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

Prishtina, on 24 July 2024
Ref. no.: MPM 2493/24

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JOINT DISSENTING OPINION
of judges Remzije Istrefi-Peci, Enver Peci and Jeton Bytyqi

in

case no. KI172/23

Applicants

Rejhane Ceka
Fiknete Ceka
Lejlane Ceka
Sara Ceka

Constitutional review of Decision Rev. no. 216/2023, of 19 June 2023 of the Supreme Court of Kosovo in conjunction with Judgment Ac. no. 3023/2020, of 7 April 2023, of the Court of Appeals of Kosovo

We respect the decision of the Majority of Judges (hereinafter: the Majority) of the Constitutional Court of the Republic of Kosovo (hereinafter: the Court). We agree with the Majority that the referral is admissible, however, always with respect, we have voted against 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: the 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 Decision [Rev. no. 216/2023], of 19 June 2023 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ac. no. 3023/2020], of 7 April 2023 of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) and Judgment [C. no. 237/18] of 13 December 2020, of the Basic Court in Ferizaj - branch in Kaçanik (hereinafter: the Basic Court).

2. The applicants consider that the aforementioned decisions violated their rights guaranteed by article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR), article 32 [Right to Legal Remedies], article 54 [Judicial Protection of Rights], as well as paragraphs 3 and 5 of Article 102 [General Principles of the Judicial System] of the Constitution.

3. The Majority decided (i) 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; (ii) to declare invalid Decision [Rev. no. 216/2023], of 19 June 2023, of the Supreme Court of Kosovo; and (iii) to remand Decision [Rev. no. 216/2023], of 19 June 2023 of the Supreme Court of Kosovo for retrial, to the latter.

Facts of the case and Applicants' allegations

4. The facts of the case, as reflected in the Judgment in case KI172/23, are related to a lawsuit of the applicants and of their parents, against the insurance company "Elsig Sh.A." (hereinafter: the insurance company), for compensation of material and non-material damage due to the death of their brother in a traffic accident.

5. The Basic Court approved the lawsuit of the applicants as well as of their parents regarding the compensation of material and non-material damage, where for the non-material damage, the applicants were awarded separately the amount of 8,000 (eight thousand) euro each, while each parent in the amount of 10,000 (ten thousand) euro. After the appeal of the insurance company, the Court of Appeals modified the judgment of the Basic Court in relation to the applicants, reducing the amount from 8,000 (eight thousand) euro to 5,000 (five thousand) euro for each of the applicants. As a result, the applicants submitted a revision against the Judgment of the Court of Appeals for compensation of the damage, on the grounds of erroneous application of the provisions of the substantive law. The Supreme Court by Decision [Rev. no. 216/2023] of 19 June 2023, rejected the revision as impermissible after finding that (i) based on Article 268 of Law No. 03/L-006 on the Contested Procedure (hereinafter: the LCP), the applicants are simple co-litigants, where the procedural position of a co-litigant does not depend on the procedural position of the other co-litigants, therefore, the value of the dispute is taken separately for each of them; and as a consequence; (ii) given that the value of the dispute did not exceed the amount of 3,000 (three thousand) euro for each of them, based on paragraph 2 of article 211 of the LCP, their revision is not permitted.

6. Before the Court, the applicants claim 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; and (iii) the right to judicial protection of rights guaranteed by Article 54 of the Constitution, as well as (iv) paragraphs 3 and 5 of Article 102 of the Constitution, among others, since according to them the value of the object of their dispute exceeds the value of 3,000 (three thousand) euro on the grounds that their claims are not separate disputes but constitute a sole claim, because (i) they are based on the same legal and factual basis and (ii) are related to one defendant; as well as (iii) contain the same claims for all claimants.

Preliminary remarks

7. 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 decide on the revision submitted against the Judgment by which the amount of compensation was reduced from 8,000 (eight thousand) euro to 5,000 (five thousand) euro for each of the applicants separately, 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.

8. In this regard, for the Majority, it has not been disputed that (i) the value contested by revision by each of the applicants against the Judgment of the Court of Appeals is below the amount of three thousand (3,000) euro; disputed, according to the Majority, in the circumstances of the present case, including and based on the applicants' allegations, is (ii) if the value of the dispute of more than 3,000 (three thousand) euro as a legal requirement for submitting the revision, should have been assessed by the Supreme Court separately for each of the applicants, or (iii) taking into account the specific circumstances of the case, the value should have been assessed in its entirety for all applicants, namely in the amount of 12,000 (twelve thousand) euro.

9. The Majority reasoned, in essence, that, in the circumstances of the present case, it was the primary duty of the Supreme Court to elaborate and apply the relevant provisions of the LCP in their entirety and not in an isolated manner. More specifically, the application of article 211 of the LCP, which determines the amount of over 3,000 (three thousand) euro as a requirement for submitting the revision, in conjunction with article 268 of the LCP, which determines that each co-litigant in the contested process is a party on his own and the performance or non-performance of such procedural actions neither benefit nor harm the other co-litigants, while on the other hand the complete disregard of Article 32 of the LCP which determines that if a lawsuit filed against a respondent includes several claims that are based on the same factual and legal basis, then the value of the object of the dispute is determined according to the total amount of the value of all claims, whereas the application and/or non-application of Article 32 of the LCP was decisive for fulfilling the aspect *ratione valoris* for filing the revision, and if this has resulted in "*excessive formalism*" in the interpretation and application of the law in the context of the right of "*access to justice*", according to the case law of the ECtHR.

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 Decision [Rev.no.216/2023], of 19 June 2023 of the Supreme Court of Kosovo

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 "*right 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"* is 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. In this respect, and more specifically as regards the foreseeability of the restriction, the ECtHR has emphasized that a coherent domestic case law and a consistent application of this case law will normally meet the criterion of foreseeability in relation to a restriction of access to the high court (see ECtHR cases, *Jovanović v. Serbia*, cited above, paragraph 48, and *Egić v. Croatia*, cited above, paragraphs 49 and 57).

16. 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.

17. 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 which establishes that "*Revision is not permitted in the property-judicial contests, in which the charge request involves money requests, [...] proposal if the value of the object of contest in the attacked part of the decision does not exceed ",* and article 268 of the LCP, according to which*:* "*Each litispendence in the contested process*

is parties in its own, while the procedural actions committed or not do not, are not in favor or against other litispendence."

18. Regarding this, the Supreme Court reasoned that: *[...] the cited provisions refer to the permissibility of the revision conditional on the value of the dispute which must be over 3,000 (three thousand) euro, for the revision to be permitted, and the situation when the revision is allowed regardless of the value of the dispute according to the exclusion criterion for the nature of the contested case. In this case, the value of the dispute in the part rejected by the second instance court for the claimants for each claim separately is that: for the claimant [R.C], the sister of the deceased in the amount of €3,000, for the claimant [F.C], the sister of the deceased in the amount of €3,000, for the claimant [L.C], the sister of the deceased in the amount of €3,000, for the claimant [S.C.], the sister of the deceased in the amount of €3,000, and which does not exceed the amount of €3,000 for none of the claimants. In this case, we are dealing with simple co-litigants, where the procedural position of a co-litigant does not depend on the procedural position of the other co-litigants. According to Article 268 of the LCP, each of them is independent in the judgment and that the value of the dispute is taken separately for each of them".*

19. Therefore, the Supreme Court, assessing that (i) each co-litigant in this contested process is a party on his own and the performance or non-performance of such procedural actions neither benefit nor harm the other co-litigants; had noted that (ii) none of the applicants had exceeded the threshold of 3,000 (three thousand) euro, 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. The Majority, based on the general principles elaborated above, did not question the fact that (i) none of the applicants exceeds the value of 3,000 (three thousand) euro foreseen by law; (ii) that the legal provision which determines the legal *ratione valoris* threshold before the Supreme Court pursues a legitimate aim, namely respect for the rule of law and the proper administration of justice. Also, within the framework of (iii) proportionality of the limitation, it was not contested for the Majority that (a) the procedure for filing the revision is regulated in a coherent and predictable manner in the applicable law; and (b) the limitation was not the result of errors made during the

procedure either by the courts or by the applicants. Disputable for the Majority, was only if in the interpretation of the applicable law, (c) there has been "*excessive formalism*" on the part of the Supreme Court for the fact that the Supreme Court did not refer to or clarify the provision of the LCP, namely its article 32, and which is related to the method of determining the general value of the object of the dispute.

22. In this regard, we refer to article 32 of the LCP which stipulates that (i) if a lawsuit filed against a defendant includes several claims based on the same factual and legal basis, then the value of the object of the dispute is determined according to the total amount of the value of all claims; and (ii) if the claims in the lawsuit result from different bases, or if they are filed against several defendants, the value of the object of the dispute is determined according to the value of each individual claim. However, Article 32 of the LCP refers to the object of the dispute in relation to the lawsuit and regulates the latter in cases where the same is filed (i) against a defendant, while Article 32 of the LCP (ii) is silent in relation to cases where we are dealing with more than one claimant, such as the present case. Also, article 32 of the LCP (iii) does not regulate the way of calculating the value of the revision, which according to article 211 of the LCP, concerns the value contested through the revision and not the general value of the dispute determined according to article 32 of the LCP. In connection with this, and in the circumstances of the present case, we note that even the regular courts for all claimants had decided separately, therefore for the father and mother of the deceased, the amount of compensation for material and non-material damage determined by the courts was higher, while the amount for sisters was lower and in this respect the courts have been unable to award a unique amount for all the claimants.

23. Therefore, in these circumstances, we consider that the Supreme Court has assessed the amount of the revision based on Article 268 of the LCP in terms of simple co-litigation where each co-litigants is a party on his own, while the joint value contested in the revision would be expressed only if article 269 of the LCP was applied, which stipulates that "*If according to the law or due to the nature of the judicial relations, the contest can be resolved only in the same way for each of litispendence (unique co-litigation), than all of them are considered as a sole litidependent party*". In the circumstances of the present case, this was not the case since, despite the fact that the dispute was related to the same factual and legal basis, each of the applicants had submitted the revision for compensation of the damage in relation to the amounts awarded to them by the Court of Appeals, and as a consequence would bear the consequences in terms of legal action against her part of the lawsuit, regardless of other co-litigants.

24. Therefore, we consider that in the present case, Article 32 of the LCP was not decisive in order to determine the value of the dispute according to the revision, since this article is related to the general value of the dispute at the time of filing the lawsuit and not to the value contested through revision, as stipulated by article 211 of the LCP. Disputable was whether, in the present case, the provisions of Article 268 of the LCP regarding simple co-litigation or the provisions of Article 269 of the LCP regarding unique co-litigation were applied. Therefore, given that each party to the proceedings was a party on its own, regarding which the amount of compensation was determined separately by the Court of Appeals, and that the dispute would not necessarily have to be resolved in the same way for all applicants, since the revision of one party had no consequences for the other parties, as foreseen by article 269 of the LCP. Therefore, in the present case, the provisions of Article 268 of the LCP regarding simple co-litigation are applicable.

25. Therefore, in the circumstances of the present case, we consider that the decision-making of the Supreme Court did not result in "*excessive formalism*". This, moreover, that the Supreme Court in relation to the calculation of the value contested by the

revision when we are dealing with simple co-litigation, results to have a coherent case law and which it applies in a consistent manner.

26. Therefore, based on the above, and with respect to the Majority, we consider that it should have been found that Decision [Rev. no. 216/2023] of 19 June 2023, of the Supreme Court is not contrary to 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 European Convention on Human Rights.

Respectfully submitted by Judges:

Remzije Istrefi –Peci	Enver Peci	Jeton Bytyqi
_____	_____	_____

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