure for the return of funds by the Chinese company; (ii) erroneously found that the Applicant had acknowledged that the signature on the statement of 30 July 2013 was his; (iii) did not take into account the request for a witness to be heard in this matter, employed by the Bank, respectively A.B.; and (iv) did not take into account the violations of Law no. 04/L-155 on Payment System (hereinafter: the Law on Payments), respectively Article 33 (Authorization of transfers), paragraph 1 of Article 34 (Erroneous payment orders), sub-paragraph 1.2.1 of Article 41 (Circumstances where customer is not liable) and paragraph 1 of Article 53 (Waiver of rights and greater protection) thereof. The Applicant also requested the Court of Appeals to conduct a "super expertise by an independent expert". On 27 June 2017, the Bank filed a response to the appeal, challenging the Applicant's allegations and proposing to the Court to reject the respective appeal as unfounded, upholding the Judgment of the Basic Court.
25. On 11 November 2019, the Court of Appeals by Judgment [Ae.nr. 179/2017], rejected as unfounded the Applicant's appeal and upheld the Judgment [III.EK.nr.201/15] of 25 May 2017 of the Basic Court. The Court of Appeals noted (i) the confirmation of 22 July 2013 signed by the Applicant; (ii) the statement of 30 July 2013 signed by the Applicant; and (iii) the Overdraft Contract signed on 31 July 2013 which the Contracting Parties had voluntarily signed, and in this case, the Applicant had waived the return of the funds erroneously paid in exchange for the additional goods.
26. On 11 December 2019, before the Chief State Prosecutor's Office, the Applicant had submitted a proposal to initiate a request for protection of legality against the above Judgment of the Court of Appeals.
27. On 17 December 2019, the Chief State Prosecutor's Office through Notification [KML.nr.195/2019] informed the Applicant that his proposal to initiate a request for

protection of legality against the Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals was rejected on the ground that the allegations submitted were not sufficient because no “*reasoning regarding the erroneous application of any concrete provision of substantive law*” was submitted in the sense of point b) of paragraph 1 of Article 247 [without title] of Law no. 03/L-006 on Contested Procedure (hereinafter: LCP).

Applicant’s claims

28. The Applicant claims that Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals in conjunction with Judgment [III.EK.nr.201/15] of 25 May 2017 of the Basic Court, have been rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a due process) of the ECHR.
29. Regarding the alleged violations of the abovementioned Articles of the Constitution and the ECHR, the Applicant, in essence, alleges the lack of a reasoned court decision. In this regard, the Applicant states that the Court of Appeals has failed to substantiate its substantive allegations as follows: (i) violations of Articles 33, 34, 41 and 53 of the Law on Payments; (ii) his request for the hearing of Witness A.B., a senior officer at the Bank, through which, according to the Applicant, it would be proved that he did not request the suspension of the procedure for the return of the disputed amount by the Chinese company; (iii) its request for super expertise; and (iv) objecting to the signing of the statement of 30 July 2013. The Applicant also disputes the bias of Judge F.I. who has remanded his case to the Basic Court.
30. Finally, the Applicant requests the Court to (i) declare his Referral admissible; and (ii) quash Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals in conjunction with Judgment [III.EK.nr.201/15] of 25 May 2017 of the Basic Court, remanding his case for retrial to another trial panel.

Relevant Constitutional and Legal Provisions

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 power.*
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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Law No. 04/L-155 on Payment System

Article 33 (Authorization of transfers)

- 1. A fund transfer is considered to be authorized only if the sender has given consent to execute such transfer.*
- 2. Consent to execute a fund transfer or a series of transfers shall be given in the form agreed between the parties.*
- 3. In the absence of such consent, a transfer shall be considered to be unauthorized.*
- 4. If a payment institution and its customer have agreed that the authenticity of payment orders issued to the payment institution in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving institution is effective as the order of the customer, whether or not authorized, if:*
 - 4.1. the security procedure is reasonable method in aspect of commercial provision of security against unauthorized payment orders; and*
 - 4.2. the institution proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer. The institution is not required to follow an instruction that violates a written agreement with the customer or notice of which is not received at a time and in a manner affording the institution a reasonable opportunity to act on it before the payment order is received.*

[...]

Article 34 (Erroneous payment orders)

- 1. Where a payment order is initiated by the payer, payer's payment institution shall be liable to the payer for correct execution of the payment transaction, unless the payment institution can prove that the error was made by the payer, or the payment institution can prove to the payer and, where relevant, to the payee's payment institution, that the payee's payment institution correctly received the payment transaction, in which case, the payee's payment institution shall be liable to the payee for the correct execution of the payment transaction.*

[...]

Article 41
(Circumstances where customer is not liable)

1. *A customer shall not be liable for loss:*
 - 1.1. *not attributable to or not contributed by the customer;*
 - 1.2. *caused by the fraudulent or negligent conduct of officers of or agents appointed by:*
 - 1.2.1 *the institution;*
 - 1.2.2. *companies and other institutions involved in networking arrangements; or*
 - 1.2.3. *merchants who are linked to the card or other communication system.*
 - 1.3. *relating to a card that is forged, faulty, expired; or*
 - 1.4. *occurring before the customer has received his card or security access code.*
2. *Where any dispute arises in relation to a customer's card, it is to be presumed that the customer did not receive the card, unless the institution can prove otherwise.*

Article 53
(Waiver of rights and greater protection)

1. *No agreement in writing between a customer and a payment institution may contain any provision that constitutes a waiver of any right conferred or cause of action created by this Law.*
2. *Nothing in this Law shall prohibit any agreement, which grants a customer more extensive rights, or remedies or greater protection than those contained in this Law.*

Assessment of the admissibility of the Referral

31. The court initially examines whether the admissibility criteria set out in the Constitution and further specified in the Law and the Rules of Procedure have been met.
32. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulate:

“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.”
33. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which stipulates:

“4. Fundamental rights and freedoms set forth in the Constitution are also valid

for legal persons to the extent applicable.”

34. In addition, the Court also examines whether the Applicant has met the admissibility criteria as set out in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

Article 47
(Individual Requests)

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

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

Article 48
(Accuracy of the Referral)

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

Article 49
(Deadlines)

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

35. In this regard, the Court first notes that the Applicant has the right to file a constitutional complaint, citing alleged violations of his fundamental rights and freedoms, which apply to individuals and legal entities. (See Court case KI41/09, Applicant *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14; KI35/18, with Applicant *“Bayerische Versicherungsverband”*, Judgment of 11 December 2019, paragraph 40; and KI227/19, with Applicants *N.T. “Spahia Petrol”*, Judgment of 20 December 2020, paragraph 37).
36. Whereas, regarding the fulfilment of other admissibility criteria set out in the Constitution and Law and elaborated above, the Court emphasizes that the Applicant is an authorized party who challenges an act of a public authority, namely Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms that he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.
37. 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 and that it cannot be declared inadmissible on the basis of the conditions set out in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also notes that the Referral is not manifestly ill-founded

on constitutional grounds, as set out in paragraph (2) of Rule 39 of the Rules of Procedure, and must therefore be declared admissible and its merits examined.

Merits

38. The Court recalls that the circumstances of the present case are related to a transaction of 21 June 2013, on behalf of the Applicant to a Chinese company, which was carried out by the Bank. However, the latter had erroneously conducted the transaction in Euros and not in Dollars, thus resulting in an additional payment of 17,436.85 euros, to the detriment of the Applicant, as a result of the exchange rate difference. Subsequently, based on the case file, it appears that the Applicant and the Bank had reached an agreement under which (i) part of the erroneously transferred transfer would remain with the Chinese company, from which the Applicant would order additional goods; whereas (ii) the Bank would enable the Applicant an Overdraft Contract through which the Applicant would reimburse the Bank for the contested amount within a specified period. It appears from the case file that there is no data on whether the Applicant received the goods ordered by the Chinese company.
39. At the beginning of 2015, the Applicant addressed the regular courts, not only requesting the return of the disputed amount but also the compensation of the losses caused, as a result of the actions of the respective Bank, the Basic Court had ordered an expertise which had ascertained that the only contentious issue in the circumstances of this case is the damage that may have been caused to the Applicant as a result of the Bank's error. The expertise had analysed the chronology of the Bank and the Applicant's actions and found that the Applicant had additional obligations to the Bank in the amount of 13,201.72 euros. The Basic Court rejected the Applicant's claim as unfounded, as it had clarified that the disputed issues arising from the error that the Bank had made through the transaction of 21 June 2013, had been resolved at the will of the parties through (i) the statement signed by the Applicant on 30 July 2013; and (ii) the Overdraft Contract signed on 31 July 2013. The Applicant challenged the findings of the Basic Court in the Court of Appeals, mainly regarding the erroneous assessment of the facts, inter alia, emphasizing the fact that the witness proposed by him was not heard in the Basic Court and requesting the appointment of a super expert. Furthermore, the Applicant also alleged a violation of the provisions of the Law on Payment System and more precisely, Articles 33, 34, 41 and 53 thereof. The Court of Appeals, through the challenged Judgment had approved the findings of the Basic Court. Subsequently, the Chief State Prosecutor's Office also rejected the Applicant's proposal to initiate a request for protection of legality against the Judgment of the Court of Appeals. Before the Court, the Applicant alleges that this Judgment, respectively Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals has been rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a due process) of the ECHR, due to the lack of a reasoned court decision. As explained above, the Applicant before the Court states that the Court of Appeals has failed to substantiate its allegations, in particular as regards (i) his request for the hearing of witness A.B.; (ii) his request for super expertise; and (iii) violations of Articles 33, 34, 41 and 53 of the Law on Payments.
40. These allegations of the Applicant will be examined by the Court based on the case law of the European Court of Human Rights (hereinafter: ECtHR), in accordance with

which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, and onwards, the Court will examine the Applicant's allegations regarding the lack of a reasoned decision, an assessment in which the Court will first (i) elaborate on the general principles; and thereafter, (ii) will apply the same to the circumstances of the present case.

(i) General principles regarding the right to a reasoned court decision

41. 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, the Court first notes that it already has a consolidated case law. This practice is built on the case law of the ECtHR, 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 against 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*, Judgment 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. Furthermore, the basic principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, with Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, with Applicant “*IKK Classic*”, Judgment of January 9, 2018; KI143/16, with Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI24/17, with Applicant *Bedri Salihu*, Judgment of 27 May 2019; KI35/1S, with Applicant “*Bayerische Versicherungsverband*”, cited above; and KI227/19, with Applicant *N.T. “Spahia Petrol”*, cited above, paragraph 45.
42. In principle, based on the case law of the ECtHR, the guarantees embodied in Article 6 of the ECHR include the obligation for courts to provide sufficient reasons for their decisions. (See ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53; also for more details on the right to a reasoned court decision, see the ECtHR Guide to Article 6 of the ECHR of 31 August 2020, Right to a fair trial (civil limb), IV. Procedural Requirements, 7. Reasons of Court Judgments, paragraphs 371 to 382 and references used therein). A reasoned decision shows to the parties that their case has indeed been heard, and consequently contributes to a greater admissibility of the decisions. (See ECtHR case *Magnin v. France*, Decision of 10 May 2012, paragraph 29). This case law also stipulates that despite the fact that a court has a certain discretion regarding the selection of arguments and evidence, it is obliged to justify its activities and decision-making by giving the relevant reasons. (See ECtHR cases: *Suominen v. Finland*, cited above, paragraph 36; *Carmel Saliba v. Malta*, Judgment of 24 April 2017, paragraph 73; see also the Court case, KI227/19, with Applicant *N.T. Spahia Petrol* cited above, paragraph 46). Furthermore, the decisions must be reasoned in such a way as to enable the parties to exercise effectively any existing right of appeal. (See ECtHR case, *Hirvisaari v. Finland*, cited above, paragraph 30).
43. That said, Article 6 of the ECHR obliges courts to give reasons for their decisions, but this does not mean that a detailed answer is required on each argument. (See ECtHR cases *Van de Hurk v. The Netherlands*, cited above, paragraph 61; *Garcia Ruiz v. Spain* cited above, paragraph 26; *Jahnke and Lenoble v. France*, Decision of 29 August 2000;

Perez v. France, Judgment of 12 February 2004, paragraph 81; and see also the Court case, KI227/19, with Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 47). The extent to which this obligation applies may change depending on the nature of the decision and should be determined in the light of the circumstances of each case. (See ECtHR cases: *Ruiz Torija v. Spain*, Judgment of 9 December 1994, paragraph 29; *Hiro Balani v. Spain*, cited above, paragraph 27; and see also the Court case, KI227/19, with Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 47). An appellate court, for example, may, in principle, reject an appeal by upholding the reasons for the lower court's decision, however even such a decision must contain sufficient reasoning to show that the relevant court has not upheld the findings reached by a lower court without sufficient consideration. (See, inter alia, the ECtHR case, *Tatishvili v. Russia*, cited above, paragraph 62; see also the Court case, KI227/19, with Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 47).

44. However, based on the case law of the ECtHR, courts are required to consider and provide specific and clear answers regarding (i) the substantive allegations and arguments of the party (see ECtHR cases, *Buzescu v. Romania*, cited above, paragraph 67; and *Donadze v. Georgia*, Judgment of 3 March 2006, paragraph 35); (ii) allegations and arguments that are decisive for the outcome of the proceedings (see, ECtHR cases: *Ruiz Torija v. Spain*, cited above, paragraph 30; and *Hiro Balani v. Spain*, cited above, paragraph 28); or (iii) claims relating to the rights and freedoms guaranteed by the Constitution and the ECHR. (See the ECtHR case, *Wagner and JMWL v. Luxembourg*, Judgment of 28 June 2007, paragraph 96 and references therein; and also see the Court case, KI227/19, with Applicant *N.T. Spahia Petrol* cited above, paragraph 48).

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

45. The Court first recalls that the Basic Court through Judgment [III.EK.nr.201/15] rejected the Applicant's claim as unfounded. The Court of Appeals, through the challenged Judgment, upheld the findings of the lower Court, emphasizing "*the will of the parties*" to resolve the relevant dispute, recalling in particular (i) the confirmation dated 22 July 2013 signed by the Applicant; (ii) the statement of 30 July 2013 signed by the Applicant; and (iii) the Overdraft Contract signed on July 31, 2013. However, based on the case file, before the Court of Appeals, through the Applicant's appeal, among other things, three specific allegations were raised, including (i) violation of the applicable law, namely Article 33, paragraph 1 of Article 34, sub-paragraph 1.2.1 of Article 41 and paragraph 1 of Article 53 of the Law on Payment System; (ii) request for a super expert; and (iii) failure to hear witnesses proposed by him at the level of the Basic Court. Before the Court, the Applicant states that none of these allegations have been addressed by the Court of Appeals, alleging, consequently, a violation of his right to a reasoned court decision, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
46. The Court recalls that based on the case law of the ECtHR, courts with appellate jurisdiction, as is the case in the circumstances of the present case, are obliged to give reasons for their decisions, but this does not mean that a detailed answer is required regarding each argument. They may, in principle, reject an appeal by upholding the reasons for the lower court's decision. The Court notes that in the circumstances of the present case, the Court of Appeals rejected the Applicant's appeal, approving the position and reasoning of the Basic Court. Having said that, based on the same case law, such decisions must also contain sufficient reasoning to show that the relevant

court, in this case the Court of Appeals, has not upheld the findings reached by a lower court, namely the Basic Court, without sufficient consideration. (See the Court case, KI227/19, with Applicant *N.T. "Spahia Petrol"*, cited above, paragraph 54 and references used therein).

47. With regard to the sufficient consideration to be shown by the courts of appellate jurisdiction when approving the decisions of the lower courts and the necessary measure of reasoning for the court decision in such circumstances, the Court recalls the ECtHR case *Tatishvili v. Russia* (Judgment of 22 February 2007), in which the ECtHR reviewed a case related to an Applicant's application for registration of residence. All the administrative instances and the respective courts had rejected the Applicant's allegations. (For case facts see paragraphs 7 to 19 of the ECtHR case *Tatishvili v. Russia*, cited above). The ECtHR found, inter alia, a violation of Article 6 of the ECHR due to the lack of a reasoned court decision and the violation of the right to a fair trial, because the relevant court which was responsible for reviewing the lower court decision, simply, in summary and without sufficient consideration, had upheld the reasoning of the lower court, without addressing the relevant allegations of the Applicant, thus failing to correct the shortcomings of the previous decision. (For the relevant reasoning, see paragraphs 55 to 63 of the ECtHR case *Tatishvili v. Russia*, cited above).
48. To determine whether, in the circumstances of the present case, the reasoning given by the Court of Appeals meets the standards of a reasoned court decision, respectively reflects sufficient consideration in evaluating the decision of the lower court, based on the general principles of case law of the Court and the ECtHR, as discussed above, the Court recalls the reasoning of the Court of Appeals in the challenged Judgment [Ae.no.179/2017] of 11 November 2019 of the Court of Appeals, which states the following:
- "This court considers that the court of first instance has correctly applied the substantive law after the claimant and respondent have resolved the disputed matter between them and based on their free will they have formalized it with the Overdraft Contract no. K0413/498, dated 31.07.2013. From the submission of the respondent (confirmation for the payment of 21.06.2013) dated 22.07.2013, which was signed by the claimant, it derives that the claimant was notified of the proceedings and did not request the return of the transferred funds, therefore the respondent with the consent of the claimant has stopped the procedure of return of funds from the beneficiary. After that, the claimant has given the statement dated 30.07.2013, a copy of which (signed by the claimant) is found in the case file, whereby he accepts the agreement to regulate the issuance of the transfer. [...] The claimant in the lawsuit claims the return of the erroneously transferred funds and the compensation of the damage, but voluntarily gave up the return of those funds and with no evidence failed to argue that he suffered damage as a result of the erroneous transfer by the respondent."*
49. Based on the above reasoning of the Court of Appeals, the Court notes that the same rejection of the Applicant's allegations submitted through the respective appeal and consequently, the approval of the Judgment of the lower court, is based mainly on (i) "free will" of the parties to formalize the Overdraft Contract; and (ii) "will" of the

Applicant to waive the return of those funds, namely the funds which were initially erroneously transferred by the Bank as a result of exchange rate differences, under the conditions set out in the relevant statement. The Court notes, however, that in the reasoning of the Court of Appeals, there is no reference or reasoning regarding the Applicant's allegations regarding the failure to hear the witnesses proposed by him at the Basic Court level, the super-expertise nor the alleged violation of the provisions of the Law on Payment System, an issue which the Applicant had specifically raised before the Court of Appeals.

50. The Court emphasizes that the Law on Payment System devotes a special chapter, namely Chapter III, to unauthorized and erroneous transfers of funds, defining the rights of customers, if such banking transactions occur. Insofar as it is relevant to the circumstances of the present case (i) in Article 33 thereof, the above Law defines, inter alia, transfers that are considered unauthorized, specifying that a transfer of funds is considered authorized only if the sender has given consent for execution of such transfer; (ii) in its Article 34, the above Law regulates the issues of erroneous payment orders and the respective responsibility of the payment institution, where among other things it is specified that when a payment order is initiated by the payer, the payment institution is responsible to the payer for the correct execution of payment transaction; while (iii) in its Article 41, the above Law lists the circumstances in which the customer is not liable for damages caused as a result of unauthorized transfers, including cases where such damage is caused by the negligence of officials of institutions.
51. Moreover, and most importantly in this case, Article 53 of the Law on Payment System, defines the manner of waiving the rights and greater protection of customers, specifying that *"No agreement in writing between a customer and a payment institution may contain any provision that constitutes a waiver of any right conferred or cause of action created by this Law."* The same article also stipulates that nothing in this law, namely the Law on the Payment System, shall prohibit any agreement, which grants a customer more extensive rights, or remedies or greater protection than those contained in this Law.
52. In the circumstances of the present case, based on the case file, as assessed by the regular courts, it is not disputed that (i) on 30 July 2013, the Applicant signed a statement stating that he had requested from the Bank to allow overdraft of 22,000.00 euros, from which amount he would compensate the Bank, for the technical error made by the Bank's payment officers, while the amount allowed for overdraft, he would pay according to the agreement reflected in this statement; and (ii) on 31 July 2013, the Applicant and the Bank had signed an Overdraft Contract, through which the Applicant was obliged to pay the disputed amount to the Bank within a specified deadline.
53. The Court notes, however, that despite the fact that it may not be disputed that the agreement between the respective parties was reached of their own free will, as assessed by the Court of Appeals, Article 53 of the Law on Payment System, violation of which the Applicant specifically alleges before the Court of Appeals, expressly laying down restrictions on written agreements between the customer and the payment institution, so that the former are protected by the latter, stating that no agreement between the client and the payment institution may contain provisions whereby customers waive the rights guaranteed under the Law on Payment System.

54. The Court, although unable to assess whether the agreement reached between the Applicant and the Bank entails the waiver of any of the Applicant's rights, or even whether Article 53 of the Law on Payment System is applicable in the present dispute, nevertheless states that such an allegation, related to the violation of legal provisions, is substantial and may also be decisive, regarding the merits of the Applicant's claim.
55. The Court, based on its case law and that of the ECtHR, reiterates that Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the sense of a reasoned judicial decision, obliges the courts to reason (i) substantive claims and arguments of the party; (ii) claims and arguments that may be decisive for the outcome of the proceedings; or (iii) claims relating to the rights and freedoms guaranteed by the Constitution.
56. In the circumstances of the present case, the Applicant's allegations regarding the violation of certain provisions of the Law on Payment System are substantive allegations of the Applicant, and as such, burden the relevant court, in this case the Court of Appeals, with the obligation to address and justify the same. Despite this obligation, in the circumstances of the present case, beyond the failure to substantiate the allegations of the Applicant regarding the super-expertise and non-hearing of certain witnesses, the same in its reasoning did not include a single sentence regarding the allegations of the Applicant on violation of the provisions of the Law on Payment System.
57. The Court also notes that in assessing a decision of a lower court, the higher court is also obliged to assess the Applicant's appeals, and not just to assess whether the lower court has correctly assessed the relevant appeal before it. Furthermore, the Court also notes that the primary purpose of a reasoned court decision is to show the parties that their case has indeed been heard, thus resulting in a greater admissibility of court decisions. In this respect, it is not necessarily relevant whether the claims of the parties are meritorious for a case pending before a court. Depending on the nature of the case before it, the relevant court is obliged to address at least those allegations which are essential or determining the merits of a case.
58. The silence of the courts regarding the relevant allegations of the respective Applicants has been specifically examined through the case law of the ECtHR. For example, in the following cases: *Ruiz Torija v. Spain*, cited above and *Hiro Balani v. Spain*, cited above, the ECtHR, beyond the general principles regarding the right to a reasoned judicial decision, also addressed the circumstances in which the relevant courts had remained silent on the arguments, which the ECtHR deemed essential. In both cases, the ECtHR considered whether the silence of the relevant court could reasonably be interpreted as an implicit rejection of the parties' arguments. (See the ECtHR case, *Hiro Balani v. Spain*, cited above, paragraph 28). However, in the absence of proper reasoning, the ECtHR stated that it was impossible to ascertain whether the respective courts had simply neglected to deal with the respective claims or implied their rejection and, if that was its purpose, what were its reasons for such an approach. (See ECtHR cases: *Hiro Balani v. Spain*, cited above, paragraph 28; and *Ruiz Torija v. Spain*, cited above, paragraphs 29 and 30). In both cases, the ECHR found a violation of Article 6 of the ECHR.

59. In the circumstances of the present case, having regard to the fact that the Court of Appeals failed to address and substantiate the substantive allegations of the Applicant raised before it through the appeal against Judgment [III.EK.nr.201/15] of 25 May 2017 of the Basic Court, it is also impossible to ascertain whether the Court of Appeals simply neglected to deal with the relevant allegations or implied their rejection and, if that was its purpose, what were its reasons for such an approach. Such a court decision may not be compatible with the standards of a reasoned court decision, as set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the relevant case law of the Court and the ECtHR.
60. Therefore, taking into account the above observations and the procedure as a whole, the Court considers that the Judgment of the Court of Appeals, respectively the Judgment [Ae.no.179/2017] of 11 November 2019, was rendered in violation of the Applicant's right to a reasoned court decision, as an integral part of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, because it failed to address the Applicant's substantive allegations regarding the violation of the applicable law, Articles 33, 34 and 41, and in particular, Article 53 of the Law on Payment Systems.
61. The Court also notes, finally, that it has already found that the challenged Judgment of the Court of Appeals is not in accordance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR and due to the lack of a reasoned court decision, it considers that it is not necessary to examine the Applicant's other allegations. The Applicant's respective allegations should be considered by the Court of Appeals, during the revision of its Judgment, (i) in relation to the Applicant's appeal filed before it; and (ii) the findings of this Judgment. In this regard, the Court also notes that its finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relate exclusively to the lack of reasoning of the court decision, as explained in this Judgment, and in no way correlate with or prejudice the outcome of the case merits.

Conclusions

62. The Court has examined the Applicant's allegations, applying on this assessment the case law of the Court and the ECtHR regarding the lack of a reasoned court decision, a guarantee determined by Article 31 of the Constitution and Article 6 of the ECHR.
63. During this assessment, the Court found that in rendering the Judgment [Ae.no.179/2017] of 11 November 2019, the Court of Appeals has failed to substantiate the substantive allegations of the Applicant. The same did not substantiate in a single sentence the allegations of the Applicant regarding the violation of the provisions of the Law on Payment System.
64. The court, based on the case law of the ECtHR, emphasized, inter alia, the fact that courts are obliged to substantiate the claims of the parties that are substantial or that may determine the merits of a case. In this context, the Court also clarified that despite the fact that when courts with appellate jurisdiction uphold the decisions of lower courts, they are not obliged to reason each argument, they are nevertheless obliged to show sufficient consideration in assessing the lower degree decision. Moreover, in assessing a decision of a lower court, the higher court is also obliged to assess the

applicant's appeal allegations, and not just to assess whether the lower court has rightly assessed the relevant appeal before it. In the circumstances of the present case, the Court, based on all the explanations given in this Judgment, considers that this is not the case.

65. Consequently, the Court found that the above Judgment of the Court of Appeals is not in accordance with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a reasoned court decision, and therefore should be declared void, and remanded for retrial to the Court of Appeals.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 21.4 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in the session held on 3 February 2021, in majority:

DECIDES

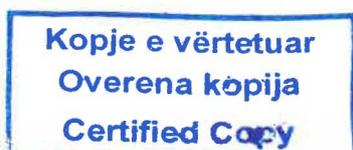
- I. TO DECLARE the Referral admissible;
- II. TO FIND that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the European Convention on Human Rights;
- III. TO DECLARE void the Judgment of the Court of Appeals [Ae.no.179/2017] of 11 November 2019;
- IV. TO REMAND the Judgment of the Court of Appeals [Ae.no.179/2017] of 11 November 2019, for revision in accordance with the Judgment of this Court;
- V. TO ORDER the Court of Appeals to notify the Court, pursuant to Rule 66 (5) of the Rules of Procedure, by 2 August 2021, of the measures taken to implement the Judgment of the Court;
- VI. TO REMAIN committed to this matter in accordance with this order;
- VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;
- VIII. 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.