



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

Prishtina, on 19 February 2019
Ref. no.:RK 1326/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI69/17

Applicant

Xhavit Arifi

**Constitutional review of Judgment E. Rev. 340/2016 of the Supreme
Court of Kosovo of 15 February 2017**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Applicant is Xhavit Arifi from Rimanishte, Municipality of Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment E. Rev. No. 340/2016 of the Supreme Court of Kosovo, of 15 February 2017, which was served on him on 27 March 2017.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly, has violated the Applicant's right guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113, paragraphs 1 and 7 of the Constitution, Articles 22 and 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law), and Rule 31 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Court approved in the administrative session the amendment and supplement of the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Therefore, during the review of the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 19 June 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 21 June 2017, the President of the Court appointed Judge Selvete Gërzhaliu- Krasniqi as Judge Rapporteur. On the same date, the President of the Court appointed the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Almiro Rodrigues and Ivan Čukalović.
8. On 28 June 2017, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 5 December 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.
10. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović ended.

11. Due to the transitional period in Court and changes in the composition of the Court, the Resolution on Inadmissibility was not finalized in the old composition of the Court.
12. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
13. On 21 January 2019, the full Court in the administrative session decided that the Referral KI 69/17 should be dealt with from the initial stage and a new review panel be appointed.
14. On 22 January 2019, the President of the Court, in accordance with the Decision of the Administrative session of judges of 21 January 2019 (Ref. No. KK.-SP: 03-4/19/bo), rendered Decision GJK. KSHKI 69/17 on the replacement of the Review Panel and in the panel were appointed judges: Arta Rama-Hajrizi (Presiding), Bajram Ljatifi and Radomir Laban (members).
15. On 30 January 2019, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

16. On 15 February 2000, the Applicant established employment relationship on indefinite term with the Public Municipal Enterprise "Trafiku Urban" (hereinafter: PME) in Prishtina, in a job position as a bus conductor, which had later changed to a job position of the "dispatcher".
17. On 16 April 2006, the Applicant left his working place. During his absence at the workplace, three people took two kiosks and sent them in the unknown direction.
18. On 26 April 2006, the working group for the management of the PME, by Decision No. 210, found the Applicant responsible for violation of his duties and imposed on him the disciplinary measure "Termination of the employment relationship".
19. On 31 May 2006, the PME Board, as a second instance, by Decision No. 836 rejected the Applicant's appeal and upheld the first instance decision on termination of employment relationship.
20. On an unspecified date, the Applicant filed a claim with the Municipal Court against the decision of the PME Board.
21. On 8 December 2006, the Municipal Court in Prishtina, by Judgment C. No. 158/06, approved the Applicant's claim as grounded, annulled the decisions of the PME to terminate the employment as unlawful and ordered the PME to reinstate the Applicant to work with all rights deriving from the employment relationship.

22. Against this judgment within the “*legal deadline*” the respondent PME filed an appeal with the District Court in Prishtina.
23. On 14 October 2008, the District Court in Prishtina, by Decision Ac. No. 528/2007, quashed Judgment C. No. 158/06 of the Municipal Court in Prishtina, and remanded the case to the first instance for retrial.
24. On 30 July 2013, the Basic Court in Prishtina, by Judgment C. No. 373/08, deciding again on the Applicant's case, approved the Applicant's claim as grounded, annulled the PME decisions which terminated the Applicant's employment relationship and ordered his reinstatement to work with all rights deriving from the employment relationship.
25. On 20 August 2013, the PME against the Judgment of the Basic Court in Prishtina filed an appeal with the Court of Appeals on the grounds of essential violations of the provisions of the contested procedure and erroneous and incomplete determination of factual situation.
26. On 19 September 2016, by Judgment CA. No. 2735/2014, the Court of Appeals of Kosovo rejected as ungrounded the appeal and upheld in entirety the Judgment of the first instance court.
27. On 26 October 2016, the PME submitted a request for revision to the Supreme Court of Kosovo.
28. On 15 February 2017, the Supreme Court, by Judgment Rev. No. 340/2016, decided: *“The revision of the respondent PME “Trafiku urban” in Prishtina is approved as grounded, Judgment CA. No. 2735/2014 of the Court of Appeals of Kosovo, of 19 September 2016 and that of the Basic Court in Prishtina, C. No. 373/2008 of 30.7.2013, are modified, so that the statement of claim of the claimant Xhavit Arifi from Prishtina is rejected as ungrounded”*.
29. On 5 April 2017, the Applicant addressed the State Prosecution with a request for protection of legality.
30. On 24 April 2017, the State Prosecution by Notification KMCL. No. 37/2017, notified the Applicant that his request was inadmissible and also out of time.

Applicant's allegations

31. The Applicant alleges that the Supreme Court violated his right to work as the Judgment on revision modified the decisions of the lower instance courts which were in his favor because *“they determined the factual situation differently from the real situation”*.
32. The Applicant further emphasizes that his innocence regarding the disciplinary violation he was charged with is confirmed also by Judgment C. No. 373/08 of the Basic Court in Prishtina, which acquitted him of criminal prosecution after the withdrawal of the summary indictment by the prosecutor of the case. The criminal case according to the Applicant was related to the disciplinary proceedings against him.

33. The Applicant requested the Court to annul the Judgment of the Supreme Court regarding the request for revision, emphasizing that this court decision has violated his right to work and has been denied to exercise the profession, a right protected by Article 49 of the Constitution. The Applicant requests his reinstatement to the job position or another position that corresponds to his qualifications and working abilities.

Admissibility of the Referral

34. The Court first examines whether the admissibility requirements established in the Constitution and as further specified in the Law and in the Rules of Procedure have been met.

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

“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”.

36. The Court also recalls 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”.

37. Finally, the Court further refers to Rule 39 [Admissibility Criteria] of the Rules of Procedure, which foresees:

“(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim”.

38. The Court finds that the Applicant’s Referral fulfills the requirements of Article 113.7 with regard to the authorized party and exhaustion of legal remedies, as it was filed within the deadlines of Article 49 of the Law, therefore, the Court must further assess whether the requirements of Rule 39 of the Rules of Procedure have been met.

39. The Court notes that the Applicant specifically alleged that Judgment Rev. No. 340/16 of the Supreme Court violated his Right to Work and Exercise Profession (Article 49 of the Constitution), which has the following content:

Article 49 [Right to Work and Exercise Profession]

- 1. The right to work is guaranteed.*
- 2. Every person is free to choose his/her profession and occupation.*

40. The Court notes that the Applicant's arguments regarding the violation of the right to work consist in the erroneous and incomplete determination of factual

situation by the Supreme Court. Unlike the Basic Court and the Court of Appeals, which according to the Applicant, had correctly found his innocence regarding a theft of the property (two kiosks) of the PME for which the Applicant was held responsible and for which reason the employment relationship was terminated.

41. The Court finds that the Basic Court in Prishtina, deciding on the Applicant's claim when approving it as grounded, found, *inter alia*, that *"The court found in the present case that the claimant was not in any way responsible for overseeing the premises of the company because, from the job description of the bus conductor or a dispatcher, there is no obligation for the employee employed in any of these positions to do the work of the guard of the enterprise. The claimant's duties and responsibilities are clearly outlined in the respondent's regulation for job systematization. Therefore, the most severe sanction imposed on the claimant was found by the court as inadmissible and unlawful"*.
42. The Court further notes that the Court of Appeals in the reasoning of Judgment CA. No. 2735/2014 has emphasized *"The Panel considers that the first instance court has correctly and completely determined the factual situation and correctly applied the substantive law when it decided as in the enacting clause of the appealed judgment, because according to the state of the matter as well as the normative acts of the respondent, it does not result that due to leaving the workplace the claimant has committed serious violation of his duties, as a consequence of which a disciplinary measure of termination of the employment relationship could be imposed. The claimant did not have a capacity of the guard of the assets of the respondent, whereas in the criminal proceedings it was not proved that he was involved in the criminal case - the theft of the respective kiosks"*.
43. Following the above, the Supreme Court, in the Judgment of the revision, *inter alia*, emphasized *"The Supreme Court of Kosovo found that the lower instance courts have completely and correctly determined the factual situation decisive for fair adjudication of this legal matter, but based on such a situation, according to the assessment of this Court, they have erroneously applied the substantive law..."*.
44. The Supreme Court further reasoned *"This is because from the evidence found in the case file, it is determined in a certain and convincing manner the claimant's liability for serious breach of his duties. The claimant, by disregarding the order of the company's director to preserve the property of the Company on 16 April 2006 at 15:30 hrs, has left the workplace and has not returned until 18:30 and during this time in absence of the claimant from work, three people with one truck took two kiosks from the company's location."*
45. In assessing the Applicant's allegations and the evidence presented in the Referral, the Court notes that in principle it is not its duty to deal with errors of fact or of law (legality) allegedly committed by the Supreme Court in the present case, unless and in so far as they may have infringed the rights and freedoms of the Applicant protected by the Constitution (constitutionality).

46. In addition, the Court notes that the challenged Judgment of the Supreme Court does not in any way prevent the Applicant from working or exercising a profession, and that such a prohibition measure had not been imposed by any of the decisions of the regular courts. Accordingly, there is nothing in the Applicant's allegation that would justify the conclusion that his constitutional right to work and exercise profession has been violated (See, the case of the Constitutional Court, KI136/14).
47. In this regard, the Court also finds that the Applicant alleges that the Supreme Court had not correctly and completely determined the factual situation and that it is clearly a matter of legality, while on the other hand, he did not present any evidence as to how and in what manner the right to work had been violated or he was denied to exercise the profession.
48. The allegation that he had been acquitted of the criminal liability for the case resulting in disciplinary proceedings against him, the Supreme Court clearly replied, stating that *"The fact that the claimant has been acquitted of liability does not constitute a legal ground for approving the statement of claim of the claimant because the disciplinary and criminal proceedings are two proceedings that are conducted independently. Therefore, the submissions in the revision relating to the erroneous application of the substantive law are grounded for which this Court decided as in the enacting clause of this Judgment"*.
49. The Court further reiterates that it is not its task under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See case *Garcia Ruiz vs. Spain*, ECtHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
50. In sum, the Court concludes that the Referral is not justified on constitutional basis and that the Applicant did not prove, nor substantiate the allegation of a violation of a constitutional right; therefore, pursuant to Rule 39 (2), the Referral is to be declared inadmissible as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 31 January 2019, unanimously

DECIDES

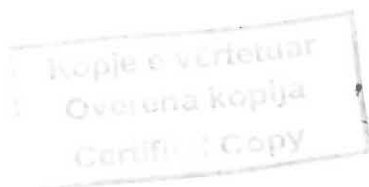
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Selvete Gërxhaliu-Krasniqi

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.