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

Prishtina, on 24 May 2021
Ref. no.:AGJ 1782/21

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JUDGMENT

in

Case No. KI113/20

Applicant

IF Skadeforsikring, from Norway

Constitutional review of Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020

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 the Insurance Company IF Skadeforsikring, from Norway (hereinafter: the Applicant), represented by lawyers Visar Morina and Besnik Nikqi, from Prishtina.

Challenged decision

2. The Applicant challenges Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020, which was served on it on 18 May 2020.

3. The Applicant submits a Referral to the Court for the second time. It had previously filed Referral KI87/18, for which the Court rendered the Judgment on 27 February 2019, and found a violation of Article 31 of the Constitution.

Subject matter

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

Legal basis

5. The Referral is based on paragraph 4, of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] 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

6. On 14 July 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 21 July 2020, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

8. On 3 August 2018, the Court notified the Applicant about the registration of the Referral. A copy of the Referral in accordance with the Law was sent to the Supreme Court.

9. On 22 October 2020, the Court requested a legal position from the Supreme Court regarding Referrals KI74/19, KI111/19, KI09/20 and KI113/20, in which the subject of the constitutional review are the judgments of the Supreme Court, by which it was decided on the right of debt subrogation and interest rate (penalty interest), for civil disputes initiated by insurance companies.

10. On 24 November 2020, the Court reiterated its request addressed to the Supreme Court on 22 October 2020.

11. On 2 December 2020, the Supreme Court submitted a legal opinion expressing its position on the unification of case law regarding the application of interest rates to all types of civil disputes.

12. On 28 April 2021, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral and assessment on merits.

13. On the same date, the Court voted, unanimously, that the Referral is admissible; and by a majority of votes, that there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (1) [Right to a fair trial] of the European Convention on Human Rights.

Summary of facts

Facts of the case regarding first Referral KI87/18

14. On 26 July 2009, a car accident occurred involving two passenger vehicles, in which the "Mercedes" vehicle bearing registration plates of the Republic of Kosovo, insured in the insurance company "SIGMA", which caused damage to the passenger "Audi" vehicle, with Norwegian license plates and "casco" auto insurance "IF Skadeforsikring" from Norway.

15. On 19 October 2010, the Applicant sent a request to the insurance company "SIGMA" requesting the payment of damage based on compensation, which resulted from a traffic accident, to which "SIGMA" company did not respond.

16. On 9 July 2012, the Applicant filed an appeal against "SIGMA" company with the Basic Court, in which he requested that the amount of 23,609.24 C be paid in the name ofthe damage incurred, with a penalty interest rate of 12 %, from 19 October 2010.

17. On 23 November 2015, the Basic Court rendered Judgment I. C. No. 281/2012, which approved the Applicant's statement of claim in entirety. The reasoning of the judgment reads: *"Article 939, paragraph 1, of the LOR, defined that by paying the compensation from insurance pass on the insurer, based on the Law itself, until the amount of paid compensation, all the rights of the insurer against person who is responsible in any ground for the damage, whereas Article 3 of the Law on Compulsory Motor Liability Insurance defines that the insurer is responsible for the compensation of the damage caused to third persons from the use of the vehicle insured based on motor liability. From the above mentioned legal provisions, it follows that the claimant as insurer of the vehicle that took part in the accident based on motor casco insurance was obliged to compensate the damage caused to the insured vehicle, which he did and in the meantime it enjoys the right to regress the amount paid by the respondent as insurer of the vehicle "Audi A6" based on motor liability insurance for the damage caused to third persons. The Court approved the statement of claim regarding the requested penalty interest in the amount of 12 % per year, deciding in this way in accordance to Article 26.6 of the Law on Compulsory Motor Liability Insurance*".

18. The Insurance company SIGMA filed an appeal with the Court of Appeals against the judgment of the Basic Court on the grounds of violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, the decision on the interest, the decision on the costs of the proceedings and erroneous application of the substantive law.

19. On 31 October 2017, the Court of Appeals rendered Judgment Ae. No. 191/2015, rejecting the appeal of SIGMA as ungrounded. The reasoning of the judgment reads: *"This Court assesses that the Court of the first instance correctly applied the substantive law, namely Article 939 of the Law on Compulsory Motor Liability Insurance (hereiansfter: LCI), because from the case files and examined evidence it results that the insured person of the respondent was responsible for the caused damage, the respondent paid to its insurer the compensation of the suffered damage and by paying the compensation, all the rights of the insurer passed to the claimant. For the Court of the second instance the appealing allegations of the respondent regarding the gravity of the interest and time period of calculation do not stand because the interest is calculated from the moment of submission of the claim to the Court which in the present case the calculation of the interest was calculated correctly based on Article 26, paragraph 6, of the LCI. The Court assessed the other allegations of the respondent, but found that they were ungrounded because the Court of the first instance completely confirmed the factual situation and correctly applied the substantive law while the allegations of the respondent are contrary to the evidence that are contained in the case files".*

20. SIGMA submitted a request for revision to the Supreme Court against the judgment of the Court of Appeals, on the grounds of erroneous determination of factual situation, erroneous application of the substantive law, the monetary amount, as well as the amount of interest and the time period of its calculation.

21. The Applicant also responded to the Applicant's request for revision, stating *"that the revision as inadmissible within the meaning of Article 214.2 of Law 04/L-118 (on amending and supplementing Law 04/L-006 on Contested Procedure), by the reasoning that the revision refers entirely and only to the erroneous determination of the factual situation, namely that the allegations of the respondent deriving from the revision do not deal with any violations of the provisions of LCP or erroneous application of the substantive law".*

22. On 24 January 2018, the Supreme Court rendered Judgment E. Rev. No. 27/2017, by which: *"I. The revision of the respondent submitted against Judgment Ae. No. 191/2015, of the Court of Appeals of Kosovo, of 31 October 2017, is rejected in the part that is related to the obligation of the respondent for paying to the claimant the amount of 23.609.24 Euros in the name of regress from the base of motor casco insurance, within a time limit of 7 days from the receipt of the Judgment. II. The revision of the respondent is approved, the challenged Judgment is modified regarding the interest so that the respondent is obliged to pay to the claimant the amount of 23.609.24 Euros with interest in the amount of saving deposits without term, which are paid by the business banks in Kosovo, without certain destination for more*

than one year, from the submission of the claim on 19 November 2010 until the complete payment".

23. In the first paragraph of the enacting clause, regarding the rejection of the respondent's appeal, the Supreme Court stated: *"According to the assessment of the Supreme Court of Kosovo, the courts of lower instance have correctly applied the provisions of the contested procedure and substantive law, when they found that the statement of claim of the claimant is grounded. In their judgments, they gave sufficient reasons for the decisive facts recognized by this court of revision too".*

24. In the second paragraph of the enacting clause, regarding the approval of the respondent's revision and modification of the judgment, the Supreme Court stated: *"Regarding the determination of the interest, the judgments of the courts of lower instance have been rendered with erroneous application of the substantive law; therefore, as a consequence they were modified so that the respondent shall pay to the claimant the amount of 23.609.24 Euros with interest rate in the amount of saving deposits without term which are paid by the business banks in Kosovo, without certain destination for more than one year, from 19 November 2010 until the complete payment, this happens because Law on Compulsory Auto Liability Insurance entered in force in 2011 while the case happened in 2009 and as such, it is not applied in the present case".*

25. On 27 February 2019, the Constitutional Court, deciding on Referral KI87/18 came to the conclusion and found that the Supreme Court as a court of last instance, taking a different position in the challenged Judgment in a case which is completely identical or similar to other cases, without giving a clear and sufficient reasoning for this, has violated the Applicant's right to a reasoned court decision. This also led to a violation of the principle of legal certainty, as one of the fundamental components of the rule of law, which is also an inseparable element of the right to a fair trial under Article 31 of the Constitution and Article 6, paragraph 1 of the ECHR. In point IV of the operative part, the Court decided: *"TO REMAND the Judgment of the Supreme Court for reconsideration in accordance with the Judgment of this Court".*

Facts of case regarding current referral KI113/20

26. On 6 April 2020, the Supreme Court, deciding in accordance with the order of the Constitutional Court, reconsidered the Applicant's request for revision and rendered Judgment E. Rev. No. 62/2020, by which:

    i. rejected as ungrounded the revision of the Applicant, filed against the Judgment Ae. No. 191/2015 of the Court of Appeals, of 31 October 2017, in the part related to the obligation of the respondent (SIGMA) that in the name of regress by auto-casco insurance base to pay to the Applicant the amount of 23,609.24 euro, within 7 days from the day of receiving the Judgment;

    ii. partially approved the revision of the Applicant, modifying Judgment Ae. No. 191/2015 of the Court of Appeals, of 31 October 2017 in part (II) of the

enacting clause as well as Judgment EK. No. 281/2012 of the Basic Court in Prishtina, of 23 November 2015, in part (I) of the enacting clause, obliging the insurance company "SIGMA" to reimburse the Applicant the amount of 23,609.24 euro, with interest rate of term savings deposits which are paid by commercial banks in Kosovo, without a fixed destination over one year, starting from 19 October 2020, until the final fulfillment of the payment.

27. On 14 July 2020, dissatisfied with the challenged Judgment, the Applicant filed with the Court the Referral KI113/20, by which she requests the constitutional review of the latter, claiming a violation of the right to a fair trial, which is guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

28. On 22 October and 24 November 2020, the Court, noting the growing number of referrals arising on the issue of debt subrogation and the application of interest rate (penalty interest) sought legal opinion from the Supreme Court, before deciding on Referrals KI74/19, KI111/19, KI09/20 and KI113/20.

29. On 2 December 2020, the Supreme Court submitted to the Court a legal opinion, through which it expresses its position on the unification of case law, for all claims where the subject of review is the application of the interest rate, based on the law applicable at the time of the establishment of the legal-civil relationship.

30. In the following, the relevant part indicating the purpose of the issuance of a legal opinion by the Supreme Court:

Reasoning of Legal Opinion

"The Supreme Court of Kosovo, in its case law when assessing the legality of the decisions of the lower instance courts has found a non-unique practice regarding the issue of interest claims. The non-unique practice of lower instance courts mainly concerns applicable law, interest rate and interest flow time.

The Supreme Court, from its practice, but also from the continuous requests it has received from the courts and judges, considers it important to standardize the case law, addressing the issue of interest through a legal opinion.

The jurisdiction of the Supreme Court of Kosovo, to issue a legal opinion in cases where there is a non-unique practice of application of law by regular courts, or challenges in the implementation and interpretation of legal provisions, is determined by the Law on Courts, Article 27 of the Law, the provisions of which determine the General Session of the Supreme Court, while the need to address this issue through legal opinion is derived as a proposal and conclusion of the Civil Branch of the Supreme Court, after reviewing, analyzing and assessing a significant number of court decisions on the issue of interest, as well as from requests, questions or suggestions from regular courts or judges.

The Supreme Court of Kosovo considers that the issuance of this legal opinion will contribute in the first place to the unification of judicial case law, the establishment of the standard of legality in judicial decision-making on the issue of interest, efficiency, performance of judges and public trust in the courts. This is because the standardization of case law

affects the legality of decision-making, efficiency and credibility of the public in the courts.

The subject of this legal opinion are almost all situations of interest claims in terms of applicable law, interest rate and time of interest flow with some exceptions relating to matters governed by specific laws.
The reasoning of this legal opinion follows the chronology of issues addressed according to the division into points.

Applicant's allegations

31. The Applicant alleges that Judgment E. Rev. No. 62/2020 violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR. The Applicant relates the allegation of violation of Article 31 of the Constitution and Article 6.1 of the ECHR to the reasons that the Supreme Court did not reason its decision, and that the latter did not decide according to the findings of the Constitutional Court and the case law of the ECtHR.

Regarding the insufficiency of the reasoning of the court decision

32. In this regard, the Applicant alleges that the challenged Judgment of 6 April 2020 is again characterized by a lack of adequate reasoning, because the Supreme Court did not provide sufficient and adequate reasoning regarding the modification to Judgment Ae. No. 191/2017 of the Court of Appeals of 31 October 2017, regarding the penalty interest, thus violating the principle of prohibiting arbitrariness in decision-making. The Applicant bases this allegation on the fact that the Supreme Court in the reasoning of the challenged Judgment only listed the remarks from Judgment KI87/18 of the Constitutional Court and did not adhere to its recommendations. In essence and consequently the Applicant alleges that the reasoning of challenged Judgment E. Rev. No. 62/2020 turns out to have the same flaws, because it contains insufficient reasoning, namely the lack of reasoning and objective explanations that justify this avoidance of consistency regarding the previous positions of this court, as to the institution of penalty interest on compulsory insurance.

33. In general, the Applicant states that the elaboration of the case as a whole, in Judgment E. Rev. No. 62/2020, of 6 April 2020 does not differ from the previous Judgment, namely this reasoning is included in the last four paragraphs of the Judgment. Thus, according to the Applicant, it results that the Supreme Court, with this brief reasoning, bases the change of position and the inconsistency regarding the institution of penalty interest on compulsory insurance on the same argument, that there can be no retroactive action of Law no. 04/L-018 for this insured case. Further, the Applicant adds that, in the reasoning part, the contradictory positions of the Supreme Court are evident when referring to the same Law No. 04/L-018, namely the provision of its Article 26 with the conclusion: *"that in disputes for subrogation of damage legally the interest defined by Article 26.6 of the Law on Compulsory Motor Third Party Liability Insurance is not applied". According to the Applicant, this conclusion does not correspond at all to the content of the mentioned*

provision of the law, because it does not make any difference regarding the claim of insurance claims, whether they are direct or subrogation claims, and at least the injured party on the basis of subrogation, not to have the status of "injured person". As can be seen from the provision of the law (Article 26.6) we do not have such a definition which explicitly states that no penalty interest is applied for subrogation claims. This interpretation according to the Applicant can not be qualified other than a "*de lege ferenda*" position of this court.

34. In addition, the Applicant alleges that the non-application of the jurisprudence of the Constitutional Court regarding the lack of reasoning constitutes a serious violation of Article 31 of the Constitution. Supporting this allegation, the Applicant refers to cases KI55/09, KI135/14, KI97/16 and KI138/15 where the Court found a violation of Article 31 of the Constitution, due to lack of reasoning of the court decision.

35. Thus, the Applicant alleges that the Supreme Court has also violated the jurisprudence of the ECtHR, which has held that the notion of a fair trial requires, *inter alia*, the national courts of all instances to address all the essential issues of the case when pronouncing their court decisions. The Applicant further alleges that the decision-making of the Supreme Court is also contrary to the requirements of Article 53 of the Constitution, according to which the courts are obliged to interpret human rights in accordance with the case law of the ECtHR.

36. Furthermore, the Applicant alleges that the Supreme Court, by ignoring in entirety the issues regarding the legal basis of the institution of the penalty interest and otherwise determining the amount of the penalty interest rate by the challenged Judgment, E. Rev. No. 62/2020 has not meet the requirements stemming from Article 31 of the Constitution and Article 6.1 of the ECHR regarding the sufficiency of the reasoning of the court decision.

37. It is further alleged that the above-mentioned legal flaws of the challenged Judgment of the Supreme Court seriously violate the Applicant's right to a fair trial, guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR. Therefore, the Applicant requests the Court that, after assessing its allegations, to annul Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020, because of violation of Article 31 of the Constitution and Article 6.1 of the ECHR, and to remand the latter for reconsideration.

38. In support of its allegations, the Applicant again submitted to the Court several Judgments of the Supreme Court to prove that the Supreme Court did not follow its case law, such as: E. Rev. No. 23/2017, 23 December 2017, E. rev. No. 48/2014, 13 May 2014, E. Rev. No. 62/2014, 21 January 2015, E. Rev. nr. 14/2016, 24 March 2016, E. Rev. No. 06/2015, 19 March 2015, E. Rev. No. 55/2014, 3 November 2014 and E. Rev. No. 20/2014, 14 April 2014.

Relevant legal provisions

LAW NO. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

Article 281

Subrogation by law

If an obligation is performed by a person that has any legal interest therein the creditor's claim with all the accessory rights shall be transferred thereto upon performance by law alone.

Article 382
Penalty interest

1. A debtor that is in delay in performing a pecuniary obligation shall owe penalty interest in addition to the principal.

2 The interest rate for penalty interest shall amount to eight percent (8%) per annum, unless stipulated otherwise by a separate act of law.

LAW NO. 04/L-018 ON COMPULSORY MOTOR LIABILITY INSURANCE

Article 26
Compensation claims procedure

1. The insurer shall be obliged to process, for damages to persons latest within a period of 60 (sixty) days, while for damages to property within a period of 15 (fifteen) days from the day of submission of the compensation claim, the claim shall be processed and the injured party shall be notified in writing of:
1.1. compensation offer with relevant explanations;
1.2. decision and legal reasons for rejecting the compensation claim, when the liability and the damage degree are disputable.

2. If the submitted claim is not completed by evidence and documentation necessary to render a decision on compensation, the insurer shall be obliged, latest within a period of 3 (three) days from the date of the receipt of compensation claim, to notify the injured party in writing, indicating the evidence and documentation required to supplement the claim. Time limits from paragraph 1 of this Article on insurer's obligation to process the compensation claims shall apply as of the day of receipt or the completion of claim documentation, respectively.

3. CBK will issue sub-legal act to establish the compensation procedure, including such determination when a claim is considered completed by evidence and documentation necessary to render a decision on compensation.

4. Being unable to establish the damage, or to have the compensation claim fully processed respectively, the liable insurer shall be obliged to pay to the injured party the undisputable share of damage as an advance payment, within the time limit set out in paragraph 1 of this Article.

5. If the liable insurer fails to reply to the injured party within the time limits established under paragraph 1 of this Article, the injured party shall have the right to file a lawsuit to the competent Court.

6. In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim.

7. Provisions from paragraph 1, 2, 4 and 5 of this Article shall respectively apply in cases of compensation claims processing which shall bind the Bureau to damages based on border insurance and the Compensation Fund liabilities.

8. Special procedures and time limits under the Crete Agreement shall apply to compensation claims from the International Motor Insurance Card system.

***RULE 3* On Amending the Rule On Compulsory Third Party Liability Motor Vehicle Insurance approved by the Governing Board of the Central Bank of the Republic of Kosovo, on September 25, 2008**

Article 5.1

Claim Settlement

Indemnity claims of third parties based on a CTPL Insurance in accordance with provisions of this Rule, including recourse from the Guarantee Fund have to be settled within the period of 10 days of the submission of necessary proofs and relevant documentation required by the insurance company or the Guarantee Fund referring to the claimed indemnity for death, bodily injury or property damage.

The Guarantee Fund or an insurance company that fails to make a settlement of a valid claim within a period of ten (10) days as prescribed above shall pay a late payment penalty equal to 20 % yearly interest calculated from the date when the claim was reported until the date when indemnity was paid or settled.

Law no. 06 / L-054 on Courts, which in Article 14 provides the mechanism for fair administration of justice and review of changes in case law

Article 14

Competences and Responsibilities of the President and Vice-President of the Court "[...]

2.10. the President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices".

Legal Opinion on Interest adopted at the General Meeting of the Supreme Court of the Republic of Kosovo, on 1 December 2020

FIRST PART: Applicable Law:

I. *For the obligational relationship that have arisen before 20.12.2012, for interest apply the provisions of the Law on Obligations (Official Gazette of the SFRY), No. 29/78, 39/85, 57/89).*

II. *For the obligational relationship that have arisen after 19.12.2012, for interest apply the provisions of the Law on Obligations, No. 04/L-077, Official Gazette of the Republic of Kosovo, No. 19/19, of 19.06.2012.*

III. *For periodic claims which have arisen from the relationship of obligations before 20.12.2012, but which extend (reach for payment) in the period after 19.12.2012, while the court on the case under dispute according to the lawsuit decides after 19.12.2012, then the applicable law is:*

- *for periodic claims which have reached for payment by 20.12.2012, with regard to interest apply the provisions of the Law on Obligations (Official Gazette of the SFRY, no. 29/78, 39/85, 57/89);*

- *for periodic claims which reach for payment after 19.12.2012, with regard to interest apply the provisions of the Law on Obligations, Law no.04/L-077.*

PART TWO: Amount/interest rate:

IV. *For the obligational relationships that have arisen before 20.12.2012, the rate/amount of penalty interest is set as for assets deposited in the bank, over one year, without a specific destination.*
[...]

VI. *For the obligational relationships that have arisen after 19.12.2012, the rate/amount of the annual penalty interest for all claims will be set at 8%, unless otherwise provided by a special law.*
[...]

XI. *For cases of claims for compensation of damage or coverage of expenses for the insured case (insured case compensation) by voluntary policy (voluntary insurance), the amount of interest is determined according to point IV (four) and VI (six) of this legal opinion, depending on which law is in force at the time the insured case is filed.*

Exceptions to item IV (four), V (five), VI (six), VII (seven), VIII (eight), IX (nine) and X (ten) for the amount of interest.

XII. *For third parties' claims to Insurance Companies, the interest rate of 12% of annual interest is calculated when the legal requirements are met, in cases of non-compliance with deadlines (Article 26, paragraph 1 and 2 of the Law on Compulsory Motor Liability Insurance, No. 04/L-018, published in the Official Gazette no. 4, of 14 July 2011, which entered into force on 30 July 2011) and non-fulfillment of the obligation (Article 26,*

paragraph 4, of the same law) by the responsible insurers (Insurance Companies) for each day of delay until the settlement of the obligation by the responsible insurer, starting from the date of filing the claim for compensation.

Situations when the annual interest rate of 12 % is applied:

- When claims filed with Insurance Companies for personal injury are not dealt with within 60 days;

- When claims filed with Insurance Companies for property damage are not dealt with within 15 days;

- In the impossibility of determining the damage, namely the treatment of the indemnity in full, the responsible insurer is obliged to pay to the injured party the non-disputed part of the damage in advance, within 60 days for damage to persons and 15 days for damage to property.

XIII. For late payments of debtors to creditors-financial institutions, lenders, penalty interest will be calculated in the procedure determined by sub-legal acts by the Central Bank of Kosovo (CBK), according to the rate/ amount determined by the terms and conditions of the relevant agreement of the credit instrument, to the relevant financial institution.

Reasoning for item I (one) of legal opinion *- It is a standard of civil law that the substantive law will apply at a certain time and territory. In this context, the application of the provisions of the Law on / for Obligations Relations is determined, taking as a basis the time of arising the civil legal relations. In practice it has been presented as a dilemma, and in some cases the provision of the law has been incorrectly applied which was not in force at the time of arising the civil legal relationship.*

[...]

Reasoning for item IX (nine) of legal opinion *- In the case law, there are frequent cases of creditors for reimbursement of damages who have fulfilled their obligations in advance to third parties, which are mainly related to cases provided by local insurance companies with foreign companies. For this type of claims in the practice of the courts, there has been an interpretation and application of legal provisions in several forms regarding the rate/amount of penalty interest for cases of reimbursement claims. This happened because the creditors when filing claims for compensation of damage referring to Article 26 of the Law on Compulsory Motor Third Party Liability Insurance, no. 04/L-018, published in the Official Gazette no. 4, dated 14 July 2011, which entered into force on 30 July 2011, requested that the claim be reimbursed at an annual rate of 12%, but the Supreme Court of Kosovo in its General Session through this legal opinion has assessed that an annual interest rate/penalty interest of 12% cannot be applied in all cases. This is because creditors' claims for reimbursement of damages mainly refer to situations of legal-civil relations (non-contractual for the creditor and the debtor), therefore, in such a case according to the assessment of the Supreme Court of Kosovo, the annual penalty interest must be paid according to item IV (four) and VI (six) of this legal opinion. This means that in case the creditor has fulfilled the obligation to the third party, before 20.12.2012, the interest rate will be applied as for*

the funds deposited in the bank over one year without a specific destination, while in case the creditor has fulfilled the obligation to the third party after 19.12.2012, then the rate/amount of penalty interest will be applied at a rate of 8%.

In addition to the above, the Supreme Court considers that the rate/amount of the annual penalty interest of 12%, cannot be applied due to the fact that according to the provisions of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, promulgated in Official Gazette No. 4, dated 14 July 2011, which entered into force on 30 July 2011, the annual interest rate of 12%, comes into expression due to negligence of insurance companies (which then appear as regressive creditors) , because if the regressive creditors had treated the claims of third parties in accordance with their legal responsibilities, the rate/amount of penalty interest of 12% could not be applied to them in court decisions, but the rate/amount would be applied as for funds deposited over a year without a specific destination, or the rate/amount of 8%, depending on which law was in force at the time the obligation relationship arouse.

Admissibility of the Referral

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

40. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, in conjunction with paragraph 4, of Article 21 [General Principles] the Constitution, which establish:

Article 113
[Jurisdiction and Authorized Parties]

"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".

[...]

Article 21 [General Principles]

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

41. The Court further examines whether the Applicant has met the admissibility criteria, as specified by Law, namely Articles: 47, 48 and 49 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced...".

42. In assessing the fulfillment of the admissibility criteria as set out above, the Court notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of his fundamental rights and freedoms applicable both to individuals and to legal persons (See, cases of the Court KI118/18, Applicant, *Eco Construction l.l.c.*, Resolution on Inadmissibility, of 10 September 2019, paragraph 29; No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14). Therefore, the Court finds that the Applicant is an authorized party challenging an act of public authority, namely Judgment Rev. No. 62/2020 of the Supreme Court, of 6 April 2020, after the exhaustion of all legal remedies provided by law.

43. The Court notes that Judgment E. Rev. No. 62/2020 of the Supreme Court, of 6 April 2020, was submitted to the Applicant on 18 May 2020, while the referral under review was submitted on 14 July 2020, namely within the legal deadline provided by Article 49 of the Law.

44. The Court also considers that the Applicant has accurately indicated what rights, guaranteed by the Constitution and the ECHR, he claims to have been violated to its detriment, in accordance with the criteria set out in Article 48 of the Law.

45. Therefore, the Court concludes that the Applicant is an authorized party; that he has exhausted all legal remedies; that he respected the requirement of submitting the referral within the legal deadline; has accurately clarified the alleged violations of fundamental human rights and freedoms, and has shown what the challenged specific act of the public authority is.

46. In light of the allegations of the Referral and their argumentation, the Court considers that the Referral raises serious constitutional issues and their addressing depends on the consideration of the merits of the referral. Also, the referral cannot be considered as manifestly ill-founded, within the meaning of Rule 39 of the Rules of Procedure, and no other basis has been established to declare it inadmissible (see the Constitutional Court Case no. KI97/16, Applicant *IKK Classic*, Judgment of 4 December 2017).

47. Therefore, the Court declares the Referral admissible for review of its merits.

Merits of the Referral

48. The Court recalls that the Applicant alleges a violation of its rights guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR, because the challenged Judgment of the Supreme Court does not provide sufficient and adequate reasoning regarding the change of position as to the calculation of penalty interest, a position which, according to the Applicant, the Supreme Court had hitherto consistently applied in its practice. Furthermore, the Applicant alleges that the Supreme Court did not decide in accordance with the findings of the Constitutional Court under Judgment KI87/18, of 27 February 2019.

49. The Court considers that in the present case the allegations of non-reasoning of the court decision and non-application of the case law of the Constitutional Court and the ECtHR, due to the nature of the case and their interrelation, will deal within a single reasoning.

50. In light of these clarifications, the Court will further examine the Applicant's allegation of a violation of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

51. In this regard, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

> *"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".*

52. In addition, the Court also recalls the content of Article 6.1 (Right to a fair trial) of the ECHR, which stipulates:

> *"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,...".*

53. The Court states that under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution in accordance with the ECtHR case law. Accordingly, as regards the interpretation of the allegations of violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR, namely relating to the right to a reasoned and reasonable court decision, the Court will refer to ECtHR case law.

General principles on the right to a reasoned and reasonable court decision

54. The Court notes, first of all, that the guarantees contained in Article 6 paragraph 1 of the ECHR include the obligation of the courts to provide a reasoning for their decisions. The reasoned court decision shows to the parties, that their case has really been examined (see judgment of the ECtHR *H. v. Belgium*, application 8950/80, paragraph 53 of 30 November 1987).

55. The Court also states that, according to the ECtHR case law, Article 6 paragraph 1 obliges the courts to give reasons for their judgments, but this cannot be understood as requiring a detailed answer to every argument (see ECtHR cases *Van de Hurk v. Netherlands*, judgment of 19 April 1994; *Garcia Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, paragraph 26, *Jahnke and Lenoble v. France*, *Perez v. France* [GC], paragraph 81).

56. In this regard, the Court adds that the domestic court has a certain margin of appreciation when choosing arguments and admitting evidence in support of the parties' submissions, a domestic court is also obliged to justify its proceedings by giving reasons for its decisions (see ECtHR judgment *Suominen v. Finland*, Application 37801/97, from 1 July 2003, paragraph 36).

57. The Court also states that, in accordance with the ECtHR case law, when examining whether the reasoning of a court decision meets the standards of the right to a fair trial, the circumstances of the particular case should be taken into account. The court decision cannot be without any reasoning, nor will the reasoning be unclear. This applies in particular to the reasoning of the court decision deciding upon the legal remedy in which the legal position presented in the lower instance court decision has been changed (see: case of ECtHR *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61).

58. The Court wishes to emphasize that the notion of a fair trial, according to the ECtHR case law, requires that a national court which has given sparse reasons for its decisions, did in fact address the essential issues which were submitted

to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court. This requirement is all the more important where a litigant has not been able to present his case orally in the domestic proceedings (See ECtHR judgment *Helle v. Finland*, application 157/1996/776/977, of 19 December 1997, paragraph 60).

59. In addition, the Court refers to its case law where it is established that the reasoning of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (the Constitutional Court, cases: no. KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI96/16 *IKK Classic* Judgment of 8 December 2017).

Application of the abovementioned principles to the right to a reasoned and reasonable decision on the present case

60. The Court recalls that the Applicant challenges the constitutionality of Judgment E. Rev. No. 62/2020 of the Supreme Court, claiming that the latter *"is again characterized by a lack of adequate reasoning, because the Supreme Court did not provide sufficient and adequate reasoning regarding the modification to Judgment Ae. No. 191/2017 of the Court of Appeals of 31 October 2017, regarding the penalty interest, thus violating the principle of prohibiting arbitrariness in decision-making"*.

61. The Applicant further alleges that the Supreme Court in the reasoning of the challenged Judgment, only listed the remarks from Judgment KI87/18 of the Constitutional Court and did not comply with its recommendations. In essence and consequently, the Applicant alleges that the reasoning of the challenged Judgment results in the same flaws, because it contains insufficient reasoning, namely the lack of justification and objective explanations.

62. In essence, the Applicant challenges the constitutionality of the challenged Judgment, only in relation to item 2 (two) of the enacting clause, regarding the penalty interest, again linking it to the alleged violations of Article 31 of the Constitution and Article 6.1 of the ECHR, namely to the right to a reasoned and reasonable court decision.

63. Therefore, in view of the Applicant's main appealing allegation, the Court considers that it must be examined whether the Supreme Court has provided clear and sufficient reasons on which it based its decision on modification of the judgments of the lower instances, regarding the interest rate/penalty interest.

64. First, the Court recalls that in its case KI87/18, it found a violation of Article 31 of the Constitution and Article 6.1 of the ECHR due to insufficient reasoning of the court decision, as a result of the inconsistency of the Supreme Court in decision-making regarding the application of interest rates.

65. In addition, the Court refers to the relevant parts of the challenged Judgment to assess whether the Supreme Court has eliminated the causes that led to a violation of Article 31 of the Constitution and Article 6.1 of the ECHR. Consequently, the Court assesses whether the Supreme Court justifies the change of the Judgment of the Court of Appeals in item 2 (two) of the enacting clause and the Judgment of the Basic Court in Prishtina, in item 1 (one) of the enacting clause, regarding the change of the penalty interest.

66. The reasoning of the Supreme Court on this point, states: *"The Supreme Court has unified the case law in cases of determining the interest rate, in the dispute for subrogation of debt, concluding that in disputes for subrogation of damages the penalty interest defined by Article 26.6 of the Law on Compulsory Motor Third Party Liability Insurance is not applied (regardless of whether the law was in force). Therefore, based on the current state of the case, the Supreme Court finds that the courts of lower instance have erroneously applied the substantive law by accepting 12% interest, in disputes for debt subrogation, as is the case here. This is due to the fact that this interest rate is applied, but only to the claims of the injured parties for compensation of damage in the out-of-court procedure, as provided in Article 26 of the Law in question and Article 5.1 of the CBK Rule, no. 3 On the amendment of the Rule on Compulsory Motor Third Party Liability Insurance of 25 September 2008, in which provisions are invoked by the courts of lower instance.*

67. The Supreme Court further notes that: *"The interest applied by the courts of lower instance is provided for the purpose of disciplining insurance companies in insurance reports on claims for compensation of injured persons, which insurance companies are obliged to deal urgently within the foreseen deadlines, in accordance with the above-mentioned provisions. Paragraph 7 of Article 26 of the Law on Compulsory Motor Third Party Liability excludes the application of 12% interest for debt subrogation, this interest is provided for non-dealing and delayed processing of claims of injured persons for compensation.*

68. In conclusion, the Supreme Court reasoned: *"It follows that the claimant (Applicant) is entitled only to penalty interest based on the amount paid by commercial banks in Kosovo, in deposited funds and without a definite destination over one year, in terms of the legal provision of Article 277 of LOR, and not qualified interest according to the provision applied by the courts of lower instance. Since the claimant with the submission of 19 October 2010, has requested subrogation of the debt from the respondent, it results that the respondent from this date has fallen into delay when it has not fulfilled the obligation within the deadline until the final payment".*

69. From the above, the Court considers that the Supreme Court, with the challenged Judgment, has given convincing and sufficient reasons by elaborating in detail the legal basis on which it has based the change of the interest rate (penalty interest rate) in item 2 (two) of the enacting clause, reasoning logically why in such circumstances the Applicant cannot be granted an interest rate of 12%, in accordance with Article 26.6 of the Law on Compulsory Motor Third Party Liability Insurance.

70. In this regard, the Supreme Court reasoned that Article 26.6 of the Law in question applies only in cases when the delay in payment of the obligation (compensation) is done at the request of the injured parties. Further, the Supreme Court reasoned that in the circumstances of the present case we are not dealing with a claim for compensation from the injured party, for a claim for late payment of the obligation by the local insurance company SIGMA, to the Applicant, therefore in this regard, the Supreme Court reasoned that paragraph 6 of Article 26 of the Law on Compulsory Motor Third Party Liability Insurance does not apply to the Applicant but paragraph 7 of Article 26 of the same Law.

71. The Court recalls that the Applicant may still be dissatisfied with the reasoning and legal basis applied by the Supreme Court. However, the Court in its case law has consistently reiterated that the issues of fact and issues of interpretation and application of the law are within the scope of the regular courts and other public authorities, and as such are issues of legality, unless and insofar as such issues result in violation of fundamental human rights and freedoms or create an unconstitutional situation (see, *inter alia*, Constitutional Court Case No. KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2018, paragraph 91).

72. In addition, the Court finds that the decision-making of the Supreme Court, in the factual and legal circumstances of the present case, is in accordance with the legal opinion issued at the general meeting of the Supreme Court of 2 December 2020. In this regard, the Court recalls reasoning of the legal opinion in item nine (IX), where Supreme Court reasoned, as follows:

> ***Reasoning for item IX (nine) of legal opinion*** *- In the case law, there are frequent cases of creditors for reimbursement of damages who have fulfilled their obligations in advance to third parties, which are mainly related to cases provided by local insurance companies with foreign companies. For this type of claims in the practice of the courts, there has been an interpretation and application of legal provisions in several forms regarding the rate/amount of penalty interest for cases of reimbursement claims. This happened because the creditors when filing claims for compensation of damage referring to Article 26 of the Law on Compulsory Motor Third Party Liability Insurance, no. 04/L-018, published in the Official Gazette no. 4, dated 14 July 2011, which entered into force on 30 July 2011, requested that the claim be reimbursed at an annual rate of 12%, but the Supreme Court of Kosovo in its General Session through this legal opinion has assessed that an annual interest rate/penalty interest of 12% cannot be applied in all cases. This is because creditors' claims for reimbursement of damages mainly refer to situations of legal-civil relations (non-contractual for the creditor and the debtor), therefore, in such a case according to the assessment of the Supreme Court of Kosovo, the annual penalty interest must be paid according to item IV (four) and VI (six) of this legal opinion. This means that in case the creditor has fulfilled the obligation to the third party, before 20.12.2012, the interest rate will be applied as for the funds deposited in the bank over one year without a specific destination, while in case the creditor has*

fulfilled the obligation to the third party after 19.12.2012, then the rate/amount of penalty interest will be applied at a rate of 8%.

In addition to the above, the Supreme Court considers that the rate/amount of the annual penalty interest of 12%, cannot be applied due to the fact that according to the provisions of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, promulgated in Official Gazette No. 4, dated 14 July 2011, which entered into force on 30 July 2011, the annual interest rate of 12%, comes into expression due to negligence of insurance companies (which then appear as regressive creditors) , because if the regressive creditors had treated the claims of third parties in accordance with their legal responsibilities, the rate/amount of penalty interest of 12% could not be applied to them in court decisions, but the rate/amount would be applied as for funds deposited over a year without a specific destination, or the rate/amount of 8%, depending on which law was in force at the time the obligation relationship arouse.

73. In this regard, the Court notes the fact that the Supreme Court, as the highest instance of the regular judiciary, has fulfilled its legal and constitutional obligation, unifying the case law by issuing a principled act (legal opinion) which is required to be applied to all instances of the judiciary, including the Supreme Court. This legal act avoids the probability of violating the right to a fair trial, namely the principle of legal certainty.

74. In this regard, the Court considers that the Supreme Court, in accordance with the requirements of Article 14 of Law no. 06/L-054 on Courts, has established an effective mechanism, which avoids possible deviations from consistent case law, on the same factual and legal issues, deviations which according to the findings of the Constitutional Court have led to the violation of the principle of legal certainty, rule of law, good administration of justice and loss of public trust in the judiciary.

75. Therefore, this legal opinion of the Supreme Court is in accordance with the established criteria of the ECtHR, through which divergences (contradictions) are identified in decision-making on the same factual and legal issues, such as: (i) profound and long-standing differences in case law, (ii) determining whether domestic law provides for a mechanism that overcomes these inconsistencies, and (iii) determining whether this mechanism has been implemented and, if so, to what extent, so that domestic court decision-making is in compliance with the requirements of a fair trial, as required by Article 31 of the Constitution and Article 6.1 of the ECHR.

76. The Court, from all the above mentioned considerations, in the circumstances of the present case, considers that the Applicant is merely dissatisfied with the outcome of the proceedings before the Supreme Court. However, its dissatisfaction cannot in itself raise an arguable claim of a violation of the fundamental rights and freedoms guaranteed by the Constitution (see, ECtHR case *Mezotur-Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

77. Furthermore, the Court finds that all the remarks given by the Court in its Judgment of 27 February 2019 (case KI87/18), regarding the reasoning of item 2 (two) of the challenged Judgment, on what legal basis or law the Supreme Court based the modification of the Judgment of the Court of Appeals regarding the interest rate (penalty interest), have already been consumed because the challenged Judgment contains a logical reasoning and explains exactly why in the Applicant's case a rate of 12% may not be applied, noting that this interest rate applies only when claims for compensation are filed by injured persons, the claims which the insurance companies are obliged to deal with urgently within the time limits provided by the provisions of Article 26 of the Law on Compulsory Motor Third Party Liability Insurance. In addition, the Court notes that the allegation of inconsistency in decision-making has been consumed, through the issuance of a legal opinion by the Supreme Court. Thus, the causes which have led to legal uncertainty due to the non-uniform application of case law on the same factual and legal issues have been eliminated.

78. Therefore, the Court finds that in the Applicant's case there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

Conclusion

79. In sum, with regard to the allegation of a violation of the right to a reasoned and reasonable court decision, the Court concludes that the Supreme Court: (i) provided the legal basis and clearly explained why in the Applicant's case the interest rate of 12%; does not apply (ii) the challenged Judgment of the Supreme Court contains a logical connection between the legal basis, the reasoning and the conclusions drawn; (iii) as a logical consequence between the legal basis, the reasoning and the conclusions it has resulted that challenged Judgment E. Rev. 62/2020 of the Supreme Court meets the requirement of a reasoned and reasonable court decision.

80. Therefore, the Court concludes that, in the circumstances of the present case, there has been no violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (1) (Right to a fair trial) of the ECHR.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 21.4 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 28 April 2021,

DECIDES

I. TO DECLARE, unanimously the Referral admissible;

II. TO HOLD, by a majority of votes, that Judgment E. Rev. No. 62/2020 of the Supreme Court of the Republic of Kosovo, of 6 April 2020 is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6 (1) [Right to a fair trial] of the European Convention on Human Rights;

III. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

IV. This Judgment is effective immediately.

Judge Rapporteur | **President of the Constitutional Court**

Nexhmi Rexhepi | Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.