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

Prishtina, on 14 February 2019
Ref.no.: RK 1324/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI133/18

Applicant

Mehdi Selmani and others

Request for constitutional review of Decision Rev. No. 216/2018 of the Supreme Court of 4 July 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 Mehdi Selmani, Nezir Selmani, Zahir Selmani, Nysret Salihu, Avni Bahtiri, Shemsi Vllahiu, Sejdi Breznica, Besim Kerolli, Musa Berisha, Ismajl Zariqi, Florim Prokshi, Skender Hyseni, Zenel Ramadani, Muhamed Mavriqi, Astrit Berisha, Mergim Grajqevci, Afrim Jashari, Sabit Koci, Jusuf Kosumi, SahitKlinaku, Xhavit Klinaku, Agron Zhabari, Naim Sadiku, Zeqir Feka, Kadri Meholli, Riza Veseli, Muharrem Mustafa, Ferat

Prokshi, Selman Selmani, Agron Syla, Fehmi Bajqinca, Xhemshir Raci, Ali Mustafa, Fehmi Klinaku, Nysret Aliu, Ekrem Selmani, Sokol Kaqurri, Ekrem Gervalla, Izet Bunjaku, Avni Buliqi, Shefki Bytyqi, Shemsi Krasniqi, Bajram Gashi, Izet Konjuhi, Bajram Rostolli, Blerim Muja, Naim Gashi, Sabit Mjekiqi, Vehbi Syla, Afrim Drenoci, Sadik Parduzi, Xhafer Krasniqi, Avdullah Jasharri, Ibrahim Krasniqi, Bedri Rushiti, Shefki Pllana, Sami Hasani, Sahit Hetemi, Ymer Shabani, Fehmi Gashi, Nexhat Murati, Shaban Murati, Shaban Mehaiva, Emrush Mjeku, Gani Berisha and Ragip Krasniqi, all former employees of Kosovo Energy Corporation (hereinafter: KEK), (hereinafter: the Applicants), who are represented by Nysret Mjeku, a lawyer from Prishtina.

Challenged decision

2. All Applicants challenge Decision Rev. No. 216/2018 of the Supreme Court of 4 July 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violated the rights and freedoms of all Applicants guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on 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).

Proceedings before the Constitutional Court

5. On 6 September 2018, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 17 September 2018, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (Presiding), Safet Hoxha and Radomir Laban.

7. On 29 September 2018, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 27 November 2018, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. Taking into account the fact that all the Applicants in the Referral present the same factual situation, the Court finds it necessary to consider them as such in the report.

10. Based on the case file, it results that the Applicants were in the employment relationship with KEK, namely, they worked in the defense and security unit.

11. On an unspecified date, KEK published a public invitation to accept bids regarding the provision of security services to the surrounding facilities and locations in the KEK area of Kosovo.

12. On 23 January 2004, based on the bids received, KEK selected the bid of WDG company as the most successful bid, and on the same date they signed an agreement for providing defense and security services.

13. In addition, in the signed contract, namely in Article 6 of the contract, the contracting parties specified the conditions under which KEK employees, of the security and defense unit were transferred to the new WDG company, while the same article regulates also the rights and other obligations of employees.

14. On 9 July 2010, the Applicants filed a claim with the first instance court against KEK with a request to annul Article 6 of the contract, which was signed on 23 January 2004 between KEK and WDG, as well as to return to them the status of KEK employees.

15. On 28 October 2014, KEK replied to the Applicants' claim, stating that their claim was filed after the expiration of the legal deadline because since the time the contract was concluded, namely from 23 January 2004 until 9 July 2010, when the Applicants filed the claim, 7 years have passed.

16. On 2 November 2015, the Basic Court rendered Decision No. 1522/10, by which the Applicants' claim was rejected as inadmissible pursuant to Article 391 (f) of the LCP. The reasoning of the decision reads: "[...] *the claim was submitted after the expiration of the legal time limit defined by Article 80 of the Law on basic rights from the employment relationship. This is because the claimants did not act pursuant to the provisions of Article 83 of the same Law, which stipulates that the employee who is not satisfied with the final Decision of the competent authority in the organization or if this authority does not issue a Decision within 30 days from the submission of the request, namely objection, has the right to request the protection of his rights before the competent court within the time limit of 15 days. In the present case the claimants request judicial protection for the realization of their rights 7 years after the conclusion of the contract between the respondent and WDG*".

17. The Applicants filed an appeal with the Court of Appeals against Decision No. 1522/10 of the Basic Court, stating that the decision of the Basic Court was not based on law because the agreement between the respondent KEK and the third party WDG cannot have legal effect on the claimants, because they (the claimants) had indefinite employment relationship with the respondent.

18. On 11 April 2018, the Court of Appeals rendered Decision CA. No. 3650/2016, which rejected the appeal of the Applicants as ungrounded. The decision of the Court of Appeals states:

> *„In order to request judicial protection for the protection of rights deriving from the employment relationship two conditions should be fulfilled cumulatively: the exhaustion of remedies before the authorities of the employer and the submission of the claim within the legal time limit.*
>
> *Therefore, based on the situation of the case, the panel assesses that the legal stance of the first instance court, expressed in the enacting clause of the appealed Decision is based on Law because paragraph 1 of Article 391 of the LCP, defines that: "After the pre examination the court can drop charges as unnecessary if it determines the charges are presented after the deadline, if it was set by legal provisions."*

19. The Applicants filed a request for revision with the Supreme Court, alleging violation of the provisions of the contested procedure and substantive law, as well as erroneous determination of factual situation, and that the courts had incorrectly applied the law based on which they calculated the deadlines.

20. On 4 July 2018, the Supreme Court rendered Decision Rev. No. 216/2018, which rejected the request for revision of the Applicants as ungrounded. In the decision, the Supreme Court stated:

> *„[...] the courts of lower instance correctly applied the provisions of Article 83 of the Law on Basic Rights from the Employment Relationship due to the reason that this time limit is preclusive and after this time limit the employee loses the right to judicial protection. Therefore, the claim submitted after this time limit shall necessarily be dismissed as out of time or inadmissible; therefore, the Supreme Court of Kosovo assesses that the decisions of lower instances are fair and lawful."*

Applicant's allegations

21. The Applicants in the Referral expressly state that their rights under Article 31 [Right to Fair and Impartial Trial] and Article 49 [Right to Work and Exercise Profession] of the Constitution have been violated, however, they did not explain even by one sentence the manner in which the constitutional rights and freedoms were violated.

22. The Applicants request the Court to recognize the employment relationship they had with KEK until 23 January 2004.

Admissibility of the Referral

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

24. 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."*

25. The Court further examines whether the Applicants have fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which foresee:

Article 48 [Accuracy of the 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... ."*

26. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (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."*

27. As to the fulfillment of these criteria, the Court finds that the Applicants have submitted the Referral in a capacity of the authorized party, who challenge an act of a public authority, namely Decision Rev. No. 216/2018 of the Supreme Court, after exhausting all legal remedies. The Applicants also specified the rights and freedoms they claim to have been violated in accordance with the requirements of Article 48 of the Law and have submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

28. However, the Court notes in the present case that, despite the fact that the Applicants stated in the Referral that their constitutional rights and freedoms were violated, they did not explain by any sentence or stance who violated their constitutional rights, in what manner and how they bring them in connection with the court decisions.

29. In this respect, the Court notes that, according to its case law and case law of the European Court of Human Rights (hereinafter: the ECtHR), the Applicant must declare a violation of his rights protected by the Constitution or ECHR

and also to make convincing allegations and evidence to substantiate his claim. The Referral is manifestly ill-founded if it lacks *prima facie* evidence, which shows with sufficient clarity that the alleged violation of human rights and freedoms is possible (see, Judgment of the ECtHR, *Vanek v. Slovakia*, of 31 May 2005, no. of application no. 53363/99 and see: case No. KI19/14 and KI21/14 of the Constitutional Court, Applicants: *Tafil Qorri and Mehdi Syla* of 5 December 2013) and whether the facts for which the claim is filed do not clearly constitute a violation of the rights alleged by the Applicant, namely if the Applicant does not have a "*reasoned claim*" (see ECtHR Judgment, *Mezőtúr-Tiszazugi Vízgazdálkodási Társulat v Hungary*, of 26 July 2005, application No. 5503/02).

30. The Court also recalls the ECtHR case law, according to which it is not its duty to assess the erroneous determination of factual situation or erroneous application of substantive law as long as this does not call into question the rights and freedoms that are protected by the Constitution and the ECHR. Therefore, it cannot act as a "*fourth instance court*" (see: case *Akdivar v. Turkey*, No. 21893/93 ECtHR, Judgment of 16 September 1996, para 65, see also *mutatis mutandis* case KI86/11, Applicant: *Milaim Berisha*, Resolution on Inadmissibility, of 5 April 2012).

31. In the present case, taking into account the Applicants' allegations, which had already been initiated before the regular courts, the Court can only assume that they also come up with the same allegations before this Court, which are based on erroneous determination of factual situation and erroneous application of substantive law which they bring in connection with the rejection of their statement of claim filed against KEK, for the annulment of the challenged Article 6 of the contract.

32. The Court refers to the case law of the European Court on Human Rights (hereinafter: EctHR), according to which, it is not the role of the Court to review the conclusions of the regular courts in respect of the factual situation and application of the substantive law (see ECHR, *Pronina v. Russia*, decision on admissibility of 30 June 2005, Application No. 65167/01)). In fact, the Court is not competent to replace the regular courts in assessing the facts and evidence; in general, it is the task of the regular courts to assess the facts and evidence presented. (See ECtHR judgment *Thomas v. United Kingdom*, application no. 19354/02, application of 10 May 2005)).

33. It is the role of the Constitutional Court to examine whether there has been a violation or neglect of the constitutional rights (right to a fair trial, access to court, right to an effective legal remedy, etc.), and whether the application of the law was eventually arbitrary or discriminatory. Therefore, within the limits of its competence, the Constitutional Court deals solely with the question of possible violation of the constitutional rights or the rights of the ECHR in the proceedings before the regular courts, and in this case, the Court will consider whether the proceedings in entirety was fair in the manner required by Article 6 paragraph 1 of the ECHR.

34. In this respect, the Court, having regard to the proceedings initiated by the Applicant before the first instance court, notes that it refers to the annulment

of the challenged Article 6 of the contract, which KEK had concluded with the new company WDG, which specifies the terms of the transfer, as well as the rights and obligations of the claimants.

35. The Court notes that the Basic Court and the Court of Appeals in that regard found that the Applicants' statement of claim was out of time, namely that the Applicants, in accordance with the provision of the applicable law, had the opportunity to request the annulment of the challenged Article of the contract within the foreseen deadline, and that after the expiry of that period, the employees have lost their right to judicial protection.

36. The Court notes that the Supreme Court in the revision procedure dealt with the same appealing allegations of the Applicants, finding that the lower instance courts have correctly applied the provisions of Article 83 of the Law on Basic Rights of Employment Relationship because this deadline is clear and accurate, and that after the expiry of this deadline, the employees have lost the right to judicial protection. Therefore, the lower instance courts have correctly acted when they dismissed the Applicants' statement of claim as out of time.

37. In addition, the Court cannot fail to notice that the Supreme Court also responded to the Applicants' allegations concerning erroneous application of the law based on which the Basic Court and the Court of Appeals calculated the time limits for the statute of limitation, namely, that the courts should have applied the Law on Obligational Relationships and not the Law on Basic Rights from the Employment Relationship.

38. In this regard, the Supreme Court concluded that *„...the allegation in the revision that in the present case the time limit of prescription of 5 years shall be applied within the meaning of Article 352 of the LOR, is assessed by this court as ungrounded due to the reason that the request of the claimants deriving from the employment relationship is in question and in the matter are applied the laws that regulate this area wherein the preclusive time limits are stipulated, after the expiration of which the employee loses the right to judicial protection and not the provisions of the Law on Obligational Relationships as alleged in the revision."*

39. Therefore, the Court considers that the regular courts in the present case have reasonably explained their decisions, and that the reasoning is not considered as arbitrary by this Court. The Court also notes that the Applicants did not provide any arguments that would justify their allegations that in any way there has been a violation of their right to a fair trial, except that they are dissatisfied with the outcome of the concrete proceedings.

40. Therefore, the Court considers that nothing in the case presented by the Applicants indicates that the proceedings before the regular courts were unfair or arbitrary so that the Constitutional Court would be satisfied that the Applicant was denied any procedural safeguards, which would result in violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, namely Article 6 of the ECHR.

41. For this reason, the Court concludes that the Applicants' allegations of violation of the right to fair and impartial trial are manifestly (*prima facie*) ungrounded.

42. The Court further notes that the Applicants also claim a violation of the right to work and exercise profession, which is guaranteed by Article 49 of the Constitution.

43. In this regard, the Court recalls that the right to work is exercised in the manner and under the conditions laid down by law. The right to work also implies the right of an individual to have his employment relationship not interrupted in a way that is contrary to the one established by law.

44. However, in the present case, the Court notes that the regular courts in all three cases decided exclusively on the Applicants' statement of claim regarding the fulfillment of the procedural requirements for filing the statement of claim, and not for the termination of the Applicant's employment relationship.

45. In addition, the regular courts did not at any time deal with their decisions, nor did they deal with the issue of the Applicants' right to work or the rights and obligations deriving from the right to work. More specifically, the courts did not take decisions by which the Applicants in some way denied or prohibited them to work or exercise their profession or otherwise prevented them from exercising the rights under the employment relationship.

46. Therefore, the Court finds as ungrounded the Applicants' allegations of violation of Article 49 [Right to Work and Exercise Profession] of the Constitution.

47. The Court reiterates that it is the Applicants' obligation to substantiate their constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

48. The Court finds that the Applicants have not substantiated their allegations and did not indicate the manner in which their rights have been violated.

49. The Court further considers that it cannot act as a "fourth instance court".

50. Therefore, the Applicants' Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 47 of the Law, and Rule 39 (2) of the Rules of Procedure, in the session held on 27 November 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**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi