



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

Pristine, 07 February 2012
Ref. No.: RK200/12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 107/11

Hamzi Bylykbashi, and others

**Request for Constitutional review of the Judgment of the District Court in Prizren Ac.
No. 293/2010, of 23 March 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
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. **Applicants of the Referral are:** Hamzi Bylykbashi, Ferat Kuqi, Nasibe Llapatinca, Sadri Abazi, Abaz Demiri, Shaban Basha, Tahir Gashi, Asbije Gashi, Sali Bytyqi, Hajrije Sallani, Gani Musliu, Xhemali Jahaj, Halil Durmishi, Igballe Koigeci, Hamdi Palushi, Baftijar Hoxha, Shaban Tahiri, Mahmut Kadolli, Hysen Muqaj, Haki Baraliu, Hazir Bytyqi, Sinan Hajdari, Ramadan Sallahu, Ibrahim Berisha, Sahit Basha, Ismet Vranovci, Shefka Avdija, Sali Morina, Mexhit Baraliu, Xhemajl Kuqi, Mahmut Alijaj, Zenel Krasniqi, and Aziz Bukoshi, all former employees of Municipal Assembly, represented with authorization by Ethem Rogova, lawyer from Prizren.

Challenged decision

2. The challenged decision of the public authority alleging the violations guaranteed by the Constitution of Kosovo is the Judgment of the District Court in Prizren, **Ac. No. 293/2010 of 23 March 2011**, which the representative of the Applicants, according to the signed copy of the receipt of the Municipal Court in Suhareke, has received on **1 April 2011**.

Subject matter

3. Basic issue of the registered case with the Constitutional Court of the Republic of Kosovo, on 8 August 2011, is the constitutional review of Judgment of the District Court in Prizren Ac. No. 293/2010 of 23 March 2011, by which this Court has rejected the proposal of the representative of the applicants, addressed to this court for repeating of the completed procedure by the Judgment of Municipal Court in Suhareka C. no. 423/2004 dated 23 November 2004, and amended by the Judgment of the Supreme Court rev. no. 31/2007, dated 14 June 2007.

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 dated 16 December 2009, which entered into force on 15 January 2010 (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedures).

Proceedings before the Court

5. On 15 July 2011, the Constitutional Court received by mail a letter, to which were attached the challenged decisions of public authorities, by which it was requested Constitutional Court to review the constitutionality of the Judgment of the District Court in Prizren Ac. No. 293/2010 dated 23 March 2011.
6. On 22 July 2011, Constitutional Court sent a notification to the representative of the applicants, lawyer Mr. Ethem Rogova, requesting that within the given deadline set in the notification, to supplement the referral by filling in also the official application form for submission of the referrals with the Constitutional Court.
7. On 28 July 2011, within the given deadline by the Court, Mr. Rogova submitted the response to the Constitutional Court regarding the request, and requested additional clarification of where to get the official application form.
8. On 4 August 2011, the Constitutional Court received by mail the repeated request from lawyer Ethem Rogova, this time with completed official application form and all copies of decisions of public authorities related to the case.

9. On 8 August 2011, the Applicant's referral was registered in the respective department of the Constitutional Court under KI 107/11.
10. On 8 August 2011, the same day, the Constitutional Court sent the notice on the registration of the referral to the parties involved in the subject and at the same time requested from the representative of the applicants to supplement the referral with the written authorization for representation and with the ID copies of the represented persons.
11. On 22 August 2011, the Constitutional Court received by lawyer Rogova the additional required documentation.
12. On 23 August 2011, President of the Court, by Decision GJR KI 107/11, appointed Judge Robert Carolan to draft the preliminary report regarding the referral.
13. On the same day, President of the Court, by decision KSH-KI 107/11, appointed Review Panel composed of: Ivan Cukalovic (presiding), and judges Mr.sc. Kadri Kryeziu and Prof. Dr. Enver Hasani, as members of the Panel.
14. On 17 November 2011, the Constitutional Court received by fax from Municipal Court in Suhareke the copy of the service note of Judgment of the District Court in Prizren Ac no. 293/2010 of 23 March 2011, confirming that Mr. Hamzi Bylykbashi, the first one in the list of complainers and the one who has the authorization to represent his colleagues, has received this decision on 1 April 2011.

Summary of facts

15. In 2001 (no date specified), the Chief Executive of the Suhareke Municipality has released a circular addressed to all municipal employees in civil service (local administration), in form of voluntary retirement offer for all those who meet conditions specified in circular, which are at least 45 years of age, and at least 15 years of service (experience). Voluntary retirement should be compensated in kind (material means), amounting to a monthly salary, for each year of service and will not exceed the total of 8000 Dm.
16. The circular specified that this offer is intended to provide a material support package for those whose employment will be terminated in the municipality, because according to the recommendation of the Commission for public administration reform, and according to the decision of the Municipal Assembly of Suhareke, "the number of the employees in the municipal administration should be reduced". While the application for offered pension is voluntary.
17. Following the deadline set on the circular, to this offer of the Chief Executive responded a large number of employees that met the required conditions, while the

municipality officially selected “for voluntary retirement” 33 of the most recent applicants, who filed the referral with the Constitutional Court.

18. According to the documents in the case file, all employees who have been granted the right to voluntary retirement, have **received resolutions in writing for termination of their employment contract upon agreement**, wherein are specified the date of termination of employment and the material compensation they are entitled. All employees had received these resolutions and had signed it, while as evidence along with the referral at the Constitutional Court is filed also the resolution (in copy) 02 no. 334 dated 30 July 2001 for the employee Mr. Sadri Abazi, who was given also the legal advice that an aggrieved party has the right to appeal within 15 days of its receipt.
19. On 22 December 2003, the Municipal Court in Suhareke, acting on the appeal of 33 former employees of the municipal administration of the municipality of Suhareke, has issued Judgment C. no. 159/03 by which it rejected the lawsuit of the plaintiffs in their entirety **as unfounded**, and the reasoning of the judgment that its groundlessness relies on the fact that all employees have signed resolutions for termination of employment upon agreement, that they have received compensation upon resolutions and that, even though they had available legal remedy of appeal they have not used it, so these decisions are final.
20. Against this judgment, within the legal time limit, the representative of the plaintiffs has filed a complaint in District Court in Prizren.
21. On 23 June 2004, the District Court in Prizren issued the Judgment Ac. 42/2004 by which it **approved** the appeal of the plaintiffs representatives (Hamzi Bylykbashi and 32 others), annulled Judgment C. no. 159/03 of 22 December 2003 and the case was returned for appeal to the Municipal Court in Suhareke. In the reasoning of its decision the District Court stated that the court of first instance had based its own decision on determination of erroneous and incomplete factual situation and in the erroneous application of substantive law, and therefore necessarily the court’s decision had to be annulled by the court of second instance.
22. On 23 November 2004, Municipal Court in Suhareke, taking into account the decision of the District Court in the repeated procedure, issued Judgment C. no. 423/04 and approved the lawsuit of the plaintiffs, and also canceled all resolutions for termination of employment upon agreement, by obliging the respondent Municipality of Suhareke, within 15 days to return the plaintiffs to their job positions according to the qualifications they possess.
23. Against this Judgment the Municipality of Suhareke filed a complaint with the District Court in Prizren.
24. On 10 November 2006, the District Court in Prizren, issued Judgment Ac. no. 30/2005, by which it rejected as ungrounded the appeal of the respondent – Municipality of Prizren and **confirmed** the Judgment C. no. 423/2004 of 23 November 2004, of the Municipal Court in Suhareke, concluding that the Judgment of first instance fully and completely confirmed the factual situation and fairly applied the substantial provisions.

25. Against this Judgment, the Municipality of Suhareke filed a request for revision with the Supreme Court of Kosovo.
26. On 14 June 2007, the Supreme Court of Kosovo issued Judgment rev. no. 31/2007, by which it ACCEPTED the revision of the respondent- Municipality of Suhareke, and **changed** the Judgment of the District Court in Prizren Ac. No. 30/2005 of 10 November 2006, and the Judgment of the Municipal Court in Suhareke C. no. 423/2004 of 23 November 2004, so that the claim of the plaintiffs in this legal matter was REJECTED as **out of time (untimely)**.
27. In reasoning of this Judgment, the Supreme Court noted that the courts of lower instances “On factual situation rightly and fully have found, erroneously have applied the substantive law when finding that the plaintiff’s lawsuit is based, for which reason both judgments of the lower instance were amended so that the plaintiff’s claim be rejected as out of time. “
28. The Supreme Court further in the reasoning of the Judgment Rev. no. 31/2007, stipulated that its judgment was based on the fact that the applicable law at the time the dispute occurred (Law on State Administration of Kosovo, Official Gazette 30/80) with Article 213 provided that the deadline for appeal to the authority of second instance was 15 days from the date of decision, and that after the decision from the second instance , a party still dissatisfied within 30 days had the right to address with the competent court and the Supreme Court also cited the fundamental Law on Labor Relations, as applicable Law in Kosovo which in Article 83 par. 2 provided that “ Judicial protection before the court cannot be required if the employee had not previously sought protection before the competent authority of the employer”, thus taking into account the fact that employees of Suhareka Municipality had not used this right, and their claim was out of time.
29. Supreme Court also noted that “subject matter in this dispute is the legality of the resolutions of the respondent by which plaintiffs have been terminated their labor relation, against which the plaintiffs have not sought legal protection under the abovementioned legal provisions, so the low instance courts have erroneously applied the substantive law when they approved the claim stating that the plaintiff has acted contrary to legal provisions regulating retirement issues, and in fact the respondent’s resolutions have nothing to do with the retirement of the plaintiffs but with the termination of their labor relationship under the agreement” (see Judgment of Supreme Court Rev. no. 31/2007, dated 14 June 2007. P.3)
30. Unsatisfied with this Judgment, the applicants through their authorized representative Ethem Rogova, have filed **request for repeating of the procedure** in the District Court in Prizren.
31. On 21 March 2011, the District Court in Prizren issued Judgment Ac. no. 293/2010, by which rejected the request for repeating of the completed procedure with the Judgment of the Municipal Court in Suhareke C. no. 423/2004, of 23 November 2004 as amended

by the Judgment of the Supreme Court Rev. no. 31/2007 of 14 June 2007, stating that there were no facts that would justify repeating the procedure.

Alleged violations of the constitutionally guaranteed rights

32. The applicants are alleging that by the Judgment of the District Court in Prizren, that their rights guaranteed by the Constitution of the Republic of Kosovo, under the: Article 49 (Right to Work and Exercise profession), Article 41 of the European Convention on Human Rights (Just satisfaction) have been violated.

Assessment of the admissibility

33. In order to be able to adjudicate the Applicant's referral, the Court first needs to examine whether the Applicant has fulfilled all the admissibility requirements laid down in the Constitution, the Law on the Constitutional Court and the Rules of Procedure of the Court.

34. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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"

The Court also considers:

Article 49 of the Law on Constitutional Court providing that:

"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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force".

and

Rule 36 of the Rules of Procedure of the Constitutional Court which provides:

"(1) The Court may only deal with referrals if:

- c) The referral is not manifestly ill-founded.

35. Referring to the alleged violation of the rights guaranteed by the Constitution of the Republic of Kosovo and the Conventions and other international instruments by the applicant, the Constitutional Court concludes:
36. The authorized representative by the applicants, has sent by mail to the Constitutional Court on 15 July 2011 a written request to which were attached all the judgments and necessary decisions, and following the request of the Court, and the deadline given by the Court, had completed the case file with standard application form. The court therefore considers that the date of first communication with the Court 15 July 2011

makes the referral timely under the law and the rules of procedure, even though it was not registered with the Court until 8 August 2011.

37. In this regard, the Constitutional Court refers to the ECHR case law in the case of Kamevuako against Holland (application no. 65938/09 of 1 June 2010) wherein it was noted that “as a general rule should be considered the date of submission of an application before the date of communication with the court by the applicant, even if the subject matter is briefly explained, provided that a completely filled application form is filed within the time limit specified by the Court.
38. **The Court always considers that** the four month rule is to promote legal certainty of the law, to ensure that the cases raising for constitutional issues will be dealt within a reasonable time and to protect the authorities and other persons concerned from being in a situation of uncertainty for a prolonged period of time (see *mutatis mutandis* PM against United Kingdom Application no. 6638 /03 of 19 July 2005).
39. The Applicants claimed violation of their rights guaranteed by the Constitution according to the Article 49 of the Constitution, the Right to Work and Exercise Profession.
40. Regarding this allegation, the Constitutional Court emphasizes that the right to work and exercise profession, is a right specified by the Constitution of the Republic of Kosovo (Article 49), and that first of all it means that each individual has the right to work and exercise a profession in complete freedom and under the same conditions as all other citizens. At the same time, the right to work can be regulated by the pertinent rules of the relevant working areas.
41. **Constitutional Court is not a court for verifying the facts and wants to emphasize that finding of fair and complete factual situation is full jurisdiction of regular courts, as in this concrete case by the Supreme Court by approving the revision of the respondent or the revision of the District Court by rejecting the request for retrial by the plaintiff, and that the role of the Constitutional Court is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, and therefore cannot act as a “forth instance court” (see, mutatis mutandis, shall, Akdivar v. Turkey, 16 September 1996, RJD, 1996-IV, before . 65) with respect to verifying the facts or applying the applicable law.**
42. The simple fact that the applicants are unsatisfied with the result of the case cannot serve them the right to file a substantiated referral on the violation of Article 31 of the Constitution (see *mutatis mutandis* ECHR Judgment Application no. 5503/02, Mezotur-Tiszazugi Tarsulat against Hungary, Judgment of 26 July 2005, or Tengerakis against Cyprus no. 35698/03, decision of 9 November 2006, § 74).
43. In this case, the Applicants failed in a timely manner to exhaust all of their legal remedies as described in Paragraph 28 of this Resolution. For this Court to now act on

their referral, this Court would have to ignore the fact that the Applicants failed to act in a timely manner to exhaust all of their legal remedies. This Court does not have that authority. This Court cannot act as a fourth instance court substituting its judgment of the facts and/or the applicable law for that of the regular courts.

44. To declare a judgment or resolution of a public authority as unconstitutional, the applicant should prima facie indicate that “the decision of public authority as such, would be an indicator of a violation of the request for a fair trial if its unreasoning is so obvious that the decision can be considered as extremely arbitrary decision (see ECHR. *Khamidov against Rusia*, no. 72118/01, Judgment of 15 November 2007, § 175).
45. Constitutional Court in the District Court’s Judgment Ac. No. 293/2010 of 21 March 2011, did not found elements of arbitrariness, or alleged violations of human rights, as the applicants had claimed.
46. In these circumstances the applicants “does not sufficiently substantiate their claim” and cannot be concluded that the referral was grounded, therefore the Court in compliance with Rule 36 paragraph 2 item c and d, holds that the claim is rejected as manifestly unfounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution of the Republic of Kosovo, Article 47 of the Law on Constitutional Court and the Rule 36 of the Rules of Procedure, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible.
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.
- III. This Decision is effective immediately.

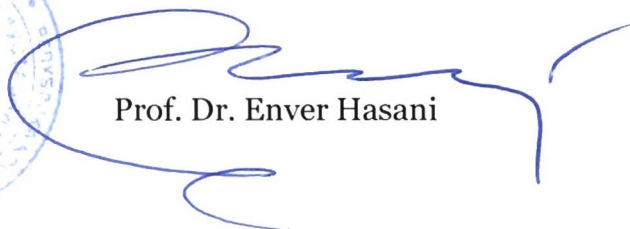
Judge Rapporteur



Robert Carolan



President of the Constitutional



Prof. Dr. Enver Hasani