



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

Prishtina, on 16 May 2016
Ref. no.: RK938/16

RESOLUTION ON INADMISSIBILITY

In

Case No. KI03/16

Applicant

Remzie Duga

Constitutional review of Judgment Rev. no. 226/2015 of the Supreme Court of Kosovo, of 14 September 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

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

Applicant

1. The Referral was submitted by Ms. Remzie Duga, from Prishtina (hereinafter, the Applicant), who is represented by Mr. Naim Haliti, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 226/2015 of the Supreme Court of Kosovo, of 14 September 2015, which rejected as ungrounded the revision of the Applicant filed against the Judgment of the Court of Appeal Ac. no. 1176/2013, of 30 March 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) and Article 6 of the European Convention on Human Rights (hereinafter, the ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on 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

5. On 5 January 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
6. On 12 February 2016, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Ivan Čukalović (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
7. On 29 February 2016, the Court informed the Applicant about the registration of the Referral and sent a copy of it to the Supreme Court of Kosovo.
8. On 13 April 2016, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 8 January 2001, the Applicant established employment relationship for an indefinite period with the Ministry of Internal Affairs (hereinafter, MIA).
10. On 30 July 2007, the Applicant submitted a request to MIA to be allowed an unpaid leave.
11. The Applicant says that she did not wait for an answer of MIA regarding her request to be allowed unpaid leave, left Kosovo to go to Switzerland for medical treatment and did not appear to her working place.

12. On 14 December 2007, after the conducted investigations, the MIA (Decision ref. 10070/D) terminated the Applicant's employment relationship, because she *"violated the principle of P/3.20 III-A, IV, D, G related to the requests for leave, she violated the principle P.1. 30, Annex H, by unexcused absence from work for more than 15 days and she violated the principle P- 4.16, III, E, which is related to professional standards of Kosovo Police Service"*.
13. In 2010, the Applicant returned to Kosovo and applied for re-employment with the MIA; her application was rejected under Article 65.3 of the Law on Police.
14. On 20 July 2011, the Applicant filed a lawsuit against MIA with the Municipal Court in Prishtina, requesting her reinstatement to the previous job position as well as the payment of all monthly salaries from the moment she was dismissed from work.
15. On 11 September 2012, the Municipal Court (Judgment C. no. 1676/11) rejected the statement of claim of the Applicant, reasoning that the decision of the Kosovo Police Service on termination of employment relationship *"is fair and legitimate"*.
16. The Applicant filed an appeal with the Court of Appeal of Kosovo, due to *"essential violations of the provisions of the contested procedure and erroneous application of the substantive law"*.
17. On 30 March 2015, the Court of Appeal (Judgment Ac. No. 1176/13) rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Municipal Court.
18. The Applicant filed a request for revision with the Supreme Court of Kosovo due to *"essential violations of contested procedure provisions and erroneous application of the substantive law"*.
19. On 14 September 2015, the Supreme Court (Judgment Rev. no. 226/2015) rejected as ungrounded the request for revision, because *"the lower instance courts had correctly applied the provisions of contested procedure and the substantive law"*

Applicant's allegations

20. The Applicant claims that the challenged Judgment of the Supreme Court violated *"Article 31, the right to a fair trial in conjunction with Article 6 of the European Convention on Human Rights and the right to work"* and, in addition, *"by previous judgments [of regular courts] was violated also the right not to be discriminated against as a constitutional category"*.
21. The Applicant alleges that her constitutional rights were violated, *"because the courts have made contradictory assessment and by opposite determination of the factual situation and application of the substantive law"*.

22. The Applicant also alleges that the decision terminating her employment relationship “*was never served on her*” and “*there is no fact that the latter [the Applicant] signed the decision above*”.
23. The Applicant further alleges that “*the lower instance courts did not correctly determine the circumstances in rendering these decisions*”, “*the facts related to statements of the persons given under oath in the service of notaries, which are not included*”.
24. The Applicant requests the Court “*to annul the previous judgments during the constitutional review and the case be remanded to the competent court for reconsideration and retrial*”.

Admissibility of the Referral

25. The Court examines whether the Applicant has fulfilled the admissibility requirements as established in the Constitution and as further provided in the Law and as specified in the Rules of Procedure.
26. In that respect the Court refers to paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] 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”.
27. The Court also refers to Article 48 [Accuracy of the Referral] of the Law, which provides:

“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”.
28. In addition, the Court takes into account Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, which specifies:

*“(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:
[...]
(d) the Applicant does not sufficiently substantiate his claim”.*

29. The Court recalls that the Applicant claims that the challenged Judgment of the Supreme Court violated her rights to a fair and impartial trial (i), to work and not to be discriminated against (ii).

(i). Right to a fair and impartial trial

30. In that respect, the Court refers to Article 31 of the Constitution, which establishes:

“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”.

31. Furthermore, the Court takes into account Article 6 (1) of the ECHR:

“In the determination of his civil rights and obligations, everyone is entitled to a fair hearing by [a] tribunal”.

32. In fact, the Court notes that the Applicant filed the revision with the Supreme Court, due to *“essential violations of the contested procedure and the erroneous application of the substantive law”.*

33. The Court recalls that the Applicant allege that her right to a fair and impartial trial was violated, *“because the courts have made contradictory assessment and by opposite determination of the factual situation and application of the substantive law”.*

34. In that respect, the Court notes that the Supreme Court considered that *“the second instance court (...) gave sufficient reasons for all the allegations raised in the appeal and (...), the lower instance courts had correctly applied the provisions of contested procedure and the substantive law when it assessed the claimant’s statement of claim is unfounded”.*

35. The Court further notes that the Supreme Court found that the Applicant *“left her working place and did not wait for an answer to the request for unpaid leave”* and thus *“the employment contract is terminated to an employee without his consent if he did not come to work for no reason for 5 consecutive days”*, in accordance with the provision of Article 75, paragraph 3 of the Law on Basic Employment Rights.

36. The conclusion of the Supreme Court is in conformity with the jurisprudence of the ECtHR which upheld that the disputes on termination of service of public servants related with *“the specific activities of the public service in so far as the Applicant is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities”* are excluded from the scope of Article 6 (1) of the Convention. *“A manifest*

example of such activities is provided by (...) the police". (See cases: *Pellegrin v. France*, paragraph 66 ECtHR Judgment of 08, December 1999; *Massa v. Italy*, paragraph 26, ECtHR Judgment of 23 June 1993; *Glazenapp and Kosiek v. Germany*, paragraph 49. ECtHR Judgment of 28 August 1986).

37. The Court considers that the Supreme Court thoroughly analyzed, explained and justified the Applicant's allegations on violations of contested procedure and erroneous application of the substantive law.
38. Indeed, the Court emphasizes that the task of the Court is to assess whether the regular courts' relevant proceedings were fair in their entirety, including the way the evidence was taken, or in any way unfair or tainted by arbitrariness. (See *mutatis mutandis*, *Shub v. Lithuania*, paragraph 16 ECtHR Decision on Admissibility of Application of 30 June 2009; *Edwards v. United Kingdom*, paragraph 34. ECtHR Judgment of 66 December 1992; *Barbera and Messeque Jabardo against Spain*, paragraph 68. ECtHR Judgment of 6 December 1988,).
39. The Court reiterates that it is not its task to deal with errors of factual findings or applicable law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). An applicant must submit a reasoned allegation and a compelling argument when claiming that a public authority has infringed her/his rights and freedoms protected by the Constitution.
40. Moreover, the Court also reiterates that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and, therefore, it cannot act as a "fourth instance court". (See case *Akdivar v. Turkey*, paragraph 65 ECtHR, Judgment of 16 September 1996 See also *mutatis mutandis* the case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
41. In fact, the Court also considers that the Applicant has not sufficiently substantiated her allegations and has not explained how and why the Judgment of the Supreme Court on establishing the factual situation and applying the substantive law constitute a violation of her right to fair and impartial trial. Furthermore, she has not succeeded to show that the proceedings before the regular courts, including the Supreme Court, were unfair or tainted by arbitrariness or that his rights and freedoms have been infringed.
42. The Court recalls that the Applicant also alleged that "*the facts related to statements of the persons given under oath in the service of notaries*" were not included in the assessment of the factual situation. However, the Court notes that these statements are dated of November and December 2015 and the challenged Judgment of the Supreme Court is dated of 14 September 2015. Thus the statements could never be considered by the Supreme Court as they were issued after the completion of the proceedings and cannot be taken by the Court either.

43. The Court further recalls that the Applicant, in order to be reinstated to the previous job position and get back the claimed salaries, filed a lawsuit with the Municipal Court, filed an appeal with the Court of Appeal and filed a request for revision with the Supreme Court. Her request was rejected as ungrounded in all these instances.
44. The Court considers that the Applicant had the opportunity to present her claim and allegations before the regular courts. The facts and applicable law was extensively and comprehensively assessed by all the decisions. Moreover, the Applicant in general had access to the first instance, appeal and revision, where she could present arguments and evidence in relation to her claims.
45. The Court further considers that the Applicant disagrees with the conclusion of the Supreme Court on establishing the facts and applying the substantive law. However, the mere disagreement of the Applicant with the outcome of the proceedings conducted by the regular courts cannot of itself raise an arguable claim for breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 of the ECHR. (See *mutatis mutandis* case *Mezotur-Tiszazugi Tarsulat vs. Hungary*, paragraph 21, ECtHR Judgment of 26 July 2005).

(ii). Right to work and not to be discriminated against

46. The Court further recalls that the Applicant claims before the Constitutional Court that the decisions of the regular courts have violated her right to work and that she was discriminated against.
47. In that respect, the Court refers to Article 24 [Equality Before the Law], which establishes:
 - “1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
 2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status”.
48. The Court also refers to Article 49 [Right to Work and Exercise Profession], which establishes:
 - “1. The right to work is guaranteed.
 2. Every person is free to choose his/her profession and occupation”.
49. The Court considers that the Applicant does not substantiate her claims on a violation of her right to work and not to be discriminated against; she only states that her right to work and not to be discriminated against were violated as a result of the violation of the right to fair trial, without even referring to any constitutional provision,

50. Moreover, the Court notes that the Applicant has not raised these claims before the Supreme Court; she is presenting them for the first time before the Constitutional Court.
51. The Court reiterates that the Applicant should have raised these allegations before the regular courts for them to be able to consider them. Furthermore, the Court notes that the allegation on a violation of the right to work and not to be discriminated against would be a consequence of the alleged violation of her right for fair and impartial trial.
52. The Court has just found that the Applicant's allegation on a violation of the right to fair and impartial trial is inadmissible as manifestly ill-founded on a constitutional basis.
53. Therefore, the Court considers that it is unnecessary to separately examine in detail the alleged violation of the Applicant's right to work and not to be discriminated against under Articles 24 and 49 of the Constitution.
54. In all, the Court finds that the Referral is manifestly ill-founded on constitutional basis and is inadmissible, in accordance with the Rule 36 (1) (d) and (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Articles 20 and 48 of the Law, and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in the session held on 16 April 2016, unanimously

DECIDES

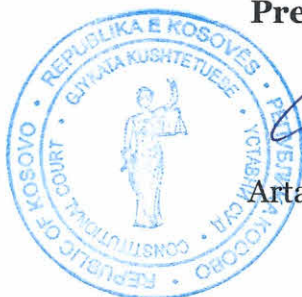
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur



Almiro Rodrigues

President of the Constitutional Court



Arta Rama-Hajrizi