



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Pristina, 01. October 2012
Ref. No.: AGJ309/12

JUDGEMENT

in

Case No.

KI 132/10, KI 28/11, KI 82/11, KI 85/11, KI 89/11, KI 100/11, KI 104/11, KI 109/11, KI 118/11, KI 123/11, KI 142/11, KI 143/11, KI 144/11, KI 154/11, KI 01/12, KI 02/12, KI 14/12

Applicants

Istref Halili and 16 other former employees of Kosovo Energy Corporation

Constitutional Review of 17 Individual Judgments of the Supreme Court of the Republic of Kosovo

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 and
Ivan Čukalović, Judge

Introduction

1. This Judgment concerns Referrals made by the Applicants listed below which were lodged with the Constitutional Court by seventeen (17) former employees of the Kosovo Energy Corporation (KEK) between December 2010 and February 2012.
2. The present cases are similar– to Case KI No. 40/09, “Imer Ibrahim and 48 other former employees of Kosovo Energy Corporation against 49 Individual Judgments of the Supreme Court of the Republic of Kosovo” and “Gani Prokshi and 15 other former employees of the Kosovo Energy Corporation against 16 Individual Judgments of the Supreme Court of the Republic of Kosovo” and “Isuf Mërlaku and 25 other former employees of the Kosovo Energy Corporation against 17 individual Judgments of the Supreme Court of the Republic of Kosovo” and “Ilaz Halili and 19 other former employees of the Kosovo Energy Corporation”The Constitutional Court in all Judgments found that there has been a violation of Article 46 of the Constitution of the Republic of Kosovo (Protection of Property) in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights as well as that there has been violation of Article 31 of the Constitution (Right to Fair and Impartial Trial) in conjunction with Article 6 of the European Convention on Human Rights with in relation to some of those Applicants. Consequently it was decided to declare invalid the Judgments delivered by the Supreme Court in some of those cases and Remand those cases to the Supreme Court for reconsideration in conformity with the judgment of this Court (see the Judgments of the Constitutional Court of 23 June 2010, 18 October 2010, 10 March 2011 and 27 December 2011).

The Applicants in the present case are as follows:

3. In this Judgment for ease reference the Applicants may be referred to collectively as “Istref Halili and seventeen (17) other former employees of the Kosovo Energy Corporation (KEK)”.
- 1) Istref Halili
 - 2) Ahmet Bytyqi
 - 3) Nazmi Kelmendi
 - 4) Selim Krasniqi
 - 5) Ramadan Duraku
 - 6) Shefqet Shala
 - 7) Habib Muja
 - 8) Brahim Shabani
 - 9) Nexhat Latifi
 - 10) Enver Hashani
 - 11) Sefe Isufi
 - 12) Sylva Shefik
 - 13) Lute Luta
 - 14) Ahmet Krasniqi
 - 15) Brahim Imeri
 - 16) Tafil Miftari
 - 17) Nuhi Gerguri

The Applicants challenge the following Judgments of the Supreme Court of Kosovo adopted in the cases of:

- 1) KI 132/10 Istref Halili, Rev. 60/2009 dated 11 February 2009
- 2) KI 28/11 Ahmet Bytyqi, Rev. 198/2009 dated 15 July 2009
- 3) KI 82/11 Nazmi Kelmendi, Rev. 529/2008 dated 11 February 2009
- 4) KI 85/11 Selim Krasniqi, Rev. 103/2008 dated 27 January 2009
- 5) KI 89/11 Ramadan Duraku, Rev. 138/2008 dated 27 January 2009
- 6) KI 100/11 Shefqet Shala, Rev. 339/2008 dated 10 February 2009
- 7) KI 104/11 Habib Muja, Rev. 511/2008 dated 11 February 2009
- 8) KI 109/11 Brahim Shabani, Rev. 261/2008 dated 10 February 2009
- 9) KI 118/11 Nexhat Latifi, Rev. 88/2009 dated 23 February 2009
- 10) KI 123/11 Enver Hashani, Rev. 123/2009 dated 02 June 2009
- 11) KI 142/11 Sefe Isufi, Rev. 456/2008 dated 10 March 2009
- 12) KI 143/11 Syla Shefiku, Rev. 509/2008 dated 23 February 2009
- 13) KI 144/11 Lute Luta, Rev. 496/2008 dated 11 February 2009
- 14) KI 154/11 Ahmet Krasniqi, Rev. 85/2009 dated 23 February 2009
- 15) KI 01/12 Brahim Imeri, Rev. 510/2008 dated 10 March 2009
- 16) KI 02/12 Tafil Miftari, Rev. 451/2008 dated 11 February 2009
- 17) KI 14/12 Nuhi Gerguri, Rev. 418/2009 dated 10 March 2010

Subject matter

4. The subject matter of this Referral is the assessment of the constitutionality of the individual Judgments delivered by the Supreme Court of the Republic of Kosovo in the seventeen (17) individual cases of the Applicants against KEK as specified above.

Legal basis

5. The Referral is based on Article 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Law) and Section 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the facts as alleged by the Parties

6. The facts of these Referrals are similar to those in “the Case of Imer Ibrahim and 48 other former employees of the Kosovo Energy Corporation v. 49 individual Judgments of the Supreme Court of the Republic of Kosovo” and “the Case of Gani Prokshi and 15 other former employees of the Kosovo Energy Corporation v. 16 Individual Judgments of the Supreme Court of the Republic of Kosovo” and “Isuf Mërlaku and 25 other former employees of Kosovo Energy Corporation” See the Judgments of Constitutional Court of Kosovo, (hereinafter referred to as “the case of Ibrahim and others” dated 23 June 2010, “the case of Prokshi and others” dated 18 October 2010, “the case of Merlaku and others” dated 10 March 2011 and “the case of Halili and others” dated 27 December 2011
7. In the course of 2001 and 2002, each of the Applicants in this Referral, as with the Applicants in the said Judgment of 23 June 2010, 18 October 2010, 10 March 2011 and 27 December 2011, signed an Agreement for Temporary Compensation of Salary for Termination of Employment Contract with their employer KEK. These Agreements were, in substance, the same.

8. Article 1 of the Agreements established that, pursuant to Article 18 of the Law on Pension and Invalidity Insurance in Kosovo (Official Gazette of the Social Autonomous Province of Kosovo No 26/83, 26/86 and 11/88) and at the conclusion of KEK Invalidity Commission, the beneficiary (i.e. each of the Applicant) is entitled a temporary compensation due to early termination of the employment contract until the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.
9. Article 2 of the Agreements specified that the amount to be paid monthly to each Applicant was to be 206 German Marks.
10. Article 3 specified that “payment shall end on the day that the Kosovo Pension-Invalidity Insurance Fund enters into operation. On that day onwards, the beneficiary may realize his/her rights in the Kosovo Pension and Invalidity Insurance Fund (the Kosovo Pension Invalidity Fund), and KEK shall be relieved from liabilities to the User as per this Agreement.”
11. On 1 November 2002, the Executive Board of KEK adopted a Decision on the Establishment of the Pension Fund, in line with the requirements of UNMIK Regulation No 2001/30 on Pensions in Kosovo. Article 3 of this Decision reads as follows: “The Pension Fund shall continue to exist in an undefined duration, pursuant to terms and liabilities as defined with Pension Laws, as adopted by Pension Fund Board and KEK, in line with this Decision, or until the legal conditions on the existence and functioning of the Fund are in line with Pension Regulations or Pension Rules adopted by BPK.”
12. On 25 July 2006, the KEK Executive Board annulled the above mentioned Decision on the Establishment of the Supplementary Pension Fund and terminated the funding and functioning of the Supplementary Pension Fund, with effect from 31 July 2006. According to the Decision of 25 July 2006, all beneficiaries were guaranteed full payment in line with the Fund Statute. Furthermore the total obligations towards beneficiaries were 2, 395,487 Euro, banking deposits were 3,677,383 Euro and asset surplus from liability were 1,281,896 Euro. The Decision stated that KEK employees that are acknowledged as labour disabled persons by the Ministry of Labour and Social Welfare shall enjoy rights provided by the Ministry. On 14 November 2006, KEK informed the Central Banking Authority that “decision on revocation of the KEK Pension Fund is based on decision of the KEK Executive Board and the Decision of the Pension Managing Board... due to the financial risk that the scheme poses to KEK in the future”.
13. According to the Applicants, KEK terminated the payment stipulated by the Agreements in the summer of 2006 without any notification. The Applicants claim that such an action is in contradiction to the Agreements signed.

The Applicants also claim that it is well known that the Kosovo Pension Invalidity Fund has not been established yet. On the other hand, in the original case, KEK contested the Applicants’ allegations arguing that it was widely known that the Invalidity Pension Fund had been functioning since 1 January 2004.

14. According to KEK, the Applicants were automatically covered by the national invalidity scheme pursuant to UNMIK Regulation No 2003/40 on Promulgation of the Law on Invalidity Pensions in Kosovo (Law No 2003/23).
15. KEK further argued that on 31 August 2006 it issued a Notification according to which all beneficiaries of the KEK Supplementary Fund had been notified that the Fund was terminated. The same notification confirmed that all beneficiaries were guaranteed

complete payment in compliance with the SPF Statute, namely 60 months of payments or until the beneficiaries reached 65 years of age, pursuant to the Decision of the Managing Board of the Pension Fund of 29 August 2006.

16. KEK further argued that the Applicants did not contest the Instructions to invalidity pension and signature for early termination of employment pursuant to the conclusion of the Invalidity Commission.
17. The Applicants sued KEK before the Municipal Court in Prishtina, requesting the Court to order KEK to pay unpaid payments and to continue to pay 105 Euro (equivalent to 206 German Marks) until conditions are met for the termination of the payment.
18. The Municipal Court in Prishtina approved the Applicants' claims and ordered monetary compensation. The Municipal Court of Prishtina found (*e.g. the Judgment C. Nr. 1863/2007 of 23 April 2008 in the case of the first Applicant Istref Halilii*) that the conditions provided by Article 3 of the Agreements have not been met. Article 3 of the Agreements provides for salary compensation until exercise of the Applicants' right, "which means an entitlement to a retirement scheme".
- 19.
20. KEK appealed against the judgments of the Municipal Court to the District Court, arguing, *inter alia*, that the Municipal Court judgment was not fair because the Agreements were signed with the Applicants because of the invalidity of the Applicants and that they cannot claim continuation of their working relations because of their invalidity.
21. KEK reiterated that the Court was obliged to decide upon the UNMIK Regulation 2003/40 on the promulgation of the Law on Invalidity Pensions according to which the Applicants were entitled to an invalidity pension.
22. The District Court in Prishtina rejected the appeals of KEK and found their submissions ungrounded.
23. KEK submitted a revision to the Supreme Court because of an alleged essential violation of the Law on Contested Procedure and erroneous application of material law. It repeated that the Applicants were entitled to the pension provided by the 2003/40 Law and that because of humanitarian reasons it continued to pay monthly compensation after the Law entered into force. It argued that the age of the applicant was not relevant but that his invalidity was.
24. The Supreme Court accepted the revisions of KEK, and quashed the judgments of the District Court and the Municipal Court in Prishtina and rejected as unfounded the Applicants' lawsuits.
25. The Supreme Court argued that the manner of termination of employment was considered lawful pursuant to Article 11.1 of UNMIK Regulation 2001/27 on the Basic Labour Law in Kosovo.
26. In its Judgment in the case of the first applicant Istref Halili, Rev. No. 60/2009 of 11 February 2009, the Supreme Court stated: "*Taking into account the undisputed fact that the respondent party fulfilled the obligation towards the plaintiff, which is paying salary compensation according to the specified period which is until the establishment and functioning of the Invalidity and Pension Insurance Fund in Kosovo effective from 1 January 2004, the Court found that the respondent party fulfilled the obligation as per the agreement. Thus the allegations of the plaintiff that the respondent party has the obligation to pay him the temporary salary compensation after the establishment of*

the Invalidity and Pension Insurance Fund in Kosovo are considered by this Court as unfounded because the contractual parties until the appearance of solving condition-establishment of the mentioned fund have fulfilled their contractual obligations...

27. On 15 May 2009, Kosovo Ministry of Labour and Social Welfare issued the following note: *“The finding of the Supreme Court of Kosovo, in its reasoning of e.g. Judgment Rev. No. 338/2008, that in the Republic of Kosovo there is a Pension and Invalidity and Pension Insurance Fund which is functional since 1 January 2004 is not accurate and is ungrounded. In giving this statement, we consider the fact that UNMIK regulation 2003/40 promulgates the Law No 2003/213 on the pensions of disabled persons in Kosovo, which regulates over permanently disabled persons, who may enjoy this scheme in accordance with conditions and criteria as provided by this law. Hence let me underline that the provisions of this Law do not provide for the establishment of a Pension and Invalidity Insurance in the country. Establishment of the Pension and Invalidity Insurance Fund in the Republic of Kosovo is provided by provisions of the Law on pension and Invalidity Insurance funds, which is in the process of drafting and approval at the Government of Kosovo.”* The same note clarified that at the time of writing that note, the pension *inter alia* existed *“Invalidity pension in amount of 45 Euro regulated by the Law on Pensions of Invalidity Persons (beneficiaries of these are all persons with full and permanent Invalidity)”* as well as *“contribution defined pensions of 82 Euro that are regulated by Decision of the Government (the beneficiaries of these are all the pensioners that have reached the pensions age of 65 and who at least have 15 years of working experience)”*.

Complaints

The Applicants complain that their rights have been violated because KEK unilaterally annulled their Agreements although the condition prescribed in Article 3, the establishment of the Kosovo Pension-Invalidity Insurance Fund) had not been fulfilled. The Applicants further argued that they have not been able to remedy such violation before the ordinary courts. While all the Applicants do not explicitly complain of a violation of the European Convention on Human Rights (ECHR), it appears from the Applicants' submissions that the subject of the complaints are their property rights (as guaranteed by Article 1 Protocol 1 to the ECHR) as well as their right to fair trial (as guaranteed by Article 6 of the ECHR).

Summary of the proceedings before the Court

28. Between September 2010 and February 2012, the Applicants individually, filed the Referrals to the Constitutional Court. The President of the Court appointed Judge Kadri Kryeziu as Judge Rapporteur and appointed a Review Panel of the Court composed of Judges Altay Suroy (Presiding), Enver Hasani and Ivan Cukalovic.
29. On 3 July 2012, after having considered the Report of the Judge Rapporteur Kadri Kryeziu, the Review Panel, composed of Altay Suroy, Enver Hasani and Ivan Cukalovic made a recommendation to the full Court on the admissibility of the Referral.
30. On the same day the Court deliberated and voted on the case.

Admissibility

31. As was done in the case of *“Ibrahimi and others”*, *“Prokshi and others”*, *“Mërlaku and others”* and *“Halili and others”*, already referred to, in order to be able to adjudicate the Applicants' Referral the Constitutional Court needs first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution.
32. 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”;

and to Article 47.2 of the Law, stipulating that:

“The individual may submit the referral in question only after he/she has exhausted all legal remedies provided by the law.”

33. The Court further has to consider whether Applicants submitted their Referral within the four months time limit prescribed by Article 49 of the Law. In this connection, the Constitutional Court refers to Article 49 of the Law, which stipulates 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...”

34. The Court recalls that in the present case, as in the cases of *“Ibrahimi and others”*, *“Prokshi and others”*, *“Mërlaku and others”* and *“Halili and others”*, the Applicants still suffer from the unilateral annulment of their Agreements signed by KEK. They raised the same argument as the Applicants in the earlier that it is well known that the Pension and Invalidity Insurance Fund has not been established to date. Therefore, there is a continuing situation. As the circumstance of which the Applicants complain continued, the four months period as prescribed in Article 49 of the Law is inapplicable to these cases.

35. The Constitutional Court is cognizant that some of the Applicants were older than 65 years at the time of submitting his Referral to this Court.

36. These Applicants are: Istref Halili (1943), Selim Krasniqi (1942), Ramadan Duraku (1945). Habib Muja (1945), Brahim Shabani (1942), Sefë Isufi (1943), Ahmet Krasniqi (1943) and Tafil Miftari (1943).

37. The Constitutional Court recalls that according to the Note issued by the Ministry of Labour and Social Welfare on 15 May 2009 persons who have reached the pensions age of 65 and who have at least 15 years of working experience are entitled to pension in a monthly amount of 82 Euro. The substance of this Note was confirmed by the representative of the Ministry at the public hearing that the Constitutional Court held on 30 April 2010 in the case of Ibrahimi and others.

It appears consequently that the above listed Applicants are entitled for pension from the moment when they reached the age of 65.

However, their complaint to the extent of unpaid compensation for the period prior to that moment, on account of a continuing situation, remains at issue.

38. Therefore, the Referrals of the Applicants: Istref Halili, Selim Krasniqi, Ramadan Duraku. Habib Muja, Brahim Shabani, Sefë Isufi, Ahmet Krasniqi and Tafil Miftari are partly admissible.

39. With regard to the remaining Applicants, the Constitutional Court does not find any reason for inadmissibility of the Referral.
40. The Court further considers that it is appropriate to join the Referrals pursuant to Rule 37 of the Rules of Procedure.

Merits

41. The Court recalls its Judgments of 23 June 2010, 18 October, 10 March 2011 and 27 December 2012 adopted in the earlier KEK cases in which it found that there has been a violation of Article 46 of the Constitution of the Republic of Kosovo (Protection of Property) in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights as well as that there has been violation of Article 31 of the Constitution (Right to Fair and Impartial Trial) in conjunction with Article 6 of the European Convention on Human Rights with regard to the same Applicants. Consequently it was decided to declare invalid the judgments delivered by the Supreme Court in the Applicants' cases and remit those judgments to the Supreme Court for reconsideration in conformity with the judgment of this Court.

i. as regards the Protection of Property

42. The Applicants complain that their rights have been violated because KEK unilaterally annulled their Agreements although the condition prescribed in Article 3 (i.e. Establishment of the Kosovo Pension-Invalidity Insurance Fund) had not been fulfilled. In substance, the Applicants complain that there has been a violation of their property rights.
43. At the outset, the following legal provisions should be recalled:

Article 53 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.”

Article 46 [Protection of Property] of the Constitution reads as follows

1. *The right to own property is guaranteed.*
2. *Use of property is regulated by law in accordance with the public interest.*
3. *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*

Article 1 of Protocol No. 1 of the European Convention on Human Rights provides

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

44. According to the case law of European Court of Human Rights, an Applicant can allege a violation of Article 1 of Protocol no. 1 only in so far as the impugned decisions related to his “possessions” within the meaning of this provision.
45. Furthermore, “possessions” can be either “existing possessions” or assets, including claims, in respect of which the applicant can argue that he or she has at least a “legitimate expectation” of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a “possession” within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfillment of the condition” (see the judgements in the cases of “Ibrahimi and others”, “Prokshi and others”, “Mërlaku and others” and “Halili and others”).
46. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, confer on the Applicant a title to a substantive interest protected by Article 1 of Protocol No. 1 to the ECHR. (See the judgements in the cases of “Ibrahimi and others”, “Prokshi and others”, “Mërlaku and others” and “Halili and others”).
47. The Constitutional Court notes that, at the time of concluding the Agreements between the Applicants and KEK, these type of agreements have been regulated by the Law on Contract and Torts (Law on Obligations) published in Official Gazette SFRJ 29/1978 and amended in 39/1985, 45/1989, 57/1989.

Article 74(3) of the Law on Contract and Torts reads as follows:

“After being concluded under rescinding condition (raskidnim uslovom) the contract shall cease to be valid after such condition is valid.”

48. The crux of the matter is therefore whether the rescinding condition under which the Agreements were signed has been met. Answering that question will allow the Constitutional Court to assess whether the circumstances of this Referral, considered as a whole, confer on the Applicants title to a substantive interest protected by Article 1 of Protocol No. 1 to the ECHR.
49. The Constitutional Court notes that it is clear from the documents and it is undisputable between the parties that the “rescinding condition” under which the Agreements have been signed is the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.
50. In this respect, the Constitutional Court also notes that, according to the Ministry of Labour and Social Welfare, the establishment of the Pension and Invalidity Insurance Fund, was to be provided by the Law on Pension and Invalidity Insurance Funds. This was in the process of drafting and approval with the Government of Kosovo.
51. The Constitutional Court considers that the Applicants, when signing the Agreements with KEK, had a legitimate expectation that they would be entitled to the monthly indemnity in the amount of 105 Euro until the Pension and Invalidity Insurance Fund was established.

52. Such legitimate expectation is guaranteed by Article 1 of Protocol No. 1 to the Convention, its nature is concrete and not a mere hope, and is based on a legal provision or a legal act, i.e. Agreement with KEK (*the judgements in the cases case of “Ibrahimi and others”, “Prokshi and others”, “Mërlaku and others” and “Halili and others”*); also *mutatis mutandis* Gratzinger and Gratzingerova v. the Czech Republic (dec.), no. 39794/98, para 73, ECHR 2002-VII).
53. Therefore, the Constitutional Court considers that the Applicants have a “legitimate expectation” that their claim would be dealt in accordance with the applicable laws, in particular the above quoted provisions of the Law on Contract and Torts and the Law on Pension and Invalidity Insurance in Kosovo, and consequently upheld (see judgements in the cases of *“Ibrahimi and others”, “Prokshi and others”, “Mërlaku and others” and “Halili and others”*).
54. However, the unilateral cancellation of the Agreements, prior to the rescinding condition having been met, breached the Applicants’ pecuniary interests which were recognized under the law and which were subject to the protection of Article 1 of Protocol No. 1. (see *the judgements in the cases of “Ibrahimi and others”, “Prokshi and others”, “Mërlaku and others” and “Halili and others”*).
55. Consequently, the Constitutional Court concludes that there is a violation of Article 46 of the Constitution in conjunction Article 1 of Protocol 1 to the European Convention on Human Rights.

ii. as regards the right to fair trial

56. The Applicants further complain that they have not been able to the remedy violation of their property rights before the ordinary courts.

Article 31 [Right to Fair and Impartial Trial] of the Constitution, reads as follows:

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

Article 6 of the European Convention on Human Rights

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

57. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts, including the Supreme Court. In general, “Courts shall adjudicate based on the Constitution and the law” (Article 102 of the Constitution). More precisely, the role of the ordinary courts is to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *García Ruiz v. Spain* [GC], no. 30544/96, paragraph 28, European Court on Human Rights [ECHR] 1999-I).
58. On the other hand, “The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution” (Article 112. 1 of the Constitution). Thus, the Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see among others authorities, Report of the Eur. Commission on Human Rights in the case Edwards

v. United Kingdom, App. No 13071/87 adopted on 10 July 1991).

59. According to the jurisprudence of the European Court of Human Rights, Article 6 paragraph 1 of the ECHR obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. Thus the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see the judgements in the cases of “*Ibrahimi and others*”, “*Prokshi and others*”, “*Mërlaku and others*” and “*Halili and others*”).
60. In the present case, the Applicants requested the ordinary courts to determine their property dispute with the KEK. The Applicants referred, in particular, to the provision of Article 3 of the Agreements, stating that the Law on Pension that establishes Pension and Invalidity Insurance Fund has not been adopted yet. This fact has been confirmed by the representative of the responsible Ministry of Labour and Social Welfare.
61. However, the Supreme Court made no attempt to analyze the Applicants’ claim from this standpoint, despite the explicit reference before every other judicial instance. Instead the Supreme Court view was that it was an undisputed fact that the respondent party (KEK) fulfilled the obligation towards the plaintiff, which was paying salary compensation according to specified period which was until the establishment and functioning of the Invalidity and Pension Insurance Fund in Kosovo effective from 1 January 2004.
62. It is not the task of the Constitutional Court to decide what would have been the most appropriate way for the ordinary courts to deal with the Applicants’ argument, i.e. fulfilling the rescinding condition of Article 3 of the Agreements, which fulfilment is also regulated by Article 74(3) of the Law on Contract and Torts taken in conjunction with Article 18 of the 1983 Law on Pension and Invalidity Insurance.
63. However, in this Court’s opinion, the Supreme Court, by neglecting the assessment of this point altogether, even though it was specific, pertinent and important, fell short of its obligations under Article 6 para 1 of the ECHR.(see the cases of “*Ibrahimi and others*”, “*Prokshi and others*”, “*Mërlaku and others*” and “*Halili and others*”).
64. In view of the above, the Constitutional Court concludes that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

FOR THESE REASONS,

THE COURT UNANIMOUSLY DECIDES AS FOLLOWS:

I. TO JOIN THE REFERRALS;

II. TO DECLARE AS

a) Admissible the Referral with regard to the following Applicants:

KI 28/11 Ahmet Bytyqi
KI 82/11 Nazmi Kelmendi
KI 100/11 Shefqet Shala
KI 118/11 Nexhat Latifi
KI 123/11 Enver Hashani
KI 143/11 Sylva Shefiku
KI 144/11 Lute Luta
KI 01/12 Brahim Imeri
KI 14/12 Nuhi Gerguri

b) Partly admissible the Referral with regard to the following Applicants:

KI 132/10 Istref Halili
KI 85/11 Selim Krasniqi
KI 89/11 Ramadan Duraku
KI 104/11 Habib Muja
KI 109/11 Brahim Shabani
KI 142/11 Sefë Isufi
KI 154/11 Ahmet Krasniqi
KI 02/12 Tafil Miftari

III. TO FIND THAT

a) There has been a violation of Article 46 of the Constitution of the Republic of Kosovo in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights, in the cases of all Applicants.

c) There has been violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights with regard to the same Applicants who suffered violation of Article 46 of the Constitution.

IV. Declares invalid the judgments delivered by the Supreme Court in the following cases:

KI 132/10 Istref Halili, Rev. 60/2009 dated 11 February 2009
KI 28/11 Ahmet Bytyqi, Rev. 198/2009 dated 15 July 2009
KI 82/11 Nazmi Kelmendi, Rev. 529/2008 dated 11 February 2009
KI 85/11 Selim Krasniqi, Rev. 103/2008 dated 27 January 2009
KI 89/11 Ramadan Duraku, Rev. 138/2008 dated 27 January 2009
KI 100/11 Shefqet Shala, Rev. 339/2008 dated 10 February 2009
KI 104/11 Habib Muja, Rev. 511/2008 dated 11 February 2009
KI 109/11 Brahim Shabani, Rev. 261/2008 dated 10 February 2009
KI 118/11 Nexhat Latifi, Rev. 88/2009 dated 23 February 2009
KI 123/11 Enver Hashani, Rev. 123/2009 dated 02 June 2009

KI 142/11 Sefe Isufi, Rev. 456/2008 dated 10 March 2009
KI 143/11 Sylva Shefik, Rev. 509/2008 dated 23 February 2009
KI 144/11 Lute Luta, Rev. 496/2008 dated 11 February 2009
KI 154/11 Ahmet Krasniqi, Rev. 85/2009 dated 23 February 2009
KI 01/12 Brahim Imeri, Rev. 510/2008 dated 10 March 2009
KI 02/12 Tafil Miftari, Rev. 451/2008 dated 11 February 2009
KI 14/12 Nuhi Gerguri, Rev. 418/2009 dated 10 March 2010

V. REMAND these Judgments to the Supreme Court for reconsideration in conformity with the judgment of this Court

VI. REMAINS seized of the matter pending compliance with that Order.


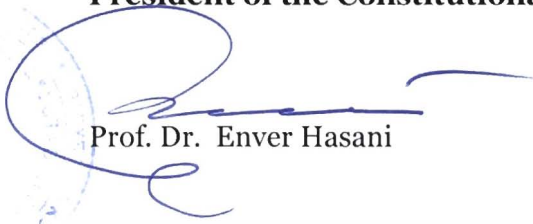
This Judgment shall have effect immediately on delivery to the parties.

Done at Prishtina this day of 26 September 2012

Judge Rapporteur


Kadri Kryeziu

President of the Constitutional Court



Prof. Dr. Enver Hasani