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

Prishtina, on 16 May 2024
Ref. no.: MM 2429/24

This translation is unofficial and serves for informational purposes only.

DISSENTING OPINION

of Judge Jeton Bytyqi, who was joined by Judge Enver Peci

in

case no. KI121/22

Applicants

Mexhid Asllani, Ekrem Asllani and Nuredin Xhaferi

Constitutional review of Decision [Rev. no. 434/2021] of 24 May 2022 of the Supreme Court and Judgment [Ac. no. 1148/2018] of 4 March 2020 of the Court of Appeals

We respect the decision of the Majority of Judges (hereinafter: the Majority) of the Constitutional Court of the Republic of Kosovo (hereinafter: the Court). However, always with respect, we have voted against the admissibility of the referral and finding a violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR). Therefore, for the reasons that will be elaborated below and based on Rule 56 (Dissenting Opinions) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure) we present this Dissenting Opinion.

Scope of the Referral

1. The applicants challenge the constitutionality of (i) Decision [Rev. no. 434/2021] of 24 May 2022 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) and the constitutionality of (ii) Judgment [Ac. no. 1148/2018] of 4 March 2020 of the Court of Appeals, in conjunction with Judgment [C. no. 395/2015] of 23 June 2017 of the Basic Court in Ferizaj (hereinafter: the Basic Court).

2. The applicants consider that the aforementioned decisions violated their rights guaranteed by articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of

Kosovo (hereinafter: the Constitution), as well as Article 6.1 (Right to a fair trial) of the ECHR.

3. The majority decided (i) to declare the referral admissible; (ii) to find that there has been a violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR; (iii) declare invalid the Decision [Rev. no. 434/2021] of 24 May 2022, Judgment [Rev. no. 426/2020] of 29 June 2021 of the Supreme Court and Judgment [Ac. no. 1148/2018] of 4 March 2020 of the Court of Appeals; and (iv) to remand the Judgment [Ac. no. 1148/2018] of 4 March 2020 of the Court of Appeals, for retrial to the latter.

Facts of the case and Applicant's allegations

4. The facts of the case, as reflected in the Judgment in case KI121/22, are related to a traffic accident in which the applicants suffered bodily injuries, the cause of which was the insured of the respondent Sigal Uniqua Group Austria. The applicants filed a lawsuit against the company in question with the Basic Court, by which they requested compensation for material and non-material damage on the grounds of physical and mental injuries suffered in the accident.

5. The Basic Court by the Judgment [C. no. 395/2015] partially approved the lawsuit of the applicants and obliged the respondent Sigal Uniqua Group Austria to pay them the total amount of eight thousand seven hundred and fifty one euro (8,751.00) euro, while it rejected the claim for the amount of seven thousand eight hundred and forty (7,840.00) euro, which divided for each applicant did not exceed the amount of three thousand (3,000.00) euro. Against the Judgment of the Basic Court (i) the respondent Sigal Uniqua Group Austria; and (ii) the applicants submitted appeals to the Court of Appeals. The Court of Appeals, by the Judgment [Ac. no. 1148/2018], of 4 March 2020, rejected the appeal of the respondent Sigal Uniqua Group Austria, upholding the Judgment of the Basic Court. The Court of Appeals, by the aforementioned Judgment, did not decide in relation to the appeal of the applicants.

6. Against the Judgment [Ac. no. 1148/2018], of 4 March 2020, of the Court of Appeals (i) the respondent Sigal Uniqua Group Austria; and (ii) the applicants submitted a revision to the Supreme Court. As a result of this, the Supreme Court, (i) by the Judgment [Rev. no. 426/2020] of 29 June 2021, rejected the revision of the respondent Sigal Uniqua Group. Whereas, (ii) upon the request of the applicants to consider their revision, the Supreme Court, by Decision [Rev. no. 434/2021], supplemented the Judgment [Rev. 426/2020] of the Supreme Court and decided to dismiss as impermissible the revision of the applicants, based on paragraph 2 of Article 211 and Article 221 of Law No. 03/L-006 on Contested Procedure (hereinafter: the LCP), on the grounds that the value of the dispute, of each applicant, did not exceed the amount of three thousand (3,000.00) euro.

7. Before the Court, the applicants allege a violation of (i) the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR; (ii) the right to legal remedies guaranteed by Article 32 of the Constitution; as well as (iii) the right to judicial protection of rights, guaranteed by Article 54 of the Constitution, among others, since according to them (i) the Court of Appeals did not consider their appeal against the Judgment of the Basic Court; while (ii) the Supreme Court has not examined the merits of their revision against the Judgment [Ac. no. 1148/2018], of 4 March 2020, of the Court of Appeals, where, among other things, the issue of not considering the appeal of the applicants by the Court of Appeals was raised.

Preliminary remarks

8. As it was emphasized above, the Majority found that the contested decisions are rendered in violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR, on the grounds that the Supreme Court has violated the principle of "*access to the court*" because it did not assess the allegation of the applicants that the Court of Appeals has not decided on the appeal filed against the Judgment of the Basic Court, but rejected the revision as impermissible because the value determined in the contested judgment of the Court of Appeals by the revision for each applicant has not exceeded the amount of three thousand (3,000.00) euro, as a requirement to file the revision based on Article 211 of the LCP.

9. In this regard, for the Majority it has not been disputable that (ii) the contested monetary amount by each of the applicants against the Judgment of the Court of Appeals is below the amount of three thousand (3,000.00) euro; nor (ii) the way of calculating the contested value as a consequence of simple co-litigation, where the procedural position of a co-litigator does not depend on the procedural position of the other co-litigants, but is taken separately for each one of them. According to the Majority it was disputable, whether, despite the fact that the amounts contested through the revision by each of the applicants is below the amount of three thousand (3,000.00) euro, the Supreme Court, by rejecting as impermissible the revision of the applicants against the Judgment of the Court of Appeals violated the right of applicants of "*access to court*" as an integral part of a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. The Majority reasoned that regardless of the criterion of admissibility of the value contested by revision, the Supreme Court had the obligation to deal with the revision of the applicants, taking into account that the applicants raised before it the issue of not handling their appeal against the Judgment of the Basic Court by the Court of Appeals.

10. With respect to the Majority, we cannot agree with the above-mentioned findings, as we consider that these findings are not compatible with the case law of the Court and that of the ECtHR.

Regarding the constitutionality of Judgment [Rev. no. 426/2020] and Decision [Rev. no. 434/2021] of the Supreme Court

11. Initially, as it has been emphasized also in the Court's case law, the issue of rejecting the revision because it does not reach the value established by law falls within the scope of the right to "*access to court*", as an integral part of a fair trial right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR (see the case of the Court, KI96/22, applicants *Naser Husaj and Uliks Husaj,* Resolution on Inadmissibility, of 29 August 2023, paragraph 49). Therefore, based on the case law of the ECtHR, but also of the Court, the "*rights to court*" determines that the parties to the proceedings must have an effective legal remedy that enables them to protect their civil rights (see the above-mentioned cases of the Court KI54/21, applicant *Kamber Hoxha,* paragraph 62; KI224/19, with aforementioned Applicant *Islam Krasniqi,* paragraph 35; and KI20/21, with aforementioned Applicant *Violeta Todorović*, paragraph 41, see in this regard also the aforementioned cases of the ECtHR, *Běleš and others v. Czech Republic*, paragraph 49, also the aforementioned case *Naït-Liman v. Switzerland*, paragraph 112).

12. However, the right to *"access to court"* s not absolute, but it can be subject to limitations, since by its very nature it calls for regulation by the state, which enjoys a certain margin of appreciation in this regard (see in this regard the aforementioned case of the Court KI54/21, paragraph 64; KI20/21, cited above, paragraph 44). In this context, any limitation of the right of access to the court must not limit or reduce a person's access in such a way or to such an extent as to impair the very essence of "*the right to a court*". Such limitations will not be compatible if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see case of the Court KI20/21, cited above, paragraph 58, and the ECtHR cases: *Sotiris and Nikos Koutras ATTEE v. Greece*, Judgment of 16 November 2000, paragraph 15, and *Běleš and Others v. the Czech Republic*, Judgment of 12 November 2002, paragraph 61).

13. In this context, and more specifically related to the legal *ratione valoris* threshold, the ECtHR through its case law has emphasized that the latter *"recognised that the application of a statutory ratione valoris threshold for appeals to the supreme court is a legitimate and reasonable procedural requirement having regard to the very essence of the supreme court's role to deal only with matters of the requisite significance*" (see ECtHR *Zubac v. Croatia* no. 40160/12, Judgment of 5 April 2018, paragraph 83, and cases cited therein).

14. The ECtHR also clarified that "*with respect to the application of statutory ratione valoris restrictions on access to the superior courts, the Court has to varying degrees taken account of certain further factors, namely (i) the foreseeability of the restriction, (ii) whether it is the applicant or the respondent State who should bear the adverse consequences of the errors made during the proceedings that led to the applicant's being denied access to the supreme court and (iii) whether the restrictions in question could be said to involve „excessive formalism"* (see, case *Zubac v. Croatia*, paragraph 85, and cases cited therein).

15. Therefore, as it results from the principles of the ECtHR, in principle, conditioning a legal remedy at the level of the Supreme Court with a certain value, from the point of view of the right to a fair trial, is allowed and legitimate, taking into account the essence of the role of the higher courts to deal only with matters of necessary importance, and must meet the aforementioned criteria defined in the case law of the ECtHR.

16. In the present case, the Supreme Court, by the contested decision, decided that the revision of the applicants is not allowed on the grounds that the value of the dispute, of each applicant separately, based on the simple co-litigation, did not exceed the amount of three thousand (3,000.00) euro. The Supreme Court based its decision on paragraph 2 of article 211 and article 221 of the LCP. More specifically, Article 211 of the LCP defines the criteria for the permissibility of the revision, specifying that: *"Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, handing items or fulfillment of a proposal if the value of the object of contest in the attacked part of the decision does not exceed 3, 000 €*".

17. Exceptionally, paragraph 4 of article 211 of the LCP establishes an exhaustive list of when revision is always allowed, and that related to (a) food disputes; (b) disputes for the compensation of damage for lost food, due to the death of the food donator; and (c) disputes from employment relationships which the employee initiates against the decision to terminate the employment relationship. Consequently, with regard to the

abovementioned issues, revision is always allowed, regardless of the value of the dispute, which in the present case, was not the case.

18. In this regard, while article 211 of the LCP establishes the criteria for the permissibility of the revision, article 214 of the LCP (amended and supplemented by Law 04/L-118), defines the grounds for which the revision can be filed.

19. Therefore, if the filed revision is allowed, including if the amount of the dispute is over three thousand (3,000.00) euro and when this is applicable, based on the admissibility criteria defined in article 211 of the LCP, then the latter is reviewed based on Article 214 of the aforementioned Law, and the grounds stipulated in this article. From this it follows that the grounds for the revision defined in article 214 of the LCP, can be examined only when the Supreme Court has established the permissibility of the revision as defined in Article 211 of this Law. Consequently, in the present case too, the Supreme Court, assessing that none of the applicants had exceeded the threshold of three thousand (3,000.00) euro, had found and consequently decided that the revision was not allowed as established in Article 211 of the LCP.

20. Based on the above, we consider that this finding of the Supreme Court is in harmony with the already consolidated case law of the Constitutional Court in a number of cases before, when it assessed the issue of the admissibility of the revision before the Supreme Court as a result of not meeting the threshold of the value of the dispute. In this context, we refer to the case of the Court KI199/18, Resolution on Inadmissibility of 6 June 2019, namely paragraph 38, where the Court emphasized that *"The case law of this Court indicates that there were other cases when a decision of the Supreme Court was challenged- such as the present one – by which were rejected as inadmissible the requests for revision, and in which the value of the dispute was below € 3,000. In such cases, the Court, as in the present case, focused only on that whether, in entirety, the respective Applicants have benefited from fair and impartial trial, not entering the issues of legality and aspects of the interpretation of procedural and substantive law, as such prerogatives are the competence of the regular courts. Therefore, the Court declared such cases inadmissible as manifestly ill-founded. (See the cases of the Constitutional Court where a Supreme Court decision was challenged that the request for revision was rejected on procedural grounds as inadmissible: KI66/18 Applicant Sahit Muçolli, Resolution of 6 December 2018; KI110/16 Applicant Nebojša Đokić, Resolution of 24 March 2017; KI24/16 Applicant Avdi Haziri, Resolution of 4 November 2016; KI112/14 Applicant Srboljub Krstić, Resolution of 19 January 2015; Applicant Gani, Ahmet and Nazmije Sopaj, Resolution of 18 November 2013)."*

21. Therefore, we consider that in the present case too, the Supreme Court applying paragraph 2 of article 211 of the LCP, deciding regarding its jurisdiction defined by law, decided that the revision of the applicants is not allowed because the value contested by the Judgment of the Court of Appeals for each applicant, does not exceed the value of three thousand (3,000.00) euro, for each applicant. Furthermore, it has not been argued by the applicants that this legal limitation *ratione valoris* for access to the Supreme Court, and based on the criteria defined in the case law of the ECtHR, including the case of *Zubac v. Croatia*, cited above: (i) is not predictable; (ii) the applicants have borne the adverse consequences of errors during the proceedings that led to the denial of the applicant's access to the supreme court; and that (iii) the interpretation of the Supreme Court results in *"excessive formalism"*.

22. Also, it is important to emphasize that according to the case law of the ECtHR and that of the Court, the rules governing the procedural steps to be taken and the time-limits to be complied with regard to filing an appeal are designed to ensure the proper administration of justice and compliance, in particular, with the principle of legal certainty (see case of the Court, KI210/19, Resolution on Inadmissibility of 15 July 2020, paragraph 37; and ECtHR case *Ben Salah Adraqui and Dhaime v. Spain*, no. 45023/98, Decision of 27 April 2000).

23. Therefore, we consider that the regular courts have an obligation to respect their jurisdiction defined by the Constitution and the law. On the contrary, the issue of exceeding the jurisdiction of a court, based on the case law of the ECtHR and of the Court, raises issues of the right to *"a tribunal established by law"*, as an integral part of a fair trial. In this regard, I refer to the case of the Court which emphasized that this principle is violated, among other things, if a court has decided outside its jurisdiction (see the case of the Court KI14/22, Applicant *Shpresa Gërvalla*, Judgment of 23 February 2023, paragraph 58 as well as cases *Coëme and others v. Belgium*, no. 32492/96 and four others, Judgment of 22 June 2000, paragraphs 107-109 and *Sokurenko and Strygun v. Ukraine*, nos. 29458/04 and 29465/04, Judgment of 20 July 2006, paragraphs 26-28);

24. Moreover, the Court by its Judgment in case KI214/19, Applicant *Murteza Koka*, found a violation of the applicant's right to fair and impartial trial, guaranteed by Article 31 of the Constitution as a result of the decision of the Supreme Court by which the applicant's case, decided by the Judgment of the Court of Appeals which upheld the Judgment of the Basic Court and which had become *res-judicata*, was reopened precisely considering the value of the dispute which, according to court decisions, was below the amount for which the revision is allowed, namely below the amount (3,000.00) euro, while the value of the object of the dispute with no decision of the regular courts was contested and corrected (see Court's case KI214/19, applicant *Murteza Koka*, Judgment of 29 July 2020).

25. Having said that, if the Supreme Court were to ignore the legal requirements regarding the value of the amount contested by revision, as defined in article 211 of the LCP, it would exceed its jurisdiction established in this law, and this would result in a violation of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

26. Based on the above, we consider that the applicants' referral regarding (i) the Decision [Rev. no. 434/2021] of 24 May 2022 of the Supreme Court is manifestly ill-founded, as established in paragraph 2 of Rule 34 (Admissibility Criteria) of the Rules of Procedure.

Regarding constitutionality of Judgment [Ac. no. 1148/2018] of 4 March 2020, of the Court of Appeals

27. Regarding the Judgment of the Court of Appeals, the fact is that the applicants had a legitimate claim, related to the non-handling of their appeal by the Court of Appeals, by its Judgment [Ac. no. 1148/2018] of 4 March 2020, which raises the issue of the right to "*access to justice*" guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

28. However, we consider that the applicants had available legal remedies to challenge the Judgment of the Court of Appeals before the Constitutional Court through the

individual referral as provided for in paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution.

29. This is because, first of all, as the Court's case law currently stands, it is not required, after the decision of the Court of Appeals, to exhaust extraordinary legal remedies, as is the case by the revision, in order to address the Constitutional Court (see the case of the Court KI24/20, Applicant "*Pamex SH.P.K*" Judgment of 3 February 2021).

30. Secondly, regardless of the above, the Court has clarified through its case law that in cases where the extraordinary legal remedy of revision in the Supreme Court is not allowed based on the applicable law, the latter cannot be used for the purposes of calculating the four (4) month deadline and that as "*final decision*" should be counted the decision of the relevant court against which the extraordinary legal remedy of revision was filed, and which is challenged before the Court. Therefore, these circumstances, in principle, include cases where the extraordinary legal remedy of revision in the Supreme Court was used, despite the fact that it is not allowed based on articles 211 of the LCP, including in the case when the value of the dispute is below the amount of three thousand (3,000.00) euro (see the case of the Court KI118/20 with applicant *Selim Leka*, Resolution on Inadmissibility, of 21 October 2021, paragraphs 44-48). Consequently, in the aforementioned case, the Court had declared the referral as out of time.

31. Having said that, after being served with the Judgment [Ac. no. 1148/2018] of 4 March 2020 of the Court of Appeals, nothing has prevented the applicants from addressing the Constitutional Court. Despite this, they have used the legal remedy of revision against the Judgment of the Court of Appeals, aware that the value contested for each applicant is below the value of three thousand (3,000.00) euro, which has resulted in their revision being rejected as impermissible.

32. Therefore, we consider that the "*final decision*", according to Article 49 of the Law, is the Decision [Ac. no. 1148/2018] of the Court of Appeals of 4 March 2020, and which, based on the circumstances of the case, we consider to have been submitted before the Court outside the four (4) month deadline established by Article 49 (Deadlines) of the Law on the Constitutional Court and paragraph 1 (c) of Rule 34 of the Rules of Procedure.

Respectfully submitted by:

Judge Jeton Bytyqi

Judge Enver Peci

This translation is unofficial and serves for informational purposes only.