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

Prishtina, 10 July 2012

DISSENTING OPINION OF JUDGES
Ivan Čukalović and Altay Suroy

in

Referral No. KI37/10

Applicants

Stanojević Nebojša, Marinković Dragan and 118 former employees of SOE „Kllokot Banja"

Constitutional Review of the Judgment of the Special Chamber of the Supreme Court No.SCEL-06-0016, dated 10 October 2006 and Resolution No. SCEL 06-016, dated 31 January 2007

1. With all due respect to our colleagues, we feel the need to reason our dissent concerning the decision of the Constitutional Court on inadmissibility of the Referral in case KI-37-10, rejecting the request of Stanojević Nebojša, Marinković Dragan and 118 former employees of the SOE „Kllokot Banja" for compensation, on the occasion of privatization of the mentioned enterprise.

2. Applicants' request was rejected on the grounds stated in paragraph 29, that the Applicants have submitted the Referral to the Constitutional Court on 2 June 2010, while the latter decision concerning this case was rendered by the Special Chamber of the Supreme Court, No. SCEL 06-016, on 31 January 2007. It is further stated that the Referral concerns the issue prior to 15 June 2008, respectively, before the Constitution of Kosovo entered into force, therefore, the Referral is *ratione temporis* incompatible with the provisions of the Constitution and the Law.

3. According to our belief, these claims do not have legal nor factual basis, for the following reasons: it should be noted that the SOE „Kllokot Banja" consists of two working units:

   a) Working unit Plant for producing Mineral Water in Kllokot; and

   b) Working unit Resort Spa (Cure and Rehabilitation Center) also in Kllokot.

4. Applicants have worked in the unit Resort Spa (Cure and Rehabilitation Center).

5. On the occasion of the privatization of the first working unit of the enterprise on 24 November 2005, the PAK has established the list of eligible employees to whom belongs the part of 20% of the proceeds from the privatization. The list of eligible employees has been published in Albanian language in the dailies *Zëri and Koha Ditore* on 28 and 29 June and on 1 July 2006, whereas the list of eligible workers was published in Serbian language on 28 and 29 June and 1 July 2006 in *Danas* and *Blic,* dailies that are published in the Republic of Serbia.

6. Employees of the working unit Resort Spa (Cure and Rehabilitation Center) living in Serbia, have seen the announcement and filed their requests to be included in the list, while those who were in Kllokot did not do so, because in no way they could be informed about that, since these dailies are not distributed in the territory of the Republic of Kosovo, and the only media in Serbian language „Radio Kllokot" did not announce this, what has been proved by the Applicants.

7. It should be emphasized that the Special Chamber of the Supreme Court stressed "de jure condendo to be conducted a more effective and widespread circulation of the list of eligible employees among the potentially damaged parties", as stated in paragraph 17 of the decision of the Constitutional Court.

8. When it came to the determination of the contract on privatization of the working unit Resort Spa (Cure and Rehabilitation Center) on 15 April 2010, Applicants have submitted a request to be included in the list for distribution of shares, but on 29 October 2010 their request was rejected, with reasoning that the list of the eligible employees was already established on the occasion of privatization of the first part of the enterprise, referring to the instruction of the SRSG's office, which says„... *if an enterprise has more organization units, in that case the common list is created for all the organization units, while the official date of privatization is considered the date of the privatization of the first unit of the said enterprise*", that the list of the eligible employees was established on 10 October 2006 and cannot be changed.

9. Unsatisfied with the decision of PAK, on 2 June 2010, employees submitted a Referral with the Constitutional Court, after being informed that their request from 15 April 2010 will be rejected, what was confirmed with the decision of the PAK, of 29 October 2010.

Assessment of admissibility of the Referral

10. Based on the presented arguments it can be clearly concluded that in this case there are no reasons to reject the Referral;

11. The latter decision in this case is not, as stated in the decision of the Constitution Court, the decision of the Special Chamber of the Supreme Court No. SCEL 06-016 of 31 January 2007, but, it is the decision of the PAK, of 29 October 2010, by which was rejected the employees' request, of 15 April 2010, to include them in the list of eligible employees for distribution of shares.

12. Also, there is no basis for claims that the Referral is inadmissible as *ratione temporis*, because the request of the employees to be included in the list was rejected on 15 April 2010, the decision of PAK on the appeal of the employees was rendered on 29 October 2010, while the Constitution entered into force on 15 June 2008.

13. On the other hand, should be mentioned that Applicants' rights to use their language, pursuant to Article 5 paragraph 1 of the Constitution of Kosovo, have been violated:

"1. Official languages in the Republic of Kosovo are Albanian and Serbian."

14. As well as Article 58 paragraph 2:

> *"The Republic of Kosovo shall promote a spirit of tolerance, dialogue and support reconciliation among communities and respect the standards set forth in the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. "*

15. In this case, the call for the eligibility list was announced only in Albanian language, while in Serbian language it was announced in Danas and Blic, dailies that are published in Serbia and not distributed in Kosovo, where Applicants live.

16. Thus, there was violation of constitutional rights to use of language, guaranteed by the Article 5 paragraph 1 and Article 58 paragraph 2 of the Constitution of Kosovo.

17. Finally, even the Special Chamber of the Supreme Court, itself, confirmed that „ *should be conducted a more effective and widespread circulation of the list of eligible employees among the potentially damaged parties", as stated in paragraph 17 of the decision of the Constitutional Court.*

18. In addition, we cannot accept neither arguments stated in paragraph 21 of the decision of the Constitutional Court, quoting instruction of the SRSG, which reads *„... if an enterprise has more organization units, in that case the common list is created for all the organization units, while the official date of privatization is considered the date of the privatization of the first unit of the said enterprise"*, that the list of the eligible employees was established on 10 October 2006 and cannot be changed.

19. This means that, from the moment the decision on privatization is taken, property alienation or change of status or similar cannot be done. And finally we have cases that the enterprise consists of several units while only a part of the enterprise is privatized.

20. Based on the presented arguments, we reasonably consider that the Referral of the employees of the working unit Resort Spa (Cure and Rehabilitation Center) is admissible for the following reasons:

    a. The Referral was submitted to the Constitutional Court on 2 June 2010, while their request to be included in the list was filed on 15 April 20120, whereas the decision of PAK rejecting their request was rendered on 29 October 2010, what proves inaccurate claims that the Referral is inadmissible *ratione temporis*,

    b. By not announcing the call for the list of eligible employees in Serbian in 2006, but, only in Albanian, rights of the Applicants to use official language from Article 5 paragraph 1 and use of legal remedies from Article 32 of the Constitution of the Republic of Kosovo **are continuously being violated**.

21. These allegations are substantiated by the case law of the ECHR. The concept of a "continuing situation" refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims.

22. In these cases the deadlines start to run from the end of the continuing situation (*Ülke v. Turkey** (dc.))ESLJP.

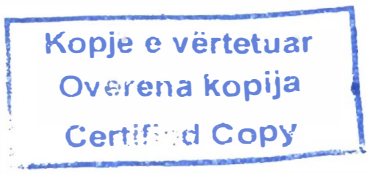
23. As long as the situation continues the deadlines rule provided by law is not applicable (*Iordache v. Romania*) ECHR. See also (*Varnava and Others v. Turkey) ECHR*.

24. It follows that, due to continuous violation of Applicants' rights to use their language, prevented them not only to be informed on how to apply for the call on the eligibility list, but, they also could not be informed on their right to use of legal remedies, what violates their rights guaranteed by Article 32 of Constitution.

25. Based on the foregoing, we consider that there was violation of the Applicants' rights guaranteed by Article 5 paragraph 1 and Article 58 paragraph 2 of the Constitution of the Republic of Kosovo, resulting in further violation of Articles 32 and 54 of the Constitution of the Republic of Kosovo and Article 13 of European Convention on Human Rights, due to continuous violation of aforementioned rights, thus, it is our opinion that their Referral is admissible.

Judges,

Ivan Čukalović



Altay Suroy