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

Prishtina, on 10 April 2018
Ref. No.: RK 1212/18

# RESOLUTION ON INADMISSIBILITY

in

**Case No. KI132/17**

Applicant

**Ajshe Hoti**

**Request for constitutional review of Judgment Rev. No. 147/2017 of the Supreme Court of 29 June 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 and
Gresa Caka-Nimani, Judge

## Applicant

1. The Referral was submitted by Ajshe Hoti from Prishtina (hereinafter: the Applicant).

## Challenged decision

2. The Applicant challenges Judgment [Rev. No. 147/2017] of the Supreme Court of Kosovo of 29 June 2017. The challenged Judgment was served on the Applicant on 28 July 2017.

## Subject matter

3. The subject matter is the constitutional review of the abovementioned judgment of the Supreme Court, which allegedly violated the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

## Legal basis

4. The Referral is based on Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

## Proceedings before the Court

5. On 13 November 2017, the Applicant submitted the Referral to the Court.

6. On 14 November 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

7. On 22 November 2017, the Court notified the Applicant about registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 2 March 2018, 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. Until 2003, the Applicant was in an employment relationship with the Insurance Company „Kosova e Re“ (hereinafter: “Kosova e Re”) in Prishtina.

10. In 2003, „Kosova e Re“ terminated the Applicant's employment relationship.

11. Due to this decision, the Applicant initiated the contested proceedings before the Municipal Court in Prishtina (hereinafter: the Municipal Court), requesting reinstatement to her working place and payment of unpaid personal income.

12. On 13 December 2004, the Municipal Court rendered Judgment [C. No. 370/03], obliging the responding party „Kosova e Re“ to reinstate the

Applicant to the working place with all the rights and obligations arising from the employment relationship.

13. „Kosova e Re“ filed an appeal with the District Court against Judgment [C. No. 370/03] of the Municipal Court.

14. On 3 October 2006, the District Court rendered Judgment [Ac. No. 578/05], rejecting the appeal of "Kosova e Re" as ungrounded.

15. "Kosova e Re" submitted a request for revision to the Supreme Court against Judgment [Ac. No. 578/05] of the District Court.

16. On 17 January 2008, the Supreme Court rendered Judgment [Rev. No. 126/2007], which rejected the request for revision as ungrounded.

17. On 9 May 2008, "Kosova e Re" sent to the Applicant the notice No. 1959, in which it stated *"your job position ceased to exist ... by respecting decision Rev. Nr. 126/07 of 17.01.2008 of the Supreme Court of Kosovo, the claimant can start the work with a fixed period from 15.05.2008 as an operator of voluntary insurances".*

18. On 21 May 2008, "Kosova e Re" submitted to the Applicant a notice No. 2004, in which it stated *"that the respondent informed the claimant for the second time that if she does not appear at work until 02.06.2008, her employment contract would be terminated".*

19. On 2 June 2008, "Kosova e Re" rendered a decision in which conclusion is stated *"...because the claimant failed to appear at the workplace, the respondent has considered that the claimant did not respect the decision of the Supreme Court, therefore, she finally lost her place of work at 'Kosova e Re'".*

20. On 23 August 2011 the Applicant and the respondent "Kosova e Re" signed a settlement agreement. By that agreement the respondent "Kosova e Re" was obliged to pay the Applicant the unpaid personal income for the period from 1 March 2003 to 1 April 2008 whereby the final judgment pertaining to the payment of the salaries to the Applicant was entirely enforced.

21. On an unknown date, the Applicant filed a new claim with the Basic Court against "Kosova e Re", in which she requested compensation for damage on the basis of unpaid personal income due to failure to comply with the decision of the Supreme Court Rev. No. 126/2007 for the period from 1 April 2008, until the final Judgment is rendered.

22. On 30 June 2014, the Basic Court rendered Judgment [C. No. 2307/11], which approved the Applicant's statement of claim as grounded. In the Judgment, the Basic Court obliged the respondent ("Kosova e Re") *"to grant the wage compensation for the period from 01.04.2008 until completion of the dispute on the basis of personal income being not paid for this period, and all obligations arising from the employment relationship".*

23. "Kosova e Re" filed an appeal with the Court of Appeals against the Judgment of the Basic Court *on the grounds of incorrect and incomplete determination of factual situation and erroneous application of the substantive law.*

24. On 13 March 2017, the Court of Appeals rendered Judgment [CA. No. 4116/2014], rejecting the appeal of "Kosova e Re" as ungrounded, stating, *inter alia*, that "*Considering the appealed allegations as well as the evidence in the case, the Court of Appeals found that the first instance court has rightly concluded when it decided that the claimant is entitled to compensation of personal income for the period from 01.04.2008 in the amount confirmed by the financial expert".*

25. "Kosova e Re" submitted a request for revision to the Supreme Court against Judgment [CA. No. 4116/2014] of the Court of Appeals on the grounds of "*essential violation of the provisions of the contested procedure and erroneous application of substantive law*".

26. On 29 June 2017, the Supreme Court rendered Judgment [Rev. No. 147/2017], which approved the request for revision of "Kosova e Re", and modified the judgments of the Court of Appeals and the Basic Court and rejected the Applicant's statement of claim as ungrounded.

27. The reasoning of the judgment of the Supreme Court, among others, states: "*The Supreme Court notes that the Judgment of the Municipal Court of 2004 has been partially executed in respect of the compensation of salaries so that the claimant has been compensated for salaries from 01.03.2003 until 01.04.2008.*

> *[...]*
>
> *Considering the written notification of the respondent nr.1959 of 09.05.2008 it results that the respondent after having been served with Judgment Rev. No. 126/07 of Supreme Court of Kosovo of 17.01.2008 notified the claimant that her workplace ceased to exist, therefore, respecting the aforementioned judgment has invited the respondent that she would be able to start the work at fixed period of time, but the claimant did not respond to the respondent's invitation as she did not appear in the workplace and did not prove any reason why she did not appear. Considering the remark in written form of 21.05.2008 no. 2004, it appears that the respondent informed the claimant for the second time that if she does not appear at the work until 02.06.2008, her employment contract would be terminated which has been confirmed also by the respondent in the conclusion in written form of 02.06.2008".*

## Applicant's allegations

28. The Applicant considers that the lower instance courts had correctly determined the factual and material provisions when rendering the judgments, while Judgment Rev. No. 147/2017 of the Supreme Court on the modification of these judgments, was rendered without taking into account the previous proceedings.

29. The Applicant further claims that her employer, without her consent, changed the recruitment regime from indefinite to a fix period of time, thus the respondent only partially executed Judgment Rev. No. 126/2007 of the Supreme Court of 17 January 2008.

30. The Applicant alleges that the Supreme Court by approving the request for revision violated her rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial).

31. The Applicant requests the Court to annul Judgment Rev. No. 147/2017 of the Supreme Court of 29 June 2017 and to oblige this court instance to decide once again on the revision, bearing in mind the decision of this Court.

**Admissibility of Referral**

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

> 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...".*

35. Regarding the fulfillment of these requirements, the Court finds that the Applicant filed a referral in the capacity of an authorized party, challenging an act of a public authority, namely the Judgment of the Supreme Court [Rev. No. 147/2017] of 29 June 2017, after exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms she 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 of 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. Rule 36 [Admissibility Criteria], paragraphs (1) (d) and (2) (b) of the Rules of Procedure, stipulates:

> *"(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,"*

37. In the present case, the Court recalls that the Applicant alleges violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, because:

> *"a) The Supreme Court has erroneously determined the factual situation and erroneously applied the substantive law, which affected the fact that it approves the request for revision and therefore to modify the judgments of the Basic Court and of the Court of Appeals.*
>
> *b) that the employer only partially implmented Judgment Rev. No. 126/2007 of the Supreme Court".*

38. The Court recalls that in accordance with Article 53 [Interpretation of Human Rights Provisions) of the Constitution *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

39. In this regard, the Court reiterates that the complete determination of factual situation, as well as interpretation and application of the law are within the full jurisdiction of the regular courts, whereas the role of the Constitutional Court is solely to ensure the compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court" (see: ECtHR case *Akdivar v. Turkey*, No. 21893/93, of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court: case KI86/11, Applicant *Milaim Berisha*, of 5 April 2012).

40. Bearing in mind the Applicant's main arguments relating to alleged violations of Article 31 of the Constitution, the Court emphasizes that it is not its role to deal with errors of fact or law allegedly committed by the regular courts, when

assessing the evidence (legality), unless and insofar they may have violated the rights and freedoms protected by the Constitution (constitutionality).

41. Moreover, the Court notes that the Supreme Court, in its Judgment Rev. No. 147/2017, responded to all Applicant's appealing allegations, both regarding the issue of erroneous determination of factual situation and application of substantive law, as well as on the issue of her allegation that the employer failed to fulfill the obligations arising from the judgment of the Supreme Court Rev. No. 126/2007.

42. In this regard, the Court notes that Supreme Court found that that the position on approving new statement of claim of the Applicant regarding monetary compensation in the name of the failure to enforce Judgment [No. 126/2007] of the Supreme Court... *"is wrong, and that by such a position the Basic Court and the Court of Appeals erroneously applied the substantive law..."*.

43. The Court further notes that such a position was taken by the Supreme Court on the grounds that the Basic Court and the Court of Appeals did not take into account the fact that the employer in accordance with Judgment [No. 126/2007] of the Supreme Court offered the opportunity to the Applicant to conclude a new written employment contract for a fixed period of time, which she rejected. The issue of the payment of unpaid salaries to the Applicant for the contested period was resolved with the signing of the settlement agreement of 23 August 2011.

44. In this regard, the Supreme Court concluded the provisions of Article 55 paragraph 2 of the Labor Law stipulate that: *"The right to salary, overtime, salary compensation and other additional income, shall be exercised by the employee on the basis of the agreement reached with the employer for the work performed and time spent at work as defined in the employment contract"*.

45. Based on this, the Court notes that the Supreme Court, taking into account the fact that the Applicant did not conclude a new employment contract, as well as the relevant legal provisions of the Labor Law, which led to the situation that no new contractual obligations have been established, nor could have been established, which the employer would have to meet *vis-a vis* the Applicant, therefore, there is no basis for the approval of the new statement of claim for compensation of the Applicant for the time period when she did not work.

46. In addition, the Court also finds that the position of the Supreme Court is grounded, which states that *"the Applicant should have responded to the respondent's invitations and establish a new employment relationship, whereas possible dissatisfaction with new working conditions, the working place or the duration of the contract, she could have challenges by the use of respective legal remedies"*.

47. The Court does not either see any arbitrariness in the reasoning of the challenged Judgment of the Supreme Court in the application of the substantive law, and also cannot find elements that would indicate irregularity,

arbitrariness or discrimination in rendering the challenged decisions to the detriment of the Applicant.

48. In these circumstances, the Court considers that nothing in the case presented by the Applicant indicates that the proceedings before the Supreme Court was unfair or arbitrary such that the Constitutional Court would be satisfied that the core of the right to a fair and impartial trial has been violated or that the Applicant was deprived of any procedural guarantees which would lead to a violation of that right under Article 31 of the Constitution or paragraph 1 of Article 6 of ECHR.

49. The Court reiterates that it is the Applicant's obligation to substantiate her constitutional allegations and to submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR. That assessment is in compliance with the case-law of the Court (see: case of the Constitutional Court No. KI19/14 and KI21/14 Applicants *Tafil Qorri and Mehdi Syla*, of 5 December 2013).

50. Therefore, the Applicant s' 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 of Kosovo, in accordance with Article 113 (7) of the Constitution, Article 47 of the Law and Rules 36 (1) (d), (2) (b) of the Rules of Procedure, in the session held on 2 March 2018, 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 is effective immediately;

**Judge Rapporteur** **President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi Arta Rama-Hajrizi