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

Prishtina, on 03 Juna 2019
Ref. no.:RK 1367/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI22/19

Applicant

Sabit Ilazi

Constitutional review of Judgment Rev. No. 377/2018 of the Supreme Court of od 20 November 2018

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 Referral was submitted by Sabit Ilazi from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Rev. No. 377/2018 of the Supreme Court of 20 November 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, 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).

Legal basis

4. The Referral is based on Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of Law No. 03 / L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [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 1 February 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 8 February 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gëxhaliu-Krasniqi and Bajram Ljatifi.

7. On 20 February 2019, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 8 May 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. The Applicant, under a fixed-term employment contract (No. 11738/0), was employed in the Kosovo Energy Corporation in Prishtina (KEK) for the period from 1 October 2009 until 31 December 2009.

10. On 16 November 2009, the KEK by notificaton (No. 235) notified the Applicant that the employment contract (No. 11738/0) was terminated based on the recommendation by the disciplinary commission due to irregularities in work and poor performance.

11. On 19 November 2009, the Applicant filed a complaint with EEK against this notice.

12. On 25 November 2009, KEK by Decision (No. 284) rejected the Applicant's complaint as ungrounded, and upheld the decision on termination of the employment contract.

13. On an unspecified date, the Applicant filed a lawsuit with the Municipal Court in Prishtina with a proposal to annul the KEK notice of termination of the employment contract and to approve his lawsuit for returning to the working place.

14. On 31 January 2011, the Municipal Court in Prishtina by Judgment [C. No. 2751/09], approved the Applicant's statement of claim, annulled the KEK notice on termination of the employment contract and obliged the KEK to return the Applicant to the working place foreseen by the contract.

15. On an unspecified date, KEK filed an appeal with the Court of Appeals in Prishtina on the grounds of *„essential violation of the provisions of the LCP, erroneous and incomplete determination of factual situation and erroneous applicaiton of the substantive law, proposing to the second instance court to modify the appealed judgment and to reject the claimant's statement of claim as ungrounded*".

16. On 1 July 2013, the Court of Appeals, by Decision [Ac. No. 5300/2012], approved the appeal of KEK, annulled the Judgment [C. No. 2751/09] of the Municipal Court in Prishtina and remanded the case to the same court for retrial. The reasoning of the Court of Appeals, *inter alia,* states that *„in the present case, the factual situation of this legal matter was not completely and correctly determined by the first instance court, the latter did not provide a fair assessment of the employment contract concluded between the claimant as an employee and the respondent as an employer and based on this determined situation, the substantive law was also incorrectly applied when it found that the claimant's statement of claim was grounded, for annulment of the respondent's decision as un lawful and his reinstatement to work*".

17. On 30 June 2014, the Basic Court in Prishtina in the repeated proceedings rendered Judgment C. No. 1827/13, by which approved the Applicant's statement of claim, annulled the KEK notice on termination of the employment contract and obliged KEK to reinstated the Applicant to the working place provided for by the contract.

18. On an unspecified date, against the Judgment of the Basic Court in Prishtina, KEK filed an appeal with the Court of Appeals on the grounds of *"essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law, with the proposal that the second instance court approves the appeal as grounded and modify the appealed judgment as well as to reject the claimant's statement of claim*".

19. On 2 September 2015, the Court of Appeals, by Decision [Ac. No. 4409/2014], approved the KEK appeal, annulled the Judgment [C. No. 1827/13] of the Municipal Court in Prishtina and remanded the case to the same court for

retrial. The reasoning of the Court of Appeals states, *inter alia*, reads "*since the first instance court did not act upon the remarks in the decision of the second instance court Ac. No. 5300/12 of 31.01.2011, in which decision are given very clear instructions for the first instance court, and when it is known that according to the aforementioned provision, the instructions of the second instance court are binding for the first instance court.*
The first instance court was obliged to remedy the abovementioned flaws in the repeated procedure by presenting all necessary evidence, assessing the abovementioned employment contract, and complying with the instructions from the abovementioned decision of the second instance court and taking into account the appealing allegations, so that, after correct and the complete determination of the factual situation of the abovementioned facts and circumstances to render fair and meritorious decision based on the law."

20. On 29 February 2016, the Basic Court in Prishtina rendered Judgment C. No. 2162/13, by which he approved the Applicant's statement of claim, annulled the KEK notification terminating the employment contract and obliged KEK to reinstate the Applicant to the working place foreseeb by the contract.

21. On an unspecified date, against the Judgment of the Basic Court in Prishtina, KEK filed an appeal with the Court of Appeals on the grounds of "*essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law, with the proposal that the second instance court approves the appeal as grounded and to modify the appealed judgment, as well as to reject the claimant's statement of claim*".

22. On 29 February 2016, the Court of Appeals, by Decision [Ac. No. 1657/2014], approved the appeal of the KEK and, with a detailed reasoning regarding the factual situation and the application of law, modified the Judgment [C. No. 2162/13] of the Basic Court in Prishtina and rejected as ungrounded the Applicant's lawsuit.

23. On an unspecified date, the Applicant submitted a request for revision to the Supreme Court on the grounds of "*essential violations of the provisions of the contested procedure and erroneous application of substantive law, with a proposal that the revision be approved, the judgment of the second instance court be annulled, and the judgment of the first instance court be upheld*".

24. On 20 November 2018, the Supreme Court, by Judgment [Rev. No. 377/18] rejected the Applicant's request for revision on the grounds that the second instance court has correctly determined the factual situation, correctly applied the substantive and procedural law and that the challenged judgment does not contain essential violations of the contested procedure.

Applicant's allegations

25. The Applicant alleges that the regular courts violated his right protected by Article 31 of the Constitution, as the termination of the employment contract in his case was unlawful.

26. In his Referral, the Applicant states in the proceedings before the regular courts the factual situation was not correctly determined, namely, the Applicant specifically states that *"the factual situation was not the way it was presented by the respondent and was unlawfully approved by the court"*.

27. The Applicant also states that *"the facts were deposited in the court, but the court unfairly rejected the statement of claim without ensuring fair and impartial trial by giving trust only to the respondent's allegations"*.

28. Finally, the Applicant requests the Court to approve the Referral as admissible and declare invalid and remand for retrial the Judgment [Rev. No. 377/18] of the Supreme Court of 20 November 2018.

Admissibility of the Referral

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

30. 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."*

31. The Court also examines whether the Applicant has fulfilled the admissibility requirements as prescribed 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 foresee:

> 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 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...".

32. As regards the fulfillment of the abovementioned requirements, the Court finds that the Applicant is an authorized party; that he has exhausted available legal remedies; that he stated the act of a public authority that he challenges before the Court, and has filed a referral in time.

33. In addition, the Court refers to Rule 39 (2) [Admissibility Criteria], of the Rules of Procedure, which stipulates:

„(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."

34. The Court recalls that the Applicant alleges that the regular courts violated the rights protected by Article 31 [Right to a Fair and Impartial Trial] of the Constitution.

35. As regards the allegations of violation of Article 31 of the Constitution, the Court notes that the termination of the Applicant's employment relationship relates to the violation of duties and responsibilities at work, which are stipulated by the Law on Labor and the sublegal act of the KEK.

36. In addition, the Court notes that the Applicant's allegations of violation of this constitutional right relate to the way in which the regular courts administered the evidence before them, the manner they have determined the factual situation and how they interpreted and applied the substantive and procedural law in the case of the Applicant. Therefore, the Court, as such, considers that these allegations raise the issue of legality which is dealt with by the regular court in accordance with the competencies given to them by the Constitution.

37. The Court notes that the Court of Appeals explained in its reasoning: *"there is an employment contract in the case file no. 11738/0 of 01.10.2009. which is a contract for a certain period of time, the last written warning given to the claimant for poor work results - performance, so that the last written notice warned the claimant that the failure to fulfill performance or other violation of work duties would lead to a termination of the employment contract before*

the expiration of its term, and that such a thing is envisaged by Article 11 of the employment contract".

38. The Court of Appeals further reasoned in the following: *"...in the enacting clause of Article 69.3.1 of the Law on Labor, it is stipulated: "An employee may cancel his/her employment contract without providing prior notice in written form defined in paragraph 1 of this Article, where the employer is guilty a breach of obligations under the employment contract", while the respondent informed him by the last written remark for failure to fulfill his work results. Whereas, in the provision of Article 70, paragraphs 1.1.4. 1, 1. 4. 2 and 1. 6. 2 of the Law on Labor, it is stipulated that: "An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, in, serious cases of misconduct of the employee; as well as the employee's performance remains dissatisfactory in spite of the written warning", and because of the abovementioned reasons, the first instance judgment was modified and the claimant's statement of claim was rejected as ungrounded".*

39. Finally, the Supreme Court explains in its reasoning: *"pursuant to Article 11.5 of Regulation 2001/27 on the Basic Labor Law in Kosovo, which entered into force on 8 October 2001, it is more precisely determined that the employer in writing, informs the employee that he intends to terminate the employment contract. This notice must include the reasons why the contract is terminated and a meeting between the employer and the employee is held and at that meeting the employer gives an employee an oral explanation of the reason for the termination of the contract. Also, pursuant to Article 8.4 of the Regulations for district operations of the respondent, it is precisely foreseen that in case of violation of the work duties that constitute the basis for the termination of the employment contract. In the present case, the respondent complied with the provisions of Regulation no. 2001/27 on the Basic Labor Law in Kosovo, precisely Article 11. 5 under items (a) and (b) in conjunction with Article 8 of the Regulation on Operations of the District of the Respondent in termination of an employee's employment contract.*
The Supreme Court considers that the notice or decision of the respondent which annulment is requested is not against the law because they are rendered in accordance with the provisions of the aforementioned laws".

40. The Court notes that in this case the Applicant mainly complains of the assessment of evidence and the outcome of the proceedings before the regular courts. The Court recalls that it is not its task to act as a "fourth instance court", questioning the outcome of the regular proceedings. The regular courts are in the best position to assess the relevance of the evidence in the case and for the interpretation and application of the rules of substantive and procedural law (see, among many authorities, *Vidal v. Belgium*, Judgment of 22 April 1992, Series A No. 235-B, p. 32-33, paragraph 32).

41. The Court reiterates that it is not its role to deal with errors of fact or law allegedly committed by the regular courts, when assessing evidence or applying the law (legality), unless and insofar they may have violated the rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role

of the regular courts to interpret and apply relevant rules of procedural and substantive law. (See: *mutatis mutandis*, European Court of Human Rights, case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, paragraph 28). (see: Judgment *Donadze v. Georgia*, No. 74644/01, paragraphs 30 and 31 of 7 March 2006).

42. The Court notes that the Applicant in the regular proceedings had benefited from the adversarial proceedings. The Applicant was legally represented during the entire proceedings and could prove his right to a fixed-term employment contract and provide evidence supporting him in the case. The Court of Appeals reasoned in detail the judgment in the merits of the case and heard both parties. Moreover, the factual and legal reasons for the rejection of the case are stated in detail in the judgment of the Court of Appeals and the Supreme Court. In these circumstances, it cannot be claimed that the regular courts have foreseen important aspects of the case or that thye did not take into account the historical background of the dispute. see: the ECtHR judgment, *Pekinel v. Turkey*, of 18 March 2008, No. 9939/02, par. 54.

43. In considering the process in entirety, the Court considers that the Court of Appeals and the Supreme Court, in their decisions, provided detailed and complete description of their conclusions, giving numerous reasons in response to the Applicant's allegations (see: ECtHR judgment, *Pekinel v. Turkey*, 18 March 2008, No. 9939/02, paragraph 55)

44. In conclusion, the Court finds that the Applicant did not sufficiently prove and substantiate the allegation that his rights protected by the Constitution have been violated. In addition, the Applicant failed to substantiate his allegation of violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.

45. Therefore, the Applicant's Referral on constitutional basis is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, on 8 May 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

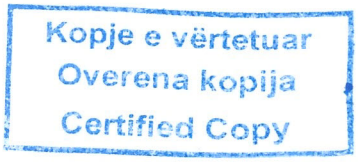
II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Radomir Laban Arta Rama-Hajrizi



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