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

Prishtina, on 31 December 2020
Ref.No.:RK 1683/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI135/20

Applicant

Hava Behxheti

Constitutional review of Judgment ARJ-UZVP. no. 122/2019 of the Supreme Court, of 18 November 2019

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 Hava Behxheti, with residence in Prishtina (hereinafter: the Applicant), who is represented before the Constitutional Court by lawyer Albana Kelmendi.

Challenged decision

2. The Applicant challenges the constitutionality of Judgment ARJ-UZVP. no. 122/2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), of 18 November 2019, which she has received on 19 May 2020.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which as alleged by the Applicant violated her rights guaranteed by Articles 3 and 24 [Equality before the Law], Article 22 [Direct Applicability of International Agreements and Instruments] and Article 31.2 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6.1 [Right to a fair trial] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

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] and 47 [Individual Requests] of the 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 17 September 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 24 September 2020, 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 (members).

7. On 27 September 2020, the Court notified the Applicant about the registration of the Referral. On the same day, a copy of the Referral was submitted to the Supreme Court.

8. On 27 October 2020, the Court requested information from the Basic Court in Prishtina with respect to the date of receipt of the Judgment [ARJ-UZVP. no. 122/2019] of the Supreme Court by the Applicant.

9. On 28 October 2020, the Basic Court in Prishtina informed the Court that the Judgment [ARJ-UZVP.no.122/2019] of the Supreme Court, of 18 November 2019, was served on the Applicant on 19 May 2020.

10. On 10 December 2020, the Review Panel considered the Report of the Judge Rapporteur, and unanimously/by majority made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. In January 2005 the Applicant entered into a fixed-term employment contract with the Ministry of Labour and Social Welfare (hereinafter: the MLSW), for a period from 1 January 2005 to 31 December 2006, for the position of "administrative clerk" at the Regional Employment Center of the DLE.

12. On 1 December 2006, the MLSW took a decision to terminate several job positions at the MLSW, with the aim of reforming and restructuring the administration within the MLSW, including the position of "administrative clerk" of the Applicant, due to the lack of budget funds and overstaffed administrative personnel, by relying upon the decision of the Government of the Republic of Kosovo which provided for employee downsizing in the civil service.

13. On 6 December 2006, the MLSW, through a notification, informed the Applicant that her job position was terminated in accordance with the provisions in force and that the Applicant's employment contract, which expires on 31.12.2006, cannot be extended.

14. On 29 December 2006, the MLSW, by a decision, terminated the employment relationship of the Applicant who held the position of administrative clerk at the Regional Employment Center in Prishtina/Department of Labour and Employment.

15. Dissatisfied with this Decision, the Applicant submitted a request to the Independent Oversight Board for the Civil Service of the Republic of Kosovo (hereinafter: IOBCSK) seeking the annulment of the decision on termination of employment at the MLSW.

16. On 30 March 2007, the IOBCSK, by Decision A/02/93/2007, rejected the Applicant's request for annulment of the decision on termination of her employment at the MLSW because the fixed-term employment contract had expired as well as due to reforms and internal restructuring of the administration at the MLSW.

17. On 3 February 2015, the Applicant filed a claim with the Basic Court in Prishtina - Department for Administrative Matters, against the Decision [A / 02/93/2007] of the IOBCSK, of 30 March 2007, which did not approve her request for annulment of the Decision on termination of employment at the MLSW. The Applicant through her claim also requested the payment of unpaid salaries for the period from 1 January 2007 until her retirement.

18. On 2 May 2017, the Applicant specified the claim, seeking the annulment of the Decision [A/02/93/2007] of the IOBCSK, of 30 March 2007, arguing that by the decision of the first instance the termination of the employment relationship was carried out contrary to the Administrative Instruction 2001/36 on the Civil Service of Kosovo and the Administrative Instruction 2000/3, as well as for the fact that the decision is contradictory and contains a self-contradictory reasoning. The Basic Court had notified the Respondent/ the IOBCSK about the filing of the claim.

19. On 23 January 2018, the Respondent/IOBCSK submitted a response to the claim by proposing to the Basic Court in Prishtina to reject the Applicant's claim as unfounded and confirm the Decision no. A/02/93/2007, of the IOBCSK, of 30 March 2007 as based on law.

20. On 24 January 2018, the Basic Court in Prishtina, by Judgment A.no. 192/2015, rejected as unfounded, the Applicant's claim seeking the annulment of the Decision A/02/93/2007 of the Respondent/ IOBCSK, of 30.03.2007, on the grounds *that "... the court has established that the claimant's employment relationship has been terminated in accordance with the legal provisions, respectively in the sense of Article 35.1 (b) [of] the Administrative Direction 2003/2 implementing Regulation 2001/36, since the claimant has entered into a fixed term contract, which has expired, and this means that the rights and obligations of the parties have ceased to exist, while the employment authority was not in a position to extend the contract due to the downsizing and the said position could not be replaced with any similar position within the MLSW, hence the claimant's employment has ended automatically."*

21. On 26 February 2018, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court in Prishtina, due to incomplete determination of the factual situation, violation of the provisions of the contested procedure and alleged violations of the substantive and procedural law, by proposing to have the Judgment of the first instance quashed

22. On 5 February 2019, the Court of Appeals, through Judgment A.A.no. 147/2018, rejected, as unfounded, the Applicant's appeal filed against the Judgment [A.no. 192/15] of the Basic Court in Prishtina by confirming it as being correct, with the following reasoning: *"... in this legal administrative case, in the administrative procedure and in the court proceedings of the first instance, the factual situation was determined in a correct manner and the substantive law was correctly applied, while the claimant's allegations are not proven by substantiated evidence in order for the case to be decided in her favour and they have no such influence as to have a different decision rendered in this administrative legal case".*

23. On 2 April 2019, the Applicant filed a request for extraordinary review of the court decision with the Supreme Court, against Judgment [A.A.no. 147/2018] of the Court of Appeals, of 5 February 2019, due to erroneous application of the substantive law and violation of the provisions of the procedural law, requesting the approval of her request, the modification of the challenged judgment and the recognition of the legitimate right

24. On 18 November 2019, the Supreme Court, by Judgment ARJ-UZVP.no. 122/2019, rejected as unfounded the Applicant's request for extraordinary review of the court decision, filed against the Judgment [A. A. no. 147/2018] of the Court of Appeals and Judgment [A.no.192/15] of the Basic Court in Prishtina, by confirming both judgments in question as correct and based on law.

25. In the relevant part of the reasoning of the Judgment [ARJ-UZVP. no. 122/2019], of the Supreme Court, it stated:

"On the basis of the case file it is established that the respondent, upon having applied the administrative procedures, has acted correctly when rejecting the claimant's appeal as unfounded. This court has found that the Ministry of Labour and Social Welfare (referred to by abbreviation MLSW), with the aim of reforming and restructuring the administration within the MLSW, took a decision to terminate several job positions at the MLSW, including the claimant's position of "administrative clerk". This decision to terminate several job positions was taken due to the lack of budget funds and the overstaffed administrative personnel, by relying on the decision of the Government of Kosovo no. 06/2014 which included the downsizing of the number of employees in the Civil Service and measures to increase the employment of civil servants in the PISG and Regulation no. 2006/61 on the approval of AKK (the Kosovo Budget and Authorizing Expenditures) for the period 01.01 - 31.12.2007, where was envisaged the allowed number of employees in the civil service which resulted in a reduced number of employees. Based on the case file documents it is noticed that the claimant was notified by the MLSW that starting from 01.12.2006 several positions at the MLSW would be terminated with aim of reforming and restructuring the administration and among those positions was also the job position of "administrative clerk" at the Regional Employment Center- DLE, where the claimant was employed. The claimant was notified about this decision by the notification of the MLSW dated 06.12.2006, informing her that the fixed term employment contract, covering the time period from 01.12.2005 to 31.12.2006 will not be extended, whilst by decision no. 1724 of 29.12. 2006 her employment relationship was terminated. Based on Article 35.1 (b) of the Administrative Direction no. 2003/2 implementing Regulation 2001/36, given that the claimant has entered into a fixed-term employment contract, and the same contract expired on 31.12.2006, it means that the rights and obligations of the parties have ceased to exist, while the employment authority was not in a position to extend the contract due to the downsizing of job positions and the said position could not be replaced with a similar position within the MLSW.

Based on the above information, the Supreme Court rejects as unfounded the allegations of the claimant, whilst those that have been presented have no such influence as to have rendered a different decision than the one confirmed by the court of second instance. The challenged judgment is clear and comprehensible. The reasoning of the challenged judgment contains sufficient reasons and decisive facts for taking lawful decisions. Also, this Court considers that the substantive law has been correctly applied and there have been no violations of the law to the detriment of the claimant."

Applicant's allegations

26. The Applicant alleges that the regular courts have violated her rights guaranteed by Articles 3 and 24 [Equality before the Law], Article 22 [Direct Applicability of International Agreements and Instruments] and Article 31.2 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

27. The Applicant does not explain in what way have the rights guaranteed by Articles 3 and 24 [Equality before the Law] and Article 22 [Direct Applicability of International Agreements and Instruments] been violated, but she relates the violations of these Articles to the violation of Article 31.2 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

28. As regards the violation of the right to fair and impartial trial, the Applicant alleges that the Basic Court in Prishtina from the moment of the claim being filed (2007), to the moment of decision being rendered in 2018 has delayed her case contrary to the principle of issuing decisions within a reasonable time.

29. The Applicant further alleges that also the Court of Appeals violated her right to fair trial because it failed to address her allegation regarding the excessive length of the proceedings and the adjudication of the case within a reasonable time by the Basic Court in Prishtina. The Applicant addresses the violation of the right to fair trial also to the Supreme Court, stating that: *"The Supreme Court of Kosovo renders a judgment whereby it rejects as unfounded the Applicant's request for extraordinary review of the court decision, but does not justify the allegation on why has the court not addressed the meritorious case within the legal deadlines defined by law."*

30. Based on the foregoing, the Applicant alleges that: "*On the basis of what is stated above, the decisions of the Basic Court in Prishtina, the Court of Appeals and the Supreme Court clearly prove the unlawful actions and as such violate the guaranteed rights. The violated rights are covered also by international instruments, the implementation of which is binding on Kosovo, such as the European Convention on Human Rights, as well as the case law of the European Court of Human Rights (ECtHR).*"

31. Furthermore, the Applicant states that the resolution of the issue of excessive length of proceedings by the Constitutional Court would enable in the future other persons who face denial of the right to a fair trial to have their discomfort reduced, by adding that the Court's declaration in this regard would create *"... a precedent for the regular courts of the Republic of Kosovo on how to act in cases when they are faced with the right to fair and impartial trial, who are parties to the administrative proceedings."*

32. Finally, the Applicant requests from the Court: "to find her Referral admissible; to find that the failure to provide a fair trial constitutes a violation of her individual rights, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR; and to determine any rights or responsibilities of the parties in this Referral which this Court deems reasonable and lawful."

Admissibility of the Referral

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

34. 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".*

35. In addition, the Court also refers to the admissibility criteria, as provided by Law. In this respect, 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...".*

36. As to the fulfillment of the admissibility criteria, as stated above, the Court finds that the Applicant is an authorized party, challenging an act of a public authority after having exhausted all legal remedies prescribed by law in the sense of Article 113.7 of the Constitution and Article 47.2 of the Law. The Applicant has also clarified all fundamental rights and freedoms which she claims to have been violated by public authorities, pursuant to Article 48 of the Law, and has submitted the Referral within the deadline stipulated by Article 49 of the Law.

37. In addition, the Court examines whether the Applicant has fulfilled the admissibility criteria pursuant to Rule 39 [Admissibility Criteria], sub-rule (2) of the Rules of Procedure, which provides:

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 recalls that the Applicant alleges that the regular courts have violated her rights, guaranteed by Articles 3, 22, 24, 31.2 of the Constitution, and Article 6 of the ECHR.

39. Based on the case file, the Court notes that the essence of the Applicant's allegations falls within the scope of Article 31 of the Constitution and Article 6.1 of the ECHR, as her complaint relates to the length of the proceedings before the regular courts, respectively the right to a fair trial within a reasonable time.

40. In this context and in the following, the Court will address the Applicant's allegations regarding the alleged violations of Article 31.2 of the Constitution, in conjunction with Article 6.1 of the ECHR, by basing upon Article 53 [Interpretation of Human Rights Provisions] of the Constitution, according to which the courts are obliged to interpret human rights and fundamental freedoms, consistent with the court decisions of the European Court of Human Rights (hereinafter: the ECtHR).

41. In this respect, the Court recalls the content of paragraph 2 of Article 31 of the Constitution and paragraph 1 of Article 6 of the ECHR, which provide:

Article 31.2 of the Constitution

[...]

2. "Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law."

[...]

Article 6.1 of the ECHR

1) "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law,..."
[...]

42. Initially, the Court notes that Article 6.1 of the Convention requires Contracting States to organize their legal systems in such a way that the competent authorities can meet the requirements of the said Article, including the obligation to hear the cases within a within a reasonable time, and where necessary, join them, suspend them or reject the further institution of new

proceedings (for more details, see the ECtHR Judgment *Luli and Others v. Albania*, of 1 April 2014, Applications no. 64480/09, 64482/09, 12874/10, 56935/10, 3129/12 and 31355/09, paragraph 91).

43. As regards the length of the proceedings, the Court takes into account the criteria set out in the ECtHR Judgment in the case of *Tomažič v. Slovenia*, of 2 June 2008, Application no. 38350/02, paragraph 54, which provides: "*As to the reasonableness of the length of the proceedings, the Court reiterates that it must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, ii. the conduct of the applicant and the relevant authorities and iii. what was at stake for the applicant in the dispute.*"

44. Within the meaning of Article 6, paragraph (1) of the Convention, the calculation of the process, the reasonable length of the proceedings, starts to run when the parties file a request with the competent court for the establishment of a right or a legitimate interest claimed (see, the ECtHR case, *Erkner and Hofauer v. Austria*, of 23 April 1987, paragraph 64; see also the ECtHR case *Poiss v. Austria*, of 23 April 1987, paragraph 50). This process is considered completed with the issuance of a final court decision by a competent court of the last instance (see case *Eckle v. the Federal Republic of Germany*, ECtHR, of 15 July 1982, paragraph 74).

45. The Court first finds it necessary to emphasize that it does not possess evidence and proofs on what procedural steps were taken by the Applicant from 2007 to 3 February 2015, therefore this period cannot be taken into consideration by the Court.

46. As regards the Applicant's allegation that the Basic Court in Prishtina, from the moment of the claim being filed has delayed the resolution of her case until 2018, the Court refers to the case file documents and the fact that the claim was filed with the Basic Court in Prishtina on 3 February 2015 and thereupon specified on 2 May 2017. After this date, the Basic Court in Prishtina had undertaken several procedural actions, including notifying of the respondent (IOBCSK) about the filing of the claim, until the holding of the public hearing session on 24 January 2018, when it was decided on the claim, respectively when the claim was rejected as unfounded. In this sense, the Court finds that the Basic Court in Prishtina has decided regarding the Applicant's claim within a time period of approximately 3 years.

47. Further, the Court notes that the Applicant, on 26 February 2018, had filed an appeal with the Court of Appeals, which decided on the appeal on 2 February 2019. Considering the moment of the appeal being filed and the date of the decision on the appeal, the Court notes that this trial process has lasted approximately 1 (one) year.

48. The Court also notes that the Applicant had thereupon exercised the extraordinary remedy and on 2 April 2018 addressed the Supreme Court with a request for extraordinary review of the court decision. The respective court in question decided regarding this legal remedy on 18 November 2019, which

means that the request was decided within a time period of approximately 7 (seven) months.

49. In this context, the Court considers that the Applicant's case was resolved in all three court instances within a period of approximately 5 years.

50. The Court points out that the applicants have the right to follow all procedural steps made available to them by the applicable laws. However, they must also take in account the consequences when the use of legal remedies may cause delays in the proceedings (see *McFarlane v. Ireland*, ECtHR, 10 September 2010, Application no. 31333/06, paragraph 148, see also the Constitutional Court, case KI127 / 15, Applicant: Mile Vasović, Resolution of 5 June 2017, paragraph 51).

51. Moreover, the Court recalls that the Applicants' conduct constitutes an objective fact which cannot be attributed to the courts and should be taken into account when ascertaining whether the proceedings took longer than the reasonable time required by the provisions of Article 31 of the Constitution and Article 6 of the Convention (see, the EctHR case: *Eckle v. Germany*, Application no. 8130/78, Judgment of 15 July 1982, paragraph 82).

52. The Court would like to point out that the procedural actions taken by the Applicants cannot be attributed to the courts as delays, because the length of proceedings is effectively calculated from the moment the when the court of the respective jurisdiction learns about the legal remedy exercised by the parties, until the date of the final decision in the case.

53. Consequently, in the light of the circumstances of the present case, the Court, taking into account the conduct of the Applicant and of the relevant authorities, concludes that the respective courts, from the moment of initiation of the proceedings, have been quite active by taking decisions within reasonable time limits. Therefore, the Court concludes that the Applicant's allegations for violation of the right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR are manifestly ill-founded on constitutional basis.

54. As regards the other allegations of the Applicant, the Court notes that the Applicant does not explain in what way have the rights guaranteed by Articles 3 and 24 [Equality before the Law] and Article 22 [Direct Applicability of International Agreements and Instruments] been violated, but she relates the violations of these Articles to the violation of Article 31.2 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6.1 [Right to a fair trial] of the ECHR. The Court does not consider it necessary to treat these allegations separately, as long as the essence of the complaint relates to allegation for a violation of Article 31.2 of the Constitution, in conjunction with Article 6.1 of the ECHR, respectively the right to a final decision within a reasonable time (see, the case of Constitutional Court, KI127/15, Applicant: *Mile Vasović*, Resolution of 5 June 2017, paragraph 54).

Conclusion

55. In sum, the Court concludes that the Applicant's Referral must be declared as manifestly ill-founded on constitutional basis, in its entirety, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 10 December 2020, 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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