



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 2 May 2017
Ref. No.:RK 1056/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI103/16

Applicant

Ministry of Health of the Government of the Republic of Kosovo

**Constitutional review of Decision AA. no. 174/16 of the Court of Appeal of
Kosovo, of 11 July 2016**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by the Ministry of Health of the Government of the Republic of Kosovo (hereinafter: the Applicant), which is represented by Shefqet Hasimi, a senior legal officer in the State Advocacy Office.

Challenged decision

2. The Applicant challenges Decision AA. no. 174/16 of the Court of Appeal, of 11 July 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision. The Applicant does not specifically state what Articles of the Constitution were violated, but he only states that the challenged decision, as well as the relevant decisions of the Independent Oversight Board for Civil Service of Kosovo (hereinafter: IOBK) are contrary to the principle *res judicata*.

Legal basis

4. The Referral is based on Article 113.7 and 21.4 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on Constitutional Court (hereinafter: the Law) and Rule 29 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 8 August 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 19 September 2016, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur. On the same date, the President of the Court appointed the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Arta Rama-Hajrizi.
7. On 10 October 2016, the Court notified the Applicant about the registration of the Referral.
8. On 2 December 2016, the Court sent a copy of the Referral to the Court of Appeal.
9. On 4 April 2017, 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

10. In 2011, internal proceedings were conducted between the Applicant and employee N. SH. regarding non-extension of the contract.
11. On 1 February 2011 the internal proceedings [Decision no. 05-5971/7] were completed and the appeal of N.SH. against non-extension of employment relationship was rejected.

12. Against Decision [No.05-5971/7] of the Applicant, N.SH. filed an appeal with the IOBK.
13. On 22 April 2011, the IOBK [Decision No. 02 (47) 2011] approved the appeal of N.SH., annulled all previous procedural actions and obliged the Applicant to reinstate N.SH. to his previous job position.
14. On 9 June 2011, the Applicant [Decision No. 64 (VI) 2011] reinstated N.SH. to his previous position, and on 13 June 2011 notified the IOBK about the execution of their decision [No. 02 (47) 2011].
15. Following this, N.SH. submitted a proposal for execution to the Municipal Court in Prishtina requesting the monetary compensation of salaries for the period from 1 February 2011 until 9 June 2011, namely for the period in which he was not in employment relationship.
16. On 16 December 2011, the Basic Court in Prishtina [Decision E. no. 807/2011] rejected the proposal of N.SH. for execution, considering that by decision [No. 64 (VI) 2011] the Applicant executed Decision [No. 02 (47) 2011] of the IOBK.
17. N.SH. filed an appeal with the Court of Appeal against the Decision of the Municipal Court, alleging essential violations of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.
18. On 14 May 2013, the Court of Appeal [Decision Ac. no. 3021/2012] rejected the appeal of N.SH. as ungrounded, and upheld the decision of the first instance court, with the reasoning: *"Regarding the compensation of salaries, this court assesses that the court of the first instance decided correctly when it rejected the execution because the Decision of the Independent Oversight Board for the Civil Service of Kosovo did not determine the obligation of the debtor to compensate salaries to the creditor, therefore, within the meaning of Articles 23 and 25 of the LEP, there is no legal basis for determining the execution, respectively the executive title is missing. This court assesses that the first instance court acted correctly because the right of the creditor for getting his salaries, can be realized in a special contested procedure..."*
19. On 22 April 2013, N.SH. filed again an appeal with the IOBK, with a proposal that the Applicant be obliged to compensate him the personal income for the period during which he was dismissed from work, from 1.01.2011 until 09.06.2011.
20. On 28 June 2013, the IOBK [Decision A 02/184/2013] approved the appeal of N.SH. and obliged the Applicant to compensate him the personal income for the period he was dismissed from his job, from 01.01.2011 until 09.06.2011. In the legal remedy of this decision reads that the dissatisfied party may initiate the administrative dispute within 30 (thirty) days.
21. On 19 August 2016, the Applicant against Decision [A 02/184/2013] of the IOBK filed a claim with the Basic Court in Prishtina.

22. On 12 April 2016, the Basic Court in Prishtina [Decision A. no. 1102/13] rejected the Applicant's claim as out of time.
23. Against this decision, the Applicant filed an appeal with the Court of Appeal.
24. On 11 July 2016, the Court of Appeal [Decision AA. no. 174/2016] rejected the appeal of the Applicant as ungrounded and upheld the Judgment of the Basic Court in Prishtina. In the reasoning, the Court of Appeal *inter alia* stated:

„...the Basic Court in Prishtina – Department for Administrative Matters rightfully dismissed the claim of the claimant in this legal-administrative matter, as out of time because the claimant did not act in accordance with the legal time limit, that it filed the claim with the Court 34 days after the time limit for filing the claim started to run, by missing the legal time limit for filing the claim, according to Article 27 of LAC. Therefore, the statements of the appeal that according to the official duty it should have been issued a Decision for the adjudicated matter according to Article 391, item d), of the LCP, this Panel did not approve because it assessed that the appealing allegations were without effect in determination of a different factual situation from the one determined also by the first instance court.”

25. The Applicant proposed to the Office of the Chief State Prosecutor to initiate the request for protection of legality against the abovementioned decisions of the Basic Court and the Court of Appeal.
26. On 29 July 2016, the Office of the Chief State Prosecutor [Notice KLMC. no. 06/16] notified the Applicant that in that case the legal requirements for filing the request for protection of legality have not been met.

Applicant's allegations

27. The Applicant based its Referral on the fact that the IOBK and the regular courts have not correctly applied the principle *res judicata* when adjudicated its dispute.
28. The Applicant, among the other, reiterates: “[...] *The Basic Court in Prishtina rejected the claim under number A. no. 1102/13 as out of time, while it did not ensure, ex officio, whether it is an adjudicated matter (res judicata) [...].*”
29. In addition, the Applicant requests: “*By this letter, addressed to the Constitutional Court of Kosovo, I request the assessment of constitutionality and legality of the contested decisions which violate the law, starting from Decision A. 02/184/2013, of IOBCSK, of 28 June 2013, closed as a res judicata case of Decision no. 02/47/2011, of 22 April 2011 [...].*”

Admissibility of the Referral

30. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and as further specified in the Law and the Rules of Procedure.

31. In this regard, the Court recall Article 113.1 and 113.7 of the Constitution which establishes:

“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”.

32. The Court further refers to Article 21.4 of the Constitution which provides:

“[...]

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

33. The Court also refers to Article 48 of the Law, which stipulates that:

“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.”

34. The Court refers to Rule 36 (2) (d) of the Rules of Procedure, which foresees that:

“(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

[...]

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights

[...]

(d) the Applicant does not sufficiently substantiate his claim.”

35. In this case, the Court assesses that the Applicant has met the procedural requirements provided by Article 113.7 of the Constitution. However, in order to verify the admissibility of the Referral, the Court has to assess further whether the Applicant has met the requirements prescribed by Article 48 of the Law and the admissibility criteria provided by Rule 36 of the Rules of Procedure.

36. The Court notes that the essence of the appeal of the Applicant is: *“the assessment of the constitutionality and legality”* of the challenged decisions.

37. In addition, the Court notes that the Applicant has not provided any procedural or substantive reasoning in its Referral. It only requests the assessment of constitutionality and legality, without specifying particular Articles of the Constitution that have been violated.

38. In this regard, the Court notes that the Court of Appeal explained in detail to the Applicant that it had legal obligation to file a claim within the legal period of thirty (30) days. This is why its appeal was rejected as out of time. Further

on this point, the Court notes that the Office of the Chief State Prosecutor notified the Applicant that it cannot file a request for protection of legality precisely because his claim with the Basic Court was out of time.

39. The principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. That failure shall be understood as a giving up of the right to further object the violation and complain.
40. The Court recalls that the Applicant did not fulfill the legal obligation to file a complaint within the legal deadline before the regular courts, thus not giving the opportunity to regular courts to address this issue (See: *Resolution in case KI24/16, Avdi Haziri, Constitutional review of Resolution Rev. no. 191/2015 of the Supreme Court, of 01 September 2015, paragraph 39; Resolution in case KI139/12, Besnik Asllani, Constitutional review of Judgment PKL. no. 111/2012 of the Supreme Court, of 30 November 2012, paragraph 45; Resolution, in Case No. Kl. 07/09, Demë KURBOGAJ and Besnik KURBOGAJ, Constitutional review of Judgment Pkl. no. 61/07, of the Supreme Court of 24 November 2008, paragraph 18; Decision in case no. KI89/15, Fatmir Koci, Constitutional review of Judgment PAKR. nr. 473/2014, of the Court of Appeal, of 21 November 2014, paragraph 35; and see mutandis mutandis Selmouni v. France [GC], § 74; Kudla v. Poland [GC], § 152; Andrasik and Others v. Slovakia (dec.).*
41. The Court notes that the interpretation of the provisions related to legal deadlines is competence of the regular courts and as such it is a matter of legality.
42. In this regard, the Court reiterates that the Applicant requests only the constitutional review without substantiating how the constitutional violation occurred, as it is required by Article 48 of the Law.
43. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
44. In fact, the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis, Garcia Ruiz v. Spain*, no. 30544/96, para. 28, the European Court of Human Rights (hereinafter: ECtHR) 1999-I).
45. The Court recalls that it is not the fact-finding court, and therefore, the correct and complete determination of factual situation is in full jurisdiction of the regular courts. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, and, therefore, cannot act as a “fourth instance court” (See: *Case Edwards vs. United Kingdom* KI47-48/15, constitutional review of Judgment AC-II-14-

0057, of the Special Chamber of the Supreme Court of Kosovo, of 12 March 2015, Applicants *Beqir Kosokoviku and Mustafë Lutolli*)

46. The fact that the Applicant disagrees with the outcome of the case cannot serve it as a right to raise an arguable claim on the violation of the Constitution (See Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).
47. Therefore, the Court considers that the Referral, on constitutional basis, is manifestly ill-founded and is to be declared inadmissible, as it is established in Article 113.7 of the Constitution, foreseen in Article 48 of the Law and specified in Rule 36 (2) (d) 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 Rules 36 (2) d) of the Rules of Procedure, on its session held on 4 April 2017, 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;

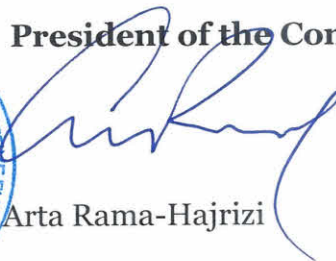
Judge Rapporteur



Selvetë Gërxhaliu-Krasniqi



President of the Constitutional Court



Arta Rama-Hajrizi