



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

Pristine, 04. December. 2012
Ref. No.: RK326/12

RESOLUTION ON INADMISSIBILITY

In

Case No. KI 120/11

Applicant

Ministry of Health

**Constitutional Review of the Decision of the Supreme Court A.No.551, dated
20 June 2011**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Applicant is the Ministry of Health, represented by its General Secretary.

Challenged Decision

2. The Applicant challenges Decision of the Supreme Court A.No.551, dated 20 June 2011.

Subject Matter

3. The Applicant alleges that that Judgment, rejecting its lawsuit against the decision of the Independent Oversight Board (A, 02/63/2011, of 17 May 2011), violated the rights of the Ministry of Health guaranteed by the Constitution of the Republic of Kosovo (hereinafter, the Constitution), namely Article 113.8, and Article 6.1 of the European Convention on Human Rights (hereinafter, the ECHR).

Legal Basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, in conjunction with Article 22 of the Law No. 03/L-121 on Constitutional Court (hereinafter, the Law) and Rules 54, 55 and 56 (2) of Rules of Procedure of the Constitutional Court (hereinafter, the Rules).

Proceedings before the Court

5. On 5 August 2011, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
6. On 5 August 2011, the Constitutional Court informed the Ministry of Health, Supreme Court and Independent Oversight Board on the Referral.
7. On 1 September 2011, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (presiding), Altay Surroy and Ivan Čukalović..
8. On 9 July 2012, the Review Panel considered the report of the Judge Rapporteur and deliberated on the matter and made a recommendation to the Court.

Summary of the Facts

9. On 1 December 2010, the General Secretary of the Ministry of Health decided (decision ZSP 115-XII-2010) to terminate the employment relationship with its employee Alban Pozhegu. The decision reasons that the position of Mr. Pozhegu will be cut and thus his contract of employment would not be renewed. Alban Pozhegu complained to the Committee for Disputes and Complaints within the Ministry of Health.
10. On 8 February 2011, the Committee rejected (Decision No. 05-5784/4) the claim of Mr. Alban Pozhegu and upheld the Decision of the General Secretary. Alban Pozhegu filed a claim against this decision with the IOB.
11. On 17 May 2011, IOB upheld (decision A 02-63-2011) the claim of Mr. Alban Pozhegu, annulled the Ministry of Health decision and at the same time obliged the Ministry “to reinstate the complainant in his working place, to systemize him in a similar position within the Ministry of Health by extending his employment with all the rights from employment relationship” .
12. On 15 June 2011, the Applicant filed an appeal to the Supreme Court, requesting “to **ANNUL** the Decision of the Independent Oversight Board (...) as unlawful and ungrounded” and “to **UPHOLD** the lawsuit of the Ministry of Health (...) as well

grounded”. The Applicant proposed to the Supreme Court of Kosovo “to refer the Law No. 036/L-192 on the Independent Oversight Board for Civil Service of Kosovo (Article 13 and 14) to the Constitutional Court of Kosovo for interpretation of the compliance of this law with the Constitution”.

13. On 20 June 2011, the Supreme Court of Kosovo decided (Judgment A.nr.551/2011) “to reject the lawsuit” and that “the request for postponement of execution of the Decision of the Independent Oversight Board (...) is unsubstantiated”.
14. In fact, the Supreme Court found that the lawsuit was unsubstantiated, “because the respondent [IOB] observed the rules of the procedure and verified the factual situation in a fair and complete manner, and thus did not violate the law in detriment of the plaintiff” [the Ministry of Health]. On the other side, the Supreme Court also “assessed other contentions in the lawsuit that another decision needs to be taken based on the claims on the lawsuit of the plaintiff, and found that they would have no impact in this administrative matter”. Finally, the Supreme Court concluded that “because of the decision rendered (...), the request for postponement of execution is unwarranted”.

Allegations of the Applicant

15. The Applicant alleges that that Judgment, rejecting its lawsuit against the decision of the IOB, violated the rights of the Ministry of Health guaranteed by the Constitution, namely Article 113.8 [Jurisdiction and Authorized Parties] of the Constitution and Article 6.1 [The Right to a Fair Trial] of the ECHR.
16. The Applicant argues that, in its appeal before the Supreme Court, it “presented all facts related to the case where it *inter alia* proposed that the Supreme Court of Kosovo refers the case to the Constitutional Court of the Republic of Kosovo for assessment of Constitutionality of the Law on Independent Oversight Board of Kosovo (No. 03/L-192), more specifically Articles 13 and 14 of the respective law”.
17. The Applicant further argues that “the Decision of the Board is based on this law, which we consider to be inconsistent with the Constitution in several articles, and considering the explicit request to the Supreme Court to forward this law to the Constitutional Court, we consider that the Supreme Court based on Article 113.8 of the Constitution was obliged to stay the procedure of the concrete case and file a request to the Constitutional Court for Assessment of Constitutionality of disputable provisions of the respective law”.
18. The Applicant considers that a “violation of Article 113.8 of the Constitution was committed by the Supreme Court because it failed to uphold the proposition of the Ministry of health for forwarding the case to the Constitutional Court for assessment of constitutionality of the Law on IOB (No. 03/L-192) in relation Article 31 of the Constitution, because by failing to uphold the proposition of the Ministry of Health and by failing to examine evidence presented by the Ministry of Health it failed to provide equal treatment to parties in the procedure (Equality of arms)”.
19. The Applicant also refers to a violation of Article 6.1 of the ECHR [The Right to a Fair Trial], (...) because “the Supreme Court had the obligation to *inter alia* properly review the appeal, arguments and evidence presented therein by the parties, and assess it without prejudice, in order to see whether they are relevant for its decision (see, *mutatis mutandi European Court of Human Rights, Kraska v. Switzerland, dated 19 April 1993*)”.

20. The Applicant also states that “the ‘Equality of arms’ principle is an important criterion of a fair trial” and refers the subject to some decisions of the European Court of Human Rights. “It is completely clear that by not taking into consideration arguments presented by the Ministry of Health, the Supreme Court committed a violation of Article 6 of ECHR (...)”.
21. The Applicant concludes his claim requesting to the Constitutional Court the “annulment of Supreme Court of Kosovo Judgment, A.nr. 551/11 dated 20 June 2011 and annulment of IOBK Decision A 02/63/11 dated 17 may 2011 by announcing them as not-in-compliance with the Constitution of the Republic of Kosovo, and by expressing the opinion that the Law on Independent Oversight Board (Law No. 03/L-192) of the Republic of Kosovo in many provisions is not in compliance with the Constitution of Kosovo”.
22. The legal arguments and requests made by the Applicant might be fairly summarized in only one main question: whether the Judgment of the Supreme Court, as a final decision (which includes already the IOB decision), violated the rights of the Applicant, namely the right to a fair trial (taken as a complex of rights related to the fairness of judicial proceedings, including the absence of reasoning on the proposed unconstitutionality of the Law on IOB).

Admissibility of the Referral

23. First of all, the Court examines whether the Applicant has fulfilled the Referral admissibility requirements.
24. Article 113. (1 and 7) of the Constitution establishes the general frame of legal requirements for a Referral being admissible. It 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.”*
25. Article 47 (2) of the Law on Court also establishes that:

“The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law”.
26. In addition, Rule 36 (1) a) of the Rules provides that

“The Court may only deal with Referrals if: all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted.”
27. Those admissibility requirements are further developed in the Law and the Rules of Procedure, which in addition specify, among others: complying with a prescribed deadline; including a procedural and substantive justification of the referral, with a succinct statement of facts and accurate clarification of the rights that have been violated; indicating the concrete act of public authority that is subject to challenge and the relief sought; and attaching the necessary supporting information and documents.
28. The Applicant is acting not as an individual but as a representative of a legal person, the Ministry of Health. Article 21 (4) of the Constitution provides that

“fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”.

Thus, the Applicant is entitled to submit a constitutional complaint. (See *Resolution in Case No. KI. 41/09, AAB-RIINVEST University L.L.C., Pristina, versus Government of the Republic of Kosovo, paragraph 14*).

29. The Court considers that the Applicant complied with the prescribed deadline of four months counted from the day upon which the Ministry has been served with the judgment of the Supreme Court; justified the referral with the relevant facts and a clear reference to the supposedly alleged violations; expressly challenges the Judgment of the Supreme Court as being the concrete act of public authority subject to the review; clearly points out the relief sought; and attaches the different decisions and other supporting information and documents.
30. However, the Applicant is under the obligation to exhaust all legal remedies provided by law, as stipulated for individuals by Article 113.(7) and the other legal provisions, as mentioned above.
31. The purpose of the exhaustion rule is, in the case, allowing to the Supreme Court the opportunity of settling the alleged violation of the Constitution. The exhaustion rule is operatively intertwined with the subsidiary character of the constitutional justice procedural frame work.(See, *mutatis mutandi Selmouni v. France [GC], § 74; Kudła v. Poland [GC], § 152; Andrášik and Others v. Slovakia (dec.)*).
32. The principle of subsidiarity requires that the applicants exhaust all procedural possibilities in the regular proceedings, either administrative or judicial, in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right. Thus, the Applicant is liable to have its case declared inadmissible by the Constitutional Court, when failing to avail itself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a waiver of the right to further object the violation and complain. (See *Resolution, in Case No. KI. 07/09, Demë KURBOGAJ and Besnik KURBOGAJ, Review of Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008, paragraph 18*).
33. A human right is violated if the judicial decision is based on a position which the Constitutional Court would annul because not in conformity with the Constitution. However, when it occurs, the applicants are obliged to exhaust all legal remedies provided by law in order to allow to the public authority, including the regular courts, the opportunity of settling the alleged violation of the Constitution.
34. The non exhaustion of remedies might encompass different situations: the referral is premature, because a decision on the same matter is still pending; the referral was filed with some appeals missing; or a complaint was filed in the last instance court proceedings and no opportunity of settling the alleged violation was given to that last instance court.
35. Whenever a decision is challenged on the basis of some legal position that is unacceptable from the viewpoint of human rights and fundamental freedoms, the very same authority, including the regular courts that delivered the decision must be afforded with the opportunity to reconsider the challenged decision. That means that every time a human rights violation is alleged such an allegation cannot as a rule arrive to the Constitutional court without being considered first by the public authority, including the Supreme Court.

36. The Applicant, in the instant case, should have complained before the Supreme Court against the alleged violation of its right to fair trial, as the Supreme Court also “shall adjudicate based on the Constitution and the law” (Article 102 (3) of the Constitution).
37. In practice, nothing prevented the Applicant of having complained before the Supreme Court about the alleged violation of his right to fair trial. If the Supreme Court would consider the violation and would fix it, it would be over; if the Supreme Court either did not fix the violation or did not consider it, the Applicant would have met the requirement of having exhausted all remedies, in the sense that the Supreme Court was allowed the opportunity of settling the alleged violation.
38. In fact, that analysis is in conformity with the European Court jurisprudence which establishes that applicants are only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time, that is to say, that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (*Sejdović v. Italy* [GC], no. 56581/00, ECHR 2006-II § 46). It must be examined whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (*D.H. and Others v. the Czech Republic* [GC], §§ 116-22).
39. Thus, the Applicant cannot as a rule complain directly before the Constitutional Court about a human rights and fundamental freedoms violation. The Applicant should have complained first before the Supreme Court. The fact of the Applicant not having complained before the Supreme Court against the alleged violation of his right to fair trial shows that all the remedies provided by the regular legal system have not been exhausted.
40. Therefore, the Constitutional Court cannot assess the alleged constitutional violation without the Supreme Court having the opportunity of settling that same violation. Taking into account all the above, pursuant to Article 47 (2) of the Law and Rule 36 (1) of the Rules of Procedure the Court concludes that the referral must be rejected as inadmissible.
41. Consequently, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56 (2) of the Rules of Procedure, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 47 (2) of Law, and Rule 36 (1) 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



Almiro Rodrigues



President of the Constitutional Court



Prof. Dr. Enver Hasani