



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Pristina, 6 April 2011

Ref. No.: 115/11

DISSENTING OPINION

in

Case No. KI 55/09

Applicant

N.T.SH Meteorit

**Constitutional Review of the Decision of the Supreme Court of Kosovo,
No. 2407/2006, dated 30 September 2009**

Judges

Almiro Rodrigues

and

Gjyljeta Mushkolaj

We welcome the judgment of the majority of the Constitutional Court, but respectfully dissent on that “there was no violation of a right to a fair hearing and no violation of the Applicant’s right to a fair trial as provided for in Article 6.1 of the Convention”.¹

1. In fact, the Judgment concluded that “there is no evidence in the instant case that the Supreme Court has assessed the evidence provided by the Applicant in an unfair or an inaccurate manner. The Applicant has failed to prove that the Supreme Court has violated Article 6 of the European Convention on Human Rights and Article 31 of the Constitution.”²
2. With all respect, it is our view that there was a violation of a right to a fair hearing (a) and a violation of the Applicant’s right to a fair trial (b) and a different conclusion should have been reached (c).

¹ Paragraph 24 of the Judgment

² Paragraph 23 of the Judgment

(a) Violation of a right to a fair hearing

3. In our view, there was a violation of fairness, as the argument made by the Applicant was neither heard nor a reasoned decision on it was delivered to him. The right to be heard is not strictly linked to an oral hearing, but mainly to an answer of the court to an argument of the Applicant, including in written. The Applicant made the argument as follows.
4. The Applicant claimed, on one side, about "the method of determination of additional turnover and obligations that arise hitherto, alleging that the arguments that are convincing have not been taken into account"³ nor the supporting evidence.
5. The Applicant further alleged that "the assessment of the control inspectors was not correct because according to the figures in the case files more goods were declared that they were available in stock"⁴.
6. On the other side, the Applicant alleges that the Supreme Court of Kosovo⁵ concluded, in its first Judgment, that "the factual situation was not determined and that there was contradiction between the evidence and disputed decision regarding the respective tax obligation of the plaintiff".
7. Furthermore, the Applicant claims that the Independent Review Board did not follow the instruction of the Supreme Court on "how the decision making authority should act for rendering a lawful decision, examination of evidence, and decisive facts"⁶.
8. It is up to the Supreme Court, to rectify the errors of the lower courts. Complying with that obligation, the Supreme Court, in answering that argument of the Applicant, identified in its first Judgment a violation on that "***the factual situation was not determined and that there was contradiction between the evidence and disputed decision regarding the respective tax obligation of the plaintiff***". Therefore, the Supreme Court remanded the case to the Independent Review Board instructing how it should act for rendering "a lawful decision, examination of evidence, and decisive facts".
9. Meanwhile, the Applicant claims that the second Judgment of the Supreme Court⁷ "is in contradiction with the verdict of the same court A.Nr.233/04" and "the case files indicate that the right of the claimant to fair and impartial trial provided under Article 31 of the Constitution of Republic of Kosovo" was violated.
10. The main question to be discussed is whether the second decision of the Independent Review Board correctly determined "***the factual situation***" and

³ See Appeals to the Supreme Court against the decisions Nr.426 of 09.01.2004 and Nr.62/2004 of 14.04.2004

⁴ See Appeals to the Supreme Court against the decision A.Nr.439/06 of 24.08.2006

⁵ Judgment A.Nr.233/04 of 17.05.2006

⁶ See Appeals to the Supreme Court against the decision A.Nr.439/06 of 24.08.2006

⁷ A.Nr.2407/2006 30 December 2009

eliminated the ***“contradiction between the evidence and disputed decision*** regarding the respective tax obligation of the plaintiff”.

11. In our view, such a determination and elimination were not done by the Independent Review Board. Therefore, either the first Judgment of the Supreme Court was correct on pointing out these shortcomings or not. If yes, it should have maintained the same view in relation to the second decision of the Independent Review Board. We consider that the second decision⁸ did not fulfill the shortcomings, as we will further explain.
12. As a matter of fact, a comparison of both the two decision of the Independent Review Board⁹ shows the following:
 - i) The very same clause “The purchase and sales books were not kept in accordance with the Regulation” appears in both decisions (62/2004, the first, and 439/2006, the second);
 - ii) Also the very same clause “The tax inspector has acted correctly and has applied the method of supply analysis and declared sales in relation to the chronology of the date of use” appears in both decisions (62/2004, the first, and 439/2006, the second);
 - iii) The clause “Based on Section 7 and 2 of the Regulation 2000/20 and Section 9.1 and 9.4 of Regulation 1/2000 and Section 8 and 27 of Regulation 2001/11 and Section 10 of Regulation 2002/4, during tax reassessment we concluded that the decision of Tax Administration is valid and penalties that were calculated for the taxpayer are also valid” only appears in the second decision (439/2006). Apparently this is the only modification made by the Independent Review Board in order to comply with the instruction of the Supreme Court.

We note that that all of these sentences/clauses are conclusive and without any factual and legal analysis.

13. Furthermore, the second Decision of the Supreme Court¹⁰ contains the following statement: “following the analysis of the evidence presented by the owner of the taxpayer and analysis of the written appeal and following the hearing of the representative of the Tax Administration and evidence presented at the hearing, cross-examined the evidence presented by both parties, in which it determined the following factual situation”.
14. However, neither facts were established nor legal analysis was made before having concluded as it was mentioned under paragraph 12 i) and ii) above. On the other side, the clause mentioned under paragraph 12 iii) is only a mere legal reference to certain legal provisions completely empty of practical legal meaning, as without any link to an established factual situation. It is only a stereotypical formula.

⁸ Decision A.Nr.439/2006 dated of 24.08.2006

⁹ Nr.62/2004 dated of 14/04/2004 and A.Nr.439/2006 dated of 24.08.2006

¹⁰ A.Nr.2407/2006 30 December 2009

15. Apparently, the Majority was satisfied that the abovementioned clause under paragraph 12 iii) was enough to fill in the shortcomings pointed out in the first Judgment of the Supreme Court, in as much as it mentioned the applicable legal provisions and regulations.
16. However, the statement/clause under paragraph 12 iii), without specifying what facts were established and what relationship with the mentioned legal provisions, is nothing more than an empty and unexpressive formula. On the other side, the argument made and the evidence presented by the Applicant has to do with the heart of the case. Therefore, the argument of the Applicant should have been explicitly taken, analyzed and concluded.

(b) Violation of the Applicant's right to a fair trial

17. The Applicant has the *right to obtain a court ruling in conformity with the law*. This right includes *the obligation for courts to provide reasons* for their rulings with reasonable grounds at both procedural and material level. The right to have reasons for court decisions requires explanations with *plausible and legally well constructed reasons* for the decision taken in each individual case, which should include both the *legal criteria and factual elements* in support of the decision.
18. The decisions, which are under consideration in the case, were mainly delivered by the Independent Review Board. Even though the Independent Review Board is not a tribunal, the term "court"¹¹ is to be understood in its broadest sense, in conformity with the ECtHR jurisprudence. Thus all bodies, including Independent Review Board, required to settle administrative disputes are to be regarded as courts. Consequently, the right to a fair trial should also be guaranteed in proceedings before these bodies.
19. In addition, the Law No.2004/48 on Tax Administration and Procedures¹², which establishes the Independent Review Board¹³, firmly acknowledges the right to a fair trial as guaranteed by the ECHR and the Constitution.
20. On the other hand, Section 3 of the UNMIK Administrative Direction No. 2000/7¹⁴ requires the Board to "conduct a hearing and review the relevant testimony, documents and other evidence presented by the taxpayer and the Tax Administration" (Section 3.1.), as well as stipulates that "the Board shall discuss the case as a panel and shall notify the parties of its decision, **together with written reasons for the decision**, within 30 days of the conclusion of the hearing" (Section 3.2.).

¹¹ The term "Tribunal" used by Article 6 (1) of the European Convention or the term "Courts" used by Article 31 (1) of the Constitution.

¹² Regulation No. 2005/17 9 April 2005 on the Promulgation of the Law on Tax Administration and Procedures adopted by the Assembly of Kosovo

¹³ Article 57.1 of the Law No.2004/48 prescribes that "The Independent Review Board established under UNMIK Administrative Direction No. 2000/7 shall continue as the Independent Review Board under this law."

¹⁴ UNMIK Administrative Direction No 2000/7 of 12 April 2000.

21. As said above, the Applicant alleges a violation of his right to fair trial by the Independent Review Board and Supreme Court when his right to be heard was not respected and the decision was not reasoned.
22. In addition, the right to a fair hearing, as embodied in constitutional texts and Article 6 of the European Convention on Human Rights and Article 31 of the Constitution of Republic of Kosovo, is of fundamental nature to safeguard fundamental rights.
23. However, the right of access to court is not an absolute right. In its case-law, the ECtHR has further held that any limitation will only be compatible with Article 6 if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved¹⁵. Therefore, any limitation must be subject to the principles of necessity and proportionality, meaning only if necessary and until it is necessary.
24. The fundamental right to a fair trial is derived from the fundamental right to judicial protection¹⁶. More than other fundamental rights, the right to a fair trial demands that judges be careful as they are always in danger of violating it. All judges sitting in higher courts also have to check that this principle has been correctly applied at the lower levels. In fact, the right to a fair trial is a general reference to a complex of other rights: namely, the right to present arguments and evidence, the right to a reasoned decision and the adversarial principle and equality of arms.
25. Article 31 of the Constitution and Article 6 of the Convention require that the domestic courts give reasons for its judgment. Courts are not obliged to give detailed answers to every argument or question¹⁷. However, if a submission is fundamental to the outcome of the case, the court must then specifically and expressly deal with it in its judgment.
26. In *Hiro Balani v. Spain*¹⁸ the applicant had made a submission to the court which required a specific and express reply. The court failed to give that reply making it impossible to ascertain whether they had simply neglected to deal with the issue or intended to dismiss it and if so what were the reasons for dismissing it. This was found by the ECtHR to be a violation of Article 6 (1).
27. In our view, it is indisputable that it is fundamental to the outcome of that case the argument on "the method of determination of additional turnover and obligations that arise hitherto, alleging that the arguments that are convincing have not been taken into account" nor the supporting evidence. It is also fundamental for the outcome of the case that "The assessment of the control inspectors was not correct because according to the figures in the case files more goods were declared than they were available in stock".

¹⁵ Ashingdane v the United Kingdom, 28 May 1985, pa 57

¹⁶ Article 54 of the Constitution

¹⁷ Van de Hurk v Netherlands, 19 April 1994, pa. 61

¹⁸ *Hiro Balani v. Spain*, 9 December 1994

28. In addition, no specific and express reply to the argument made and evidence presented by the Applicant was provided by either the second decision of the Independent Review Board or by the second Judgment of the Supreme Court. Then, it was impossible for the Applicant to "ascertain whether they had simply neglected to deal with the issue or intended to dismiss it and if so what were the reasons for dismissing it".
29. In principle, the Referral against a regular court is admissible if an Applicant was denied the possibility of being heard before the court due to an incorrect procedure on the part of the regular courts in the course of the proceedings.
30. The right to a fair hearing is a right that concerns constitutional judges¹⁹ not only because they are called upon to review compliance with this constitutional principle by the regular courts, but also insofar as they themselves have a duty to apply the right to a fair hearing.
31. We assume that the more opportunity the parties have to present their arguments on an equal footing, respecting the equality of arms and adversarial principles, the more chance for the decision itself is being fair. In other words, in endeavoring to establish whether a trial has been fair, we should no longer consider the substance of the decision itself but the way in which the decision was reached.
32. The right to obtain a court decision in conformity with the law includes the obligation for the courts to provide reasons for their rulings with reasonable grounds at both procedural and substantive level. Providing reasons requires explanations with plausible and legally constructed reasons for the decision taken in each individual case, which should include both the legal criteria and factual elements in support of the decision.
33. The statement of reasons should not, in any case, be too long, but it must enable the person for whom the decision is intended, and the public in general, to follow the reasoning that led the court to make a particular decision. The right of appeal, moreover, can only be effective if the facts are well established and the reasons for the decision are sufficiently spelt out.
34. Thus, the justification of the decision must state the relationship between the merit findings and reflections when considering evidence on the one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them.
35. Therefore, we consider there to be a violation of the right to a fair trial where arbitrariness or unreasonableness is found in a decision of a regular court. Consequently, the judgment of the Supreme Court where it did not check the factual

¹⁹ The European Court, in the case *Kraska v Switzerland*, 19 April 1993, para 26, has stated that Article 6 applies to proceedings before a constitutional court if the outcome of these proceedings is directly decisive for a civil right or obligation.

allegation on a reasonable basis should be declared invalid. A fortiori, the judgment may be considered to be overturned in the case of arbitrariness, namely following absence or unreasonable evaluation of essential evidence.

(c) Conclusion that should have been reached

36. Before the foregoing reasons, we consider that the challenged decisions violated the right to a fair trial in the sense that

- i. they did not take into account the fundamental and essential arguments made, and pertinent and essential evidence presented, by the Applicant, as they did not weigh their relevancy for the case and they did not take position concerning the relevant statements;
- ii. they violated the equality of arms and adversarial principles, as they have not considered equally all the arguments of both parties and
- iii. they are without sufficient reasons.

37. In sum, there is evidence in the instant case that the Supreme Court, in its second and final Judgment, was not consistent and fair when assessing the initial argument and evidence provided by the Applicant and, thus, there has been a violation of the Applicant's right to a fair trial, as provided for in Article 31 of the Constitution and Article 6 of the Convention quoted above and, accordingly, we respectfully dissent.

38. Consequently, in accordance with Rule 74 of the Rules of Procedure, the Judgment of the Supreme Court should have been declared invalid and the case remanded to the Supreme Court for reconsideration.

Almiro Rodrigues
Judge



Gjyljeta Mushkolaj
Judge

