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

Prishtina, 9 March 2015
Ref. no.:RK777/15

RESOLUTION ON INADMISSIBILITY

in

Case KI118/14

Applicant

Raiffeisen Bank Kosovo J.S.C

Constitutional review of
Judgment E. Rev. no. 24/2013 of the Supreme Court of Kosovo,
of 5 February 2014

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Referral is submitted by Raiffeisen Bank Kosovo J.S.C in Prishtina, represented by Mr. Ilir Tahiri, head of the legal office (hereinafter, the Applicant).

Challenged decisions

2. The Applicant challenges the Judgment E. Rev. no. 24/2013 of the Supreme Court of Kosovo of 5 February 2014, which is in connection with Judgment Ac. no. 352/2012 of the Appeals Court of Kosovo of 7 June 2013 and Judgment II. C. nr. 272/2011 of the Kosovo Commercial Court of 30 January 2012.

3. The challenged decision was served on the Applicant on 18 March 2014.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment, which allegedly *"has violated the Applicant's constitutional rights, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo and Article 6.1 of the European Convention for Protection of Human Rights and Fundamental Freedoms"*.

Legal basis

5. The Referral is based on Articles 113 (7) and 21 (4) of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Articles 29 and 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law).

Proceedings before the Constitutional Court

6. On 15 July 2014, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 6 August 2014, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Ivan Čukalović and Kadri Kryeziu.

8. On 15 August 2014, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

9. On 15 September 2014, the President of the Constitutional Court replaced Judge Robert Carolan as member of the Review Panel with Judge Snezhana Botusharova.

10. On 23 September 2014, the Review Panel considered the Report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. In the period 12 July 2005 to 21 November 2007, the Applicant signed with third party loan agreements, which included 3% penalty interest clauses for the delayed payment of instalments.

12. On 27 April 2009, the Applicant initiated an enforcement procedure before the Municipal Court in Prizren considering that the third party did not honor the deadlines of payment of the loan.

13. On 3 July 2009, the Municipal Court in Prizren (Decision E. no. 763/2009) allowed the sale of mortgaged property. However, the District Court in Prizren (Decision Ac. no. 536/2009) quashed the decision of the Municipal Court and remanded the case for retrial.

14. On 20 May 2011, the Municipal Court, based on the proposal of the Applicant, imposed security measures on the mortgaged property and ordered the third party to hand over the mortgage to the Applicant.

15. Meanwhile, on 26 May 2011, the Applicant and the third party signed an extra-judicial agreement "*on repayment of debt in exchange of the removal of a part of the penalty interest and the suspension of the procedure for execution of mortgage*".

16. On 30 September 2011, the third party filed a claim with the District Commercial Court in Prishtina against the Applicant for repayment of 44.640,54 Euros as ungrounded profit which allegedly had been realized by the Applicant.

17. On 19 October 2011, the Applicant responded, requesting the claim to be "*rejected because: (i) filing of claim was not permitted under Article 211 of the LCT, since the Carrera paid the debt voluntarily, according to the extrajudicial agreement, which was reached at the proposal of Carrera itself; (ii) exercising of legal unalienable rights of the Applicant to enforce the mortgage cannot be considered as exercising violence; and (iii) collection payment of penalty interest was agreed and implemented in full compliance with Article 277.2 of LCT in conjunction with Articles 10 and 28 of LCT, which provide instrument of penalty interest and allow contracting of the amount of penalty interest" (para 14 of the Referral).*

18. On 30 January 2012, the District Commercial Court in Prishtina (Judgment II.C.no.272/2011) determined:

    The statement of claim of claimant "CARRERA – R" L.l.c. – Prizren is APPROVED as grounded, and the respondent RAIFFEISEN BANK – Prishtina is obliged to pay to the claimant the amount of 44.640,54 € with an annual interest of 3.5%, on behalf of the ungrounded profit starting from 30.05.2011 until the final payment, and to compensate the expenses of the contested procedure at the amount of 1.123 €, all this within a 7 day time limit after the Judgment becomes final under the threat of forced execution.

19. On 24 February 2012, the Applicant appealed the District Commercial Court Judgment and based its appeal on three main points: *(i) a substantial violation of contested procedure provisions, pursuant to Article 182, paragraph 2, item (n) of the LCP (...); (ii) erroneous and incomplete determination of factual situation, as the judgment presented facts in relation to the amount of the debt and paid penalty interest and the reasons of payment that were completely contrary to the evidence presented during the proceedings; and (iii) erroneous application of the material law, so that the judgment qualified the penalty*

interest, agreed upon Article 4.1 (c) of the Loan Agreement, based on Article 277 of LCT as "a contractual penalty" under Article 277.3 of LCT.

20. On 7 June 2013, the Court of Appeals of Kosovo (Judgment Ac. No. 352/2012) determined:

    The respondent's appeal is REJECTED as not grounded and the Judgment of the District Commercial Court II.C.no.272/11 of date 30.01.2012, is UPHELD.

21. On 6 August 2013, the Applicant filed a revision and a complement of revision with the Supreme Court, *"due to the:*

    1) Violation of the provisions of the contested procedure
    2) Erroneous application of the material law".

22. In the revision, the Applicant states mainly what follows.

    a). It has provided to the Supreme Court *"a comprehensive analysis of the theory and practice of application of the legal instrument penalties under Article 277 and the major differences between this legal instrument and "contractual penalties provided by Article 270.3 of the LCT".* In addition, it has provided *"a detailed analysis of the theory and practice of Article 270.3 and 277 of LCT, including the essential difference between the contractual penalty and default interest".*

    b). It highlighted that the Court of Appeal Judgment *"not only (...) did not consider the appealed allegations regarding violation of contested procedure provisions under Article 182, paragraph 2, item (n), but it also failed to consider the appeal within the boundaries of the appealed allegations, by completely ignoring two of the three categories of the appealed allegations of the Applicant, in breach of Article 194 of the LCP".*

23. In the complement of the revision, the Applicant reasoned the ground on incorrect application of substantive law arguing namely what follows.

    a). The Court of Appeal violated *"seriously the principle of separation of power established by Article 4 of the Constitution"*, by disregarding Article 277 of the LOR, *"without any consideration and in arbitrary manner, without giving any single reasoning".* In fact, the Applicant states that *"Article 4 of the Constitution stipulates clearly that the Assembly of Kosovo exercises the legislative power in the country. Consequently, (...) no court in Kosovo is entitled that through its own decisions pronounce null and legally void a legal provision which is approved by the Assembly of Kosovo or predecessor institutions, and which have exercised the legislative function in Kosovo. The appealed judgment in its reasoning by pronouncing null and legally void the punitive interest rate, which was contracted through litigation parties indirectly also pronounces null and legally void the Article 277 of LOR. (...). In this manner, the Court of Appeal by violating seriously the principle of separation of power – as per Article 4 of the Constitution – is put in the role of legislative power in which case annuls in*

counter- constitutional manner one legal provision and in this case produces legal effect, which is equal to legislative activity".

b). In addition, *"the reason why Article 277 SFRY LOR has not elaborated enough freedom of parties to contract the level of "penalty interest", has to do with the fact that the SFRY LOR was drafted in a planned economic system in which the state has a crucial role as a regulator of economic relations. Considering that pursuant to Article 10 of the Constitution "market economy with free competition is the basis for economic regulation of the state", Article 277.2 of SFRY LOR should be interpreted and implemented on the basis of this constitutional postulate".*

24. On 5 February 2014, the Supreme Court of Kosovo (Judgment E. Rev. no 24/2013) determined what follows.

The revision of the respondent, filed against the judgment of the Court of Appeal of Kosovo Ae. no 352/2012 of 07.06.2013 and the District Court of Prishtina II. C. no. 272/2011 of 30.01.2012, is rejected as ungrounded in part related to the amount of €44,640,54.

The revision of the respondent in relation to the amount of interest adjudicated by judgment of the Court of Appeal and the District Commercial Court of Kosovo in Prishtina II. C. no. 272/2011 of 30.01.2012, is approved in the amount of €44,640,54, so in this part two judgments are modified the respondent is obliged to pay to claimant the above-mentioned amount plus interest in the amount paid by local banks for term deposits for one year without a specific purpose, starting from 30.09.2011 until the final payment.

25. The Supreme Court reasoned its judgment as it follows.

The claims in the revision that the second instance court has erroneously applied the material law when it assessed the penalty interest as agreed interest, just as the penalty interest was provided by the contract, this Court has assessed as unacceptable, given that these data are in contrast with the assessment of the first instance court, where it is stated the interest rate agreed upon in Article 4.1 c) of the Loan Agreement is contrary to Article 270, paragraph 3 LCT, because the default interest cannot be concluded with monetary claims, since the interest was set by contract.

The claims in revision that the penalty interest provided for in Article 4.1 c) of the interest based on law or on Article 277 LCT is unacceptable and contrary to the content of Article 277 of LCT, given that the default interest does not need to be contracted, payment basis stems from the law and not based on the contract. The default interest shall become effective only if it is stipulated in the contract and there is no legal basis for payment if it is not set by the contract. This form of interest cannot be contracted in monetary obligations.

Applicant's allegations

26. The Applicant claims that *"the Challenged Decision has violated the Applicant's constitutional rights, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6.1 of the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention)".*

27. The Applicant alleges that *"the Supreme Court failed not only to justify the Challenged Decision, but also ignored in an unlawful manner the factual and legal allegations of the Applicant, which were decisive for fair adjudication of this legal matter".*

28. The Applicant further alleges that *"as a consequence of the violation of the constitutional right of the Applicant for fair and impartial trial, the Challenged Decision deprived the Applicant for the constitutional right, sanctioned by Article 32 [Right to Legal Remedies] and Article46 [Protection of Property] of the Constitution".*

29. In sum, the Applicant alleges a violation of its right to fair and impartial trial as guaranteed by Article 6 of the ECHR and 31 of the Constitution and, as a consequence, a violation of its right to protection of property under Article 46 of the Constitution.

30. The Applicant supports his allegations referring to the judgment of this Court in case no. KI72/12 Applicant Veton Berisha and Ilfete Haziri rendered on 7 December 2012.

Assessment of admissibility

31. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

32. In this respect, the Court refers to Article 113 of the Constitution which establishes:

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

33. The Court also refers to Article 48 of the Law which provides:

    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.

34. The Court additionally refers to Rules 36 (1) d) and (2) d) of the Rules of Procedure, which provide:

(1) The Court may consider a referral if: ... d) the referral is prima facie justified or not manifestly ill-founded.
(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: ... (d) the Applicant does not sufficiently substantiate his claim.

Scope of the assessment

35. The Court recalls that the Applicant appealed to the Court of Appeals on the grounds of "*Violation of the provisions of the contested procedure; Erroneous and incomplete finding of the factual situation; Erroneous finding of the material law*".

36. The Court further recalls that the Applicant claims that the Court of Appeals responded to its allegations "*without any analysis, giving impression that it did not consider the allegations at all*".

37. In that respect, the Court emphasizes that, in accordance with the principle of subsidiarity, the exhaustion rule followed by the Applicant provided to the Supreme Court with the opportunity to prevent or put right an alleged violation. "*The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see mutatis mutandis, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).*

38. Therefore, the Court considers that, if the abovementioned claim would be grounded, the Applicant gave to the Supreme Court the opportunity to fix the violation through the exhaustion process, as it will be explained further on.

39. In addition, the Court observes that the Applicants focus its Referral mainly on contesting the main subject of the lasting discussion throughout the proceedings in the regular courts' instances: "*the first instance court found that the statement of claim of the claimant is grounded, due to the fact that the amount paid of €44640.54 has to do with the penalty interest, which was made by erroneous application of the material law because the provisions of Article 4.1 under items c) of the Loan Agreement was agreed monthly default interest rate of 3% for every delayed month for unpaid loan instalments. These provisions are inconsistent with the provisions of Article 270 paragraph 3 of the LCT, according to which contractual penalty cannot be contracted in monetary obligations which is imperative in nature, so that as the default interest includes the penalty interest, and it cannot have any legal effect. So, through pressure, seizure of the mortgage, the claimant and the Guarantors in the executive procedure, the amount of €44.640.54 paid on 30.05.2011 in the name of default interest is the acquisition without ground by the respondent, pursuant to Article 210, paragraph 1 and 2, LCT, decided as in the enacting clause*".

40. The Court notes that, in the case, the main and continuous key allegation of the Applicant in proceedings before the regular courts concerns an applicability of a

law question: how to apply the provisions of Articles 270 (3) and Article 277 of LCT to paragraph 4 (1) c) of the Loan Agreement.

41. In fact, the Applicant claims mainly that:

    i). the decision of the Supreme Court did not examine and address key questions raised by it which were indispensable for a meritorious and just resolution of the said legal matter;
    ii). the challenged decision does not contain coherent reasoning;
    iii). the challenged decision is contradictory because, inter alia, the Supreme Court failed to explain how is it possible that article 277 of the LOR which envisages penalty interest is applied by automatic action of the law and without contracting the altitude of penalty interest.

42. The Applicant argues in general that the Supreme Court judgment *"not only failed to address serious violations, referred by the applicant during the adjudication of this case by the lower courts, but it made violations of the constitutional and legal rights of the applicant that threaten the rule of law in the country"*.

43. In addition, the Applicant alleges that the Supreme Court *"without any basis found no violation of contested procedure provisions and* [found] *that the factual situation in this matter was correctly determined"*. The Applicant further considers that *"the part of the reasoning provided regarding the application of the material law has not addressed a single essential appealed allegation of the revision. This violation shows better than any other fact the arbitrary nature of the* [judgment of the] *Supreme Court"*.

44. The Court observes that the Supreme Court complied with the requirement of examining the Applicants' main argument by explaining:

    i). why the contracted penalty interest is in contravention with the law;
    ii). why the designation of the penalty interest as contractual punishment by the lower courts does not change the essence of the legal affair concluded by the parties; and
    iii). why the lower courts have correctly applied the material law when they held that the penalty interest cannot be applied vis-à-vis pecuniary obligations.

45. The Court considers that the main allegation on erroneous application, to Article 4 (1) c) of the Loan Agreement, of the legal provisions of Articles 270 (3) instead of 277 of LCT pertains to the domain of legality which falls under the prerogative of the regular courts.

46. The Court also recalls that the Applicant, in its complement to the revision, reasoned the ground on erroneous application of material law arguing that the Court of Appeal violated *"seriously the principle of separation of power established by Article 4 of the Constitution", by disregarding Article 277 of the LOR"*.

47. In addition, in its complement to the revision's reasoning, the Applicant invokes Article 10 of the Constitution which establishes that *"a market economy with free competition is the basis of the economic order of the*

Republic of Kosovo". The Applicant considers that *"Article 277.2 of LOR should be interpreted and implemented on the basis of this constitutional postulate"*.

48. The Court considers that the reference to Articles 4 and 10 of the Constitution, used by the Applicant to reason the ground on erroneous application of the law, does not constitute in itself an allegation on constitutionality. In fact, that reference makes part of its arguments addressed to show which legal provision should have been applied and that there was an error on applying the material law. Thus the ground of appeal is still on the domain of legality; it does not go at the domain of constitutionality.

49. Moreover, the Applicant would not be an authorized party to refer to the Constitutional Court such matters related to the compatibility of laws with the Constitution or questions of constitutional compatibility of a law when it is raised in a judicial proceeding.

50. Indeed, compatibility of laws with the Constitution or constitutional questions raised in judicial proceedings are matters which are in the jurisdiction of the Constitutional Court, but only if they are referred by authorized parties, which in that case are respectively only the Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson (Article 113 2. 1), and the Courts (Article 113 8). (See Cases of the Constitutional Court KO04/11, Applicant *Supreme Court of the Republic of Kosovo* requesting Constitutional Review of Articles 35, 36, 37 and 38 of the Law on Expropriation of Immovable Property, No. 03/L-139, Judgment of 1 March 2012; KO43/10, Applicant *LDK-AAK-LDD, Prizren MA,* Resolution on Inadmissibility of 25 October 2011, paragraphs 19-21; KI230/13, Applicant *Tefik Ibrahimi,* Resolution on Inadmissibility of 19 May 2014, paragraphs 25-27).

51. In this regard, the European Court of Human Rights (hereinafter, the ECtHR), in accordance with its established case law, held that *"The Convention does not institute for individuals a kind of actio popularis for its interpretation and thus does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention"*. (See *Monnat v. Switzerland*, No. 73604/01, ECtHR, Judgment of 21 September 2006, paragraphs 31-32 and, see *mutatis mutandis, Klass and Others v. Germany,* No. 5029/71, ECtHR, Judgment of 6 September 1978, paragraph 33).

52. The Referral is based on Article 113 (7) of the Constitution which establishes that *"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution"*. Thus the Applicant cannot obtain a constitutional assessment of constitutionality of a Law through Article 113 (7) where it is possible only through Article 113 (2) 1) and Article 113 (8) of the Constitution and cannot use the alleged constitutional violation of Articles 4 and 10 as an argument to prove an erroneous application of substantive law.

53. The Court acknowledges that the competing interests under dispute in the case is very important for both the parties, may radiate and impact on other individual's liberty and autonomy, and affect the constitutional rights of private parties in civil litigations. However, no such constitutional allegation and argument was brought either before the Supreme Court or before the Constitutional Court.

54. Therefore, the Court will confine itself to the allegations and arguments made by the Applicant:

    (i) violation of Articles 6 (1) and 13 of the ECHR and Articles 31 of the Constitution and
    (ii) violation of Article 46 of the Constitution.

    Both the allegations are logically dependent, as the second is a consequence of the first one. Thus the Court will start analyzing the first one.

Violation of the right to fair and impartial trial

55. The Court, having identified the main matter of the analysis, recalls that, pursuant to Article 53 of the Constitution, it is bound to interpret human rights and fundamental freedoms guaranteed by the Constitution consistently with the court decisions of the ECtHR.

56. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and material law. (See, mutatis mutandis, *García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECtHR] 1999-I).

57. In addition, the Constitutional Court reiterates again that the correct and complete determination of the factual situation and applicable law is a full jurisdiction of regular courts, and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and, therefore, cannot act as a "fourth instance court". (See case *Akdivar v. Turkey,* No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65. See also *mutatis mutandis* the case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

58. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of factual findings or applicable law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

59. Thus, the Court will assess whether the relevant proceedings were in any way unfair or tainted by arbitrariness, in conformity with the case law of the European Court of Human Rights. (See mutatis mutandis, *Shub v. Lithuania*, ECtHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

60. In fact, the Court notes that the Applicant filed the "revision" on the grounds of "*violation of the provisions of the contested procedure; erroneous application of the material law*" and it has not invoked the ground on "*erroneous and incomplete finding of the factual situation*" which it has previously alleged before the Court of Appeals.

61. The Court also notes that the Judgment of the Supreme Court reads that the Applicant *"filed the revision due to substantial violation of the contested*

procedure provisions and erroneous application of the material law". Thus, the Court considers that the Supreme Court was aware of the grounds of the revision to be taken into account.

62. The Supreme Court found that *"the challenged judgment does not contain any substantial violation of civil procedure alleged by the revision. The enacting clause is clear and there is no contradiction within the reasoning, while in the reasoning are provided full and sufficient reasons for all of the material facts relevant to the trial of this legal matter. Therefore, the allegations in the revision that the lower courts judgments contain substantial violation of contested procedure provisions are ungrounded"*.

63. The Supreme Court further found in relation to the erroneous application of the material law that *"the claims in revision that the penalty interest provided for in Article 4.1 c) of the interest based on law or on Article 277 LCT is unacceptable and contrary to the content of Article 277 of LCT, given that the default interest does not need to be contracted, payment basis stems from the law and not based on the contract. The default interest shall become effective only if it is stipulated in the contract and there is no legal basis for payment if it is not set by the contract. This form of interest cannot be contracted in monetary obligations"*.

64. Moreover, the Supreme Court *"found that the adopted interest in the adjudicated amount is applied in an unfair way by the provisions of Article 277 of LCT, because the interest rate is determined in accordance with this legal provision, as adopted interest rate of 3.5% may not be the same in all local banks. Therefore, starting from the fact that, in connection with the approved interest rate, the first instance court made an erroneous application of the material law (by rejecting as unfounded the claimant's revision), the same judgment with this part was modified pursuant to Article 224, paragraph 1 of the LCP. The claimant is admitted interest from the time of filing the claim (30.09.2011) in accordance with Article 279, paragraph 2, of LCT the claimant was late to return the agreed amount in the name of compensation of damage. Therefore, pursuant to Article 277, paragraph 1 of the LCT, the claimant is entitled to interest on the amount paid by local banks for savings account for more than one year without a specific purpose"*.

65. Furthermore, the Supreme Court also expressly took into account the ground of appeal brought by the Applicant before the Court of Appeals on "*erroneous and incomplete finding of the factual situation*", meaning that *"the judgment of the first instance court is contrary to the minutes when it is concluded that it is not disputed that the claimant paid the amount of €44,640.54"*.

66. In fact, the Supreme Court Judgment explained that the claim on erroneous and incomplete finding of the factual situation is *"inadmissible because, although from the contents of the case file results that the respondent* [here, the Applicant] *in entire proceedings challenged the claimant's statement of claim, from the banking statement as of 1 January 2011, issued by the respondent, it results that the amount of loans of €300,000, to claimant as debtor was set the certain interests in the amount € 10,799,46 and €38,841,08, or total amount of €44,640,54, which the claimant seeks as penalty. In addition, these data are inconsistent with the contents of the case file and the data in the session of first instance on 04.11.2011, where the respondent claims*

that the extra-judicial agreement to pay the debt in part of unpaid debt, default interest and contractual penalties concluded after default interest was deducted in the amount of €55,657,47. So accordingly, the claims in the revision that the challenged judgment contains substantial violation of contested procedure provisions are unacceptable".

67. The Court notes that the Applicant claims in summary that the Supreme Court failed to explain how is it possible that Article 277 of the LOR which envisages penalty interest is applied by automatic action of the law and without contracting the altitude of penalty interest.

68. The Court acknowledges that the importance of the right to a reasoned decision is well established by the case law of the ECtHR. (See, among others, cases *Garcia Ruiz v. Spain,* 1994; *Pronia v. Ukraine,* 2006; *Nechiporuk and Tornkalo against Ukraine,* 2011; *Hirvisaari v Finland, 2001; Hadijanastrassiou v. Greece,* 1992; *Hirvisaari v. Finland,* 2001).

69. In accordance with the ECtHR case law, the right to a reasoned decision encompasses a complex of obligations for the court judgments, namely, to provide the reasons on which the decision is based, to demonstrate to the parties that they have been heard, to provide with the opportunity to appeal the decision, to provide sufficient clarity of the grounds on which the decision is rendered.

70. However, the ECtHR has also acknowledged that the "*the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases*". (See *Dombo Beheer B.V. v. the Netherlands,* para 32; *Levages Prestations Services v. France,* para 46).

71. Although a regular court has a certain margin of appreciation when choosing arguments and admitting evidence, Article 6 (1) does not require a detailed answer to each and every argument. (See *Suominen v. Finland,* para 36; *Van de Hurk v. the Netherlands,* para 61; *Garcia Ruiz v. Spain* [GC], para 26; *Jahnke and Lenoble v. France* (déc.); *Perez v. France* [GC], para 81; *Ruiz Torija v. Spain,* para 29; *Hiro Balani v. Spain,* para 27).

72. In addition, ECtHR established that Article 6 (1) does not require the Supreme Court to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law. (*Burg and others v. France,* (dec.); *Gorou v. Greece (No. 2)* [GC], para 41).

73. Furthermore, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision (*Garcia Ruiz v. Spain* [GC], para 26). However, the notion of a fair procedure 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 (*Helle v. Finland,* para 60).

74. In the case, the Court observes that the matter under dispute is a civil case concerning civil rights and obligations; the Supreme Court was aware of the grounds of the revision and dealt with all of them, including the errors of fact only invoked before the Court of Appeals; the main question under dispute has

to do with the application of specific legal provisions; and the Supreme Court endorsed some reasons of the lower instances, but it also addressed the essential issues mainly when dealing with errors on factual findings and erroneous application of the substantive law.

75. The Court further recalls that the Applicant, in supporting his arguments, refers to the judgment of this Court in case no. KI72/12 (Applicants *Veton Berisha and Ilfete Haziri*, rendered on 7 December 2012). The Court reminds that, in case no. KI72/12, the regular courts had completely disregarded and did not answered to key questions and proof set forth by the then Applicant.

76. In the instant case, the Court considers that the Applicant was provided with replies to his legal allegations on violation of the contested procedure, erroneous application of material law and also on erroneous and incomplete finding of the factual situation. Therefore, no parallel lines can be drawn between the two cases: case KI72/12 raises constitutional questions; the present case KI118/14 raises legality matters.

77. The Applicant notes that *"if the appealed judgment will not be quashed and if the instrument of "penalty instrument" or "default interest" is pronounced null it would lead to the collapse of the entire monetary system of obligational relationships in general and especially the financial system in Kosovo"*.

78. In this respect, the Court emphasises that it is not a court of appeal or a court which can quash decisions of the regular courts or retry cases heard by them, nor can it re-examine cases in the same way as the Supreme Court, neither it is meant to act as a court of fourth instance nor as a legislative body.

79. Thus it is not up to the Constitutional Court to determine whether the penalty interest can or cannot be applied *vis-à-vis* pecuniary obligations and then caring of *"the entire monetary system (...) and especially the financial system in Kosovo"* or to act as a legislative body enacting a law in order to harmonize the legal system.

80. Therefore, the Court considers that the Applicant has not substantiated and proved its allegation that the Supreme Court violated his rights by not having applied, to Article 4 (1) c) of the Loan Agreement, the provisions of Article 277 instead of Article 270 of the LOC and clarified whether the penalty interest can or cannot be applied *vis-à-vis* pecuniary obligations.

81. Moreover, the Applicant does not convincingly show that the Supreme Court acted in an arbitrary or unfair manner by not having given answers to each and every presented argument. It is not the task of the Constitutional Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of the regular courts to assess the presented evidence and determine the applicable law. The Constitutional Court's task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way in which evidence was taken and presented. (See case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).

82. The Court considers that the Supreme Court conducted the proceedings in a fair way and justified the decision on the grounds of the revision, including the ones

which the Applicant was claiming not having been taken into account by the Court of Appeals.

83. Furthermore, the fact that the Applicant disagrees with the factual and legal outcome assessment of the case cannot of itself raise an arguable claim of a breach of Articles 31 [Right to Fair and Impartial Trial] of the Constitution. (See case *MezoturTiszazugi Tarsulat vs. Hungary*, No. 5503/02, ECtHR, Judgment of 26 July 2005).

84. In these circumstances, the Applicant has not substantiated its allegation for violation of its right to fair and impartial trial and, consequently, its right to property, because it has not shown that the regular courts had denied it the rights guaranteed by the Constitution.

Violation of the right to protection of property

85. The Court recalls that the Applicant further alleged that *"the Challenged Decision deprived the Applicant from the constitutional right, guaranteed by (...) Article46 [Protection of Property] of the Constitution"*.

86. The Court notes that the allegation was made by the Applicant *"as a consequence of the violation of the constitutional right of the Applicant for fair and impartial trial"*.

87. The Court has just concluded that the Applicant's allegation on a violation of the right to fair and impartial trial is inadmissible.

88. Therefore, the Court considers that it is not necessary to examine separately the admissibility of the Applicant's allegation on a violation of its right to protection of property under Articles 46 of the Constitution.

89. In sum, the Referral is manifestly ill-founded and thus inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (1) and (7) of the Constitution, Article 48 of the Law and Rules 36 (1) d) and (2) d) of the Rules of the Procedure, in its session held on 9 March 2015, unanimously

DECIDES

I. TO DECLARE the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur **President of the Constitutional Court**

Almiro Rodrigues Prof. Dr. Enver Hasani