



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

Prishtina, on 6 December 2018
Ref. no.: RK 1296/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI66/18

Applicant

Sahit Muçolli

**Constitutional review of Decision Rev. No. 276/2017 of the Supreme
Court of Kosovo, of 8 February 2018**

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 Referral was submitted by Sahit Muçolli, from Prishtina (hereinafter: the Applicant), represented by Ramiz Suka, a lawyer.

Challenged decision

2. The Applicant challenges the constitutionality of Decision [Rev. No. 176/2017] of 8 February 2018 of the Supreme Court of Kosovo in conjunction with Judgment [Ac. No. 2056/16] of the Court of Appeals of 5 October 2017 and Judgment [C. No. 07/13] of the Basic Court in Prishtina of 29 March 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 22 [Processing Referrals] and Article 47 [Individual Requests] of the 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, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session 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 15 (fifteen) 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 4 May 2018, the Applicant submitted the Referral to the Court.
7. On 7 May 2018, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
8. On 16 May 2018, the Court, in accordance with paragraph 2 of Rule 33 [Registration of Referrals and Filing Deadlines] of the Rules of Procedure, requested the representative of the Applicant to submit the power of attorney to the Court.
9. On 22 May 2018, the Applicant's representative submitted the power of attorney for representation to the Court.
10. On 23 May 2018, a copy of the Referral was sent to the Supreme Court.

11. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Ćukalović ended.
12. 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.
13. On 22 August 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur, instead of Judge Snezhana Botusharova.
14. On 21 September 2018, the President of the Court rendered Decision No. KSH. KI66/18 for the replacement of the member of the Review Panel Altay Suroy. The Review Panel was reappointed composed of Judges: Arta Rama-Hajrizi, Radomir Laban and Remzije Istrefi-Peci.
15. On 29 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. From the documents included in the Referral, it results that the Applicant had an employment contract from 1 September 2009 until 31 August, 2010, as a teacher at a certain primary school. By Decision [No. 118-23963] of the Municipality in Prishtina of 17 September 2010, the Applicant was notified that his employment relationship was terminated on 14 June 2010 due to reaching of the retirement age.
17. On 3 January 2013, the Applicant addressed the Basic Court in Prishtina with a lawsuit against the respondent, namely the Municipality of Prishtina, requesting the realization of two salaries for July and August in the amount of 552 euro and the respective interest of 3.5%. The Applicant alleged that he worked two months after his retirement and that for this reason he was entitled to compensation for two unpaid salaries.
18. On 29 March 2016, the Basic Court in Prishtina, by Judgment [C. No. 07/13], rejected as ungrounded the Applicant's statement of claim. The Basic Court in Prishtina found that the Applicant was notified by Decision [No. 118-23963] of 17 September 2010 that on the certain date, namely on 14 June 2010, his employment relationship is considered to be completed due to the retirement age. The Basic Court added that the Applicant did not prove that he was entitled to the realization of the two unpaid salaries for the work he had claimed to have finished two months after he had reached the retirement age.
19. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the aforementioned Judgment of the Basic Court, alleging essential violation of the procedural provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law. The Applicant requested that the challenged Judgment be annulled and the case be remanded for retrial.

20. On 5 October 2017, the Court of Appeals by Judgment [Ac. No. 2056/16], rejected as ungrounded the Applicant's appeal and upheld the challenged Judgment of the Basic Court.
21. The Court of Appeals found that the challenged Judgment of the Basic Court "*was fair and lawful*" because: a) it was not characterized by a violation of procedural law or erroneous application of substantive law; and b) that in the present case there is no termination of unilateral or unlawful employment relationship; but for "termination" of the employment relationship due to the retirement age based on the law in force.
22. On an unspecified date, the Applicant filed a request for revision against the abovementioned judgment of the Court of Appeals with the Supreme Court, alleging essential violation of the procedural provisions and erroneous application of the substantive law. The Applicant again proposed that the challenged judgments be annulled and the case be remanded for retrial to the first instance court.
23. On 8 February 2018, the Supreme Court by Decision [Rev. No. 276/2017], rejected as inadmissible the request for revision of the Applicant. The Supreme Court reasoned that the request for revision was not admissible because the value of the object of the dispute did not exceed the amount of € 3,000 as defined by Article 211 of Law No. 03/L-006 on the Contested Procedure (hereinafter: the LCP).

Applicant's allegations

24. The Applicant alleges that Decision [Rev. No. 276/2017] Supreme Court of 8 February 2018 violates his right to fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution.
25. The Applicant specifically alleges that his employment contract was valid until 31 August 2010, whereas the retirement age he reached in June 2010. As a result, he alleges that he has the right to be paid two salaries for the months he worked after reaching the retirement age and that the regular courts failed to prove such a thing.

Admissibility of the Referral

26. 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.
27. 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”.

28. The Court also examines whether the Applicant has met the admissibility requirements as further specified in the Law. In this regard, the Court refers to the Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which define:

*Article 48
[Accuracy of Referral]*

“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”.

*Article 49
[Deadlines]*

“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...”.

29. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely Decision [Rev. No. 276/2017] of the Supreme Court of 8 February 2018, and has exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms that he alleges to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

30. In addition, the Court examines whether the Applicant has fulfilled the admissibility requirements foreseen in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure determines the criteria based on which the Court may consider the Referral, including the requirement that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) establishes:

“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”.

31. In this regard, the Court initially notes that the Applicant alleges a violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution. The Applicant specifically alleges that the regular courts failed to prove the fact that he worked two months after reaching retirement age, and subsequently denied the respective compensation.

32. In addressing the Applicant's allegations, the Court initially states that the essential claims of the Applicant relating to alleged violations of the procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, have been interpreted in accordance with the case law of the ECHR, in accordance with which the Court, pursuant to Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Therefore, in interpreting the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECtHR.
33. The Court also recalls that in accordance with the case law of the ECtHR, the fairness of a proceeding is assessed looking at the proceeding as a whole (see Judgment of ECHR, of 6 december 1988, *Barbera, Messeque and Jabardo v. Spain*, No. 10590/83, paragraph 68). Consequently, in assessing the Applicant's allegations, the Court will also adhere to this principle. (See also case KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38, and Case KI143/16, Applicant *Muharrem Blaku and Others*, Resolution on Inadmissibility of 13 June 2018, paragraph 31).
34. In this regard, and initially, the Court considers that the Applicant built his case on the grounds of legality, namely on the determination of the facts and the erroneous interpretation of the Law on Contested Procedure. The Court recalls that this allegation relates to the domain of legality and as such does not fall within the jurisdiction of the Court, and, in principle, cannot be considered by the Court. (See case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 35).
35. In the circumstances of the present case, the Court notes that the Basic Court and the Court of Appeals have explained that in the Applicant's case there is no unilateral termination of the employment relationship, but it's a termination because of the retirement age. As to the Applicant's allegation for two unpaid salaries, the Court of Appeals found that the Applicant had not provided any "evidence" to prove that he had worked for two months without being paid. Whereas, the Supreme Court rejected as inadmissible the request for revision of the Applicant because the value of the object of the dispute did not exceed the amount of € 3,000, as provided by Article 211 of the LCP.
36. The Court notes that the relevant decisions of the regular courts addressed all the allegations of the Applicant as to the nature of the termination of his employment relationship, but also the rejection of the claim for compensation of the income which he claims is entitled to. They reasoned and explained, *inter alia*: a) retirement based on legal power; b) the difference between the non-implementation of the contract and termination of employment relationship due to retirement according to the legal power; c) deadlines and requirements for the submission of new evidence; and d) the legal requirements for filing a revision with the Supreme Court.
37. In this regard, the Court refers to the reasoning of the Judgment of the Basic Court, which among other things contain:

“With the Decision no. 118-23963 dated 17.09.2010, the claimant was notified that because on 14.06.2010 he reached the age of 65, thus, the employment relationship is terminated and subsequently retired...The Court based on the administered evidences found that the claimant did not prove to the Court that he is entitled to the right on realization of two salaries after the retirement as he alleges that used to work for another two months after his retirement from the respondent, he did not produce any evidence that would make his claim and statement of claim more credible, therefore in compliance with the Article 322.1 of LCP rejected the statement of claim of claimant as ungrounded and decided as in enacting clause of this Judgment”.

38. Whereas, the relevant part of the Judgment of the Court of Appeals, provides:

“The mandatory retirement age for civil servants is sixty-five (65); thus in this case it is not about the unilateral unlawful suspension-termination of the employment relationship by the responding party, but it is about the cease of the employment relationship for the fact that the claimant reached the age for retirement and therefore by the Decision No. 03. No. 118-23963 dated 17.09.2010 was notified that on date 14.06.2010 his employment relationship will be terminated because he reached the age for retirement, and it does not mean non-compliance of the employment relationship but it means the termination of the employment relationship by the legal authority”.

39. Moreover, the Court notes that the Applicants had the benefit of the conduct of the proceedings based on adversarial principle; that he was able to adduce the arguments and evidence he considered relevant to his case at the various stages of those proceedings; he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair. (See, *inter alia*, case of the Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility of 16 February 2018, paragraph 35; see also *mutatis mutandis*, *Garcia Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, para. 29).
40. The Court reiterates that Article 31 of the Constitution, as well as Article 6 of the ECHR, do not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provide for the Court to challenge the application of substantive law by the regular courts of a civil dispute, where often one of the parties wins and the other loses (*Ibidem*, case No. KI118/17, see also case no. KI142/15, Applicant *Habib Makiqi*, Resolution on Inadmissibility of 1 November 2016, paragraph 43).
41. In this respect, in order to avoid misunderstandings on the part of applicants, it should be borne in mind that the “fairness” required by Article 31 of the Constitution is not “substantive” fairness, but “procedural” fairness. This translates in practical terms into adversarial proceedings in which submissions

are heard from the parties and they are placed on an equal footing before the court (See also the case of the Court No. KI42/16 Applicant: *Valdet Sutaj*, Resolution on Inadmissibility of 7 November 2016, para. 41 and other references therein).

42. In this respect, the Court reiterates that it is not the role of the Court to deal with errors of facts or law, allegedly committed by the regular courts (legality), 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 leads 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 and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
43. The Court further notes that the Applicant is not satisfied with the outcome of the decisions of the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim for the violation of the constitutional right to fair and impartial trial (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; and see also, case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 42).
44. As a result, the Court considers that the Applicant has not substantiated the allegations that the relevant proceedings in his case were in any way unfair or arbitrary, and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR. (See *mutatis mutandis*, *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).
45. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and is declared inadmissible, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, on 29 October 2018, unanimously

DECIDES

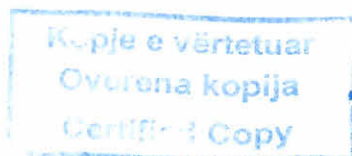
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Gresa Caka-Nimani

Arta Rama-Hajrizi



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