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

Prishtina, 14 June 2021
Ref. no.:AGJ 1805/21

JUDGMENT

in

Case No. KI235/19

Applicant

"Allianz Suisse Versicherungs- Gesellschaft AG"

Constitutional review of Judgment E. Rev. No. 32/2019 of the Supreme Court of Kosovo of 31 July 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 "*Allianz Suiss Versicherungs- Gesellschaft AG*" with its seat in Zurich of Switzerland, represented by ICS Assistance L.L.C., through Besnik Mr. Nikqi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges constitutionality of Judgment [E. Rev. No. 32/2019] of 31 July 2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ae. No. 289/2017] of 31 January 2019 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [I. C. No. 238/2015] of 31 October 2017 of the Department for the Commercial Matters of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The challenged Judgment of the Supreme Court was served on the Applicant on 21 August 2019.

Subject matter

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

Legal basis

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 Court

6. On 20 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 30 December 2019, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban.

8. On 20 January 2020, the Court notified the Applicant about the registration of the Referral and requested him the power of attorney for representation.

9. On 3 February 2020, the Applicant submitted to the Court the power of attorney for representation.

10. On 4 February 2020, the Court notified the Supreme Court about the registration of the Referral and sent it a copy of the Referral.

11. On 22 October and 24 November 2020, respectively, the Court sent a letter to the Supreme Court, regarding a number of cases submitted to the Court challenging Judgments of the Supreme Court pertaining to the determination of default interest in cases of claims for compensation of damage based on the right to subrogation as a result of traffic accidents caused in the Republic of Kosovo. Clarifying that the respective cases before the Court, *inter alia*, challenge the violation of legal certainty, as a result of conflicting decisions of the Supreme Court in similar cases, the Court requested clarification whether (i) the Supreme Court has issued a principled position regarding compensation of damage and setting default interest in relation to claims under the right of subrogation; and if this is not the case (ii) to notify the Court regarding the case law of the Supreme Court, in what cases Article 382 (Penalty interest) of Law no. 04/L-077 on Obligational Relationships (hereinafter: the LOR) is applied and in what cases paragraph 6 of Article 26 (Compensation claims procedure) of Law no. 04/L-018 on Compulsory Motor Liability Insurance (hereinafter: the Law on Compulsory Insurance) is applied.

12. On 18 November 2020, the Court (i) requested from the Basic Court the complete case file; and (ii) notified the Kosovo Security Bureau (hereinafter: the KSB) about the registration of the Referral and enabled it to submit comments, if any, to the Court.

13. On 19 November 2020, the Basic Court submitted the complete case file to the Court.

14. On 1 December 2020, the Supreme Court (i) before the Court clarified the issues raised through the abovementioned letter; and (ii) submitted to the Court the Legal Opinion on the Interests of 1 December 2020 of the Supreme Court (hereinafter: the Legal Opinion of the Supreme Court).

15. On 28 April 2021, the Review Panel considered the report of Judge Rapporteur Gresa Caka-Nimani and, unanimously, recommended to the Court the admissibility of the Referral and the assessment of the case on merits.

16. On the same date, the Court unanimously voted that the Referral is admissible; but by a majority of votes, found 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.

17. On the same date, the Judge Rapporteur in accordance with paragraph (4) of Rule 58 (Deliberations and Voting), of the Rules of Procedure considering that he was not among the judges that found as above, asked the President of the Court that another judge be appointed, by a majority, to prepare the Judgment without constitutional violation.

18. On the same date, in accordance with the abovementioned rule, the President of the Court appointed Judge Safet Hoxha, as one of the judges of the Review Panel, to prepare the Judgment without constitutional violation.

19. On xx xx xx, Judge Safet Hoxha presented the Judgment before the Court.

Summary of facts

20. On 16 September 2009, Sh.Z., who was insured by the Applicant, lost her life as a result of a traffic accident caused by H.K., who was insured by BKS. The family of Sh.Z. was compensated by the Applicant in the amount of 36,000.00 euro.

21. Based on the case file it also results that (i) BKS and the family of Sh.Z. had reached an out-of-court settlement for compensation of material and non-material damage related to the above mentioned accident in the amount of 27,000 euro; (ii) on 10 March 2015, the Applicant addressed the BKS, that on the basis of the right to subrogation defined by Article 280 (Performing with transferring the rights to perfomer (subrogation)) of the LOR, be reimbursed the amount of 36,000.00 euro; and (iii) considering that this request was not met, on 5 June 2015, the Applicant filed a lawsuit with the Basic Court.

22. On 31 October 2017, the Basic Court by the Judgment [I. C. No. 238/2015], (i) approved the Applicant's statement of claim; (ii) obliged the BKS, based on the relevant expertise, to pay to the Applicant the amount of compensation of 36.000.00 euro; (iii) obliged the BKS to pay to the Applicant the interest of twelve percent (12%) per year, starting from 5 June 2015 until the final payment; and (iv) obliged the BKS to pay the costs of the proceedings. The Basic Court, by its Judgment, justified the determination of a penalty interest of twelve percent (12%) per year, based on paragraph 6 of Article 26 of the Law on Compulsory Insurance.

23. The Basic Court, by the abovementioned Judgment, addressed, *inter alia*, (i) the allegations regarding the statute of limitations for the lawsuit filed before it by the BKS; and (ii) those relating to the determination of the amount of default interest. With regard to the first case, the relevant Judgment clarifies that based on Article 377 (Claiming Damages for Injury or Loss Caused by a Criminal Offence) of the Law on Obligations of 1978 (hereinafter: the old LOR), considering that the damage was caused by a criminal offense, as confirmed by Judgment [P. No. 212/09] of 15 May 2010 of the District Court in Prizren, by which the person H.K. was convicted for the criminal offense of endangering public traffic defined by paragraph 5 of Article 297 (Endangering Public Traffic) of the Provisional Criminal Code of Kosovo, the statute of limitations set for the respective criminal offenses apply and consequently in the circumstances of the case, the claim does is not statute-barred. Regarding the second issue, the relevant Judgment clarifies that the default interest of twelve percent (12%) per year, is determined through paragraph 6 of Article 26 of the Law on Compulsory Insurance.

24. On 13 November 2017, the BKS filed an appeal with the Court of Appeals against the abovementioned Judgment of the Basic Court, alleging essential violation of the provisions of the contested procedure, erroneous or incomplete determination of factual situation and erroneous application of substantive law, proposing that the challenged Judgment be modified or quashed and that the matter be remanded for retrial. Whereas, on 17 November 2017, the Applicant responded to the complaint and proposed that the BKS complaint be

rejected as ungrounded. The appeal and response to the appeal, *inter alia*, argue and counter-argue issues related to (i) the statute of limitations on the statement of claim; (ii) the active legitimacy of the claimant, namely the applicant; and (iii) erroneous determination of factual situation. Regarding the amount of default interest, the Applicant stated that based on Article 382 of the LOR, the amount of default interest is eight percent (8%) per year, unless otherwise provided by special law, while in matters related to Compulsory Motor Third Party Liability Insurance, a special law is the Law on Compulsory Insurance, based on Article 26 of which, the amount of default interest is twelve percent (12%) per year.

25. On 31 January 2019, the Court of Appeals, by Judgment [Ae. No. 289/2017], rejected as ungrounded the appeal of the BKS and upheld the Judgment of the Basic Court.

26. On 13 March 2019, the BKS filed an appeal against the Judgment of the Court of Appeals with the Supreme Court, alleging essential violation of the provisions of the contested procedure and erroneous application of substantive law, proposing that the revision be upheld as grounded and the Judgment of the lower courts be annulled and the matter be remanded for retrial. The Applicant, on 2 April 2019, submitted a response to the revision and proposed that it be rejected as ungrounded.

27. On 31 July 2019, the Supreme Court by Judgment [E. Rev. No. 32/2019] of (i) rejected as ungrounded the revision of the BKS regarding the principal debt on the basis of subrogation; while (ii) accepted as grounded the revision regarding the default interest, obliging the BKS to pay the interest of eight percent (8%) from 5 June 2015 until the final payment. In the context of the latter, the Supreme Court reasoned, *inter alia,* that (i) paragraph 7 of Article 26 of the Law on Compulsory Insurance, "*excludes the application of 12% interest for debt repayment, this interest provided only for non-treatment and the delay in processing the claims of injured persons for compensation*"; and consequently, (ii) the claimant, namely the Applicant, is entitled only to the default interest of eight percent (8%) per year, provided by Article 382 of the LOR.

Applicant's allegations

28. The Applicant alleges that the Judgment [E. Rev. No. 32/2019] of 31 July 2019 of the Supreme Court was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant specifically alleges (i) a violation of the principle of legal certainty as a result of divergence in the relevant case law of the Supreme Court; and (ii) violation of the right to a reasoned court decision regarding the modification of the Judgments of the Basic Court and that of the Court of Appeals, as to the amount of the default interest.

29. Regarding the allegations related to the violation of legal certainty, namely the divergence in the case law of the Supreme Court regarding the determination of default interests in cases of compulsory motor third party liability insurance,

the Applicant states that (i) by modifying the Judgments of lower instance courts the Supreme Court and the Court of Appeals, the Supreme Court acted contrary to its case law. In this context, the Applicant refers to the three Judgments of the Supreme Court, as follows: (i) Judgment [E. Rev. No. 22/2019] of 1 August 2019; (ii) Judgment [E. Rev. No. 27/2018] of 24 September 2018; and (iii) Judgment [E. Rev. 23/2017] of 14 December 2017. In support of his allegations of violation of the principle of legal certainty, the Applicant refers to the case of Court KI87/18, Applicant *IF Skadeforsikring*, Judgment of 26 February 2019 (hereinafter: the case of the Court KI87/18).

30. Regarding the allegations related to the lack of a reasoned court decision, the Applicant states that the challenged Judgment (i) modified the Judgment [Ae. nr. 289/2017] of 31 January 2019 of the Court of Appeals regarding the default interest, without beng based on the respective legal provisions; (ii) has not justified the departure from the case law of the Supreme Court regarding the amount of default interest "*in identical court cases*"; (iii) has not clarified the selective application of the Law on Compulsory Insurance, applying the same, namely paragraph 6 of its Article 26 when determining the moment of delay of the debtor, while applying the provisions of the LOR instead of Article 26 of the Law on Compulsory Insurance when determining the amount of default interest, and that consequently, the relevant reasoning is contrary to the principle "*lex specialis derogat legi generali*"; (iv) refers to "*simple interest*" and "*qualified interest*" without any basis on the Law on Compulsory Insurance; and (v) determines the difference between debt regress disputes and claims of injured parties for damages in out-of-court proceedings, without any legal basis because the provisions referred to by the Supreme Court, namely Article 26 of the Law on Compulsory Insurance and paragraph 1 Article 5 (Claims settlement) of Rule 3 on Amending the Rule on Compulsory Motor Liability Insurance (hereinafter: Rule 3), do not establish this distinction.

31. In his allegations, the Applicant has elaborated on the basic principles of the right to a reasoned court decision as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and in support of these arguments, the Applicant also referred to the case law (i) of the Court in cases KI55/09, Applicant *NTSH Meteorit*, Judgment of 3 December 2010; KI135/14, Applicant *IKK Classic*, Judgment of 10 November 2015; KI97/16, Applicant *IKK Classic*, Judgment of 4 December 2017; and KI87/18, cited above, and (ii) that of the European Court of Human Rights (hereinafter: the ECHR) in the cases of *Hadjianastassiou v. Greece* (Judgment of 16 December 1992); *Van de Hurk v. the Netherlands* (Judgment of 9 April 1994); *Hiro Balani v. Spain* (Judgment of 9 December 1994); *Ruiz Torija v. Spain* (Judgment of 9 December 1994); *Helle v. the Netherlands* (Judgment of 19 December 1997); *Souminen v. Finland* (Judgment of 1 July 2003); and *Tatishvili v. Russia* (Judgment of 22 February 2007).

32. Finally, the Applicant requests the Court to (i) declare his Referral admissible; and (ii) find that the challenged Judgment, namely [E. Rev. No. 32/2019] of 31 July 2019 of the Supreme Court was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, declaring the latter invalid and remanding the case for retrial.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 31
Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
[....]

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6
(Right to a fair trial)

"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".
[...]

LAW No. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

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

Article 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".

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".

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 25 September 2008

Article 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, on 1 December 2020, basen on Article 26 paragraph 1 item 1.4 of the Law on Courts

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, dated 19.06.2012.

PART TWO

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.

V. [...]

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.

IX. 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.

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;*

Reasoning of Legal Opinion

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

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

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

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

35. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides:

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

36. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Article 47 [Individual Requests], Article 48 [Accuracy of the Referral] and Article 49 [Deadlines] of the Law, which establish:

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...".

37. In this regard, the Court initially 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, in this context, the case of the Court KI118/18, Applicant, *Eco Construction l.l.c.*, Resolution on Inadmissibility, of 10 September 2019, paragraph 29). Whereas, as regards the fulfilment of the admissibility requirements, established by the Constitution and the Law referred above, 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.

38. The Applicant has also clarified the rights and freedoms he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

39. The Court also finds that the Applicant's Referral also meets the admissibility criteria established in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. The Court also notes that the Referral cannot be declared inadmissible on any other grounds.

40. Therefore, the Referral must be declared admissible and its merits should be reviewed.

Merits

41. The Court first recalls that the circumstances of this case are related to an accident of 2009, in which, the Applicant's insured, namely Sh.Z., lost her life. Liability for the accident fell on H.K., a BKS insured, who was convicted of the criminal offense of endangering public traffic in 2010. The Applicant compensated the family of the deceased in the amount of 36,000.00 euro. Regarding this amount in 2015, the Applicant addressed the BKS with a request for compensation on the basis of the right to subrogation determined through the LOR, and in the absence of an agreement, addressed the Basic Court by a lawsuit. The Basic Court and the Court of Appeals recognized the right to the Applicant, confirming the obligation of the BKS to compensate the Applicant in the abovementioned amount and also the obligation to pay interest of twelve percent (12%) per year, starting from 5 June 2015 until the final payment. The Supreme Court had also finally confirmed the Applicant's right to respective compensation on the basis of subrogation, but modified the Judgment of the Basic Court and that of the Court of Appeals, regarding the default interest. The Supreme Court determined that the annual interest rate should be eight percent (8%) per year, based on Article 382 of the LOR and not twelve percent (12%) per year, based on Article 26 of the Law on Compulsory Insurance, as decided by the lower instance courts. This finding of the Supreme Court, regarding the amount of default interest, was challenged by the Applicant before the Court, alleging a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, on the grounds of (i) violation of the principle of legal certainty, as a result of divergence in the relevant case law of the Supreme Court; and (ii) lack of a reasoned court decision.

42. The Court recalls that the Applicant, in addition to alleging a violation of the principle of legal certainty as a result of divergence in the relevant case law, also alleges a lack of a reasoned court decision, stating, *inter alia* and as explained above, that the challenged Judgment (i) has modified the Judgment [Ae. No. 289/2017] of 31 January 2019 of the Court of Appeals regarding the default interest without support in the respective legal provision; (ii) has not justified the departure from the case law of the Supreme Court regarding the amount of default interest "*in identical court cases*"; (iii) has not clarified the selective application of the Law on Compulsory Insurance, applying the latter, namely paragraph 6 of its Article 26 when determining the moment of delay of the debtor, while applying the provisions of the LOR instead of Article 26 of the Law on Compulsory Insurance when determining the amount of default interest, and that consequently, the relevant reasoning is contrary to the principle "*lex specialis derogat legi gjenerali*"; (iv) refers to "*simple interest*" and "*qualified interest*" without any basis in the Law on Compulsory Insurance; and (v) determines the difference between debt regress disputes and claims of injured parties for damages in out-of-court proceedings, without any legal basis because the provisions referred to by the Supreme Court, namely Article 26 of the Law on Compulsory Insurance and paragraph 1 of Article 5 of Rule 3, do not determine this distinction.

43. This category of allegations, which relate to the lack of a reasoned court decision, will be examined by the Court on the basis of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of

Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, and in the following, in order to determine whether the challenged Judgment of the Supreme Court is in accordance with the guarantees established in Article 31 of the Constitution in conjunction with Article 6 of the ECHR with respect to the reasoned court decision, the Court will initially recall the general principles of the ECtHR and the Court starting with those relating to the violation of legal certainty, and then apply the latter to the circumstances of the present case.

Regarding violation of legal certainty

(i) General principles as developed by the case law of the ECHR and of the Court

44. The Court recalls that the Applicant alleges inconsistency, namely divergence in the case law of the Supreme Court regarding the determination of default interest in cases of compulsory motor third party liability insurance, referring to the three Judgments of the Supreme Court, as follows: (i) Judgment [E. Rev. No. 22/2019] of 1 August 2019; (ii) Judgment [E. Rev. No. 27/2018] of 24 September 2018; and (iii) Judgment [E. Rev. 23/2017] of 14 December 2017.

45. With regard to the principle of legal certainty as a result of the lack of consistency in the case-law, the ECtHR in its case-law has developed basic principles and established the criteria whether an alleged divergence of court decisions constitutes a violation of Article 6 of the ECHR. The Court has also applied in its case law the criteria set by the ECtHR, during the review of the Applicants' allegations of violation of the principle of legal certainty, as a result of conflicting decisions (see, *inter alia*, the above cases of the Court KI35/18 and KI87/18, where the Court found a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of divergence in the case law of the ECtHR).

46. The Court further notes that the case law of the ECtHR has resulted in four basic principles that characterize the analysis regarding the consistency of the case law, as follows: (i) that one of the essential components of the rule of law is legal certainty, which, among other things, guarantees a certain certainty in legal situations and contributes to public confidence in the courts (see, *mutatis mutandis*, *Ştefănică and Others v. Romania*, application no. 38155/02, Judgment of 2 November 2010, paragraph 38, *Nejdet Sahin and Perihan Sahin v. Turkey*, Judgment of 20 October 2011, paragraph 56, see case KI35/18, cited above, paragraph 64); (ii) that there is no acquired right to the consistency of the case-law (see ECtHR, cited above, *Nejdet Şahin and Perihan Şahin v. Turkey*, para. 56, see also the case cited above, of the Court KI35/18, Applicant *Bayerische Versicherungsverbrand*, paragraph 65, and case KI42/17, Applicant *Kushtrim Ibraj*, Resolution on Inadmissibility of 25 January 2018, paragraph 33); (iii) 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, and such divergences may also arise within the same court, which divergence cannot be considered contrary in itself (see case *Santos Pinto v. Portugal*,

application no. 39005/04, paragraph 41, paragraph 41, Judgment of 20 May 2008, see also the case of the Court KI87/18, Applicant *"IF Skadeforsikring"*, cited above, paragraph 66 and case KI35/18, Applicant *Bayerische Versicherungsverbrand*, paragraph 67); and (iv) except in cases of apparent arbitrariness, it is not its duty to question the interpretation of domestic law by local courts and in principle, it is not its function to compare different decisions of local courts, even if they are taken in apparently smilar proceedings (see, for example, ECtHR cases *Adamsons v. Latvia*, Judgment of 24 June 2008, paragraph 118; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 50; and case KI35/18, cited above, paragraph 68).

47. However, referring to the principles set out above, the ECtHR has established three basic criteria to determine whether an alleged divergence of the court decisions constitutes a violation of Article 6 of the ECHR, as follows:: (i) *whether "profound and long-standing differences" exist in the case-law*; (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. (In this context, see ECtHR cases, *Beian v. Romania* (no. 1), Judgment of 6 December 2007, paragraphs 37-39; *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraphs 116-135; *Iordan Iordanov and Others v. Bulgaria*, Judgment of 2 July 2009, paragraphs 49-50; *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 53; and see the case of the Court, KI29/17, Applicant *Adem Zhegrova,* Resolution on Inadmissibility of 5 September 2017, paragraph 51 and see also the case of the Court, KI42/2017, Applicant *Kushtrim Ibraj*, paragraph 39, KI87/17 Applicant *"IF Skadiforsikring"*, paragraph 67, KI35/18 Applicant *Bayerische Versicherungsverband*, paragraph 70).

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

48. In the following, the Court will apply the principles set out above in the circumstances of the present case, applying the criteria on the basis of which the ECtHR addresses divergence issues with regard to case law, starting with the assessment of whether, in the circumstances of the present case, (i) the alleged divergences in case law are *"profound and long-standing"* and, if this is the case, (ii) the existence of mechanisms capable of resolving the relevant divergence; and (iii) an assessment of whether these mechanisms have been implemented and with what effect in the circumstances of the present case.

49. In this regard, the Court should also reiterate that, based on the ECtHR case law, it is not its function to compare different decisions of regular courts, even if taken in apparently similar proceedings. It must respect the independence of the courts. Moreover, in such cases, namely allegations of constitutional violations of fundamental rights and freedoms as a result of divergences in the case law, the Applicants should submit to the Court relevant arguments concerning the factual and legal similarity of the cases alleging that they have been resolved differently than the regular courts, thus resulting in a divergence in case law and which may have resulted in a violation of their constitutional rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR (see case KI35/18, Applicant *"Bayerische Rechtsverband"*, cited above, paragraph 76).

50. The Court recalls that the Applicant alleges that in his case, the Supreme Court decided differently on the amount of default interest, acting contrary to its case law. In support of his arguments, the Applicant refers to the three Judgments of the Supreme Court, as follows: (i) Judgment [E. Rev. No. 22/2019] of 1 August 2019; (ii) Judgment [E. Rev. No. 27/2018] of 24 September 2018; and (iii) Judgment [E. Rev. 23/2017] of 14 December 2017.

51. Before analyzing whether (i) the challenged Judgment of the Supreme Court, namely Judgment [E. Rev. No. 32/2019] of 31 July 2019 was rendered by the Supreme Court contrary to its case law; and (ii) the alleged divergences in the case-law are *"profound and long-standing"*, the Court first recalls the reasoning of the challenged Judgment in respect of default interest. The Court recalls that the Supreme Court in the circumstances of the present case, approved as grounded the revision regarding the default interest, obliging the BKS to pay interest of eight percent (8%) from 5 June 2015 until the final payment. In the context of the latter, the Supreme Court, *inter alia*, reasoned that (i) the default interest of 12% is provided only for non-processing and the delay in processing the claims of the injured persons for compensation"; and consequently, (ii) the claimant, namely the Applicant, is entitled only to the default interest of eight percent (8%) per year, determined by Article 382 of the LOR.

52. In this context, and with regard to the laws applicable in the circumstances of the present case, the Law on Obligations was adopted by the Assembly of the Republic of Kosovo on 10 May 2012, was decreed by the President of the Republic of Kosovo on 30 May 2012, is published in the Official Gazette of the Republic of Kosovo on 19 June 2012, and based on its Article 1059 (Entry into force), has entered into force six (6) months after publication in the Official Gazette, namely on 19 December 2012, whereas, the Law on Compulsory Motor Liability Insurance was adopted by the Assembly of the Republic of Kosovo on 23 June 2011, was decreed by the President of the Republic of Kosovo on 5 July 2011, was published in the Official Gazette of the Republic of Kosovo on 14 July 2011, and based on Article 44 thereof (Entry into Force), entered into force fifteen (15) days after its publication in the Official Gazette, namely on 29 July 2011. Furthermore, this Law, by its Article 43, has established the repeal of UNMIK Regulation 2001/25 governing the compulsory motor insurance and the respective sub-legal acts of the Central Bank of Kosovo (hereinafter: the CBK), which are contrary to this law.

53. In the following, the Court will reproduce the relevant parts of some of the above-mentioned decisions, where the Applicant refers to them in support of his allegations.

54. In the first case, namely Judgment [E. Rev. 22/2019] of 1 August 2019, the circumstances of this case were related to an accident that occurred on 1 August 2011, in which accident the insured Sh. Sh. of the Company "Suva Rechtsabteilung" suffered injuries. The statement of claim for compensation of damage under the right of subrogation, filed by the Company "Suva Rechtsabteilung" was approved as grounded and the default interest was set according to the Law on Compulsory Insurance. As a result of the revision filed

by the Insurance Company "Insing", the Supreme Court decided that "*the lower instance courts have correctly applied the provision of Article 26 item 6 of the Law on Compulsory Motor Liability Insurance (Law no. 04/4-018), which entered into force on 5 July 201,1 because the claimant on 27.4.2012 has initiated a request for debt regress in out-of-court proceedings, resulting that from this date the respondent is in delay within the meaning of Article 305 of LOR of the Republic of Kosovo, therefore the claimant is entitled to penalty interest provided by Article 26 of the aforementioned Law, of which this Court considered the claim of the respondent that the court of lower instance has erroneously applied the substantive law in the case of setting the interest, as ungrounded.*"

55. In the second case, namely the Judgment [E. Rev. No. 27/2018] of 24 September 2018, the circumstances of the case are related to an accident that occurred on 31 December 2010, in which case as a result of the statement of claim of the Company "Suva Rechtasabteilung" the Basic Court approved its claim in entirety by imposing penalty interest with 20% starting from 15 April 2011 until 29 July 2011, while the annual interest of 12% from 29 July 2011 until the final payment. The Court of Appeals had partially modified the Judgment of the Basic Court only as regards the amount of default interest "*on the amount approved of 88,000 euro, the Applicant be paid the interest which the local banks pay as for funds deposited in the bank over a year without a specific destination with an additional penalty in the amount of 20% of the annual interest rate starting from 15.04.2011 as the date of reporting the damage until 29.07.2011, while from 30.07.2011 until the final payment, the interest in the amount of 88,000 euro will be calculated according to the annual rate of 12%.*" Finally, as a result of the revision filed by the Insurance Company "Illyria", the Supreme Court by its Judgment, [E. Rev. No. 27/2018] of 24 September 2018 approved the revision of the respondent only in terms of default interest, modifying the Judgment of the Court of Appeals in this part and upholding the Judgment of the Basic Court.

56. Whereas, in the case, namely the Judgment [E. Rev. 23/2017] of 14 December 2017 of the Supreme Court, the circumstances of this case are related to an accident that occurred on 28 September 2009, in which case as a result of the claim of the Insurance Company IF "Insurance" in Norway, the Basic Court had imposed penalty interest in the amount of 20% [in accordance with Article 5.1 of Rule 3 of the Central Bank on amending the Rule on Compulsory Motor Third Party Liability Insurance] starting from 15 April 2011 to 29 July 2011, while the annual interest rate of 12% from 29 July 2011 until the final payment. The Court of Appeals had partially modified the Judgment of the Basic Court only as regards the amount of default interest "*on the amount approved 24,030.00 euro, the Applicants pay the interest which the local banks pay as for funds deposited in the bank over one year without a definite destination with an additional penalty in the amount of 20% of the annual interest rate starting from 22.04.2010 as the date of reporting the damage until 29.07.2011, while from 30.07.2011 until the final payment, the interest on the adjudicated amount will be calculated according to the annual rate of 12%. "As a result of the revision submitted by the Insurance Company, the Supreme Court, had partially approved its revision and decided that "[...] regarding the interest rate, the challenged judgment of the Court of Appeals of Kosovo*

Ae. No. 53/2016 of 21.09.2017 is modified and the respondent is obliged to pay the claimant the interest in the amount of 20% of the approved amount of the claim starting from 22.04.2010 as the date of submitting the claim for compensation of damage until 29.07.2011, whereas from 30.07.2011 until the final payment the interest in the amount of 12% of the adjudicated amount".

57. In the context of the Judgments of the Supreme Court referred by the Applicant, the Court notes that in all three (3) cases from the date of entry into force of the Law on Compulsory Insurance a default interest of 12% was applied based on Article 26, paragraph 6 of this law, namely the moment from which this default interest starts to be calculated was determined. In cases [E. Rev. 23/2017] of 14 December 2017 and [E. Rev. nr. 27/2018] of 24 September 2018, was set on 30 July 2011, as the date when the default interest would be reduced from 20% to 12%, thus applying Article 26 of the Law on Compulsory Insurance.

58. In the circumstances of the present case, the Court recalls that the Basic Court and the Court of Appeals had given the Applicant the right, by confirming the obligation of the BKS to compensate the Applicant in the abovementioned amount and also the obligation to pay the interest of twelve percent (12%) per year, starting from 5 June 2015 until the final payment, based on Article 26 of the Law on Compulsory Insurance.

59. The Court recalls that the Supreme Court in quashing the Judgments of the lower courts, regarding the default interest, had excluded the application of the Law on Compulsory Insurance, finding that the default interest of 12% is provided only for non-processing and the delay in processing of claims of injured persons for compensation"; and consequently, (ii) the claimant, namely the Applicant, is entitled only to the default interest of eight percent (8%) per year, established in Article 382 of the LOR.

60. The Court notes that it assesses the consistency of the case law of the regular courts only in relation to the alleged violations of the Applicant. Consequently, the lack of consistency in the case law must have resulted in a violation of the fundamental rights and freedoms of the Applicant. To find such a violation, and to find that the fundamental rights and freedoms of the Applicant have been violated as a result of "profound and long-standing differences" in the relevant case law, the factual and legal circumstances of the Applicant's case should coincide with those of the cases the contradiction with which is claimed.

61. In the context of the circumstances of the case, the Court recalls that the ECtHR has stated that the contradictions in the case law are an integral part of any judicial system and that divergence in the case law may also arise within the same court. That, in itself, is not necessarily contrary to the Constitution and the ECHR (See ECtHR cases, *Santo Pinto v. Portugal*, cited above, paragraph 41; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 51). Moreover, and as noted above, the ECtHR has consistently stated that the requirements for legal certainty and legitimate protection of public confidence in the courts do not guarantee a right to consistent case law. The development of case law is important to maintain the proper dynamic for the continuous improvement of the administration of justice. (See ECtHR case,

Atanasovski v. "the Former Yugoslav Republic of Macedonia", Judgment of 14 January 2010, paragraph 38; and *Nejdet Sahin and Perihan Sahin*, cited above, paragraph 58, see the case of the Court KI35/18, Applicant *Bayerische Rechtsverband,* cited above, paragraph 98). An exception to these general principles, is an apparent arbitrariness, and in terms of assessing the lack of judicial consistency, assessing whether there are "*profound and long-standing differences*" in the relevant case law and if there is an effective mechanism to address the latter.

62. The Court, referring to its case law, namely cases KI87/18 and KI35/18, recalls that it found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to a violation of the principle of legal certainty as a result of the divergence of case law, in case KI87/18 in the assessment of 3 (three) cases of the Supreme Court, rendered in a period of 3 (three) years, and in case KI35/18 in the assessment of 9 (nine) cases of the Supreme Court issued over a period of 5 (five) years and after finding that (i) there were "profound and long-standing differences"; (ii) the mechanism of the Supreme Court for harmonizing the case law existed; but that (iii) the abovementioned mechanism was not used (see case of the Court KI87/18, cited above, paragraph 79 and paragraphs 81 to 85, and case KI35/18, cited above, paragraph 70 and paragraphs 110-111).

63. On the other hand, only the finding that there are "*profound and long-standing differences*" in the case law regarding the amount of default interest does not necessarily result in a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. To find this, the Court must also consider the other two ECtHR criteria that are relevant to assessing the lack of consistency of case law, namely whether the applicable law establishes mechanisms capable of resolving such divergence; and whether such a mechanism has been applied in the circumstances of a case and with what effect.

64. The Court notes that the Supreme Court has a mechanism that enables the resolution of such disputes, based on point 10 of paragraph 2 of Article 14 (Competences and Responsibilities of the President and Vice-President of the Court) of Law no. 06/L-054 on Courts (hereinafter: the Law on Courts). The presidents of the courts through the annual meetings of all judges have the obligation, *inter alia*, to review and propose changes in procedures and practices (see the case of Court KI87/18 Applicant "*IF Skadeforsikring*", cited above, paragraph 80 and case KI35/18, Applicant *Bayerische Rechtsverband*, cited above, paragraph 107).

65. In the following, and for the purpose of clarifying whether such a mechanism for resolving the disputes, which were subsequently alleged by the Applicants in such cases before the Court, the Court recalls that in its request of 22 October 2020, also addressed the Supreme Court with the question whether: "*The Supreme Court had issued a principled position regarding the compensation of damage and determination of default interest in respect of claims under the right of subrogation*".

66. The Supreme Court in its response to the aforementioned question answered as follows:

"The case law described above, the Supreme Court of Kosovo has consolidated since the claims for compensation of damage under the right of subrogation were submitted, but it should note the cases when the Supreme Court of Kosovo in the procedure according to extraordinary legal remedies cannot change decisions of lower instance in cases where it would be considered a violation of the principle "reformatio in peius".

The provision of Article 203 of the Law on Contested Procedure stipulates that: "Second instance court can change the decision of the first instance court to the prejudice of the complaining party if only it complained and not the opposing party".

The cited principle prevents the Supreme Court from changing the decisions of the lower instances even with regard to the annual rate of default interest if the revision belongs to the claimant, which has partially won the court dispute but has filed a revision for the rejected part. In this case, the Supreme Court, even if it finds that the material legal provisions on default interest have been incorrectly applied, cannot change the court decision. Also, the Supreme Court, when the revision is filed only in relation to interest, cannot enter at all the assessment of its grounds and eventually change the judgments of the lower instance, because in this situation the revision is not allowed at all in accordance with Article 211. paragraph 2 of the LCP, since within the meaning of Article 30 paragraph 1 of the LCP, only the value of the main claim is taken into account for the values of the subject of the dispute, and not the interest (Article 30 paragraph 2 of the LCP).

The Supreme Court of Kosovo, in reflection of the constant requests of the courts of lower instances, but also from the findings in its case law a few months ago in the civil branch, initiated the idea of the need for a legal opinion on the issue of interest, which ideas have been researched in domestic practice, comparative analyzes of legislation and practice in the region have been made, the need to maintain continuity has been assessed, but also the need for progressive changes in order to meet the standards for adequate judicial protection and after holding many meetings, this idea has been materialized in legal opinion, first in the civil branch of the Supreme Court and then in the General Session of the Supreme Court, held on 01 December 2020.

The legal opinion on the issue of interest has addressed, among others, the situation of regress of claims, point IX (nine) of the legal opinion. Part of this response to the requested information, please consider also the Legal Opinion on interest, a copy of which you may find attached."

67. However, the Court through the present case also notes that item 4 of paragraph 1 of Article 26 (Competencies of the Supreme Court) of the Law on Courts defines the exclusive competence of the Supreme Court to determine principled positions, issue legal opinions and guidelines for unique application of laws by courts in the territory of the Republic of Kosovo. In the case

involving the circumstances of the present case, namely the application of the amount of default interest in relation to compulsory motor liability insurance, the Supreme Court approved such a mechanism, namely a legal opinion regarding interest on 1 December 2020, namely after the Applicant had submitted his Referral to the Court and following the request of the Court, through which it was sought to clarify whether the Supreme Court had issued any unifying position regarding its case law.

68. Accordingly, the Court, considering the elaboration of the aforementioned three cases of the Supreme Court and the response of the Supreme Court, through its letter of 2 December 2020, finds that in the circumstances of the present case all three criteria of the ECtHR regarding the assessment if the lack of consistency, namely divergences in the case law, have resulted in violation of the rights and freedoms to a fair and impartial trial, have not been met.

69. The Court first reiterates that in the circumstances of the present case it has not found "*profound and long-standing differences*" in the case law of the Supreme Court regarding the application of the provisions governing the amount of default interest in the context of compulsory motor third party liability insurance upon submission of only three (3) decisions. Second, the Court considers that the clarification given by the Supreme Court through its letter regarding the application of the provisions of the law in the cases of claims referring to the determination of the amount of default interest within the right of subrogation is clear. Regarding the mechanism of the Supreme Court for harmonization of this practice, namely the approval of the Legal Opinion regarding the Interest, the Court emphasizes that this mechanism was created and approved after submitting a number of cases to the Court which challenge the Judgments of the Supreme Court regarding the determination of default interest in cases of claims for compensation of damage under the right of subrogation.

70. Therefore, the Court finds that the challenged Judgment of the Supreme Court does not contain violation of the principle of legal certainty and violation of the Applicant's right to fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

As to a reasoned court decision

(i) General principles regarding the right to reasoned court decisions

71. As to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case-law. This case-law was build based on the case law of the ECtHR, including but not limited to the cases of *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22

February 2007. Moreover, the fundamental principles concerning the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019; KI35/18, cited above; and KI227/19, Applicant *N.T. "Spahia Petrol"*, Judgment of 31 December 2020.

72. In principle, the Court notes that the guarantees embodied in Article 31 of the Constitution include the obligation of courts to provide sufficient reasons for their decisions (see, case of the Court KI230/19, Applicant *Albert Rakipi*, cited above, paragraph 139).

73. The Court also notes that based on its case law, which is based on the case law of the ECtHR, when assessing the principle which refers to the proper administration of justice, the court decisions must contain the reasons on which they are based. The extent to which the duty to give reasons applies may vary depending on the nature of the decision and must be determined in the light of the circumstances of the particular case. It is the essential arguments of the Applicants that need to be addressed and the reasons given must be based on the applicable law (see, by analogy, the cases of the ECtHR *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, Judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, paragraph 42; see also the case of Court KI97/16, Applicant *IKK Classic*, cited above, paragraph 48; and case KI87/18 *IF Skadeforsikring*, cited above, paragraph 48). By not requiring a detailed response to each complaint raised by the Applicant, this duty implies that the parties to the proceedings may expect to receive a specific and explicit response to their allegations that are crucial to the outcome of the proceedings conducted (see, case *Morerira Ferreira v. Portugal*, Judgment of 5 July 2011 paragraph 84 and all references used therein, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 137).

74. 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 the examination of evidence on the one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of ban on arbitrariness in decision-making, if the reasoning given fails to contain the established facts, the legal provisions and the logical relationship between them (see the Constitutional Court, cases KI87/18 Applicant *"IF Skadeforsikring"*, Judgment of 27 February 2019, paragraph 44; KI138/19 Applicant *Ibish Raci*, cited above, paragraph 45, as well as the case of Court KI230/19, Applicant *Albert Rakipi*, Judgment of 9 December 2020, paragraph 138).

(i) Application of these principles to the circumstances of the present case

75. In applying the general principles elaborated above, in the circumstances of the present case, and in order to assess whether the challenged Judgment was

rendered in accordance with the constitutional guarantees of a reasoned court decision, the Court recalls that in rendering its challenged Judgment, the Supreme Court had modified the Judgments of the lower courts, with respect to default interest. The latter, in the circumstances of the present case, applied the interest at the rate of twelve percent (12)% per year, referring to Article 26 of the Law on Compulsory Insurance, while the Supreme Court determined that in the circumstances of the present case, Article 26 of the Law on Motor Third Party Liability Insurance is not applicable, but interest at the rate of eight percent (8)% must be applied, referring to Article 382 of the LOR.

76. In the context of the Applicant's allegations, the Court refers to the relevant part of the Judgment [E. Rev. No. 32/2019] of the Supreme Court, where regarding the default interest, it is stated as follows:

"However, the judgment of the first and second instance courts regarding the part related to the adjudicated interest contains erroneous application of the substantive law under Article 382 of the LOR (no. 04/L-077), and in conjunction with Article 26.7 of the Law on compulsory motor liability insurance no (04/L-018 which entered into force on 30 July 2011).

The erroneous application of the substantive law lies in the facts that, as stated above, the claimant's statement of claim for compensation of damage and the lawsuit was filed at the time when the Law on Compulsory Motor Liability Insurance entered into force. The interest approved by the courts of lower instance is not legally applied in debt regress disputes but only in claims for processing claims of injured parties for damages in out-of-court proceedings 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, which provisions are referred to by the courts of lower instance. Those interest rates which have been applied by the court of first and second instance are foreseen in order to discipline the insurance companies in the insurance reports against the claims for compensation of the injured persons which claims the insurance companies are obliged to treat urgently within the deadlines provided for in the abovementioned provisions.

Paragraph 7 of Article 26 of the Law on Compulsory Motor Liability Insurance, excludes the application of interest of 12% for debt regress, interest provided only for non-treatment and the delays in processing the claims of injured persons for compensation. It follows that the claimant is entitled only to default interest provided for in Article 382 of LOR and not "qualified" interest according to the provisions applied by the first and second instance courts."

77. The Court notes that the Supreme Court in the challenged Judgment has determined: (i) that the relevant legal provisions in the Applicant's case are Article 382 of the LOR in conjunction with Article 26.7 of the Law on Compulsory Insurance; (ii) that interest of 12% does not apply in cases of debt regress but only in claims for treatment of injured persons for damages in out-of-court proceedings; (iii) that 12% interest is applied only for non-processing and delayed processing of claims of injured persons for compensation and not

for debt regress; and, that (iv) for these reasons, the Applicant is entitled to the default interest provided for in Article 382 of the LOR (8%) and not "qualified" interest (12%).

78. In this context, the Court refers to Article 382, paragraph 2 of the LOR, which stipulates that: "*The interest rate for penalty interest shall amount to eight percent (8%) per annum, unless stipulated otherwise by a separate act of law*".

79. Whereas paragraph 6 of Article 26 of the Law on Compulsory Insurance stipulates 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*".

80. Based on the above, the Court notes that in determining the default interest "in the amount of 8%" according to paragraph 2 of Article 382 of the LOR, the Supreme Court specified that regarding the amount of default interest in cases of claims under the right to subrogation, in which case the Applicant's case is included, paragraph 6 of Article 26 of the Law on Compulsory Insurance is not applicable.

81. Furthermore, the Court notes that as a reason for modifying the decision on the amount of default interest, the Supreme Court reasons that the lower instance courts, namely the Basic Court and the Court of Appeals, respectively, have erroneously interpreted the substantive law when they found that paragraph 6 of Article 26 of the Law on Compulsory Insurance is applicable.

82. The Court, in the context of similar allegations related to the amount of default interest, on 22 October and 24 November 2020, namely, sent a letter to the Supreme Court regarding a number of cases submitted to the Court challenging Judgments of the Supreme Court, regarding the determination of default interest in cases of claims for compensation of damage under the right of subrogation as a result of traffic accidents caused in the Republic of Kosovo. The Court requested clarification as to whether (i) the Supreme Court has issued a principled position regarding the compensation of damage and the determination of default interest in respect of claims under the right of subrogation; and if this is not the case (ii) to notify the Court regarding the case law of the Supreme Court, in what cases Article 382 (Penalty interest) of Law No. 04/L-077 on Obligations is applied and in what cases paragraph 6 of Article 26 (Compensation claims procedure) of Law no. 04/L-018 on Compulsory Motor Third Party Liability Insurance is applied.

83. In the above-mentioned question of the Court, the Supreme Court answered as follows:

"In this context, in principle regarding the default interest for the obligational relationships that have arisen before 20.12.2012, for interest apply the legal provision under Article 277 of the Law on Obligations (Official Gazette of the SFRY), No. 29/78, 39/85,57/89), while for the obligational relationships that have arisen after 19.12.20 [12] the provision under Article 382 of the Law on Obligations no. 04/L-077 has been applied, Official Gazette of the Republic of Kosovo, no. 19/19, of 19.06.2012, and for the claims of third parties to the Insurance Companies, in cases when the legal requirements are met after the entry into force (on 30 July 2011) of the Law on Compulsory Motor Liability Insurance, no. 04/L-018, published in the Official Gazette No. 4, on 14 July 2011, the provisions of this law have been applied.

According to the Supreme Court "Cases of claims for compensation of damage based on the right of subrogation in the practice of the Supreme Court of Kosovo, depending on the time of entering into the obligation are reviewed and decided in accordance with the provisions of the laws cited above, with relevant specifics [...]."

84. As regards the determination of default interest at 12%, the Supreme Court clarified that:
"*Interest in the amount of 12% of the annual interest is applied/calculated when the legal conditions 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, i published in the Official Gazette no. 4, on 14 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 liable insurer, starting from the date of filing the claim for compensation. The situation described according to the provisions of 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, refers to the liability that Insurance Companies have towards third parties, therefore the annual interest rate of 12% in this case aims to encourage a kind of correct approach of Insurance Companies to third parties, so that claims for damages are dealt with within the legal deadlines, otherwise Insurance Companies will also pay the annual interest of 12%.*

The annual interest rate of 12% in certain cases by law should be considered as a kind of penalty to Insurance Companies, when they are not liable to third parties, but cannot be considered as favoring the creditor's claim entitled to regress to the debtor because the relationship between the creditor and the debtor in the payment of the regress is a special relationship of obligations and is not the relationship of the third party with the Insurance Company, therefore for the claim of the third party as the injured party in relation to The insurance company in certain cases annual interest rate of 12% can be adjudicated but not for the refund claim".

85. Based on the above, the Court considers that the response given by the Supreme Court regarding its interpretation of what law will be applied regarding the amount of default interest is in accordance with its reasoning given in the Judgment challenged by the Applicant in the present case. Therefore, the Court considers that the interpretation and application of the

relevant legal provisions in determining the default interest by the Supreme Court in the Applicant's case falls within the scope of legality, which is within the jurisdiction of this court. Having said that, the Supreme Court, by its Judgment and the clarification given in its response to the Court's question, has managed to explain the relationship between the facts presented and the application of the law to which it has invoked, namely how they correlate with each other and how they have influenced the decision of the Supreme Court to modify the decisions of the lower courts regarding the determination of the amount of default interest.

86. Based on the above, the Court reiterates that the Supreme Court by its challenged Judgment has addressed the Applicant's allegations presented in his Referral, and consequently considers that it does not appear that the proceedings conducted have resulted in "arbitrary conclusions" or "manifestly unreasonable "that would make their decision-making incompatible with the standards of a reasoned and reasonable court decision (see, *mutatis mutandis*, Constitutional Court in case no. KI55/19, Applicant *Ramadan Osmani*, Resolution on Inadmissibility, of 23 January 2020, paragraph 46).

87. In doing so, the Court reiterates that the Supreme Court has fulfilled its constitutional obligation to provide a reasoned court decision, as required by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR and the case law of the Court, and that of the ECtHR.

88. Therefore, based on the above, finds that the Judgment [Rev. no. 28/2019] of 1 August 2019, of the Supreme Court regarding the allegation of non-reasoning of the court decision does not constitute a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Conclusions

89. The Court has dealt with all the allegations of the Applicant, applying on this assessment the case law of the Court and of the ECtHR regarding the manifestly erroneous interpretation and application of the law and the principle of legal certainty in terms of consistency of case law, which guarantees, with certain exceptions, are embodied in Article 31 of the Constitution and Article 6 of the ECHR.

90. First, with regard to the allegation relating to the lack of reasoning of the court decision, the Court found that the Judgment [E. Rev. No. 32/2019] of 31 July 2019, of the Supreme Court does not contain violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR and has sufficiently reasoned its decision.

91. Second, as regards the principle of legal certainty in the context of a lack of consistency, namely the divergence of the case law of the Supreme Court, the Court, after elaborating on the basic principles and criteria of the ECtHR in this respect, applied the latter to the circumstances of the present case, and found that in the case law of the Supreme Court there are no "profound and long-standing differences" regarding the application of legal provisions related to the amount of default interest applicable in cases of compulsory motor third

party liability insurance, and consequently found that the principle of legal certainty has not been violated, and that the Judgment [E. Rev. No. 32/2019] of 31 July 2019 was not rendered in violation of the Applicant's fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 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 the 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. 32/2019 of the Supreme Court of the Republic of Kosovo, of 31 July 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 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 who prepared the Decision **President of the Constitutional Court**

Safet Hoxha **Arta Rama-Hajrizi**

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