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

Pristina, 03.November 2011
Ref. No.: RK 153/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 70/10

Applicant

Fatime Kabashi

Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev.no. 28/2010, dated 30 June 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mrs. Fatime Kabashi, residing in Prizren, represented by Dr. Sc. Hazër Susuri, a practicing lawyer in Prizren.

Challenged court decision

2. The decision challenged by the Applicant is the Judgment of the Supreme Court of Kosovo (hereinafter: the "Supreme Court"), Rev.no.28/2010, dated 30 June 2010, which was served upon the Applicant on 13 July 2010.

Subject matter

3. The Applicant alleges a violation of Article 49 [Right to work and exercise profession] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

4. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rule 56(2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 30 July 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 26 August 2010, the Referral was forwarded to the Supreme Court.

7. On 21 October 2010, by Decision of the President No.GJR. 70/10, Judge Snezhana Botusharova was appointed as Judge Rapporteur. On the same date, the President, by Decision No. KSH. 70/10, appointed the Review Panel composed of Judges Ivan Čukalović (Presiding), President Enver Hasani and Judge Iliriana Islami.

8. On 19 January 2011, the Court requested additional documents from the Applicant, who submitted them on the same day.

9. Also on the same day, the Court requested the complete case file from the Municipal Court of Prizren, which submitted it on 28 January 2011.

10. On 21 February 2011, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court.

Summary of facts

11. On 1 September 2003, the Applicant signed a contract of employment valid from 1 September 2003 until 31 August 2004 for the position as a school teacher at Leke Dukagjini, Prizren (hereinafter: the "Employer"). This contract of employment was transformed into an indefinite contract of employment.

12. On 23 January 2004, the Applicant's request for leave to visit her daughter in Zambia from 26 of January 2004 to 26 of February 2004 was granted by the Department of Education and Science, Prizren.

13. On 7 December 2004, the Applicant requested once more unpaid leave – this time from 17 January 2005 until 21 of February 2005 - to visit her daughter, who was about to give birth.

14. On 23 December 2004, the Department of Education and Science in Prizren rejected the request of the Applicant, because unpaid leave was only meant (1) for a newly born child and could only be granted if there was no one else to take care of it and (2) for medical treatment abroad. Nevertheless, the Applicant took the leave and left for Zambia.

15. On 12 January 2005, the Applicant visited the emergency ward of the University Hospital in Lusaka, Zambia, where the doctor prescribed the Applicant bed rest for two weeks and to avoid travelling.

16. On 23 January 2005, the employer was notified by a third party that the Applicant had fallen ill and could not travel, until she got better. The employer was further informed that the Applicant had received his letter, refusing the Applicant's request for unpaid leave, but since she had already paid the tickets and prepared everything for the trip, there was no way back.

17. On 24 January 2005, the Applicant's contract of employment was terminated, on the ground that she had been absent from work in violation of Administrative Direction No. 2003/2 implementing UNMIK Regulation No. 2001/36 on the Kosovo Civil Service (hereinafter: Administrative Direction 2001/36), Article 30.1 (b), (c), (d) and Article 5 of the Administrative Direction of the Ministry of Science and Technology (No. 44/2004) of 24 August 2004 (hereinafter: "Administrative Direction 44/2004").

18. On 26 January 2005, the Applicant visited the emergency ward at the University Hospital in Lusaka, Zambia, again.

19. On 1 March 2005, the Applicant filed a claim with the Department of Education and Science in Prizren, stating that she had been ill and that she had notified the employer thereof, which was the reason why she could not come to work.

20. On 4 March 2005, the Department of Education and Science in Prizren rejected the claim of the Applicant as unfounded and upheld the decision on termination of the employment contract.

21. On 15 March 2005, the Applicant filed a complaint against the decision of the Department of Education and Science in Prizren to the Regional Office of the Ministry of Education in Prizren, which, on 21 March 2005, rejected the complaint of the Applicant as unfounded.

22. On 6 June 2005, the Applicant filed a complaint against the decision of the Regional Office of the Ministry of Education in Prizren to the Inspectorate Office with the Ministry of Education, Science and Technology.

23. On 11 July 2005, the Applicant filed a claim with the Municipal Court of Prizren requesting the annulment of the decision on the termination of the employment contract. The Applicant claimed that she had notified the employer that she was out of the country and that she had fallen ill. Hence, she could not return to work.

24. On 13 January 2006, the Inspectorate Office at the Ministry of Education, Science and Technology rejected the claim of the Applicant as unfounded. The Applicant apparently did not appeal against this decision to the Ministry of Education, Science and Technology within 30 days.

25. On 5 April 2006, the Municipal Court of Prizren upheld the Applicant's claim annulling the termination of the contract of employment as unlawful because the Applicant had reasons for being absent since she had fallen ill (C. no. 527/05).

26. The employer filed a complaint with the District Court of Prizren, which on 6 October 2006, upheld the complaint of the employer, quashing the judgment of the Municipal Court and sending it to the Municipal Court for retrial (Ac.no. 341/06). The District Court concluded that the Applicant had disregarded the employer's decision, rejecting the Applicant's request for unpaid leave. That the Applicant fell ill, while she was visiting her daughter, was no valid reason for being absent from work.

27. On 26 March 2008, the Municipal Court retried the case and upheld the Applicant's claim annulling the termination of the contract of employment. The Municipal Court concluded that there was no legal basis in the Administrative Direction 44/2004 for the employer to terminate the contract of employment. Further, the employer had not acted in accordance with UNMIK Regulation No. 2001/27 on Essential Labour Law in Kosovo (hereinafter: "UNMIK Regulation 2001/27").

28. The employer filed a complaint with the District Court, which, on 6 November 2009, rejected the complaint and upheld the Judgment of the Municipal Court (Ac. No. 284/08). The District Court concluded that the Municipal Court had correctly applied the substantive law and verified correctly the factual situation.

29. On 25 November 2009, the employer submitted a complaint on points of law to the Supreme Court against the Judgment of the District Court and the Municipal Court, claiming that the Municipal Court had no jurisdiction to decide, because it was an administrative issue and the Applicant should have directed the claim to the Independent Oversight Board (hereinafter: the "IOB") which is competent to decide on issues concerning civil servants.

30. On 30 June 2010, the Supreme Court quashed the judgments of the District and Municipal Court and rejected the claim of the Applicant as unfounded, stating that the lower instances had wrongly judged the factual situation as well as wrongly applied the substantive law (Rev.I.no. 28/2010). In the Supreme Court's opinion, the Applicant had been absent from work without authorization, even though she had been informed the day before that her request for unpaid leave had been rejected. With regard to the substantive law, the Supreme Court reiterated that UNMIK Regulation 2001/36 and Administrative Instruction 44/2004 were applicable instead of UNMIK Regulation 2001/27.

Applicant's allegations

31. The Applicant alleges that the Supreme Court has rendered its judgment in violation of Article 49 of the Constitution which stipulates that the right to work is guaranteed by the state. She maintains that this guarantee was denied to her by the state judicial authority, respectively, the Supreme Court through its anti-constitutional judgment.

32. The Applicant claims that she was dismissed from work without any legal reasons and that her employment contract was terminated without any legal basis in an arbitrary manner by the employer.

Assessment of the admissibility of the Referral

33. As to the Applicant's complaint that Article 49 [Right to Work and Exercise Profession] of the Constitution was violated, the Court observes that, in order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, as further specified in the Law and the Rules of Procedure.

34. In this respect, reference is made to Article 47.2 of the Law, providing:

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

35. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999).

36. In this regard, the Court notes that the Applicant, as a civil servant, could have submitted an appeal against her dismissal to the Independent Oversight Board, which is the competent body to hear and determine appeals against public authorities. However, the Applicant apparently did not make use of this remedy.

37. The Court, therefore, determines that, in this respect, the Applicant has not exhausted all legal remedies available to her under applicable law.

38. Furthermore, an Applicant cannot complain that the regular courts have committed errors of fact or law, unless and in so far as they may have infringed rights and freedoms protected by the Constitution.

39. In this connection, the Court maintains that it is not a court of fourth instance, when considering the decisions taken by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, Resolution on Inadmissibility in Case No. KI 13/09, Sevdail Avdyli, of 17 June 2010 and, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

40. The Constitutional Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, for instance, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87 adopted on 10 July 1991).

41. In the present case the Applicant was successful in her law suits before the Municipal and District Courts, but the Supreme Court quashed the lower courts' decisions for having wrongly applied the substantive law. In this respect, the Court notes that the Applicant has not submitted any evidence showing that the finding of the Supreme Court was unfair or tainted by arbitrariness (see mutatis mutandis, Shub v. Lituania, ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

42. The Court, thus, concludes that the Applicant neither has substantiated her complaint regarding the alleged violations nor has she exhausted all legal remedies available to her under applicable law.

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (2) of the Rules of Procedure, by majority,

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Prof. Dr. Enver Hasani