



REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 29 March 2024
Ref. no.: MM 2412/24

DISSENTING OPINION

of Judge

NEXHMI REXHEPI

in

Case No. KI123/22

Applicant

Getoar Mjeku

Constitutional review of Judgment [ARJ.nr.36/2022] of the Supreme Court, of 13 June 2022

1. With profound consideration for my colleagues and respecting the majority's decision as a decision of the Court, I present this dissenting opinion in case KI 123/22, with Applicant Getoar Mjeku, who challenged before the Court the constitutionality of the Judgment [ARJ no. 36/2022] of the Supreme Court of 13 June 2022, in conjunction with the Resolution [AA. no. 638/2020] of the Court of Appeals of 28 May 2021 and Judgment [AA. no. 684/2021] of the Court of Appeals of 21 March 2022.
2. While I agree with the factual situation presented in the Court's decision, I express my dissent with the decision declaring the Applicant's Referral inadmissible for review on merits and its assessment as ill-founded on constitutional basis.
3. The Applicant alleges before the Court that the challenged decision has violated his constitutional rights guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial] and 49 [Right to Work and Exercise Profession] of the Constitution. As explained in paragraphs 26-37 of the Court's decision, the Applicant alleges that, in his case, these fundamental rights were violated as a result of an unreasoned court decision in relation to his essential allegations, as an integral part of the guarantees of Article 31 of the Constitution, which further resulted in the denial of equality before the law and the violation of the right to work and exercise profession.

4. The majority has concluded that the reasons given in the challenged decision of the Supreme Court and the related decision of the Court of Appeals, regarding the guarantees of Article 31 of the Constitution, do not raise serious issues that would convince the Court to review the merits of the Applicant's Referral while regarding the allegations related to Articles 24 and 49, the majority concluded that such allegations have been addressed in relation to the allegations related to Article 31.
5. However, I agree with the majority's assessment that the allegations regarding the specific constitutional rights raised by the Applicant constitute a set of related allegations because such is the nature of the fundamental constitutional rights. Thus, although they are individually defined, the scope of a right and its essence is inseparably linked with one or several other rights.
6. I have never had the slightest doubt that each claim should be treated as a case in itself, strictly considering the particular circumstances that constitute the essence of the dispute in question.
7. In the circumstances of the present case, the Applicant, in the capacity of the bar exam applicant, was rejected by the Ministry of Justice, as the responsible legal authority for organizing and conducting this exam. The Applicant claimed that he had completed his law studies in the university education system in the United States of America, by submitting the relevant administrative documents issued by the responsible university authorities in the United States of America (Texas) and those issued by the Ministry of Education Science and Technology. Therefore, the essence of the case, in my view, is whether the Applicant has formal and vocational education as a lawyer, or whether the equivalence of his vocational education and training should be recognized.
8. In this regard, I do not intend to assume competencies of other institutions responsible for the recognition of education attended and completed in foreign countries and education systems, nevertheless, I consider that in the present case the interpretative approach of the regular courts in the challenged decisions has been highly formal, by not taking into account the essence of the Applicant's rights at all, but by repeating uniformly the legal positions. It is evident that, although the Applicant supports the argumentation of the allegations in procedural guarantees, his appeal is related to the denial of the substantive law, namely the essence of the substantive law.
9. In circumstances where the procedure is decisive for a substantive right, the obligation to give convincing reasons in a court decision becomes even more imperative, because a formal argumentation sounds unconvincing and may call into question the authority of the courts. Moreover, an informal reasoning could lead to other conclusions, which could go in favour of the Applicant.
10. For these reasons, my personal assessment is that the Court, without prejudice to the conclusions of the review of merits, should have reviewed the Referral on merits, and made assessments as to whether the regular courts should have provided reasons for the following matters, namely whether:

- a) the regular courts should have given clear explanations to the Applicant regarding his allegation that “he can exercise the profession of a lawyer as a foreign lawyer, as long as he does not meet the conditions to take a bar exam in the Republic of Kosovo”?
 - b) the regular courts should have given convincing reasons to the Applicant that the latter, as a result of not being allowed to take the bar exam, cannot exercise the profession of a lawyer in the Republic of Kosovo?
 - c) the essence of the right to exercise the profession has been affected in the case of the Applicant?
11. It is very clear that the requirements of Article 53 of the Constitution that the fundamental rights and freedoms guaranteed by the Constitution should be interpreted in accordance with the case law of the European Court of Human Rights (ECtHR) and that such requirements produce obligations for all public institutions in the Republic of Kosovo, especially for courts. Therefore, it is expected that every individual being subject of court proceedings will be inclined to believe and ultimately to be convinced that this requirement will be complied with and has been complied with, in its full clarity.
 12. Our Constitution, in two paragraphs of Article 49, provides that: (1) the right to work is guaranteed; and (2) every person is free to choose his or her profession and occupation. This constitutional right is of an economic and social nature. Of course, this right does not imply neither the right of anyone nor the obligation of any public or private institution to provide a job to someone through an automated legal procedure. We also should take into consideration that, although the European Convention on Human Rights mainly defines civil and political rights, the ECtHR case law has found that many of such rights have implications for the rights of economic and social nature.
 13. Regarding the present case, it is of fundamental importance to consider those aspects that will result in unavoidable consequences for the Applicant, that is the inability of exercising the profession freely chosen by him, which will also affect his professional and private life (the ECtHR case *Polyakh and others vs. Ukraine*, Judgment of 12 November 2019, paragraphs 208-2011).
 14. Consequently, based on what is important for the Applicant and the consequences that the challenged decisions produce, as well as the permanent effects of these consequences for the Applicant, I consider that the Referral should have been reviewed on merits, and to find whether the Applicant has turned out to be a victim of court proceedings and decisions of such proceedings.

Dissenting Opinion is submitted by Judge;

Nexhmi Rexhepi, Judge

On 23 February 2024 in Prishtina

This translation is unofficial and serves for informational purposes only.