



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

Prishtina, on 28 June 2019
Ref. no.:RK 1384/19

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI14/19

Applicant

Xhemajl Sylejmani

Constitutional review of Decision Rev. No. 290/2018 of the Supreme Court of 10 September 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 Xhemajl Sylejmani (hereinafter: the Applicant) from the village of Gërmovë, Municipality of Viti.

Challenged decision

2. The Applicant challenges Decision Rev. No. 290/2018 of the Supreme Court of 10 September 2018. The challenged decision was served on the Applicant on 4 October 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which, allegedly violates the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 49 [Right to Work and Exercise Profession] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: 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 25 January 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 28 January 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel, composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
7. On 15 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 28 May 2019, after considering the Report of the Judge Raporteur, the Review Panel recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. The Applicant submits the Referral to the Constitutional Court for the second time in relation to the same legal dispute, therefore, the Court will present summary of the factual situation in two separate parts.

Summary of facts regarding case KI155/13

10. In the period from 2004 to 2009, the Applicant was employed in the job position of the officer for cooperation in the field at the Directorate for Civil Protection and Urgent Readiness in the Municipal Administration of Municipality of Viti (hereinafter: Municipality of Viti), according to the contract on fix term, which was extended several times.

11. On 13 August 2009, the Municipality of Viti by Notice (No. 03-07/4178) offered to the Applicant a new contract foreseeing the change of his previous working place to the working place of operator - dispatcher at the same Directorate with the same coefficient and the same amount of personal income. By the same Notice the Applicant was informed that the non-signing of the contract would result to the termination of the employment relationship.
12. On 26 August 2009, the Municipality of Viti by Decision (No. 03-118/4424), terminated the Applicant's employment relationship due to the fact that he did not sign a new employment contract, which was offered to him.
13. The Applicant filed appeal against this decision with the Appeals Commission in the Municipality of Viti (hereinafter: the Appeals Commission).
14. On 25 September 2009, the Appeals Commission by Decision (No. 03-113/4782) rejected as ungrounded, the appeal of the Applicant and upheld the Decision on termination of the employment relationship.
15. On an unspecified date, the Applicant filed a complaint with the Independent Oversight Board for Civil Service of Kosovo (hereinafter: the IOBK) against the decision of the Appeals Commission in Viti Municipality.
16. On 11 March 2011, the IOBK, by Decision (No. 462/2010), rejected the appeal of the Applicant as ungrounded and upheld the Decision of the Appeals Commission.
17. On an unspecified date, the Applicant filed a claim with the Municipal Court in Viti with the proposal to annul the Decision of the Municipality of Viti on termination of the employment relationship and to approve his claim for reinstatement to his working place.
18. On 2 May 2012, the Municipal Court in Viti by Judgment [C. No. 214/2011] rejected as ungrounded the claim of the Applicant. The reasoning of the Municipal Court, among other things, states: *"It is indisputable among the litigating parties that the claimant was in an employment relationship with the respondent in the job position as officer for cooperation in the field, in the Directorate of Public Services and in Urgent Readiness. The respondent after the harmonization of normative acts, the Statute and its Regulations, insisted on the change of the job position of the claimant without his will from his previous working place to to the operator - dispatcher at the same directorate without damaging him in personal income. As regards the new employment contract with a new title, it is based on a bilateral agreement in the present case, the respondent and the claimant pursuant to Article 2 a (signing of the contract of Administrative Instruction 2003/02 in conjunction with the Regulation on Civil Servants of Kosovo No. 2001/36 with amendments of Regulation 2008/12). It was found that the claimant did not want to sign a new employment contract, and this is confirmed by notice no. 03-07/4178 of 13.08.2009, and by the same letter – notification to the claimant where he was warned that the failure to sign the contract would lead to the termination of the employment relationship and the respondent acted in this way by its*

decision no. 03-118/4424 of 26.08.2009, which, in accordance with the applicable legal provisions, rendered the decision on termination of his employment relationship”.

19. On an unspecified date, the Applicant filed an appeal with the District Court in Gjilan against the Judgment of the Municipal Court in Viti.
20. On 10 July 2012, the District Court in Gjilan by Judgment [C. No. 207/12] rejected the Applicant’s appeal as ungrounded and upheld the Judgment of the Municipal Court.
21. On an unspecified date, the Applicant submitted a request for revision to the Supreme Court against the judgment of the Municipal Court and of the District Court.
22. On 3 June 2013, the Supreme Court by Judgment [Rev. No. 302/2012] rejected the Applicant's request for revision and upheld the judgments of the first and second instance.
23. On 2 October 2013, the Applicant filed the Referral with the Constitutional Court, alleging that that the Supreme Court by Judgment [Rev. No. 302/2012] of 3 June 2013, violated its rights protected by the Constitution, Article 21 [General Principles], Article 24 [Equality Before the Law Article 32 [Right to Legal Remedies] and Article 49 [Right to Work and Exercise Profession]. This Referral is registered under the number KI 155/13.
24. On 24 January 2014, the Review Panel concluded that the facts presented by the Applicant do not in any way justify the allegation of violation of the constitutional rights and the Applicant did not sufficiently substantiate his allegations, therefore, Referral KI 155/13 was declared inadmissible.

Summary of facts in case KI14/19 of the Constitutional Court

25. On 17 April 2014, the Applicant filed with the Court of Appeals the proposal for repetition of procedure regarding the case of the Municipal Court in Viti, C. No. 214/11, alleging that: *“final judgment is based on erroneous determination of factual situation ”.*
26. On 28 January 2015, the Court of Appeals by Decision [N. no. 51/2014], dismissed proposal of the Applicant for repetition of the proceedings as out of time. The reasoning of the Court of Appeals, among other things, states: *“From the case file it follows that judgment no. 214/11 of 02.05.2012 became final on 10.07.2012, and upon revision it was decided by judgment of the Supreme Court Rev. No. 302/2012 of 03.06.2013. The Judgment of the Supreme Court was served on the claimant on 12.07.2013. This fact is established by the court’s acknowledgement of receipt. The proposal for reopening the procedure was filed on 17.04.2014, which was confirmed by the seal of the court. By the provision of Article 234.1. (a) of the Law on Contested Procedure it is foreseen that the proposal for repetition of proceedings may be filed within thirty (30) days of the day when the final decision was served on the party”.*

27. On 20 May 2015, the Applicant filed an appeal with the Court of Appeals requesting that Decision [N. no. 51/2014] of the Court of Appeals be modified, by allowing the repetition of the proceedings. The Applicant reasoned his appeal with the *“essential violation of the provisions of contested procedure, erroneous determination of factual situation and erroneous application of substantive law”*.
28. On 11 April 2018, the Court of Appeals [Ac. no. 849/2015] rejected as ungrounded the Applicant's appeal and upheld Decision [N. no. 51/2014] of the Court of Appeals.
29. On an unspecified date, the Applicant submitted to the Supreme Court a request for revision, without specifying the grounds of the revision, with a proposal that both decisions of the Court of Appeals be quashed and the case be remanded to the first instance court for retrial.
30. On 10 September 2018, the Supreme Court by Decision [Rev. no. 290/18] rejected as ungrounded the Applicant's request for revision, with the following reasoning: *“This court of revision assesses that the challenged decision was not rendered in violation of the rules of the contested procedure with the influence on the legality of the decision as without basis is stated in the revision. Pursuant to Article 215 of the LCP, the court of revision examines the challenged decision only in that part in which it is challenged by the revision and within the reasons stated in the revision. In fact, in the revision, the claimant merely gives comments and legal assessments as to the final court judgment that relate to the factual situation which is not the subject of the assessment in this case and does not constitute legal reference for rendering a more favorable decision for the claimant and does not provide explanations regarding the alleged violations of the provisions of the contested procedure”*.

Applicant's allegations

31. The Applicant alleges that the regular courts, by rejecting his request for repetition of the proceedings, violated his rights protected by Article 31, Article 49 and Article 54 of the Constitution, without specifying that the Court has already dealt with this case.
32. The Applicant reasons that the regular courts have erroneously applied substantive and procedural law when calculating the time limits when they rejected his request for a reopening of the proceedings and that instead of a 30-day subjective deadline, the objective five-year deadline provided for in Article 234.3 of the LCP, should be applied.
33. The Applicant considers that such erroneous application of substantive and procedural law has resulted in violation of Article 31 in conjunction with Articles 49 and 54 of the Constitution.
34. Finally, the Applicant requests the Court to find that *“... this referral is admissible ... ”*, to establish that the decisions of the regular courts have violated his rights protected by Article 31 and Article 54 of the Constitution of

the Republic of Kosovo. He also requested the Court, that in the present case, allows “... *the repetition of proceedings in the contested case C. no. 214/2001 with the Basic Court in Gjilan-Branch in Viti*”.

Applicable legal provisions

LAW NO. 03/L-006 ON CONTESTED PROCEDURE

No. 03/L- 006

30 June 2008

CHAPTER XIV

EXTRAORDINARY MEANS OF STRIKE

REPETITION OF PROCEDURE

Article 232

232.1 Finalized procedure with an absolute decree can be repeated based on the proposal party:

a) if the party with an illegal act, especially in the case of not being invited to the session, the party is not given the opportunity to part take in the examination of the main issue;

b) if in the final procedure, as a charging party or unknowingly participated the individual that can't act as an intermediate party; the legal entity wasn't represented by an authorized person, when the party without legal background wasn't represented by its legal representative, when the legal representative or by proxy of the side had no required authorization for pursuing the issue at the court or for conducting concrete procedural actions respectively when pursuing the case at the court or conducting concrete procedural actions was not approved by the side later on [...].

[...]

Article 234

234.1 Proposal for repeating the procedure is presented within the period of thirty (30) days and that:

a) in the case of article 232, point a) of this law, from the day when the verdict of absolute decree was handed to the party;

[...]

234.3 After a five year deadline passed from the day when the verdict became absolute, the proposal for repeating the procedure can be presented, except the repetition is required from the causes mentioned in article 232, point a) and b), of this law.

Assessment of the admissibility of Referral

35. The Court first 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.
36. 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.

37. The Court refers to Article 48 [Accuracy of Referral] of the Law, which stipulates:

Article 48 [Accuracy of Referral]

“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 ”.

38. The Court recalls that the Applicant initiated two sets of proceedings relating to the same legal dispute, namely:
- (i) the appeals procedure relating to the termination of employment relationship which is assessed by the Constitutional Court by Decision KI155/13
 - (ii) procedure on the request for repeating an appeal procedure that is subject to constitutional review in the case KI14/19.

39. With regard to the appeals procedure relating to the termination of the employment relationship, the Court notes that the Applicant does not challenge any decision of the public authority by which this legal dispute has been resolved, however, the Court notes that these Applicant's allegations were considered by the Court in case KI155/13 of 4 April 2014 and rejected them for being manifestly ill-founded.
40. Based on the foregoing, the Court will limit itself to the assessment of the constitutionality of decisions of public authorities relating to the proceedings concerning the request for reopening of proceedings, because these decisions of public authorities are challenged by the Applicant, and are also the last procedural step of the entire proceedings conducted before the regular courts.
41. The Court further refers to paragraph (3) (b) of Rule 39 [Admissibility Criteria] of the Rules of Procedure, which prescribes:

[...]
(3) The Court may also consider a referral inadmissible if any of the following conditions are present:

[...]
(b) the Referral is incompatible *ratione materiae* with the Constitution.
[...].

42. As a primary issue in this referral and in all the referrals submitted to the Court, it is primarily necessary to ascertain whether the alleged rights by the Applicants are in accordance with the substantive jurisdiction (*ratione materiae*) of the Court. Therefore, it is necessary to ascertain whether the alleged rights are guaranteed and protected by the Constitution and the ECHR.
43. In the present case, the Court notes that the Applicant's main allegation is that Article 31 [Right to Fair and Impartial Trial] of the Constitution was violated, because the regular courts have erroneously determined the factual situation and as a result of erroneous determination of factual situation, they have erroneously applied the substantive and procedural law, which resulted in the rejection of his request for reopening of the proceedings.
44. The Applicant also alleges violation of Article 49 [Right to Work and Exercise Profession] and Article 54 [Judicial Protection of Rights] of the Constitution, but does not reason the latter.
45. The Court reiterates that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution: “*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*”.
46. In this regard, the Court notes that the European Court on Human Rights has consistently considered that paragraph 1 of Article 6 [Right to a fair trial] of the Convention does not guarantee the right to reopen or repeat the procedure, and due to this reason Article 6 does not apply to requests for reopening or repetition of proceedings (see: *inter alia*, *Zawadzki v. Poland* (dec), No. 34158/96, 6 July 1999; *Sablon v. Belgium*, no. 36445/97, of 10 April; and *Steck-Risch and Others v. Liechtenstein* (dec.), no. 29061/08, of 11 May 2010; *Nistler v. Austria*, no. 24912/08, ECtHR (First part), Decision of 19 November 2013; *Dichev v. Bulgaria*, no. 1355/04, ECtHR (Fifth part), Judgment of 27 January 2011).
47. The Court therefore considers that Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 paragraph 1 of the Convention is not applicable to the proceedings for which the Applicant requested the regular courts to be reopened.
48. The Court emphasizes that the compatibility *ratione materiae* of the Referral with the Constitution derives from the Court's substantive jurisdiction. The right relied on by the Applicant must be protected by the Constitution in order for a constitutional complaint to be compatible *ratione materiae* with the Constitution. However, the Constitution does not guarantee to the Applicant a

right to have proceedings reopened or repeated (see: Case of Constitutional Court no. KI80/15 KI81/15 and KI82/15, Applicant: *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, paragraph 33).

49. In addition, the Court considers that the Applicant's referral in which he complains regarding the rejection of the regular courts to reopen proceedings, as such incompatible *ratione materiae* with Article 31 of the Constitution in conjunction with Article 6 paragraph 1 of the Convention (see Case of the Constitutional Court No. KI80/15 KI81/15 and KI82/15, Applicant: *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, paragraph 34).
50. The Court will not deal with the consideration of the Applicant's further allegations because he did not justify the violation of the rights guaranteed by Articles 49 and 54 of the Constitution.
51. The Court further considers that the Applicant's referral did not meet the admissibility criteria, established in the Constitution, further provided by the Law and foreseen by the Rules of Procedure.
52. Therefore, the Court concludes that the Applicant's Referral is inadmissible *ratione materiae*, in accordance with Rule 39 (3) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, and Rule 39 (3) (b) of the Rules of Procedure, on 28 May 2019, unanimously

DECIDES

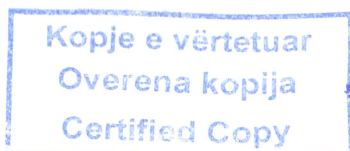
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law, and
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Radomir Laban

Arta Rama-Hajrizi



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