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

Prishtina, on 6 June 2018
Ref. No.: AGJ 1246/18

JUDGMENT

in

Case No. KI122/16

Applicant

Riza Dembogaj

Constitutional review of Decision CML. No. 6/2016 of the Supreme Court of the Republic of Kosovo of 13 September 2016

CONSTITUTIONAL COURT OF 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 Riza Dembogaj from village of Llabjan, Municipality of Peja (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court of the Republic of Kosovo, which rejected as ungrounded the request for protection of legality filed by the State Prosecutor against Decision [C. No. 437/2015] of 25 January 2016 of the Basic Court in Prishtina.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which, as alleged, violates the Applicant's rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR), Article 49 [Right to Work and Exercise Profession] of the Constitution, Article 54 [Protection Judicial Rights] in conjunction with Article 13 (Right to an effective remedy) of the ECHR and 102 [General Principles of the Judicial System] of the Constitution.

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] 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 21 October 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 November 2016, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Bekim Sejdiu.

7. On 21 November 2016, the Court notified the Applicant about the registration of the Referral and requested him to submit the challenged decisions to the Court. At the same time, the Court sent a copy of the Referral to the Supreme Court.

8. On 29 November 2016, the Applicant submitted to the Court Decision [C. No. 437/15] of the Basic Court in Prishtina and a submission further specifying his Referral.

9. On 26 January 2017, the Court requested the Applicant to submit all other relevant decisions.

10. On 31 January 2017, the Applicant completed the Referral and submitted to the Court the decisions of the District Court and the Court of Appeals, as well as the

complaints submitted to the Independent Oversight Board of Kosovo (hereinafter: the IOBK) and the State Prosecutor's request for protection of legality to the Supreme Court.

11. On 6 February 2018, the Court sent a copy of the Referral to the IOBK, requesting clarification pertaining to the Applicant's case and to the Basic Court in Prishtina requesting the file of the case.

12. On 8 February 2018, the Basic Court in Prishtina notified the Court that upon the Applicant's appeal of 5 December 2016, the case is pending before the Court of Appeals.

13. On 9 February 2018, the IOBK submitted to the Court the complete case file.

14. On 26 February 2018, the Court requested information from the Court of Appeals regarding the status of the Applicant's case before the Court of Appeals.

15. On 2 March 2018, the Court of Appeals provided information to the Court that, upon the Applicant's appeal of 5 December 2016, this case is pending before the Court of Appeals.

16. On 7 March 2018, the Court requested the Applicant to provide information regarding the status of his complaint before the regular courts.

17. On 19 March 2018, the Applicant submitted to the Court Decision [CA. No. 4504/2016] of 9 March 2018 of the Court of Appeals.

18. On 30 May 2018, the Review Panel deliberated on the report of Judge Rapporteur and recommended to the Court the admissibility of the Referral.

Summary of facts

19. On 1 May 2007, the Applicant signed a contract for a period of three years, namely until 1 May 2010, as a Police Inspector at the Kosovo Police Inspectorate Investigation Unit, with the status of a civil servant (hereinafter: the KPI).

20. On 4 May 2007, the Applicant submitted his resignation from the Kosovo Police Service (hereinafter: KPS), where he had worked for several years before starting to work as a Police Inspector with the KPI. Based on the case file, it results that before the resignation, the Applicant was under investigation by the KPS Professional Standards Unit.

21. On 28 May 2007, the KPI informed the Applicant that he was temporarily suspended until the final investigation regarding his possible involvement in a serious disciplinary violation in the KPS. On 31 May 2007, the Applicant filed an appeal against the temporary suspension.

22. On 13 June 2007, the KPI rendered Decision No. 1306/2007 (hereinafter: the Decision) on the termination of the employment contract with the Applicant, on the grounds that the information received during the process for the verification

of the past, has shown that the Applicant was under investigation by the KPS Professional Standards Unit for serious disciplinary violations.

Administrative Procedure

23. On 18 June 2007, the Applicant filed a complaint with the personnel management of the Ministry of Internal Affairs (hereinafter: the MIA), to which, according to the allegation, he has never received a reply. On the same date, the Applicant also filed an appeal with the IOBK, claiming that the termination of the employment relationship was made in violation of the applicable law.

24. On 21 June 2007, the Applicant filed a request for re-employment with the KPS, a possibility which, according to the relevant legal provisions, within a specified period of time, is allowed to the KPS members who voluntarily left the service. On 6 September 2007, his request was rejected by the KPS, on the grounds that in case of resignation during the investigation process, based on the KPS handbook guidelines, the requests for return to service cannot be approved to the former KPS officers.

25. On 14 August 2007, the IOBK, through Decision [02/259/207] rejected the Applicant's complaint as premature and obliged the KPI to consider the Applicant's complaint submitted to the personnel management and to render a decision on the merits of the case. The reasoning of the IOBK decision was based on the provisions of UNMIK Regulation 2001/36 on the Civil Service of Kosovo (hereinafter: Regulation 2001/36).

26. On 24 August 2007, the Applicant once again addressed the personnel management at the MIA, also filing an additional request for reconsideration of the decision with the IOBK.

27. On 29 August 2007, considering that the Applicant, according to the allegation, had never received a reply to the complaint made to the MIA, he again addressed the IOBK with a complaint, claiming that the termination of the employment relationship with KPI, was done in violation of the applicable law.

28. On 6 November 2007, as the MIA has not yet responded to the complaint, the Applicant submitted another complain to the IOBK. According to the Applicant, he never received a response to his complaint from the IOBK.

The First Set of Proceedings before the Courts

29. On 7 December 2007, the Applicant filed a claim with the Municipal Court in Prishtina, alleging that the termination of his employment relationship with the KPI, violated Regulation 2001/36 and the relevant administrative instructions and, consequently, that the Decision is unlawful.

30. On 9 July 2008, the Municipal Court in Prishtina, through Judgment [Cl. 520/2007] approved the Applicant's statement of claim as grounded, declaring the KPI Decision as unlawful, among others, on the grounds that the procedure for termination of the employment relationship during the probation period was not respected. The Municipal Court, through this Judgment obliged the MIA to

reinstate the Applicant to the working place and to compensate the respective income for the period and in the manner determined in the said Judgment. Throughout the reasoning of the Judgment in question, the Municipal Court was based on the provisions of the Regulation 2001/36.

31. Against this Judgment, the KPI filed an appeal with the District Court in Prishtina, alleging violation of the provisions of the contested procedure, erroneous or incomplete determination of the factual situation and the erroneous application of the substantive law, requesting that the challenged Judgment be modified and the Applicant's statement of claim be rejected as ungrounded, or that the Judgment of the Municipal Court be annulled and the case be remanded for retrial to the first instance court.

32. On 6 April 2009, according to the case file, almost two years after filing the complaint, the IOBK by Decision [02/278/07] rejected the Applicant's appeal as ungrounded and upheld the Decision of the Chief Executive of the KPI [No. 1306/2007] of 13 June 2007, as lawful. The IOBK, based on Article 11.1 of UNMIK Regulation 2008/12 amending Regulation 2001/36, among others, reasoned that the termination of the employment relationship during the probation period was conducted in accordance with the applicable legal provisions. The IOBK reasoned that the legal provisions clearly stipulate the employer's authority to terminate the employment relationship during the probation period if "*the information provided during the recruitment process is proved to be incorrect*".

33. On 12 January 2012, the District Court in Prishtina, through Judgment [Ac. No. 199/2009] approved the appeal of the KPI, annulled Judgment [C1. 520/2007] of 9 July 2008 of the Municipal Court in Prishtina and remanded the case for reconsideration to the first instance court.

34. The annulment of the Judgment of the Municipal Court, by the District Court was reasoned among others, based on the admissibility and timeliness of the claim. According to this Court, based on Article 83 of the Law on Basic Rights of Labor Relations in force (Published in "Official Gazette of SFRY", No. 60/89, 42/90 and "Official Gazette of the FRY" No. 42/92, 24/94) (hereinafter: the Labor Law), the deadline for filing a claim with the competent court was 15 days after the 30 day deadline for rendering the decision by the competent body, and consequently, the claim of the claimant, namely the Applicant, was out of time.

The Second Set of Proceedings before the Courts

35. On 30 October 2012, the Basic Court in Prishtina, through Judgment [C. No. 290/12] declared the claimant's claim, namely the Applicant, as timely, again approving the statement of claim as grounded and declaring the KPI decision as unlawful, among others, on the grounds that the procedure for termination of the employment relationship during the probation period was not respected. Through the Judgment in question, the Court obliged the KPI to reinstate the Applicant to his working place and to compensate his income for the period and in the manner determined by the Judgment in question. The reasoning of the Judgment in question, was based on the provisions of Regulation 2001/36.

36. On 27 December 2012, against Judgment [C. No. 290/12] of the Basic Court, the KPI filed an appeal alleging violation of the provisions of the contested procedure, erroneous or incomplete determination of the factual situation and erroneous application of the substantive law, requesting that the challenged Judgment be modified and the statement of claim of the claimant, namely the Applicant, be rejected as ungrounded, or that the Judgment be annulled and the matter be remanded to the first instance court for retrial.

37. On 12 February 2015, the Court of Appeals by Decision [CA. No. 1977/2013] approved the appeal of the KPI and quashed the Judgment [C. No. 290/2012] of 30 October 2012 of the Basic Court, remanding the case to the first instance court for retrial. The Court of Appeals, among others, argued that the Basic Court, in declaring unlawful the KPI decision on termination of the Applicant's employment relationship, should have also considered the Decision [02/278/07] of 6 April 2009 of the IOBK, which was issued in the meantime. In the reasoning of the Judgment in question, the Court of Appeals had specifically clarified that the provisions of Regulation 2001/36 apply in the present case.

The Third Set of Proceedings before the Courts

38. On 25 January 2016, the Basic Court in Prishtina, through Decision [C. No. 437/15] rejected the Applicant's claim as out of time. The Basic Court in Prishtina, referring to Article 83 of the Labor Law, reasoned that the Applicant had available only 15 days for filing the claim, after the 30 day deadline within which the competent body would have rendered a decision.

39. On 3 March 2016, the Applicant addressed the Basic Court with a request for return to the previous situation regarding the Decision of 25 January 2016, reasoning that his lawyer did not provide him the documents on time and consequently, he missed the deadline to challenge the Decision of 25 January 2016 to the Court of Appeals.

40. On 07 March 2016, the Basic Court in Prishtina, through Decision [C. No. 437/15] rejected the Applicant's request for return to the previous situation. This Decision was then challenged by the Applicant before the Court of Appeals.

41. On 9 March 2018, the Court of Appeals dismissed as inadmissible the Applicant's appeal against the Decision [C. No. 437/15] of 7 March 2016, which rejected the Applicant's request for return to the previous situation.

The Request for Protection of Legality

42. On 12 April 2016, the State Prosecutor of Kosovo, at the request of the Applicant, filed a request for protection of legality [KMLC. No. 20/2016] against Judgment [C. No. 437/15] of 25 January 2016 of the Basic Court in Prishtina, arguing that the Basic Court applied the wrong law on its Judgment. According to the State Prosecutor, if the correct law was applied, Regulation 2001/36 instead of the Labor Law, the Applicant's appeal would have been declared as timely and the merits of his statement of claim would have been considered.

43. On 13 September 2016, the Supreme Court, through Decision [CML. No. 6/2016] rejected as ungrounded the request for protection of legality of the State Prosecutor. The Supreme Court justified its Decision on the fact that the initial claim of the Applicant was submitted to the Municipal Court in Prishtina after the deadline. However, the Supreme Court noted that in the concrete case, it is not the Labor Law that is applicable, but rather Regulation 2001/36 and the Law no. 03/L-192 on the Independent Oversight Board for the Kosovo Civil Service of 2010 (hereinafter: the Law on the IOBK).

Applicant's allegations

44. The Applicant alleges that Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court was rendered in violation of his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the ECHR, Article 49 [Right to Work and Exercise Profession] of the Constitution, Article 54 [Judicial Protection of Rights] in conjunction with Article 13 (Right to an effective remedy) of the ECHR and 102 [General Principles of the Judicial System] of the Constitution.

45. The Applicant alleges that the regular courts applied the wrong law in his case. According to his allegations, the application of the wrong law resulted in declaring his statement of claim as out of time, and consequently he was prevented from receiving a final answer from the courts on the merits of his case. In this regard, the Applicant alleges that his rights to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, have been violated.

46. The Applicant also alleges that by applying the wrong law pertaining to the timeliness of his statement of claim, the regular courts have prevented him from the judicial protection of rights guaranteed by Article 54 of the Constitution. In addition, the Applicant alleges that the regular courts have acted in violation of Article 102 of the Constitution, failing to decide based on the applicable law as required by the Constitution.

47. Finally, the Applicant also maintains that the alleged unlawful termination of his employment relationship, violates his rights guaranteed by Article 49 of the Constitution.

48. The Applicant requests the Court to annul Decision [CML 06/2016] of 13 September 2016 of the Supreme Court and to remand the case for retrial.

Assessment of the admissibility of the Referral

49. The Court examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and as further specified in the Law and the Rules of Procedure.

50. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

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.

51. The Court also examines whether the Applicant has met the admissibility requirements as defined by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority."

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

Article 48
[Accuracy of 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..."

52. Regarding the fulfillment of these requirements, the Court notes that the Applicant submitted the referral in a capacity of an authorized party, challenging an act of a public authority, namely the Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court, after exhaustion of all legal remedies provided by law. The Applicant has also clarified the rights and fundamental freedoms, which have allegedly been violated, in accordance with Article 48 of the Law and filed a referral in accordance with the deadlines stipulated in Article 49 of the Law.

53. Finally, the Court finds that this referral is not manifestly ill-founded in accordance with Rule 36 (1) (d) of the Rules of Procedure. The Court further states that it is not inadmissible on any other ground. Therefore it must be declared admissible. (see the ECtHR case *Alimuçaj v. Albania*, application No.

20134/05, Judgment of 9 July 2012, paragraph 144; see also Case KI97/16, Applicant *IKK Classic*, Judgment of 9 January 2018, paragraph 38).

Relevant Legal Provisions

LAW ON BASIC RIGHTS OF LABOR RELATIONS
(Published in "Official Gazette of SFRY", No. 60/89, 42/90 and "Official Gazette of the FRY" No. 42/92, 24/94)

Article 83

(...)

"The employee who is not satisfied with the final decision of the competent authority within the organization or if this authority does not render a decision within 30 days from the day of the submission of the request of the appeal, has the right to request the protection of his rights before the competent court within the subsequent 15 days."

(...)

REGULATION NO. 2001/36 UNMIK/REG/2001/36 of 22 DECEMBER 2001 ON THE KOSOVO CIVIL SERVICE

Section 11
Appeals

(...)
"(d) That in each appeal brought before it, the Board shall within ninety (90) days of the end of the appeal proceedings issue a written decision setting forth its determination and the legal and factual basis therefor."

(...)

LAW NO.03/L –192 ON INDEPENDENT OVERSIGHT BOARD FOR CIVIL SERVICE OF KOSOVO OF 16 AUGUST 2008

Article 12
Appeals

"1. A civil servant who is unsatisfied by a decision of an employing authority in alleged breach of the rules and principles set out in Law on Civil Service in the Republic of Kosovo, shall have the right to appeal to the Board."

(...)

"3.4. That in each appeal brought before it, the Board shall within sixty (60) days of the end of the appeal proceedings issue a written decision setting forth its determination and the legal and factual basis therein."

(...)

Article 14
The right to appeal

> "The aggrieved party, alleging that a decision rendered by the Board is unlawful, may appeal the Board's decision by initiating an administrative dispute before the competent court within thirty (30) days from the day of the service of decision. Initiation of an administrative dispute shall not stay the execution of the Board's decision."

Merits of the Referral

54. The Court recalls that the Applicant alleges that the Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court was rendered in violation of his rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, Article 49 of the Constitution, Article 54 of the Constitution in conjunction with Article 13 of the ECHR and 102 of the Constitution, because the regular courts applied the wrong law in assessing the timeliness of his claim. Accordingly, the Applicant alleges that the regular courts have manifestly erroneously applied and interpreted the law in his case, thus violating his rights to a fair and impartial trial as guaranteed by the Constitution.

55. In that regard, the Court first notes that the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and its application, has been widely interpreted by the European Court of Human Rights (hereinafter: the ECtHR) through its case law, in accordance with which the Court, based on Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Accordingly, as it pertains to the interpretation of the allegations for a violation of the right to fair and impartial trial as a result of the alleged "manifestly erroneous application and interpretation of law", the Court will refer to the ECtHR case law.

56. As a general rule, the allegations for erroneous interpretation of the provisions of the law allegedly committed by the regular courts relate to the scope of legality and as such, do not fall within the jurisdiction of the Court and therefore, in principle, cannot be considered by the Court. (See Case No. KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 36).

57. The Court has consistently reiterated that it is not its role to deal with errors of facts or law allegedly committed by the regular courts (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were different, the Court would act as a "*fourth instance court*", which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See case *Garcia Ruiz v. Spain*, ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also cases: KI70/11, Applicants: *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011; and KI06/17,

Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 37).

58. This stance has been consistently held by the Court, following the case-law of the ECtHR, which clearly maintains that it is not the role of this Court to review the conclusions of the regular courts in respect of the factual situation and application of the substantive law. (see ECtHR, *Pronina v. Russia*, Decision on admissibility of 30 June 2005, application no. 65167/01; KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 38).

59. The Court, however, notes that the case-law of the ECtHR also provides for the circumstances under which exceptions from this position must be made. The ECtHR reiterated that while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, the role of the Court is to verify whether the effects of such interpretation are compatible with the Convention. (See the ECtHR cases, *Miragall Escolano and Others v. Spain*, No. 38366/97, paragraphs 33-39; and *Koshoglu v. Bulgaria*, No. 48191/99, Judgment of 10 May 2007, paragraph 50). Therefore, even though the role of the Court is limited in terms of assessing the interpretation of the law, it must ensure and take measures where it observes that a court has applied the law in a particular case manifestly erroneously or so as to reach "arbitrary conclusions". (See the ECtHR cases *Anheuser-Busch Inc.* Judgment, paragraph 83; *Kuznetsov and Others v. Russia*, no. 184/02, of 11 January 2007, paragraphs 70-74 and 84; *Paiduraru v. Romania*, no. 63252/00, paragraph 98,; *Sovtransavto Holding v. Ukraine*, no. 48F553/99, paragraphs 79, 97 and 98; *Beyeler v. Italy* [GC], no. 33202/96, paragraph 108; *Koshoglu v. Bulgaria*, Judgment of 10 May 2007, paragraph 50; see also KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 40).

60. Among others, in case *Andelkovic v. Serbia* (Judgment of 9 April 2013, No. 1401/08, paragraph 24), the ECtHR reiterated again that it will not question the interpretation of law by the courts, unless, it is evidently arbitrary or the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasoned. In this case, the ECtHR maintains:

> *"The Court reiterates at the outset that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among many authorities, Brualla Gómez de la Torre v. Spain, 19 December 1997, § 31, Reports of Judgments and Decisions 1997-VIII). That being so, the Court will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice (see, mutatis mutandis, Farbera and Harlanova v. Latvia (dec.), no 57313/00, 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, § 108, ECHR 2000-I)".*

61. Accordingly, based on the case law of the Court and the case law of the ECtHR, it is the role of the regular courts to assess the facts and the evidence they have administered. (see ECtHR Judgment, *Thomas v. United Kingdom*, 10 May 2005, application no. 19354/02). The role of the Court is to examine whether there has been a violation of constitutional rights (right to a fair trial, right of access to court, right to an effective remedy, etc.), and whether the manner in which the regular courts have applied the law was otherwise arbitrary or discriminatory. (See, for example, ECtHR cases *Koshoglu v. Bulgaria*, Judgment of 10 May 2007, No. 48191/99; *AnheuserBusch Inc. v. Portugal*, Judgment of 11 January 2007, No. 73049/01; *Kuznetsov and Others v. Russia*, Judgment of 11 January 2007, No. 184/02; *Khamidov v. Russia*, Judgment of 15 November 2007, No. 72118/01; *Andelkovic v. Serbia*, Judgment of 9 April 2013, No. 1401/08; *Dulaurens v. France*, Judgment of 21March 2000, No. 34553/97; see also case KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 41).

62. As it pertains the application of the principles established by the ECtHR on the manifestly erroneous application or interpretation of the law into the present case, the Court initially recalls that the Applicant alleges that the regular courts had in fact applied the wrong law in his case regarding the assessment of the timeliness of the statement of claim, thus, preventing the examination of his case on merits. The Applicant continuously alleged before the regular courts that Regulation 2001/36 and the relevant administrative instructions in force in 2007, namely at the time of termination of his employment relationship, apply into the context of his dispute. The application of the Labor Law and the Law on the IOBK of 2010 resulted, according to the allegation, in the manifestly erroneous interpretation that his statement of claim is out of time. According to the Applicant, the manifestly erroneous application of the law resulted in a violation of his rights to fair and impartial trial as guaranteed by the Constitution.

63. In this regard, the Court recalls that the Applicant's dispute started in 2007, when his employment relationship with the IPK was terminated. The Applicant used to work in the KPS for several years, from where he resigned after being employed with the KPI. The KPI terminated his employment relationship during the probation period because during the process of verifying his past, it turned out that the Applicant had not declared the fact that during the previous KPS employment, he had been under investigation. Upon termination of the employment relationship by the KPI, the Applicant filed a request for reinstatement to the KPS, a request that was rejected. The Applicant in fact throughout the court proceedings does not challenge any decision regarding his relation with the KPS, but with the KPI. The Decision [No. 1306/2007] of 13 June 2007 of the KPI, is the Decision that the Applicant has challenged since 2007, initially in administrative, and subsequently in the court proceedings.

64. In this regard, the Court recalls that the IOBK, through Decision [02/259/207] of 14 August 2007, initially rejected the Applicant's request as premature. The second request with the IOBK was filed by the Applicant on 29 August 2007. The Applicant did not receive a response from the IOBK, and therefore, on 7 November 2007, filed the claim and initiated court proceedings. These two dates, the date of filing a request with the IOBK on 29 August 2007 and the date

of filing a claim with the Municipal Court in Prishtina on 7 November 2007, were a subject of continuous assessment before the regular courts in terms of the timeliness of the Applicant's claim, through the application of three different laws by the regular courts, Regulation 2001/36 in force in 2007, the Labor Law, and the Law on IOBK of 2010. All three determine different timeframes for the initiation of the court proceedings in labor disputes.

65. The Court notes that the three laws set different deadlines for initiating the court proceedings in labor disputes: a) Article 83 of the Law on Labor, establishes that: "*an employee who is not satisfied with the final decision of the competent authority in the organization or if that body does not make a decision within 30 days from the day of filing the claim or appeal, has the right to seek protection of his rights before the competent court within 15 next few days*"; b) Article 11.2, item (d) of the Regulation in 2001/36 establishes that "*the Board shall within ninety (90) days of the end of the appeal proceedings issue a written decision setting forth its determination and the legal and factual basis therefore*" , an appeal against which with the competent court should be filed within 30 days; while c) the Law on IOBK of 2010 stipulates that the Board must decide within 60 days (12.3.4), an appeal against which to the competent court should be filed within 30 days (Article 14).

66. The Court also recalls that the regular courts applied the three different laws in a total of eight court decisions in Applicant's case. Four Municipal Court, namely the Basic Court, three of which relate to his statement of claim, while the fourth only with the request for return to the previous situation. The first three apply two different laws in assessing the timeliness of the Applicant's statement of claim. Judgments [Cl.520/2007] of 9 July 2008 and [C. No. 290/12] of 30 October 2012, which declared his statement of claim as timely and subsequently examined the merits of the case, apply the Regulation 2001/36, while the other, the Decision [C. No. 437/15] of 25 January 2016, declared the request as out of time by applying the Labor Law.

67. The Applicant also has three decisions of the District Court and Court of Appeals, two of which deal with his case, while the third one only the appeal against the rejection to return to the previous situation. The first two, the Judgment [Ac. No. 199/2009] of 12 January 2012 and Decision [Ca. No. 1977/2013] of 12 February 2015, respectively, apply two different laws, the first one the Labor Law, while the second, Regulation 2001/36.

68. Finally, the Supreme Court also rejected the request for protection of legality of the State Prosecutor on the grounds that the initial claim was out of time, while specifically noting that the Labor Law does not apply in this specific dispute, but rather Regulation 2001/36. However, in assessing the timeliness of the initial claim, the Supreme Court applies a third law, namely the Law on the IOBK of 2010, a law not in force at the time of the dispute.

69. Specifically, the Supreme Court in its Decision specifically clarifies that in the present case the Labor Law does not apply, but Regulation 2001/36. However, the Supreme Court also refers to the Law of the IOBK of 2010. The Supreme Court states that:

"The Supreme Court of Kosovo found that the Basic Court in Prishtina decided correctly when it dismissed the claimant's claim as out of time, however, in this case the Regulation on Civil Service of Kosovo No. 2001/36 and the Administrative Directive for the implementation of the Regulation No. 2003/2 should be applied, under which the claimant had the status of a civil servant. Therefore, the procedure for the protection of the employment rights of civil servants is implemented based on this law and the Law on the Independent Oversight Board for Civil Service of Kosovo (No. 03/L-192) which was in force at the time when the employment contract was terminated to the claimant".

70. However, in calculating the time limits based on which the Supreme Court rejects the request for protection of legality of the State Prosecutor, supporting the conclusion of the Basic Court that the Applicant's claim was out of time, the Supreme Court does not apply the provisions of Regulation 2001/36, which it maintains itself is applicable in the case of the Application, but it rather applies the Law on the IOBK of 2010, thus not in force at the time of the dispute in 2007, the deadlines for filing the claim of which, differ from those established in Regulation 2001/36. The Supreme Court maintains:

"The claimant, as a civil servant, should have filed an appeal with the Independent Oversight Board for the Civil Service of Kosovo within the time limit of 30 days from the day when the employing authority should have rendered a decision concerning his appeal, pursuant to Article 12.2 of the Law on Independent Oversight Board for Civil Service of Kosovo (Law No. 03/L- 192). In each appeal brought before it, the Board shall within 60 days issue a decision (Article 12.3.4). This was also determined by Administrative Instruction No. 2005/02 on Rules and Procedures of Appeals in the IOBK. The claimant filed an appeal with the Personnel Manager of the MIA on 18.06.2007, while on 29.08.2007 he filed an appeal with the IOBK, whereas he filed a claim with the Court on 07.12.2007, and that the deadline for filing a claim was 30.11.2007. Based on this, it results that the claim was filed after the legal time limit".

71. Finally, in responding to the State Prosecutor's allegations for the application of the deadlines established through Regulation 2001/36 in the present case, the Supreme Court continues to apply the time limits of the Law on IOBK of 2010. The Supreme Court reasoned as it follows:

"The allegations of the State Prosecutor in the request for protection of legality that in the present case, Regulation No. 31/2006 must be applied and that the time limit expired on 29.12.2007 whereas the claim was filed on 07.12.2007, are ungrounded because as it was stated above, the claimant filed the claim after the time limit of 90 days and the IOBK should have decided within the time limit of 60 days and not 90 days as alleged by the State Prosecutor in his request".

72. In this regard, the Court recalls that in rejecting the request for protection of legality of the State Prosecutor, the Supreme Court had concluded that not the Labor Law, but Regulation 2001/36 applies in the specific case. While in the reasoning the rejection of the request, it applied the time limits of the Law on

the IOBK of 2010, resulting in a different outcome pertaining to the deadline of the Applicant's initial claim, than it would have been the case if Regulation 2001/36 was applied.

73. In this respect, the Court notes that in its reasoning the Supreme Court applies a law that entered into force in 2010, namely the Law on the IOBK, into a dispute of 2007, despite the fact that it itself recognizes that Regulation 2001/36 is applicable. The Court has already noted that the deadlines for filing a claim as established in both laws are different. It also notes that the provisions of the Law on IOBK were not applicable at the time when the Applicant filed the initial claim in 2007.

74. The Court thus notes that Supreme Court has manifestly erroneously applied the law resulting into arbitrary conclusions for the Applicant. Furthermore, the Supreme Court has not provided any reasons for the application of the Law on IOBK of 2010 into the circumstances of the specific case.

75. In addition, the Court refers to the ECtHR case-law, and specifically to the Case of *Barac and Others v. Montenegro* (ECtHR Judgment of 13 December 2011, paragraph 32), which maintained that "*no fair trial could be considered to have been held where the reason given in the relevant domestic decision was not envisaged by the domestic legislation and, therefore, was not a legally valid one*". (See also, *mutatis mutandis*, *De Moor v. Belgium*, 23 June 1994, paragraph 55, Series A no. 292-A; and *Dulaurans v. France*, no. 34553/97, paragraphs 33-39, 21 March 2000).

76. Therefore, the Court must conclude that the Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court, which rejected as ungrounded the request for protection of legality filed by the State Prosecutor against the Decision [C. No. 437/2015] of 25 January 2016 of the Basic Court in Prishtina, did not meet the criteria of a "*fair trial*" as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to manifestly erroneous or arbitrary application law.

77. In this regard, the Court emphasizes that this conclusion exclusively concerns the challenged Decision of the Supreme Court from the point of view of the application of the adequate law into the circumstances of the Applicant's case and in no way prejudices the outcome of the merits of the his case.

78. Finally, the Court considers that it is not necessary to examine the Applicant's allegations in relation to Article 54 of the Constitution in conjunction with Article 13 of the ECHR and Articles 49 and 102 of the Constitution, after finding a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Conclusion

79. In conclusion, based on the case law of the ECHR, the Court finds that, taking into account that in the circumstances of the present case, the reasoning of the Supreme Court Decision, resulted into arbitrary conclusions for the Applicant,

the rights of the Applicant to fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, were violated.

80. In sum, pursuant to Rule 74 (1) of the Rules of Procedure, Decision [CML. No. 6/2016] of 13 September 2016 of the Supreme Court is declared invalid and the matter is remanded to the Supreme Court for reconsideration.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113 (7) and 116 (1) of the Constitution, Articles 47 and 48 of the Law and Rules 56 (1), 63 (1) (5) and 74 (1) of the Rules of Procedure, on 30 May 2018, by majority

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a 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 European Convention on Human Rights;

III. TO DECLARE invalid Decision CML. No. 6/2016 of the Supreme Court of 13 September 2016;

IV. TO REMAND the Decision CML. No. 6/2016 of the Supreme Court of 13 September 2016 for reconsideration, in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to inform the Court, in accordance with Rule 63 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

VI. TO REMAIN seized of the matter pending compliance with that order;

VII. TO NOTIFY this Judgment to the Parties;

VIII. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law;

IX. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Gresa Caka-Nimani Arta Rama-Hajrizi