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

Prishtina, on 08 July 2019
Ref. no.:RK 1388/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI132/18

Applicant

Limak Kosovo International Airport J.S.C. "Adem Jashari"

Constitutional review of Judgment Rev. No. 118/2018 of the Supreme Court of Kosovo of 5 April 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 Joint Stock Company Limak Kosovo International Airport J.S.C, "Adem Jashari" (hereinafter: the Applicant), based in Vrellë village, Lipjan Municipality, which is represented with power of attorney by Fazli Gjonbalaj and Leonora Fejzullahu.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 118/2018 of the Supreme Court of Kosovo, of 5 April 2018, which was served on the Applicant on 7 May 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] Article 32 [Right to Legal Remedies] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 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 5 September 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), and the case was registered with number KI132/18.

6. On 21 September 2018, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur, and the Review Panel, composed of Judges: Bekim Sejdiu (Presiding), Remzie Istrefi and Nexhmi Rexhepi, in case KI128/18.

7. On 21 September 2018, the President of the Court by Order joined the cases KI128/18, KI129/18, KI130/18, KI132/18, with the same Judge Rapporteur and the Review Panel, as in case KI128/18.

8. On 19 October 2018, the Court notified the Applicant and the Supreme Court of Kosovo about the registration and joinder of the Referrals KI129/18, KI130/18, KI132/18 with Referral KI128/18. On the same date, the Court sent a request to the Basic Court in Prishtina - Branch in Lipjan, to present evidence regarding the date of receipt of Judgment Rev. No. 118/2018 of 5 April 2018, which was challenged in case KI132-18.

9. On 29 October 2018, the Basic Court in Prishtina - Branch in Lipjan submitted to the Court the acknowledgment of receipt indicating that Judgment Rev. No. 118/2018 of 5 April 2018 was served on the Applicant on 7 May 2018

10. On 5 November 2018, the President of the Court by Order joined the cases KI128/18, KI129/18, KI130/18, KI132/18, with cases KI164/18, KI165/18, KI166/18 and KI167/18, with the same Judge Rapporteur and the Review Panel, as in case KI128/18.

11. On 8 November 2018, the Court notified the Applicant about the registration of the Referrals KI164/18, KI165/18, KI166/18 and KI167/18 and joinder with cases KI128/18, KI129/18, KI130/18, KI132/18, and submitted copies of the joined referrals to the Supreme Court.

12. On 4 April 2019, the President of the Court by Order separated the joined cases KI128/18, KI129/18, KI130/18, KI132/18, KI164/18, KI165/18, KI166/18 and KI167/18 in individual cases, with the same Judge Rapporteur and the Review Panel, as in case KI128/18.

13. On 12 April 2019, the Court notified the Applicant and the Supreme Court that cases KI128/18, KI129/18, KI130/18, KI132/18, KI164/18, KI165/18, KI166/18 and KI167/18 were separated by Order and that they will be individually reviewed before the Constitutional Court.

14. On 12 April 2019, the Applicant submitted to the Court the letter entitled *"[...] regarding the cases registered with the Constitutional Court and in particular the case registered with [...] number KI132/18"*.

15. On 16 May 2019, the Applicant submitted to the Court a submission entitled *"Submission, regarding the cases registered with the Constitutional Court"*.

16. On 20 June 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts of the case

17. On 12 August 2010, the Government of the Republic of Kosovo and the Applicant signed a Public-Private Partnership Agreement (hereinafter: the PPP Agreement). Prior to the signing of the PPP Agreement, the name of Prishtina Airport was Prishtina International Airport (hereinafter: the PIA).

18. Based on the case file, it is noted that the employee SH.D. (hereinafter: the employee) was employed with the PIA. The employee had a regular employment relationship with the Applicant initially in 2003 in the position as a "legal officer", whereas from 2005, as a "secretary of the company".

19. Pursuant to the PPP Agreement, the Applicant assumed the obligation to keep all employees in employment relationship for three (3) years. Accordingly, the

employee Sh. D. concluded the employment contract from 1 April 2011 until 3 April 2014, in the job position as a "secretary of the company".

20. Based on the case file, it follows that on 3 October 2011, the Applicant notified the employee that the employment contract is terminated under Article 15 of the Law on Labor and Article 3 of the employment contract, with the end of the probation period.

21. On unspecified date, the employee filed the statement of claim with the Basic Court in Prishtina - Branch in Lipjan (hereinafter: the Basic Court), requesting the annulment of the notice of 3 October 2011, issued by the Applicant, and obliging the Applicant to compensate the material damage.

22. On 17 September 2015, the Basic Court, by Judgment (C. No. 30/2015), (i) approved the statement of claim of the employee as grounded; (ii) annulled the Applicant's notification of 3 October 2011, as unlawful; (iii) obliged the Applicant to compensate the personal income that the employee would earn from 3 October 2011 until 3 April 2014, in a certain amount and the amount of legal interest; and; (iv) obliged the Applicant to cover the costs of the contested procedure. The Basic Court reasoned that in the present case Article 3 of the employment contract and Article 15 of the Law on Labor cannot be applied, because the employee has established employment relationship with the Applicant since 2003.

23. On 28 October 2015, the Applicant filed an appeal with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) against the Judgment (C. No. 30/2015) of the Basic Court stating that the challenged Judgment was rendered with essential violation of the procedural provisions and that there is an erroneous determination of factual situation and erroneous application of the substantive law. The Applicant in his appeal in essence stated that the Basic Court should have respected the employment contract and to apply Article 3 and Article 15 of the Law on Labor.

24. On 22 January 2018, the Court of Appeals by Judgment (CA. No. 4340/2015) rejected the Applicant's appeal as ungrounded and upheld Judgment (C. No. 30/2015) of the Basic Court, considering that the Basic Court (i) did not commit essential violation of the provisions of the Law on Contested Procedure (hereinafter: the LCP) and (ii) the reasoning of the Judgment contains the elements provided for in Article 160, paragraphs 4 and 5 of the LCP).

25. On 27 October 2018, the Applicant submitted a request for revision to the Supreme Court against the Judgment of the Basic Court and the Judgment of the Court of Appeals of Kosovo, alleging essential violation of the procedural provisions and erroneous application of the substantive law. The Applicant alleged that the lower instance courts did not correctly apply the notice of termination of the probation period, which was based on Article 15, paragraphs 1-3 and Article 72, paragraphs 1 and 2 of the Law on Labor and Article 3 of the Employment Contract.

26. On 5 April 2018, the Supreme Court by Judgment Rev. No. 118/2018 rejected the Applicant's revision as ungrounded, reasoning that "*...The probation period for a job position with the employer is foreseen when the employment relationship is established for the first time, and the claimant in the present case at the same job position as the secretary of the company worked for about 6 years. [...] In this state of matter, the Supreme Court of Kosovo considers that the legal position of the first and second instance courts is admissible, when they decided for the reasons above, have decided on the approval of the statement of claim of the claimant [...]*".

27. Regarding the compensation of damage, the Supreme Court reasoned that as a direct legal basis in the cases of compensation for damage caused by unlawful termination of the employment relationship, serve the provisions of the Law on Obligations (hereinafter: the LOR) based on Articles 154.1 and 189.3 of the LOR, namely the provisions regarding the lost profits in cases where the damage was caused without the fault of the party [employee].

Applicant's allegations

28. The Court recalls that the Applicant alleges that *"The Supreme Court of Kosovo, by its Judgment Rev. No. 118/ 2018, [...] has violated his right to fair and impartial trial, as guaranteed by Article 31 [Right to Fair and Impartial Trial], on the grounds of unreasoned decision, further claiming that "as a result of the absence the reasoning, the challenged decision deprived the Applicant of the constitutional right to an effective legal remedy" and thereby violated his constitutionally right guaranteed by Article 32, as a result of these violations, the Applicant's right of property under Article 46 [Protection of Property] of the Constitution has also been violated. The Applicant also alleges that there is a violation of Article 6 (Right to a fair trial) of the ECHR".*

29. The Applicant in substance justifies his referral by stating that the regular courts have erroneously have erroneously applied the substantive law, stating that the decisions of the regular courts did not sufficiently reason with regard to the Applicant's act to terminate with the notice the Applicant's probation work under Article 3 of the Employment Contract and Article 15 of the Law on Labor.

30. The Applicant alleges that "*the Constitutional Court should assess whether the trial in its entirety was fair and impartial, as required by Article 31 of the Constitution (see, inter alia, mutatis mutandis, Edwards v. United Kingdom, 16 December 1992, p. 34, Series A, No. 247 and B. Vidal v. Belgium, 22 April 1992, p. 33, Series A. No. 235).*

31. The Applicant alleges that the regular courts damaged his financial aspect by enabling the employee SH.D. payment of personal income, and, thus, refers to Article 46 of the Constitution.

32. By his letter sent on 12 April 2019, the Applicant refers in "*particular*" to the case KI132/18, and states "*[...] we request from the review panel an analysis of the case KI132/2018 as well as to examine Article 9.1.9 item "d" of the PPP*

Agreement which article clearly clarifies the probation period based on the category in which all employees are classified [...]".

33. The Applicant requests the Court to annul the Judgment of the Supreme Court and to remand the case for retrial.

Relevant legal provisions

Law No. 03/L-212 on Labor

Article 15
Trial Period

1. The trial period shall be defined in the Employment Contract.
2. The trial period cannot last more than six (6) months in compliance with this Law, Collective Contract and Employer's Internal Act.
3. During the trial period, the employer and employee may terminate the employment relationship through a previous notice in a term of seven (7) days.
[...]

Article 67
[Termination of Employment Contract on Legal Basis]

1. Employment contract, on legal basis, may be terminated, as follows:
1.1. With the death of the employee;
1.2. With the death of the employer when the work performed or services provided by the employee are of personal nature and the contract cannot be extended to the successors of employer;
1.3. With the expiry of duration of contract;
1.4. When an employee reaches the pension age, sixty- five (65) years of age;
1.5. On the day of the submission of plenipotentiary proof of the loss of labour competencies; 1.6. If an employee shall serve a sentence which will last longer than six (6) motnhs;
1.7. With the decision of the competent court, which leads to the termination of employment relationship;
1.8. With the bankruptcy or liquidation of the enterprise;
1.9. Other cases specified by Laws in force.

Article 70
[Termination of Employment Contract by the Employer]

1. An employer may terminate the employment contract of an employee with the prescribed period of notice of cancellation, when:
1.1. Such termination is justified for economic, technical or organizational reasons;
1.2. The employee is no longer able to perform the job;
1.3. The employer may terminate the employment contract in the circumstances specified in sub-paragraph 1.1 and 1.2 of this paragraph, if, it is impracticable for the employer to transfer the employee to other

employment or to train or qualify the employee to perform the job or other jobs;
1.4. An employer may terminate the employment contract of an employee with providing the period of notice of termination required, in:
1.4.1. serious cases of misconduct of the employee; and
1.4.2. because of dissatisfactory performance of of work duties;
1.5. An employer shall notify the employee about his/her dismissal immediately after the event which leads to this decision or as soon as the employer has become aware of it.
1.6. An employer may terminate the employment contract of an employee without providing the period of notice of termination required, in the case when:
1.6.1. the employee is guilty of repeating a less serious misconduct or breach of obligations;
1.6.2. the employee's performance remains dissatisfactory in spite of the written warning.
2. The employer may terminate the employment contract of an employee under subparagraphs 1.6 of paragraph 1 of this Article only when after the employee has been issued previous written description of unsatisfactory performance with a specified period of time within which they must improve on their performance as well as a statement that failure to improve the performance shall result with dismissal from work without any other written notice.

Public-Private Partnership Agreement for the Operation and Expansion of Prishtina International Airport

9.18 [Termination of Personnel]

„The Private Partner may terminate the employment or other engagement of any PIA Employee (i) at any time for cause in accordance with applicable laws, rules, administrative regulations and decrees, (ii) upon mutual agreement and (iii) without limitation, after the third (3rd) anniversary of the Effective Date".

Admissibility of the Referral

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

35. 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".

36. The Court also refer to paragraph 4 of Article 21 [General Principles] of the Constitution, which establishes:

> *"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

37. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms applicable both to individuals and to legal persons (case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

38. The Court further examines whether the Court 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 establish:

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 [...]".*

39. Regarding the fulfillment of these requirements, the Court considers that the Applicant is an authorized party, challenging an act of a public authority, after exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

40. However, the Court should further assess whether the criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure have been met, including the requirement that the Referral is not manifestly ill-founded. Thus, Rule 39 (2) of the Rules of Procedure provides that:

"(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".

41. Initially, the Court notes that the Applicant alleges that his right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR has been violated, because the decisions of the regular courts were not sufficiently reasoned, while the violations of other rights guaranteed by the Constitution and the ECHR are presented by the Applicant as a result of the violation of the right to fair and impartial trial.

42. The Applicant in essence justifies his Referral by repeating the same allegations that it had filed before the regular courts, which pertain to erroneous application of the substantive law, pointing out that the decisions of the regular courts did not sufficiently reason the Applicant's act to terminate by notice the probation period under Article 3 of the Collective Contract and Article 15 of the Law on Labor.

43. By addressing the Applicant's allegations, the Court first notes that the Applicant's allegations before the regular courts were related to the application of the substantive law with respect to the notice of termination of the probation work of the employee SH.D.

44. The Court recalls that in this respect, the regular courts explained to the Applicant that he could not terminate the employment relationship under Article 3 of the Employment Contract and Article 15 of the Law on Labor because the employee was in the employment relationship for 6 years. The Supreme Court, further, upholding the reasons given by the lower courts reasoned that *"[...] The probation period for a job position with the employer is foreseen when the employment relationship is established for the first time, while the claimant in the present case in the same job position as a secretary of the company worked for about 6 years".*

45. Secondly, regarding the Applicant's allegation that he was financially damaged because he was obliged to compensate the employee, the Court notes that the Supreme Court gave the reasons by stating that *"In the law on obligations there is a general principle contained in the provision of Article 16 of the LOR, according to which "every person is obliged to refrain from action by which damage could be caused to another". The issue of compensation for damage is regulated by the provisions of Articles 154 to 209 of the LOR, which have a substantive-legal character, for which the Court takes care ex officio, regardless of whether the parties are referred to them or not in the course of realizing the protection of their rights and interests. [...] In accordance with [these provisions] employed has the right to compensation for damage, at the amount of lost profits [...]".*

46. Based on the foregoing, the Court finds that the regular courts took into consideration the Applicant's allegations, explaining to him why Article 3 of the Employment Contract and Article 15 of the Law on Labor could not be applied

in the present case, and why according to the provisions of the LOR, the employee SH.D. the respective must be paid a compensation.

47. The Court first reiterates that it is not its function to deal with the errors related to the factual situation or the erroneous application of the law, allegedly, committed by the regular courts, unless the errors and erroneous application of the law are not such as to violate the rights and freedoms protected by the Constitution (see case of ECtHR, *Garcia Ruiz v. Spain* [GC], no. 30544/96, Judgment of 21 January 1999, paragraph 28).

48. However, it is the primary role of the regular courts to resolve the issues of interpretation of the domestic legal rules. This applies in particular to the interpretation of substantive and procedural law by the courts (see ECtHR case, *Pekinel v. Turkey*, No. 9939/02, 18 March 2008, paragraph 53). The role of the Court is only to determine whether the effects of such interpretation are in accordance with the Constitution in entirety and with the principle of legal certainty, in particular those guaranteed by Article 6 of the ECHR.

49. The Court reiterates that Article 6 of the ECHR and Article 31 of the Constitution oblige the courts to give reasons for their decisions, but this cannot be understood as an obligation of the court to give a detailed answer to any arguments of the Applicant. (see ECtHR case, *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994, paragraph 61). The extent to which the duty to give reasons applies may vary according to the nature of the decision. It should also take into account, *inter alia*, the variety of submissions submitted by a party to proceedings that may make the courts give various legal opinions and conclusions when drafting judgments. Therefore, the question whether the court has fulfilled the obligation to explain the reasons for its decision, stemming from Article 6 of the ECHR, can only be determined in the light of the circumstances of each individual case.

50. Accordingly, the Court finds that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle, he was able to adduce the arguments and evidence he considered relevant to his case at the various stages of those proceedings, he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party; all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts; the factual and legal reasons of the challenged decision were presented in detail; and therefore, the proceedings, viewed in entirety, were fair (see, *mutatis mutandis,* case *Garcia Ruiz v. Spain*, cited above, paragraphs 29 and 30).

51. Therefore, the Court finds that the right to fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, has not been violated by the decisions of public authorities.

52. Taking into account that the Applicant failed to present evidence, facts and arguments showing that the proceedings before the regular courts violated its right to fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, the Court will not deal with the examination of further allegations of the Applicant because the violations of other rights guaranteed

by Articles 24, 32 and 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, are presented by the Applicant as a result of the violation of the right to fair and impartial trial.

53. The Court recalls that the mere fact that the Applicant does not agree with the outcome of the decisions of the Supreme Court, as well as mentioning of articles of the Constitution, are not sufficient to build a reasoned allegation of constitutional violations. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (See, *mutatis mutandis*, case of the Constitutional Court KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).

54. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, and Rule 39 (2) of the Rules of Procedure, on 20 June 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**

Radomir Laban Arta Rama-Hajrizi

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