



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Pristina, 14 October 2013
Ref. No.: AGJ478/13

JUDGEMENT

in

Cases No.

KI53/11, KI25/12, KI100/12 and KI49/13

Applicants

Isa Grajqevci, Fehmi Ajvazi, Musli Nuhiu and Ramadan Imeri

**Constitutional Review of the
Judgments of the Supreme Court**

Rev. no. 196/2009, dated 23 June 2009;

Rev. no. 111/2009, dated 2 June 2009;

Rev. no. 370/2008, dated 23 February 2009 and

Rev. no. 264/2008, dated 10 December 2009

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

Arta Rama-Hajrizi, Judge

Applicants

1. The Referrals were submitted by Isa Grajqevci, Fehmi Ajvazi, Musli Nuhiu and Ramadan Imeri (hereinafter, the Applicants).

Challenged decisions

2. The challenged decisions are the Judgments of the Supreme Court, Rev. no. 196/2009, dated 23 June 2009; Rev. no. 111/2009, dated 2 June 2009; Rev. no. 370/2008, dated 23 February 2009 and Rev. no. 264/2008, dated 10 December 2009, which are challenged, respectively, by the Applicants Isa Grajqevci, Fehmi Ajvazi, Musli Nuhiu and Ramadan Imeri.

Subject matter

3. The subject matter of the Referrals is the review of the constitutionality of the challenged Judgments of the Supreme Court, which allegedly violated the right to property and to a fair trial of the Applicants, as guaranteed by Article 46 of the Constitution, in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights (hereinafter, the ECHR), and Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.
4. The present case is identical to the following cases already decided by the Constitutional Court (hereinafter, the identical cases):
 - a) Case KI No. 40/09, "Imer Ibrahimimi and 48 other former employees of Kosovo Energy Corporation against 49 Individual Judgments of the Supreme Court of the Republic of Kosovo";
 - b) Case KI No. 58/09, "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";
 - c) Case KI No. 08/10, "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";
 - d) Case KI No. 76/10, "Ilaz Halili and 19 other former employees of the Kosovo Energy Corporation" and
 - e) Case KI No. 132/10, "Istref Halili and 16 other former employees of the Kosovo Energy Corporation against 17 individual Judgments of the Supreme Court of the Republic of Kosovo".
5. The Constitutional Court found in all those identical cases 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 ECHR, as well as of Article 31 of the Constitution (Right to Fair and Impartial Trial), in conjunction with Article 6 of the ECHR in relation to some of those Applicants.
6. Consequently, the Court decided to declare invalid the Judgments delivered by the Supreme Court in those identical cases and remand those cases to the Supreme Court for reconsideration in conformity with the judgment of this Court.

Legal basis

7. The Referrals are 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 Kosovo (hereinafter, the Law) and Section 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Court

8. Between April 2011 and April 2013, the Applicants individually filed the Referrals with the Constitutional Court.
9. The President of the Court appointed Judge Kadri Kryeziu as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Enver Hasani and Ivan Cukalovic.
10. On 5 July 2013, the Review Panel, pursuant to Rule 37 of the Rules of Procedure, made a recommendation to the Court on the joining Referrals KI25/12, KI100/12 and KI49/13 to the Referral KI53/11, and on admissibility of the Referrals. On the same date, the Court deliberated the joined Referrals.

Summary of the facts

11. In general, the facts of these Referrals are identical to those cases abovementioned under paragraph 4.
12. In fact, in the course of 2001 and 2002, the Applicants signed an Agreement for Temporary Compensation of Salary for Termination of Employment Contract with their employer Kosovo Energy Corporation (hereinafter, KEK).
13. Article 1 of the Agreement 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 Applicants) is entitled to a temporary compensation due to early termination of the employment contract until the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.
14. Furthermore, Article 2 of the Agreement specified that the amount to be paid monthly to each Applicant was to be 206 German Marks.
15. In addition, Article 3 of the Agreement 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".
16. 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"

17. 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.
18. According to the Decision of 25 July 2006, all beneficiaries were guaranteed full payment in line with the Fund Statute. The Decision further 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.
19. 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".
20. In the summer of 2006, KEK terminated the payment stipulated by the Agreement without any notification.
21. 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.
22. 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. 138/2007 of 21 March 2008 in the case of the first Applicant Isa Grajqevci*) 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".
23. 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. 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.
24. The District Court rejected as ungrounded the appeals of KEK
25. KEK submitted a revision to the Supreme Court, arguing an alleged essential violation of the Law on Contested Procedure and erroneous application of material law. KEK 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. KEK further argued that the age of the applicant was not relevant but that his invalidity was.

26. The Supreme Court rejected as unfounded the Applicants' lawsuits and quashed the judgments of the District and Municipal. The Supreme Court concluded that the termination of employment was lawful pursuant to Article 11.1 of UNMIK Regulation 2001/27 on the Basic Labour Law in Kosovo.
27. In the Judgment of the applicant Isa Grajčevci (Rev. No. 196/2009 of 23 June 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..."*
28. On 15 May 2009, 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)"*.

Allegations of the parties

29. The Applicants claim that the termination of the payment is in contradiction to the signed Agreement.

30. 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 KI No. 40/09, KEK contested the Applicants' allegations, arguing that it was widely known that the Invalidity Pension Fund had been functioning since 1 January 2004.
31. 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).
32. 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.
33. 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.
34. In sum, the Applicants claim that their rights to property and to fair trial have been violated by the decision of KEK unilaterally annulling their Agreements. The Applicants further claim that they have not been able to remedy such violation before the regular courts.

Admissibility of the Referrals

35. The Court first examines whether the Applicants have fulfilled the admissibility requirements as laid down in the Constitution and the Law.
36. In this connection, the Court refers to Article 113.7 of the Constitution, which establishes:

"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".

37. The Court also refers to Article 47.2 and 49 of the Law. Article 47.2 provides that *"The individual may submit the referral in question only after he/she has exhausted all legal remedies provided by the law"*. Article 49 provides that *"The referral should be submitted within a period of four (4) months (...)"*.
38. The Court notes that in the present case, as in the identical cases, 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 and there is a continuing situation. Thus as the circumstance on the basis of which the Applicants complain continued, the four months period prescribed in Article 49 of the Law is inapplicable to these cases.

39. The Constitutional Court also notes that the Applicant Ramadan Imeri was older than 65 years at the time of submitting his Referral to this Court. In fact, 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.
40. 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". Consequently, the Applicants are entitled for pension from the moment when they reached the age of 65.
41. Therefore, the Referral of the Applicant Ramadan Imeri is partly admissible. With regard to the remaining Applicants, the Court does not find any reason for inadmissibility of the Referrals, as they are authorized parties, have no legal remedies to exhaust and the four months period is not applicable to the Referrals.

Substantive aspects of the Referrals

i. As regards the Protection of Property

42. The Applicants claim 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, Article 46 and 53 of the Constitution, and Article 1 of Protocol No. 1 of the ECHR should be recalled.

Article 53 [Interpretation of Human Rights Provisions] of the Constitution establishes:

"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:

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 identical cases).
46. The question 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 identical cases).
47. The Court notes that, at the time of concluding the Agreements between the Applicants and KEK, these type of agreements have been regulated namely by Article 74 (3) 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. Therefore, the crux of the matter is whether the rescinding condition under which the Agreements were signed has been met. The Answer to that question will allow the Constitutional Court to assess whether the circumstances of this Referral, considered as a whole, confer on the Applicants a title to a substantive interest protected by Article 1 of Protocol No. 1 to the ECHR.
49. The Constitutional Court notes that it is undisputable between the parties that the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance is the “rescinding condition” under which the Agreements have been signed.

50. In this respect, the 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 a monthly indemnity 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 it is based on a legal provision or a legal act, i.e. Agreement with KEK (see the judgements in the identical cases); 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 the judgements in the identical cases).
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 identical cases).
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 ECHR.

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 regular courts*.
57. The Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 of the ECHR.

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

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 ECHR reads:

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

58. The 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 regular 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 regular 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).
59. 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 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).
60. 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.
61. Moreover, it is 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 identical cases).
62. In the present case, the Applicants requested the regular 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.
63. 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's 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.
64. It is not the task of the Constitutional Court to decide what would have been the most appropriate way for the regular 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.

65. However, the Court considers that 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 identical cases).
66. Before the foregoing, 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:**

I. TO DECLARE

- a) Admissible in total the Referrals KI53/11, KI25/12 and KI100/12, respectively filed by the Applicants Isa Grajqevci, Fehmi Ajvazi and Musli Nuhiu;
- b) Admissible in part the Referral KI49/13 filed by the Applicant Ramadan Imeri;

II. 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;
- b) There has been violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights;

III. TO DECLARE INVALID the judgments delivered by the Supreme Court in the cases of the Applicants
Isa Grajqevci, Rev. no. 196/2009, dated 23 June 2009;
Fehmi Ajvazi, Rev. no. 111/2009, dated 2 June 2009;
Musli Nuhiu, Rev. no. 370/2008, dated 23 February 2009 and
Ramadan Imeri, Rev. no. 264/2008, dated 10 December 2009;

IV. TO REMAND these Judgments to the Supreme Court for reconsideration in conformity with the judgment of this Court, pursuant to Rule 74 (1) of the Rules of Procedure;

V. TO ORDER the Supreme Court to submit information to the Constitutional Court about the measures taken to enforce this Judgment of the Constitutional Court in accordance with Rule 63 (5) of the Rules of Procedure;

- VI. TO NOTIFY** the Judgment to the Parties;
- VII. TO PUBLISH** this Judgment in the Official Gazette, in accordance with Article 20 (4) of the Law;
- VIII. TO DECLARE** this Judgment immediately effective;
- IX. TO REMAIN** seized of the matter pending compliance with that Order.

Done at Prishtina this day of 14 October 2013

Judge Rapporteur

President of the Constitutional Court


Kadri Kryeziu




Prof. Dr. Enver Hasani