



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

Prishtina, 19 January 2015
Ref. no.:RK747/15

RESOLUTION ON INADMISSIBILITY

in

Case KI116/14

Applicant

Fadil Selmanaj

**Constitutional review of
Judgment AA no. 294/2013 of the Court of Appeals of Kosovo of 4
February 2014**

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 Referral is submitted by Mr. Fadil Selmanaj (hereinafter, the Applicant) from Mitrovica.

Challenged decisions

2. The Applicant challenges Judgment AA no. 294/2013 of the Court of Appeals of Kosovo of 4 February 2014, which was served on him on 12 March 2014.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment of the Court of Appeals of Kosovo.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law).

Proceedings before the Constitutional Court

5. On 8 July 2014 the Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 6 August 2014 the President of the Court by Decision No. GJR. KI116/14 appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court by Decision No. KSH. KI116/14 appointed the Review Panel composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Enver Hasani.
7. On 20 August 2014 the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals of Kosovo.
8. On 4 September 2014 the Court notified the Basic Court in Prishtina - Department for Administrative Cases about the registration of the referral and asked for the complete case-file.
9. On 8 September 2014 the Basic Court in Prishtina - Department for Administrative Cases submitted the complete case-file (no. A354/12) to the Court.
10. On 9 December 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

11. The following is the summary of the facts as presented by the Applicant in his referral and evidenced from the Court file no. A 354/12 of the Basic Court in Prishtina - Department for Administrative Cases.
12. In 2001 the Applicant was employed as director of the Directorate for Geodesy, Cadastre and Property within the Municipality of Mitrovica.

13. On 7 April 2007 the Applicant's work contract was extended and he was reappointed in the same position until 9 March 2008.
14. On 11 January 2008 the Mayor of Mitrovica issued Decision no. 01/49 appointing Directors of Directorates in the Municipality of Mitrovica. However, the Applicant was not reappointed.
15. On 2 October 2008 the Applicant, then filed a complaint with the Independent Oversight Board of the Republic of Kosovo (hereinafter: the IOBK).
16. On 10 February 2009 the IOBK by Decision A. 02/285/2008 approved the complaint of the Applicant and obliged the Municipality of Mitrovica that: *"within the deadline of 15 days from the date of the present decision, to facilitate the fulfillment of appellant's rights deriving from the labor relation in compliance with provisions of Article 11 para 11.1 of the Administrative Directive no 2003/2 on the implementation of regulation no 2001/36 of the Kosovo Civil Service, is reassigned to another post of the same level and degree of payment in harmony with his professional skills and training, if it is not possible to return him to the workplace and job description provided by the employment contract"*.
17. On 24 February 2009 the Municipality of Mitrovica challenged the decision of IOBK before the Supreme Court of Kosovo.
18. On 25 September 2009 the Supreme Court of Kosovo by Judgment A. no. 170/2009 approved the lawsuit of the Municipality of Mitrovica and quashed the IOBK Decision A. 02/285/2008 of 10 February 2009.
19. On 28 October 2010 the Applicant submitted a referral (Case No. KI108/10) with the Court thereby challenging the constitutionality of the aforementioned Judgment of the Supreme Court of Kosovo.
20. On 5 December 2011 the Court rendered Judgment in Case No. KI108/10 and declared the referral admissible. The Court also found a breach of Article 31 [Right to fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 of the European Convention on Human Rights. Consequently, the Court declared invalid the Supreme Court judgment and remanded it for reconsideration in conformity with its judgment.
21. In its judgment the Court stated, *inter alia*, that *"... the Applicant has never received a copy of the judgment from the Supreme Court. Moreover, the Supreme Court by its letter dated 8 October 2010 effectively did not provide the Applicant with a copy of the judgment and referred him to approach IOBK and then ask for a copy of the judgment. Thus, it seems that the Applicant did not have prescribed remedies at his disposal"*
22. In the reasoning the Court emphasized: *"The Court notes again that, in the Applicant's case, proceedings started and reached a final decision in the Supreme Court, without the Applicant having been present in such proceedings and without him being notified of the Decision taken."*

23. In that respect the Court also invoked the case-law of the European Court of Human Rights thereby stating that: *"The ECtHR further considered that "a litigant's right of access to a court would be illusory if he or she were to be kept in the dark about the developments in the proceedings and the court's decisions on the claim, especially when such decisions are of the nature to bar further examination. (See Sukhorubchenko v Russia, Judgment of 10 February 2005, para. 53.)"*
24. On 17 October 2012 in relation to case no. KI108/10 the Court was informed by the Supreme Court of Kosovo that: *"... with regards to this matter, we inform you that this case in Supreme Court has taken the registration number A. no. 354/12 and it was allocated to be worked on..."*
25. On 1 January 2013 the Law No. 03/L-199 on Courts entered into force. Pursuant to Article 14. 1 of that Law: *"The Administrative Matters Department of the Basic Court shall adjudicate and decide on administrative conflicts according to complaints against final administrative acts and other issues defined by Law"*
26. On 11 July 2013 the Basic Court in Prishtina - Department for Administrative Cases, following the main hearing at which the Applicant was present, issued Judgment A. no. 354/12 and rejected as unfounded the lawsuit of the Municipality of Mitrovica.
27. On 22 August 2013 the Municipality of Mitrovica filed an appeal with the Court of Appeals of Kosovo against the aforementioned judgment of the Basic Court in Prishtina-Department for Administrative Cases. A copy of the appeal was not sent to the Applicant.
28. On 4 February 2014 the Court of Appeals of Kosovo by Judgment AA no. 294/2013 ruled to: i) approve the lawsuit of the Municipality of Mitrovica, ii) to annul Judgment A. no. 354/2012 of the Basic Court in Prishtina - Department for Administrative Cases dated 11 July 2013, iii) to annul the IOBK Decision A 02/285/2008 dated 10 February 2009, and iv) the Decision no. 01/49 of the Mayor of the Municipality of Mitrovica dated 11 January 2008 remains in force.
29. In the aforementioned judgment, the Court of Appeals of Kosovo reasoned:

The panel of the Court of Appeals, grounded on this situation of the case and after assessing the decision of the Mayor of Mitrovica Municipality, the decision of the IOBSCK, the challenged Judgment of the first instance court as well as the rest of the case file finds that, the decision of the IOBCSK, and the challenged Judgment are incomplete in their content and have not included all the evidences and arguments provided by the litigating parties, but are rather grounded only in some evidences and documents, without reviewing completely the case. The first instance court also does not review all the evidences and the claim allegations pursuant to Article 44 of the LAC, overlooking the fact that the claimant in the claim invokes the change of the legislation which corresponded with the organizing aspect of the

municipality, abrogating al the previous provisions of selecting and appointing the directors until then in the quality of civil servants.

30. On 12 March 2014 a copy of the judgment of the Court of Appeals of Kosovo was served to the Applicant.
31. On 21 March 2014 the Applicant filed a request for revision with the Supreme Court of Kosovo against the aforementioned decision of the Court of Appeals of Kosovo.
32. On 30 May 2014 the Supreme Court of Kosovo by Decision Rev. A. no. 6/2014 rejected the revision of the Applicant as inadmissible.
33. In the aforementioned decision, the Supreme Court of Kosovo, inter alia, reasoned:

“..., this Court found that against final decisions for administrative cases of the second instance, the party can submit with the Supreme Court a request for extraordinary review of a judicial decision and the public prosecutor can submit a request for protection of legality, which means that against final decisions for administrative cases in the second instance a revision cannot be filed, therefore, this Court rejects the revision filed by Fadil Selmanaj as inadmissible”.

Applicant's allegations

34. The Applicant alleges that: *“... the Court of Appeals of Kosovo via this judgment has committed the same violation previously committed by the Supreme Court...the Court of Appeals did not notify the interested party Fadil Selmanaj”.*
35. The Applicant alleges that: *“... The Court of Appeals did not review at all the case of the Applicant...it did not take into account decisions of the IOBK and the Basic Court in Prishtina... by eschewing the full responsibility the Court of Appeals unjustly assessed as if Regulation 2007/30 envisages that positions of Directors as politically appointed positions... and as if previous directors impliedly should automatically be discharged from their positions even though the Applicant was not politically appointed but is a civil servant who was admitted to his position by competition and work contract”.*
36. Furthermore, the Applicant claims that the Court of Appeals of Kosovo violated his right to fair and impartial trial as guaranteed by Article 31 of the Constitution because it did not grant him the right to defend his case.

The Law

Law No. 03/L-202 On Administrative Conflicts

Article 24

Against the final form decision of the Competent Court for administrative matters of second instance, the party may submit to the Supreme Court of Kosovo the request for extraordinary review of the legal decision.

The request under paragraph 1 of this Article may be submitted only in case of violation of material right or violation of procedure provisions, that may influence on solving the issue.

On the request for extraordinary review of the court decision shall decide the Supreme Court of Kosovo.

Article 55

Reviewing

The interested party may request reviewing of the decision in effect, when:

...

the interested person was not allowed to take part in the administrative conflict.

Assessment of admissibility

37. The Court observes that, in order to be able adjudicate the Applicants complaint, it is necessary to first examine whether they have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

38. 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”.

39. The Court also refers to Article 47.2 of the Law which prescribes:

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

40. The Court also takes into account Rule 36 (1) (b) of the Rules of Procedure which establish:

(1) The Court may consider a referral if:

...

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted...

41. In the concrete case the Applicant has filed a revision with the Supreme Court against the judgment of the Court of Appeals of Kosovo which was rejected as inadmissible on procedural grounds.
42. Furthermore the Court notes that the Applicant makes reference to case no. KI108/10 whereby he alleges that: *"... the Court of Appeals of Kosovo via this judgment has committed the same violation previously committed by the Supreme Court... the Court of Appeals did not notify the interested party Fadil Selmanaj"*.
43. In relation to case no. KI108/10 this Court had stated that: *"there is no evidence that the Applicant has been either informed of the possibility of reopening the procedure before the Supreme Court or that the Applicant would have the opportunity of appearing at a new procedure to present his arguments"*.
44. The Court notes that while in case no. KI108/10 the Applicant never received a copy of the judgment from the Supreme Court and therefore did not have an opportunity at a new procedure, in the case at issue the Applicant was served with a copy of the judgment of the Court of Appeals and thus, had an opportunity to use prescribed remedies by the Law No. 03/L-202 On Administrative Conflicts.
45. In this respect, the Court notes that the Applicant did not make use of a corresponding and appropriate legal remedy available to him and therefore has failed to observe the forms prescribed by the applicable law in Kosovo. Furthermore, the Court also notes that the Applicant did not do everything that could be reasonably expected of him in relation to exhaustion of legal remedies (See case *D. H. and Others v. the Czech Republic*, No. 57325/00, ECtHR, Judgment of 13 November 2007, para. 116).
46. The Court considers that in order for the Applicant to be absolved from the requirement to exhaust all legal remedies it is incumbent on him to show that: i) the legal remedy was in fact used, ii) the legal remedy was inadequate and ineffective in relation to his case, and iii) there existed special circumstances absolving the Applicant from the requirement to exhaust all legal remedies. From the documents contained in the Referral there is nothing that suggests that the Applicant meets the criteria to be absolved from exhaustion of all legal remedies to his avail.
47. Furthermore, the Court notes that after its judgment in case no. KI108/10, a new case was developed with its own dynamics and in the new context the Applicant has not exhausted all legal remedies.
48. 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 case KI41/09, Applicant *AAB-RIINVEST University L.L.C., Prishtina*, Resolution on Inadmissibility of 21 January 2010, and *mutatis mutandis*, see case ECHR, *Selmouni vs. France*, No. 25803/94, ECtHR, Decision of 28 July 1999).

49. Thus, the Applicant in failing to proceed further with the appropriate legal remedy as prescribed by the applicable law in Kosovo is liable to have his case declared inadmissible, as it shall be understood as a waiver of the right to further proceedings on objecting the violation of constitutional rights (See case KI16/12, Applicant *Gazmend Tahiraj*, Resolution on Inadmissibility of 22 May 2012).
50. It follows that the Applicant has not exhausted all effective remedies within the meaning of Article 113.7 of the Constitution in order for the Court to proceed with the allegations about the constitutionality of the Judgment of the Court of Appeals of Kosovo.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 47 of the Law and Rules 36 (1) b) of the Rules of the Procedure in its session held on 9 December 2014 unanimously

DECIDES

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

Judge Rapporteur


Snezhana Botusharova

President of the Constitutional Court


Prof. Dr. Enver Hasani

