



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

Prishtina, 7 July 2014
Ref.no.:RK665/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI57/14

Applicant

Besianë Gashi

**Constitutional Review of the Decision No. 03/1586 of the Kosovo Judicial
Council, dated 20 September 2013**

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 Ms. Besianë Gashi, residing in Obiliq.

Challenged decision

2. The Applicant challenges the Decision No. 03/1586 of the Kosovo Judicial Council, of 20 September 2013, which was served on the Applicant on 1 October 2013.

Subject matter

3. The subject matter of the Referral is the constitutional review of the Decision of the Kosovo Judicial Council which the Applicant alleges violated her right guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo, (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 28 March 2014 the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").
6. On 3 April 2014 the President of the Court, by Decision No. GJR. KI57/14, appointed Judge Robert Carolan as Judge Rapporteur. On the same date the President of the Court, by Decision, No. KSH. KI57/14, appointed the Review Panel consisting of Judges Snezhana Botusharova (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
7. On 22 April 2014 the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Basic Court in Mitrovica and the Secretariat of the Kosovo Judicial Council.
8. On 19 May 2014 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

9. On 30 January 2013 the Kosovo Judicial Council announced that there was a vacant position of Information Officer at the Basic Court in Mitrovica.
10. On 17 April 2013 the Kosovo Judicial Council notified the Applicant that she had been selected for the vacant position.
11. On 25 April 2013 the Applicant signed the appointment document which was for an indefinite period of time. She was supposed to start work on 2 May 2013.

12. On 1 October 2013 the Secretariat of the Kosovo Judicial Council notified the Applicant that her contract would be terminated on 1 October 2013 because the Independent Oversight Board of Kosovo on 10 September 2013 rendered a decision annulling the competition for the position of Information Officer at the Basic Court in Mitrovica pursuant to an appeal of another candidate that applied for the same position.

Applicant's allegations

13. The Applicant alleges that the Kosovo Judicial Council, by applying the law for the employment of civil servants, violated her right to work. She specifically alleges that the Kosovo Judicial Council by violating the competition announcement procedures and the dismissing her without grounds violated Article 49 [Right to Work and Exercise Profession] of the Constitution.
14. Furthermore, the Applicant claim that *"[...] the KJC [Kosovo Judicial Council] has violated my right to work because it appointed me prematurely in this position for an indefinite period, and as a third party in the dispute between the Independent Oversight Board and KJC I was injured as a result of my employer's negligence. If it was not for the multiple negligence of the KJC, starting with the erroneous announcement of the competition, followed by my premature appointment, I would not be waiting and would have no legal ground to seek to continue working at the mentioned position. Upon the signing of the indefinite appointment act, when I resigned from my previous position, my right to work in this position is guaranteed by the KJC. My dismissal from this position could only be done if I would fail in performing my duties, or other violations as provided by law. Therefore, the lack of any of these legal grounds, confirms the lack of legal ground to dismiss me from this position. Therefore, due to these two aggravating actions of the KJC, due to continuous violations of the applicable law, my right to work guaranteed pursuant to Article 49 of the Constitution has been violated."*
15. The Applicant also states that she has not exhausted all available legal remedies because, allegedly, *"[...] these remedies would not be efficient in this case, for two main reasons: grounded suspicion that regular courts cannot be independent to decide objectively in a case against their employer; and the possible delay of the procedures and execution of a possible decision against the KJC as a result of the lack of this independence."*
16. It is argued by the Applicant that *"[...] considering that the responding party in this dispute is the KJC – the only employer and supervisor of all Judges and courts in the Republic of Kosovo, makes it impossible that I am provided a fair and impartial trial by any of regular courts in Kosovo except the Constitutional Court."* The Applicant alleges that *"[...] firstly all the Judges in the Republic of Kosovo, except the Judges of the Court, are selected and proposed to be appointed only by the KJC – in this case the respondent. Secondly, although the Judges have lifetime tenure, their performance is supervised by the KJC and various measures may be exerted against them, which could lead to their dismissal. And finally, in case of undertaking any punishing measure against a Judge by the KJC, the same Judge has no*

efficient and effective manner of challenging his employer, due to the same reasons mentioned above.”

17. In addition, the Applicant alleges that *“The regular courts in Kosovo are known for the extreme delays of procedures in any of civil matters. Considering the direct dependability from the KJC, the tendency to delay this procedure will be even greater in this case.”*

Admissibility of the Referral

18. The Court observes that, in order to be able to adjudicate the Applicant’s complaint, it is necessary to examine whether she has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
19. As to the present Referral, the Court notes that, on 1 October 2013, the Secretariat of the Kosovo Judicial Council notified the Applicant that her contract would be terminated immediately. Pursuant to this decision, the Applicant could have appealed to the Commission for Solving Contests and Appeals within a 30 day time limit. However, the Applicant never appealed against this decision.
20. In this respect, the Court refers to Article 113, paragraph 7 of the Constitution, which establishes that:

“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.”

21. The Court also refers to Article 47.2 of the Law, which provides:

“The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law”.

22. Furthermore, the Court also refers to Rule 36 (1) a) of the Rules of Procedures which provides that:

“(1) The Court may only deal with Referrals if: (a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted...”

23. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility: *AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo*, KI41/09, of 21 January 2010, and see *mutatis mutandis*, ECHR, *Selmouni vs. France*, no. 25803/94, Decision of 28 July 1999).

24. The Court also recalls that in accordance with the principle of subsidiarity, the Applicant is under the obligation to exhaust all legal remedies provided by law, as stipulated by Article 113(7) and the other legal provisions, as mentioned above. Therefore, the Applicant could have filed an appeal in accordance with the legal remedy provided in the decision of the Secretariat of the Kosovo Judicial Council.
25. Because the Applicant failed to appeal from the adverse decision of the Kosovo Judicial Council she has not exhausted all of her effective legal remedies as required by Article 113.7 of the Constitution as one of several preconditions which she must satisfy before her referral can be considered admissible.
26. The Court also considers that a mere suspicion of a party that a court or courts cannot be fair, impartial or independent in their personal cases is not sufficient to exclude the applicant from her obligations to appeal before the competent bodies in due time (See *Whiteside v the United Kingdom*, decision of 7 March 1994, Application no. 20357/92, DR 76, p. 80 and Case KI16/12, Applicant *Gazmend Tahiraj*, Constitutional Court, Resolution on Inadmissibility of 22 May 2012). Indeed, if those courts are given an opportunity to hear the case and fail to act fairly, impartially and in an independent manner, the Applicant would then have the opportunity to refer such a violation to the Constitutional Court.
27. In the present case, the Court finds that the Applicant has not exhausted all effective remedies under Kosovo law, in order for the Court to proceed with her allegation about the constitutionality of the decision of the Secretariat of the Kosovo Judicial Council.
28. It follows that the Referral is inadmissible pursuant to Article 113.7 of the Constitution.
29. Even if the Applicant had exhausted all of her effective legal remedies and if the decision of the Kosovo Judicial Council she is complaining about was her final available legal remedy for exhausting her legal rights, then her referral would be inadmissible because it was filed with this Court beyond the four month period allowed by Article 49 of the Law on the Constitutional Court. Because the Applicant has not exhausted all her effective legal remedies, the Court cannot conclude that this referral was not timely filed.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 and 49 of the Law and Rule 56 (2) of the Rules of Procedure, on 7 July 2014, unanimously

DECIDES

- I. TO REJECT the Referral as 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;
- IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur



Robert Carolan



President of the Constitutional Court



Prof. Dr. Enver Hasani