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

Prishtina, 23 December 2013
Ref. No.: RK531/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI151/13

Applicant

Sitkije Morina

Constitutional Review
of the Judgment of the Supreme Court, Rev. No. 176/2012
of 18 April 2013

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

The Applicant

1. The Referral is submitted by Mrs. Sitkije Morina (hereinafter: the Applicant), represented by Mr. Sahit Bibaj.

Challenged decision

2. The challenged Decision is the Judgment of the Supreme Court, Rev. No. 176/2012 of 18 April 2013, which was served on the Applicant on 24 May 2013.

Subject matter

3. The subject matter is the request for constitutional review of the Judgment of the Supreme Court Rev. No. 176/2012 dated 18 April 2013. In its Judgment, the Supreme Court, in the part related to compensation for material damage, decided to uphold the judgments of lower court instances, whereby the Insurance Company was obliged to pay to the Applicant the compensation in the amount of 1,500.00 € plus the specified interest rate. Whereas for the part related to compensation for non-material, namely the rehabilitation costs and specified interest, it decided to remand the case for retrial to the first instance court.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Rule 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 24 September 2013, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 30 September 2013, the President appointed Judge Snezhana Botusharova as Judge Rapporteur. The Review Panel composed of Judges: Altay Suroy (presiding), Almiro Rodrigues and Enver Hasani.

7. On 17 October 2013, the Court informed the Applicant of the registration of the Referral and requested to submit the power of attorney for representation before the Constitutional Court.

8. On 23 October 2013, the Applicant submitted to the Court the power of attorney.

9. On 28 October 2013, the Court notified the Supreme Court of the registration of the Referral.

10. On 5 December 2013, the Review Panel considered the report of Judge Rapporteur and made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts

11. On 3 June 2005, the Applicant, as a co-passenger in a car was the victim of a traffic accident, suffering bodily injuries.

12. On 2 May 2007, the Applicant with the Municipal Court in Rahovec filed a claim against the Insurance Company for damage compensation.

13. On 17 October 2007, the Municipal Court in Rahovec in its Judgment (C. No. 129/07) approved the claim of the Applicant.

14. As a result of an appeal filed by the Insurance Company, on 8 June 2009, the District Court in Prizren in its Judgment (Ac. No. 82/08) partially upheld the Judgment of the Municipal Court in Rahovec (C. No. 129/07, dated 17 October 2007) concerning the material damage, whereas the part referring to the bodily disfigurement and rehabilitation was remanded for retrial.

15. Consequently, on 27 August 2009, the Municipal Court in Rahovec, with its Judgment (C. No. 188/09) approved the claim of the Applicant and obliged the Insurance Company to pay to the Applicant the compensation in the amount of 1,500.00 € for the bodily disfigurement and 1,200.00 € for the physiotherapeutic-climatic rehabilitation, beginning from 2 May 2007 until the final payment of the debt, including the procedure expenses in the amount of 1,050.00 €.

16. Against the Judgment of the Municipal Court in Rahovec (C. No. 188/09, dated 27 August 2009), the Insurance Company filed an appeal with the District Court in Prizren.

17. On 5 March 2012, the District Court in Prizren in its Judgment Ac. No. 64/2010 rejected the appeal of the Insurance Company as ungrounded and upheld the Judgment of the Municipal Court in Rahovec (C. No. 188/09, dated 27 August 2009).

18. On 19 April 2012, against the Judgment of the District Court in Prizren (Ac. No. 64/2010, dated 5 March 2012), the Insurance Company filed a revision with the Supreme Court.

19. In its revision submitted to the Supreme Court, the Insurance Company alleged the following:

> *[...]*
> *"The approval of claim for medical rehabilitation is not based on evidence and facts, it is not proven by any evidence that the claimant was in rehabilitation and physiotherapy treatment.*
> *[...]*
> *Likewise, the court of first instance decides in violation with the legal provisions and with regards to decisions on procedure expenses as well on the interest rate of 20 %, which is not permitted and is in contradiction with the case law. This interest rate is inadmissible in case law and the same constitutes the element of an ungrounded benefit, since the adjudicated*

amount is smaller in comparison with adjudicated interest rate, which is not known whether it is monthly or it is an interest rate, which will be counted only at the moment of compensation".

20. On 18 April 2013, the Supreme Court in its Judgment Rev. No. 176/2012 decided:

I. To reject as ungrounded the revision filed by the Insurance Company for the part referring to non-material damage in the name of bodily disfigurement at the amount of 1,500.00 €, including the specific interest rate, starting from 17 October 2007, the day the judgment of the court of first instance was rendered until the final payment; and

II. To approve as grounded the revision and quash the Judgments of the Municipal Court in Rahovec (C.no.188/09, dated 27 August 2009) and District Court in Prizren (Ac.no.64/2010, dated 5 March 2012) for the part referring to the decision on material damage, namely the rehabilitation, the interest rate for non-material damage, as well as the procedure expenses. For this part, the Supreme Court decided to remand the case to the court of first instance for retrial.

21. Referring to the part of the decision on rejecting the revision related to non-material damage, the Supreme Court found that:

[...]
"The court of second instance, in the appeal procedure approved in entirety the factual conclusion and the legal stance of the court of first instance, finding that the challenged judgment does not constitute substantial violations of contested procedure and with regards to relevant facts it contained sufficient reasoning, and therefore it rejected the appeal of the respondent as ungrounded and upheld the judgment of the court of first instance."
[...]

22. With regards to the part of the decision on approving the revision related to material damage, filed by the Insurance Company, the Supreme Court held that:

[...]
" The court of first instance, in the part of enacting clause related to material damage, namely physiotherapeutic and climatic rehabilitation, has erroneously applied the substantive law, for the reasons that the factual situation was not completely determined, when for the physiotherapeutic rehabilitation it accorded the amount of 1.120 €, therefore this Court for the time being cannot approve such conclusion of the lower instance courts.

According to the conclusion of the medical expert [...], the claimant needed physiotherapeutic – climatic treatment, but the court of first instance has not determined the fact if the claimant was in physiotherapeutic – climatic treatment to confirm that claimant suffered material damages in relation to rehabilitation.

Therefore, in order to determine these facts, the court of first instance during the retrial is obliged to eliminate the abovementioned flaws so that in relation to climatic treatment it should order the claimant to bring to the court the evidence with regards to physiotherapy from the respective institution, in order to be able to determine the amount paid for this period, in case the claimant was in a rehabilitation institution, she should prove that there were material damages in relation to rehabilitation and after determination of these circumstances as well as other eventual evidence, to be able to render fair and lawful decision.

Likewise, in the case of determination of the interest rate amount in the name of non-material damage for bodily disfigurement and physiotherapeutic and climatic rehabilitation, the court of first instance set the interest rate of 20 % counting it from the day the claim was filed without providing clear and complete reasoning in relation to determination of the interest rate amount and the date of counting the interest rate for non-material damage.

Taking into account that the judgment of the first instance court was quashed in the part referring to material damage, the decision in relation to costs of proceedings had also to be quashed."

Applicant's allegations

23. The Applicant alleges violation of Article 24.2 [Equality before the Law], Article 31 [The Right to Fair and Impartial Trial] and Article 102.3 [General Principles of the Judicial System] of the Constitution and the provisions of the Law on Contested Procedure.

24. The Applicant argues that by the Judgment of the Supreme Court, namely in the part whereby it decided to approve the revision filed by the Insurance Company and remand the case for retrial to the first instance court: [...] *"her rights to fair and impartial trial were violated, since the parties in proceeding are not treated equally, and that the above mentioned court has not reviewed the evidence and facts that the claimant provided, namely in its response to revision, since that according to the applicable law [...]"*

25. The Applicant further claims that *[...]" firstly the revision was supposed to be rejected as inadmissible pursuant to Article 211.1 of LCP [Law on Contested Procedure], for the reason that the revision is filed against the judgment of the court of first instance and not against the judgment of second instance as it is provided by law, and secondly the revision is filed based on object of contest that does not exceed 3,000.00 €, which is in contradiction with Article 211.2 of LCP. And according to this second criterion, the revision had to be rejected as inadmissible. "*

26. The Applicant *concludes, requesting the Court*:

"To conclude that by final Judgment of the Supreme Court of Kosovo Rev.no.176/2012 of 18.04.2013 item II of enacting clause of judgment, there

are violations of the Constitution and applicable law, right to fair and impartial trial, in compliance with Constitution and Law.

The Judgment of Supreme Court of Kosovo, Rev.no.176/2012 of 18.04.2013, paragraph II of enacting clause to be annulled and revision of the respondent to be rejected as inadmissible by law."

27. With regards to the Applicant's claims and request addressed to the Court, the Applicant's allegations are to be divided as following:

A. Allegation regarding the decision of the Supreme Court to remand the case for retrial to the first instance court; and

B. Allegation regarding the admissibility of the revision.

Assessment of admissibility of the Referral

28. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

As to the Applicant's first allegation related to the decision of the Supreme Court to remand the case for retrial to the first instance court

29. In this respect, the Court refers to Article 113, paragraph 7, of the Constitution, which establishes 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."

30. Article 47 (2) of the Law on Constitutional Court also provides:

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

31. In the concrete case, the Supreme Court in its Judgment Rev. No. 176/2012 approved the revision of the Insurance Comapany for the part related to material damage, whereby it decided to quash the Judgments of the Municipal Court in Rahovec (C.no.188/09, dated 27 August 2009) and the District Court in Prizren (Ac.no.64/2010, dated 5 March 2012) and remand the case to the court of first instance for retrial.

32. Thus, the Referral is premature because the Applicant's case referring to the rehabilitation costs, interest rate and procedure expenses related to material damage is still ongoing in a regular judicial procedure.

33. In this respect, the Court reiterates that the regular courts are independent in exercising their legal powers and it is their constitutional obligation and

prerogative to interpret issues of fact and law which are relevant for the cases raised before them.

34. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (See case KI 41/09, Applicant AABRIINVEST University L.L.C, Resolution on Inadmissibility of 21 January 2010, and see *mutatis mutandis,* Selmouni vs. France, no. 25803/94, ECtHR, Decision of 28 July 1999*).*

35. The principle of subsidiarity requires that the Applicant has exhausted all procedural means in a regular proceeding, administrative or judicial, so that constitutional violations are prevented, or in case they happen, to rectify such violation of basic rights. (See, case KI 07/09, Applicants Demë Kurbogaj and Besnik Kurbogaj, Resolution on Inadmissibility of 19 May 2010).

36. Consequently, the Court cannot assess any alleged constitutional violations, without the regular courts having the possibility to complete the pending procedure and correct the alleged violations.

As to the Applicant's allegation on the inadmissibility of the Revision of the Supreme Court

37. The Applicant alleges that the Supreme Court should have rejected the revision filed by the Insurance Company as inadmissible. In this respect, she argues that*: [...]" firstly the revision was supposed to be rejected as inadmissible pursuant to Article 211.1 of LCP [Law on Contested Procedure], for the reason that the revision is filed against the judgment of the court of first instance and not against the judgment of second instance as it is provided by law, and secondly the revision is filed based on object of contest that does not exceed 3,000.00 €, which is in contradiction with Article 211.2 of LCP. And according to this second criterion, the revision had to be rejected as inadmissible.*

38. In this regard, the Court also takes into account Rule 36 of the Rules of Procedure, which provides:

> *"(1) The Court may review referrals only if: (c) The referral is not manifestly ill-founded."*

39. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as it may have infringed rights and freedoms protected by the Constitution (constitutionality).

40. In this connection, the Constitutional Court reiterates that it is not its task under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis*, García Ruiz v. Spain, No. 30544/96, ECtHR, Judgment of 21 January

1999, para. 28; see also case No. KI70/11, Applicants Faik Hima, Magbule Hima and Bestar Hima, Resolution on Inadmissibility of 16 December 2011).

41. Moreover, the Supreme Court in its Judgment for the part referring to non-material damage rejected the revision filed by the Insurance Company and upheld the Judgment of the lower instance Court. For this part, the Supreme Court obliged the Insurance Company to pay to the Applicant the amount of 1,500.00 € plus the specified interest, this being a decision in favor of the Applicant. Whereas, for the part referring to material damage, namely the rehabilitation costs plus specific interest rate, the Supreme Court decided to remand the case for retrial in the first instance Court.

42. Consequently, the Court considers that the Applicant cannot claim to be a victim of violation of constitutional rights while the proceedings related to material damage are still pending before the Court and furthermore the decision of the Supreme Court to uphold the Judgments of the lower instance courts related to non-material is a decision in her favor.

43. In general, the Court concludes that the Applicant's Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49, paragraph 2, of the Law and Rules 36. (1) a) and 36. (2) c) of the Rules of Procedure, on 23 December 2013, unanimously:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision effective immediately

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Prof. Dr. Enver Hasani