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

Prishtina, 18 May 2017
Ref. No.:RK 1064/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI147/16

Applicant

Asllan Fazliu

Constitutional review of Judgment Rev. no. 250/2016 of the Supreme Court, of 13 October 2016

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 and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by Asllan Fazliu from Ferizaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [Rev. no. 250/2016] of the Supreme Court, of 13 October 2016.

Subject matter

3. The subject matter is the constitutional review of the abovementioned Judgment of the Supreme Court, whereby the Applicant's rights and freedoms guaranteed by Article 31.1 [Right to Fair and Impartial Trial], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 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 14 November 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 16 January 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Selvete Gërxhaliu-Krasniqi (Judge) and Gresa Caka-Nimani (Judge).

7. On 6 February 2017, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.

8. On 5 April 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

9. The Applicant was an employee of the State Office of Accounting and Payment - Branch in Ferizaj (also known as 'Social Accounting Service', hereinafter: SAS) until 1991.

10. On 09 April 1991, SAS rendered decision [no. 7/3-2] on termination of employment relationship "*due to serious violation of work duties.*"

11. On an unspecified date in 1992, the Applicant filed the statement of claim with the Municipal Court in Ferizaj, requesting the annulment of Decision [no. 7/3-

2] of SAS, reinstatement to his working place and the payment of unpaid salaries.

12. On 26 June 1998, the Municipal Court in Ferizaj rendered Judgment [1080/92], which approved the Applicant's statement of claim as grounded and obliged the respondent (SAS) to remand the Applicant to the working place and pay him unpaid salaries.

13. SAS filed an appeal with the District Court in Prishtina against the Judgment of the Municipal Court in Ferizaj of 26 June 1998.

14. On 14 September 1998, the District Court in Prishtina rendered Judgment [597/98] which rejected the SAS appeal as ungrounded, and upheld the Judgment of the Municipal Court in Ferizaj in its entirety.

15. On 24 April 2000, the Applicant filed a statement of claim with the Municipal Court in Ferizaj against the Banking and Payment Authority of Kosovo in Prishtina (hereinafter: BPAK) for compensation of damage, considering that the respondent has passive legitimacy and that the latter still has available the movable and immovable assets of the former SAS.

16. On 7 April 2003, the Municipal Court in Ferizaj rendered Judgment [C. no. 10/2000], which rejected the Applicant's statement of claim as ungrounded. The reasoning of the Judgment reads:

> *„Based on this Judgment, which was rendered in conformity with UNMIK Regulation No. 1999/20, which deals exclusively with the Banking and Payment Authority of Kosovo, now as the respondent; it is provided that such an authority – the respondent – has not acquired the financial obligations of the former SAS, and therefore, as is the present with the claimant, the payment of damage compensation, namely compensation of personal income starting from the termination of the employment relationship and onwards."*

17. The Applicant filed an appeal with the District Court against Judgment of the Municipal Court [C. no. 10/2000] on the grounds of essential violations of the contested procedure, Article 353, paragraph 1, item 1.2 and 3 of LCP, with a proposal that the Judgment be annulled and the case be remanded for retrial to the first instance court.

18. On 24 May 2005, the District Court rendered Judgment [Ac. no. 446/2003] which approved the Applicant's appeal and annulled Judgment of the Municipal Court [C. no. 10/2000]. The reasoning of the decision reads:

> *„In the retrial, the first instance Court is obliged to eliminate the violations ..., by clarifying the claim as regards the correct name of the respondent..."*

19. On 1 December 2006, the Municipal Court rendered Judgment [C. No. 312/2005] which rejected the Applicant's statement of claim as ungrounded. The reasoning of the Judgment reads:

„...the statement of claim of the claimant is to be rejected based on the new situation created following the changes ensued at the respondent – the former SAS – now BPAK, by the aforementioned UNMIK Regulation. Such a situation has been determined also by relevant documents mentioned above, and the grounded categorical objections of the respondent, as regards the assuming of obligations in accordance with the claim of the claimant, obligations which would be of the former SAS, and which were not acquired by the respondent – now pursuant to UNMIK Regulation No. 47/2006, with the name BPAK, thus, on the grounds of this legal and factual situation, the court could not decide otherwise."

20. On 4 December 2006, the Applicant filed a new claim with the same requests, in which now the Central Bank of Kosovo (hereinafter: CBK), as the legal successor to the BPAK, was stated as a respondent.

21. On 22 October 2012, the Municipal Court in Ferizaj rendered Judgment [C. No. 324/08] which rejected the statement of claim of the Applicant as ungrounded. The reasoning of the judgment reads:

„The Court has analyzed the allegations of the parties to the proceedings, and in particular, it has analyzed the allegation of the responding party – Central Bank of the Republic of Kosovo in Prishtina, that the respondent does not have the passive legitimacy of a party in a procedure, due to the fact that, during the time period for which the personal income is requested, between 1990-1991, the Central Bank did not exist, and it is not a successor of the former Social Accounting Service, or of the former National Bank of Yugoslavia."

22. The Applicant filed an appeal with the Court of Appeal against the Judgment of the Municipal Court [C. No. 324/08].

23. On 16 September 2015, the Court of Appeal rendered Judgment [CA. No. 41/2013] which rejected the Applicant's appeal as ungrounded. The reasoning of the Judgment reads:

„...it undoubtedly results that the respondent – Central Bank of Kosovo is a legal successor of the Banking and Payments Authority of Kosovo, pursuant to UNMIK Regulation No. 2006/47, and the Banking and Payments Authority of Kosovo, which was established by UNMIK Regulation No. 1999/20. However, the respondent is not a legal successor of the National Bank of Yugoslavia – Office for accounting and payments, Branch in Ferizaj, which existed until 1999, by Resolution 1244 of the United Nations Security Council their operation were terminated."

[...]
Due to the aforementioned information, the Court of Appeal of Kosovo found that the conclusion of the first instance court, that the respondent – Central Bank of Kosovo does not have passive legitimacy in this legal matter, was correct, thus, it correctly rejected the Statement of claim as ungrounded."

24. The Applicant filed a request for revision with the Supreme Court against the Judgment of the Court of Appeal [CA. No. 41/2013] on the grounds of erroneous application of the substantive law.

25. On 13 October 2016, the Supreme Court rendered Judgment [Rev. No. 50/2016] which rejected the Applicant's request for revision, with the reasoning:

> *„...pursuant to Article 1 of UNMIK Regulation No. 2006/47, of 24 August 2006, on the Central Banking Authority in Kosovo, it is determined that the Central Banking Authority of Kosovo (CBAK) is a successor of the Banking and Payments Authority of Kosovo, as an independent legal entity, with full capacities as a legal person pursuant to the law in force in Kosovo; it is not foreseen by this Regulation either, the CBAK is a successor – legal inheritor of the National Bank of Yugoslavia – Office for accounting and payments, Branch in Ferizaj, thus, as the Supreme Court of Kosovo considers, the lower instance courts have applied the legal provisions correctly, when they found that the respondent does not have passive legitimacy in this legal matter, and rejected the statement of claim of the claimant as ungrounded.*
>
> *The respondent has not by any regulation or law taken over any obligation in the employment relationship towards the employees of the National Bank of Yugoslavia – Office for accounting and payments, Branch in Ferizaj, which was obliged to reinstate the claimant to work, and recognize all his rights from the employment relationship..."*

Applicant's allegations

26. The Applicant considers that, *„the courts of three instances have rendered biased and unfair decisions, because the claimant was not guaranteed a fair, correct and impartial trial, which is guaranteed by the provisions of Article 31.1 of the Constitution of the Republic of Kosovo. In addition, the claimant was not either guaranteed the right, namely defense, as provided by Article 6 of the European Convention on Human Rights."*

27. The Applicant requests the Court, *„to ANNUL Judgment Rev. no. 250/2016, of 13.10.2016, and to remand the case to the competent court for retrial."*

Assessment of the admissibility of Referral

28. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and Rules of Procedure.

29. In this respect, the Court refers to Article 113. 7 of the Constitution, which establishes:

"[...]
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."

30. The Court refers to Article 48 of the Law, which provides:

"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."

31. Regarding the foregoing, the Court finds that the Applicant is an authorized party; that he pointed out possible constitutional violations; and that the Referral was submitted in accordance with the deadlines established in Article 49 of the Law after exhausting all legal remedies.

32. However, the Court must also refer to the Rules 36 (1) (d) and 36 (2) (b) of the Rules of Procedure, which foresee:

"(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:
[...]

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights."

33. The Court notes that the crux of the Referral is related to the way how the regular courts have interpreted the relevant legal provisions concerning the passive legitimacy of the respondents (respectively: SAS,BPAK, CBK), which allegedly resulted in violation of Applicants rights and freedoms as guaranteed by Article 31.1 of the Constitution and Article 6 of the ECHR.

34. In relation to this allegation, the Court recalls that the fairness of a proceeding is assessed looking at the proceeding as a whole (see case: European Court of Human Rights (ECtHR) Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, No. 10590/83, paragraph 68), therefore, in the determination of the merits of the Applicant's allegations, the Court will comply with these principles.

35. In its examination of the case file, the Court notes that throughout the proceedings the Applicant had the ability to take legal actions to protect his rights in the regular court proceedings, he had a right to access to courts with full jurisdiction throughout the proceedings, at all stages of the proceedings he was not denied substantive equality in presenting his arguments, evidence and facts; the Applicant was given the possibility of public hearings before the courts as an "essential element" of the right to a fair trial under Article 31.1 of the Constitution.

36. The Court observes that the regular courts applied the relevant legal provisions on which they based their decisions with respect to the question of passive legitimacy of the respondents and that they provided sufficient reasons for their application, which is precisely a matter of legality that falls within the jurisdiction of regular courts.

37. The Court reiterates that it is not the task of the Constitutional Court to deal with the errors of facts or law, committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

38. In that regard, the Court emphasizes that in the case-law of the European Court of Human Rights (hereinafter: ECtHR) it is established that "*it is the role of the regular courts to interpret and apply rules of both procedural and substantive law* (See, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECtHR] 1999-I)".

39. In this respect, the Court notes that the Referral is manifestly ill-founded if it lacks any *prima facie* evidence which would clearly point to a possible violation of human rights and freedoms (see ECtHR Judgment of 31 May 2005, *Vanek vs. Slovak Republic,* application no. 53363/99) and if the facts in respect of which the Referral is submitted clearly do not constitute a violation of the rights alleged by the Applicant, namely if the Applicant has no "reasoned referral" (see *ECtHR* Judgment of 26 July 2005, *Mezőtúr-Tiszazugi and Vízgazdálkodási Társulat v. Hungary*, application number 5503/02).

40. In sum, the Court notes that the Applicant has not substantiated his allegations of a violation of his human rights and fundamental freedoms as guaranteed by the Constitution, because presented facts do not in any way justify the allegation of a violation of the constitutional rights.

41. Therefore, the Referral is manifestly ill-founded, on constitutional basis, and is to be declared inadmissible in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, on 5 April 2017, 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; and

IV. This Decision effective immediately;

Judge Rapporteur **President of the Constitutional Court**

Bekim Sejdiu

Arta Rama-Hajrizi