



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

Prishtina, on 08 February 2018
Ref. no.: RK 1195/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI103/17

Applicant

Arsim Hazeri

**Constitutional review of Judgment Rev. No. 44/ 2017 of the Supreme
Court of Kosovo of 20 April 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-Krasnqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by Arsim Hazeri from Prizren (hereinafter: the Applicant), who is represented by the lawyer Naim Qelaj.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 44/ 2017 of the Supreme Court of Kosovo, of 20 April 2017.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment which has allegedly violated Applicant's rights guaranteed by Articles 24[Equality Before the Law], 31 [Right to Fair and Impartial Trial], 49 [Right to Work and Exercise Profession], 53 [Interpretation of Human Rights Provisions]and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 (Right to a fair trial) of the European Convention of Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113. 7 of the Constitution, Article 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 18 August 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 25 August 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović.
7. On 11 September 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo.
8. On 07 December 2017, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 01 January 2012, the Applicant concluded the employment contract (No. 12605) with the Energy Corporation of Kosovo (hereinafter: KEK).
10. This employment contract was concluded for a fix period of time of one year, starting from 1 January 2012 to 31 December 2012.
11. On 18 July 2012, the first instance of KEK Disciplinary Authority, by Decision No. 1235/1, terminated the employment relationship with the Applicant, reasoning that he failed to fulfill certain working objectives.

12. On 20 July 2012, the Applicant filed a complaint, No. 4153, to the second-instance of KEK disciplinary authority, stating that the termination of employment relationship was unlawful and that the employer's decision is based on discriminatory conditions, as the evaluation of the working objectives was done based on "group norms" (group results) and that the KEK did not check at all the realization of the personal results in the realization of the business objectives ("individual norm").
13. On 30 July 2012, the second instance of the KEK disciplinary authority, by decision 424, rejected the Applicant's appeal as ungrounded and upheld the decision of the first instance of KEK disciplinary authority on termination of employment relationship.
14. On 7 August 2012, the Applicant filed a claim with the Basic Court in Prizren, requesting the annulment of both KEK decisions and reinstatement to the working place.
15. On 12 October 2012, the Basic Court in Prizren, by Judgment C. No. 751/12, approved the claim of the Applicant and ordered the following:
 - I. *"The Claim filed by the claimant Arsim Hazeri from Prizren, is hereby APPROVED, whereas the Decision of the Respondent, KEK jsc – Network Division in Prishtina, no. 1235/1 of 18.07.2012 and Decision no. 424 of 30.07.2012, on termination of employment relationship, is hereby annulled.*
 - II. *The respondent is hereby OBLIGED to reinstate the claimant at his place of work as a Electricity Consumption Specialist by acknowledging all the rights of the workplace as well as to compensate personal income in the amount of 400 € gross per month foreseen for the personal income from the place of work where he works, as of 30.07.2012 to until the reinstatement to work, also calculating the legal interest of 3.5 %, from the day of filing the claim, under the threat of the forced execution.*
 - III. *The respondent is obliged to compensate the claimant the costs of the court proceedings, in the amount of 452 €."*
16. KEK filed an appeal with the Court of Appeals of Kosovo against this Judgment of the Basic Court in Prizren.
17. On 20 September 2016, the Court of Appeals of Kosovo, by Judgment AC. No. 323/14, approved the KEK appeal, modified the Judgment of the Basic Court in Prizren by rejecting the Applicant's statement of claim as ungrounded.
18. The Applicant submitted a request for revision to the Supreme Court of Kosovo against the Judgment of the Court of Appeals of Kosovo. In his request for revision, the Applicant stated that he was discriminated against and that the equality before the law was not respected in his case. The Applicant has also attached the Judgment Rev. No. 85/14 of the Supreme Court of Kosovo, of 20 May 2014, which approved the statement of claim of the claimant E. M., who is a colleague of the Applicant and who was dismissed from his job at the same time for the same reasons and in similar circumstances.

19. On 20 April 2017, the Supreme Court of Kosovo, by Judgment Rev. No. 44/2017, partially approved the Applicant's revision, modified the Judgment of the Court of Appeals, so that it upheld the **Ist part** of the enacting clause of the first instance judgment, concerning the annulment of the decision of the respondent KEK no. 1235/1 and decision no. 424, for the termination of employment relationship. It also upheld **part III** of the enacting clause relating to the costs of contested procedure in the amount of € 452.
20. Furthermore, the Supreme Court of Kosovo modified **part II** of the first instance judgment, by obliging the respondent KEK to pay the Applicant, in the name of compensation of personal income, an amount of 400 € for each month starting from 18 July 2012 to 31 December 2012 (not until the reinstatement to work, as it was stated in the first instance decision, but until the date of termination of the employment contract).
21. Finally, the Supreme Court of Kosovo rejected the revision in the part of the judgment of the second instance court concerning the obligation of the respondent to reinstate the claimant within seven days to the previous working duties according to the employment contract no. 12605/0 of 1 January 2012, reasoning that the fixed-term employment contract has expired.

Applicant's allegations

22. The Applicant first claims that the termination of employment relationship was unlawful and that he should have been entitled to all rights from employment relationship, and, therefore, the right to reinstatement to work.
23. The Applicant considers that the fundamental rights guaranteed by the Constitution have been violated, because the same court in identical cases, for other workers, acted in favor of a request for reinstatement to work.
24. The Applicant considers that he is "*discriminated against*" and encloses two judgments of the Supreme Court of the Republic of Kosovo (Rev. No. 85/14 of 20.05.2014 and Rev. No. 151/2013 of 05.06.2013), in which the employees were reinstated to work.
25. Furthermore, the Applicant refers to the Judgment of the Constitutional Court of the Republic of Kosovo in case no. KI89/13, emphasizing that "*the claims of the party submitting the Referral and other facts are entirely identical to the case.*"
26. Subsequently, the Applicant considers that Article 49 of the Constitution has been violated and reasons that "*the termination of employment relationship by unlawful decision which was annulled, implies the reparation of all the harmful consequences caused by a legal act for a person without his guilt.*"
27. Finally, the Applicant considers that the Supreme Court has erroneously interpreted the substantive provisions of the Law on Labor "*at the expense of a person who has been erroneously injured by unlawful decision.*"

28. For the reasons above, the Applicant concludes that he was not “*provided an adequate legal and judicial protection*” which resulted in violation of „*Article 31 of the Constitution [...] u in conjunction with Article 6. 1 (Right to a fair trial) of the ECHR.*“
29. The Applicant considers that he “*was denied the right to fair trial also by the fact that regardless on the evidence provided on his favor, all those were interpreted to the detriment of the Applicant, “by which was violated Article 55 of the Constitution due to “the fact that the fundamental rights and freedoms have been violated and restricted, such as the right to work.”*”
30. Based on the above, the Applicant requests the Court to hold that “*there has been a violation of Article 24 [...], Article 49 [...], Article 53, [...], Article 55 [...], Article 31 of the Constitution of the Republic of Kosovo [...], in conjunction with Article 6. 1 (Right to a fair trial) of the ECHR.*“
31. Finally, the Applicant requests the Court to:

*To declare Judgment Rev. No. 44/17 of the Supreme Court of Kosovo, of 20.04.2017, invalid, in the part which rejected the Applicant’s revision.
To remand Judgment Rev. No. 44/17 of the Supreme Court of Kosovo of 20.04.2017 for reconsideration, in the part which rejected the Applicant’s request.*

Assessment of the admissibility of the Referral

32. The Court first examines whether the Applicant has met the admissibility requirements established in the Constitution, as further specified in the Law and foreseen in the Rules of Procedure.
33. 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.”*
34. The Court also considers whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court first refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 48 [Admissibility Criteria]

„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 a 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”.

35. Regarding the fulfillment of these requirements, the Court finds that the Applicant filed the Referral as an individual and in a capacity of an authorized party challenging the act of a public authority, that is, the Judgment of the Supreme Court [Rev. No. 44/2017] of 20 April 2017, after exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law and filed a Referral in accordance with the deadlines referred to in Article 49 of the Law.
36. However, the Court should further assess whether the requirements established in Rule 36 of the Rules of Procedure have been met.
37. Rule 36 [Admissibility Criteria], paragraphs (1) (d) and (2) (b) and (d) of the Rules of Procedure provides:
 - „(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) 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”.*
38. The Court notes that the central allegation of the Applicant is that he has been treated unequally as compared to other persons to whom the KEK terminated their employment relationship.
39. Further, the Applicant's basic request is related to his reinstatement to his working place and he considers that the challenged judgment violated his right to fair and impartial trial and the right to work, because it rejected the request for reinstatement to his working place.
40. For the reasons above, the Court concludes that in substance the Referral of the Applicant raises allegations for violation of Articles 24, 49 and 31 of the Constitution, in conjunction with Article 6 of the ECHR.
41. Therefore, the Court will analyze in detail the alleged violations of Articles 24, 49 and 31 of the Constitution.

(i) Alleged violations of Article 24 of the Constitution in conjunction with other Articles

A. General principles regarding discrimination

42. The Court recalls the case law of ECtHR which states that “*discrimination treating differently, without an objective and reasonable justification, persons in relevantly similar situations*” (See, *Willis v. the United Kingdom*, paragraph 48, ECtHR Judgment of 11 September 2002; *Bekos and Koutropoulos v. Greece*, paragraph 63, ECtHR Judgment of 13 March 2006).
43. In order that the Applicant’s allegations regarding discrimination are successful, he must prove *inter alia* that his position can be considered similar to the position of another person who had a better treatment (See *Fredin v. Sweden* (no. 1), paragraph 60, the ECtHR Judgment of 18 February 1991)

B. Application of the abovementioned principles to the present case

44. The Court notes that in support of his claims regarding “*discrimination and unequal treatment*,” the Applicant encloses two judgments of the Supreme Court of Kosovo (Rev. No. 85/14 of 20.05.2014 and Rev. No. 151/2013 of 05.06.2013), by which the employees were reinstated to work.
45. The Applicant further alleges that the Supreme Court “*for identical cases, for other workers, acted in favor of a request for reinstatement to work.*”
46. In this regard, the Court observes that the Applicant has not presented a convincing argument to substantiate his allegation that he has been treated differently by the Supreme Court, as compared to the other employees.
47. The Court has thoroughly analyzed the above-mentioned judgments of the Supreme Court and found that the Supreme Court did not “*act differently, without objective and reasonable justification, to persons in relatively similar situations.*”
48. Thus, the court notes that the Judgment of the Supreme Court of Kosovo, Rev. No. 85/14 of 20.05.2014, refers to KEK employee who was in permanent employment relationship with the KEK, while the Applicant in the current case was employed for a fixed period of time.
49. Therefore, the Court concludes that the Judgment of the Supreme Court of Kosovo, Rev. No. 85/14 of 20.05.2014, does not refer to “*identical cases*” as claimed by the Applicant.
50. The Court also analyzed Judgment Rev. No. 151/2013 of the Supreme Court of Kosovo, of 05 June 2013. By this Judgment was approved as grounded the request of the KEK workers to annul the KEK decisions on termination of employment relationship and request for reinstatement to work and the case was remanded for retrial to the Supreme Court.

51. However, the legal basis that were applied in this case and the legal basis that were applied to the Applicant are not the same.
52. The Court notes that at the time of the dispute and rendering the judgment of the Supreme Court of Kosovo, Rev. No. 151/2013, of 5 June 2013, the Law on Labor No. 12/1989 of the Socialist Autonomous Province of Kosovo pursuant to UNMIK Regulation No. 1999/24 was applicable.
53. In contrast, the challenged Judgment of the Supreme Court was rendered based on the Law on Labor of the Republic of Kosovo, No. 03/L-212, which, in the meantime entered into force and was applicable at the time when the Applicant initiated the dispute.
54. From the foregoing, the Court concludes that the two Supreme Court judgments which the Applicant refers to were not rendered at the same time and in relatively similar situations as he claims.
55. The Court also analyzed the judgment of the Constitutional Court of the Republic of Kosovo in case no. KI89/13 invoked by the Applicant. The Court concludes that the circumstances and legal situation in Judgment No. KI89/13 were identical, and the actions of the Supreme Court were different, while in the present case we do not have such a legal situation.
56. In light of the above facts and explanations, the Court concludes that we have different circumstances and different legal situations compared to the Applicant and other KEK workers, decided by the Supreme Court.
57. Therefore, the Court holds that the Applicant's allegations of discrimination and unequal treatment by the Supreme Court are ungrounded, as the Supreme Court did not "*act without an objective and reasonable justification, towards persons in relevantly similar situations.*"

(ii) Alleged violation of Article 49 of the Constitution in conjunction with other Articles

58. The Applicant further invokes a violation of Article 49 of the Constitution stating that the termination of work occurred "*by unlawful decision which was annulled, implies the reparation of all the harmful consequences caused by a legal act for a person without his guilt.*"
59. With regard to these Applicant's allegations, the Court refers to Article 49 [Rights to the Work and Exercise Profession] of the Constitution which establishes:

 1. *The right to work is guaranteed.*
 2. *Every person is free to choose his/ her profession and occupation.*
60. The Court notes that the right to work and exercise profession is subject to constitutional protection, whereby these rights are further exercised in a manner and under conditions provided by law, and this means the right of an

individual that his employment relationship is not terminated contrary to what is determined by law.

61. From the case file it transpires* that the Applicant's allegations that his employment relationship was terminated unlawfully by the decisions of the KEK, were approved by the Supreme Court. Consequently, the Supreme Court repealed as unlawful both KEK decisions.
62. However, the Court considers that the Judgment of the Supreme Court, which is challenged by the Applicant, has remedied all the negative consequences for the Applicant, so that the Supreme Court *"obliged the respondent to compensate the claimant in the name of the personal income in the amount 400 € per month starting from 18.7.2012 until 31.12.2012."*
63. In addition, the Court finds that the Judgment of the Supreme Court challenged by the Applicant recognized to the Applicant all the rights arising from employment relationship, for a fixed period of time from the moment when this employment was unlawfully terminated.
64. Furthermore, the Court considers that the Applicant's request to be reinstated to his working place, regardless of the fact that his employment contract expired on 31 December 2012, does not represent the right protected by Article 49 of the Constitution.
65. The Court notes that the Judgment of the Supreme Court does not encroach Applicant's right under Article 49, and this Judgment does not prevent the Applicant from working and exercising profession. By this Judgment, the Supreme Court only confirmed that the Applicant's employment relationship concluded for a fix period of time was terminated with the force of law by the expiry of the period of time for which the employment contract was concluded
66. Therefore, the Court concludes that the Judgment of the Supreme Court does not violate the Applicant's constitutional right to work and exercise profession (see: Resolution on Inadmissibility of the Constitutional Court of Kosovo Case No. KI78/15 of 21 December 2015 (paragraph 31)).

(iii) Alleged violations of Article 31 of the Constitution in conjunction with Article 6 of ECHR and other Articles

67. The Court recalls that the Applicant considers that the Supreme Court has erroneously interpreted the substantive law and that the Applicant *"was deprived of the right to fair trial also by the fact that regardless on the evidence provided on his favor, all those were interpreted to the detriment of the Applicant."*
68. For the reasons above, the Applicant concludes that he was not *"provided an adequate legal and judicial protection, "which resulted in violation of "Article 31 of the Constitution [...] u in conjunction with Article 6. 1 (Right to a fair trial) of the ECHR."*

69. The Court reiterates that it is not a function of the Constitutional Court to deal with the alleged errors of the application of relevant laws allegedly made by the regular courts, if such an application does not violate the rights and freedoms protected by the Constitution and the ECHR (see *Garcia Ruiz v. Spain* paragraph 28, Judgment of the ECtHR, of 21 January 1999).
70. The Court considers that the Supreme Court gave a reasoned response to all allegations of the Applicant, regarding the reasons for the application of the relevant rules of the procedural and substantive law.
71. The Court notes that the main question raised before the regular courts was the question of the “reinstatement of the Applicant to working place,” and the Supreme Court in the challenged Judgment reasoned why this Applicant’s request is ungrounded:

„The claimant has been employed by the respondent from 1.1.2012 until 31.12.2012 according to the contract of employment no. 12605/0 from 1.1.2012. From the fact that the claimant has established a fixed-term employment relationship, pursuant to Article 67 paragraph 1 item 3 of the Labor Law no. 03/L-212, the employment contract can be terminated according to the legal power with the expiry of the contract term, therefore the Supreme Court of Kosovo considers that the second instance court has correctly applied the substantive law in the part of its judgment when found that the claim filed by the claimant to oblige the respondent to return to work and previous job duties, is unfounded. “

72. Furthermore, in the challenged judgment the Supreme Court also explained the rights that the Applicant is entitled to under a fixed-term contract in the following manner:

“The Supreme Court of Kosovo considers that, according to the provision of Article 80 paragraph 1 item 1 of the Labor Law, the respondent has an obligation to pay the Claimants wages according to the employment contract, but this Court considers that the finding of the first instance court that the Respondent’s obligation to pay the Claimant the monthly salary in the amount of € 400 until his return to his place of work is ungrounded, since the Claimants only meet the unpaid wages according to the employment contract no.12605/0 dated 1.1.2012. “

73. The Court emphasizes that it is for the regular courts to resolve problems of interpretation of legislation. This applies in particular to the application and interpretation by the regular courts of relevant laws of the procedural and substantive law (see *Pekinel v. Turkey*, paragraph 53, Judgment of ECtHR of 18 March 2008). The Court’s role is confined to ascertaining whether the effects of such an interpretation are compatible with the Constitution, in particular those guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.
74. Therefore, the Court notes that the challenged judgment of the Supreme Court is reasoned in detail and clearly explains why it rejected the Applicant’s request to be reinstated to the working place.

75. The Court further notes that the Applicant does not agree with the outcome of the proceedings before the regular courts. However, this fact cannot of itself raise an arguable claim of the violation of the right to fair and impartial trial (see: *mutatis mutandis* case *Mezotur - TiszazugiTarsulat v. Hungary*, paragraph 21 no. 5503/02, ECtHR, Judgment of 26 July 2005).
76. The Court concludes that the Applicant did not present and substantiate his allegations that the challenged decision violated his constitutional rights and freedoms, guaranteed by Article 31 and Article 6 of the ECHR.

(iv) Alleged violation of Articles 53 and 55 of the Constitution in conjunction with other Articles

77. The Court notes that the Applicant also alleges violations of Articles 53 and 55 of the Constitution, but does not explain how these Articles of the Constitution were violated, but considers that the violations of these two Articles stemmed from their connection with Articles 24, 31 and 49 of the Constitution.
78. As the Court has analyzed in detail the alleged violations of Articles 24, 31 and 49 of the Constitution and found that the challenged judgment did not violate these articles of the Constitution, the Court will not enter a detailed analysis of the allegations of the violation of Articles 53 and 55 of the Constitution.
79. In conclusion, the Court considers that the Applicant has not substantiated his allegations that the challenged Judgment has been in any way unfair or arbitrary and that the challenged judgment violated his constitutional rights and freedoms guaranteed by the Constitution and the ECHR (see: *mutatis mutandis: Shub vs. Lithuania*, No. 17064/06, ECHR, Decision of 30 June 2009).
80. The Court considers that the admissibility requirements, established in the Constitution, further specified in the Law and foreseen in the Rules of Procedure, have not been met.
81. Therefore, the Court finds that the Applicant's Referral is inadmissible, as manifestly ill-founded on constitutional basis.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113 (1) and (7) of the Constitution, Article 48 of the Law, and Rules 36 (2) (b) and (d) and 56 of the Rules of Procedure, in the session held on 07 December 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;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Bekim Sejdiu



President of the Constitutional Court



Arta Rama-Hajrizi