



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

Pristina, 12 April 2012
Ref. No.: AGJ.193/12

JUDGMENT

in

Case No. KI 103/10

Applicant

Shaban Mustafa

Constitutional Review of the judgment of the Supreme Court, Rev. no. 406/2008, dated 3 September 2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Mr. Shaban Mustafa, owner of the Company “Beni Dona”, represented by Mr. Hasan Përvetica, an attorney from Podujeva.

Challenged decision

2. The Applicant challenges the judgment of the Supreme Court, Rev. no. 406/2008 of 3 September 2010, which was served on the Applicant on 6 October 2010.

Subject matter

3. The Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 12 October 2010, requesting it to review the constitutionality of the judgment of the Supreme Court, Rev. no. 406/2008.
4. The Applicant claims that the challenged decision has violated his rights guaranteed by Articles 3.2 [Equality Before the Law], 24.1 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "ECHR").
5. The Applicant complains, in particular, that the Supreme Court rendered a judgment without the Applicant having been notified and summoned to take part in the proceedings in the same way as the public prosecutor.

Legal basis

6. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121) (hereinafter: the "Law") and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Constitutional Court

7. On 12 October 2010, the Applicant submitted the Referral to the Court.
8. On 16 December 2010, the President, by Decision No. GJR. 103/10, appointed Judge Robert Carolan as Judge Rapporteur. On the same date the President, by Decision, No. KSH. 103/10, appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Ivan Čukalovič and Kadri Kryeziu.
9. On 19 January 2011, the Court communicated the Referral to the Supreme Court.
10. On 22 September 2011, the Court communicated the Referral to the Office of the Chief State Public Prosecutor in Pristina and asked it to submit its comments with respect to the Referral.
11. On 24 January 2012, the Office of the Chief State Prosecutor replied that they supported the Judgment of the Supreme Court, Rev. no. 406/2008, dated 3 September 2010, and that the Applicant's rights as guaranteed by the Constitution had not been violated.

12. On 7 March 2012, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

Summary of facts

13. On 16 September 1996, the “Beni Dona” Company owned by the Applicant, entered into a contract with the Municipality of Podujeva for the lease of the premises of the former Hotel “Llab” in Podujeva for a period of 10 years on the condition that the “Beni Dona” Company would rehabilitate it at its own costs for the amount of 342.760,00 Deutsche Marks. After the expiration of the lease contract, the Municipality of Podujeva would decide on the extension or termination of the lease contract to the effect that, if the Municipality decided to terminate the lease contract, it would have to return the amount spent on the rehabilitation of the Hotel to the “Beni Dona” Company.
14. From 2002 to 2005, upon the request of the Municipality of Podujeva, the “Beni Dona” Company paid, in addition to the rehabilitation costs, also property taxes on the leased property. Since these charges were so high and not foreseen in the lease contract, the “Beni Dona” Company was not able to pay them and requested the Municipality of Podujeva to clarify what the obligations of the “Beni Dona” Company were and to solve the situation by either continuing the lease, thereby deducting from the amount due to the Company a sum of 550 Euros as rent for each month until the equalization of the total amount of rehabilitation costs, or by returning the leased premises to the Municipality which would then pay to the Company the amount invested in the reconstruction of the Hotel, as provided in the Contract of 16 September 1996, which, converted into Euros, would be an amount of 171.380,00 Euros.
15. Since the Municipality of Podujeva did not respond to the Company’s request, the Applicant filed a claim against the Municipality with the Municipal Court of Podujeva on 6 June 2007, requesting the court to rule that either the Municipality returns the investment in the amount of 171.380 Euros, or to continue the use by the Company of the leased premises for ten years by deducting from the invested amount a rent of 550 Euros/month, until the amount would be equalized.
16. On 9 November 2007, the Municipal Court of Podujeva, by Judgment C. no. 155/2007, admitted the claim of the Applicant, ordering the Municipality of Podujeva to either return the invested funds to the Company or to continue the lease contract for another ten years.
17. On 9 November 2007, the Municipality appealed to the District Court of Pristina against this Judgment.
18. On 28 May 2008, the District Court of Pristina, by Judgment Ac. no. 28/2008, rejected the appeal of the Municipality as ungrounded, maintaining that the enacting clause of the judgment of the Municipal Court was comprehensible and suitable for execution and that, in its reasoning, the court had provided complete and comprehensible reasons on all facts of decisive importance and, therefore, the reasoning provided was fully compatible with the content of the evidence examined.

19. Within the legal deadline, the Municipality of Podujeva filed a revision against the judgments of the Municipal and District Court with the Supreme Court. At the same time, the Public Prosecutor filed a request for protection of legality with the same court, proposing to quash the judgments of the lower instance courts on the basis of substantial violations of the contested procedure provisions and erroneous application of material law, and to re-open the case at the first instance court.
20. On 3 September 2010, in the presence of the Public Prosecutor, the Supreme Court granted the request for protection of legality submitted by the Public Prosecutor as well as the revision filed by the Municipality of Podujeva, ruling that the Municipality of Podujeva was not now legally responsible for a lease contract between the Applicant and the former Municipal Assembly of Podujeva signed in 1996. The Court based its reasoning on UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo (hereinafter: "UNMIK Regulation 1999/1") and UNMIK Regulation 2000/45 on Self-Government of Municipalities in Kosovo (hereinafter: "UNMIK Regulation 2000/45") to the effect that these UNMIK Regulations changed the legal status of the Municipality of Podujeva from that of a legal person in 1996, when the lease was signed, to a separate legal status. Further, the Supreme Court concluded that this change of legal status of the Municipality eliminated any legal obligations which it may have had, before the UNMIK Regulations were adopted. Therefore, the Supreme Court found that, based on this situation and the evidence examined, the lower instance courts, had erroneously applied the material law, when finding the claim of the Applicant grounded and concluded that the 1996 lease agreement between the Applicant and the Municipality of Podujeva was no longer legally binding upon that Municipality.
21. The Supreme Court, therefore, approved the request for protection of legality submitted by the Public Prosecutor and the revision filed by the Municipality of Podujeva, thereby amending both judgments of the lower instance courts and rejecting as ungrounded the claim suit of the Applicant.

Applicant's allegations

22. The Applicant alleges that the reasoning of the Supreme Court is erroneous, in that it concluded that the Company had entered into a contract with the former Municipality of Podujeva in 1996, which, after the war, was not succeeded by the present Municipality of Podujeva and, therefore, that Municipality was not bound to assume the obligations of the 1996 contract. In his opinion, the Municipality of Podujeva was, indeed, not the political successor to the former Municipality, but had enjoyed the legal succession to that Municipality in terms of rights and obligations, since it had been established on the same premises and managed the same immovable properties as before and, since it had admitted that it was the owner of the leased premises, it had to also accept the obligations connected to this facility.
23. In the Applicant's opinion, UNMIK Regulation No. 1999/1 did not declare the existing contracts between parties invalid, even where one of the parties was a

municipality, since such contracts could not be considered as a “state act” governed by UNMIK Regulation No. 1999/1.

24. The Applicant further alleges that the Supreme Court decided on the revision of the Municipality of Podujeva and the request for protection of legality of the Public Prosecutor in a session held on 3 September 2010 only in the presence of the Public Prosecutor of Kosovo, without having invited the Applicant’s representative.
25. In this connection, the Applicant claims that the Judgment of the Supreme Court was, therefore, handed down in violation of Articles 3.2 [Equality Before the Law], 24.1 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 of ECHR, because no representative of the “Beni Dona” Company was either notified or present at the proceedings before the Supreme Court. Hence, according to the Applicant, the parties to the proceedings were not treated equally.

Applicable legal provisions regarding the request for protection of legality

26. The request for protection of legality is regulated by the Law on Contested Procedure of 20 September 2008.

Relevant Articles of Law (No. 03/L-006) on Contested Procedure

Article 250:

“The competent public prosecutor shall be notified of the proceedings in which the court shall decide on the request for protection of legality”.

Article 251:

“When the court decides on the request for protection of legality, it shall be limited to only examining the violation mentioned by the public prosecutor in his request”.

Assessment of admissibility of the Referral

27. The Applicant complains that the Judgment of the Supreme Court violated Articles 3.2 [Equality Before the Law], 24.1 [Equality Before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 ECHR, because, unlike the Public Prosecutor, no representative of the “Beni Dona” Company had been invited to participate in the proceedings in which the Supreme Court had decided on the request for protection of legality. Hence, he, as the Company’s representative had not been treated equally.
28. The Court first observes that, in order for the Referral to be admissible, the Applicant must first show that he has fulfilled all admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.
29. In this respect, the Court needs to determine whether the Applicant can be considered as an authorized party, pursuant to Article 113.7 of the Constitution,

stating that: “*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*”. Furthermore, pursuant to Article 21.4 of the Constitution “*Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable*”. In the present Referral Mr. Shaban Mustafa, owner of the “Beni Dona” Company, contests the constitutionality of Judgment Rev. no. 406/2008 of the Supreme Court, dated 3 September 2010, directed against the Company. Therefore, the Applicant must be considered as an authorized party, entitled to refer this case to the Court and to have exhausted all legal remedies as provided by law, pursuant to Article 113.7 of the Constitution.

30. As to the requirement of Article 49 of the Law that the Applicant must have submitted the Referral within a period of four (4) months to be counted from the day upon which he has been served with the final court decision, the Court determines from the submissions of the Applicant that the Company was served with the above Judgment of the Supreme Court on 6 October 2010, while the Applicant submitted the Referral to the Court on 12 October 2010, i.e. within the four months time limit as provided by Article 49 of the Law.

31. Since the Applicant has set out in detail what rights under the Constitution and the ECHR have allegedly been violated and by what public authority, the Court also finds that the Applicant has fulfilled the requirement of Article 48 of the Law, stipulating 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”.

32. In these circumstances, the Court concludes that the Applicant must be considered to have fulfilled all admissibility requirements and that it now needs to examine the merits of the Referral.

Legal assessment of the Referral

33. In the present case, the Court notes that the Municipal Court in Podujeva, by Judgment C. no. 155/2007, admitted the Applicant’s claim ordering the Municipality of Podujeva to either return the invested funds to the Company or to continue the lease contract concluded between them for another ten years. This judgment was appealed by the Municipality to the District Court of Pristina, which rejected the appeal on 28 May 2008. Against this Judgment, the Municipality of Podujeva filed a revision with the Supreme Court, while, at the same time, the Public Prosecutor submitted a request for protection of legality to the same court.

34. On 3 September 2010, the Supreme Court found, by Judgment Rev. no. 406/2008, that the Public Prosecutor’s request for protection of legality as well as the revision of the Municipality of Podujeva were grounded and that the legal conclusion of the lower instance courts that the Municipality was bound to perform the obligations of a contract dating from 1996, signed between the Company and the Municipality Assembly of Podujeva, could not be accepted.

35. In this regard, the Court notes that, at the material time, the Public Prosecutor – without having been a party to the proceedings before the lower instance courts – exercised the power under Article 245(2) of Law No. 03/L-006 on Contested Procedure of Kosovo to submit a request for protection of legality concerning, inter alia, a decision of the second instance court, against which one of the parties had filed a revision, within a time limit of thirty days to be counted from the date on which the revision was delivered to that party.
36. The Court further notes that, according to the submissions of the Applicant, the Supreme Court’s Judgment of 3 September 2010, was rendered in the presence of the Public Prosecutor, but without the Applicant having been notified and summoned to take part in the proceedings in the same way as the Public Prosecutor. Thus, in the Applicant’s opinion, the Supreme Court had not treated him equally and had, therefore, violated his right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of ECHR.
37. Article 31 [Right to Fair and Impartial Trial] of the Constitution provides, inter alia,:
1. *Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
 2. *Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.*
- [...]”
38. Article 6 (1) [Right to Fair Trial] ECHR provides:
- “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*
- [...]”.
39. The Court reiterates that, pursuant to 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”*.
40. As to the Applicant’s complaint that he had not been notified and summoned to participate in the proceedings before the Supreme Court, the Court refers to the approach of ECtHR in similar cases. For instance, in the Grozdanoski Case (see *Grozdanoski v. The Former Yugoslav Republic of Macedonia*, no. 21510/03, of 31 May 2007), the ECtHR concluded that, in civil proceedings, the principle of equality of arms implies that each party must be afforded a reasonable opportunity to present his or her case - including evidence – under conditions that do not place him/her at a substantial disadvantage vis-à-vis his/her

opponent. According to the ECtHR, the concept of a fair trial, of which equality of arms is one aspect, implies the right for the parties to have knowledge of and to comment on all evidence adduced or observations filed.

41. Moreover, in the Grozdanoski case, the public prosecutor had filed a request for the protection of legality, but the Applicant had never been notified about this. The public prosecutor's request led to the Supreme Court's decision which was to the applicant's significant disadvantage. The ECtHR considered that procedural failure to not notify the applicant had prevented the applicant from effectively participating in the proceedings before the Supreme Court of Macedonia.
42. The ECtHR was also of the opinion that Article 6 (1) ECHR is intended, above all, to secure the interests of the parties and those of the proper administration of justice, while respect for the right to a fair trial, guaranteed by Article 6 (1) ECHR, required that the applicant be given an opportunity to have knowledge of, and to comment upon the public prosecutor's request. Consequently, by failing to notify the applicant of the public prosecutor's request for protection of legality filed with the Supreme Court of Macedonia, the ECtHR found that there had been a violation of Article 6 (1) ECHR.
43. The Court further refers to the Gusak case, (See Gusak v. Russia, 7 June 2011, Application no. 28956/05, para 27.), where the ECtHR considered that *"a litigant should be summoned to a court hearing in such a way as not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare his case and to attend the court hearing."*
44. In the Court's view, public prosecutors, when acting outside the criminal law field, should enjoy the same rights and obligations as any other party in the proceedings and should not enjoy a privileged position, which violates the principle of equality of arms as part of the right to a fair trial, guaranteed by Article 31 of the Constitution and Article 6 ECHR.
45. The Court also refers to its own case law, in particular, to Case KI 108/10, Fadil Selmanaj - Constitutional Review of Judgment of the Supreme Court of Kosovo, A. no. 170/2009 of 25 September 2009, where it ruled that *"the Applicant should have been summoned to the court proceedings in such a way as not only to have knowledge of its existence, but also to present arguments and evidence during the course of the proceedings."*
46. As to the present case, the Applicant could not have exercised his right to a fair trial without being present at these proceedings before the Supreme Court. Therefore, by not notifying the Applicant of the request for protection of legality lodged by the Public Prosecutor and by not inviting him as a party to the proceedings before the Supreme Court, the Supreme Court, in its Judgment of 3 September 2010, infringed the Applicants' right to a fair trial under Article 31 of the Constitution and Article 6 (1) ECHR.
47. As to the other issues raised in the Referral, the Court observes that the Applicant can raise such issues in the proceedings before the Supreme Court.

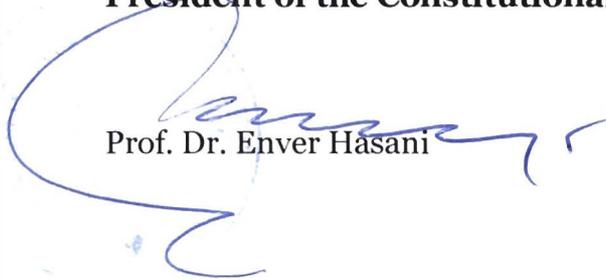
FOR THESE REASONS, THE COURT UNANIMOUSLY

- I. Declares the Referral Admissible;
- II. Holds that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (1) [Right to Fair Trial] of the European Convention on Human Rights and Fundamental Freedoms;
- III. Declares null and void the Judgment of the Supreme Court of Kosovo, Rev. no. 406/2008 of 3 September 2010;
- IV. Remands that Judgment to the Supreme Court for reconsideration in conformity with the judgment of this Court;
- V. Remains seized of the matter pending compliance with that Order;
- VI. Orders this Judgment to be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;
- VII. Declares that this Judgment is effective immediately.

Judge Rapporteur


Robert Carolan

President of the Constitutional Court


Prof. Dr. Enver Hasani