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

Prishtina, 2 October 2017
Ref. No.:RK 1127/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI29/17

Applicant

Adem Zhegrova

Constitutional review of Judgment Rev. No. 343/2016 of the Supreme Court of 16 January 2017

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 Applicant is Adem Zhegrova from the Municipality of Vushtrri (hereinafter: the Applicant), represented by the "Judex" Law Firm in Prishtina.

Challenged decision

2. The challenged decision is Judgment Rev. No. 343/2016 of the Supreme Court of Kosovo of 16 January 2017, which rejected as ungrounded the Applicant's revision against the Judgment of the Court of Appeals (Ac No. 2042/2014) of 20 September 2016.

3. The Applicant claims that the challenged Judgment was served on him on 8 February 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged judgment, which has allegedly violated the Applicant's right to fair and impartial trial, guaranteed by Article 31 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR), as well as his right guaranteed by Article 49 [Right to Work and Exercise Profession], Article 53 [Interpretation of Human Rights Provisions] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (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

6. On 8 March 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 7 April 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.

8. On 14 April 2017, the Court notified the Applicant of the registration of the Referral. On the same date, the Court sent a copy of the Referral to the Supreme Court.

9. On 5 September 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. On 18 October 2010, the Applicant was informed about the Decision of the Kosovo Energy Corporation, Distribution in Mitrovica (hereinafter: the Employer), for termination of the employment relationship. The Applicant was

notified about the employer's decision during the meeting with the District Manager.

11. The Employer's decision to terminate the employment relationship (hereinafter: the Employer's decision) was justified by the commission of serious breach of duties by the Applicant, namely manipulation of the meter and unauthorized use of electricity, which was ascertained in the internal audit report.

12. On 22 October 2010, against the Employer's decision, the Applicant filed an objection with the Employer's Executive Director.

13. On 2 November 2010, the Employer's Executive Director (Decision No. 396) rejected the Applicant's objection.

14. On 15 November 2010, the Applicant filed a claim with the Municipal Court of Vushtrri (hereinafter: the Municipal Court) requesting the annulment of the Employer's decision and reinstatement to the previous job position or to a position, which corresponds to his professional skills and qualifications.

15. On 13 April 2012, the Municipal Court (Judgment C. No. 462/2010) approved the Applicant's statement of claim and obliged the Employer to reinstate him to his previous working place or to another working place with duties corresponding to Applicant's professional qualifications and skills.

16. The Municipal Court in its judgment held that the Employer's decision was in contradiction with the provisions of the Basic Labor Law and Regulation No. 3 of the Employer, because *"[...] the employment relationship was terminated to the Applicant, before the decision on commission of the offense of theft became final, whereas [the Employer] failed to present to the court a final judgment rendered by the court of competent jurisdiction, which would prove that the latter was found guilty for commission of the criminal offense of theft."*

17. On 13 November 2012, the Employer filed an appeal with the Court of Appeals against the Judgment of the Municipal Court, claiming essential violations of the provisions of the Law on Contested Procedure, incomplete and erroneous determination of factual situation and erroneous application of the substantive law.

18. On 30 December 2013, the Court of Appeals (Judgment Ac. No. 4926/2012) quashed the Judgment of the Municipal Court (C. No. 462/2010 of 13 April 2012) and remanded the case for reconsideration and retrial. The Court of Appeals found that the Judgment of the Municipal Court contains essential violations of the provisions of the Law on Contested Procedure and incomplete determination of the factual situation.

19. The Court of Appeals, *inter alia*, reasoned that: *"[...] the disciplinary procedure is separate procedure from criminal proceedings and that the contesting court, which assesses legality of the disciplinary measure is not related to acquittal criminal judgment, namely the criminal procedure."*

20. On 23 April 2014, the Basic Court in Mitrovica-Branch in Vushtrri (hereinafter: the Basic Court) by Judgment C. No. 16/14: I. Approved the Applicant's statement of claim; II. Annulled the Employer's decision to terminate the employment relationship; III. Obliged the Employer to reinstate the Applicant to his previous working place or to a work corresponding to his qualification; IV. Ordered the Employer to compensate the Applicant for all salaries and other benefits from the date of his dismissal from work until the date of his reinstatement to work; and V. Obliged the Employer to pay a certain amount on behalf of the costs of the procedure to the Applicant.

21. The Basic Court found in its judgment that the termination of the employment relationship by the Employer is unlawful because the Employer did not conduct disciplinary proceedings against the Applicant.

22. In this regard, the Basic Court reasoned: *"[...] in relation to the Basic Labour Law in Kosovo, which in Article 11 explicitly provided the reasons for contract termination, whereas Article 26 of the same law has provided that for purposes of implementation of this law, the Special Representative of the Secretary General shall issue administrative directions. SRSG issued Administrative Direction 2003/2, to implement labour law, whereas Articles 31, 32 and Article 33 substantially regulate the disciplinary procedure."*

23. Against the Judgment of the Basic Court, the Employer filed an appeal with the Court of Appeals. In his appeal, the Employer alleged essential violations of the provisions of the contested procedure, erroneous determination of factual situation and erroneous application of the substantive law.

24. On 20 September 2016, the Court of Appeals (Judgment Ac No. 2043/14): I. Approved the Employer's appeal as grounded; II. Modified the Judgment of the Basic Court (C. No. 16/14 of 23 April 2014); and III. Rejected the Applicant's statement of claim as ungrounded.

25. In its judgment, the Court of Appeals found that by the Judgment of the Basic Court the substantive law was erroneously applied.

26. The Court of Appeals reasoned that: *"The first instance court erroneously referred to Administrative Direction No.2003/2, for the implementation of UNMIK Regulation No.2001/36 on the Kosovo Civil Service, with reference to Article 26 of Regulation No. 2001/27, on the Basic Labour Law in Kosovo, as the cited administrative direction does not refer, at all, to implementation of Regulation No.2001/27, on the Basic Labour Law in Kosovo, but refers to UNMIK Regulation No.2001/36 on Kosovo Civil Service. The court should have a clear assessment that in the present case the establishment of the working relationship between the respondent and the claimant and consequently the termination of the employment relationship is not based on UNMIK Regulation No.2001/36 on Civil Service in Kosovo, but is based on the Regulation No.2001/27, on the Basic Labour Law in Kosovo, since these two Regulations define the rules for two different categories of subjects of the working relationship. [...]"*

27. The Court of Appeals further referred to the abovementioned Basic Labor Law, and emphasized that: *"By provisions of Article 11, paragraph 1, item c) of UNMIK Regulation No. 2001/27 on Labour Basic Law, it is defined the termination of contract in serious cases of misconduct of by an employee, whereas Article 11, paragraph 5, item a) provides that: "The Employer shall notify in writing the employee about the intention to terminate the employment contract. Such notice shall include the reasons for termination of the employment contract" and in paragraph b) of the same article stipulates that: "The Employer shall hold a meeting with the employee, in which case the Employer explains orally to the employee the causes for the termination of the contract [...]"*

28. On 28 October 2016, the Applicant submitted a revision to the Supreme Court against the Judgment of the Court of Appeals alleging erroneous application of the substantive law.

29. The Applicant in his revision referred to the Law on Employment Relationships in Kosovo, No. 12/1989, which according to him was also in force and has foreseen the initiation of disciplinary proceedings in case of violations of duties or other disciplinary violations. The Applicant further refers to the Employer's internal regulations, stating that the provisions of these regulations stipulate that the disciplinary liability of the employee is proven in disciplinary proceedings.

30. On 16 January 2017, the Supreme Court (Rev. No. 343/2016) rejected the Applicant's revision as ungrounded.

31. The Supreme Court found that *"[...] the challenged judgment does not contain defects that would challenge the legality of the judgment, regarding the application of substantive law, due to the fact that the findings of the second instance court are fair, when established that the respondent respected the legal procedures laid down, during the termination of employment with the claimant, defined by UNMIK Regulation No.2001/27 on the Basic Labour Law in Kosovo, since according to Article 11.2 paragraph (a) the claimant is notified through the notification no.406 dated 18.10.2010, about its intention to terminate the claimant's employment contract pursuant to paragraph (b) the respondent has held a meeting with the claimant, in which case, orally explained the reasons for termination of the employment contract."*

32. The Supreme Court further found that: *"[...] by the provisions of Article 38.1 of this regulation it is foreseen a short disciplinary procedure, in case of a violation of labour duties stipulated by the provisions of Article 38.3 (c and f) for which the claimant was declared liable. While Article 39.1 and 2 provides that the short disciplinary procedure can be initiated on the basis of the information received from other employees, or a direct surveillance ordered by the supervisor and the employer. The Managing Director after hearing the employee may impose a disciplinary measure-termination of the contract."*

Applicant's allegations

33. The Applicant alleges that the Supreme Court by challenged Judgment *"initially acted in contradiction of its own case law, ruling differently for the same cases"*. In this regard, the Applicant considers that the Supreme Court *"has not provided him fair and impartial trial"* guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

34. The Applicant further claims that: *"having such major differences expressed in its judicial decisions by the revision court [...] the Supreme Court with these situations is creating legal uncertainty and is undermining citizens' confidence to fair and legal trial by the court"*

35. Regarding the allegation of violation of Article 49 [Right to Work and Exercise Profession] of the Constitution, the Applicant, *inter alia*, claims that *"the denial of a constitutional right, such as the right to work and right to exercise profession, consists on unilateral termination of employment and with no prior notice by the employer"*

36. The Applicant further alleges the existence of a violation of Article 55 [Limitations on Human Rights and Freedoms] of the Constitution, reasoning that: *"[...] the Applicant never had the opportunity to declare in advance, before the decision on contract termination. This is because the employer never established a disciplinary committee, which would enable issuance of a final decision, based on the arguments provided by both parties."*

37. Finally, the Applicant proposes to the Court to:

> *"To declare the Referral admissible;*
>
> *To find that there has been a violation of Article 49 (Right to Work and Exercise Profession) of the Constitution, Article 55 (Limitations on Fundamental Rights and Freedoms), Article 53 (Interpretation of Human Rights Provisions) of the Constitution of Kosovo.*
> *To find that there has been a violation of Article 6.1 (Right to a Fair Trial) of the European Convention on Human Rights.*
> *To declare Judgment Rev. No. 151/2013, of the Supreme Court of Kosovo, of 15 June 2013 and Judgment of the Court of Appeals Ac. No..2042/2014 of 20 September 2016, invalid."*

Admissibility of the Referral

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

39. 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".

40. The Court notes that the Applicant is authorized party in accordance with the Constitution, has exhausted all necessary legal remedies and has submitted his Referral within a period of 4 (four) months after the receipt of the Judgment.

41. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides 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".

42. The Court also recalls Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, which establishes:

"(1) The Court may consider a referral if:

d) the referral is prima facie justified or not manifestly ill-founded.

(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."

43. The Court recalls that the Applicant alleges that the challenged Judgment of the Supreme Court violated his right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, as well as the rights guaranteed by Articles 49 [Right to Work], 53 [Interpretation of Human Rights Provisions] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution.

44. However, the Court considers that the allegations raised by the Applicant in essence refer to the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

45. The Court notes that, in support of his allegation that the Supreme Court "*by deciding differently in identical cases is creating legal uncertainty for the citizens, and a lack of confidence to fair and lawful judicial decisions,*" the Applicant refers to Judgment Rev. No. 62/2014 (of 20 March 2014). In this

regard, the Applicant also refers to the case law of the Constitutional Court, in particular Case KI89/13, *Arbresha Januzi*, Judgment of 22 April 2014.

46. The Court first recalls 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".*

47. The Court recalls the case law of the European Court of Human Rights (hereinafter: the ECtHR), which *inter alia* emphasizes: *"[...] save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of the domestic law by the national courts (see, for example, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts [...]"* (Judgment of the ECtHR of 20 October 2011, *Nejdet Şahin and Perihan Şahin v. Turkey*, No. 13279/05, paragraph 50).

48. The Court notes that the Applicant specifically refers to the Judgment of the Supreme Court (Rev. No. 62/2014 of 20 March 2014) submitted to the Court, by which the Supreme Court had approved as grounded the revision of a former employee of the Employer. According to the Applicant, this Judgment relates to a factual situation similar to that of the Applicant.

49. The Court notes that the Supreme Court, by aforementioned Judgment (Rev. No. 62/2014 of 20 March 2014), referring to the Law on Labor Relations in Kosovo 12/1989, annulled the Judgment of the Court of Appeals, finding that the Employer had to initiate disciplinary proceedings. Consequently, the Supreme Court upheld the first instance judgment (Municipal Court in Vushtrri), by which the statement of claim of former Employer's employee for reinstatement to his previous working place or to a working place corresponding to his qualifications was approved as grounded.

50. With regard to the Applicant's claim, the Court again refers to the ECtHR case law, which has admitted that: *"A certain degree of distinction in legal interpretations [by the courts] can be accepted as an inherent feature of any judicial system [...] However, when the higher court finds no solution to contradictory decisions without any valid reason, it becomes a source of legal uncertainty. (*See ECtHR cases, *Beian v. Romania*, application No. 30658/05, Judgment of 6 March 2008, paragraph 39 and *Tomić and Others v. Montenegro*, applications no. 18650/09, 18676/09, 18679/09, 38855/09, 38859/09, 38883/09, 39589/09, 39592/09, 65365/09 and 7316/10, Judgment of 17 April 2012, paragraph 53).

51. However, the ECtHR has established in its case law the criteria for assessing the conditions in which contradictory decisions of the last instance courts are in contradiction with the right to a fair trial, namely it must be established whether there are any profound differences in the case law, whether the domestic law provides for a mechanism to overcome those inconsistencies, whether this mechanism has been implemented and if so, to what extent (See *mutatis*

mutandis the case of ECtHR *Iordan Iordanov and Others v. Bulgaria*, Application no. 23530/02, Judgment of 2 October 2009, para. 49-52).

52. In the present case, the Court finds that the Applicant referred and submitted only one Judgment of the Supreme Court (Rev. No. 62/2014 of 20 March 2014), which in similar factual circumstances interpreted differently the substantive law.

53. Accordingly, and in the light of the ECHR case law, the Court considers that it is not possible to ascertain the existence of profound and long-lasting differences in the case law of the Supreme Court which endangers the principle of legal certainty by invoking only one Judgment of the Supreme Court, rendered 3 (three) years earlier.

54. The Court further recalls that the Applicant alleges that in his case the termination of the employment relationship by the Employer is unlawful because the Employer did not initiate disciplinary proceedings.

55. In this regard, the Court recalls that the Applicant, referring to the Law on Labor Relations in Kosovo 12/1989, also raised this allegation in his request for revision with the Supreme Court.

56. The Supreme Court in its judgment found that the Judgment of the Court of Appeals did not contain flaws which would have challenged the legality of the challenged judgment. In this respect, the Supreme Court found that the Court of Appeals has correctly found that when terminating the employment relationship to the Applicant, the Employer respected the established legal procedures provided by UNMIK Regulation No. 2001/27 on the Essential Labor Law in Kosovo, as well as the Employer's Internal Regulation on Disciplinary and Material Liability.

57. The Court further considers that the Judgment of the Supreme Court is reasoned and that the interpretation of the Supreme Court with regard to the facts presented for assessment by the Applicant cannot be said to be arbitrary, not reasoned or that it could have influence on a fair trial, but was merely a matter of the law enforcement (see *mutatis mutandis*, ECtHR case, *Nejdet Şahin and Perihan Şahin v. Turkey*, No. 13279/05, paragraph 93).

58. Therefore, the Court considers that neither the number of judgments allegedly contradictory nor the period within which these judgments were rendered, nor the manner in which the Supreme Court has reviewed and reasoned the Applicant's case create sufficient grounds to justify the allegation for violation of the Applicant's right to fair and impartial trial.

59. Accordingly, the Court finds that the Applicant has not substantiated his allegations of a violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR (see case *Vanek v. Republic of Slovakia*, No. 53363/99, ECtHR, Decision of 31 May 2005).

60. The Court further recalls that the Applicant alleges violation of Articles 49, 53 and 55 of the Constitution. In this regard, the Court notes that the mere fact that the Applicant does not agree with the outcome of the Judgment of the Supreme Court and only the mentioning of relevant Articles of the Constitution without elaborating their alleged violation, is not sufficient that the Applicant builds a claim based on constitutional violation. When such violations of the Constitution are alleged, the Applicant must provide a reasoned claim and a convincing argument. (See the Constitutional Court case, KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).

61. In addition, as to the Applicant's allegation of violation of the right to work and exercise profession, the Court considers that the challenged Judgment of the Supreme Court does not in any way prevent the Applicant from working or exercising a profession. Consequently, there is nothing in the Applicant's claim that would justify a conclusion that his constitutional right to work and exercise profession has been violated (see case of the Constitutional Court, KI136/14, *Abdullah Bajqinca,* Resolution on Inadmissibility of 10 February 2015, paragraph 34).

62. For the aforementioned reasons, the Court concludes that the facts presented by the Applicant do not in any way justify his allegation of a violation of Articles 31, 49, 53 and 55 of the Constitution, and the Applicant has not sufficiently substantiated his allegations.

63. Therefore, pursuant to Rule 36 (1) (d) and (2) (b) and (d), the Referral is manifestly ill-founded on constitutional basis and, accordingly, inadmissible.

FOR THESE REASONS

In accordance with Article 113 (7) of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, in the session held on 5 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur | **President of the Constitutional Court**

Bekim Sejdiu | Arta Rama-Hajrizi