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

Pristine, 05 December 2011
Ref. No.: AGJ. 163/11

JUDGMENT

in

Case No. KI108/10

Applicant

Fadil Selmanaj

Constitutional Review of Judgment of
The Supreme Court of Kosovo A.no.170/2009 of 25 September 2009

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.

The Applicant

1. The Applicant is Mr. Fadil Selmanaj, residing in Mitrovica.

Challenged Decision

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo A.no.170/2009 of 25 September 2009, which was made known to him on 18 October 2010.

3. The Applicant requests an assessment of the constitutionality of the Judgment of the Supreme Court, because of an alleged *"lack of official communication between Supreme Court and the respondent"*, which, according to the Applicant, *"provides room for suspicions that we are dealing here with manipulations and that as a consequences of this, [he] as an interested party, [has been] materially and morally damaged"*.

4. The Applicant also requests the Constitutional Court (hereinafter, the Court) to *"through its decision to repel or annul the Supreme Court Judgment A.nr.170/2009, dated 25 September 2009, due to shortcomings related to lack of evidence from the respondent party, whose obligation was to present proofs and facts in ...[the Applicant's] legal interest."*

5. The Applicant wants to achieve the fulfillment of his rights related to his labour contract.

Legal Basis

6. The Referral is based on Art. 113 (7) of the Constitution of the Republic of Kosovo (hereinafter, the Constitution); Article 20 of Law No. 03/L-121 on the Court of the Republic of Kosovo (hereinafter, the Law), and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules).

Proceedings before the Court

7. On 28 October 2010, the Applicant filed a Referral with the Secretariat of the Court.

8. On 7 December 2010, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Robert Carolan (Presiding), Enver Hasani and Gjyljeta Mushkolaj.

9. On 11 January 2011, the Constitutional Court informed the Supreme Court of Kosovo that the Applicant submitted his referral, requesting the Court to assess the constitutionality of the Supreme Court Judgment A. No. 170/2009, dated 25 September 2009.

10. On 24 February 2011, the Constitutional Court requested additional information from the Applicant confirming whether he has ever been notified of the petition submitted by the Municipality of Mitrovica in which the Municipality requested the annulment of the Decision of the Independent Oversight Board.

11. On 2 March 2011, the Applicant informed the Court that he had never received the petition submitted by the Municipality of Mitrovica, nor had he ever been informed about the case pending before the Supreme Court.

12. On 5 April 2011, the Constitutional Court informed the Supreme Court about the Applicant's allegations specified above and asked it to confirm whether the Applicant has ever been informed about the petition submitted by the Municipality of Mitrovica

and whether he has ever been informed about the case pending before the Supreme Court.

13. On 12 April 2011, the Supreme Court informed the Constitutional Court that the Applicant's case file was delivered to the Municipal Assembly of Mitrovica on 17 October 2010.

14. On 25 May 2011, the Constitutional Court informed the Municipal Assembly of Mitrovica about the Applicant's allegations and asked the Municipal Assembly to deliver the file case to the Court.

15. On 10 June 2011, the Public Municipal Attorney of the Municipality of Mitrovica sent to the Court a copy of the petition dated 24 February 2009 and a copy of the judgment of the Supreme Court.

16. On 7 July 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

17. On 6 October 2011, the Court deliberated and adopted this judgment.

The facts of the case

18. In 2001, the Applicant was employed in the post of Director of the Directorate for Geodesy, Cadaster and Property within the Municipal Assembly of Mitrovica. His employment contract was valid until 9 March 2008.

19. On 11 January 2008, the Mayor of Mitrovica issued Decision No. 01/49, appointing the Directors of the Municipal Directorates in the Municipality of Mitrovica. However, the Applicant was not reappointed.

20. On 10 March 2008 and on 30 April 2008, the Applicant filed a complaint to the Directorate of Administration and Personnel against the Decision No.01/49, but he did not receive any response to his complaint.

21. On 2 October 2008, the Applicant filed an appeal to the Independent Oversight Board of Kosovo (hereinafter, IOBK), challenging Decision No.01/49 and proposing that his appeal be upheld as grounded. In particular, the Applicant requested that he be provided a workplace that complies with his professional experience and qualifications and his employment contract be thus respected.

22. On 10 February 2009, the IOBK adopted Decision no.02 (285)2008, finding that the Applicant's appeal was grounded. Then, it compelled the employment authority that *"within the deadline of 15 days from the date of the present decision, to facilitate the fulfillment of appellant's rights deriving from the labour relation in compliance with provisions of Article 11 para 11.1 of the Administrative Directive no 2003/2 on the implementation of regulation no 2001/36 of the Kosovo Civil Service, is reassigned to another post of the same level and degree of payment in harmony with his professional skills and training, if it is not possible to return him to the workplace and job description provided by the employment contract"*.

23. That Decision, no.02 (285)2008, also provided that the Director of the Directorate of Administration and Personnel was responsible to implement that decision and that the IOBK should inform the Assembly of Kosovo about non-compliance.

24. Moreover, it was stated in the "legal advice" section of the IOBK decision that this decision is *"final in the administrative procedure and no appeal is allowed against the present decision. However the present decision can be subject of court review in compliance with the laws in force"*.

25. On 24 February 2009, the Municipality of Mitrovica challenged the decision of the IOBK before the Supreme Court, alleging mainly that *"directors of the municipal directorates are not civil servants and enjoy the status of political appointees..."*.

26. Meanwhile, on 5 March 2009, the Applicant informed the IOBK that Decision no.02 (285)2008 was not enforced and therefore he requested IOBK to take the necessary measures prescribed by law in order to enforce the above mentioned decision.

27. On 25 September 2009 the Supreme Court of Kosovo issued Judgment A. no 170/2009 and upheld the suit of the Municipality of Mitrovica. Consequently, the decision of the IOBK, A no.02 (285)2008, was annulled.

28. That judgment reads that, on 20 March 2009, the Supreme Court requested the IOBK to submit the case file and its response to the suit. This request was reiterated on 9 June 2009, warning IOBK that, if the case file was not submitted within the provided deadline, the Supreme Court would decide the complaint without the case file. The Judgment further reads that the IOBK did not provide any response to the Supreme Court's second request, it did not submit the case file and thus it did not provide any response to the suit. The Supreme Court Judgment A. no 170/2009 of 25 September 2009 does not contain any reference to the Applicant having been at any stage involved in this administrative dispute as an interested party. Moreover, the Supreme Court had not notified the Applicant or served him with a copy of the challenged judgment.

29. The Applicant stated that, during an occasional visit to the Municipality premises, he "heard" that the judgment had been issued by the Supreme Court. Then, the Applicant requested the Supreme Court to give him a copy of judgment A. no 170/2009.

30. On 8 October 2010, the Supreme Court confirmed having "received your [of the Applicant] letter on 04.10.2010, whereby you requested to be delivered a copy of the judgment A. nr. 170/2009". The Supreme Court further informed the Applicant that it "does not do the expedition [delivery] of decisions, so you can have recourse to the Independent Oversight Board of Kosova (first instance body) for the realization of your rights".

31. Consequently, on 18 October 2010, the Applicant approached IOBK and, upon his request, he was given a copy of the judgment of the Supreme Court.

32. There is no evidence to show that the Applicant received a copy of the Municipality's petition to the Supreme Court or any notification that the case was pending or was finalized at the Supreme Court.

Arguments of the Applicant

33. The Applicant argues that he is an interested party in the proceedings which started and reached a final decision in the Supreme Court.

34. He alleges that he has never been notified of the existence of any stage of such proceedings and learnt about the final decision only by chance.

35. The Applicant appears to conclude that his right to fair trial, guaranteed by Article 31 of the Constitution, has been violated by the actions and omissions of the administrative and judicial bodies.

Reply and comments

36. The Court has not received replies and/or comments from the Supreme Court or from Mitrovica Municipality relating to the Applicant's allegations.

Relevant legal background

37. On 25 September 2009, the date of the Judgment of the Supreme Court, the Constitution of the Republic of Kosovo was already in force.

38. Article 16 of the 1977 Law on Administrative Dispute establishes that *"the third person to whom the nullification of the challenged act would be in direct damage (interested party) has in the dispute the position of the party"*.

39. Furthermore, Article 27 of that Law on Administrative Dispute obliges a petitioner to submit an additional copy together with accompanying documents of the petition to any interested party as well.

40. Finally, Article 33 of the same Law on Administrative Dispute prescribes the obligation of the Court to deliver a copy of the petition to any interested party.

Admissibility of the Referral

41. The admissibility requirements are laid down in the Constitution and further specified in the Law and the Rules of Procedure.

42. 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".

43. The Court has to consider whether the Applicant has exhausted all remedies provided by law. For that purpose, the Court takes into account that the IOBK Decision no.02 (285)2008 stated that "the decision is final in the administrative procedure and no appeal is allowed against the present decision. However the present decision can be a subject of court review in compliance with the laws in force" (legal advice of that decision).

44. The Court notes that the Applicant has never received a copy of the judgement from the Supreme Court. Moreover, the Supreme Court by its letter dated 8 October 2010 effectively did not provide the Applicant with a copy of the judgement and referred him to approach IOBK and then ask for a copy of the judgement. Thus, it seems that the Applicant did not have prescribed remedies at his disposal.

45. The Court also notes that the 1977 Law on Administrative Disputes does not generally provide for an Appeal.

46. However, Article 52(6) of the 1977 Law on Administrative Disputes provides that the procedure concluded by a Judgement or a Decision may be re-opened *"if the interested party did not have an opportunity to participate in the procedure"*. Article 53 of the

same Law further provides that the request for re-opening of the procedure *"can be initiated within the time limit of 30 days from the date when the party learnt the reason for the re-opening"*.

47. The Court refers to its case AAB-RIINVEST University L.L.C., Prishtina, vs. Government of the Republic of Kosovo, KI. 41 /09, of 27 January 2010, where it was stated as follows.

"(...) applicants are only required to exhaust remedies that are available and effective. Discretionary or extraordinary remedies need not to be exhausted, for example requesting a court to revise its decision (see, mutatis mutandis, ECHR, Cinar v. Turkey, no 28602/95, decision of 13 November 2003)".

48. The European Court of Human Rights (ECtHR) considers that *"when a domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence' (...),that person should, once he becomes aware of the proceedings, be able to obtain, from the court which has heard him, a fresh determination of the merits of the charge"*. (See Colozza v. Italy, 12 February 1985, para 27, Series A no. 89, para 29.)

49. If there is a procedure allowing such a fresh determination, a litigant should in principle try to use it: leave to appeal out of time against a judgment given in absentia may be a remedy that needs to be exhausted, but, in the particular circumstances of the case, it would not be effective. (See Sejdovic v. Italy [GC]. No. 56581/00 paras 43 and 47-55, ECHR 2006-II.)

50. The Court notes that there is no evidence that the Applicant has been either informed of the possibility of reopening the procedure before the Supreme Court or that the Applicant would have the opportunity of appearing at a new procedure to present his arguments.

51. Thus, the Court considers that the abovementioned jurisprudence of ECtHR applies *mutatis mutandis* to the case in the sense that the Applicant is not required to exhaust extraordinary legal remedies that appear not to be effective.

52. Therefore, taking into account the circumstances of the case, the case law of this Court as well as the ECtHR, the Constitutional Court concludes that the Applicant's referral is admissible.

Substantive legal aspects of the Referral

53. As stated earlier, the Applicant's claims that the Judgment of the Supreme Court violated his right to fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (the Convention).

54. Article 31 [Right to Fair and Impartial Trial] of the Constitution prescribes as follows:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

55. Furthermore, Article 53 [Interpretation of Human Rights Provisions] of the Constitution prescribes that:
"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

56. In addition, Article 6 (1) of the European Convention on Human Rights reads:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]"

57. On one hand, the Applicant alleges more precisely that he is an interested party to the proceedings and that his right to a fair trial has been violated due to the actions and omissions of the administrative and judicial bodies.

58. The ECtHR considers that, although the right to take part in a hearing is not expressly mentioned in Article 6 (1), *"the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing".* (See Colozza v. Italy, 12 February 1985, p 27, Series A no. 89.) *"Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in his criminal trial. This includes, inter alia, a right not only to be present, but also to hear and follow the proceedings. This right is implicit in the very notion of an adversarial procedure".* (See Ziliberg v. Moldova, no. 61821/00. p.40, 1 February 2005.)

59. Moreover, Article 6 (1) applies to both civil and criminal proceedings. Even though Article 6 (2) and (3) state that they apply to criminal proceedings, the ECtHR considers that Article 6, *"read as a whole"*, may apply also to civil proceedings.

60. The Constitutional Court is bound, under Article 53 of the Constitution, to interpret human rights and fundamental freedoms guaranteed by the Constitution *"consistent with the court decisions of the European Court of Human Rights".*

61. The Court notes again that, in the Applicant's case, proceedings started and reached a final decision in the Supreme Court, without the Applicant having been present in such proceedings and without him being notified of the Decision taken.

62. Therefore, the Constitutional Court finds that Article 6 (1) of the Convention and Article 31 of the Constitution are applicable to the Applicant's case.

63. Furthermore, the Applicant alleges that his absence during the course of the proceedings and the lack of notification to him of the final decision violates his right to a fair trial.

64. The fundamental right to a fair trial is derived from the fundamental right to judicial protection, guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution. In fact, the right to a fair trial is a general reference to a complex of other rights, including, the right to access to a court.

65. The Court reiterates that the procedural guarantees laid down in Article 6 of the European Convention on Human Rights secure to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way, it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. (See *Golder*

v. the United Kingdom, judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36.) The right of access to a court includes not only the right to institute proceedings but also the right to obtain a "determination" of the dispute by a court.

66. In that respect, the ECtHR considered that *"a litigant should be summoned to a court hearing in such a way as not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare his case and to attend the court hearing.* (See Gusak v. Russia, 7 June 2011, *Application no. 28956/05,* para 27.)

67. The ECtHR further considered that *"a litigant's right of access to a court would be illusory if he or she were to be kept in the dark about the developments in the proceedings and the court's decisions on the claim, especially when such decisions are of the nature to bar further examination.* (See Sukhorubchenko v Russia, Judgment of 10 February 2005, para 53.)

68. In the case at issue, the IOBK adopted Decision no.02 (285)2008, finding that the Applicant's appeal is grounded and it compelled the municipality of Mitrovica, *"within the deadline of 15 days from the date of the present decision, to facilitate the fulfillment of appellant's rights deriving from the labour relation (...)".*

69. Meanwhile, the municipality of Mitrovica challenged the decision of IOBK before the Supreme Court. The Supreme Court of Kosovo delivered Judgment A. no 170/2009, upholding the suit of the municipality of Mitrovica and, **c**onsequently, annulled the decision of the IOBK A 02(285). The Applicant claims that he was completely put aside during all these proceedings.

70. In fact, the Municipality of Mitrovica filed a petition with the Supreme Court in the file case where the Applicant was already a party. Thus, the Applicant was a stranger to that petition, in spite of the fact that the petition impacted substantially on the determination of his civil rights. That conclusion is corroborated by Article 16 of the Law on administrative disputes which prescribes that the "*the third person to whom the nullification of the challenged act would be in direct damage (interested party) has in the dispute the position of the party".*

71. Also, it must be stated that the IOBK, as "a*n independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service" (*Article 101 (2) of the Constitution).

72. Furthermore, *"the judicial power (...) ensures equal access to the courts"* and *"the Supreme Court of Kosovo is the highest judicial authority"* (Articles 102 and 103 of the Constitution)

73. The case file requested by the Supreme Court was exactly the same case where the Applicant filed an appeal to the IOBK, against the Decision No.01/49 of the municipality of Mitrovica. Therefore, the Applicant and the municipality of Mitrovica were the very parties to the case and the IOBK acted as a "first instance body", as mentioned by the Supreme Court in its letter of 8 October 2010.

74. The Court considers that the foregoing ECtHR jurisprudence also applies *mutatis mutandis* to the present case, particularly, in that that the Applicant should have been summoned to the court proceedings in such a way as not only to have knowledge of its existence but also to present arguments and evidence during the course of proceedings.

75. Therefore, it must be concluded that there was a violation of Article 31 of the Constitution, in conjunction with Article 6 (1) of the European Convention on Human Rights.

FOR THESE REASONS, THE COURT UNANIMOUSLY

I. Declares the Referral admissible;

II. Holds that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 [Right to a Fair Trial] of the European Convention of Human Rights;

III. Declares invalid the Judgment of the Supreme Court of Kosovo A.no.170/2009 of 25 September 2009;

IV. Remands the Judgment to the Supreme Court for reconsideration in conformity with the judgment of this Court;

V. Remains seized of the matter pending compliance with that order;

VI. Orders this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VII. Declares that this Judgement is effective immediately.

Almiro Rodrigues — Judge Rapporteur

Prof. Dr. Enver Hasani — President of the Constitutional Court