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

Prishtina, 4 July 2017
Ref. no.:AGJ 1101/17

JUDGMENT

In

Case no. KI81/16

Applicant

Valdet Nikçi

Constitutional review of
Decision Ac. no. 949/16 of the Court of Appeals,
of 20 April 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Valdet Nikçi, from Peja (hereinafter, the Applicant).

Challenged decision

2. The Applicant challenges Decision Ac. no. 949/16 of the Court of Appeals, of 20 April 2016, which rejected as ungrounded the Applicant's appeal and approved the Decision C. no. 1022/15 of the Basic Court in Peja, of 8 February 2016, on suspending the procedure in his contested case.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 21 [General Principles], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 20 May 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 14 June 2016, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Bekim Sejdiu.

7. On 2 November 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur, replacing Judge Robert Carolan who resigned on 9 September 2016. The President Arta Rama-Hajrizi also appointed herself as judge in the Review Panel replacing Judge Almiro Rodrigues.

8. On 21 November 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals.

9. On 01 December 2016, the Court informed the Privatization Agency of Kosovo (hereinafter: PAK) about the registration of the Referral and invited them to submit any comments within 7 days of receipt of the invitation.

10. On 12 December 2016, PAK submitted their comments on the Referral.

11. On 14 December 2016, the Court decided to postpone the consideration of the Referral.

12. On 31 May 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral and the finding of a violation of the Constitution.

Summary of facts

A. Initial proceedings

13. The Applicant was employed in the Socially Owned Enterprise "Factory for Metal Constructions" (former "UTVA") in Peja (hereinafter, the FMC), which allegedly had not paid his monthly salaries for the period of 1 June 1995 until 31 March 1997.

14. On 27 May 1997, the Applicant, representing other co-workers, filed a claim with the Municipal Court in Peja against the FMC, requesting the payment of their unpaid salaries.

15. On 27 October 2004, the Municipal Court (Judgment C. no. 133/03) approved the Applicant's claim and obliged the FMC to pay the unpaid monthly income, from 1 June 1995 to 31 March 1999. The Municipal Court *"[...] found that the specified statements of claim of the claimants have legal basis, and as such were approved by the court as grounded".*

16. On 16 February 2005, the KTA, through the State Public Prosecutor, filed with the Supreme Court a request for protection of legality against the Judgment of the Municipal Court, due to "*essential violations of the provisions of contested procedure and Regulation no. 12/2002 on establishment of Kosovo Trust Agency".*

17. On 22 March 2005, the Supreme Court (Judgment Mlc. No. 2/2005) rejected as ungrounded the request for protection of legality, reasoning that *"the Municipal Court in Peja had jurisdiction to decide on the claims, in accordance with the Law on Regular Courts (No. 21/1978) and it had correctly determined the facts and correctly applied the procedural and the substantive law".*

18. Moreover, the Supreme Court assessed the arguments of the request for protection of legality and found that *"the Municipal Courts among other things, are competent to judge the contests regarding the property legal requests" (...) the respondent [FMC] has the quality of the legal person, therefore, the claims that the enterprise, as responding party could not participate in procedure are ungrounded"; (...) "From this provision (Article 29 of that Regulation 12/2002) it is understood that each claim that will be filed after this Regulation enters into force it will be under the regulations determined by this provision, but since the claimants filed the claim before this Regulation entered into force, also the statement in the request for protection of legality that the challenged Judgment violated this provision, is ungrounded".*

B. Repetition of proceedings

19. During the period 2010-2014, the Privatization Agency of Kosovo (hereinafter, PAK), the legal successor to the KTA, submitted two requests for the reopening of proceedings on the Applicant's claim via two parallel proceedings: (A) a first

proceeding before the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter, the Appellate Panel) and (B) a second proceeding before the District and Supreme Courts.

B1. Before the Special Chamber of the Supreme Court

20. On 10 January 2011, the PAK filed with the Appellate Panel a request for retrial of the Municipal Court case C.no.133/03 (Judgment C.no.133/03, dated 27 October 2004), on the basis of Article 421 paragraph 3 and 9 of the SFRY Law on Contested Procedure (LCP). The PAK argued that the Municipal Court should have declined jurisdiction to decide the claim as it was filed against FMC, a Socially Owned Enterprise (SOE) under the administration of the Kosovo Trust Agency (KTA), later the PAK.

21. On 3 March 2011, the Appellate Panel (Decision SCPL-11-0001) transferred the request for retrial to the Trial Panel of the Special Chamber in order to take over the case from the jurisdiction of the regular courts pursuant to Section 16, UNMIK Administrative Direction 2008/6.

22. On 4 December 2013, the Specialized Panel of the Special Chamber (the legal successor to the Trial Panel) rejected (Decision SR-11-0001) the PAK request for retrial. The Specialized Panel reasoned that, irrespective of whether or not the Municipal Court had jurisdiction in the case at the time, the decision of the Municipal Court (Judgment C.no.133/03, dated 27.10.2004) had become final and binding (*res judicata)*, because no further appeals against that decision had been filed. The Specialized Panel considered that this decision came within the principle of legal certainty and concluded what follows.

> *"In the case at hand the [PAK] had not raised the matter of lack of jurisdiction during the proceedings at the Pejë/Peć Municipal Court and further it had not filed an appeal against the Judgment of 27 October 2004, received on 16 December 2004. In line with the arguments presented above on the legal status of a Socially Owned Enterprise under the administration of the PAK the fact that the Municipal Court failed to involve the [PAK] in the proceedings does not change the fact [that] the judgment became final.*
>
> *The Pejë/Peć Municipal Court Judgment therefore shall not be subject to further review by the Special Chamber".*

B2. Before the District and Supreme Courts

23. On 30 April 2010, the PAK filed with the first instance of the District Court in Peja a request for repetition of proceedings regarding case C. no. 133/03, which had been decided by the Municipal Court on 27 October 2004.

24. On 22 November 2010, the first instance of the District Court (Decision Ac. no. 390/2010) rejected as outdated the request for repetition of the proceedings, since the deadline of (5) five years has elapsed.

25. The PAK filed an appeal with the second instance of the District Court, due to violations of the Law on Contested Procedure and erroneous and incomplete determination of the factual situation.

26. On 21 March 2011, the second instance of the District Court (Decision K Ac. no. 4/10) quashed the first instance decision of the District Court and remanded the case to the first instance of the District Court for reconsideration and retrial. That Decision specifically considered that the regularity of the appealed decision *"cannot be assessed because when deciding the* (first instance) *District Court erroneously applied the provision of Article 196, in conjunction with Article 237.2, of the LCP, because the representative of PAK with the proposal regarding the request for repetition of the procedure, its claims were that where upon deciding on merit Article 421, item 3, of the LCP, was violated, because in procedure participated as claimant or respondent the person who cannot be party in the procedure or the party which is legal person did not represent the authorized person. Since this claim was in the proposal for the repetition of the procedure then the Court should have assessed this matter".*

27. On 20 April 2011, the first instance of the District Court (Decision AC. no. 141/2011) annulled the original Judgment (C no. 133/03, of 27 October 2004) of the Municipal Court and allowed the repetition of the procedure.

28. On 3 July 2011, the Applicant filed with the Supreme Court a request for revision of that Decision, *"due to essential violations of the provisions of LCP".*

29. The Applicant namely alleged in his request for revision that KTA *"was notified regarding (...) the contest in the Municipal Court in Peja is being conducted (...). This notification was made on 10 May 2004, at 11:20"; (...) "no appeal was filed against this Judgment so that this Judgment became final"; (...) "the Supreme Court of Kosovo* [Judgment Mlc. No. 2/2005, of 22 March 2005] *responded regarding the doubt (...) if it is in question the matter of legitimacy of the respondent party or not and if the provisions of Article 29, of UNMIK Regulation 12/2002 were violated"; (...) "the Court of the first instance decided for the claim against Metal Construction Factory* [FMC] *in Peja, and not against the Agency".*

30. On 3 April 2014, the Supreme Court (Decision Rev. no. 21/2014) rejected as inadmissible the Applicant's request for revision.

C. Reopening and suspending the proceedings

31. As a consequence of the approval of the repetition of proceedings by the first instance of the District Court, the Basic Court in Peja (legal successor to the Municipal Court in Peja based on the new Law on Courts, which entered into force on 1 January 2013) started to review the case, now registered with the Basic Court under number C. no. 254/11.

32. On 2 June 2014, the PAK requested the Basic Court *"to terminate all the procedures (...) by also involving the session* [on 8 July 2014 at 10:00] *of Court case C. no. 254/11, of 8 July 2014",* because, under the Law 03/L-067 on

Privatization Agency of Kosovo, applicable at that time, any proceedings concerning a Socially Owned Enterprise in a liquidation procedure shall be suspended.

33. On 23 July 2014, the Applicant submitted the Referral KI121/14 to the Constitutional Court alleging, *inter alia,* a violation of the right to a fair trial due to various substantive decisions of the Supreme Court and the District Court. The Basic Court was informed about the registration of the Referral KI121/14.

34. On 3 September 2014, the Basic Court suspended the contested procedure *"for indefinite time and the date of the next hearing will be set after the Constitutional Court decides on the legality* (sic) *of the decision of the Supreme Court [...]".*

35. On 8 September 2015, the Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47.2. of the Law and Rule 36(1)(a) of the Rules of Procedure, declared the Referral KI121/14 inadmissible, because the Applicant had not exhausted yet all legal remedies.

36. Following the decision of the Constitutional Court, the Basic Court resumed its consideration of the contested proceedings.

37. On 8 February 2016, the Basic Court (Decision C. no. 1022/15) suspended consideration of the contested proceedings in the case C. no. 254/11 pending the conclusion of the liquidation procedure of the FMC. The Basic Court reasoned what follows.

> *"According to provisions of Article 10, paragraph 1, of the Annex of Law no. 04/L-034 on the Privatization Agency of Kosovo, it is determined that any judicial, administrative or arbitration action, proceeding or act involving or against an Enterprise (or any of its assets) that is the subject of a Liquidation Decision shall be suspended upon the submission by the Liquidation Authority of a notice of the Liquidation Decision to the concerned court, public authority or arbitral tribunal.*
>
> *(...)*
>
> *Therefore, based on the above mentioned reasons and also on the above mentioned provisions, since the Metal Construction Factory in Peja is in liquidation from 16 November 2007, based on the Decision of the board of Kosovo Trust Agency, of 1 November 2007, the Court decided to suspend the procedure in this contested case".*

38. The Applicant filed with the Court of Appeals an appeal, alleging *"essential violation of rules of contested procedure, erroneous and incomplete application of the factual situation, erroneous application of the substantive law".*

39. On 20 April 2016, the Court of Appeals (Decision Ac. no. 949/16) rejected as ungrounded the Applicant's appeal and approved the Decision of the Basic Court of 8 February 2016.

40. Moreover, the Court of Appeals acknowledged that Judgment C. no. 133/03 of the Municipal Court, of 27 October 2004, *"became final on 28 December 2004"*. It further acknowledged that "*By Decision Ac. No. 141/2011, of 20 April 2011, the District Court in Peja allows the repetition of the procedure terminated by final Judgment CP. No. 133/03, of the Municipal Court in Peja, of 27 October 2004, and annuls the mentioned Judgment*".

Applicant's allegations

41. The Applicant claims that the decisions of the regular courts, namely of the Court of Appeals (Decision Ac. no. 949/16), violated his rights guaranteed by Article 21 [General Principles], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 32 [Right to Legal Remedies] of the Constitution.

42. The Applicant primarily alleges that the Court of Appeals, by suspending the contested proceedings until the conclusion of the liquidation of the FMC, has effectively prevented him from ever receiving a final determination on his claim.

43. Furthermore, in the Applicant's own words, *"this procedure is final because after the liquidation procedure is over, this enterprise will not exist anymore and there will be nothing to consider, as the proverb says: 'A dead man has no luck'"*.

44. Moreover, the Applicant requests the Court *"to ascertain the legality and constitutionality"* of the decisions delivered in his case and, namely, *"if the Basic Court in Peja,* [Decision C. no. 1022/15, of 8 February 2016] *decided correctly wherein suspends the procedure because the enterprise is in liquidation procedure, and that the enterprise was in liquidation procedure also at the time when the proposal for the repetition of the procedure was approved, and also if the Court of Appeals* [Decision Ac. no. 949/16, of 20 April 2016] *decided correctly when it rejected the appeal and approved Decision C. no. 1022/15"*.

45. In the end, the Applicant claims a final decision on the payment of unpaid salaries. The challenged Decision, allegedly suspending the proceedings *sine die*, makes the final payment almost not achievable and denies to the Applicant the right to a final decision.

Admissibility of the Referral

46. The Court refers to Article 46 [Admissibility], which provides:

> *The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.*

47. Thus, the Court first assesses whether the Applicant has met the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

48. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides:

> *1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*

49. The Court also refers to Article 47, 48 and 49 of the Law, which provide as it follows.

> Article 47 [Individual Requests]
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*
>
> Article 48 [Accuracy of the Referral]
>
> *In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.*
>
> Article 49 [Deadlines]
>
> *The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision.*

50. The Court further refers to Rule 36 (1) (b) of the Rules of Procedure which foresees:

> *(1) The Court may consider a referral if:*
> *[...]*
> *b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.*

51. The Court notes that the Applicant filed the Referral on 20 May 2016, challenging the Decision of the Court of Appeals of 20 April 2016, which has indefinitely suspended the proceedings, where he is a claimant, and allegedly violated his rights to equality before the law, to fair and impartial trial and to legal remedies.

52. The Court considers that the Applicant is an authorized party, has exhausted all the legal remedies provided by the law, submitted his Referral within the provided period of four (4) months and accurately clarified what rights have

allegedly been violated and specified what concrete act of public authority he is challenging.

53. Therefore, the Court, pursuant to Article 46 of the Law, determines that that the Applicant has met the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

54. Consequently, the Applicant's Referral is admissible and the Court will now assess the substantive legal aspects of his Referral.

Substantive legal aspects of the Referral

55. The Court recalls that the Applicant claims a violation of (i) his rights to a fair and impartial public hearing within a reasonable time and (ii) to legal remedies. The Applicant also claims a violation of (iii) his right to equality before the law and the general principles of the Constitution.

(i) Alleged violation of the right to a fair and impartial public hearing within a reasonable time

56. The Court also recalls that the Applicant alleges that the Decision Ac. no. 949/16 of the Court of Appeals, of 20 April 2016, violated his right to a timely final judicial decision, by approving the decision of the Basic Court on suspending consideration of the contested proceedings until an unforeseen conclusion of the liquidation procedure of the FMC.

57. The Court observes that the Court of Appeals failed to specify a date either for the period of suspension of the proceedings or any foreseeable indicative date for the conclusion of the liquidation procedure of the FMC.

58. Furthermore, the Court notes that the Court of Appeals and the Basic Court based their Decisions on paragraph 1 of Article 10 [Suspension of actions] of the Annex to Law no. 04/L-034 on the Privatization Agency of Kosovo. This provision foresees:

> *1. Any judicial, administrative or arbitration action, proceeding or act involving or against an Enterprise (or any of its assets) that is the subject of a Liquidation Decision shall be suspended upon the submission by the Liquidation Authority of a notice of the Liquidation Decision to the concerned court, public authority or arbitral tribunal.*

59. The Court recalls that, on 4 December 2013, the Specialized Panel of the Special Chamber (Decision SR-11-0001) decided that the original claim of the Applicant for payment of his unpaid salaries had been determined in final instance by the Municipal Court of Peja in its Judgment C.no.133/03) of 27 October 2004. According to the Specialized Panel, this Judgment was final and binding and had become *res judicata*. The Specialized Panel further concluded that "*the Pejë/Peć Municipal Court Judgment therefore shall not be subject to further review by the Special Chamber*".

60. The Court recalls that, on 20 April 2011, the District Court (Decision AC.no.141/2011) decided to annul the Judgment of the Municipal Court of 27 October 2004 and allowed the repetition of the proceedings. Consequently, the Basic Court reopened the proceedings on the Applicant's claim.

61. The Court considers that the final determination on the long standing Applicant's claim to the payment of unpaid salaries has not been concluded yet. In fact, the contested proceedings on this claim have been reopened and subsequently suspended by the Basic Court pending a conclusion of the liquidation of the FMC. That suspension was confirmed by the challenged Decision of the Court of Appeals.

62. The Court refers to Article 31 [Right to Fair and Impartial trial] of the Constitution, which in its second paragraph provides:

> *2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations [...] within a reasonable time [...].*

63. The Court also recalls paragraph 1 of Article 6 [Right to Fair trial] of the European Convention on Human Rights (hereinafter, the ECHR), which provides:

> *1. In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time [...].*

64. The Court reiterates that, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, *"human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights"*.

65. In that respect, the Court recalls that the European Court of Human Rights (hereinafter, the ECtHR) has interpreted the scope of application of Article 6 (1) of the ECHR to provide, at least, that claims related to purely economic rights, such as claims for salary or an 'essentially economic' right, come within the meaning of the phrase "civil rights and obligations". (See, *mutatis mutandis,* ECtHR case *Vilho Eskelin and Others v. Finland*, No. 63235/00, Judgment of 19 April 2007, paragraph 45).

66. Thus the Court considers that the Applicant's claim for payment of unpaid salaries comes within the scope of 'civil rights and obligations' as established in Article 6 (1) of the ECHR and in Article 31 (2) of the Constitution.

67. Therefore, the Court finds that the contested proceedings on the Applicant's claim are 'directly decisive' for the determination of his civil right to payment of unpaid salaries, within the meaning of Article 6 (1) ECHR and Article 31 (2) of the Constitution. (See, *mutatis mutandis*, ECtHR case *Ringeisen v. Austria*, No. 2614/65, Judgment of 16 July 1971, paragraph 94).

68. The Court notes that the Applicant's Referral primarily concerns the suspension of the proceedings on his civil claim, which have started on 27 May

1997 and have been suspended on 20 April 2016, pending the conclusion of a liquidation of the FMC, without any apparent date for the conclusion of all this process.

69. In this connection, the Court notes that the Constitution entered into force on 15 June 2008.

70. The Court also notes that the period to be taken into consideration for these proceedings began on the date of the Constitution entering into force, even though the Applicant entered a claim with Municipal Court in 1997 and a final decision has allegedly been delivered in 2004.

71. The Court further notes that, similarly as to the ECtHR, the Court has no jurisdiction to analyze the juridical quality of the decisions of the regular courts. However, it considers that, since the remittal of cases for reopening is usually ordered as a result of errors previously committed, the repetition of such orders within one set of proceedings may disclose a serious deficiency in the judicial system. (See ECtHR cases *Wierciszewska v. Poland*, no. 41431/98, Judgment of 25 November 2003, paragraph 46; *Šilc v. Slovenia*, No. 45936/99, Judgment of 29 June 2006, paragraph 32).

72. The Court considers that the proceedings had apparently been concluded on the date of entry into force of the Constitution. The additional court proceedings which followed after the entry into force of the Constitution were exclusively concerned with the request of the PAK for reopening of the case and then for the subsequent suspension of the case.

73. These additional proceedings began on 30 April 2010. They included proceedings before three separate instances of the District Court, two instances of the Special Chamber of the Supreme Court, one instance of the Supreme Court in Revision, the initiation of the reopened proceedings before the Basic Court and the decision of the Court of Appeals on 20 April 2016.

74. The Court observes that over a period of nine (9) years the regular courts conducted proceedings in different and separate instances. Even though, on that basis, in and of itself, the Court considers that the KTA/PAK and the regular courts have failed to proceed the Applicant's case with attention to the main questions, diligence in dealing with these questions and effectiveness in reaching the proceedings' objective.

75. The Court recalls that Section 1 [Legal Status] of the Regulation NO. 2002/12 determined that the KTA *"is established as an independent body pursuant to section 11.2 of the Constitutional Framework"*. Also Article 5 [Establishment and Legal Status] of the Law No. 03/L-067 determines that the PAK *"is established as an independent public body that shall carry out its functions and responsibilities with full autonomy. (...) The Agency is established as the successor of the Kosovo Trust Agency regulated by UNMIK Regulation 2002/12"*.

76. In fact, the Court observes that initially the KTA and subsequently the PAK, in 2005 and on 2 June 2014 requested the termination and/or suspension of the contested proceedings on the basis of the fact that the FMC was in liquidation.

77. Moreover, the Court notes that KTA has not appealed the Judgment C. no. 133/03 of the Municipal Court of 27 October 2004. However, it has promoted to the State Prosecutor to file a request for protection of legality. One ground for the request was that *"the Special Chamber shall have exclusive jurisdiction for all suits against the Agency"* (Article 30 of the Regulation no. 12/2002 on the Establishment of the Kosovo Trust Agency). The request for protection of legality was rejected as ungrounded by the Supreme Court on 22 March 2005.

78. The Court also notes that, on 30 April 2010, the PAK filed with the first instance of the District Court a request for repetition of proceedings regarding case C. no. 133/03 decided by the Municipal Court on 27 October 2004. The request for the repetition was based on the existence of a liquidation procedure of FMC, which allegedly started on 13 October 2007. On 20 April 2011, the first instance of the District Court (Decision AC. no. 141/2011) annulled the original Judgment C no. 133/03, of 27 October 2004 of the Municipal Court and allowed the repetition of the procedure.

79. The Court further notes that, on 10 January 2011, the PAK filed with the Special Chamber a request for the reopening of proceedings on the Applicant's claim (C no. 133/03, of 27 October 2004), arguing that the Municipal Court should have declined jurisdiction to decide the claim as the matter was under the exclusive jurisdiction of the Special Chamber as it was filed against FMC, a SOE. On 4 December 2013, the Specialized Panel found that the Judgment C.no.133/03 of the Municipal Court dated 27.10.2004 had become final and binding (*res judicata).* Moreover, the Specialized Panel found that the absence of procedural intervention of the Agency (KTA) in the case C.no.133/03 is not an impeachment to the finality of the judgment and a final judgment in a case in which only the SOE or the Agency has been party is a binding judgment for both, the SOE and the Agency.

80. However, the Court brings together the chronology of procedural initiatives conducted by PAK as it follows.

81. On 30 April 2010, the PAK filed with the first instance of the District Court a request for repetition. On 22 November 2010, the District Court rejected as outdated the request for repetition. The PAK filed an appeal. On 21 March 2011, the second instance of the District Court quashed the first instance decision of the District Court and remanded the case for retrial. On 20 April 2011, the first instance of the District Court annulled the original Judgment of the Municipal Court and allowed the repetition of the procedure. The Applicant filed a revision. On 3 April 2014, the Supreme Court rejected the revision.

82. On 10 January 2011, the PAK filed with the Appellate Panel of the Special Chamber a request for retrial the Municipal Court case. On 4 December 2013, the Specialized Panel of the Special Chamber rejected the PAK request.

83. Before these two sets of facts, the Court observes that PAK filed its request with the District Court on 30 April 2010; similar request was filed with the Special Chamber on 10 January 2011. PAK got a decision on its request filed with the District Court on 3 April 2014; a decision on its request filed with the Special Chamber was delivered on 4 December 2013.

84. The Court concludes that, at least between 10 January 2011 and 4 December 2013, PAK was acting simultaneously with the District Court and Supreme Court, on one side, and with the Special Chamber, on the other side.

85. The Court considers that the conduct of PAK did not contribute to the clarity, transparency, and efficiency and effectiveness of the case.

86. Moreover, the Court observes that, by April 2014, the Basic Court started to review the newly reopened case. However, on 2 June 2014, the PAK requested the suspension of the procedure. On 8 February 2016, the Basic Court suspended the case pending the conclusion of a liquidation procedure of the FMC. As said above, the Basic Court based its decision on Article 10, paragraph 1, of the Annex of Law no. 04/L-034 on the Privatization Agency of Kosovo and that decision was confirmed on 20 April 2016 by the Court of Appeals.

87. The Court considers that KTA/PAK insistently adopted some inconsistent, ambivalent and erratic procedural conduct while, on one side, requesting for repetition of the procedure before the Special Chamber of the Supreme Court because a liquidation procedure started and the subject matter was under the exclusive competence of the Special Chamber; and, on the other side, requesting for repetition of the procedure before the regular courts, because the liquidation procedure was ongoing and the subject matter was also (now not exclusive competence of the Special Chamber anymore) under the competence of the regular courts. Just after having obtained the repetition of the proceedings, PAK requested the suspension of the case until the liquidation procedure is over.

88. The Court recalls again that the Applicant claims that with the indefinite suspension of the proceedings, the Court of Appeals prevented him from receiving a final determination on his unpaid salaries' claim.

89. In that respect, the Court observes that the Supreme Court (Rev. 21/2014) acknowledged the fact that *"by Decision Ac. No. 141/2011, of the District Court in Peja, of 20 April 2011, was allowed the repetition of the procedure terminated by final Judgment C. no. 133/2003, of the Municipal Court in Peja, of 27 October 2004"*.

90. The Court also observes that the Court of Appeals (Ac. No. 949/16) acknowledged that, *"by the request of KTA of 6 July 2004 addressed to the President of the Municipal Court in Peja, KTA requested to suspend the legal process since the Special Chamber of the Supreme Court of Kosovo is competent for this case"; (...) "this Judgment* [C. no. 133/2003, of the Municipal Court, of 27 October 2004] *became final on 28 December 2004"; (...) "By Decision SR-11-0001, the Special Chamber of the Supreme Court decided that the suggestion for the withdrawal of case C. no. 133/03, from the*

Municipal Court in Peja for the Special Chamber, was rejected"; (...) "on 27 June 2011, PAK again filed request for the termination of the legal procedure in this case because the enterprise is in liquidation procedure".

91. The Court considers that the regular courts apparently ignored and disregarded in substance the Decision of the Specialized Panel of the Special Chamber of 4 December 2013 and other aspects of the facts and of law which were relevant for their effective decisions.

92. The Court takes into account that the ECtHR has had regard to the principle of the proper administration of justice, namely, that regular courts are under a duty to deal properly with the cases before them. (See, *mutatis mutandis*, ECtHR case *Boddaert v. Belgium*, Numbered 65/1991/317/389, Judgment of 12 October 1992, § 39).

93. The Court recalls that the ECtHR reiterated that *"it is for Contracting States to organize their legal systems in such a way that their courts can guarantee the right of everyone to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time".* (See ECtHR case *Mikulić v. Croatia*, No. 53176/99, Judgment of 4 September 2002, § 45).

94. Moreover, the Court reiterates that the right to a court as guaranteed by Article 6 of the ECHR also protects the implementation of final, binding judicial decisions, which, in States that accept the rule of law, cannot remain inoperative to the detriment of one party. (See, *mutatis mutandis*, ECtHR Case *Hornsby v. Greece*, Application No. 18357/91, Judgment of 19 March 1997, § 40). Accordingly, the execution of a judicial decision cannot be unduly delayed.

95. The Court also recalls that the ECtHR accepted that *"a stay of execution of a judicial decision for such period as is strictly necessary to enable a satisfactory solution to be found (...) may be justified in exceptional circumstances".* (See, *mutatis mutandis,* ECtHR case *Immobiliare v. Italy*, Application No. 22774/93, Judgment of 28 July 1999, § 69).

96. The ECtHR concluded that, *"while it may be accepted that Contracting States may (...) intervene in proceedings for the enforcement of a judicial decision, the consequence of such intervention should not be that execution is prevented, invalidated or unduly delayed or, still less, that the substance of the decision is undermined".* (See *Immobiliare v. Italy*, Ibidem, § 74).

97. In that respect, the Court observes that the KTA/PAK took initiative and the regular courts made their decisions on the repetition and suspension of the proceedings based on the applicable laws regarding a liquidation of FMC as a SOE. However, the regular courts have not taken into consideration legal and factual aspects which were making part of the history of the case, even though the regular courts were aware of them, and which were potentially able to lead the case to an end.

98. Furthermore, the Court notes that, since the date of the Constitution entered into force, the decision on the Applicant's claim for unpaid salaries had already been pending for nine years without a final determination on the Applicant's

request. So the case continues after all that period, but mainly continues *sine die.*

99. In fact, the Court considers that the Applicant has been deprived of its right under Article 6 (1) of the Convention to have its request for payment of unpaid salaries finally decided by a court.

100. The Court further considers that that situation is incompatible with the principle of the rule of law.

101. Consequently, the Court finds that there has been a violation of Article 31 of the Constitution, in conjunction with Article 6 (1) of the ECHR.

(ii) Alleged violation of the right to legal remedies

102. The Court recalls that the Applicant also claimed a violation of his right to legal remedies under Article 32 of the Constitution. However, the Applicant does not explain how and why the challenged decision of the Court of Appeals has violated such right.

103. In that respect, the Court refers to Article 32 [Right to Legal Remedies] of the Constitution, which establishes:

> *Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.*

104. The Court also refers to Article 13 [Right to an effective remedy] of the ECHR, which establishes:

> *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.*

105. The Court considers that the Applicant complains before the Constitutional Court because his right to a final judicial decision within a reasonable time was violated; he is not complaining because he had no legal remedy available to secure his right to a reasonably timed and final decision.

106. In fact, the Court considered his Referral admissible namely because he has exhausted all legal remedies available complying with the principle of subsidiarity. In fact, the Court is aware of that the Kosovo legal system does not foresee legal remedies in order to speed up the proceedings before the public authorities, including the regular courts, and ensure a final decision in due time. Therefore, the Court considers that, in these circumstances, the Constitutional Court itself is the Applicant's only legal remedy to secure his right to a timed and final decision.

107. The Court recalls that the ECtHR considered that *"even though at present there is no prevailing pattern in the legal orders of the Contracting States in respect*

of remedies for excessive length of proceedings, there are examples emerging from the Court's own case-law on the rule on exhaustion of domestic remedies which demonstrate that it is not impossible to create such remedies and operate them effectively (see, for instance, Gonzalez Marin v. Spain (dec.), no. 39521/98, ECHR 1999-VII, and Tomé Mota v. Portugal (dec.), no. 32082/96, ECHR 1999-IX)". (See ECtHR case *Kudla v. Poland*, No. 30210/96, Judgment of 26 October 2000, § 154).

108. In that same case, the ECtHR further considered that, if Article 13 is *"to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by Article 6 § 1, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system"*. (See *Kudla v. Poland*, Ibidem, § 155).

109. The Court considers, as the ECtHR also considered, that *"the correct interpretation of Article 13 is that that provision guarantees an effective remedy before a national authority for an alleged breach of the requirement under Article 6 § 1 to hear a case within a reasonable time"*. (See *Kudla v. Poland*, Ibidem, § 156).

110. Therefore, having in mind the need for the Kosovo legal system to establish legal remedies ensuring timely decisions, the Court, in these circumstances, finds no violation of Article 32 [Right to Legal Remedies] of the Constitution, in conjunction with Article 13 [Right to an effective remedy] of the ECHR.

(iii) Alleged violation of the right to equality before the law and the general principles of the Constitution

111. The Court has just found a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR

112. Therefore, the Court considers that it is not necessary to examine the other Applicant's complaints under Articles 21 [General Principles] and 24 [Equality before the Law] of the Constitution.

Conclusion

113. The Court notes that the Court of Appeals has confirmed the indefinite suspension of the proceedings *sine die*. Thus Court considers that the indefinite suspension of the proceedings is depriving the Applicant of a final decision on his request to be paid the unpaid salaries. Therefore, the Court finds that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the ECHR.

114. The Court also finds that, in the circumstances of the case, there has been no violation of Article 32 [Right to Legal Remedies] of the Constitution.

115. The Court further finds that it is not necessary to examine the Applicant's other complaints under Articles 21 [General Principles] and 24 [Equality before the Law] of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 20 of the Law, and Rule 56 (a) of the Rules of Procedure, in the session held on 31 May 2017,

DECIDES

I. TO DECLARE, by unanimity, the Referral admissible;

II. TO DECLARE, by majority, that there has been a violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the European Convention on Human Rights;

III. TO DECLARE invalid the Decision Ac. no. 949/16 of the Court of Appeals, of 20 April 2016, in accordance with Rule 74 of the Rules of Procedure;

IV. TO REMAND the Decision Ac. no. 949/16 to the Court of Appeals for reconsideration in conformity with this Judgment of the Constitutional Court, in accordance with Rule 74 of the Rules of Procedure;

V. TO REQUEST the Court of Appeals to inform the Constitutional Court, as soon as possible, but not later than within six (6) months, regarding the measures taken to implement the Judgment of this Court, in accordance with Rule 63 of the Rules of Procedure of the Court;

VI. TO NOTIFY this Decision to the Parties;

VII. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

VIII. TO DECLARE this Decision effective immediately;

IX. TO SEND a copy of this Judgment to the Kosovo Judicial Council and to the Government for information.

Judge Rapporteur | **President of the Constitutional Court**

Almiro Rodrigues | Arta Rama-Hajrizi

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