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

Prishtina, on 14 June 2021
Ref.No:AGJ 1807/21

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

Case No. KI111/19

Applicant

Insurance Company "SUVA Rechstabteillung"

Constitutional review of Judgment E.Rev.no.1/2019 of the Supreme Court, of 27 February 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 the Insurance Company *"SUVA Rechtsabteilung"* having its seat in Lucerne, Switzerland (hereinafter: the Applicant) represented by the Law Firm "ICS Assistance L.L.C." Prishtina, through Visar Morina and Besnik Z. Nikqi, lawyers from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment [E.Rev.no.1/2019] of the Supreme Court, of 27 February 2019.

3. The challenged Judgment of the Supreme Court was served on the Applicant on 14 March 2019.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Judgment of the Supreme Court, which has allegedly violated the Applicant's right and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 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 the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (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 2 July 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 3 July 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Gresa Caka-Nimani and Safet Hoxha.

8. On 2 September 2019, the Applicant was notified about the registration of the Referral and a copy thereof was sent to the Supreme Court.

9. On 2 September 2019, a copy of the Referral was sent to the Basic Court in Prishtina along with a request for submission of the acknowledgment of receipt indicating the date of receipt of the challenged decision by the Applicant.

10. On 16 September 2019, the Basic Court submitted the aforementioned document to the Court.

11. On 22 October 2020, the Court requested from the Supreme Court to be notified about the case law regarding the application of penalty interest in debt subrogation disputes. The request addressed to the Supreme Court, apart from

the case under review KI111/19, was also related to other cases of a similar nature KI74 /19, KI09/20 and KI113/20.

12. On 2 December 2020, the Supreme Court submitted the "Legal Opinion on Interest adopted at the general meeting of the Supreme Court of the Republic of Kosovo of 1 December 2020, based on Article 26 paragraph 1 point 1.4 of the Law on Courts". The relevant parts of the Legal Opinion of the Supreme Court are reflected in the below text of the present judgment.

13. 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 the assessment based on merits.

14. On the same day, the Court unanimously voted that the Referral is admissible; and by majority vote 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

15. Based on the submitted documents it results that on 1 May 2013, the Applicant's insured person S.B. while driving a vehicle "VE Polo" with license plates 05-867-BM was involved in a traffic accident with the passenger car with license plates E-310-EH driven by M.D., who was insured with the respondent, the Insurance Company "Elsig" in Pristina.

16. Meanwhile, in criminal proceedings, the Basic Court in Ferizaj by a final criminal Judgment (P.no. 1448/13, of 21.11.2013) had confirmed that the "exclusive" culprit for the accident of 1 May 2013 was M.D., the insured person of the respondent- the Insurance Company "Elsig" in Prishtina.

17. On 11 March 2014, the Applicant submitted a claim to the Insurance Company "Elsig" seeking compensation and setting of the penalty interest rate at 12% based on Article 26 point 6 of the Law No.04/L-018 on Compulsory Motor Liability Insurance (hereinafter: the Law on Motor Liability).

18. On an unspecified date, the Applicant filed a claim with the Basic Court in Prishtina-Department for Commercial Matters (hereinafter: the Basic Court) regarding the regression for the costs of medical treatment and disability compensation for the injured party S.B. involved in the traffic accident of 1 May 2013. The Applicant had requested that the respondent, the Insurance Company "Elsig" be obliged to pay the total amount of funds in the amount of 80,037.04 Euros along with the annual interest rate of 12%.

19. On 26 September 2016, the Basic Court in Prishtina-Department for Commercial Matters (Judgment III.C.no.150/2015) (i) approved the Applicant's statement of claim in its entirety; (ii) obliged the respondent, the Insurance Company "Elsig" based in Prishtina, to pay the total amount of funds in the sum of 80,037.04 Euros in the name of regression, along with the annual

interest rate of 12%; and, (iii) obliged the respondent to compensate the Applicant for the costs of the proceedings.

20. On the basis of medical and traffic expertise the Court had established: (i) that the respondent's insured person M.D. is at fault for the damage caused in the accident of 1 May 2013; (ii) that the injured party S.B. had medical expenses as well as compensation for incapacity for work in the amount of 80,037.04 Euros; and, (iii) given that the accident was caused by the insured person of the respondent, the Basic Court based on Articles 281 and 960 of Law No. 04 /L-077 on Obligational Relationships (hereinafter: the LOR) decided to oblige the respondent to regress to the Applicant the amount of 80,037.04 Euros along with the annual interest rate of 12%.

21. In the relevant part of the judgment, the Basic Court had established: "*The Court has also assessed the respondent's allegations stating that the claimant could not base its statement of claim upon Article 72 of the Swiss Federal Social Security Law, as such a claim was rejected by the court as unfounded since the claimant has relied on the legal basis under Articles 281 and 960 of the LOR, while the said provisions deal with subrogation in insurance; there were also other claims of the respondent that were rejected by the court as unfounded because they were not relevant and had no bearing as to have a different decision issued in this civil legal issue, since also the claimant has deducted the granted amount paid according to the opinion and the findings of the medical expertise. The court obliged the respondent to pay to the claimant, the determined amounts of compensation along with the interest at the rate of 12%, in conformity with Article 26.6 of the Law 04/L-018 on Compulsory Motor Liability Insurance which was calculated from the date of the submission of the claim for reimbursement to the respondent on 11.03.2014 until the definitive payment.*"

22. On an unspecified date, the respondent- Insurance Company "Elsig" filed an appeal against the aforementioned judgment by alleging essential violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law. The respondent had also requested that the judgment of the Basic Court be quashed or remanded for reconsideration or amended by rejecting the statement of claim in its entirety in the absence of liability and failure to prove that there were incurred costs as a result of the accident.

23. On 5 November 2018, the Court of Appeals (Judgment Ae.no.240/2016) rejected the appeal of the respondent Insurance Company "Elsig" as unfounded by upholding the Judgment (III.C.no.150/2015) of the Basic Court in Prishtina, of 26 September 2016. The Court of Appeals found that the court of the first instance has correctly applied the substantive law, namely Articles 281 and 960 of the LOR, for the reason that on the basis of the case file and the statements of the respondent it results that the insured person of the respondent was liable for the damage caused. The Court of Appeals added that the Applicant has paid to its insured person compensation for the damage suffered and that upon the payment of compensation all the rights of the insured person have been transferred to the Applicant.

24. In the relevant part of the judgment, the Court of Appeals had established: *"This court considers that the court of the first instance has correctly applied the substantive law, namely Articles 281 and 960 of the LOR, because based on the case file and the statements of the respondent party it results that the respondent's insured person was liable for the damage caused. The claimant has paid to its insured person the compensation for the damage suffered and upon the payment of the compensation all the rights of the insured person have been transferred to the claimant. The appeal claim that the court should have applied Article 269 of the LOR is unfounded because this provision refers to other natures of insurance (life insurance, property insurance against disasters, etc.) and is therefore inapplicable in this case [. ..] The court also assessed the other respondent's allegations, related to the interest rate, but found that they are unfounded, because Article 26, point 6, of the Law on Compulsory Motor Liability Insurance, determines the interest rate of 12% from the date of the claim for compensation being submitted. In the concrete case, based on the case file it results that the claimant has submitted the claim for compensation to the respondent on 11.03. 2014, thus according to the abovementioned provision the interest starts to run from this date, therefore, the court of the first instance has applied the substantive law in a correct manner".*

25. On an unspecified date, the respondent party, the Insurance Company "Elsig" submitted a request for revision of the judgment of the Court of Appeals by alleging substantial violations of the provisions of the contested procedure and erroneous application of substantive law, by proposing to the Supreme Court to dismiss the said judgment and remand the case to the court of the first instance for retrial.

26. On 27 February 2019, the Supreme Court by Judgment E.Rev.1/19, decided:

> *"(I) the revision of the respondent, the Insurance Company "Elsig" in Prishtina, submitted against the Judgment Ae.No.57/2013 of the Court of Appeals of Kosovo, of 10.6.2014 is hereby REJECTED as unfounded;*
>
> *(II) The revision of the respondent is accepted only in respect of the decision on the approved interest, and the Judgment Ae.no.24/2016 of the Court of Appeals of Kosovo, of 05.11.2018, and Judgment III. C. No. 150/2015 of the Basic Court in Prishtina-Department for Commercial Matters, of 26.09.2016 are amended, so that the respondent is obliged to pay to the claimant the interest at the rate of 8% on the adjudicated amount of 80, 03704 Euros, starting from 11.03.2014 onwards until the complete payment of the debt".*

27. The Supreme Court found that the courts of the lower instance have erroneously applied the substantive right under Article 382 of the LOR in conjunction with Article 26.7 of the Law on Compulsory Motor Liability Insurance. The Supreme Court further reasoned that Article 26.7 of the Law on Compulsory Motor Liability Insurance excludes the application of the 12% interest rate for debt regression, which is foreseen only for non-processing and delays in the processing of the claims for compensation of the injured persons.

The Supreme Court added that the Applicant is entitled only to the penalty interest under Article 382 of the LOR but not to the "qualified" interest under the provisions applied by the courts of the lower instance.

Applicant's allegations

28. The Applicant alleges that the Judgment [E.Rev.1/2019] of the Supreme Court, of 27 February 2019, has been issued in breach of its fundamental rights and freedoms established in 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.

29. In respect of the allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant adds: *"The Applicant considers that the Judgment [E.Rev.No.1/2019] of the Supreme Court, of 27.02.2019, is characterized by a lack of adequate reasoning as the Supreme Court did not provide sufficient and adequate legal reasoning when changing the Judgment [Ae.No.240/2016] of the Court of Appeals of Kosovo in respect of the manner of calculation of the penalty interest in the field of motor liability insurance (thus changing the position of the Supreme Court regarding the annual interest rate maintained in identical cases)."*

30. The Applicant alleges: *"The reasoning of the Judgment of the Supreme Court challenged by this Referral does not determine at all on what legal basis the Supreme Court has based its decision to change the penalty interest determined by the lower instance court. The Applicant considers that the reference to Article 26 para.7 of the Law No. 04/L018 is inadequate and consequently arbitrary as the above provision [Paragraph 7] does not even address this issue, nor does it correspond to the content cited in the reasoning of the Judgment [E.Rev.No. 1/2019, of 27.02.2019]."*

31. The Applicant alleges that the Supreme Court erroneously refers to paragraph 7 of Article 26 of the Law No.04/L-018 on Compulsory Motor Liability Insurance regarding the rate of the penalty interest, which, according to the Applicant, deals with something completely different compared to what the Supreme Court refers to.

32. The Applicant considers: *"Judgment [E.Rev.No.1/2019 of 27.02.2019 is not based upon certain legal norms for determining the amount of the annual rate. While the reasoning of the challenged Judgment deals with the institution of penalty interest, it does not provide legal grounds when determining the amount of the annual penalty interest rate. The Applicant draws the attention of the Constitutional Court that there is already a long-term practice of the Supreme Court of Kosovo that in principle the institution of penalty interest in the field of compulsory insurance is decided on the basis of the provisions of the Law No. 04/L-018 as a special law "lex specialis".*

33. The Applicant alleges: *"... in the position given in the challenged Judgment of the Supreme Court it did not specify on what legal basis it has relied when finding that "the interest approved by the courts of the lower instance, does*

not apply to the debt regression disputes but only to delays in processing the claims for compensation of damages of the injured persons in extrajudicial proceedings as provided for by Article 26 of the Law in question and Article 5.1 of the CBK Rule No. 3 on Compulsory Motor Liability Insurance of 25 September 2008."

34. In relation to the principle of legal certainty and consistency in decision-making, the Applicant alleges: *"The Applicant considers that this Judgment has violated the principle of legal certainty and consistency in decision-making. The demand for consistency is essential and contributes to the equal treatment of individuals who make the same or, in relevant aspects, similar demands before the Supreme Court of the Republic of Kosovo."*

35. The Applicant adds*: "The Judgment of the Supreme Court not only lacks legal reasoning but is also contrary to its case law because referring to its case law applied in the same situations it results that the Supreme Court on the occasion of addressing the issue of annual penalty interest rate has approved different decisions."*

36. In support of the allegations for violation of the right to a reasoned decision, the Applicant refers to cases from the jurisprudence of the ECHR such as *Souminen v. Finland, Tatishvili v. Russia, Van de Hurk v. The Netherlands*, etc. The Applicant also refers to the decisions of the Court, Case no. KI87/8, Applicant *IF Skadeforsikring*, Judgment of 15 April 2019; Case no. KI97 / 16, Applicant *IKK Classic*, Judgment of 11 January 2018.

37. In support of the allegationsfor consistency in decision-making and legal certainty, the Applicant refers to several decisions of the Supreme Court: (1) [E.Rev. No. 27/2018 of 24 September 2018]; (2) [E.Rev.No.23/2017 of 14 December 2017]; (3) [E.Rev.No.14/2016 of 24 March 2016]; (4) [E.Rev.No. 6/2015 of 19.03.2015]; (5) [E.Rev.No.62/2014 of 21 January 2015]; (6) [E.Rev.No. 20/2014 of 14 April 2014]; (7) [E.Rev.No-48/2014 of 13 May 2014], (8) [E.Rev.No.55/2014 of 3 November 2014].

38. In this respect, the Applicant adds: *"Based on the comparison of these Judgments of the Supreme Court, it results that this Court has continuosly and consistently applied the same legal position in respect of the determination of the legal basis regarding the application of the annual interest rate. Therefore the judgment [E.Rev.No.1/2019 dated 27.02.2019] of the Supreme Court in a completely opposite way deviates from the current case law, without providing a single line and any explanation as to why the Court deviates from the current legal interpretation regarding the same court matter that has been the subject of review in the Supreme Court of Kosovo. Therefore, this lack of consistency of the case law of the highest instance court in the Republic of Kosovo directly violates the principle of legal certainty of the Applicant."*

39. The Applicant states: *"The Applicant considers that the failure of the Supreme Court of Kosovo to determine the legal basis regarding the determination of the annual interest rate in the field of motor liability insurance accompanied*

by a lack of legal reasoning related to the deviation from the practice of the Supreme Court so far in similar cases, clearly constitutes an interference with the exercise of the right to a fair trial under Article 31 of the Constitution of Kosovo and Article 6 para.1 of the ECHR regarding the reasoning of the court decision."

40. Finally, the Applicant requests from the Court: "[...] *after the review and assessment of the Applicant's constitutional allegations, to annul the Judgment [E.Rev.No. 1/2019] of the Supreme Court, of 27.02.2019, due to a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with para.1 of Article 6(Right to a fair trial) of the European Convention on Human Rights whilst the Judgment of the Supreme Court [E.Rev.No.1/2019 of 27.02.2019] to be remanded for reconsideration."*

Relevant Legal Provisions

LAW ON OBLIGATIONAL RELATIONSHIPS NO.04/L-077

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.

SUB-CHAPTER 3

DELAY IN PERFORMANCE OF PECUNIARY OBLIGATIONS PENALTY INTEREST

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.

SUB-CHAPTER 6

TRANSFER OF INSURED PERSON'S RIGHTS AGAINST LIABLE PERSON TO INSURANCE AGENCY (SUBROGATION)

Article 960
Subrogation

1. Upon the payment of compensation from insurance all the insured person's rights against a person that is in any way liable for the damage up to the amount of the insurance payout made shall be transferred by law alone to the insurance agency.

2. If through the fault of the insured person such a transfer of rights to the insurance agency is partly or wholly made impossible the insurance agency shall to an appropriate extent be free of its obligations towards the insured person.

3. The transfer of rights from the insured person to the insurance agency may not be to the detriment of the insured person; if the insurance payout obtained from the insurance agency is for any reason lower than the damage incurred the insured person shall have the right to obtain a payment from the liable person's assets for the remaining compensation before the payment of the insurance agency's claim deriving from the rights transferred thereto.

4. Irrespective of the rule on the transfer of the insured person's rights to the insurance agency, the rights shall not be transferred thereto if the damage was inflicted by a person who is a direct relative of the insured person, a person for whose action the insured person is liable or who lives in the same household, or a person who works for the insured person, unless any of these inflicted the damage intentionally.

5. If any of those specified in the previous paragraph was insured against liability the insurance agency may demand that his/her insurance agency reimburse the amount paid to the insured person.

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

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. 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.

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.

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

Article 14
Competences and Reponsibilities of the President and Vide-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".

Rule 3 on Amending Rule on Compulsory Third Party Liability Motor Vehicle Insurance adopeted by the Governing Board of the Central Bank of the Republic of Kosovo on 25 September 2008

Section 5
Claim Settlement

5.1 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.

Legal Opinion on Interest adopted at the General Meeting of the Supreme Court of the Republic of Kosovo of 1 December 2020, based on Article 26 paragraph 1 point 1.4 of the Law on Courts

FIRST PART
Applicable Law

I. *For obligational relationships that have arisen before 20.12.2012, the provisions of the Law of Obligations (Official Gazette of the SFRY, no. 29/78, 39 / 85, 57 / 89) shall apply in respect of the interest).*

II. *For obligational relationships that have arisen after 19.12.2012, the provisions of the Law on Obligational Relationships, No. 04 / L-077, Official Gazette of the Republic of Kosovo, no. 19/19, of 19.06.2012, shall apply in respect of the interest.*

SECOND PART

IV. *For obligational relationships that have arisen before 20.12.2012, the rate/amount of annual interest for all claims is set as for the funds deposited in the bank, for a period over one year, without a specific destination.*

V. [...]

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

IX. For creditors' claims for compensation of damage on all bases of liability when creditors are entitled to compensation of damage, the amount of interest is set according to point IV (four) and VI (six) of this legal opinion, depending on which law has been applicable (has been in force) at the time when the creditor in the capacity of debtor has performed the obligation to the third party.

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

- *When claims submitted to Insurance Companies, for damage to persons, are not processed within 60 days;*

- *When claims submitted to Insurance Companies, for damage to property, are not processed within 15 days;*

The reasoning of the Legal Opinion

Reasoning for point IX (nine) of the legal opinion - *In the case law, frequently appear cases of creditors for reimbursement of damages, who have fulfilled their obligations in advance to third parties, which are mainly related to insurance 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 degree/rate of penalty interest for cases of reimbursement claims. This has happened because the creditors when submitting claims for compensation of damage by referring to Article 26 of the Law on Compulsory Motor Liability Insurance, No.04/L-018, published in the Official Gazette no.4, on 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 the annual rate/penalty interest f 12% cannot be applied in all cases. This is because creditors' claims for damages mainly refer to situations of civil-legal relations (non-contractual relationship for the creditor and the debtor), therefore, in such a case according to the assessment of the Supreme Court of Kosovo, the annual interest must be paid according to IV (four) and VI (six) of this legal opinion. This means that in case the creditor has performed the obligation to the third party, prior to 20.12.2012, the interest rate will be applied as for the funds deposited in the bank for a period over one year without a specific destination, while in case the creditor has performed the obligation to the third party after 19.12.2012, then the penalty interest shall be applied at a rate of 8%.*

In addition to what is stated above, the Supreme Court considers that the rate/amount of the annual penalty interest of 12%, cannot be applied also due to the fact that according to the provisions of the Law on Compulsory Motor Liability Insurance, No.04/L-018, promulgated in the Official Gazette no. 4, on 14 July 2011, which entered into force on 30 July 2011, the annual interest rate is 12%, is taken into account due to the negligence of insurance companies (which thereupon appear as regressive creditors), because had the regressive creditors processed the claims of third parties in accordance with their legal responsibilities, the penalty interest rate of 12% could have not been applied against them in the court decisions, instead there would have been applied the degree/rate of 8% as applied for funds deposited for a period over a year without a specific destination, depending on which law has been in force at the time of the creation of the obligational relationship.

Admissibility of the Referral

41. 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.

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

Article 21
[General Principles]

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

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."

43. 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..."

44. In assessing the fulfillment of the admissibility criteria as stated above, the Court notes that the Applicant is entitled to file a constitutional complaint, by calling uponthe alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as for legal persons. (See, the cases of Court KI118/18, Applicant, *Eco Construction sh.pk*, Resolution on Inadmissibility, of 10 September 2019, paragraph 29; and KI41/09, Applicant, *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility, of 3 February 2010, paragraph 14). Consequently, the Court finds that the Applicant is an authorized party challenging an act of public authority, namely the Judgment [E.Rev. 1/19] of the Supreme Court, of 27 February 2019, after having exhausted all legal remedies provided by law.

45. The Court notes that the Judgment [E.Rev. 1/19] of the Supreme Court was served on the Applicant on 14 March 2019 whilst the Referral under review was submitted on 2 July 2019, namely within the legal deadline provided by Article 49 of the Law.

46. The Court also considers that the Applicant has clearly indicated which rights guaranteed by the Constitution and the ECHR have been violated to his detriment, pursuant to the criteria established in Article 48 of the Law.

47. Therefore, the Court comes to the conclusion that the Applicant is an authorized party; which has exhausted all legal remedies; it has respected the requirement of submitting the request within the legal deadline; has accurately clarified the alleged violations of fundamental human rights and freedoms, and specified which concrete act of the public authority is being challenged.

48. Taking into consideration the Applicant's allegations and its arguments, the Court considers that the Referral raises serious constitutional issues and their determination depends on review 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 grounds have been established to have the Referral declared inadmissible (see, the case of Constitutional Court No. KI97/ 16, Applicant *IKK Classic*, Judgment of 4 December 2017).

49. The Court declares the Referral admissible for review based on the merits.

Merits of the Referral

50. The Court recalls that the Applicant alleges a violation of the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant alleges that the challenged Judgment of the Supreme Court violates his rights to a reasoned decision which has subsequently caused also the violation of the principle of legal certainty. According to the Applicant, these violations have occurred because the Supreme Court in its Judgment did not provide sufficient and adequate reasoning for the change of position in respect of the calculation of penalty interest, a position which it has until then consistently applied in its practice.

51. The Applicant further alleges that the fact as to the legal basis on which the Supreme Court has based its judgment on the change of the interest rate adjudicated by the lower instance courts remains unclear and unreasoned.

52. The Applicant adds that the Judgment of the Supreme Court lacks the relevant reasoning on the new approach in this case, regarding the institution of penalty interest in the legal relationships of compulsory motor liability insurance, because in the practice so far the Supreme Court had decided differently in the same cases.

53. Taking into consideration the allegations raised in the Referral under review, the Court refers to Article 31 (1) and (2) [Right to Fair and Impartial Trial] of the Constitution, which provides that:

> *"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".

54. The Court also refers to Article 6 (1) (Right to a fair trial) of the ECHR, which provides:

> *"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."*

55. The Court reiterates that on the basis of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution in accordance with the case law of the ECtHR. Consequently, in regard to the allegations raised for violation of Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR, the Court will refer to the general principles established in the consolidated jurisprudence of the ECHR.

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

56. The Court recalls, first of all, that the guarantees embodied in Article 6 paragraph 1 of the ECHR include the obligation of the courts to provide sufficient reasons for their decisions. A reasoned court decision shows to the parties that their case has indeed been examined (see the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph).

57. The Court also emphasizes that according to the case law of the ECtHR, Article 6 paragraph 1 obliges courts to reason their decisions, however, this cannot be interpreted in such a way as to require the courts to provide a detailed answer to each allegation (see, the cases of the ECtHR, *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994, paragraph 61; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 26; *Jahnke and Lenoble v. France*, Decision on Admissibility, of 29 August 2000).

58. In this regard, the ECtHR adds that even though the domestic court has a certain margin of appreciation when choosing arguments and admitting evidence, it also obliged to justify its actions by giving reasons for its decisions (see case of the ECtHR, *Suominen v. Finland*, Judgment of 1 July 2003, paragraph 36).

59. 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 can the reasoning be unclear. This applies in particular to the reasoning of the court decision when deciding upon the legal remedy in which the legal positions presented in the decisions of the lower instance court have been changed (see, *Van de Hurk v. the Netherlands,* cited above, paragraph 61).

60. The Court wishes to reiterate that the notion of a fair trial, in accordance with the case law of the ECtHR, 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, the ECtHR case *Helle v. Finland*, Judgment of 19 December 1997, para. 60).

61. The Court also 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 (see, the cases of Constitutional Court: no. KI72/12, Applicants *Veton Berisha dhe Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; no. KI135/14, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 58, and KI 97/16, Applicant *IKK Classic*, Judgment of 11 January 2018).

(ii) General principles related to the legal certainty and consistency of the case law

62. The ECtHR in its case-law has established that it is not its function to deal with errors of fact or law allegedly committed by a domestic court, unless and in so far as such errors may have infringed the rights and freedoms protected by the ECHR (see *García Ruiz v. Spain*, cited above, paragraph 28). Nor is it its function to compare, except in cases of apparent arbitrariness, the different decisions of national courts, even if given in apparently similar proceedings, it must respect the independence of those courts (see, the case of ECtHR *Ādamsons v. Latvia*, Judgment of 24 June 2008, paragraph 118).

63. The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the ECHR (see ECHR cases *Santos Pinto v. Portugal*, Judgment of 20 May 2008, paragraph 41; and *Tudor Tudor v. Romania*, cited above, paragraph 29).

64. However, the ECtHR, in its case law has established the criteria which it uses to assess whether the contradictory decisions(deviations from the practice) of the national courts, adjudicating in the last instance, violate the requirement of a fair trial provided for by Article 6 paragraph 1 of the ECHR, and those criteria are: ***(i)*** *whether "profound and long-standing differences" exist in the case-law of the national courts;* ***(ii)*** *whether the domestic law provides for a mechanism to overcome these divergences, and* ***(iii)*** *whether that mechanism has been applied and, if so, to what extent* (see the cases of the ECtHR, *Iordan Iordanov and Others v. Bulgaria*, Judgment of 2 July 2009, paras. 49-50; *Beian v. Romania* (no.1), Judgment of 6 December 2007, paras.34-40; *Ştefan*

and Ştef v. Romania, Judgment of 27 January 2009, paras. 33-36; *Schwarzkopf and Taussik v Czech Republic*, Decision on Admissibility, of 2 December 2008; *Tudor Tudor*, cited above, paragraph 31; and *Ştefănică and Others v. Romania*, Judgment of 2 November 2010, paragraph 36).

(iii) Application of general principles of a reasoned decision and legal certainty to the circumstances of the present case

65. The Court notes that the Applicant's main appellate allegation is that the Supreme Court did not provide clear and sufficient reasons on which it has based its decision to change the judgments of the lower courts, in respect of the calculation of the penalty interest rate in the Applicant's case and did not reason why it had issued a different decision compared to its previous practice, thus infringing the principle of legal certainty guaranteed by Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR.

66. The Court considers that in the present case the allegations for a reasoned decision and legal certainty, due to the nature of the case and their interrelationship, must be examined in the context of a single reasoning. The Court recalls that the Supreme Court (Judgment E.Rev. 1/19) accepted the respondent's revision only in respect of the decision on the approved interest and amended the Judgment (Ae. No. 240/2016) of the Court of Appeals, of 5 November 2018, and Judgment (III. C. no. 150/2015) of the Basic Court, of 26 September 2016.

67. In this regard the Supreme Court stated: *"("(I) the revision of the respondent, the Insurance Company "Elsig" in Prishtina, submitted against the Judgment Ae.No.57/2013 of the Court of Appeals of Kosovo, of 10.6.2014 is hereby REJECTED as unfounded; (II) The revision of the respondent is accepted only in respect of the decision on the approved interest, and the Judgment Ae.no.24/2016 of the Court of Appeals of Kosovo, of 05.11.2018, and Judgment III. C. No. 150/2015 of the Basic Court in Prishtina-Department for Commercial Matters, of 26.09.2016 are amended, so that the respondent is obliged to pay to the claimant the interest at the rate of 8% on the adjudicated amount of 80, 03704 Euros, starting from 11.03.2014 onwards until the complete payment of the debt".*

68. In this regard, the Court reiterates that the Applicant has submitted eight (8) decisions of the Supreme Court in similar cases dealing with debt regression and penalty interes in support of his allegation for violation of the principle of legal certainty: (1) [E.Rev.No.27/2018 of 24 September 2018]; (2) [E.Rev.No.23 / 2017 of 14 December 2017], (3) [E.Rev.No.14/2016 of 24 March 2016]; (4) [E.Rev.No. 6/2015 of 19.03.2015], (5) [E.Rev.No.62/2014 of 21 January 2015], (6) [E.Rev.No.20/2014 of 14 April 2014]; (7) [E.Rev.No-48/2014 of 27 October 2014], (8) [E.Rev.No.55/2014 of 3 November 2014].

69. In the following, the Court will reproduce the relevant parts of some of the above decisions.

70. In the relevant part of the Judgment E.Rev.no. 20/2014 of 14 April 2014, the Supreme Court had reasoned: *"Even the revision claims of the respondent that the courts of lower instance have erroneously applied the substantive law when accepting the claimant's right to interest on the approved amount at the rate of 12% per annum are unfounded, because the courts of the lower instance have correctly applied the substantive law, specifically the provision of Article 277 of the LOR in conjunction with Article 26 point 6 of the Law on Compulsory Motor Liability Insurance No. 04 / L-018 whereby it is provided that 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".*

71. In the relevant part of the Judgment E. Rev. no. 62/2014 of 21 January 2015, the Supreme Court had reasoned: *"This Court assesses that the court of the second instance has correctly applied the substantive law when accepting the respondent's right to the interest on the amount of the main debt at the rate of 12% by calculating from 14.6.2010 until the definitive payment because according to the provision of article 277 of the LOR in conjunction with Article 26.6 of the Law on Compulsory Motor Liability Insurance No. 04/L-018, the envisaged interest at the rate of 12% per annum is calculated for each day of delay until the complete payment of compensation by the insurer, counting from the date of the claim for compensation being submitted."*

72. In the relevant part of the Judgment E.Rev. 23/2017 of 14 December 2017, the Supreme Court had reasoned: *"This interest rate was foreseen until the entry into force of the Law on Compulsory Motor Liability Insurance (No.04/L-018) which entered into force on 30.07.2011 and this date should be calculated interest of 12% based on Article 26, point 6. The court of the second instance has calculated the interest on the adjudicated amount at the rate as paid by the banks for the funds deposited for a period over one year without a certain destination as well as the interest on the basis of Rule 3 of the Central Bank of Kosovo (CBK) and the Law on Compulsory Motor Liability Insurance."*

73. In the the relevant part of the Judgment E.Rev.No.55/2014 of 3 November 2014, the Supreme Court had reasoned: *"The Judgment Ae.nr.46/2013 of the Court of Appeals of Kosovo, of 10.05.2014 had rejected the respondent's appeal and upheld the Judgment C.no.282/2012 of the Commercial Court of the Prishtina District, of 09.10.2012, approving the claimants' statement of claim and obliging the respondent to pay the amount of 14,041.58 € in the name of regressive debt along with the annual interest at the rate of 12% [...] The Supreme Court of Kosovo, having reviewed the case file and the challenged judgment, pursuant to the provision of Article 215 of the LCP, assessed that: The revision is unfounded.".*

74. In the the relevant part of the Judgment E.Rev.no.48/2014 of 27 October 2014, the Supreme Court had reasoned: *"This Court considers that the courts of the lower instance have correctly applied the substantive law when accepting the claimant's right to interest on the amount of the main debt at the annual rate of 20% starting from 19.11.2010 until 28.07.2011 and at the interest rate of 12% starting from 29.07.2011 until the definitive payment because according to the provision 277 of LOR and Article 26.6 of the Law on Compulsory Motor Liability Insurance No. 04/L-018, it is provided that in the event of non-compliance with the time limits from paragraph 1 of this Article, and non-fulfillment of the obligation of the advance payment under paragraph 4 of this Article, the liable insurer shall be considered to be late in fulfilling the compensation obligation, hence it will be charged with an interest rate. This interest rate shall be paid at twelve (12%) percent of the annual interest rate and shall be counted for each day of delay until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim."*

75. In the relevant part of the Judgment E. Rev.no.6/2015, of 19 March 2015, the Supreme Court in had reasoned: *"By the Judgment Ae.no.162/2013 of the Court of Appeals of Kosovo, of 10.06.2014, the appeal of the respondent was rejected as ungrounded, whilst the Judgment C.no.339/2019 of the Basic Court in Prishtina-Department for Commercial Matters, of 16.07.2013 was upheld, whereby the claimant's statement of claim was approved as grounded, and the respondent was obliged to pay the amount of 17,924, 35 €, in the name of compensation for damage-casco regression relating to the repair of the damaged vehicle type "BMW 5" with license plates ES VS 2009, involved in the accident of 25.08.2009, whose owner was V.J. who had insured this vehicle with the respondent with casco insurance, along with a penalty interest of 12% starting from 22.07.2010 until the definitive payment and the costs of proceedings in the amount of 1,134.29 € [...] The Supreme Court of Kosovo, having reviewed the second instance judgment challenged by revision, pursuant to the Article of the Law on Contested Procedure (LCP), found that: The respondent's revision is unfounded."*

76. In the relevant part of the Judgment E.Rev.no.14/2016 of 24 March 2016, the Supreme Court had reasoned: *"By the Judgment Ae.no.40/2015 of the Court of Appeals of Kosovo, of 11.12.2015, the appeal of the respondent was rejected as unfounded while the judgment C.no.544/2013 of the Basic Court in Prishtina-Department for Commercial Matters, of 23.12.2014 was upheld, which in its part I of the enacting clause had approved the claimant's statement of claim as grounded seeking to oblige the Insurance Company "Insig" having its seat in Prishtina, to compensate the claimant in the amount of 42,243.41 €, in the name of regression from motor liability insurance with an interest rate of 12% per annum, calculated from 14.1.2010 until the definitive payment, within a term of 7 days from the day of the service of this judgment [...] The Supreme Court of Kosovo, having reviewed the judgment challenged under Article 215 of the LCP, has found that: The revision is unfounded."*

77. In the relevant part of the Judgment E.Rev.no.27/2018 of 24 September 2018, the Supreme Court had reasoned: *"Whereas, the Supreme Court of Kosovo,*

considers that the judgment of the court of the second instance, in respect of the adjudicated interest, was issued by erroneous application of substantive law, therefore, it changed the same in this part, by upholding the judgment of the court of the first instance. This is for the reason that the court of the first instance has correctly applied the substantive law when accepting the claimant's right to interest at the rate of 20% starting from 24.11.2011, until 29.07.2011 and interest at the rate of 12% starting from 29.07.2011 until the definitive payment because according to the provision of Article 277 of the LOR and Article 26.6 of the Law on Compulsory Motor Liability Insurance, which provision provides that in the event of non-compliance with the time limits from paragraph 1 of this Article, and non-fulfillment of the obligation of the advance payment under paragraph 4 of this Article, the liable insurer shall be considered to be late in fulfilling the compensation obligation, hence it will be charged with an interest rate. This interest rate shall be paid at twelve (12%) percent of the annual interest rate and shall be counted for each day of delay until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim."

78. Based on above, the Court will use the test prescribed by the jurisprudence of the ECtHR which determines: (i) whether "profound and long-standing diferencës" exist in the case-law of the national courts; (ii) whether the domestic law provides for a mechanism to overcome these divergences, and (iii) whether that mechanism has been applied and, (iv) if the challenged decision of the Supreme Court meets the criteria of a reasoned decision in accordance with the jurisprudence of the ECtHR and of this Court.

79. The Court again refers to the Law on Courts No. 06/L-054, which in Article 14 provides for the mechanism for a fair administration of justice and review of changes in the case law.

Article 14
Competences and Reponsibilities 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."

80. The Court reiterates that in its case law on many occasions it has held that questions of fact and questions of interpretation and application of law are within the domain of the regular courts and other public authorities within the meaning of Article 113.7 of the Constitution and as such are a matter of legality, unless and in so far, such questions result in a breach of fundamental human rights and freedoms or create an unconstitutional situation. (see, *inter alia*, the case of Constitutional Court No. KI33/16, Applicant *Minire Zeka*, Judgment of 4 August 2018, paragraph 91).

81. The Court considers that the Supreme Court is the last and highest instance of the regular judiciary, and as such, it should take care of the harmonization of the case law in the Republic of Kosovo as well as the fair administration of justice. It is the obligation of the Supreme Court that in relevantly identical cases, to the extent possible, its decisions be predictable and characterized by the regularity of the results. The predictability and regularity of Supreme Court decisions would be equal to the benefit of the complainants and the lower instance courts.

82. The Court notes that the Supreme Court in the challenged Judgment has determined: (i) that the legal provisions relevant to the Applicant's case are Article 382 of the LOR in conjunction with Article 26.7 of the Law on Motor Liability; (ii) that the interest of 12% does not apply in cases of debt regression but only when addressing the claims for damages of the injured persons in extrajudicial proceedings; (iii) that the interest of 12% applies only to non-processing and delays in processing the claims for compensation of the injured persons and not for debt regression; and, that (iv) for these reasons, the Applicant is entitled to the penalty interest as provided for in Article 382 of the LOR (8%) and not to the "qualified" interest (12%).

83. In this respect, the Court refers to the relevant part of the judgment of the Supreme Court, which states: *"... the judgment of the court of the first and second instance concerning the part relating to the adjudicated interest contains an erroneous application of the substantive law from Article 382 of the LCT in conjunction with Article 26.7 of the Law on Compulsory Motor Liability Insurance [...] the erroneous application of the substantive law consists in the fact that as stated above, the claimant's statement of claim for damages as well as the claim was submitted at the time when the Law on Compulsory Motor Liability Insurance has entered into force. The interest approved by the courts of the lower instances is not legally applied in debt regression disputes, but only in the claims for compensation of damage of the injured persons in the extrajudicial proceedings as provided for in Article 26 of the said law and Article 5.1 of the CBK Rule No. 3 on Amending Rule on Compulsory Third Party Liability Motor Vehicle Insurance of 25 September 2008, provisions which the courts of the lower instance have referred to. Those interest rates which have been applied by the court of the first and second instance are foreseen in order to discipline the insurance companies in the insurance relationships against the claims for compensation of the injured persons, which the insurance companies are obliged to handle on an urgent basis within the deadlines provided for by the above provisions. Paragraph 7 of Article 26 of the Law on Compulsory Motor Liability Insurance, excludes the application of the interest rate of 12% for debt regression, this interest is provided only for non-processing and the delay in processing the claims for compensation of the injured persons. Based on this it results that the claimant is entitled only to the penalty interest provided for in Article 382 of the LOR and not to the "qualified" interest according to the provisions applied by the court of the first and the second instance. Given that the claimant with the submission of 11.3.2014 has requested the debt regression from the respondent, it turns out that from this date the respondent has been in delay*

since it failed to fulfil the obligation within the deadline until the definitive payment".

84. The question of whether the Applicant is entitled to 12% or 8% of the penalty interest is a matter of application and interpretation of the law and of the discretion of the Supreme Court, and as such, they do not come in itself, in contradiction with the right to a fair and impartial trial, unless there results to exist a flagrant breach of fundamental human rights and freedoms, which obviously has not occurred in the case under review.

85. Based on the foregoing, the Court considers that the Supreme Court has provided the legal basis and explained in which cases does the legal norm determining the penalty interest of 12% respectively of 8% apply and why in the Applicant's case is applied the norm that determines the penalty interest of 8%. In the challenged judgment of the Supreme Court, there is a logical connection between the legal basis, the reasoning and the conclusions drawn which means that the challenged judgment contains all the components of a reasoned decision.

86. In regard to the consistency of the case-law, based on the triple test established by the ECtHR, the Court finds: (i) that in the present case the existence of "deep and long-standing" differences regarding the consistency of the case-law of the Supreme Court has not been proved; (ii) that there is a mechanism for a fair administration of justice and for review of changes in the case law (see, the Law on Courts No.06/L-054, Article 14. 2.10); and that; (iii) on 1 December 2020, the Supreme Court has issued a "Legal Opinion on Interest related to the Applicable Law, Interest Rate and Calculation Period" based on Article 14. 2.10 of the Law on Courts.

87. In this regard, the Court underlines that Article 31 of the Constitution in connection with Article 6 (1) of the ECHR does not grant the acquired right to the consistency of the case law. The development of the case law, in itself, is not contrary to the fair administration of justice as the failure to maintain a dynamic and evolutionary approach would hinder the reform or improvement (see, the ECtHR cases *Nejdet Şahin and Perihan Şahin v. Turkey*, Judgment of 20 October 2010, paragraph 58; *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 116). Differences in the case law are, by nature, an inherent consequence of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. The role of the Supreme Court is precisely to resolve such conflicts (see the case of the ECHR, Beian v. Romania (no. 1), cited above, paragraph 37).

88. With regard to the decisions of the Supreme Court which were submitted by the Applicant in order to demonstrate the conflicting positions of the Supreme Court and to compare them with the challenged Judgment in the present case, the Court states that it is not its function to compare those decisions with the challenged judgment, except in cases of apparent arbitrariness, which did not occur in the circumstances of the present case, in particular, by taking into consideration the respect for the independence of the regular courts (see,

mutatis mutandis, the case of the ECtHR, *Ādamsons v. Latvia*, cited above, paragraph 118).

89. In view of the above, the Court concludes that the challenged Judgment of the Supreme Court is in compliance with the right to a reasoned decision and the principle of legal certainty because: (i) it explains that the interest rate of 12% is applied only for non-processing and delays in processing the claims for compensation of the injured persons and not for debt regression; (ii) the Applicant is entitled to the interest envisaged under Article 382 of the LOR at the rate of 8% and not to the "qualified" interest at the rate of 12% and, that (iii) the Supreme Court on 1 December 2020 has issued the "Legal Opinion on Interest related to the Applicable Law, Interest Rate and Calculation Period" based on Article 14. 2.10 of the Law on Courts.
90. Consequently, the Court finds that 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

91. In relation to the allegation for violation of the right to a reasoned decision, the Court assessed that the Supreme Court (i) has provided the legal basis and explained why in the Applicant's case is applied the penalty interest at the rate of 8%; (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 the challenged judgment of the Supreme Court meets the condition of a reasoned decision; and, that (iv) whether the Applicant is recognized the right to 12% or 8% of the penalty interest is a matter of application and interpretation of the law and of the discretion of the Supreme Court, and as such, in itself, they do not come into contradiction with the right to a fair and impartial trial.

92. In relation to the allegation for a violation of the principle of legal certainty, the Court found: (i) that in the present case the existence of "deep and long-standing" differences in respect of the consistency of the case law of the Supreme Court has not been proved; (ii) that there is a mechanism that provides for a fair administration of justice and review of changes in the case law (see, the Law on Courts No. 06/L-054, Article 14. 2.10); (iii) The Supreme Court on 1 December 2020 has issued a "Legal Opinion on Interest related to the Applicable Law, Interest Rate and Calculation Period" based on Article 14. 2.10 of the Law on Courts (iv) that the possibility of conflicting decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction; (v) the question as to which law is to be applied in the circumstances of the present case is the prerogative and duty of the Supreme Court; and, that (v) the role of the Supreme Court is precisely to resolve such conflicts.

93. Finally, the Court finds 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, pursuant to Article 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 the sesion held on 28 April 2021, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible in a unanimous manner;

II. TO HOLD, by majority vote, that the Judgment E E. Rev. no. 1/2019 of the Supreme Court of the Republic of Kosovo, of 27 February 2019, is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO NOTIFY this decision to the Parties, and in accordance with Article 20.4 of the Law, to have the decision published in the Official Gazette;

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Remzije Istrefi-Peci Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.