



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

Prishtina, on 18 July 2014  
Ref. no.: RK678/14

## RESOLUTION ON INADMISSIBILITY

in

**Case no. KI42/14**

Applicant

**PTK-JSC, Prishtina**

**Constitutional review of the Judgment Rev. no. 238/2013 of the Supreme Court of Kosovo, of 7 November 2013, with the request for imposition of interim measure**

### THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President  
Ivan Čukalović, Deputy-President  
Robert Carolan, Judge  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Kadri Kryeziu, Judge and  
Arta Rama-Hajrizi, Judge

#### **Applicant**

1. The Applicant is the Joint Stock Company–Post-Telecom of Kosovo (hereinafter: PTK-JSC, Prishtina), which is represented by Mr. Lulzim Sokoli, the manager for legal affairs and administration in PTK.

## **Challenged decision**

2. The challenged decision is the Judgment of the Supreme Court of Kosovo, Rev. no. 238/2013, of 7 November 2013, which was served on the Applicant on 3 January 2014.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, for which the Applicant alleges that it has violated his rights, guaranteed by the Constitution of Kosovo, pursuant to Article 31 (Right to Fair and Impartial Trial) in conjunction with Article 6 of the European Convention of Human Rights (the Convention) Article 46 (Protection of Property), as well as the property right under Article 1 of the Protocol 1 of the Convention.

## **Legal basis**

4. Article 113.7, in conjunction with Article 21.4 of the Constitution, Article 47 of the Law on the Constitutional Court of the Republic of Kosovo, no. 03/L-121 (hereinafter: the Law) and Rule 56 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 7 March 2014, the Applicant submitted the Referral to the Constitutional Court (hereinafter: the Court).
6. On 1 April 2014, by Decision GJR. KI42/14, the President of the Court appointed Judge Arta Rama-Hajrizi as Judge Rapporteur, and on the same date, the Review Panel, composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu.
7. On 22 April 2014, the Court notified the Applicant and the Supreme Court on the registration of Referral.
8. On 19 May 2014, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

## **Summary of facts**

9. On 13 December 2011, the Applicant rendered the decision to reduce all operational expenses, including the expenses for its staff for 20%. In the work sectors, where the decision was implemented, it has influenced on the decrease of salaries of employees of the Applicant. This decision, according to the Applicant, was taken upon the request of the owner of all the shares of the enterprise-the Government of Kosovo, of 7 December 2011.

10. On 11 May 2012, M. Sh., employed with the Applicant PTK-JSC – Prishtina, affected by the Applicant's decision, filed a claim with the Municipal Court in Peja, by challenging the decision on change of the grade of the work categorization from grade 7 to grade 6 and the decrease of his salary, together with the benefits belonging to him, with the salary, such as the bonuses and the payment to the pension savings fund.
11. On 19 March 2013, the Basic Court in Peja rendered the Judgment C. no. 364/12, by which approved the claim of the claimant M. SH. as grounded in entirety.
12. In the reasoning of the Judgment, among the other, the Basic Court in Peja, stated: *"Deciding on the legality of the challenged decision, by which the claimant's grade of personal income has decreased from grade 7 to grade 6, the court pursuant to provisions of Article 10.1, item 2, item 2.1, 10.3, 10.5, II, 55, 56 of the Law on Labor, no. 03/L-2012, in conjunction with Article 5 of the employment contract, concluded on 20.10.2011, the court concluded that the challenged decision is contrary to the legal provisions in force and contrary to Article 5 of the employment contract"*.
13. The Basic Court further stated: *"The court concludes that the employment relationship is legal – contractual relationship, where the parties, with the conclusion of such contract must completely respect the contract requirements in which case the court concludes that the employment contract concluded between the claimant and the respondent has been compiled by respecting all general requirements for compiling a contract such as working ability of the contracting parties, consent, the will of the parties, object of the contract and grounds of the contract"* and in this respect, this court also found that *"the employment contract concluded between the claimant and the respondent could have been amended only by the will expressed by the both parties and that the respondent could not change the contract requirement, only by the unilateral expression of its will"*.
14. Against this Judgment, the Applicant filed within legal time limit an appeal with the Court of Appeal in Prishtina, due to substantial violations of the contested procedure provisions, erroneous and incomplete determination of factual situation and erroneous application of the material law.
15. On 12 July 2013, the Court of Appeal of Kosovo rendered Judgment AC. no. 1447/13, by which approved the Applicant's appeal, modified Judgment of the Basic Court in Peja, C. no. 364/12, of 19 March 2013, so that the appeal of the claimant M. SH. is rejected as ungrounded.
16. By challenging the reasoning of the Basic Court in Peja, the Court of Appeal, stated among the other: *"This court assessed such a conclusion of the first instance court and found that a decision and such a legal stance cannot be accepted as correct and lawful, since, according to the assessment of this court, based on this factual situation the material law was erroneously applied, when the first instance court found that the claimant's statement of claim is grounded."*

17. The Court of Appeal, by reasoning its Judgment, further stated:

*“This, among other is because of the fact that the respondent has acted in full compliance with the decision of the shareholder – the Government of Republic of Kosovo, namely the Ministry for Economic Development, which had recommended a reduce of personal expenses for the staff of the respondent (PTK), based on the internal policies, in compliance with it and with the business plan for 2012, as well as with the decision of the board of directors of 13.12.2011, with the purpose of decreasing the staff expenses to a maximum of 20% of general income, and all this by referring to the shareholders decision – Ministry for Economic Development dated 06.12.2011 etc”.*

18. On 17 November 2013, the Supreme Court of Kosovo, deciding upon the revision, filed against the Judgment of the Court of Appeal by M. SH., rendered the Judgment Rev. no. 238/2013, by which approved the claimant’s revision and modified Judgment of the Court of Appeal, AC. no. 1447/13, of 12 July 2013, by deciding to uphold Judgment of the Basic Court in Peja, C. no. 364/12, of 19 March 2013.
19. In the reasoning of the Judgment, *“The Supreme Court assessed as grounded the claims in the revision that the challenged Judgment is in contradiction with Article 55 par. 1 of the Law on Labour (Official Gazette 03-L-212 -of RK), by which it was determined that the employee is entitled to salary, which is determined by the employment contract and in compliance with this Law, the collective contract, and internal act of the Employer. The claimant’ salary, according to the employment contract was in 7th grade and lowering this grade is contrary to the provisions of the contract and the law”.*

### **Applicant’s allegations**

20. The Applicant alleged that the Judgment of the Supreme Court violated the rights guaranteed by the Constitution, under Article 31 (Right to Fair and Impartial Trial), Article 46 (Protection of Property) and the rights guaranteed by the Convention, Article 6 (Right to a fair trial) and Article 1 of the additional Protocol (Protection of Property).
21. The Applicant bases his allegations for violation of the constitutional provisions and of the Convention on the following arguments:

#### *Alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the Convention*

According to the Applicant, the right to fair and impartial trial was violated by the challenged Judgment, because the Supreme Court has rendered the reasoning, completely contradictory to the reasoning given in the Judgment of the Court of Appeal. This assessment, completely contradictory to the factual situation and the application of the substantive law by two courts have resulted in alleged violation of the Constitution and the Convention, because according to the Applicant, one of the guarantees of Article 6 of the Convention, the right to a reasoned decision, was violated.

The Applicant requested further from the Court to ask from the Government of Kosovo, as the shareholder of the PTK shares, for the official explanation whether its request for decrease of the operational expenses for 20% refers also to the decrease of expenses for the staff.

*Alleged violation of Article 46 of the Constitution, in conjunction with Article 1 of Additional Protocol of the Convention*

The right of property, guaranteed by the Constitution and the additional Protocol of the Convention, according to the Applicant's allegations has been violated because *"the reasoning given by the Supreme Court does not correspond with the real state of facts."* The challenged judgment deprived in unlawful and arbitrary manner the Applicant of its property.

22. The Applicant requested from the Court to impose interim measure, by which the Supreme Court of Kosovo would be bound to not review possible cases with the subject of review that may come in the future, until a decision on this referral would be rendered by the Constitutional Court, because otherwise the public interest would be severely violated.

**Admissibility of the Referral**

23. In order to be able to adjudicate the Applicant's Referral, the Court needs to examine beforehand whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.

24. In this respect, the Court refers to Article 113.7 of the Constitution, which provides:

*"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".*

25. The Court also takes into account Rule 36 of the Rules of Procedure, which provides:

*"(1) The Court may only deal with Referrals if:  
c) the Referral is not manifestly ill-founded."*

26. In assessing the allegations raised by the Applicant, the Court notes that it challenges the Judgment of the Supreme Court, Rev. no. 238/2013, of 17 November 2013, by which the Court decided on the revision filed by M. SH., employee of the Applicant.

**Relevant provisions of the Constitution and of the Convention regarding the case**

27. The Court recalls that the Constitution of Kosovo and the Convention in the provisions, challenged by the Applicant, provide:

*Article 31 of the Constitution [Right to Fair and Impartial Trial]*

*1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*

*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 46 [Protection of Property]*

*1. The right to own property is guaranteed.*

*2. Use of property is regulated by law in accordance with the public interest*  
[...]

*Article 6.1 of the Convention*

*Right to a fair trial*

*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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

[...]

*Article 1 of the additional Protocol of the Convention, Protection of property*

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

28. In order to decide the merits of the Referral, the Court also takes into account the provisions of the Law on Courts, 2010/03-L-199, decreed on 9 August 2010, where it is provided:

*Article 21, the Supreme Court*

1. *The Supreme Court is the highest judicial authority in Kosovo and shall have territorial jurisdiction over the entirety of the Republic of Kosovo.*

[...]

*and*

*Article 22, Competencies of the Supreme Court*

1.3. *defines principled attitudes and legal remedies for issues that have importance for unique application of Laws by the courts in the territory of Kosovo;*

[...]

29. By assessing the constitutionality of the challenged judgment in light of the allegations for constitutional violations and the facts that have supported these allegations and by comparing these facts with the content of the abovementioned provisions, the Court holds that it has not found the arguments that the constitutional provisions and of the Convention provisions have been violated, moreover when such allegations are based on "*the erroneous and incomplete determination of factual situation*" on the arguments of implementation of legality and not of the constitutionality and on evident dissatisfaction regarding the final outcome of the trial.
30. In this regard, the Court notes that the simple description of the provisions of the Constitution and the Convention, and the conclusion that they have been violated, without presenting evidence of the way they were violated, without specifying the circumstances, without specifying the actions of the public authority that are contrary to fair and impartial trial, do not constitute sufficient ground to convince the Court that there has been a violation of the Constitution or of the Convention regarding a fair and impartial trial.
31. The Court further holds that it is not a fact finding court, it does not adjudicate as a court of fourth instance, and it is not merely a higher instance court. The Court, in principle does not consider the fact whether the regular courts have correctly and completely determined factual situation. It is essential for the Court the issues on which existence depends the assessment of possible violations of the constitutional rights and not clearly legal issues, which were mainly the facts presented by the Applicant (See, *mutatis mutandis, i.a., Akdivar v. Turkey*, 16 September 1996, R.J.D, 1996-IV, para. 65).
32. Regarding the above, the Court notes that it is the task of the courts of regular jurisdiction to decide on the ranking of the importance of evidence and to appreciate what evidence pursuant to the correct application of the applicable law prevails, as in the present case it was undoubtedly up to the Supreme Court to decide how fair is the legal stance of the first instance court or of the Court of Appeal and to sanction this by its final court decision.

33. Moreover, when it is taken into account that the Constitution of Kosovo, in Article 103.2 has provided that the Supreme Court is the highest judicial authority, the Law on Courts has given the authority to the Supreme Court for "*unique application of Laws by the courts in the territory of Kosovo*" and consequently the unification of the case law of the regular courts.
34. In this regard, the Court has not found that different reasoning of the courts of two judicial instances have resulted in violation of Article 31 of the Constitution in conjunction with Article 6 of the Convention, because the final judgment of the Supreme Court has concluded the determination of the factual situation and of the application of legality, and in no way the Court could find the violation of *the right to a reasoned decision* as one of the guarantees of Article 6 of the Convention and of the right to a fair and impartial trial.
35. Moreover, the Court recalls that the Convention, in its case law, has assessed that the obligation of a domestic court to reason its decisions cannot be understood as requiring a detailed answer to every argument adduced by a litigant. Obligation to reason the decision depends on the nature of the decision at issue. When the Supreme Court rejects an appeal due to the lack of legal basis of the matter, the requirements of Article 6 of the Convention can be met with a very limited reasoning (See the decisions of the ECHR on issues *Marini v. Albania*, 18 December 2007 § 105 and *Mishgjoni v. Albania*, 7 December 2010)
36. The Court, further, in response to alleged violations of the property right, considers that it cannot find evidence that the Applicant is deprived of property in an arbitrary manner, on the contrary, the challenged issue between the parties is resolved by a "*court established by law*" and in a judicial process provided by law, and therefore the court decision, rendered under such circumstances cannot be considered by this Court as arbitrary, so as to be an indicator of the alleged violation.
37. In these circumstances, the Court finds that the facts submitted by the Applicant do not in any way justify the allegation for violation of a constitutional right or of a right guaranteed by the Convention; therefore, it cannot be concluded that there is a violation of human rights by the challenged decision and in compliance with Rule 36 paragraph (2) item b), the Court finds that the Referral must be declared inadmissible as manifestly ill-founded.

### **Request for interim measure**

38. Taking into account the fact that the Referral is declared inadmissible in its entirety as manifestly ill-founded, the Court found that this request must be rejected, because the imposition of this measure in the form requested by the Applicant would be moot and ungrounded in entirety.



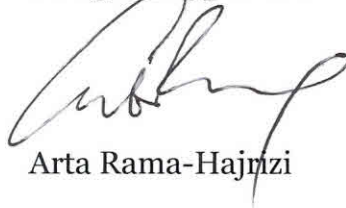
## FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rule 56 of the Rules of Procedure, on 19 May 2014, unanimously:

### DECIDES

- I. TO DECLARE the Referral Inadmissible;
- II. To notify this Decision to the parties and to publish this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- III. This Decision is effective immediately.

**Judge Rapporteur**



Arta Rama-Hajrizi



**President of the Constitutional Court**



Prof. Dr. Enver Hasani