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

Prishtina, on 5 February 2021
Ref.No:RK1699/21

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI40/20

Applicant

Sadik Gashi

Constitutional review of Decision Ac. no. 1449/2011, of the District Court in Prishtina , of 30 January 2012 and Judgment Rev. no. 333/2019 of the Supreme Court, of 6 November 2019

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 Sadik Gashi, residing in the Municipality of Prishtina, who is represented by Basri Morina, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges (i) the Decision [Ac.no.1449/2011] of the District Court in Prishtina(hereinafter: the District Court) of 30 January 2012, in conjunction with the Decision [C.no.559/09] of the Municipal Court in Prishtina (hereinafter: the Municipal Court) of 15 September 2011; and (ii) the Judgment [Rev.no.333/2019] of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), of 6 November 2019 in conjunction with the Judgment [Ac.no.3710/2015] of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) of 11 June 2019 and the Judgment [C. no. 559/2009] of the Basic Court in Prishtina (hereinafter: the Basic Court), of 16 December 2014.

Subject matter

3. The subject matter is the constitutional review of the challenged decisions which as alleged by the Applicant have violated his fundamental rights and freedoms guaranteed by Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of 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 25 February 2020, the Court received the Referral submitted by the Applicant.

6. On 28 February 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 5 March 2020, the Court (i) notified the Applicant about the registration of the Referral; and (ii) sent a copy of the Referral to the Supreme Court.

8. On 20 January 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 22 August 2008, in the Civil Status Office of the Municipality of Kamenica, the Applicant and B.F. entered into wedlock. On 19 February 19, their common child was born.

10. On an unspecified date, B.F. had filed a claim for divorce with the District Court.

11. On 18 March 2009, B.F. had also addressed the Municipal Court with (i) a claim *"for the division of the joint property of the spouses"*; and (ii) a request for the imposition of interim measures, in order to prevent the Applicant from *"alienating, pledging, or mortgaging"* the immovable property registered in the cadastral zone in the Municipality of Prishtina (hereinafter: the disputable immovable property).

Proceedings with regard to the claim for divorce

12. On 16 November 2009, the District Court by Judgment [C.no.132/2009] decided to: (i) dissolve the "marriage" entered into on 22 August 2008 between the Applicant and B.F.; (ii) entrust the common child to the Applicant for *"further custody, education and care"*; and (iii) oblige B.F. to pay a sum of 50 euros each month in the name of *"alimony"*.

13. On 11 February 2010, the Applicant filed an appeal with the Supreme Court, against the abovementioned judgment, by proposing to ascertain that the marriage was dissolved through the fault of B.F., and consequently the latter to be obliged pay the amount of 100 euros per month in the name of child's alimony, starting from 1 December 2019 onwards.

14. On 13 August 2010, the Supreme Court, by Judgment [Ac.no.16/2010], rejected the Applicant's appeal as ungrounded and confirmed the Judgment [C.no 132/2009] of the District Court, of 16 November 2009.

Proceedings with regard to the interim measures

15. On 1 April 2009, the Municipal Court by Decision [C.no.559/09] approved the request of B.F. and imposed the interim measure, whereby the Applicant was prohibited from *"alienating, putting a charge, mortgaging, pledging as well as certifying and legalizing any contract of sale of the immovable property that is the subject of dispute"*.

16. On an unspecified date, , the Applicant filed an appeal with the District Court against the above-mentioned Decision, by proposing to have the challenged Decision annulled and the case to be remanded to the first instance court for reconsideration.

17. On 23 July 2010, the District Court by Decision [Ac. no. 670/2010] annulled the Decision [C. no. 5559/09] of the Municipal Court, of 1 April 2009 and remanded the case to the court of first instance for reconsideration.

18. On 15 September 2011, the Municipal Court, by Decision [C.no.559/09], again imposed the interim measure regarding the disputable immovable property.

19. On 19 September 2011, the Applicant again filed an appeal with the District Court against the above-mentioned Decision of the Municipal Court, by proposing to have the challenged Decision annulled and the case to be remanded to the court of first instance for reconsideration.

20. On 30 January 2012, the District Court by Decision [Ac.no.1449/2011] rejected the Applicant's appeal as ungrounded and confirmed the Decision [C.no.559/09] of the Municipal Court, of 15 September 2011, by upholding the interim measure in force.

Proceedings with regard to the statement of claim for "compensation of separate property"

21. On 3 December 2013, during the session held in the Basic Court B.F. had specified her claim, by submitting a request for "compensation of separate property" pursuant to Article 46 (Separate Property of Spouses) of the Family Law of Kosovo No. 2004/32 (hereinafter: the Family Law) instead of the initial request for *"the division of the joint property created during the course of marriage"*. B.F. had requested the amount of 44,047.00 euros as a compensation for the value of the house, which according to the statement of claim *"was constructed with financial means donated by her father before the marriage"*.

22. On the basis of the case file, it results that during the review of the case, the Basic Court had assessed two expertises for calculating the value of works for constructing the house, drafted by (i) the expert Q.F., who had determined the value in the amount of 39,708 .00 euros; and (ii) the expert S.C., who had determined the value in the amount of 31,382.72 euros.

23. On 16 December 2014, the Basic Court by Judgment [C.nr.559/2009], (i) found that the house built by the father of B.F. represents a "*separate property acquired through donation, during the period of engagement and cohabitation prior to marriage."*; (ii) partially approved the statement of claim of B.F. and obliged the Applicant, to pay to BF the amount of 31,582 euros in the name of compensation of separate property, along with legal interest which is *"paid by commercial banks for one year term-deposited funds, without a specific destination starting from 16 December 2014 until the final payment"*; and (iii) dismissed as unfounded the remainder of the statement of claim of B.F. relating to "*the specification of the work performed, the purchase of construction material or the purchase of furniture and personal debt in the total amount of 12,465.00 euros"*. Also, based on the reasoning of the Basic Court, it results that (i) the said court had based its decision upon the expertise of the expert S.C.; (ii) the Applicant had assessed this expertise as "*being closer to the existing reality"* and he had not proposed a super-expertise*, "due to the difficult financial situation"*; and (iii) during the main trial were also heard the witnesses E.F., S.K.H., E.K., N.H., F.Rr. and M.S.

24. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court, alleging a substantial violation of the provisions of contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law, by proposing that his appeal be approved as grounded, whereas the Judgment of the Basic Court under point I of the enacting clause to be annulled and consequently, the claim and the statement of claim of B.F. to be rejected as unfounded and the case to be remanded to the court of first instance. In his appeal, among other things, the Applicant stated that the challenged Judgment of the Basic Court (i) was issued in violation of item n) of paragraph 2 of Article 182 [untitled] of the Law No. 03 / L-006 on Contested Procedure (hereinafter: the LCP) because "the enacting clause of the judgment is incomprehensible, contradictory to its own content and to the reasons of the judgment."; (ii) paragraph 2 of Article 257 (Changing the claim) of the LCP because the court had allowed the change of the claim of B.F.; (iii) it had failed to prove the lack of active legitimacy of B.F. because *"she was not in a legal relationship with him, but it was her father who is not a party to these proceedings."*; (iv) it has erroneously assessed that we are dealing with a separate property because *"the spouse acquires property only during the marriage and not before the marriage.'*; and (v)the court has not accurately determined the "*amount of the claim"* because during the proceedings before the Basic Court, there were two experts with conflicting reports and the *"big difference"* between them reflects *"that neither of these two expertises has been accurate"*.

25. On 11 June 2019, the Court of Appeals by Judgment [Ac.no.3710/2015] rejected as ungrounded the Applicant's appeal and confirmed the Judgment [C. no. 559/2009] of the Basic Court, of 16 December 2014.

26. On 20 August 2019, the Applicant filed a revision with the Supreme Court against the Judgment of the Court of Appeals, alleging essential violations of the provisions of the contested procedure and erroneous application of the substantive law by proposing to have his request for revision approved whilst the Judgment of the Basic Court and that of the Court of Appeals to be annulled, by rejecting the claim and the statement of claim of B.F. as unfounded or alternatively the case to be remanded to the court of first instance for reconsideration.

27. The Applicant in his request for revision stated, among other things, that the Judgments of the lower courts were issued in (i) violation of paragraph 1 and item n) of paragraph 2 of Article 182 of the LCP; (ii) violation of the provisions of the LCP because the judge who had decided in the case in the Basic Court was biased and that in the minutes of 20 February 2014, was not reflected his request for the disqualification of the judge; (iii) violation of the provisions of the LCP, because the respective court was obliged ex officio to order the super-expertise as a result of the discrepancy between the two expertises submitted to the Basic Court; and (iv) paragraph 2 of Article 257 of the LCP because the court had allowed the change of the claim of B.F., by stating also that *"the property was his and his wife's joint property for the reason that according to him when her father built the house it was meant for both them and the house was built on the land, which was the property of the Applicant"*.

28. On 6 November 2019, the Supreme Court by Judgment [Rev.no.333/2019] rejected the Applicant's revision as ungrounded. By this Judgment, the Supreme Court, inter alia, stated that (i) on the basis of paragraph 2 of Article 214 [no title] of the LCP, the revision cannot be submitted due to incomplete and erroneous determination of the factual situation, and consequently it will not consider those allegations; (ii) on the basis of Article 46 of the Family Law, the lower courts had decided in a fair manner regarding the *"separate property"* of the B.F., because "*the donation represents a legal title for the acquisition of separatel property, regardless of whether the donation was intended for the joint use of the spouses."*; (iii) the relevant allegations concerning the violations of paragraph 1 and item n) of paragraph 2 of Article 182 of the LCP in conjunction with paragraph 5 of Article 160[untitled] of the LCP are unfounded, by clarifying that the Applicant had objected the expertise of the expert Q.F., and consequently, the Basic Court had appointed the expert S.C., in a hearing session, in which the Applicant had not requested another expertise or a super-expertise; and (iv) the relevant allegations concerning the non-reflection of the Applicant's request *"for disqualification of the case judge"* are also unfounded *because "his authorized representative had signed the minutes without remarks."*

Applicant's allegations

29. The Applicant alleges that the challenged Judgment of the Supreme Court was issued in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

30. As to the violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant alleges that (i) the challenged Judgment of the Supreme Court does not meet the standards of a reasoned court decision, in particular with regard to the two *"diametrically opposed"* expertises, on the basis of which the Basic Court has determined the respective amount of compensation, whilst it did not order a super-expertise; and (ii) the Judgment of the Basic Court is in contradiction with the Constitution because "*not all the witnesses proposed by him were heard, it is only the witnesses proposed by B.F. who were heard, and consequently according to him this constitutes a procedural violation".*

31. The Applicant also challenges the Decision [Ac. no. 1449/2011] of the District Court, of 30 January 2012, issued in the procedure regarding the interim measure, alleging that also the said decision is in contradiction with Article 31 of the Constitution because it was issued contrary to "the provisions of the contested as well as enforcement procedure" and more specifically in violation of Article 297 [untitled] of the LCP, because being in the capacity of claimant B.F. *"has failed to make credible the existence of the request nor of the subjective right"* and *"has not provided any guarantee to the extent and of the type determined by the Court for the damage that may be caused to the opposing party by the imposition and execution of the interim measure".*

32. Finally, the Applicant requests from the Court to: (i) declare his Referral admissible; (ii) find a violation of Article 31 of the Constitution in conjunction

with Article 6 of the ECHR; (iii) declare invalid the challenged Judgment [Rev. no. 333/2019] of the Supreme Court, of 6 November 2019; and (iv) remand the case to the Supreme Court for reconsideration.

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 powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with 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.
[...]

Family Law of Kosovo No. 2004/32 [published in the Official Gazette on 1 September 2006]

Article 46
Separate Property of Spouses

(1) Property belonging to the spouse at the time of entering into wedlock remains separate property of his.

(2) Separate property is also property acquired during marriage through inheritance, donation, or other forms of legal acquisition.
(3) Property belonging to the spouse based on the proportion of common property is also separate property.
(4) The product of art, intellectual work or intellectual property is considered separate property of the spouse who has created it. (5) Each spouse independently administers and possesses his/her separate property during the course of the marriage.

Law No. 03/L-006 on Contested Procedure

EXPERTS

Article 356

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

Article 357

357.1 The party that proposes an expertise has to state why that expertise is needed for as well as its goal. The person for an expertise should also be proposed.
357.2 The opponent party should be given a chance to say its opinion regarding proposed expertise.
357.3 If the involved parties can not bring a decision regarding the person who will conduct the expertise, or regarding the object or volume, then the court will decide about it.

Article 369

369.1 If there are more experts involved, they can submit their opinion together if there are no contradictions. If there are contradictions then they submit their opinions separately.
369.2 If their opinions differ substantially, or if they are unclear, if it contradicts with itself or with given circumstances, and those can not be clearer in the experts hearing, then the court will do another expertise with the same experts or with different experts.

Assessment of the admissibility of Referral

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

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

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

35. In addition, the Court also refers to the admissibility criteria, as provided by Law. In this respect, 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..."

36. The Court recalls that the Applicant challenges before the Court (i) the Decision [Ac. 0.1449/2011] of the District Court, of 30 January 2012 issued in the procedure for imposition of the interim measure; and (ii) the Judgment [Rev.no.333/2019] of the Supreme Court, of 6 November 2019.

37. With respect to the Decision [Ac.no.1449 / 2011] of the District Court, of 30 January 2012, the Court refers to Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, which stipulate that the Referral should to be filed within four (4) months from the date on which the decision on the last effective legal was served on the Applicant. In the circumstances of the present case, this is not the case. In fact, this Decision is being challenged before the Court after more than eight (8) years.

38. The Court recalls that the purpose of the four (4) months legal deadline, under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, is to promote

legal certainty by ensuring that cases raising issues under the Constitution are dealt within a reasonable time and that past decisions are not continually open to constitutional review. (See, inter alia, the case of the ECtHR *Sabri Gunes v. Turkey*, Application No. 27396/06, Judgment of 29 June 2012, paragraph 39; see also, inter alia, the cases of Court KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 17 March 2014, paragraph 24; and KI120/17, Applicant *Hafiz Rizahu*, Resolution on Inadmissibility, of 7 December 2017, paragraph 39).

39. In conclusion, for the reasons mentioned above, the Court, pursuant to Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, finds that the Referral as regards the constitutional review of the Decision [Ac.no. 1449/2011] of the District Court, of 30 January 2012 is inadmissible because it is out of time.

40. Whereas, as regards the Judgment [Rev. no. 333/2019] of the Supreme Court, of 6 November 2019, the Court finds that the Applicant is an authorized party, which is challenging an act of public authority, namely the Judgment [Rev. no. 333/2019] of the Supreme Court, of 6 November 2019, after having exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms which he alleges to have been violated, pursuant to the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

41. However, in addition, the Court also examines whether the Applicant has fulfilled the admissibility criteria established in paragraph (2) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement for the Referral not to be manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

Rule 39
(Admissibility Criteria)

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

42. The Court initially notes that the abovementioned rule, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR) and of the Court, enables the latter to declare the referrals inadmissible for reasons related to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after assessing its merits, namely if it deems that the content of the referral is manifestly ill-founded on constitutional basis, as defined in paragraph 2 of Rule 39 of the Rules of Procedure.

43. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as "manifestly ill-founded" in its entirety or only with respect to any specific claim that a referral may contain. In this regard, it is more accurate to refer to the same as "manifestly ill-founded claims". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i)

claims that qualify as claims of '"fourth instance"; (ii) claims that are categorized as "clear or apparent absence of a violation"; (iii) "unsubstantiated or unsupported" claims; and finally, (iv) "confused or far-fetched" claims. (See, more precisely, the concept of inadmissibility on the basis of a referral assessed as "manifestly ill-founded", and the specifics of the four above-mentioned categories of claims qualified as "manifestly ill-founded", The Practical Guide to the ECtHR on Admissibility Criteria of 30 April 2019; part III. Inadmissibility Based on Merit; A. Manifestly ill-founded applications, paragraphs 255 to 284).

44. In the context of the assessment of the admissibility of the referral, namely, in the assessment whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the essence of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

45. In this respect, and initially, the Court recalls that the circumstances of the present case relate to the divorce of the Applicant and B.F., and the subsequent proceedings concerning the division of the joint property. B.F. had initially initiated (i) a request for the interim measure, whereby, she requested the prohibition of alienating, pledging, mortgaging or certifying and legalizing of any contract on sale and purchase of the disputable immovable property; and (ii) the procedure regarding the request for division of the joint property, a request which was made during the hearing session before the Basic Court, and was replaced with the request for compensation of the separate property on the basis of Article 46 of the Family Law. The proceedings concerning the interim measure had resulted in favour of B.F. Whereas, in the proceedings for compensation of separate property, the Basic Court had partially approved the statement of claim of B.F., by obliging the Applicant to compensate her in the amount of 31,582 euros. The Basic Court had ascertained that the house had been constructed by the investment of the father of B.F., and was consequently categorized as a separate property. The value of the compensation was determined by the Basic Court after haveing assessed two expertises, while it based its decision on the expertise which the Applicant had assessed as being "closer to the existing reality". Despite the appeal and the request for revision, filed with the Court of Appeals and the Supreme Court, respectively, the said courts had confirmed the findings of the Basic Court. The Applicant challenges before the Court, the findings of the Supreme Court, by alleging a violation of Article 31 of the Constitution, due to the non-reasoning of the court decision, relating to the two expertises and failure to order a super expertise as a result, as stated by the Applicant, of the contradictory expertises.

46. In the following, the Court will first examine the Applicant's allegations concerning the lack of a reasoned court decision, in which the Court (i) will elaborate on the general principles; and then, (ii) will apply the same to the circumstances of the present case.

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

47. As 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 case-law was build based on the case law of the ECtHR, including but not limited to the cases of *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*, 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. Moreover, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019; and KI35/18, Applicant *"Bayerische Versicherungsverbrand"*, Judgment of 27 January 2020.

48. In principle, based on the case law of the ECHR, the guarantees embodied in Article 6 of the ECHR include the obligation of courts to provide sufficient reasons for their decisions. (See the 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 on Article 6 of ECHR of 30 April 2020, Right to a fair trial (civil limb), IV.Procedural Requirements, 7. Reasoning of Judicial Decisions, paragraphs 369 to 380 and references used therein). A reasoned decision shows the parties that their case has indeed been heard, and that consequently it contributes to a greater admissibility of the decisions. (See the ECtHR case *Magnin v. France*, Decision of 10 May 2012, para.29). This case law also determines 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 providing the relevant reasons. (See the ECtHR cases: *Suominen v. Finland* cited above, para. 36; and
Carmel Saliba v. Malta, Judgment of 24 April 2017, para.73). Moreover, the decisions must be reasoned in such a way as to enable the parties to exercise effectively any existing right of appeal. (See the ECtHR case, *Hirvisaari v. Finland*, cited above, paragraph 30.).

49. Having said that, Article 6 of the ECHR obliges the courts to provide reasons for their decisions, but this does not mean that a detailed response is required for each argument (see the 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; and *Perez v. France*, Judgment of 12 February 2004, paragraph 81). The extent to which this obligation applies may vary depending on the nature of the decision and should be determined in the light of the circumstances of each case (see the ECtHR cases: *Ruiz Torija v. Spain*, Judgment of 9 December 1994, paragraph 29; and *Hiro Balani v. Spain*, cited above, paragraph 27). An appellate court, for example, may, in principle, reject an appeal by upholding the reasons of the

lower court's decision, however even such a decision must contain a sufficient reasoning to show that the relevant court has not upheld the findings reached by a lower court without sufficient consideration (see the ECtHR case, *Tatishvili v. Russia*, cited above, paragraph 62)).

50. However, based on the case law of the ECtHR, courts are required to consider and provide specific and clear responses regarding (i) the substantive allegations and arguments of the party (see the 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 the ECtHR cases: *Ruiz Torija v. Spain*, cited above, paragraph 30; and *Hiro Balani v. Spain*, cited above, paragraph 28); or (iii) allegations concerning the rights and freedoms guaranteed by the ECHR and its Protocols(see the ECtHR case, *Wagner and JMWL v. Luxembourg*, Judgment of 28 June 2007, paragraph 96 and references therein).

51. Finally, the Court, referring to its case-law, recalls that court decisions would violate the constitutional principle of a ban on arbitrariness in decision-making if the reasoning provided does not contain the established facts, the relevant legal provisions and the logical relationship between them. See, inter alia, the cases of the Court: KI72/12, Applicant *Veton Berisha and Ilfete Haziri*, cited above, paragraph 61; KI135/14, Applicant *"IKK Classic"*, cited above, paragraph 58; KI96/16 Applicant "IKK Classic", cited above, paragraph 52, and KI87/18, Applicant *IF Skadeforsikring*, Judgment of 26 April 2018, paragraph 49).

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

52. The Court recalls that the Applicant alleges that the challenged Judgment of the Supreme Court does not meet the standards of a reasoned court decision because it did not justify the failure to order a superexpertise, given that in the circumstances of the present case, there have existed two *"diametrically opposed"* expertises regarding the respective amount of compensation".

53. As to the expertises on the basis of which the regular courts have determined the respective amount of compensation, the Court recalls that in the circumstances of the present case, the Basic Court has ordered the preparation of two expertises determining the value of the disputable immovable property. The first expertise was ordered by the Court by Decision [C.no.559/2009] of 20 February 2014, where it has determined the task of performance of the expertise to the expert Q.F., upon the proposal of the legal representative of B.F. for appointing an expert to valuate the "*works performed and construction materials*". Whereas, the second expertise was ordered by the Court by Decision [C.no.559/09] of 4 September 2014, determining the task of performance of the expertise to the expert S.C., upon the proposal of the Applicant. The expertise of the expert Q.F., had resulted in the value of the property amounting to 39,708 euros, while the expertise of the expert S.C., had resulted in the value of the property amounting to 31,382.72 euros.

54. In the session of the main trial held in the Basic Court, the Applicant had challenged the expertise of Q.F., whilst with regard to the expertise of the expert S.C., he stated that he considered it as being "*closer to the existing reality*". However, the Applicant had also stated that these two expertises are contrary to each other, but due to his difficult financial situation he could not afford to propose a super-expertise. Also B.F., in the capacity of claimant, did not agree with the value determined by the experts in relation to the disputable immovable property, by emphasizing that the determined value should also include the value of the furniture which, according to her, had been bought by her father, and further stating that the value of the compensation should consequently include an additional amount of 12,465 euros, which would then amount to a total value of 44,047 euros.

55. Based on the case file, the Basic Court had once again heard the two experts in the main trial session of 16 December 2014 and had determined the respective amount of compensation based on the expertise of expert S.C., namely the amount of 31,582 euros. In this context, the Basic Court, by its Judgment, among other things, had emphasized that *"this expertise was largely entrusted by the court because it includes in a more specific manner the performed construction works, with the exception of preparation soil works that are calculated at a lower price than the market price in similar cases. This finding was confirmed by the court also on the basis of the clarifications provided by the two (2) experts in the session of the main trial in the case."*

56. The Basic Court had also rejected B.F.'s allegations stating that she was to be compensated also the amount of EUR 12,465 in respect of the furniture invested. The Basic Court rejected these allegations having relied on Article 323 [no title] of the LCP, according to which, the relevant court decides based on its free evaluation, in cases where it is established, among other things, that the respective compensation of damages *"could be done with great difficulties."* Moreover, in this context, the Basic Court also reasoned that *"[B.F.] failed to prove by any evidence that her father had bought the furniture as a gift for her daughter, just as she could not also prove the amount claimed in the name of personal debt, for the fact that the court did not entrust the claimant's specification as material evidence."*

57. The Applicant, taking into account the discrepancies in the findings of the two expertises had challenged the findings of the Basic Court, specifically in relation to the non-ordering of a super-expertise, by filing an appeal with the Court of Appeals and a request for revision filed with the Supreme Court.

58. The Court of Appeals by Judgment [Ac.no.3710/2015] of 11 June 2019, in relation the above allegation of the Applicant, among other things, had stated that the Basic Court had decided correctly when it had partially approved the statement of claim of B.F. in the amount of 31,582, 00 euro, on the basis of the valuation of the expert S.C., *"since the previous expertise performed by the expert [Q.F.], was objected [by the Applicant] due to the high value determined by the experts, but in the end, once the court had heard these experts, and in the presence of the parties, he had not proposed another eventual expertise"*. Whereas, the Supreme Court, by Judgment [Rev. no. 333/2019] of 6 November

2019, in the context of this allegation, had found that the allegations for violation of paragraph 1 and item n) of paragraph 2 of Article 182 of the LCP in conjunction with paragraph 5 of Article 160 of the LCP are ungrounded, because the Applicant had objected the expertise of the expert Q.F., and consequently, the Basic Court, in the main trial session held on 4 September 2014, at the request of the Applicant, had appointed the expert S.C., whilst the Applicant had not requested another expertise or a super-expertise in this session.

59. The Court also notes that the procedure for appointing experts in contested procedure is determined by the provisions of the LCP, namely Articles 356 to 372 thereof. Article 369 of the LCP, specifically defines the procedure to be followed in cases where more than one expert has been appointed to assess a case. Pursuant to paragraph 2 of this Article, if, among other things, the findings of the experts differ substantially, *"the expertise will be repeated with the same experts or with other experts"*, in case these differences can not be eliminated by a repeated hearing of experts.

60. In the circumstances of the present case, based on the case file, it results that despite the fact that before the Basic Court were presented two expertises with different values (i) The Basic Court has based the determination of the compensation value upon the report of expert who was proposed by the Applicant and whose findings were described by the Applicant as being "closer to the existing reality"; and (ii) the experts were heard again in the main hearing session held on 16 December 2014 and consequently, th discrepancies in the findings of the relevant expertise were addressed by the repeated hearing of the experts, as stipulated in Article 369 LCP.

61. The Court, based on the general principles regarding the right to a reasoned court decision elaborated above, recalls that in addressing the allegations of the respective Applicants, the regular courts are obliged to provide answers, among other things, regarding those allegations which are substantial or decisive for the circumstances of a case. In the circumstances of the present case, the Court considers that the regular courts have addressed the Applicant's allegations regarding the lack of a super-expertise. This allegation was specifically addressed by the Supreme Court, during the assessment of the Applicant's request for revision, where, among other things, it has stated as follows:

> "*The Supreme Court of Kosovo, has reviewed the allegations of the respondent stated in the revision, that the challenged judgment was rendered based on a substantial violation of Article 182 para.1 and 2 item (n), in conjunction with Article 160 para.5 of the LCP, as stated, the court must take care ex officio to order a super-expertise, because the party did not have the financial means to pay for it, that the court of second instance did not provide reasons for the claims from the appeal, and that from the judgment cannot be understood the role of E.F - the claimant's father, but these allegations are considered ungrounded by this Court, because of the fact that the respondent had objected the expertise of expert Q.F after which the court had appointed another expert S.C, a graduated construction engineer and upon hearing the expert in the main trial session the respondent had not proposed another expertise, while according to the*

provision of Article 319 of the LCP each litigant has the duty to prove the facts on which he bases his requests and claims."

62. In this context, the Court, based upon the above clarifications, and specifically by taking into account the allegations raised by the Applicant and the facts adduced by him, as well as the reasoning of the regular courts elaborated above, considers that the challenged Judgment of the Supreme Court, based on the case law of the Court and of the ECtHR, is not characterized by a lack of reasoned court decision, and that consequently, the Applicant's claims regarding the lack of a reasoned court decision in relation to the lack of ordering a super-expertise, based on the *"clear or apparent absence of a violation"* are clearly unfounded.

63. The Court further recalls that in the context of the allegations for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant also refers to the fact that "*not all the witnesses proposed by him were heard, it is only the witnesses proposed by B.F. who were heard, and consequently according to him this constitutes a procedural violation*.

64. In this respect, the Court recalls that in the main trial session in the Basic Court, held on 20 February 2014, was initially heard the witness proposed by B.F., namely her father E.F. Subsequently, in the main trial session, also the witness S.K.H. was heard in the capacity of architect as well as other witnesses who had carried out construction works in the disputable immovable property, namely the witnesses E.K., N.H., F.Rr., and M.S. Consequently, the Basic Court after the conclusion of the main trial session had also administered as evidence the testimonies given by the above-mentioned witnesses in this session.

65. In this respect, the Court recalls that the Applicant had filed an appeal with the Court of Appeals against the Judgment of the Basic Court. However, on the basis of the case file, it does not result that the above allegation of Applicant cocnerning the hearing of witnesses was raised in his appeal submitted to the Court of Appeals. The Court also notes that the Applicant did not raise this allegation even in his request for revision filed with the Supreme Court.

66. In such a context, when the Applicant's allegations have been neither formally nor substantially raised before the regular courts, the Court refers to its case law and the case law of the ECtHR concerning the criterion of exhaustion of remedies in the substantial aspect, and recalls that in such circumstances, such allegations cannot be considered by the Court due to the lack of exhaustion of the remedies in the substantial aspect. Based on the same case law, the Court had refused to consider the relevant allegations because they had never been raised before the regular courts, inter alia, in the cases of the Court, KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility, of 3 May 2009 (paragraph 71), KI154/17 and KI05/18, Applicants *Basri Deva, Aferdita Deva and Limited Liability Company "BARBAS"*, Resolution on Inadmissibility, of 22 July 2019 (paragraph 92), KI155/18, Applicant *Benson Buza*, Resolution on Inadmissibility, of 25 September 2019 (paragraph 50) and KI163/18, Applicant *Kujtim Lleshi*, Resolution on Inadmissibility, of 24 June 2020 (paragraph 59).

67. The Court reiterates that the exhaustion of remedies includes two elements: (i) that of exhaustion in the formal-procedural aspect, which implies the possibility of using a legal remedy against an act of a public authority in a higher instance with full jurisdiction; and (ii) exhaustion of the remedy in a substantial aspect, which means reporting constitutional violations in "substance" before the regular courts so that the latter have the opportunity to prevent and rectify the violation of human rights protected by the Constitution and the ECHR. The Court considers the legal remedies as exhausted only when the Applicants, in accordance with the applicable laws, have exhuasted them, in both aspects. (See also, the cases of the Court, KI71/18, Applicants *Kamer Borovci*, *Mustafa Borovci and Avdulla Bajra*, Resolution on Inadmissibility, of 21 November 2018, paragraph 57; case KI119/17, cited above, paragraph 73; case KI154/17 and KI05/18, cited above, paragraph 94, and case KI163/18, cited above, paragraph 61).

68. Such a stance is completely in line with the case law of the ECtHR, on the basis of which, in so far as there is a remedy enabling the regular courts to address, at least in substance, the argument of a violation of a right, then that remedy should be used. If the complaint brought before the Court has not been put, either explicitly or in substance, before the regular cours when it could have been raised in the exercise of a remedy available to the Applicant, then the regular courts have been denied the opportunity to address the issue, which the rule on exhaustion of legal remedies intends to provide. (See, inter alia, the case of the ECtHR Ja*ne Nicklinson v. The United Kingdom* and *Paul Lamb v. The United Kingdom*, cited above, paragraph 90 and references therein; see also the case-law of the Court, KI119/17 , cited above, paragraph 73; case KI154/17 and KI05/18, cited above, paragraph 93; case KI155/18, cited above, paragraph 49; and case KI163/18, cited above, paragraph 60).

69. Having regard to these principles and the circumstances in which, according to the case file it results that these specific allegations of the Applicant have been filed for the first time before the Court, it concludes that the Applicant did not give the opportunity to the regular courts, including the Court of Appeals, to address these allegations and, on that occassion, to prevent alleged violations raised by the Applicant directly before this Court, without having exhausted legal remedies in their substance. (See, inter alia, the cases of the Court, KI118/15, Applicant *Dragiša Stojković*, Resolution on Inadmissibility, of 12 April 2016, paragraphs 30-39; the case KI119/17, cited above, paragraph 74; case KI154/17 and KI05/18, cited above, paragraph 95; and the case KI163/18, cited above, paragraph 62).

70. Consequently, the Court finds that this allegation must be rejected as inadmissible on procedural basis due to the substantial non-exhaustion of all legal remedies, as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

71. Therefore, and finally, the Court finds that the Applicant's Referral is inadmissible, because the allegations for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR in relation to Decision

[Ac.no.1449/2011] of the District Court, of 30 January 2012 are out of time, in accordance with Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure; whereas the allegations for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR concerning the Judgment [Rev.no. 333/2019] of the Supreme Court, of 6 November 2019 (i) due to the lack of a reasoned court decision based on the *"clear or apparent absence of a violation"* are clearly unfounded, in accordance with paragraph 7 of Article 113 of the Constitution , Article 47 of the Law and Rule 39 (2) of the Rules of Procedure; whereas the allegations (ii) regarding the lack of having the relevant witnesses heard before the Basic Court, are inadmissible as a result of non-exhaustion of legal remedies in the substantial aspect, as required by paragraphs 1 and 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20, 47, 48 and 49 of the Law and Rule 39 (1) (b) (c) (d) and (2) of the Rules of Procedure, on 20 January 2021, unanimously

DECIDES

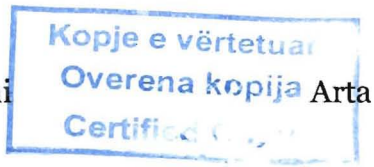
I. TO DECLARE the Referral inadmissible;

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;

IV. This Decision 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.