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

Prishtina, on 26 August 2019
Ref. no.:RK 1422/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI160/18

Applicant

Interpress R. Company

Constitutional review of Decision Rev. No. 163/2018 of the Supreme Court of Kosovo of 4 May 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Interpress R. Company (hereinafter: the Applicant) represented by Valon Hasani, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of Decision [Rev. No. 163/2018] of the Supreme Court of 4 May 2018, in conjunction with Decision [Ac. No. 4821/16] of the Court of Appeals of 28 August 2017 and Decision [C. No. 1395/13] of the Basic Court in Prishtina of 20 January 2016.

3. The Decision of the Supreme Court was served on the Applicant on 3 July 2018.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision which allegedly violates the rights of the Applicant Company guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 4 of Article 21 [General Principles] of the Constitution, Articles 47 and 48 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 17 October 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 23 October 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.

8. On 7 November 2018, the Court notified the Applicant about the registration of the Referral and a copy of the Referral was sent to the Supreme Court of Kosovo.

9. On 23 July 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. The Applicant in the capacity of the claimant on 26 October 2001, with the then Municipal Court in Prishtina, filed a lawsuit against the respondent, the Republic of Serbia for compensation of damage, while on 27 October 2008 it

specified the lawsuit seeking the respondent in the name of compensation to pay the amount of US $ 21,131,500, as a counter value for compensation of damage by burning and US $ 250,000 in the name of the lost profits for each year beginning on 24 March 1999. The Applicant requested that all costs be paid within fifteen 15 days of the receipt of this judgment with legal interest as well as the costs of the proceedings.

11. On 20 January 2016, the Basic Court in Prishtina (Decision C. No. 1395/13) dismissed as inadmissible the lawsuit of the Applicant Company filed against the respondent, the Republic of Serbia. The Basic Court declared itself incompetent to adjudicate the case, reasoning that: "*it is a principle of the international law for the resolution of disputes of foreign nationals enjoying the right of international law to settle disputes of foreign nationals enjoying the right of immunity and for the resolution of disputes of foreign states and international organizations shall apply international rules and that the domestic court may adjudicate such disputes only in cases where the competence of the country with an international element is expressly provided for by law or international contract, or in cases where foreign nationals, foreign states or international organizations have given their consent that they may be responding party in the domestic court*".

12. On an unspecified date, the Applicant filed an appeal with the Court of Appeals alleging essential violations of the procedural provisions, erroneous and incorrect determination of factual situation and violation of the substantive law with the proposal that the challenged decision be quashed and the case be remanded to the first instance court for reconsideration and retrial.

13. On 28 August 2017, the Court of Appeals (Decision Ac. No. 4821/16) rejected the appeal of the Applicant Company as ungrounded and upheld the challenged decision of the Basic Court. The Court of Appeals approved the decision of the Basic Court, finding it fair and lawful. The Court of Appeals further added that: (i) the responding party, the Republic of Serbia, cannot be sued in the courts of the Republic of Kosovo; and, (ii) no international agreement is currently concluded, which defines the jurisdiction of the local courts to adjudicate such disputes.

14. On an unspecified date, the Applicant filed a revision with the Supreme Court alleging essential violation of the provisions of the contested procedure and erroneous application of substantive law with the proposal that the revision be approved as grounded, whereas the challenged decision be quashed and the case be remanded to the first instance court for retrial. The Applicant also referred to Article 8.2 of the Comprehensive Proposal for the Kosovo Status Settlement (hereinafter: the Ahtisaari Plan), alleging that the provision in question obliges the Republic of Kosovo to "take over the compensation for damage caused to its citizens by the Republic of Serbia during the war of 1999".

15. On 4 May 2018, the Supreme Court (Decision Rev. No. 163/2018) rejected as ungrounded the revision of the Applicant Company filed against Decision AC. No. 4821/2016 of the Court of Appeals of 28 August 2017. The Supreme Court upheld the decisions of the lower instance courts, finding them fair and lawful.

16. As to the jurisdiction of the courts to adjudicate the Applicant's case, the relevant part of the Decision of the Supreme Court reads: *"In such a case, the Supreme Court of Kosovo held that the lower instance courts had correctly applied the provision of Article 18.3 of the LCP, which provides that when the court finds in the proceedings that the court of the country is not competent to resolve the dispute, it shall be declared incompetent, it shall declare invalid all the procedural actions performed and shall dismiss the lawsuit filed with it. However, the court will not act in that way if the jurisdiction of the domestic court depends on the consent of the respondent and the respondent has given its consent. Thus, the lower instance courts held that the case brought by the lawsuit does not fall within the jurisdiction of any domestic court, and therefore the first instance court dismissed the lawsuit of the claimant as inadmissible. This legal position of the court of first and second instance is admissible due to the fact that in the present case, the norms of the collision of the law are taken into account, according to which the jurisdiction of any court of any other country is established, and based on the provision of Article 28.2 of the LCP, when it comes to disputes with a foreign element, the domestic court is competent only if this international jurisdiction expressly stems from any international agreement or the Law itself."*

17. As to the Applicant's allegation for the obligations arising from the provision of Article 8.2 of the Ahtisaari Plan for the Republic of Kosovo, the Supreme Court explained: *"[...] for the reasons stated above, the revision claims that the decision of the court of first instance and second instance is in contradiction with the substantive law, namely the principle of general succession, are ungrounded because on the occasion of Kosovo's independence, the Assembly of the Republic of Kosovo has clearly taken over all the rights and obligations created by the then Serbian power, as provided for in Article 8.2 of the Ahtisaari Package, the Supreme Court considers that in the revision this matter is misinterpreted, namely Article 8.2 of the Comprehensive Proposal for the Kosovo Status Settlement of 26 March 2001 (Ahtisaari Package), because under this provision, the Republic of Kosovo has not taken the obligation to compensate the damage to its citizens caused by the Republic of Serbia during the military conflict in 1999".*

Allegations of the Applicant Company

18. The Applicant alleges that the Decision [Rev. No. 163/2018] of the Supreme Court of 4 May 2018 in conjunction with the Decision [Ac. No. 4821/16] of the Court of Appeals of 28 August 2017 and the Decision [C. No. 1395/13] of the Basic Court in Prishtina of 20 January 2016, violates its rights to fair and impartial trial guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 [Right to a fair trial] of the ECHR.

19. The Applicant alleges: *"... that in the present case the Republic of Serbia does not enjoy immunity in the judicial proceedings before the courts of the Republic of Kosovo because: (a) there is no international agreement obliging the Republic of Kosovo to grant immunity to the Republic of Serbia in the judicial proceedings that take place against the latter in the courts of the Republic of Kosovo; (b) the customary international law does not oblige the*

State of the Republic of Kosovo to grant immunity to the Republic of Serbia in proceedings conducted against the latter in the courts of the Republic of Kosovo; (c) the Republic of Serbia never invoked immunity from the proceedings in the courts of the Republic of Kosovo.."

20. The Applicant also alleges: "*The proceedings in the present case have been delayed because the lawsuit was filed with the court in 2001, and only in 2018 the regular courts finally decided that the latter are not competent to adjudicate the case. The regular courts needed 17 years to decide on a procedural matter. There is no doubt that this procedure is in contradiction with Article 6 of the ECHR and Article 31 of the Constitution of the Republic of Kosovo as this trial was not decided within a reasonable time*".

21. The Applicant requests the Court to declare the Referral admissible and to declare invalid the Decision of the Supreme Court and to "*oblige the latter to reconsider the revision of the referring party*".

Assessment of the admissibility of the Referral

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

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

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

24. In addition, the Court also examines whether the Applicant has met the admissibility requirements as defined by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

> "*1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law*".

Article 48
[Accuracy of the Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".

25. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely Decision [Rev. No. 163/2018] of the Supreme Court of 4 May 2018, after exhausting all legal remedies provided by law. The Applicant has also clarified the rights and freedoms they claim to have been violated in accordance with the criteria of Article 48 of the Law and have submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

26. In addition, the Court examines whether the Applicant has met the admissibility requirements specified in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure sets out the criteria on the basis of which the Court may consider the Referral, including the criterion that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) states that:

> *"The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim."*

27. In this regard, the Court notes that the Applicant alleges violation of the right to fair and impartial trial and judicial protection of rights guaranteed by Articles 31 and 54 of the Constitution in conjunction with Article 6 of the ECHR.

28. In addressing the Applicant's allegations, the Court notes that the substantive allegations concerning alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been interpreted in detail in the ECtHR case law, in accordance with which the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, in interpreting the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECtHR.

29. The Court notes that the case law of the ECtHR and also its case law are guided by a principle that the fairness of a proceeding is assessed looking at the proceeding as a whole (See the ECtHR Judgment of 6 December 1988,

Barbera, Messeque and Jabardo v. Spain, paragraph 68, see also case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and case KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

30. The Court recalls that the Applicant alleges that the courts of the Republic of Kosovo have jurisdiction to adjudicate its case because there is no norm of the international law, whether established by any international agreement or customary international law binding the courts of the Republic of Kosovo to grant immunity to the Serbian state, even more when the latter "*never invoked immunity from the proceedings in the courts of the Republic of Kosovo.*"

31. The Applicant also alleges that the proceedings before the regular courts have been extended in breach of the standards set out in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

32. The Court notes that the Supreme Court responded to the Applicant's central allegations by: (i) explaining the causes of "incompetence" of the regular courts; (ii) interpreting relevant legal provisions governing the issues with international elements; and (iii) giving the reasoning why the provision of Article 8.2 of the Ahtisaari Plan was misinterpreted by the Applicant.

33. In this respect, the Court refers to the relevant part of the Decision of the Supreme Court which provides: *"In such a case, the Supreme Court of Kosovo held that the lower instance courts had correctly applied the provision of Article 18.3 of the LCP, which provides that when the court finds in the proceedings that the court of the country is not competent to resolve the dispute, it shall be declared incompetent, it shall declare invalid all the procedural actions performed and shall dismiss the lawsuit filed with it. However, the court will not act in that way if the jurisdiction of the domestic court depends on the consent of the respondent and the respondent has given its consent. Thus, the lower instance courts held that the case brought by the lawsuit does not fall within the jurisdiction of any domestic court, and therefore the first instance court dismissed the lawsuit of the claimant as inadmissible. This legal position of the court of first and second instance is admissible due to the fact that in the present case, the norms of the collision of the law are taken into account, according to which the jurisdiction of any court of any other country is established, and based on the provision of Article 28.2 of the LCP, when it comes to disputes with a foreign element, the domestic court is competent only if this international jurisdiction expressly stems from any international agreement or the Law itself "[...] for the reasons stated above, the revision claims that the decision of the court of first instance and second instance is in contradiction with the substantive law, namely the principle of general succession, are ungrounded because on the occasion of Kosovo's independence, the Assembly of the Republic of Kosovo has clearly taken over all the rights and obligations created by the then Serbian power, as provided for in Article 8.2 of the Ahtisaari Package, the Supreme Court considers that in the revision this matter is misinterpreted, namely Article 8.2 of the Comprehensive Proposal for the Kosovo Status Settlement of 26 March 2001 (Ahtisaari Package), because under this provision, the Republic of*

Kosovo has not taken the obligation to compensate the damage to its citizens caused by the Republic of Serbia during the military conflict in 1999".

34. Based on the foregoing, the Court notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; that it was able to adduce the arguments and evidence it considered relevant to its case at the various stages of those proceedings; and that all the arguments, viewed objectively, relevant for the resolution of its case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair. (See, *inter alia*, case of the Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility of 16 February 2018, paragraph 35; see also *mutatis mutandis*, *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

35. In this respect, the Court reiterates that it is not its role to deal with errors of law, allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were different, the Court would act as a "fourth instance court", which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See, case *Garcia Ruiz v. Spain*, ECtHR, No. 30544/96, of 21 January 1999, paragraph 28; and see also case: KI70/11, Applicants: *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

36. Regarding the obligations of the Republic of Kosovo with respect to damages caused by the state of Serbia, the Court also highlights its case-law built on the case-law of the ECtHR, where it was emphasized the existence of procedural barriers imposed by the principle of sovereign state immunity - as one of the fundamental principles of international public law - in relation to judicial proceedings that may be conducted against a state in the domestic courts of another state (see the joined cases of the Constitutional Court, KI96/18, KI97/18,KI98/18, KI99/18,KI100/18,KI101/18, KI102/18,KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18,KI117/18, KI119/18 and KI125/18, Resolution on Inadmissibility of 30 January 2019, paragraphs 58 and 59, see also *mutatis mutandis* the ECtHR cases, *Jones and Others v. the United Kingdom*, no. 34356/06 and 40528/06, Judgment of 14 January 2014 and *Al-Adsani v. United Kingdom*, application no. 35763/97 Judgment of 21 November 2001).

37. In addition, in the case of *Al-Adsani v. the United Kingdom*, the ECtHR reasoned as follows: "*The right of access to court may be subject to limitations, unless the essence of the very right is impaired. Such limitations must pursue a legitimate aim and be proportionate. The recognition of sovereign state immunity in civil proceedings follows the legitimate aim of respecting the international law [...]. As far as proportionality is concerned, the Convention should, as far as possible, be interpreted in accordance with other rules of international law, including those relating to the immunity of States. Thus,*

the measures taken by the state which reflect the general rules of international law on the immunity of States cannot, in principle, be regarded as a disproportionate limitation of the right of access to the court". Such an attitude, as far as concerns the tension between the principle of sovereign immunity of states and the right to access to justice (court), was emphasized by the International Court of Justice (see, for example, case: *Germany v. Italy; Greece as an intervening party*, Judgment of 3 February 2012, and see *Ibidem,* joined cases of the Constitutional Court, paragraphs 58-59).

38. The Court further notes that the Applicant merely does not agree with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicants with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim of violation of the right to fair and impartial trial (see: *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; and see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 42).

39. As to the allegation of the Applicant for delay of the proceedings, the Court notes that there is nothing in the referral that suggests that this question was raised by the Applicant during the course of regular proceedings. This issue was raised for the first time with the Constitutional Court. However, the Constitutional Court - in accordance with the principle of subsidiarity - cannot assess this question without it having been raised and assessed in the regular proceedings beforehand (see the Constitutional Court of the Republic of Kosovo: case no. KI89/15, Applicant *Fatmir Koci*, Resolution on Inadmissibility of 22 March 2016, paragraph 35).

40. The Court considers that the Applicant did not substantiate allegations that the respective proceedings before the regular courts were in any way unfair or arbitrary and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR. (see *mutatis mutandis*, *Shub v. Lithuania*, no. 17064/06, ECtHR, Decision of 30 June 2009).

41. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis, and is to be declared inadmissible, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 47 and 48 of the Law, and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 23 July 2019, unanimously

DECIDES

I. TO DECLARE the Referral 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;

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Nexhmi Rexhepi Arta Rama-Hajrizi

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