



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

Prishtina, on 12 November 2018
Ref. no.: RK 1289/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI54/18

Applicant

Shaip Sylaj

Constitutional review of Judgment ARJ. UZVP. No. 63/2017 of the Supreme Court of 7 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Applicant is Shaip Sylaj from village Sllapuzhan, Municipality of Suhareka (hereinafter: the Applicant).

Challenged decision

2. The challenged decision is Judgment UZVP. No. 63/2017 of the Supreme Court of Kosovo of 7 December 2017, which rejected as ungrounded the Applicant's request for extraordinary review against Judgment AA. UZH. No. 298/2017 of the Court of Appeals of 28 September 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's rights guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, in an administrative session the Court adopted the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force (fifteen) 15 days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 2 April 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 11 April 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.
8. On 8 May 2018, the Court notified the Applicant about the registration of the Referral and requested him to complete the referral form, to submit legible copies of the Judgments of the Supreme Court UZVP. No. 63/2017, of 7 December 2017 and of the Court of Appeals, AA. Uzh. No. 298/2017 of 28 September 2017, as well as a copy of the Decision of the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: the IOBCSK), No. 1363/09 of 8 July 2009. On the same date, the Court sent a copy of the Referral to the Supreme Court.
9. On 30 May 2018, the Applicant submitted the completed form and the copies of the Judgments of the Basic Court and of the Court of Appeals, but did not submit a copy of the IOBCSK Decision No. 1363/09, of 8 July 2009.

10. On 16 June 2018, the mandate of Judges: Almiro Rodrigues and Snezhana Botusharova ended. On 26 June 2018, the mandate of Judges Altay Suroy and Ivan Čukalović ended.
11. On 26 July 2018, the Court requested again the Applicant to submit a copy of the IOBCSK Decision No. 1363/09 of 8 July 2009, and also to submit the statement of claim filed by him with the Basic Court, the appeal to the Court of Appeals and his request for extraordinary review of the Judgment of the Court of Appeals in the Supreme Court.
12. On 6 August 2018, the Applicant submitted to the Court the IOBCSK Decision of 8 July 2009, the statement of claim filed with the Supreme Court on 29 July 2009, the minutes of the public hearing in the Basic Court of 12 April 2017, the appeal filed with the Court of Appeals, as well as the request for extraordinary review of the Judgment of the Court of Appeals filed with the Supreme Court.
13. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
14. On 11 September 2018, the President of the Court appointed a new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani (members).
15. On 10 October 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

16. On 9 February 2009, the Disciplinary Committee of the Municipality of Suhareka (hereinafter: the Employer), due to the violation of his work duties, imposed on the Applicant a severe disciplinary measure of the demotion in the job position from “responsible for vehicle maintenance and central heating” to the position “firefighter - driver”.
17. Against the abovementioned decision of the Employer, the Applicant filed a complaint with the Appeals Commission of the Employer.
18. On 24 March 2009, the Appeals Commission rejected the Applicant's appeal.
19. Against the Decision of the Appeals Commission, the Applicant filed a complaint with the IOBCSK.
20. On 8 July 2009, IOBCSK, by Decision 1363/09, rejected the Applicant's complaint as ungrounded.
21. The IOBCSK in its decision found that the Employer did not commit a violation when imposing the disciplinary measure “*as the latter was assigned to work duties that correspond to his professional qualification and work experience and is not damaged in salary [...]*”. The IOBCSK concluded that the Employer during the conduct of the disciplinary proceedings had implemented all the legal provisions in

force and all the procedures were conducted according to the deadlines established by the relevant legal acts in force.

22. On 29 July 2009, the Applicant filed a statement of claim with the Supreme Court requesting that the abovementioned Decision of the IOBCSK be annulled. In his statement of claim, the Applicant alleges that regarding the Employer's decision on demotion in position he was not notified at all and that the Employer's bodies had to administer all the evidence prior to making a decision.
23. On 10 May 2017, the Basic Court in Prishtina, the Department for Administrative Matters (hereinafter: the Basic Court), by Judgment A. No. 1796/2015, rejected as ungrounded the Applicant's statement of claim against the IOBCSK Decision 1363/09 of 8 July 2009.
24. The Basic Court in its Judgment found that the Applicant was imposed disciplinary measures of demotion in position due to the violations of his work duties. Subsequently, the Basic Court found that the disciplinary proceedings by the Disciplinary Committee of the Employer were conducted in accordance with the legal provisions in force. Consequently, the Basic Court concluded that the Employer's bodies, as well as the IOBCSK, have correctly established the factual situation and rightly rejected the Applicant's complaints as ungrounded.
25. Against the Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals. In his appeal, the Applicant alleged essential violation of the Law on Administrative Conflict and erroneous determination of factual situation. The Applicant in particular alleges that he was not heard by the Basic Court in the capacity of the party at a public hearing and that he was discriminated against.
26. On 28 September 2017, the Court of Appeals, by Judgment AA. No. 298/2017, rejected the Applicant's appeal as ungrounded and upheld Judgment A. No. 1796/2015 of the Basic Court, of 10 May 2017.
27. Regarding the Applicant's allegation of essential violation of the provisions of the Law on Administrative Conflict, the Court of Appeals found that the Basic Court correctly assessed the legality of the IOBCSK decision, in accordance with the relevant provisions of the Law on Administrative Conflict, based its decision on the claims filed in the lawsuit and the evidence administered at the court session, as well as providing convincing reasoning based on the facts relevant to this legal matter.
28. Whereas, regarding the Applicant's allegation that the Basic Court did not hear the Applicant at the hearing, the Court of Appeals found that *"[...] these allegations are unsustainable and ungrounded, having regard to the minutes of the public hearing of the first instance court signed by [the Applicant]"*.
29. The Court of Appeals also found that the Employer *"[...] did not commit a procedural violation as the latter was assigned to the job and the job duties that correspond to his professional qualification and work experience and was not damaged in salary"*.
30. Finally, the Court of Appeals concerning the Applicant's allegation of discrimination found that this allegation was unreasoned and unsubstantiated.

31. On 1 November 2017, the Applicant filed a request for extraordinary review of the abovementioned judgment of the Court of Appeals with the Supreme Court. In his request, the Applicant once again claimed that he was not heard as a party in the proceedings during the hearing held in the Basic Court.
32. On 7 December 2017, the Supreme Court, by Judgment UZVP. No. 63/2017, rejected as ungrounded the Applicant's request for extraordinary review.
33. The Supreme Court in its Judgment found that the Applicant was subjected to a severe disciplinary measure of 'demotion in position' in accordance with the relevant provisions of Administrative Direction 2003/2 implementing UNMIK Regulation 2001/36 on the Kosovo Civil Service. The Employer's Disciplinary Committee, after the hearing session where the Applicant was present, found that Applicant disregarded the orders of the superior and consequently, it decided to impose the aforementioned disciplinary measure.
34. Finally, the Supreme Court found that *"[the Applicant's] allegations are ungrounded and do not have influence on different determination of factual situation other than that determined by the second instance court. The decision of the second instance court is clear and comprehensible, that the substantive law was also correctly applied and the law was not violated to the detriment of the Applicant [...]"*.

Applicant's allegations

35. The Applicant alleges that the challenged Judgment of the Supreme Court violated his rights guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 [Right to a Fair Trial] of the ECHR.
36. The Applicant in particular alleges a violation of the procedure by the regular courts because he was denied the request for a witness hearing proposed by him. In this regard, the Applicant requests the Court to assess *"why the procedure regarding the hearing of the witness was not respected based on the analysis of the case file, in particular the acts which the authorities received up to the level of the Supreme Court"*.
37. The Applicant further claims that *"[...] the lower instance courts, when rendering the challenged decisions, have not completely and correctly determined the factual situation as required by the correct application of the procedure, whereby the application of material rules was violated with the violation of the substantive law of the claimant"*.
38. The Applicant also alleges that the decisions of the regular courts contain *"clear contradictions in reasoning"*. With regard to this allegation, the Applicants refer to the case law of the European Court of Human Rights (hereinafter: the ECtHR) namely the case *Hirvisaari v. Finland*, Application no. 49684/99, Judgment of 27 September 2001.
39. Finally, the Applicant proposes that the Judgments of the Supreme Court, the Court of Appeals and of the Basic Court be annulled, and the case be remanded for retrial.

Admissibility of the Referral

40. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, as further specified by the Law and foreseen by the Rules of Procedure.

41. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law”.

42. The Court notes that the Applicant is authorized party in accordance with the Constitution, has exhausted all necessary legal remedies and has submitted his Referral within a period of 4 (four) months after the receipt of the Judgment.

43. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides:

“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”.

44. The Court also recalls Rule 39 (2) of the Rules of Procedure, which establishes:

“(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim”.

45. The Court recalls that the Applicant alleges that the challenged Judgment of the Supreme Court violated his rights guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR.

46. The Court notes that, although the Applicant alleges that the rights guaranteed by Articles 24 and 31 of the Constitution have been violated, the essence of his allegations relates to the right to fair and impartial trial, namely Article 31 of the Constitution.

47. In this regard, the Applicant in particular alleges a violation of the procedure by the regular courts because he was denied the request “for hearing the witness”. The Applicant did not specify in his request what witness is about, or if the Applicant thereby implies that he was not heard in the capacity of the party to the proceeding.

48. The Court notes that the Applicant in his appeal against the Judgment of the Basic Court of 10 May 2017 and in his request for extraordinary review filed with the

Supreme Court claimed that he was not heard in his capacity as a party to the proceedings.

49. The Court of Appeals dismissed this claim as ungrounded, reasoning that these *“allegations are unsubstantiated and ungrounded, having regard to the minutes of public hearing of the first instance court that are signed by [the Applicant]”*.
50. On the other hand, the Supreme Court found that *“[the Applicant’s] allegations are ungrounded and do not have influence on different determination of the factual situation other than that determined by the second instance court”*.
51. The Court also refers to minutes of the public hearing in the Basic Court of 12 April 2017, filed by the Applicant, whereby is noted that the Applicant's legal representative stated at the hearing that he remained entirely behind the statement of claim, requesting the annulment of the Decision of the IOBCSK, as well as the accuracy of the response to the lawsuit by the responding party, namely by the IOBCSK. According to the abovementioned minutes, the next session was adjourned on 10 May 2017. The Judgment of the Basic Court states that the Basic Court rendered its judgment in *“the main public hearing held in the presence of the litigating parties on 10 May 2017 [...]”* “and after the administration of all the evidence.
52. The Court reiterates that the Applicant in the proceedings in the regular courts specifically claimed that he was not heard in his capacity as a party to the proceedings before the Basic Court, while in his Referral submitted to the Court, the Applicant alleges that he was denied the request for “hearing of the witness proposed” by him.
53. The Court reiterates that the Applicant has not clarified and specified his allegation regarding the witness he proposed to be heard.
54. The Court considers that the Applicant's allegations to be heard as a party to the proceedings before the Basic Court was addressed to the regular courts, namely to the Court of Appeals and the Supreme Court. In addition, the Applicant was given the opportunity to present arguments and evidence which he considers important in his case at all stages of the proceedings before the regular courts.
55. However, the Court notes that if the Applicant's allegation in his Referral submitted to the Constitutional Court means that in proceedings before the regular courts, besides him no other witness proposed by him was heard, then, in accordance with the principle of subsidiarity, the Applicant should have submitted his allegation “that the witness proposed by him be heard” in his appeal to the Court of Appeals and in his request for extraordinary review in the Supreme Court.
56. The Court recalls that based on the submissions filed by him, the Applicant did not raise this allegation either before the Court of Appeals or before the Supreme Court.
57. In the light of the foregoing arguments, the Court notes that the Applicant does not agree with the finding of the facts and the relevant legal interpretations applied by the regular courts.
58. In this respect, the Court reiterates that it is not the role of the Constitutional Court to deal with errors of facts or law (legality), allegedly committed by the regular

courts, unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were different, the Court would act as a “*fourth instance court*”, which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See case *Garcia Ruiz v. Spain*, ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also case: KI70/11, Applicants: *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

59. Therefore, the Court considers that the Applicant failed to present facts and did not sufficiently substantiate his allegation that he was denied the right to be heard at the hearing.
60. Also regarding the Applicant's allegation that the decisions of the regular courts are contradictory, the Court notes that he does not at all clarify and justify this allegation.
61. The Court reiterates that the mere fact that the Applicant is not satisfied with the outcome of the decisions of the regular courts, or the mere mentioning of respective articles of the Constitution, without elaborating their alleged violation, is not sufficient to build a grounded allegation of constitutional violation. When alleging such violations of the Constitution, the Applicants must provide a reasoned allegation and a compelling argument (See case of the Constitutional Court KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).
62. Regarding the Applicant's allegation that during the proceedings before the regular courts he was discriminated against, the Court refers to the case law of the European Court of Human Rights (hereinafter: the ECtHR), which stated that “*discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations*” (see: ECtHR Judgment of 11 July 2002, *Willis v. United Kingdom*, No. 36042/97, paragraph 48 and see ECtHR Judgment of 13 December 2005, *Bekos and Koutropoulos v. Greece*, no. 15250/02, paragraph 63).
63. The Court also reiterates that the different treatment must pursue a legitimate aim to be justified and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. (See: the ECtHR Judgment of 13 June 1979, *Marckx v. Belgium*, No. 6833/74, paragraph 33).
64. The Court considers that the Applicant did not present facts and did not sufficiently substantiate his allegation of discrimination.
65. For the reasons above, the Court concludes that the facts presented by the Applicant do not in any way justify his allegation of violation of the equality before the law guaranteed by Article 24 of the Constitution, and violation of fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.
66. Therefore, in accordance with Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, the Applicant's Referral is manifestly ill-founded on constitutional basis and, accordingly, inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 10 October 2018, unanimously

DECIDES

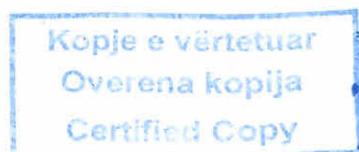
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bekim Sejdiu

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.