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

Prishtina, 6 March 2015
Ref. no.:RK776/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI182/14

Applicant

INTERPRESS R. COMPANY/Ruzhdi Kadriu

Constitutional Review of the Decision Rev. Mlc. no. 22/2014, of the Supreme Court of Kosovo, of 15 July 2014

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 Referral is submitted by Mr. Ruzhdi Kadriu, the owner of INTERPRESS R. COMPANY, with residence in Prishtina, represented by the Law Firm Sejdiu & Qerkini (hereinafter: the Applicant).

Challenged Decision

2. The Applicant challenges the Decision Rev. Mlc. no. 22/2014, of the Supreme Court of Kosovo, of 15 July 2014.

3. The challenged decision was served on the Applicant on 20 August 2014.

Subject Matter

4. The subject matter is the constitutional review of the Decision Rev. Mlc. no. 22/2014, of the Supreme Court of Kosovo, of 15 July 2014 and its annulment.

5. The Applicant claims that the challenged Decision is contrary to Article 31 [Right to Fair Trial and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution, and Article 6 [Right to a fair trial] and Article 13 [Right to an effective remedy] of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6. At the same time, the Applicant requests the Court to impose the Interim Measure and to annul the Decision Rev. Mlc. no. 22/2014, of the Supreme Court of Kosovo, from the date of submission of Referral until the Decision on merits is rendered on this case.

Legal Basis

7. The Referral is based on Articles 113.7 and 21.4 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law).

Proceedings before the Constitutional Court

8. On 16 December 2014, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

9. On 13 January 2015, the President of the Court, by Decision KSH. KI182/14, appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu.

10. On 23 January 2015, by Decision GJR. KI182/14, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur.

11. On 3 February 2015, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.

12. On 9 February 2015, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the full Court on the inadmissibility of the Referral.

13. The Review Panel also proposed to the full Court to reject Applicant's request for interim measure, with the reasoning that the Applicant did not submit any convincing evidence that would justify imposition of the interim measure as necessary to avoid any irreparable damage or any proof that such measure is in the public interest.

Summary of Facts

14. From the case file it follows that at the company, which is in the ownership of the Applicant, on 12 October 2004, an accident occurred in the workplace, resulting in an employee suffering serious injuries.

15. In 2005, the injured employee initiated civil court proceedings against the Applicant regarding the accident, for compensation of his damages caused by his injury at workplace as a result of the accident. In addition to the claim for compensation of damage, in 2007 the injured employee also filed a criminal report against the Applicant, alleging that the Applicant should also be found criminally liable for the aforementioned accident at Applicant's work place.

Proceedings before regular courts for compensation of damage

16. On 27 April 2006, the Municipal Court in Prishtina [Judgment C. no. 405/05] partially approved the civil claim of the injured employee, and obliged the Applicant to monetary compensation of the said worker for the damage caused by injury at work. In the reasoning of its decision, the Municipal Court stated among other:

> *„The three experts assigned by this Court for their specific assessments in relation to the matter of the Claimant, are qualitative and competent experts to make the assessments they have made, and the Court considered that there is no need to assign others, as requested by the Respondent's authorized representative, therefore it did not approve such proposals, and it did not grant the proposal for hearing two times the same witness."*

17. The Applicant submitted an appeal to the District Court in Prishtina against Judgment C. no. 405/05, of the Municipal Court in Prishtina.

18. On 25 June 2007, the District Court in Prishtina [Judgment AC. no. 114/2007] rejected the Applicant's appeal, but it modified the judgment related to the amount of monetary compensation to be awarded to the injured employee, and remanded it to the first instance court for re-trial regarding the compensation of expenses and capital rent previously awarded to the injured employee.

19. On 11 September 2007, the Applicant filed a revision to the Supreme Court of Kosovo against the Judgment [AC. no. 114/2007] of the District Court in Prishtina.

20. On 26 April 2008, the Supreme Court [Rev. no. 342/2007], rejected one part of the revision, but approved partly the requested revision by partly modifying the judgment of first and second instance court regarding the compensation of

expenses and capital rent. In the reasoning of its decision, the Supreme Court held, among the other:

„The allegations of the respondent regarding the legal basis of liability are ungrounded, because, as it results from the administered evidence – the conclusion and the opinion of the mechanical expert that the injury of the claimant was caused due to the lack of assessment of the risk and the lack training of the claimant for using the machine, he worked with and by which he was injured, the lack of provision of instruction of use of the machine in the employee's language, and lack of protective plates on the machine cylinders. Therefore, due to omissions in undertaking these measures, the liability for compensation of damage due to guilt, exists, pursuant to Article 158 in conjunction with Articles 18 and 154 of the LOR. Due to the fact that the protective plate of machine cylinders was not provided, the machine, as such, which is used for carrying out the activities, presents a dangerous object, therefore, as such, if used in carrying out the activities of printing house, it represents an additional risk, for which the care of a good economist is required, and due to the damage caused by such object or activity, the objective liability exists, in terms of Article 173 and 174 of the LOR, as the lower instance courts have correctly found".

Proceedings upon the criminal report of the injured party/employee

21. In addition to the claim for compensation of damages, in 2007, the injured employee filed a criminal report against the Applicant, considering the Applicant criminally liable for the aforementioned accident at work.

22. Meanwhile, in the criminal proceedings, the pre-trial judge received the request of the Public Prosecutor to conduct a new expert assessment in connection with the investigation conducted against the Applicant, where previously two expert assessments had been conducted. The first expertise was carried out by expert Fehmi Bajrami, in September 2007, under the number GJPPN, no. 892/2007. Given that this expert assessment was contrary to the expert assessment conducted by expert Agim Millaku, the court approved the request of the Prosecutor to conduct a super expert assessment by Prof. Dr. Bajrush Bytyqi, Prof. Dr. Fehmi Krasniqi and Prof. Dr. Hysni Osmani, under the number GJPPN 892/07 of 22 February 2010. Furthermore, after this expert assessment was conducted, the Municipal Public Prosecutor, by Decision PPN. no. 518-8/2007, of 30 June 2010, rejected the criminal report filed by injured employee, against the President of the company "Interpress R. Company" l.l.c. In the reasoning of its decision, the Municipal Public Prosecutor's Office, stated:

„Having analyzed the files in the criminal report, the defense of the suspect, the statement of the injured person, the testimonies of the witnesses and the material evidence, and the expertise reports of the above mentioned experts, the Prosecutor did not find any evidence proving that in the actions of the suspect exist the elements of the criminal offence as per enacting clause of this decision, because the omissions of the employer, mentioned in the last expertise report by the experts, are rather of a civil

contest nature, for which the injured person has initiated a procedure for compensation of damage with the Municipal Court in Prishtina, due to severe injury suffered at the Employer's workplace, as it can be seen from the evidence found in the case file. Therefore, based on these reasons, it was decided as per the enacting clause of this decision."

23. On 20 May 2013, the Basic Court in Ferizaj rejected the indictment of the injured employee, as a subsidiary claimant, filed against the Applicant. In the reasoning of its decision, the Basic Court, stated:

„It does not result in any way that the defendant wanted this criminal offence to be committed, namely, he did not want the consequences (the severe physical injury of the subsidiary claimant- Lulzim Rexha), and, furthermore, there is no action taken by the defendant, aiming at committing this criminal offence. In the present case, however, we are dealing with a matter of a civil-legal nature, namely of obligational relationships nature, because the facts of the matter- opinions of the experts, did not find evidence as regards the criminal liability of the defendant in relation to this criminal offence, because the omissions of the defendant as Employer – mentioned in the expertise report, namely, super-expertise report of the experts – fall into the category of the civil field."

Proceedings upon the request for repetition of procedure

24. On 16 October 2007, the Applicant submitted to the Municipal Court in Prishtina a request for repetition of procedure, basing this request on the findings of a new "super-expertise".

25. On 23 August 2012, the Municipal Court in Prishtina, by Decision C. no. 1160/08 rejected the Applicant's proposal for repetition of procedure. In the reasoning of its decision, the Municipal Court stated:

„The first instance court considers that in the present case the legal requirements to allow the repetition of procedure, as set out in Article 421, paragraph 1, item 9 of the Law on Contested Procedure, have not been met. This is due to the fact that as of the moment the hearing session for administering the evidence, by hearing the workplace safety expert, on 09.01.2006, ended, when the respondent made remarks on the expertise, until 27.04.2007, when the main hearing before the first instance court was finished, the respondent had sufficient time and the procedural right to confirm the fact - if he had the evidence - that the respondent had took the necessary safety and technical measures in the machine where the accident took place; the evidence that he had trained the claimant in the aspect of workplace safety; evidence of job description and responsibilities of the claimant, and by this evidence to reject the opinion of expert- Agim Millaku as regards the responsibility for the accident, and he could also use this procedural right by filing an appeal against the judgment of the first instance court as regards the confirmation of the essential fact, since the burden of proof is borne by the respondent. In addition, the fact of taking workplace safety measures before the accident on 11.10.2004, was

not confirmed either by the new evidence of the super-expertise of 20.02.2010, therefore the proposal for repetition of procedure was rejected".

26. The Applicant filed an appeal with the Court of Appeals in Prishtina, against the Judgment [C. no. 1160/08] of the Municipal Court in Prishtina.

27. On 1 November 2013, the Court of Appeals of Kosovo [Decision AC. no. 5143/12] rejected the Applicant's appeal and upheld the Decision C. no. 1160/08, of the Municipal Court. In the reasoning of its decision, the Court of Appeals stated:

"This court considers that the appealed allegations, such as the termination of the contested procedure due to the initiation of the criminal procedure..., are not grounded due to the fact that in the contested procedure, the court indeed considers that the criminal offence and criminal liability exist, within the meaning of Article 12, paragraph 3 of the LCP as regards the final judgment of the criminal court, however, the criminal court judgment does not resolve either the issue of the volume of legal-civil liability, and this matter should be adjudicated in the contested procedure in which the facts related to the circumstances of compensation of damage may be determined. The appealed allegation under paragraph 6, item 7 of the appeal is not grounded either, because the first instance court held the hearing session within the meaning of Article 425, paragraph 3 of the LCP, nor are grounded the appealed allegations in paragraphs 8, 9, 10 of the appeal, due to the fact that the criminal liability is a subjective liability, while the civil (obligational) liability is also objective, as in the present case. As regards the other appealed allegations, this Court considers that they could not and did not have a relevant influence on rendering this Decision."

28. On 9 December 2013, the Applicant filed a revision with the Supreme Court against the Decision [AC. no. 5143/12] of the Court of Appeals in Prishtina.

29. On 20 January 2014, the Office of the Chief State Prosecutor of Kosovo submitted the request for protection of legality to the Supreme Court of Kosovo, due to violation of the law in the Decision AC. no. 5143/12 of the Court of Appeals in Prishtina.

30. On 15 July 2014, the Supreme Court [Decision Rev. Mlc. no. 22/2014] rejected as ungrounded the Applicant's revision and the request for protection of legality of the State Prosecutor of Kosovo filed against the Decision Ac. no. 5143/12, of the Court of Appeals. In the reasoning of its decision, the Supreme Court, *inter alia*, stated:

„This court also assessed the allegations in the revision, according to which the second instance court did not apply the provisions of Article 204 of the LCP, because it did not consider the appeal on facts which are of decisive importance, i.e. the expertise of court expert- Fehmi Bajrami, the statements of court experts given in the Municipal Public Prosecution Office in Prishtina, as regards the conduct of the criminal procedure

against the legal representative of the respondent, but it found that they are ungrounded, because the second instance court assessed the appealed allegations which were of decisive importance for rendering its decision within the meaning of Article 204 of the LCP, providing sufficient reasons, pursuant to the Law, by the mere fact that the second instance court, in the reasoning of its decision approved in entirety the legal stance of the first instance court as fair and lawful, which, in its decision, provided complete reasons for decisive facts in relation to the assessment of the evidence submitted with the proposal for repetition of procedure."

Applicant's Allegations

31. The Applicant believes that the Supreme Court, by Decision Rev. Mlc. no. 22/2014 of 15 July 2014, violated the Applicant's right to fair trial as guaranteed by Article 31 of the Constitution of Kosovo and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that the same decision violated the Applicant's right to an effective legal remedy under Article 32 and 54 of the Constitution of Kosovo, and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

32. The Applicant requests the Court to:

„*I. Declare the Applicant's Referral admissible;*
II. Taking into account the violations of Applicant's rights, guaranteed by the Constitution and unrecoverable damage that would be suffered, and pursuant to Article 27 of the Law on Constitutional Court and Articles 54 and 55 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, to impose interim measure and suspend Decision Rev. Mlc. no. 22/2014 of the Supreme Court of Kosovo until final decision on this case;
III. Hold that the Applicant's constitutional rights to fair and impartial trial, guaranteed by Article 31 of the Constitution of Kosovo and Article 6 of the European Convention of Human Rights and Freedoms, and right to legal remedies, guaranteed by Articles 32 and 54 of the Constitution of Kosovo and Article 13 of the European Convention of Human Rights and Freedoms have been violated by Decision Rev. Mlc. no. 22/2014, of the Supreme Court of Kosovo;
IV. Declare invalid the Decision Rev. Mlc. no. 22/2014 of the Supreme Court, of 15 July 2014;
V. Determine and impose any other legal measure that the Constitutional Court deems as grounded on the Constitution and the Law and which is reasonable for the present case".

Admissibility of the Referral

33. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and further specified in the Law and the Rules of Procedure.

34. In this respect, the Court refers to Article 113.7 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".

35. The Court also notes Article 48 of the Law, which states that:

"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".

36. In addition, the Court takes into account Rules 36 (1) (d) and 36 (2) of the Rules of Procedure, which read that:

"(1) The Court may consider a referral if::

[...]

(d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

(a) the referral is not prima facie justified, or
(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or
(c) the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or
(d) the Applicant does not sufficiently substantiate his claim."

37. The Court notes that in this case the Applicant complains about the fact that the regular courts rejected his proposal for repetition of procedure, and that additional expertise and super expertise was not taken into account throughout the entire court proceedings.

38. In this regard, the Court considers that the Basic Court in Prishtina in the proceedings of repetition of procedure provided extensive reasons for its findings (see paragraph 23). Therefore, the Court of Appeals and the Supreme Court reasoned their decisions and substantiated each Applicant's allegation with respect to the rejection of his proposal.

39. The regular courts specifically described the different types of legal liability between the criminal proceedings in the criminal case and the civil proceedings in the civil case by summarizing that the burden of proof in the criminal case

was both objective and subjective while in the civil proceedings the burden of proof was only objective.

40. In the civil case the regular courts reasoned that all that was needed to be proven was that the Applicant's workplace was negligently dangerous and that danger was a direct cause of the employee's injuries (objective standard only).

41. In the criminal case the regular courts reasoned that before a judgment could be entered against the Applicant it would have to been proven that the workplace was dangerous, and that the Applicant knew that it was dangerous, and the Applicant intentionally did nothing to remedy the danger or to protect the employees working there (objective and subjective standard). Simply because the prosecutor and the regular courts found that there was no evidence that the Applicant intentionally violated work safety standards did not mean that the Applicant's work place was not dangerous for the employees working there and a direct cause of the employee's injuries. Because the two standards of proof are different for a civil case versus a criminal case, it is permissible that there could be different results in the two different proceedings as happened in the Applicant's case.

42. The Supreme Court states in its decision that the content of the assessment of the expertise of the court expert in civil proceedings and the assessment given in the super expertise by the court expert in criminal proceedings are in full compliance with each other in respect of objective liability of the Applicant. The Supreme Court also found that the expertise, conducted in the criminal proceedings does not constitute new evidence, since this evidence was subject of review upon the revision and supplemented the revisions of 5 October 2007 of the Applicant against the judgment of second instance court in the proceedings for compensation of damage.

43. The Court reiterates that it does not act as a court of fourth instance, in respect of the decisions taken by the Supreme Court. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. It is the role of the Constitutional Court to determine whether the regular courts' proceedings were fair in their entirety, including the way the evidence was taken (see Case: *Edwards v. United Kingdom*, no. 13071/87, Report of the European Commission of Human Rights, of 10 July 1991).

44. In the present case, the Court did not find that the pertinent proceedings before the Supreme Court were in any way unfair or arbitrary (see, *mutatis mutandis, Shub v. Lithuania,* ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

45. Therefore, the Court considers that the Applicant did not substantiate his claim on constitutional grounds and did not provide evidence indicating how and why his rights and freedoms, protected by the Constitution, were violated by challenged decision.

46. The Court concludes that the Applicant's Referral is manifestly ill-founded, in accordance with Article 48 of the Law and Rules 36 (1) (d) and 36 (2) of the Rules of Procedure.

Assessment of the request for Interim Measures

47. The Court notes that the Applicant in the Referral requests the Court to impose the Interim Measure and to annul Decision Rev. Mlc. no. 22/2014 of the Supreme Court of Kosovo, of 15 July 2014 from the date of submission of the Referral until the decision on merits is rendered by the Constitutional Court on this issue, which is the subject of proceedings.

48. In order for the Court to allow an interim measure, in accordance with Rule 55 (4) (a) of the Rules of Procedure, it needs to determine that:

    (a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;

49. As concluded above, the Referral is inadmissible. For this reason, the request for interim measures is to be rejected.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Rules 36 (1) (d), 36 (2), 55 (4) (a) and 56 (2) of the Rules of Procedure, in its session held on 6 March 2015, unanimously

DECIDES

I. TO DECLARE the Referral Inadmissible;

II. TO REJECT the request for Interim Measure;

III. This Decision shall be notified to the Parties and published in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision effective immediately.

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

Robert Carolan | Prof. Dr. Enver Hasani