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

PRISTINA, 17 DECEMBER 2010
REF. NO.: AGJ 75/10

JUDGMENT

in

Case No. KI 08/09

The Independent Union of Workers of IMK Steel Factory in Ferizaj, represented by Mr. Ali Azem, President of the Union.

Constitutional Review of the Decision of the Municipal Court of Ferizaj, Decision C No. 340/2001, dated 11 January 2002

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is the Independent Union of Workers of IMK Steel Pipe Factory from Ferizaj. In the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court"), it is represented by Mr. Ali Azem, President of the Union residing in Ferizaj.

The Challenged Decision

2. The decision challenged by the Applicant is the Decision of the Municipal Court of Ferizaj of 6 October 2008.

Subject Matter

3. The subject matter of this referral is the assessment of the constitutionality of the alleged violation of the principle *res judicata* embedded in Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"). The Applicant claims that the Municipal Court of Ferizaj, which, by judgment of 11 January 2002, approved the request for compensation of unpaid salaries of 572 workers of the socially-owned IMK Steel Pipe Factory (hereinafter: "IMK") in the amount of 25.649.250,00 Euro. That judgment has become final (*res judicata*) on 11 March 2002. On 22 December 2005, the same Municipal Court allowed the execution of the judgment. However, the execution has, so far, not been enforced.

4. The Applicant also alleges a violation of Article 49 [Right to Work and Exercise Profession] and of the right to compensation for unpaid salaries.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law") and Sections 54 and 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules Procedure").

Proceedings before the Constitutional Court

6. On 3 March 2009, the Applicant filed a referral with the Court.

7. On 26 February 2009, the workers represented by the Applicant submitted a claim for execution to the Constitutional Court (hereafter "the Court"), requesting the execution of the final decision of the Municipal Court of Ferizaj, C. nr. 340/2001 of 11 January 2002, and to oblige IMK Steel Pipe Factory in Ferizaj to pay, within eight (8) days from the receipt of the decision of the Court, to the Applicant the amount of 25.649.250,00 Euro, with 3% interest rate from 13 March 2002 until the definite payment has been made, as well as the expenditures of the executive procedure.

8. On 3 March 2009, the Court notified the Applicant that the referral has been registered with the Court.

9. On 11 August 2009, the Court notified IMK of the Referral of the Applicant and requested the IMK to submit a reply in respect to the referral.

10. By Order of the President No. GJR. 10/09, dated 24 September 2009, Judge Altay Suroy was appointed as Judge Rapporteur.
11. On 1 October 2009, the President, by Order No.KSH. 08/09, appointed the Review Panel composed of Judge Almiro Rodrigues (Presiding), and President Enver Hasani and Judge Iliriana Islami.

12. On 12 November 2009, the Court sent a letter to the Applicant, requesting clarification regarding which rights have been violated, the concrete decision that is contested and the authorization to represent the workers. On 25 November 2009, the Applicant submitted the authorization verified by the Municipal Court of Ferizaj.

13. On 12 February 2010, the Court sent a letter to the Municipal Court of Ferizaj requesting information on what steps had been taken by the Municipal Court to

execute decision C. no. 340/2001. On 12 February 2010, the Court sent a letter to the Privatization Agency of Kosovo[1] (PAK) requesting information whether PAK had been involved in the case referred by the Applicant and in the execution of decision C. no. 340/2001. On 12 February 2010, the Court sent a letter to the Kosovo Judicial Council (KJC) requesting information on the legal remedies that exist to execute decisions.

14. On 5 March 2010, the Court received a reply from PAK, providing a historical background of the case of the IMK workers.

15. On 11 March 2010, the KJC, upon the request of the Court dated 22 February 2010 to provide information on the non-execution of the decision of the Municipal Court of Ferizaj (Decision C.no. 340/2001), replied and stated that it has received a reply from the Municipal Court of Ferizaj on 10 March 2010, stating that, with the decision of the Municipal Court of Ferizaj (Decision E.no. 469/05) of 6 October 2008 all execution procedures had been suspended based on the notification of KTA that IMK was put in liquidation. The KJC further stated that this decision had been sent to the Applicant. On 23 March 2010, the Court sent the reply of PAK and the Municipal Court of Ferizaj to the Applicant for comments.

16. On 6 April 2010, the Applicant submitted its reply to the Court's request of 23 March 2010.

17. By order of the Court, No. 08-1-09/10, 21 September 2010, Public Hearing was decided to be held in case KI-08/09.

18. On 13 October 2010, a public hearing was held at which the Applicant's representative was present as well as representatives of the PAK and the NewCo IMK. The Municipal Court of Ferizaj was also invited to the public hearing but they did not respond. On the same date, additional documents were submitted by the Applicant and by PAK.

Summary of the facts

19. On 27 February 1990, the temporary management of the socially-owned enterprise IMK in Ferizaj, pursuant to the provisions of the Collective Interim Measures Laws, terminated the Contract of Employment of 572 workers, for the reason that they had been absent from work for five consecutive days. The workers filed an objection with the temporary management of IMK, but did not receive any reply to their objection. They then submitted a claim for judicial protection of their rights to the Basic Joint Labour Court in Pristina, considering the challenged decision of IMK unlawful on the ground that, during the days in question, they were not allowed to enter the factory and to continue work.

20. In 2001, the workers filed a claim in respect of their dismissal and the loss of wages from the date of their dismissal to the submission of their claim with the Municipal Court in Ferizaj.

21. On 11 January 2002, the Municipal Court of Ferizaj assessed the workers' claim in the light of Article 8 of the Law on Contested Procedure and ruled that the claim was well-founded. The Court further stated that the IMK decision to annul the employment contract was unlawful and that all workers who had reported to work

[1] In accordance with Article 1 of the Law No. 03/L-067 on the Privatization Agency of Kosovo, the Privatization Agency of Kosovo is established as the successor of the Kosovo Trust Agency.

until 1 May 2001 should be reinstated in their positions at work or to working places adequate to their qualifications and working skills and should acquire all their rights from the labour relations with IMK from 19 February 1990 to 1 May 2001. The Court reasoned that IMK had not initiated disciplinary proceedings against the workers as required by the Law on Labour Relations and subsidiary regulations issued by IMK (IMK Regulation on Disciplinary and Material Responsibility) and had failed to prove through such procedures, that the workers had been absent from work for five consecutive days. The Municipal Court further found that the workers had reported to work every day from 19 February to 5 May 1990, but that police forces had not allowed them to enter. Furthermore, none of the workers had received any individual decision regarding the termination of the labour relationship nor any decision of the Basic Joint Labour Court regarding their claim for judicial protection of their rights; thus, the matter had, so far, not received any judicial attention. The Municipal Court's judgment contained the information that an appeal against it should be filed with the District Court in Pristina within eight days from the day of receipt of a written copy of the judgment. IMK, however, didn't make use of this remedy. Since IMK didn't submit an appeal to the District Court in Pristina, the judgment of the Municipal Court of 11January 2002 became *res judicata* on 11 March 2002.

22. On 20 March 2002, the Executive Board of IMK decided to approve the request of the workers to execute the decision of the Municipal Court of Ferizaj and to reinstate the workers in their positions at work in accordance with the judgment. The Executive Board concluded that IMK would take action to compensate the workers in accordance with the judgment and, therefore, no execution procedure before the court needed to be initiated. The Financial Branch of IMK calculated the amount of compensation for the workers. Since IMK did not have the financial means to compensate the workers at the time, IMK would take the responsibility to compensate the workers by other means such as issuing securities. Moreover, if, in the meantime, IMK would undergo an ownership transformation and IMK would not compensate the workers, the workers would have the right to become share holders in the company.

23. Apparently, since they didn't obtain what IMK had promised to them, the workers seized the Municipal Court in Ferizaj once more in order to request the court for an execution order of its judgment of 11 January 2002.

24. On 22 December 2005, the Municipal Court in Ferizaj allowed the execution of its judgment of 11 January 2002, while, at the same time it prohibited the privatization of IMK by the Kosovo Trust Agency (KTA).

25. On 16 January 2006, a single judge of the Municipal Court in Ferizaj decided, *ex officio* to allow the execution of its decision of 22 December 2005 against IMK, but to reverse the part of the decision where the court had prohibited the privatization of IMK. The judge reasoned that, although the Court had allowed for the entire execution of the claim of 912 workers for the payment by IMK of salaries amounting to 25.649.250 Euros with a yearly interest of 3% starting from 13 March 2002 (based on the executive title of judgment of 11 January 2002), it was assessed, upon review of the file by the judge, that a mistake had been made in the procedure for allowing the execution, because, at the same time, the court had - erroneously - imposed the temporary measure of staying the sale of IMK by KTA for privatization purposes. In the judge's opinion, KTA had been established under UNMIK Regulation No. 2002/12 of 13 June 2002 as an independent Agency, meaning that issues and cases that had to do with the privatization of assets of Socially Owned Enterprises (SOEs) had to be excluded from the jurisdiction of the local courts in conformity with that Regulation. The judge concluded that the proposal of the creditors (the workers) to

allow the imposition of the interim measure of prohibiting the sale of IMK, had, therefore, to be rejected in conformity with the provisions of the Law on Contested Procedure, whereas the rest of the ruling on allowing the execution remained untouched.

26. In March 2006, the Head of the Trade Union stated that, if there were no means available to compensate the workers, they should get shares in the ownership of IMK.

27. On 25 March 2006, the workers made an additional proposal to the Municipal Court for the forceful execution of its decision of 16 January 2006..According to the workers, they, as creditors, had been unable to realize their financial claims, as ordered by the decision of the Municipal Court of 16 January 2006, due to the lack of financial means of IMK. They requested the Municipal Court to determine, on the basis of its previous decision of 16 January 2006 as executive title, the execution in kind against IMK of the payment of the debt and the hand-over of movable and immovable items of IMK for the preservation of their rights. The workers further proposed that any action against the court order by IMK would engage criminal responsibility and that, provided that IMK would not be successful in realizing the debt, they, as the creditors, would become co-owners of IMK up to the amount awarded to them.

28. On 25 March 2006, the District Court in Pristina refused a request of the workers to stop the privatization of the IMK, but upheld the decision of the Municipal Court's judge of 16 January 2006 allowing for the execution of their full claim regarding the unpaid salaries and their re-employment.

29. In April 2006, KTA submitted a claim-suit in its capacity as third party to the Municipal Court in Ferizaj, requesting it to declare the court decision on execution inadmissible.

30. On 17 May 2006, the Municipal Court in Ferizaj decided to delay the execution and allow KTA, as a third party to the procedure, to submit, within 30 days of receipt of the judgment, a separate law suit with a competent court (the Special Chamber of the Supreme Court) in order to challenge the decision on execution.

31. On 14 June 2006, KTA requested the Municipal Court of Ferizaj to postpone the execution, determined by court order of 16 January 2006, until the termination of the separate law suit proceedings.

32. On 2 August 2006, KTA filed an appeal with the Special Chamber of the Supreme Court, pursuant to UNMIK Regulation 2002/12 and UNMIK Administrative Direction No. 2003/13, on behalf of IMK. KTA alleged, inter alia, that it was essential that the Special Chamber was aware that its decision on the application of the law in this case was not only a decision of general public importance, but would be the precedent of how the law should be applied in unpaid wages claims and, in particular, would be the precedent for the Liquidation Committees as to how to deal with the several thousand claims of this nature. KTA further stated that the primary reason that KTA had not been able to privatize IMK was due to the fact that, in January 2002, 912 current and former IMK employees obtained a judgment against IMK from the Municipal Court in Ferizaj, dated 11 January 2002, restoring their employment rights and awarding them 25,649,250 Euros. In KTA's opinion, the workers relied on this judgment and the subsequent Execution Decision to assert a right of ownership over IMK and its assets and that this in turn prevented the progressing of a successful privatization of IMK.

33. On 9 August 2006, the Special Chamber rejected the appeal by KTA, stating that, on 2 August 2006, 46 days after the deadline given by the court, KTA had handed over this prequalification appeal to the Special Chamber and provided detailed arguments, which exclusively dealt with the merits of the judgment issued in January 2002. In the Chamber's opinion, it was clear that KTA was making attempts to appeal that judgment of 2002. Moreover, the Municipal Court was competent to decide on the claim-suit of January 2002 and that the respective judgment was never appealed and had become final (res judicata). The Special Chamber further stated that a universal principle accepted by all courts everywhere in the world said that the final judgment had to be issued by a court of jurisdiction which was competent to review the merits; the judgment was final and did not spread suspicion over the rights of interested parties once the right to appeal has expired. In the Chamber's opinion, this principle represented an absolute obstacle for any subsequent action which would be initiated either before the trial court or court of appeal. The Special Chamber then referred to the European Court of Human Rights, which, according to the Chamber, had dealt with this issue in the most eloquent manner in the case of Stere and others versus Rumania[2], from which the Chamber quoted the following part :

"In this connection it should be recalled that the rule of law, as one of the fundamental principles of a democratic society, is inherent in all Articles of the Convention (see Broniowski v. Poland [GC], no. 31443/96, § 147, ECHR 2004-V). It presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. No party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see, for example, Sovtransavto Holding v. Ukraine, no. 48553/99, § 72, ECHR 2002-VII, and Ryabykh v Russia, no. 52854/99, § 52, ECHR 2003-IX). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law".

34. On 19 September 2006, KTA issued a press release, named "KTA Statement on Municipal Court Decisions Regarding Employee Compensation from 1990s", in which it stated that, in the case of IMK, one proposed remedy, to allow execution against the assets of IMK to the workers who were party to the suit - would bring about the liquidation of IMK, the consequences of which would be months of uncertainty and diminish the sums available to all creditors, including the workers. In KTA's opinion, in order to preserve and enhance the value of socially-owned enterprises (SOEs, like IMK) the optimal strategy is to privatize them via spin-off, by separating the productive elements of the NewCo into a discreet entity, which could then receive new capital, new management, new technology and, in many cases, re-hire some or all previous employees. KTA further claimed that the effect of these lawsuits for back wages, when coupled with a remedy which includes attacking the assets of the SOE, would have the undesirable and negative effect of ending the possibility of creating a viable NewCo which could interest outside investors into bringing new capital into Kosovo. Finally, in KTA's view, the Special Chamber reviewed the decisions and procedures of KTA and would have the right to decide that the workers should be compensated for back wages, but the larger question was not simply "should the employees be compensated", but "how" were the employees to be compensated, or by "whom?". Although KTA fully understood and appreciated the hardships experienced by the workers of SOEs, who were dismissed from their positions in the 1990s in a discriminatory fashion, it was of the view that, under the applicable laws, courts were not able to give ownership of an enterprise to judgment creditors and that awarding possession of the SOE to such workers would, ultimately,

[2] Application No. 25632/02 dated 23 February 2006

hinder the rapid growth of the economy in Kosovo, by forcing KTA to undertake unnecessary liquidations, which would result in the net loss of potentially productive industries. Accordingly KTA would continue to save and protect jobs by pursuing its privatization program for the full benefit of all in Kosovo.

35. On 2 October 2006, the workers requested the Municipal Court in Ferizaj to reject the proposal for postponement of the execution, arguing that the postponement of the execution, as proposed by IMK, would cause considerable irreparable damage to them and that a postponement can only be obtained with their consent as creditors.

36. On 11 December 2006, the Municipal Court in Ferizaj froze the financial assets of IMK, obliging KTA to pay to the workers 25.649.250 Euro from the assets of IMK. On 11 December 2006, one Judge of the Municipal Court in Ferizaj addressed a letter to the KTA, stating that, due to continued pressure from the workers upon him personally and upon the court, he requested KTA to accept the request of the IMK workers and to deal with this case as it had done in previous cases such as NSH KD "Tefik Qanga" in Ferizaj, NSH SHAM "Semafori" etc, where the workers concerned had similar financial claims as the workers of IMK and the court in those cases had requested KTA to finalize those claims.

37. On 13 December 2006, KTA issued a press release, stating that it had received only one bid for NewCo IMK, while in the first round of bidding, held the previous week, two bids were received. It was further stated that the price offered for the second and final bid for IMK was 3.657.000 Euro, with an investment commitment of 13.200.000 Euro and an employment commitment of 80 persons.

38. On 2 April 2007, the Applicant filed a claim with the Special Chamber seeking to annul all privatization procedures relating to IMK and requesting a preliminary injunction seeking to enjoin KTA from proceeding with the sale of NewCo IMK. By decision of 17 December 2007, the Special Chamber rejected the claim of the Applicant, stating that, if the Applicant could prove an ownership interest in property privatized by KTA, it would annul that transaction. However, in the absence of such proof, it could not. Therefore, since the Applicant had no ownership rights, it had no standing to claim that the sale of IMK by KTA was a violation of its property rights. In the Special Chamber's opinion, the language of the decision of the Ferizaj Municipal Court of 25 March 2006 does not convey ownership. Rather it states: "The creditor...shall enter into co-ownership with debtor to the extent of the disputed requests... ...in case the creditors have no success to realize the debt in cash...". According to the Chamber, this document simply promised a future grant or an ownership interest on two conditions : first, that the extent of the disputed fractional share of that ownership would later be determined. In other words, one first had to determine the full value of the enterprise, and then calculate the fractional shares based on the court's determination of each creditor's claim. That was never done, so the award was never made; second, all this was to be done only after creditors failed to have success in recovering their claims in cash. This was also left to a future determination. The Special Chamber further stated that the Applicant had a claim pending for unpaid wages from the illegal termination of their employment, a claim which was based on the 2002 judgment which was final.

39. On 8 February 2008, the Applicant filed a request for review of the judgment with the Special Chamber. On 13 March 2008, the Special Chamber rejected the request for review (Decision SCA-08-0021).

40. On 24 April 2007, the Municipal Court in Ferizaj rejected the claim of IMK, represented by KTA, to re-open the procedure which ended with the judgment of the

Municipal Court in Ferizaj of 11 January 2002, based on the fact that the claim was out of time.

41. On 14 June 2007, the Supreme Court, deciding on the request for protection of legality submitted by the State Public Prosecutor, annulled the judgment of the Municipal Court of 11 December 2006 and returned the case to that court for review.

42. On 23 October 2007, the Municipal Court in Ferizaj reviewed the case and blocked once more the financial assets of IMK, while, at the same time, annulling all its previous execution decisions.

43. On 20 November 2007, the Special Police occupied IMK, prohibiting the workers to continue to work.

44. On 21 November 2007, KTA publicly announced that IMK had been fully privatized for the amount of 3.200.000 Euro and that the new owner had made an employment commitment for 360 workers and to invest 13.2 million Euros.

45. On 17 December 2007, the District Court in Pristina refused the appeal of KTA against the decision for execution of the Municipal Court of 1 December 2006 as unfounded.

46. On 18 December 2007, the Board of Directors of KTA declared IMK in liquidation on the basis of Section 9.1 of UNMIK Regulation 2002/12[3]. Thereupon the workers presented a credit request to the Liquidation Commission.

47. On 10 March 2008, the workers requested the Municipal Court in Ferizaj to annul the sales contract between the purchaser of IMK and KTA. They alleged that the sales agreement should be revoked as null and void, illegal, harmful, arbitrary and in contradiction with the final judgments of the Municipal Court in Ferizaj of 11 January 2002 and 16 January 2006, the decision of the District Court in Pristina Ac.Nr.589/2007, as well as the final decision of the Special Chamber of the Supreme Court. They further submitted that, when the respondents [the purchaser and KTA] considered that they could not realize their goal by exhausting all the legal remedies, they were now intentionally making obstacles to the execution of the final judgment of the Municipal Court in Ferizaj by even threatening with violence, when during the night of 20 November 2007 and with the use of special police units, the respondents made a forceful entry at IMK and prohibited the workers to enter with the justification that the purchaser had bought IMK for 3.200.000 Euro. The workers finally stated that the purchaser of IMK and KTA requested them to accept the transaction as fair and conditioned to start working with this acceptation, with the sole purpose to eliminate the final judgments and decisions of the most sacred bodies in modern civilizations, namely, the courts. They requested the Municipal Court to order the respondents to return the right to free and peaceful enjoyment and use of IMK, to the workers, who had worked in it until forcefully removed by the police and to appoint a respective institution or group of experts to determine the real value of the 29 hectares of land, buildings and all industrial equipment and goods in stock as well as other equipment for the normal functioning of IMK. They proposed to the Municipal Court to annul the agreement between the respondents and in violation of the final judgments rendered in all instances.

---

[3] The Agency may initiate a voluntary liquidation of a Socially-owned Enterprise or any part thereof, where it deems such proceedings are in the interest of the creditors and/or Owners of such Socially–owned Enterprise. The Agency shall conduct the liquidation pursuant to the procedures established under the Regulation on Business Organizations, unless otherwise provided in the present Regulation.

48. On 9 August 2008, the Committee for Human Rights, Gender Equality, Missing Persons and Petitions of the Assembly of Kosovo responded to a petition of the IMK workers of 17 March 2008, stating that it had reviewed the letter of the IMK workers, who had exercised a claim-suit for the annulment of the transaction contract of IMK between a person from Ferizaj and the KTA office in Gjilan. While referring to Judgment 469/2005 of the Municipal Court, upheld by the District Court and the Special Chamber of the Supreme Court, which all agreed that the 912 workers should return to their workplaces, and considering the actions against the execution of the judgments which were in favor of the workers, the Committee assessed that the case fell within the scope of its mandate and, therefore, concluded to uphold the judgment of the Municipal Court in Ferizaj and, at the same time, required the execution of the final judgment.

49. On 6 October 2008, the Municipal Court in Ferizaj suspended ex officio the execution following a notification sent to the Court by KTA that IMK had entered the liquidation process. The workers did not appeal against this decision because they were not notified about the decision in question. They were notified first after one year had passed and several protests before the Municipal Court of Ferizaj.

50. On 29 September 2009, the Municipal Court in Ferizaj notified the Applicant of its decision of 6 October 2008, which it had already notified previously on 20 October 2008. On 5 March 2010, the Municipal Court in Ferizaj informed the workers again of its Decision of 6 October 2008.

The Applicant's complaints

51. The Applicant is representing 912 workers, whose claims against their employer IMK in Ferizaj have been honored by the courts since 2002, but the execution of which has, so far, not occurred. In violation of Article 49 of the Constitution [Right to Work]. The Applicant further complains that the final judgment of the Municipal Court in Ferizaj of 11 January 2002 has not been executed so far. , constituting a violation of the principle of *res judicata* embedded in Article 31 [Right to Fair and Impartial Trial] of the Constitution.
52. When the judgment of 11 January 2002 became *res judicata* on 11 March 2002 the workers had to be considered as creditors, as their claim had been granted. Since that date the workers have tried to have the res judicata decision executed until to date. The crux of the present complaint is, therefore, whether, under applicable law, the 912 creditors have had the possibility to have that court decision properly executed. To that effect, the creditors had obtained several further court decisions in first instance and on appeal in their favor, allowing for the execution of the amount of 25.648.259 Euros, but until to date still without any result.

53. The Applicant refers expressly to the judgment of the Special Chamber of the Supreme Court of 9 August 2006, which confirmed that the Municipal Court in Ferizaj was competent to decide on the law suit on January 2002 and that the respective judgment, which was never appealed, had become final. The Applicant refers, in particular, to the following consideration of the Special Chamber:

"A universal principle accepted by all the courts everywhere in the world says, that [after] the final judgment shall be issued by a court of jurisdiction which is competent to review the merits, the judgment is final and does not spread suspicion over the rights of interested parties, once the right to appeal has expired. This principle represents an absolute obstacle for a subsequent action which would be initiated either before the court of trial or court of appeal. The European Court of Human

Rights deals with this issue in the most eloquent manner in the case of *Stere and others vs. Romania*[4]:

"In this connection it should be recalled that the rule of law, as one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see Broniowski v. Poland [GC], no. 31443/96, § 147, ECHR 2004-V). It presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. No party is entitled to seek for a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see, for example, Sovtransavto Holding v. Ukraine, no. 48553/99, $ 72, ECHR 2002-VII, and Ryabykh v. Russia, no. 52854/99, $52, ECHR 2003-IX). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law....".

54. In view of the above reasoning of the Special Chamber, the Applicants ask why the principle "that no party is entitled to seek a review of a final and binding judgment" has not been applied in the present case.

Relevant legal provisions concerning execution of judicial decisions

Law 2008/03-L008 on Executive Procedure

55. In the Republic of Kosovo, the legal rules, procedures of execution and security of judicial decisions is regulated by the Law on Executive Procedure (Law No. 2008/03-L008).

13.1 "The decision against which the objection is not filed in foreseen time-limit becomes final and executable."

13.2 "The decision against which is refused the objection becomes executable, and if against it is not permitted an appeal, then it becomes also final."

13.3 "The decision in which the objection is refused becomes final if against it is not filed an appeal in foreseen legal time-limit, or if the filed appeal is refused as un-grounded."

13.4 "If by this law is foreseen that against the first instance decision might be filed an appeal instead of objection, then such a decision becomes executable, but it becomes final if there is no appeal filed within legal time-limit, or if filed appeal is refused as ungrounded."

Law on Execution Procedure SFRY PR No. 692 of 30 March 1978

Article 3. "Execution and security are set and implemented for by the ordinary court".

Article 9. "Against the final decision in the procedures of execution and security the revision and reopening of proceedings is not allowed."

Article 27. "As the means of execution to order to realize money demand can only be determined: selling of motive objects, selling of immovable assets, transfer/conversion of the demand into money, conversion into money of other

[4] Stere and others vs. Romania (application nr. 25632/02 dated 23 February 2006).

property rights respectively into material and transfer of means which are kept in the account of the Social Book-keeping Service."

56. It should be noted that in the Republic of Kosovo, although it is not provided with in the law, it is a common practice by the courts to use Kosovo Police Force as a mean to enforce execution of final decisions.

Assessment of the admissibility and merits of the Referral

57. As to the present Referral, the Court notes that, on 11 January 2002, the Municipal Court assessed the Applicants' claims pursuant to the relevant provisions of the Law on Contested Procedure and ruled that the claims were well-founded, awarding to the Applicants the amount of 25.649.250,00 Euro, with 3% interest rate from 13 March 2002 until the definite payment would be made, as well as the expenditures of the executive procedure as well as their re-instatement in their previous positions. The judgment became *res judicata* on 11 March 2002. By decision of 22 December 2005, the same Court allowed for the execution of its judgment.

58. However, until today, that means almost 9 years after the *res judicata* decision and 5 years after the execution decision, the judgment has still not been enforced, although numerous related court proceedings have taken place. Moreover, in the meantime, the Kosovo Trust Agency (KTA) – which was established by UNMIK Regulation 2002/12 of 13 June 2002, that means after the Municipal Court decision of 11 January 2002 had become *res juducata* - privatized the debtor IMK by "special spin-off" procedure. According to this procedure, all assets of the debtor IMK were first transferred to a newly established NewCo IMK, leaving all debts, including the claims of the Applicants, with IMK. The NewCo IMK was subsequently privatized.

59. It follows that, even while the legal remedies, available under applicable law, have been exhausted by the workers, these remedies were not effective, in the sense that they did not bring about the expected result, because the workers are still waiting for the implementation of the Municipal Court decision of 11 January 2002.

60. Thus, all attempts by the Applicants to have the judgment of 11 January 2002 executed have remained without any success, the more so, since by decision of 6 October 2008, the same Municipal Court of Ferizaj suspended all execution activities. The only possibility left to assure their rights granted to them by the judgment of 11 January 2002, was to present a claim - as simple creditors - with the Liquidation Commission in charge of liquidating the debtor IMK, after the privatization of the NewCo IMK. These proceedings are still pending. The situation of non-implementation of the judgment of 11 January 2002 is, therefore, continuing until to date.

61. In this connection, the Court stresses that the right to institute proceedings before a court in civil matters, as secured by Article 31 of the Kosovo Constitution and Article 6, in conjunction with Article 13 of the European Convention of Human Rights (ECHR), would be illusory, if the Kosovo legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that these Articles prescribe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. To construe the above Articles, as being concerned exclusively with access to a court and the conduct and efficiency of proceedings, would be likely to lead to situations incompatible with the principle of the rule of law which the Kosovo authorities are obliged to respect (see, *mutatis*

mutandis, ECRtHR judgment in Romashov v. Ukraine, Application No. 67534/01, judgment of 25 July 2004).

62. The rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. No party is entitled to seek for a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case (see, *mutatis mutandis, Sovtransavto Holding v. Ukraine, no. 48553/99, § 72, ECHR 2002-VII*). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law. The competent authorities are, therefore, under a positive obligation to organize a system for enforcement of decisions that is effective both in law and in practice and ensures their enforcement without undue delay (see, Pecevi v. Former Yugoslav Republic of Macedonia, no. 21839/03, 6 November 2008; Martinovska v. the Former Republic of Macedonia, no. 22731/02, 25 September 2006).

63. In the Court's opinion, the execution of a judgment given by any court must, therefore, be regarded as an integral part of the right to a fair trial guaranteed by the above Articles (see, *mutatis mutandis, Hornsby v. Greece, judgment of 19 March 1997, Reports 1997-II, p. 510, para. 40*). In the instant case, the Applicants should not have been prevented from benefiting from the decision, which had become res judicata, given in their favour.

64. By failing for such a long period of time to enforce the judgment of 11 January 2002, the appropriate authorities have deprived the provisions of Article 31 of the Constitution and Articles 6 and 13 of the ECHR of all useful effect.

65. In this connection the Court refers to Article 159.2 of the Constitution, providing that "All social owned interests in property and enterprises in Kosovo shall be owned by the Republic of Kosovo". This can only be understood in the way that it is the Government of Kosovo which is responsible for all obligations of such enterprises, including the rights awarded to the Applicant by the decision of the Municipal Court of 11 January 2002 against the socially owned enterprise IMK.

66. In these circumstances, the Court concludes that the right to a fair and effective trial, as guaranteed by the above Articles of the Constitution and ECHR, has been violated.

FOR THESE REASONS,

The Constitutional Court, unanimously, in its session of 17 December 2010:

I. DECLARES the Referral admissible.

II. HOLDS that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Articles 6 [Right to a Fair Trial] and 13 [Right to an Effective Remedy] of the European Convention of Human Rights.

III. HOLDS that the final and binding decision of the Municipal Court of Ferizaj must be executed by the competent authorities, in particular, the Government and the Privatization Agency of Kosovo, as the legal successor of KTA.

IV. HOLDS that, the Government and the Privatization Agency of Kosovo shall submit to the Court, in a six months period, information about the measures taken to enforce this Judgment.

V. This Judgment shall be notified to the Parties and to the Privatization Agency of Kosovo and communicated to the Government

VI. In accordance with Article 20.4 of the Law, this Judgment shall be published in the Official Gazette.

VII. The Judgment is effective immediately and it may be subject to editorial revision.

Judge Rapporteur

Altay Suroy, signed

President of the Constitutional Court

Prof. Dr. Enver Hasani, signed