



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

Prishtina, on 15 July 2016  
Ref. No.:AGJ968/16

## JUDGMENT

in

**Case No. KI18/16**

Applicant

**Bedri Salihu**

**Constitutional review of Judgment Rev. no. 308/2015 of the Supreme Court of Kosovo, of 12 November 2015**

## CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy President  
Robert Carolan, Judge  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge

### Applicant

1. The Referral was submitted by Mr. Bedri Salihu from Mitrovica (hereinafter: the Applicant), who is represented by Mr. Selman Bogiqi, a lawyer practicing in Prishtina.

## **Challenged decision**

2. The Applicant challenges Judgment Rev. no. 308/2015 of the Supreme Court of Kosovo of 12 November 2015.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which according to the Applicant's allegation, "*has violated Article 21.2 [General Principles] of the Constitution of Kosovo*" (hereinafter: the Constitution).
4. At the same time, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure and to render a decision on the temporary suspension of Judgment Rev. No. 308/2015 of the Supreme Court of Kosovo, from the date of the submission of the Referral until the decision on the merits is rendered on this case.

## **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution and Article 47 of Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law).

## **Proceedings before the Court**

6. On 27 January 2016, the Applicant submitted the Referral to the Court.
7. On 12 February 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Selvete Gérxhaliu-Krasniqi and Gresa Caka-Nimani.
8. On 1 March 2016, 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 20 May 2016, the Review Panel deliberated on the report of Judge Rapporteur and recommended to the Court the admissibility of the Referral.

## **Summary of facts**

10. On 9 April 2010, the Applicant suffered severe bodily harm in a car accident caused by holder of a car insurance with the insurance company „SIGMA“ in Prishtina (hereinafter: SIGMA).
11. On 11 July 2012, the Municipal Court in Skenderaj [Judgment P. no. 41/2011] found a holder of the SIGMA car insurance the sole culprit of having caused a traffic accident in which the Applicant was injured.
12. On an unspecified date, the Applicant filed a claim against SIGMA with the Basic Court in Prishtina, requesting compensation for material and non-

material damage caused by an exclusive fault of the holder of the SIGMA car insurance.

13. On 30 July 2014, the Basic Court in Prishtina [through Judgment C. no. 1234/10] partly approved the Applicant's claim and obliged SIGMA to compensate the Applicant for the material and non-material damage caused by its insurance holder.
14. The Basic Court in Prishtina based the assessment of the amount of compensation for material and non-material damage on the findings of the medical expertise and "super-expertise", as well as on well-established case law concerning the determination of the amount of compensation for the material and non-material damage.
15. On an unspecified date, SIGMA filed an appeal with the Court of Appeal against the Judgment of the Basic Court in Prishtina, alleging essential procedural violations, erroneous and incomplete determination of the factual situation as well as erroneous application of the substantive law.
16. On 29 June 2015, the Court of Appeal [through Judgment Ac. no. 4842/2014] partially approved the appeal of SIGMA and quashed the Judgment of the Basic Court in the part related to the amount of material damage and remanded that part of the judgment for reconsideration to the Basic Court. As to the part of the judgment concerning the adjudication of the amount for non-material damage, the Court of Appeal upheld the judgment of the Basic Court.
17. The Court of Appeal approved the legal assessment of the first instance court concerning the adjudication of the amount for non-material damage as lawful and fair, and, therefore, concluded that the first instance judgment contains no violation of the law on contested procedure and that the factual situation was correctly and completely determined.
18. On an unspecified date, the respondent SIGMA submitted a request for revision to the Supreme Court against the judgment of the Court of Appeal, alleging essential violation of the contested procedure and erroneous application of the substantive law with the proposal that the Supreme Court of Kosovo approves the revision and decreases the amounts for non-material and material damage or to quash both judgments and remand the case to the first instance court for retrial.
19. On 12 November 2015, the Supreme Court of Kosovo through Judgment Rev. no. 308/2015] partially approved as grounded the request for revision submitted by SIGMA and, accordingly, modified the Judgment of the Court of Appeal and Basic Court in Prishtina, by significantly reducing the amount of financial compensation for non-material damage caused to the Applicant.
20. The Supreme Court concluded that the amounts for compensation for non-material damage, adjudicated by the lower instance courts "*are not adequate and harmonious with the nature of the non-material damage compensation, taking into account the importance degree of the good and purpose which this*

*compensation serves, as foreseen by Article 200, paragraphs 1 and 2 of the Law on Obligations”.*

21. The Supreme Court further concluded that “*the age of the Claimant at the time when he suffered the injuries from the accident, the nature of injuries, and the purpose of non-material damage compensation, the present Court considers that by the help of the determined amounts, the Claimant may experience a significant satisfaction as a balance for the physical pain and fear he suffered.”*”.

### **Applicant’s allegations**

22. The Applicant claims that his rights under Article 21 [General Principles] of the Constitution were violated by the judgment of the Supreme Court. The Applicant does not invoke any other article of the Constitution. However, based on the Applicant's allegations that the Judgment of the Supreme Court is not reasoned, the Court considers that the Applicant complains about the violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).
23. The Applicant alleges that his right was violated “*because the Court caused for me a damage of 20,000 Euros, because it decreased the amount up to 12,000 Euros, without reasoning the Judgment it rendered*” and there is a concern “*as to what pieces of evidence and facts are considered as basis when modifying the final judgment*”.(....),”
24. In addition, the Applicant requests that the Court ”*renders a decision to temporarily suspend Judgment Rev. no. 308/2015 of the Supreme Court of Kosovo of 12 November 2015 until the Court renders a decision*”.

### **Admissibility of the Referral**

25. 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 Rules of Procedure.
26. In this regard, the Court refers to paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

*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.*

27. The Court also refers to Article 48 [Accuracy of the Referral] 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.*

28. The Court further refers to Rule 36 (1) of the Rules of Procedure, which provides:

*“(1) The Court may only deal with Referrals if:*

- (a) The referral is filed by an authorized party, or*
- (b) All effective remedies that are available under the law against the judgment or decision challenged have been exhausted, or*
- (c) The referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or*
- (d) The referral is prima facie justified or not manifestly ill-founded”*

29. In addition, the Court refers to Article 49 [Deadlines] of the Law, which provides:

*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 (...).*

30. In this respect, the Court notes that Judgment Rev. no. 308/2015 of the Supreme Court of Kosovo is of 12 November 2015, while the Referral was submitted to the Court on 27 January 2016.
31. As a result, the Court finds that the Applicant is an authorized party, the Referral is filed within the legal deadline and all legal remedies are exhausted. Furthermore, the Applicant indicates in substance the rights which allegedly have been violated by the challenged Judgment.
32. Therefore, the Referral is admissible and the Court will now assess the merits of the Referral.

## **Merits**

33. The Court recalls that the Applicant alleges that the Supreme Court did not reason its judgment while determining a decrease on the amount of non-material compensation to the Claimant, and did not give a clear answer on why it modified the decisions of the lower courts with respect to the amount of monetary compensation decided by the lower courts.
34. As a result, the Applicant alleges a violation of the rights guaranteed by Article 21 [General Principles] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] ECHR
35. Article 31 [Right to Fair and Impartial Trial] of the Constitution provides:

*Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*

*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.*

*[...].*

36. Article 6 (Right to a fair trial), paragraph 1, of ECHR provides:

*"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".*

37. Furthermore, the Court reiterates that, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*".
38. The Court recalls that the main complaint of the Applicant is based on the fact that the Supreme Court has not sufficiently reasoned its judgment, namely it has not justified for what reasons it modified the decisions of the lower courts with respect to the determination of the amount of monetary compensation for non-material damage, while on the other hand, the Basic Court and the Court of Appeal reasoned their judgments by basing them on the findings of the expertise and super-expertise, carefully analyzing each of them separately.
39. The Court notes that the Basic Court in Prishtina determined the amount of compensation for non-material damage to be paid to the Applicant, and upheld in its entirety the medical expertise and super-expertise conducted by several experts in the medical field. The Basic Court in adjudicating the amount of compensation also referred to the established case law in similar cases.
40. The Court also notes that the Court of Appeal fully upheld the Judgment of the Basic Court in the part concerning the determination of compensation for the non-material damage caused, while in the part concerning determination of the compensation for material damage it annulled the first instance judgment and remanded it to the Basic Court for retrial.
41. The Court of Appeal reasoned its judgment in the part concerning the confirmation of determined compensation for non-material damage as follows:

*„The legal stance of the first instance court, as regards the compensation for physical pain, fear, disfigurement, and decrease of the general daily life activities, and compensation for material damage to the damaged vehicle, is upheld by the second instance court as correct and lawful,*

*because the enacting clause of this judgment was very clear and as such it is adequate for enforcement. The enacting clause in this part is not contradictory in itself and in its reasoning and it contains sufficiently convincing factual and legal reasons related to the decisive facts in this legal matter. Therefore, the challenged judgment, as regards this part, was not rendered by essentially violating the contested procedure provisions of Article 182.2 of the LCP, whereof this Court takes care ex officio, based on Article 194 of the LCP. Because of the correct and complete determination of the factual situation, which is not doubted by the appealed allegations, the substantive law was also correctly applied by the first instance court, as regards these forms of damage. The Court of Appeal considers that the adjudicated amount for the non-material damage satisfies the claimant [the Applicant], in order to put a balance for the non-material damage - mental anguish suffered, and in this regard the appealed allegations are ungrounded.“*

42. On the other hand, the Court recalls that the Supreme Court while significantly decreasing the amount of compensation for non-material damage, that was justified and approved by the lower Court, it only reasoned its Judgment by stating that “considering that the amounts for compensation adjudicated by the lower instance courts are not adequate and harmonious with the nature of the non-material damage compensation”. The Supreme Court also considered “*the age of the Claimant (...), the nature of injuries, and the purpose of non-material damage compensation*”. The Supreme Court further considered that “*the adjudicated amounts (...) are real and represent a full satisfaction for the Claimant*”.
43. The decision of the Supreme Court however, did not explain any of the facts it consider nor any of the specific reasons it might have taken into account, when significantly modifying and lowering the previously approved amounts by the lower instance courts.
44. In this regard, the Court clarifies that it is not its task to consider whether the Supreme Court correctly interpreted the applicable law (legality), but whether the Supreme Court, by the challenged judgment, violated individual rights and freedoms protected by the Constitution (constitutionality). (See, for example, Case No. KI72/14, Applicant *Besa Qirezi*, Judgment of 4 February 2015, para.65).
45. Moreover, as a general rule, the establishment of the facts of the case and the interpretation of the law are a matter solely for the regular courts whose findings and conclusions in this regard are binding on the Constitutional Court. However, where a decision of a regular court is arbitrary, the Court can and must call it into question. (See *Sisojeva and Others v. Latvia*, [GC], application no. 60654/00, Judgment of 15 January 2007, para. 89).
46. In fact, the Court reemphasizes that the challenged Judgment does not refer to any factual and legal reasons related to the question on how and why it so significantly diverted from the decision of the lower instance courts on the amount of compensation for non-material damages.

47. The Supreme Court did not justify on what basis it modified the decisions of the lower courts with respect to the determination of the compensation for the non-material damage caused and why the Supreme Court considered that the initial decisions were not adequate and in accordance with the nature of the compensation for non-material damage.
48. The Court notes that the considerations made by the challenged Judgment justifying the decision, are based on the wording “*not adequate and harmonious*”, “*the age of the Claimant (...), the nature of injuries, and the purpose of non-material damage compensation*” and “*the adjudicated amounts (...) are real and represent a full satisfaction*”.
49. However, the Court considers that, without factual and legal reasons, these considerations are of conclusive nature and cannot meet the standards required for a reasoned decision and respect the right of the Applicant to a reasoned decision as guaranteed by the Constitution and the ECHR.
50. The Court considers that the challenged judgment of the Supreme Court does not justify why the amount of compensation for non-material damage to the Applicant was modified and decreased in relation to the stand of lower instance courts on the same matter.
51. The Court reiterates that the right to obtain a judicial decision in accordance with the constitutional law includes the obligation of the courts to give sufficient reasons for its decisions, both at the procedural and the substantive level.
52. The previous conclusion is confirmed by the ECtHR case law, which establishes that the provision of reasoning with plausible and legally well-constructed reasons for the decision taken in each individual case, which shall include legal criteria and factual elements in support of the decision. (See Constitutional Court cases KI72/12, Applicants *Veton Berisha and Ilfete Haziri*, Judgment of 7 December 2012 and KI135/14 Applicant *IKK Classic* Judgment of 8 February 2016).
53. Similarly, the ECtHR found a violation of Article 6 (1) (See *Hiro Balani v. Spain*, No. 46/1993/441/520 ECHR Judgment, of 9 December 1994,), when it concluded that the courts in the regular proceedings had not sufficiently reasoned their decisions, nor had given precise answers to the substantive allegations of the Applicant, making it impossible to determine whether the regular courts simply had ignored this question or whether they intended to reject the submission (in that case, *mutatis mutandis*, to modify), and if so, what were the reasons for the rejection (in that case, *mutatis mutandis*, for the modification).
54. The Court reiterates that the reasoning should enable the person to whom the decision is directed and the general public to follow the reasoning that prompted the court to render a certain decision.
55. Accordingly, the Court considers that the failure of the Supreme Court to reason and justify and provide answers to the question why it deemed it

necessary to modify the amount of monetary compensation for non-material damage to be paid to the Applicant by SIGMA, as decided by the lower courts, constitutes a violation of the Applicant's right to a reasoned decision, as a component of his right to a fair and impartial trial.

56. Therefore, the Court concludes that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] ECHR.
57. In addition, the Court recalls that the Applicant alleges a violation of Article 21 [General Principles] of the Constitution. In this respect, the Court considers that it is not necessary to deal with allegations as to a violation of Article 21 of the Constitution, because not only he has substantiated the allegation but also because a violation of Article 31 of the Constitution and Article 6 ECHR is found.

#### **Assessment of the request for an interim measure**

58. The Court notes that the Applicant in the Referral requests the Court to impose an interim measure and to suspend the execution of Judgment Rev. no. 308/2015 of the Supreme Court, until it decides on the merits of this Referral.
59. In order for the Court to grant an interim measure, in accordance with Rule 55 (4) (b) and (c) of the Rule of Procedure, it is necessary that:

“[...]

*(b) the party requesting interim measures has shown that it would suffer irrecoverable damages if the interim relief is not granted; and*

*(c) the interim measures are in the public interest.*

*If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.“*

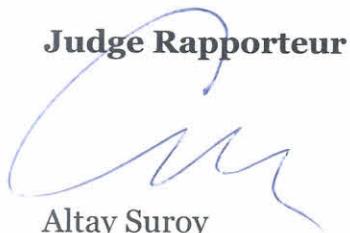
60. The Court finds that there is no ground that the Applicant will suffer irreparable damage, since the monetary compensation does not fall into the category of irreparable damage.
61. Therefore, as for the Applicant's request for an interim measure, the Court concludes that, given that the requirements set out in Rule 55 (4) (b) and (c) of the Rules of Procedure are not met, the request for an interim measure must be rejected.

## **FOR THESE REASONS**

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rules 56 (1) and 74 (1) of the Rules of Procedure, by majority, in its session of 20 May 2016:

- I. DECLARES the Referral admissible.
- II. REJECTS the request to impose interim measure.
- III. HOLDS that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a Fair Trial] of the European Convention on Human Rights.
- IV. DECLARES invalid the Judgment of the Supreme Court of Kosovo Rev. no. 308/2015 of 12 November 2015.
- V. REMANDS the Judgment of the Supreme Court for reconsideration in conformity with the judgment of this Court;
- VI. REMAINS seized of the matter pending compliance with the order;
- VII. ORDERS this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;
- VIII. DECLARES that this Judgment is effective immediately.

**Judge Rapporteur**



Altay Suroy

**President of the Constitutional Court**



Arla Rama-Hajrizi