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

Prishtina, on 12 December 2019
Ref. no.:RK 1484/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI124/18

Applicant

Limak Kosovo International Airport J.S.C. "Adem Jashari"

Constitutional review of Judgment Rev. No. 127/2018 of the Supreme Court of Kosovo of 12 April 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 Joint Stock Company Limak Kosovo International Airport "Adem Jashari" (hereinafter: the Applicant), based in Vrellë village, Lipjan Municipality, which is represented with power of attorney by Fazli Gjonbalaj and Leonora Fejzullahu.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 127/2018 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 12 April 2018.

3. The Applicant was served with the challenged decision on 14 May 2018.

Subject matter

4. 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], Article 32 [Right to Legal Remedies] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 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).

Proceedings before the Constitutional Court

6. On 23 August 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 23 August 2018, in accordance with Rule 40.1 of the Rules of Procedure, the President of the Court ordered the joinder of Referrals KI36/18, KI60/18, KI65/18, KI80/18, KI81/18, KI82/18, KI109/18, KI122/18, KI123/18 and KI124/18. Bekim Sejdiu was appointed as Judge Rapporteur in all cases.

8. On 11 September 2018, the President of the Court appointed the new Review Panel, for all joined referrals, composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka- Nimani and Radomir Laban.

9. On 13 September 2018, the Court notified the Applicant and the Supreme Court about the joinder of Referrals KI36/18, KI60/18, KI65/18, KI80/18, KI81/18, KI82/18, KI109/18, KI122/18, KI123/18 and KI124/18.

10. On 14 September 2018, the Court notified the Basic Court in Prishtina about the registration and joinder of cases and requested it to submit to the Court the acknowledgment of receipts regarding the cases: KI36/18, KI81/18, KI82/18 and KI124/18.

11. On 1 October 2018, the Basic Court in Prishtina submitted to the Court the requested acknowledgments of receipts.

12. On 17 October 2018, the Applicant submitted a document to the Court, requesting that the Referral No. KI109/18 be examined separately from the Referral with No. KI36/18, alleging that the cases are not of the same nature.

13. On 5 April 2019, the Court reviewed and approved the Applicant's Referral regarding the severance of Referral KI109/18 from the Referral number KI36/18. The Court also, in accordance with Rule 40 (3) of the Rules of Procedure, decided that the Referrals KI36/18, KI60/18, KI65/18, KI80/18, KI81/18, KI82/18, KI109/18, KI122/18, KI123/18 and KI124/18 are considered separately, as individual cases, with the same Judge Raporteur and the Review Panel.

14. On 11 April 2019, the Court notified the Applicant and the Supreme Court about the severance of Referrals KI36/18, KI60/18, KI65/18, KI80/18, KI81/18, KI82/18, KI109/18, KI122/18, KI123/18 and KI124/18.

15. On 12 April 2019, the Applicant submitted to the Court the submission entitled *"Submission regarding the cases registered with the Constitutional Court and in particular the case registered with the Constitutional Court number KI132/18"*, in which it essentially reiterated the allegations it had previously made.

16. On 16 May 2019, the Applicant submitted to the Court a submission entitled *"Submission, regarding the cases registered with the Constitutional Court"* in which it essentially reiterated the allegations it had previously made.

17. On 6 November 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts of the case

18. On 12 August 2010, the Government of the Republic of Kosovo and the Applicant signed a Public-Private Partnership Agreement (hereinafter: the PPPA). Prior to the signing of the PPPA, the name of Prishtina Airport was Prishtina International Airport "Adem Jashari" (hereinafter: the PIA). Based on the PPP Agreement, the Applicant had an obligation to keep the employees for another 3 (three) years.

19. Based on the case file, it is noted that E. BSH. (hereinafter: the employee) was employed with the PIA from 1 February 2002 until 3 April 2011.

20. After signing of the PPPA, the employee had regular employment relationship with the Applicant from 4 April 2011 until 3 April 2014.

21. On 3 March 2014, namely 30 (thirty) days before the expiry of the contract, the Applicant notified the employee that that he will not be offered a new

employment contract after the expiration of the existing contract on the grounds that the contract is not being extended according to *"[...] the policies of the Board of Directors for future human resources planning"*.

22. On 20 March 2014, the employee filed a complaint with the Applicant (the employer) regarding the notice of non-renewal of the employment contract, requesting that the latter be annulled.

23. On an unspecified date, the Applicant rejected as ungrounded the employee's complaint.

24. Based on the case file, it is noted that on 27 March 2014, the Executive Body of the Labor Inspectorate of Kosovo, through Decision Vn. 45/2014, ordered the Applicant *"to apply provisions of Articles 10.5 and 71 of the Law on Labor No. 03/L-212"*.

25. On an unspecified date, the employee filed a statement of claim with the Basic Court in Prishtina-Branch in Lipjan (hereinafter: the Basic Court), requesting the annulment of the Notice of 3 March 2014, issued by the Applicant, and obliged the Applicant to reinstate the employee to work with all rights as well as compensation of damage.

26. On 29 May 2015, the Basic Court, by Judgment C. No. 206/2014, approved the employee's statement of claim as grounded and obliged the Applicant (namely the employer): (i) to reinstate the employee to work (ii) to pay the respective amount to the employee on behalf of the material damage and (iii) to pay to employee the amount of income for the period from 4 April 2014 until 24 April 2015 (iv) and to cover the costs of the contested procedure.

27. The Basic Court reasoned that the employee had been working uninterruptedly for 10 (ten) years with the Applicant and its predecessor at the International Airport "Adem Jashari". The Basic Court further held that *"pursuant to Article 10.5 of the Law on Labor, the Court came to the conclusion that fixed-term employment relationship of the claimant with the respondent is considered to be an indefinite employment relationship, therefore the court considers that in this situation, the respondent was required when terminating the employment contract to the claimant to conduct an internal procedure for termination of employment, a procedure which was not conducted by the respondent, but the claimant was only notified with the notice of termination of the employment contract"*.

28. The Applicant filed an appeal against the Judgment of the Basic Court C. No. 206/2014, of 29 May 2015, with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), alleging essential violation of the procedural provisions, erroneous determination of factual situation and erroneous application of substantive law.

29. On 29 January 2018, the Court of Appeals, by Judgment Ac. No. 3628/2015, rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court (C. No. 206/2014), considering the latter as fair and lawful. The Court of Appeals noted that the first instance court gave concrete reasons for

the decisive facts and provided adequate explanations for such a decision, based on the relevant legal provisions.

30. On unspecified date, the Applicant submitted a revision to the Supreme Court against the Judgment of the Court of Appeals of Kosovo, alleging essential violation of the procedural provisions and erroneous application of substantive law.

31. On 12 April 2018, the Supreme Court, by Judgment Rev. No. 127/2018, rejected as ungrounded the Applicant's revision, assessing the challenged decision as fair, on the grounds that sufficient reasons for the relevant facts for fair adjudication of this case have been given.

32. The Judgment of the Supreme Court, *inter alia*, states "*[...] The Supreme Court holds that the allegations in the respondent's revision that the challenged judgment is a consequence of erroneous application of substantive law, are ungrounded, and inconsistent with the fact that the notice of non-renewal of the employment contract of the claimant is in breach of the Law on Labor, which is a basic law regulating the employment relationship in Kosovo, setting out the basis and procedures for terminating the claimant's employment contract. The claimant even after 1.2.2002 and until 3.4.2014 had a fixed-term contract, such a contract of employment pursuant to Article 10.5 of the Law on Labor is considered a contract for an indefinite period of time, therefore the termination of the employment contract must respect the established legal procedures which the respondent did not respect, resulting undoubtedly and certainly in legal conclusion that the right to lawful decision on the termination of the employment contract was violated*".

Applicant's allegations

33. The Court recalls that the Applicant alleges that the challenged decision violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] of the Constitution, as well as Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 of the Convention.

34. The Applicant alleges that the Supreme Court did not give sufficient reasoning in its decision. In relation to this allegation, the Applicant states that, "*The judgment of the Supreme Court does not have sufficient reasoning, especially in relation to essential violations of the provisions of the contested procedure (erores in procedanto) of the Law on Contested Procedure.*"

35. The Applicant alleges that the Supreme Court in the challenged judgment has erroneously applied the substantive law "*erores in judicando*" and made an erroneous interpretation of Article 10.5 of the Law on Labor, No. 03/L-212 and PPPA, because, according to the Applicant, the employee did not have 10 (ten) years of uninterrupted work with the Applicant.

36. In this regard, the Applicant further emphasizes that the Supreme Court should have taken into account Article 9.18 of the PPPA, according to which

the Applicant is obliged to keep the employees in work for a term of 3 (three) years.

37. The Applicant also cites Judgment KI138/15 of the Constitutional Court and states that *"the application of the substantive law, which could have been a fact, was a decisive factor in rendering the judgment of that court, but the Supreme Court did not address this issue at all, and only found that the lower instance courts have correctly applied the provisions of the substantive law."*

38. Therefore, the Applicant alleges that the Supreme Court did not sufficiently reason its judgment and did not address the issues raised by the judgments of the lower instance courts.

39. The Applicant requests the Court to annul the Judgment of the Supreme Court and to remand the case for retrial.

Relevant legal provisions

Law No. 03/L-212 on Labor

Article 10
[Employment Contract]

1. An employment contract shall be concluded in written form and signed by the employer and employee.

2. Employment contract may be concluded for:

2.1. an indefinite period;

2.2. . a fixed period; and

2.3. specific taks and duties.

3. Employment contract which contains no indication of its duration shall be deemed to be for an unspecified period of time.

4. A contract for a fixed period may not be concluded for a cumulative period of more than ten (10) years.

5. A contract for a fixed period of time that is expressly or tacitly renewed for a continued period of employment of more than ten (10) years shall be deemed to be a contract for an indefinite period of time.

Article 67
[Termination of Employment Contract on Legal Basis]
1. Employment contract, on legal basis, may be terminated, as follows:
[...]
1.3. With the expiry of duration of contract;

Article 70
[Termination of Employment Contract by the Employer]

1. An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, when:
1.1. Such termination is justified for economic, technical or organizational reasons;
1.2. The employee is no longer able to perform the job;
1.3. The employer may terminate the employment contract in the circumstances specified in sub-paragraph 1.1 and 1.2 of this paragraph, if, it is impracticable for the employer to transfer the employee to other employment or to train or qualify the employee to perform the job or other jobs;
1.4. An employer may terminate the employment contract of an employee with providing the period of notice of termination required, in:
1.4.1. serious cases of misconduct of the employee; and
1.4.2. *because of dissatisfactory performance of of work duties;*
1.5. An employer shall notify the employee about his/her dismissal immediately after the event which leads to this decision or as soon as the employer has become aware of it.
1.6. An employer may terminate the employment contract of an employee without providing the period of notice of termination required, in the case when:
1.6.1. the employee is guilty of repeating a less serious misconduct or breach of obligations;
1.6.2. the employee's performance remains dissatisfactory in spite of the written warning.
2. The employer may terminate the employment contract of an employee under subparagraphs 1.6 of paragraph 1 of this Article only when after the employee has been issued previus written description of unsatisfactory performance with a specified period of time within which they must improve on their performance as well as a statement that failure to improve the performance shall result with dismissal from work without any other written notice.
[...]

Article 71
[Notification period for termination of employment contract]

1. The employer may terminate an employment contract for an indefinite period according to Article 70 of this Law with the following periods of notification:
1.1. from six (6) months - 2 years of employment, thirty (30) calendar days;
1.2. from two (2)- ten (10) years of employment: fourty-five (45) calendar days;
1.3. above ten (10) years of employment: sixty (60) calendar days.
2. The employer may terminate an employment contract for a fixed term with thirty (30) calendar days notice. The employer who does not intend to renew a fixed term contract must inform the employee at least thirty (30) days before the expiry of the contract. Failure to do so entitles the

employee to an extension of employment with full pay for thirty (30) calendar days.

Public-Private Partnership Agreement for the Operation and Expansion of Prishtina International Airport

9.18 [Termination of Personnel]

"The Private Partner may terminate the employment or other engagement of any PIA Employee (i) at any time for cause in accordance with applicable laws, rules, administrative regulations and decrees, (ii) upon mutual agreement and (iii) without limitation, after the third (3rd) anniversary of the Effective Date".

Admissibility of the Referral

40. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in 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 also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

43. In this regard, the Court notes that the Applicant (as a legal person) has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, applicable both to individuals and to legal persons (See case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

44. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

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

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. [...]."

45. Regarding the fulfillment of these requirements, the Court considers that the Applicant is an authorized party, challenging an act of a public authority, after exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms it claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

46. However, the Court should also examine whether the Applicant has met the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure, including the criterion that the referral is not manifestly ill-founded. Thus, Rule 39 (2) of the Rules of Procedure stipulates:

"(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."

47. Initially, the Court notes that the Applicant alleges that its right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR has been violated, because the decisions of the regular courts have not been sufficiently reasoned, while violations of other rights guaranteed by the Constitution and the ECHR are presented by the Applicant as a consequence of a violation of the right to fair and impartial trial.

48. The substance of the Applicant's allegations is that Supreme Court did not sufficiently reason its judgment and has erroneously interpreted Article 10.5 of the Law on Labor No. 03/L-212, because according to the Applicant, the

employee did not have 10 (ten) years of uninterrupted employment with the Applicant. The Applicant further argues this allegation based on Article 9.18 of the PPPA, according to which the latter is obliged to keep the employees at work for a period of 3 (three) years. The Applicant also alleges that its constitutional rights to effective legal remedies have been violated as a result of the lack of reasoning of the challenged decision.

49. In this regard, the Court notes that the Applicant alleges that the regular courts have erroneously interpreted the law when referring to the work experience of the employee, claiming that the court in this case should have considered that it was about two different employers (referring to International Airport "Adem Jashari", before and after the signing of the PPPA), and by stating that the employee did not have more than 10 (ten) years of employment with the Applicant.

50. With regard to these Applicant's allegations, the Court first notes that the Supreme Court, while reviewing the Applicant's request for revision, reasoned that *"The claimant, even after 1.2.2002 and until 3.4.2014, had a fixed-term contract such employment contract is considered within the meaning of Article 10.5 of the Law on Labor as a contract for an indefinite period of time, therefore the termination of the employment contract must respect the established legal procedures which the respondent did not respect, resulting undoubtedly and certainly in legal conclusion that the right to lawful decision on the termination of the employment contract was violated"*.

51. As to the Applicant's concrete allegations of the applicability of Article 9. 18 of the PPPA, the Supreme Court reasoned that *"the allegations in the revision that the approval of the claimant's statement of claim is in violation of Article 9.18 of the Private Public Partnership Agreement concluded between the respondent and the Republic of Kosovo, have been the subject of review and assessment by the second instance court, where it was correctly assessed that this provision also does not foresee termination of employment contracts of employees in contravention of the laws, as this agreement provides that the private partner, here the respondent, may accept employment or any engagement whatsoever of any employee of the PIA, at any time, in matters relating to the law, rules and administrative regulations and decrees applied under the first agreement without limitations, after the third anniversary of the entry into force of this Agreement"*.

52. In the light of these arguments of the Supreme Court, the Court finds that all Applicant's allegations and arguments, which were relevant to the resolution of the dispute, have been duly heard and considered by the regular courts. Therefore, the Court finds that the proceedings before the regular courts, viewed in their entirety, were fair (see case of the Constitutional Court KI128/18, Applicant, *Limak Kosovo International Airport J. S. C. "Adem Jashari"*, Resolution on Inadmissibility of 27 May 2019, KI129/18, Applicant, *Limak Kosovo International Airport J. S. C. "Adem Jashari"*, Resolution on Inadmissibility of 20 June 2019, KI130/18, Applicant, *Limak Kosovo International Airport J. S. C. "Adem Jashari"*, Resolution on Inadmissibility of 20 June 2019).

53. The Court notes that the Applicant refers to Judgment KI138/15 of the Constitutional Court, by claiming that "*the application of substantive law, which may have been a fact, has been a decisive factor for rendering the judgment of that court, but the Supreme Court did not address this issue at all, but only found that the lower instance courts have correctly applied the provisions of substantive law*".

54. As to this allegation of the Applicant, the Court recalls that the mentioned case differs from the present case, because of the following reasons: (i) the issue of disciplinary proceedings against the Applicant's employee in that case has been reviewed differently by the regular courts; (ii) there was no clear legal basis under which disciplinary proceedings were conducted; (iii) contradictory elements existed in decisions of the lower instance courts. In addition, the Court of Appeals applied and used for explanation the Administrative Instruction which derived from the Civil Service Regulation, not the Law on Labor. This argument, although raised by the Applicant in this case, was not reviewed by the Supreme Court (see the case of the Constitutional Court KI138/15, *Sharr Beteiligung GmbH,* Judgment of 4 September 2017).

55. In the light of the foregoing considerations, the Court emphasizes its general position, that in principle, it is not its task to deal with errors of fact or law allegedly committed by the regular courts, when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law (see, *mutatis mutandis*, the ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544, paragraph 28).

56. Complete determination of factual situation and correct application of law is a primary duty and within the jurisdiction of the regular courts (issue of legality). Therefore, the Constitutional Court cannot act as a "fourth instance court" (see, *mutatis mutandis*, ECtHR Judgment of 16 September 1996, *Akdivar v. Turkey*, no. 21893/93, paragraph 65, see also, *mutatis mutandis,* case of the Constitutional Court KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

57. Therefore, the Court considers that the right to fair and impartial trial of the Applicant has not been violated by the decisions of public authorities.

58. The Court recalls that the mere fact that the Applicants do not agree with the outcome of the decisions of the Supreme Court (and of the lower instance courts) is not sufficient to build a reasoned allegation of constitutional violations. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (See, *mutatis mutandis*, case of the Constitutional Court KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33.

59. In sum, the Court finds that the Applicant did not present evidence, facts and arguments showing that the proceedings before the regular courts constituted in any way constitutional violation of their rights guaranteed by the

Constitution, namely by Articles 24, 31, 32 and 46 of the Constitution, in conjunction with Article 6 of the ECHR.

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

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (b) of the Rules of Procedure, on 6 November 2019, 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

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