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

Prishtina, on 18 December 2017
Ref. No.: RK1173/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI106/17

Applicant

Qerim Begolli

Constitutional review of the Judgment ARJ-UZVP no. 41/2017 of the Supreme Court of Kosovo, dated 19 July 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Qerim Begolli, from Peja (hereinafter, the Applicant).

Challenged Decision

2. The Applicant challenges the Judgment (ARJ-UZVP no. 41/2017 of 19 July 2017) of the Supreme Court which rejected the Applicant's request for extraordinary review of the rejection of his request for security measures following proceedings in which he requested annulment of the Decision (No. 47/2017, of 6 March 2017) of the Kosovo Judicial Council (hereinafter, the KJC).

3. The challenged Judgment was served on the Applicant on 12 August 2017.

Subject Matter

4. 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], 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). The Applicant also alleges a violation of Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter, the Convention).

5. The Applicant also requests the Court to impose an interim measure, namely "*to postpone the appointment of the selected judges following the vacancy* [of the KJC] *for recruitment of judges in basic courts of Kosovo [...]*".

6. In addition, the Applicant requests the Court to hold a public hearing *"with the purpose of clearing the presented evidence in accordance with Rule 39 of the Rules of Procedure."*

Legal basis

7. The Referral is based on Article 113 (7) of the Constitution, in conjunction with Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter, the Court) and Rules 54 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

8. On 30 August 2017, the Applicant submitted the Referral to the Court.

9. On the same day, the President appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodriguez (presiding), Snezhana Botusharova and Ivan Čukalović.

10. On 6 September 2017, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court.

11. On 18 September 2017, the Applicant filed an additional letter with the Court.

12. On 13 November 2017, 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

13. In April 2016, the KJC announced a vacancy for 61 new judges to be appointed at the basic court level in Kosovo. The Applicant was one of the candidates competing for a position. In the qualifying test, the Applicant had accumulated less than 45 points.

14. On 6 March 2017, the KJC (Decision no. 47/2017) decided as follows:

> *"1. To annul the Decision of the KJC no. 131/2016, for the lowering of the passage threshold of 28 October 2016.*
> *2. To annul the results of the written exam of 3 and 4 December 2016, for all the candidates that have applied for a position as judge in basic courts.*
> *3. To repeat the written exam only for 75 candidates who in the qualifying test of 15 October 2016 have managed to accumulate 45 points or more."*

15. On 22 March 2017, the Applicant filed a claim against the KJC with the Basic Court in Prishtina requesting the annulment of the abovementioned Decision. In addition, the Applicant requested an interim measure [security measure] to be granted through which the KJC would be ordered to halt the appointment procedure for new judges until the merits of his claim are dealt with by the regular courts.

16. On 24 March 2017, the Basic Court in Prishtina [number of the Decision missing] invited the Applicant to revise his claim *"in accordance with the applicable law which regulates the issue of postponement of the execution of an administrative act"*.

17. On 3 April 2017, the Applicant reaffirmed his position stated in his initial claim. He argued that the Basic Court in Prishtina should grant him the interim measure in accordance with *"Article 63 of the Law No. 03/L-202 on Administrative Conflicts in conjunction with Article 306 of the Law No. 03/L-006 of Contested Procedure"*.

18. On 4 April 2017, the Basic Court in Prishtina (Decision, A. no. 524/17) dismissed the Applicant's request for interim measures as impermissible by law by reasoning that: *"[...] the proposal of the claimant* [the Applicant] *as it is contains flaws which make it impossible to conduct proceedings in relation to this claim, whilst the latter* [the Applicant] *did not fix them in accordance with the concrete instructions given by the court."*

19. The Applicant appealed before the Court of Appeal. He contested the legality of the Decision of the Basic Court in Prishtina by arguing that the Law on Administrative Conflicts as well as the Law on Contested Procedure was not correctly applied.

20. On 25 May 2017, the Court of Appeal (Decision, AA. no. 163/2017) rejected the Applicant's appeal and thus confirmed the Decision of the Basic Court in Prishtina. *Inter alia*, the Court of Appeal reasoned that:

> *"The Appeal's Panel, same as the court of first instance, considers that the proposal of the claimant [...] is not based on legal provisions of Article 22 of the Law on Administrative Conflicts, which regulates the manner of submission of requests for postponing the final Decision of an administrative authority until the case is decided on merits pursuant to the claim. [...] The court of first instance returned the proposal for further corrections and completion and to submit it within the meaning of Article 22 of the Law on Administrative Conflict but the proposers again acted in the same manner by requesting interim measure of security even in the appeal but this institute is not applied in the procedure of the administrative conflict [...] therefore, the Court of the first instance rightfully dismissed the proposal of the claimants as impermissible due to the legal flaws and the failure to avoid them by completion and correction [...]."*

21. Against the Decision of the Court of Appeal, the Applicant filed a request for extraordinary review before the Supreme Court alleging violations of material and procedural law.

22. On 19 July 2017, the Supreme Court (Judgment ARJ-UZVP no. 41/2017) rejected the Applicant's request as ungrounded. The Supreme Court considered that the lower courts had rightfully applied the material law and thus confirmed their decisions. The relevant part of the Judgment reads:

> *"[...] the court of second instance made a fair application by rejecting the appeal of the claimants [...]. Article 63 of the Law on Administrative Conflicts stipulates that if this Law does not contain provisions for the procedure in administrative conflict, the provisions of the Law on Contested Procedure will be adequately applied. [...] In the present case, according to fair interpretation, the claimants should have requested by the court of first instance the postponement of the execution of the administrative act until the issuance of a court decision, pursuant to Article 22.6 of the Law on Administrative Conflict and not Article 306 of the Law on Contested Procedure [...] because Article 36 of the Law on Administrative Conflict is applied only of this law does not contain provisions for the procedure in the administrative conflict."*

Applicant's allegations

23. The Applicant claims that the challenged Judgment of the Supreme Court violated his rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 49 [Right to Work and Exercise Profession] of the Constitution as well as his right guaranteed by Article 6 [Right to Fair Trial] of the Convention.

24. With regards to his right to *"equality before the law"* and the right to *"work and exercise profession"* the Applicant claims that by not imposing an interim

measure and by not reviewing the evidence he presented, the basic courts have *"caused irreparable damage"* to him and have not afforded him equal treatment with *"other candidates."*

25. With regards to his right to *"fair and impartial trial"*, the Applicant further alleges that the challenged Judgment of the Supreme Court was *"partial because while decision upon the appeal [...] the Presiding Judge of the Supreme Court was Judge N.B. (who at the time of announcement of the vacancy was a member of the Commission for accepting candidates for judge)."* According to the Applicant, Judge N.B. *"should have requested exclusion"* from his case.

26. The Applicant concludes by requesting the Court the following:

> *"[...] I request from the Constitutional Court of Kosovo to declare invalid Decision ARJ-UZVP. no. 41/2017 of the Supreme Court of Kosovo, of 19 July 2017, to decide upon the matter of protection as it was requested by the proposal for imposing the temporary measure of protection in the statement of claim submitted on 22 March 2017, to suspend the decree of selected candidates pursuant to the vacancy for recruiting judges for basic courts of Kosovo, declared by the Kosovo Judicial Council on 24 April 2016 due to the alleged violation of the Constitution."*

Admissibility of the Referral

27. The Court examines whether the Applicant has met the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

28. In that respect, Article 113 of the Constitution provides:

> *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 exhausting all legal remedies provided by law.*

29. In addition, Article 49 of the Law provides that: *"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".*

30. In the instant case, the Court notes that the Applicant has exhausted all available legal remedies considering that the Judgment of the Supreme Court may be contested only before the Constitutional Court. The Court also notes that the Applicant was served with the challenged Judgment on 12 August 2017 and filed his Referral with the Court on 30 August 2017.

31. Thus, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies afforded to him by the applicable law and the Referral was submitted within the four months' time limit.

32. However, the Court also must take into account Article 48 of the Law and Rule 36 of the Rules of Procedure.

Article 48 of the Law

"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."

Rule 36 of the Rules of Procedure

"(1) The Court may consider a referral if: [...] (d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a Referral as being manifestly ill-founded when it is satisfied that:

[...], or
b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights;
[...]
d) the Applicant does not sufficiently substantiate his claim".

33. The Applicant, as stated above, challenges the Judgment (ARJ-UZVP no. 41/2017, dated 19 July 2017) of the Supreme Court, alleging a violation of his right to fair and impartial trial, equality before the law and the right to work and exercise a profession, as protected by the Constitution and the Convention respectively.

34. In respect to his right protected by Articles 24 and 49 of the Constitution, the Applicant claims that the regular courts have not reviewed the evidence presented by him which created a situation of *"irreparable damage"*. He further claims that the regular courts have placed him on an unequal position with the other candidates.

35. In light of these allegations, the Court first recalls that the Applicant's claim was procedurally rejected since it was considered to be *"impermissible by law"*. Even after a specific request by the Basic Court in Prishtina to correct and align the claim in accordance with the applicable law, the Applicant confirmed his initial claim and did not correct it as per the request of the first instance court. The latter reasoned its decision on this point by referring to the relevant material law.

36. Further on this crucial point, the Court recalls that the Applicant submitted his first claim and his revised claim based partly on the provisions of the Law on Contested Procedure and partly on the Law on Administrative Conflicts. However, the regular courts explained to the Applicant that a claim may be submitted under the provisions of the Law on Contested Procedure only and if

the Law on Administrative Conflicts did not regulate such matters itself. Considering that the Law on Administrative Conflicts regulated the matter of *"postponement of the execution of an administrative act"*, the Applicant was invited to correct his claim in accordance with the provisions of such law. Despite that, the decisions of the regular courts show that the Applicant had once again based his claim on provisions of the Law on Contested Procedure – which was subsequently considered as a claim impermissible by law by the regular courts.

37. The Court also recalls that the stance of the Basic Court in Prishtina with respect to impermissibility of the claim submitted by the Applicant was fully confirmed by the Court of Appeal and the Supreme Court. The Court of Appeal considered that the claim of the Applicant was *"not based on legal provisions of Article 22 of the Law on Administrative Conflicts";* whilst, the Supreme Court confirmed that the Applicant should have requested postponement of the execution of the administrative act [Decision (No. 47/2017 of 6 March 2017) of the KJC] pursuant to *"Article 22.6 of the Law on Administrative Conflict and not Article 306 of the Law on Contested Procedure."*

38. In this regard, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the public authorities, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

39. The Constitutional Court also reiterates that it does not act as a court of fourth instance, in respect of the decisions taken by the regular courts or other public authorities. It is the role of the regular courts or other public authorities, when applicable; to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis, García Ruiz v. Spain,* No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28. See also Constitutional Court case No. KI70/11, *Applicants Faik Hima, Magbule Hima and Bestar Hima,* Resolution on Inadmissibility of 16 December 2011).

40. In this respect, the Court notes that the Applicant had ample opportunities to present his case before the regular courts. The issue of the applicable law has been extensively addressed by all regular courts. The Court of Appeal and the Supreme Court have responded to the claim of the Applicant as to why his claim has been considered as impermissible by law.

41. The Constitutional Court can only consider whether the proceedings in general and viewed in its entirety have been conducted in such a way that the Applicant had a fair trial (See, *inter alia, Edwards v. United Kingdom,* No. 13071/87, Report of European Commission of Human Rights of 10 July 1991). The mere fact that the Applicant is not satisfied with the outcome of the proceedings in his case do not give rise to an arguable claim of a violation of their rights as protected by the Constitution and ECHR.

42. The Court considers that the proceedings before the Supreme Court, the Court of Appeal and the Basic Court in Prishtina have been fair and reasoned (See, *mutatis mutandis, Shub v. Lithuania,* No. 17064/06, ECtHR, Decision of 30 June 2009).

43. In respect to his right protected by Article 31 of the Constitution and Article 6 of the ECHR, the Applicant claims that the Supreme Court has not been impartial considering that one of the Judges of the Supreme Court who decided on his request for extraordinary review has been *"a member of the Commission for accepting candidates for judge"*. According to the Applicant, Judge N.B. *"should have requested exclusion"* from his case.

44. In this regard, the Court notes that despite claiming impartiality of one particular Judge of the Supreme Court, the Applicant has not presented any facts to substantiate his claim. He has not submitted any *prima facie* evidence indicating a violation of his right to fair and impartial trial as protected by the Constitution and the Convention (See *Vanek v. Slovak Republic*, No. 53363/99, ECtHR, Decision of 31 May 2005) and did not specify how the referred articles of the Constitution and the Convention support his claim, as required by Article 48 of the Law and Rules 36 (2) (b) and (d) of the Rules of Procedure.

45. The mere fact that a Judge was part of a certain commission does not make him automatically disqualified to sit on a bench. The burden of proof lays with the Applicant to convince this Court as to how and why it should question the impartiality of the Judge. The Applicant has not provided any evidence or arguments to that end and as a result the Court sees no grounds to rule that the impartiality of the Judge raises any concerns that could lead to a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

46. In view of the circumstances of the case and the above examined safeguards, the Court finds that the Applicant's complaints about the impartiality of Judge N.B. are not objectively justified and substantiated.

47. In sum, the allegations of a violation of his rights and freedoms guaranteed by the Constitution and the Convention are unsubstantiated on constitutional grounds and not proven and thus are manifestly ill-founded.

48. For the foregoing reasons, the Court considers that, in accordance with Article 48 of the Law and Rules 36 (2) (b) and (d) of the Rules of Procedure, the Referral is inadmissible.

Request for Public Hearing

49. The Applicant also requested that the Court holds a public hearing *"with the purpose of clearing the presented evidence in accordance with Rule 39 of the Rules of Procedure."*

50. The Court recalls that, in accordance with Rule 39 [Right to Hearing and Waiver], *"only the referrals determined to be admissible may be granted a hearing before the Court [...]."*

51. The Court has concluded that the Referral is inadmissible therefore there is no need to hold a public hearing.

Request for Interim Measure

52. The Applicant requested the Court to impose an interim measure, namely to postpone the appointment of selected judges following the finalization of the selection process by the KJC for basic court judges.

53. The Applicant did not provide any arguments or reasons as to why the interim measure should be granted by the Court. He merely mentioned it in the concluding part of his Referral, without providing any convincing reasons or arguments.

54. In order for the Court to decide on an interim measure, pursuant to Rule 55 (4) and (5) of the Rules of Procedure, it is necessary that:

> *"(a) the party requesting interim measures has shown (...), if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and [...]*
> *If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."*

55. As emphasized above, the Applicant has not shown a *prima facie* case on the admissibility of the Referral. Therefore, the Court rejects the request for interim measure as ungrounded.

FOR THESE REASONS

Pursuant to Articles 113.1 and 113.7 of the Constitution, Articles, 27, 47, 48 of the Law and Rule 36 (2) (b) and (d), 39, 55 (4) and 56 (3) of the Rules of Procedure, on 13 November 2017, unanimously:

DECIDES

I. TO DECLARE the Referral as 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. TO DECLARE this Decision effective immediately

Judge Rapporteur

Altay Suroy

President of the Constitutional Court

Arta Rama-Hajrizi