



REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 1 September 2022
Ref. no.:MM 2044/22

DISSENTING OPINION

of Judge Radomir Laban

in

case no. KI230/21

Applicant

Global Trade-af, L.L.C.

Constitutional review of Judgment ARJ-UZVP-no. 45/2021 of the Supreme Court of Kosovo of 28 April 2021

1. Initially, I as a judge, would like to express my respect for the opinion of the majority of judges in this case who found that there has been a violation of the right to a reasoned decision from Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).
2. In addition, I as a judge agree with the factual situation as reflected and presented in the Judgment and I accept the same factual situation as correct.
3. However, as a judge, I do not agree with the allegations of the Applicant, with the way how the Applicant's allegations are reflected and presented in the Judgment, because I consider that they have not been reflected and presented faithfully, yet the majority of judges, based on the case files, concluded what the Applicant wanted to challenge, which, in my opinion, is wrong.
4. Furthermore, I, as a judge, do not agree with the opinion of the majority of judges regarding the admissibility requirements where the majority of judges concluded that this case should be declared admissible, and the main reason why I am against this conclusion of the majority of judges is that dozens of cases considered in the Court at every session that are much better and more accurately reasoned than this case, are not declared admissible, nor are they examined on the merits of the case, while a case, which in my humble opinion, is completely unreasoned was declared admissible even though it did not meet the basic requirements.

5. Returning to the concrete case, the Applicant states that his rights protected by Article 3 [Equality Before the Law], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, but does not state how the violation of these rights occurred, nor in the entire referral does it manage to connect any allegation of violation with any specific article of the Constitution.
6. In its entire Referral, in my opinion as a judge, the Applicant failed to state what violations were committed during the regular proceedings before the regular courts and where the violations have specifically occurred. On the contrary, the Applicant changed the content of the mandatory form of the Court and removed the most important part of this form, namely part III justification of referral and alleged breaches of the Constitution.
7. Instead, the Applicant made an inadequate substitution of the form of the Court, and instead of explaining in detail where and in what way the violation of the Constitution occurred, the Applicant instructs the Court on what the competences of the Court are, instructs the Court on the jurisdiction, instructs the Court what is the admissibility of the referral, explaining to the Court what is the act of a public authority, instructs the Court what is the exhaustion of legal remedies and their illusory nature, and he further explained that he submitted the referral within the deadline and at the end of the referral he elaborated a section which he invented himself and named “*B. MATERIAL ANALYSIS*” which is incompatible with the official form of the Court, and to show how absurd it is, I will quote it in entirety:

“B. MATERIAL ANALYSIS

Therefore, based on the fact that in this case the legal deadline of four (4) months for challenging the last possible court decision was respected, the Constitutional Court is respectfully requested to admit this case and to substantively examine the violations alleged by the Applicant.

The following analysis is divided into three essential parts. The first part deals with the issue of the Supreme Court judgment rejecting the request for an extraordinary review of the court decision.

1. Judgments contrary to the Constitution of the Republic of Kosovo, the European Convention on Human Rights and Freedoms and the case law of the European Court of Human Rights

The Constitution of the Republic of Kosovo by Article 53 defines the direct implementation of the practice of the ECHR, that is, the decisions of the ECtHR. This Constitution focuses on freedom, democracy and peace¹ and emphasizes respect for the rights and freedoms of all

¹ See the Preamble to the Constitution

citizens and other individuals within its borders². Human rights and fundamental freedoms, which are considered indivisible, inalienable and inviolable, are defined as the “basis of the legal order” of the Republic³, protected by the state and respected by all. The European Convention and its application are key and central in the system designed by the Constitution of Kosovo, not only that its direct application is guaranteed by Article 22, but also that it is in accordance with Article 53. “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights. In other words, for the constitutional legislator of Kosovo, the European Convention of 1950 has such a high profile that all human rights and freedoms, even those mentioned through various international agreements or instruments, will be interpreted in accordance with the jurisprudence of the European Court of Human Rights.

2. The judgments rendered by the courts (the Court of Appeals and the Supreme Court) are in contradiction with the basic principles defined by the Constitution of Kosovo and the European Convention on Human Rights, so that the unlawful judgments of regular courts violate the right to fair and an impartial trial and equality before the law.

3. The Republic of Kosovo has a national interest that the Constitutional Court resolves this issue

4. We are aware that in the practice of the European Court, the issue of violation of the right to fair and impartial trial in administrative proceedings is considered/assessed as a violation of the fundamental rights of an individual.

Therefore, the treatment of this case and the finding of this honorable court that the Court of Appeals violated the claimant’s rights also have principled dimensions. By this Judgment, this court, in addition to finding a violation of the party’s rights.

Finally, the statement of this Court on this issue is directly related to the obligation and encouragement of state institutions to take into account the issue of unconstitutionality in the proper procedure and to take appropriate measures to respect the rights guaranteed by the Constitution and international conventions. Therefore, this honorable court can set precedents for the regular courts of the Republic of Kosovo on how to act in cases when faced with the right to fair and impartial trial, who are parties to administrative proceedings.

V. CONCLUSION AND REQUEST

Based on the facts and legal interpretations stated in this Referral, the Applicant respectfully requests the Constitutional Court of the Republic of Kosovo to:

- declare the claimant’s referral admissible;*
- to hold that the failure to ensure fair trial constitutes a violation of the individual rights of the claimant guaranteed by Article 31 of the Constitution of the Republic of*

² Article 1.2 of the Constitution of the Republic of Kosovo

³ Articles 21 and 24 2 of the Constitution of the Republic of Kosovo

Kosovo and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols

- To establish all the rights or responsibilities of the parties in this referral that this honourable court considers reasonable and legally based.

The referral was drafted and respectfully submitted:

Prishtina, 17 December 2021

Albana KELMENDI, Lawyer“

8. Such a confused referral should have been rejected in two or three paragraphs as inadmissible because it is confusing, unclear and unreasoned, or the Judge Rapporteur had to ask the Applicant to clarify the same referral and reason it in detail because the Applicant bears the burden of proof in the proceedings.
9. I consider that the Court should have reminded that, according to the case law of the ECtHR, the Court declares the referral inadmissible, as manifestly ill-founded, in accordance with the requirement of “*unsubstantiated or unsupported*” allegations when one of the two characteristic requirements are met, namely:
 - a) when the Applicant merely cites one or more provisions of the Convention or the Constitution, without explaining in what way they have been breached, unless this is obvious from the facts of the case (see: to that effect, case of the ECtHR *Trofimchuk v. Ukraine*, no. 4241/03, decision of 31 May 2005, see also case *Baillard v. France* no. 6032/04, decision of 25 September 2008);
 - b) when the Applicant omits or refuses to produce documentary evidence in support of his allegations (in particular, decisions of the courts or other domestic authorities), unless there are exceptional circumstances beyond his control which prevent him from doing so (for instance, if the prison authorities refuse to forward documents from a prisoner’s case file to the Court) or unless the Court itself determines otherwise
10. In this regard, I as a judge consider that the Court should have established that the Applicant only mentions relevant articles, but does not elaborate further on how and why these relevant articles of the Constitution were violated. I as a judge consider that the Court should have recalled that it has consistently emphasized the mere reference to Articles of the Constitution and the ECHR and their mentioning is not sufficient to build an arguable allegation of a constitutional violation. When alleging such violations of the Constitution, the applicants must provide reasoned allegations and compelling arguments (see, case KI175/20, Applicant: Privatization Agency of Kosovo, resolution on inadmissibility of 22 March 2020, paragraphs 79-82).
11. Instead, the majority of judges decided to conclude on its own what are the allegations of the applicant and based on one word in the introductory part of the referral, the majority of judges concluded that the Applicant complains of an unreasoned decision of the Supreme Court regarding the Applicant's allegations that the Court of Appeals had to hold a public session. Based on that one word, the referral became admissible, and the majority in the court concluded that this was the Applicant’s main allegation and that the Supreme Court did not adequately respond to it.

12. I as a judge consider that this is an erroneous way of conclusion and that even the Applicant himself does not benefit anything with this, because in my opinion, the main allegation of the Applicant concerned an erroneous determination of factual situation, in this way the Court will not remedy the violation of the Applicant's rights but will only prolong the proceedings, so that the Supreme Court will add one or two more sentences in the repeated proceedings by referring to the Applicant's allegations.
13. Finding a violation of the right to a reasoned decision makes sense only if such an additional reasoning would lead to a different outcome of the case.
14. I recall that if a party's submission is decisive for the outcome of the proceedings, it requires that it be answered specifically and without delay (see ECtHR judgment *Ruiz Toria v. Spain*, of 9 December 1994, application no. 18390/91, paragraph 30; Judgment *Hiro Balani v. Spain*, of 9 December 1994, application no. 18064/91, paragraph 28).
15. Therefore, the regular courts are obliged:
 - (a) to examine the main arguments of the parties (see, judgment *Buzescu v. Romania*, of 24 August 2005, application no. [61302/00](#) paragraph 67; judgment *Donadze v. Georgia* of 7 June 2006, application no. [74644/01](#) paragraph 35);
 - (b) to examine with the utmost rigor and due diligence the allegations concerning the rights and freedoms guaranteed by the Constitution, the ECHR and the protocols attached to it (see judgment *Fabris v. France* of 7 February 2013, application no. [16574/08](#) paragraph 72; judgment *Wagner and J.M.W.L. v. Luxemburg*, of 28 September 2007, application no. [76240/01](#) paragraph 96).
16. In the present case, the Applicant's allegation is not decisive for the outcome of the proceedings, and, therefore, it does not require that this allegation be answered specifically and without delay (see the judgment of the ECtHR *Ruiz Toria v. Spain*, cited above, paragraph 30; Judgment *Hiro Balani v. Spain*, cited above paragraph 28).
17. Based on all of the above, I as a judge consider that in relation to this allegation of the Applicant for violation of the rights guaranteed by Article 3, Article 22, Article 24 and 31 of the Constitution, as read in conjunction with Article 6 of the ECHR, the Court should have found that this part of the referral should be declared inadmissible as manifestly ill-founded, because these allegations are qualified as claims belonging to the category of "*unsubstantiated and unsupported*" allegations as the Applicant only mentioned articles of the Constitution without clarifying how and why these articles have been violated. As a result, they are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

Dissenting opinion was submitted by Judge;

Radomir Laban, Judge
