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

Pristine, on 16 July 2012
Ref. no.: AGJ/278/12

JUDGMENT

in

Case No. KI 47/12

Applicant

Islam Thaçi

Constitutional Review of Decision of Supreme Court Rev. No. 188/2009, dated 7 December 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge and
Ivan Čukalović, Judge

Applicant:

1. Applicant of the Referral is Mr. Islam Thaçi, with residence in Gjilan.

Challenged decision

2. The challenged decision is the Decision of the Supreme Court Rev. no. 188/2011, dated 7 December 2011, which was served on the Applicant on 13 January 2011.

Subject matter

3. The subject matter of this Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the constitutionality of the Decision of the Supreme Court Rev. no. 188/2011 dated 7 December 2011, which has to do with the Decision 119/07 of the Municipal Assembly in Kamenica, by which the employment relationship was terminated to the Applicant.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rule 28 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules").

Proceeding before the Court

5. On 4 May 2012, the Applicant submitted the Referral with the Constitutional Court.

6. On 22 May 2012, the President, by Decision No. GJR. 47/12, appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur. On the same day, by Decision No.KSH. 47/12, appointed the Review Panel composed of the judges: 1. Snezhana Botusharova (presiding), 2. Ivan Čukalović (member) and 3. Dr. Iliriana Islami (member).

7. On 30 May 2012, the Court notified the Applicant, the Supreme Court and the Municipal Assembly in Kamenica about the registration of the Referral.

8. On 2 July 2012, the President by the decision GJR 47/12 appointed the judge Alty Suroy as Judge Rapporteur replacing Judge Gjyljeta Mushkolaj, because her mandate on the Court had expired on 26 June 2012. On the same day, the President by decision KSH. 47/12, appointed the members of the Review Panel, consisting of judges: 1. Snezhana Botusharova (presiding), 2. Ivan Čukalović (member) and Prof. dr. Enver Hasani (member) replacing Judge Iliraina Islami, because also her mandate on the Court had expired on 26 June 2012.

9. On 11 July 2012, the Court deliberated and voted on the case.

Summary of the facts

10. On 6 June 2007, the Municipal Assembly in Kamenica, by the Decision no. 119, in capacity of the Employer dismissed the Applicant from the position of the Chief Executive. The Applicant signed the contract with no.03/2007, with duration from 31 January 2006 to 31 January 2008. The same filed appeal against this Decision in the Independent Oversight Board for Civil Servants of Republic of Kosovo (hereinafter: IOBCSK), since the employing body did not submit response to his appeal, which he submitted within legal time limit.

11. On 15 June 2007, in a parallel way with the appeal filed in IOBCSK, the Applicant filed claim also in the Supreme Court of the Republic of Kosovo (hereinafter: the "Supreme Court") due to administrative silence by the MA of Kamenica.

12. On 25 June 2007 the Applicant requested again from MA of Kamenica to respond to the appeal, which he filed on 15 June 2007.

13. On 27 August 2007, the IOBCSK issued Decision no. 123/08, approved partly the Appeal of the Applicant no. 1341 dated 15 June 2007, by recommending to the MA in Kamenica, that within thirty (30) days act in accordance with the given recommendations in the decision, where among the other is said:

> *"Municipal Assembly in Kamenica made procedural violation during the dismissal of Chief Executive and has not applied the procedures, stipulated by the acts in force. MA should have established a committee which would make the evaluation of the work so far of the Chief Executive who will report-propose to the Assembly on the findings from the assessment and the Assembly to decide (for dismissal or not) pursuant to the procedures of Reg. 2000/45 on governance of municipalities in Kosovo, Article 30.8, Reg. the KCS-2001/36 Article 1, the. Adm. Dir. 2003/2, UNMIK Article 2, Legal Advice No. 2007/02 issued by MLG dated 13.02.2007 Chapter IV, item5, as well as the interpretation of the OSCE dated 09 May 2007 regarding the contracts of Chief Executives and of directors in municipalities, especially item 9, where it was not acted also pursuant to Article 52 item 2 and 3 of the Municipal Statute.*
> *3. The deadline for implementation of this decision by the MA Kamenica is 30 (thirty) days from the date of service of this decision.*
> *4. After taking actions pursuant to this decision, to notify the Independent Oversight Board of Kosovo.*
> *5. In the event of inaction according to this decision, the IOBK shall notify SRSG and the Prime Minister of Kosovo, pursuant to Article 11.4 of Regulation 2001/36 on KCS for taking further measures."*

14. Since the MA in Kamenica, was delaying the implementation of the IOBCSK decision, the Applicant filed claim on 10 October 2007, in the Municipal Court in Kamenica, on which occasion he requested the annulment of the decision no. 119 of the President of MA of Kamenica regarding his dismissal from work.

15. On 28 January 2008, the Municipal Court in Kamenica issued Decision no.vep.C. 112/07 on which occasion it decided to terminate all proceedings regarding the contest, until the MA in Kamenica decided according to the decision no. 123/08 of IOBCSK. The Applicant unsatisfied with this decision used his right to file an appeal to the District Court in Gjilan.

16. On 14 February 2008, the President of Municipality of Kamenica and the Head of Personnel by Notification no. 94/2008 informed the IOBCSK about the case, by accepting the fact that the Decision on dismissal of Chief Executive was approved in contradiction with legal acts. But, despite this fact, the MA in Kamenica did not take any action regarding the return of the Applicant to the previous position of the Chief Executive.

17. On 6 March 2008, since the Municipal Court in Kamencia by the Decision no.vep.C. 112/07 had terminated all proceedings regarding this case, the Applicant, through a submission requested from the same the continuation of suspended procedures, since the MA in Kamenica did not take any action and has not yet decided on this matter, according to IOBCSK decision.

18. On 13 June 2008, Municipal Court in Kamenica, issued Decision no.vep.C. 74/2008, by which declared itself non-competent for deciding on this matter. This Court had

concluded that the decision no. 119/08 dated 6 June 2007 of the President of MA of Kamenica regarding the dismissal of the Chief Executive is an administrative act, and that for this issue by the decision no. 123/08, the IOBCSK had decided as the second instance body, which decided to return the case to the MA of Kamenica for review in order to decide according to IOBCSK recommendation.

19. On 12 November 2008, the District Court in Gjilan, issued Decision Ac. no. 308/2008, rejected as ungrounded the appeal filed by the Applicant, by confirming the Decision C.no.74/2008 of the Municipal Court in Gjilan dated 13 June 2008. Against this decision, the Applicant field revision on 14 January 2008 in the Supreme Court of Kosovo.

20. On 8 January 2009, the Supreme Court rendered the Judgment A. no. 218/2007, approved the claim of the Applicant as grounded, on which occasion it ordered IOBCSK that within time limit of eight (8) days decides on the appeal of the Applicant, since by Article 26 of the Law on Administrative Conflict, it was foreseen that the second instance body has to decide within the time limit of 60 days, from the day of its delivery. If even after 7 days, the second instance body does not issue Decision on this matter, the party has the right to initiate judicial dispute as his appeal/request was rejected.

21. On 7 December 2011, the Supreme Court of Kosovo issued Decision Rev. no.188/2009, on which occasion it rejected the revision filed by the Applicant, with a justification that according to Article 11 of the Law on Administrative Procedure, the Court is competent to decide about the requests submitted by natural and legal persons, but since the MA in Kamenica has not yet decided about this legal matter, the administrative procedure was considered as unfinished by the same, since the MA in Kamenica has not yet decided according to the IOBCSK decision.

Applicant's allegations

22. The Applicant alleges that as a consequence of non-implementation of the Decision no.123/02 of IOBCSK and the rejection of deciding on his matter on merits, all court instances, made violation of constitutional rights, guaranteed by: Article 22.1 [Universal Declaration of Human Rights], Article 31.1 [Right to Fair and Impartial Trial], Article 32.1 [Right to Legal Remedies] Article 54.1 [Judicial Protection of Rights], as well and Article 6 of European Convention on Human Rights.

Assessment on admissibility of the Referral

23. In order to be able to adjudicate the Applicant's Referral, it is necessary that the Court first examines whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

24. The Court should firstly determine whether the Applicant is an authorized party to submit Referral with the Court in accordance with the requirements of Article 113 and 113.7 of the Constitution. The Applicant submitted his Referral in compliance with these constitutional provisions. Therefore, it results that the same is an authorized party to submit Referral in the Court for constitutional protection of his rights.

25. The Applicant must also prove that he has fulfilled the requirements of Article 49 of the Law, regarding the submission of the Referral within legal time limit. The case file clearly shows that the final decision in the case of the applicant is the Decision of Supreme Court, Rev. No. 188/2009 dated 7 December 2012, which was served on the Applicant on 13 January 2012. The Applicant submitted the Referral in the Court on 4

May 2012, which means that the Referral was submitted within the deadline of 4 months, as foreseen by the Law and the Rules of Procedure of the Court.

26. The Court also determines whether the Applicant has proved to have fulfilled the requirements of the Article 113.7 of the Constitution and Article 47.2 of the Law. The Applicant has initially exhausted legal remedies within the employing institution, he continued further with the request for exercising his right with the IOBCSK and later initiated labor dispute according to civil contested procedure in all court instances up to the last legal remedy, that in the specific case in the Decision of the Supreme Court Rev. No. 188/2009 of 7 December 2012, the Court considers that the Applicant has exhausted all available legal remedies according to the laws in force, looking for the solution of this matter.

27. The Court also determines whether the Applicant in his Referral has specified and clarified which constitutional rights he alleges to have been violated, by which act and the public authority. The Applicant has also fulfilled this requirement citing violations of his rights guaranteed by the Constitution and also citing the public authority which he considers the violator of these rights.

28. Since the Applicant is an authorized party, he has fulfilled the required deadline for submission of the Referral with the Court, has exhausted all available legal remedies, and specified accurately the provisions of violations of rights and freedoms including the public authority which made violation, the Court finds that the Applicant has fulfilled all procedural requirements for admissibility.

Assessment on the merits of the Referral

29. Since the Applicant has fulfilled the procedural requirements for admissibility, the Court must consider grounds of the Referral on the merits.

30. From the submissions of the Applicant, the Court observes that the same challenges the Decision of the Supreme Court Rev. No. 188/2009 dated 7 December 2012, because of the rejection of his Referral, which had to do with solving of this legal matter (labor dispute), between him and MA of Kamenica.

31. Based on the submitted documents, initially the Municipal Court in Kamenica with the Decision no. vep. C. 112/07 had terminated all the proceedings regarding the case, and later with the Decision no.vep.C. 74/2008 declared itself non-competent for deciding on the matter, submitted by the Applicant. This decision was confirmed also by the District Court in Gjilan. These court instances emphasized the fact that the solution of the case is the IOBCSK competence and that this matter has not been decided yet by MA of Kamenica. Being unsatisfied by the decisions of these court instances, the Applicant filed a revision in the Supreme Court, which also emphasized the fact that solving of the dispute is the IOBCSK competence.

32. From the above, it is clear that the Applicant of the Referral has consumed all legal and institutional ways, looking for judicial protection of his rights, in terms of implementation of the decision no. 123/08 of IOBCSK, which was issued in accordance with foreseen administrative proceedings. But, despite many efforts by the Applicant for exercising this right, earned by the abovementioned decision, it seems that his efforts were not taken seriously by the authorities of the MA of Kamenica and by the court authorities.

33. As a consequence of non-decision of this matter by the MA of Kamenica and the rejection of its deciding by all court instances, the Applicant pursuant to Article 113.7 of

the Constitution and Article 42.7 of the Law, considering it as the last opportunity for realizing his right, on 14 May 2012 submitted the Referral with the Constitutional Court of the Republic of Kosovo.

34. Furthermore, the Court refers to Article 54 of the Constitution that highlights the fact that:

> *"Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated".*

35. The Court observes that solving of this legal matter in the particular case, naturally was the competence of IOBCSK, due to the fact that the position of the Chief Executive, according to UNMIK Regulation, no. 2001/36 on Kosovo Civil Service, which has started to be implemented in 2004, within the Ministry of Public Services, belonged precisely to this body.

36. Given the fact that the nature of work of the Applicant, has requested accelerated solution by a competent body, due to the fact that the proceedings of the solution of these disputes, require concrete and efficient actions. Hence, this fact should have been taken into consideration both, by the MA of Kamenica and by regular courts of the Republic of Kosovo too, because it is clear that the public authorities disabled the Applicant to exercise the right, which he had earned by the IOBCSK decision.

37. The municipalities of the Republic of Kosovo should see as constitutional obligation the implementation of the court decisions and of public authorities and not to delay the procedures of their execution. In addition, when respective administrative proceedings, which are regulated by the special law (*lex specialis)*, which provisions foresee solution of these legal matters in an accelerated way, by also providing legal time limits for their solution *(see, paragraph 13 this judgment, IOBCSK recommendation, item 3 of the operational part of the decision no. 123/08 of 27 August 2007)*, due to the fact that their nature requires taking of concrete actions, accelerated solution and first of all it is in the interest of the state to provide and guarantee judicial protection of legal and constitutional rights to such clerks that are categorized as "civil servants" from possible violations of their rights by public authorities where they exercise their profession.

38. The Court observes that in the case of the Applicant, the authorities of MA of Kamenica had no strong and sustainable reason to delay the proceeding regarding the implementation of the IOBCSK decision. Authorities of the MA of Kamenica, by not putting into action the mechanisms for enforcement of the abovementioned decision, failed to prove that they are ready to respect the decisions of an independent and competent body on deciding on this issue, even more when all court instances have addressed its solution to IOBCSK .

39. Furthermore, the Supreme Court with the Decision Rev. no.188/2009 dated 7 December 2011, found that solving of this legal matter is full jurisdiction of IOBCSK. Therefore, since the MA in Kamenica was not implementing the IOBCSK decision, when it is known that this court, found that IOBCSK should have decided about the above-mentioned case within the foreseen time limit *(see: Judgment A no. 218/2007 dated 8 January 2009 of the Supreme Court, where the same has recommended to IOBCSK that within the time limit of eight (8) days decides about the issue.*

40. Regarding this, the Constitutional Court emphasizes that the Supreme Court, knowing that the Applicant requested the judicial protection of legal and constitutional rights, because the MA of Kamenica was not acting according to the IOBCSK decision and in

this way Supreme Court disregarded the appeal/request of the Applicant, satisfying with the fact that the MA of Kamenica has still not decided on the matter on administrative procedure according to the IOBCSK recommendation.

41. Since the IOBCSK issued a decision and the same was not implemented by the MA of Kamenica, where it was concluded that the dismissal from the position of the Chief Executive of MA of Kamenica was in contradiction with legal acts, the question was raised where else should be requested the judicial protection of rights made by public authorities by their actions or inactions.

42. Therefore, Supreme Court by throwing responsibility for solving this issue on MA of Kamenica and IOBCSK are responsible, made that the Applicant was left without any concrete result by Supreme Court, because the Applicant did not exercise his right, due to the reason that he was not provided "the judicial protection of rights" as it is foreseen by the requirements of the Article 54 of the Constitution. Whereas, the transfer of responsibility from this instance and referring the case to IOBCSK cannot be considered as a justification for rejection of the review of the Applicant's appeal, since this independent body issued a decision in accordance with administrative procedures, as it was later found by the Supreme Court itself with the Decision Rev. no.188/2009 dated 7 December 2011, but that this IOBCSK decision was never implemented by MA of Kamenica.

43. As a matter of fact, it is clear that the Applicant was disabled to use effective legal remedies, therefore the Constitutional Court assesses that disregard of these important facts is in contradiction with the requirements of the Article 32 of the Constitution.

44. In order to make clearer this finding, the Constitutional Court refers to Article 13 of the European Convention on Human Rights, which determines that: *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

45. ECHR emphasizes that Article 13 of the Convention guarantees availability of a legal remedy at a national level, to implement the essence of the rights and freedoms of the Convention in any kind of form that may be provided in their internal legal order. The effect of the Article 13 in this way requires providing of internal legal remedies to treat the content of a "substantiated appeal" according to the Convention and to make necessary compensation *(see Kudła v. Poland [GC], no. 30210/96, § 157, ECHR 2000 XI).* the legal remedy of the Article 13 should be "effective" in practice and in the law (see, for instance, İlhan v. Turkey [GC], no. 22277/93, § 97, ECHR 2000-VII). above § 158).

46. From the above, the Court realized that the IOBCSK decision was not implemented by the authorities of MA of Kamenica. The Applicant's appeals addressed to the MA of Kamenica to respond regarding the delay of the decision making process, were not taken into account also by regular court instances. As a result of these bypassing or of the negligence of public authorities, the Applicant has not exercised in any way the right to effective legal remedy and the judicial protection of rights.

47. The Constitutional Court, in terms of clarifying the IOBCSK's position and jurisdiction, considers that IOBCSK is now an independent institution constituted by the law, in accordance with the Constitution (see Article 101.2 of the Constitution). Therefore, all obligations arising by this institution, regarding the matters that are under the jurisdiction of this institution produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service of the Republic

of Kosovo. The decision of this institution provides final administrative decision, and as such should be executed by the competent court as proposed for the execution by a creditor in terms of realization of the right earned in administrative procedure.

48. Article 6 of the Convention is also applied for administrative phases of judicial process respectively is within the framework "for the Right to a Fair and Impartial Trial" a right guaranteed by Article 31 of the Constitution of the Republic of Kosovo. From this it follows that the non-implementation of the Board's decisions is an element of Article 6 of the Convention, and its violation.

49. The Constitutional Court notes that is the right of an unsatisfied party to initiate court proceedings in case of failure of realization of the earned right as defined in Article 31 of the Constitution of the Republic of Kosovo and Article 6 in conjunction with Article 13 of the European Convention on Human Rights (ECHR). It would be meaningless if the legal system of the Republic of Kosovo would allow that a final judicial decision remains ineffective in disfavor of one party. Interpretation of the above Articles exclusively deals with the access to the court. Therefore, non-effectiveness of procedures and the non-implementation of the decisions produce effects that bring to situations that are inconsistent with the principle of Rule of Law, a principle that the Kosovo authorities are obliged to respect (*see ECHR Decision in the case Romashov against Ukraine, Submission No. 67534/01. Judgment of 25 July 2004*).

50. The Court considers that, the execution of a decision rendered by a court should be considered as an integral part of the right to a fair trial, a right guaranteed by the above articles (*see mutatis mutandis Hornsby v. Greece case, Judgment of 19 March 1997, reports 1997-II, p. 510, par. 40).* In this specific case, the Applicant should not be deprived of the benefit of a final decision, which is in his favor. No authority can justify non-implementation intending to obtain revision and fresh review of the case *(see mutatis mutandis Sovtranstvo Holding against Ukraine, No. 48553/99, § 72, ECHR 2002-VII, and Ryabykh v. Rusia, No. 52854/99, § 52, ECHR 2003-IX).*Competent authorities, therefore have an obligation to organize an efficient system for implementation of decisions which are effective in law and practice, and should ensure their implementation within reasonable time, without unnecessary delays *(see mutatis mutandis Pecevi v. former-Republic of Yugoslavia and Macedonia, no. 21839/03, 6 November 2008; Martinovska v. Former-Republic of Yugoslavia and Macedonia, no. 22731/02, 25 September 2006).*

51. In conclusion, Constitutional Court finds that non-implementation of the decisions no. 123/2008 of the IOBCSK and unreasonable delay of solving this issue by the authorities of MA of Kamenica, constitute violation of the Article 31 in conjunction with Article 32 of the Constitution as well as of Article 6 in conjunction with Article 13 of the Convention. The failure of the judicial authorities and impossibility of creation of circumstances for "effective legal remedies" and "judicial protection of rights" made that the courts issue decisions contrary to the requirements of the Article 32 in conjunction with Article 54 of the Constitution, Article 6 in conjunction with Article 13 of the Convention

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law on the Constitutional Court, and Rule 56 (1) of the Rules of Procedure, at its session held on 11 June 2011, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO DECLARE invalid the Decision Rev. nr. 188/2009 of the Supreme Court of 7 December 2011, which violates Article 32 and 54 of the Constitution, Article 6 and 13 of ECHR;

III. TO REMAND the Decision Rev. nr. 188/2009 of 7 December 2011 of the Supreme Court for reconsideration in conformity with the Judgment of the Court, pursuant to Rule 74 (1) of the Rules of Procedure.

IV. Pursuant to Rule 63 (5) of the Rules of Procedure, the Supreme Court shall submit information to the Constitutional Court about the measures taken to enforce this Judgment of the Constitutional Court.

V. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court.

VI. This Judgment is effective immediately.

Judge Rapporteur

Altay Suroy

President of the Constitutional Court

Prof. Dr. Enver Hasani