



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

Pristine, 24 May 2012
Ref. No.: RK246/12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 127/11

Applicant

Ardian Hasani

**Constitutional review of the Supreme Court Judgment,
Rev. nr 219/2009, of 10 June 2011**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Ardian Hasani, residing in Gjilan.

Challenged decision

2. The challenged court decision is the Supreme Court Judgment, Rev. nr 219/2009, of 10 June 2011, which was served on the Applicant on 18 July 2011.

Subject matter

3. The subject matter of this Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the "Court") of the constitutionality of the Supreme Court Judgment concerning Decision nr 02/11 of the Chief Executive Officer of the municipality of Gjilan, by which Applicant's position was cut down and he was dismissed from work.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as the "Constitution"), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 15 January 2009 (hereinafter referred to as the "Law") and Rule 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the "Rules of Procedure").

Proceedings before the Court

5. On 3 October 2011, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo.
6. On 7 October 2011, the President, by Decision Nr. GJR. 127/11, appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur. On the same date, the President, by Decision Nr. KSH. 127/11, appointed the Review Panel composed of judges: 1. Almiro Rodriguez (Presiding), 2. Robert Carolan (member) and 3. Prof. Dr. Enver Hasani (member).
7. On 18 January 2012, the Constitutional Court notified the Applicant, the Supreme Court and the municipality of Gjilan on the registration of the Referral.
8. On 4 May 2012, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the full Court on the Inadmissibility of the Referral.

Summary of facts in the administrative procedure

9. The Applicant concluded the Employment Contract nr. 02/111/272 with the Municipal Assembly of Gjilan on 30 March 2005, in the duration from 1 January 2005 to 31 December 2006. He was assigned to the position of the "Escort Officer" within the executive of the municipality.
10. On 4 January 2007, the municipality of Gjilan, respectively the Chief Executive Officer, issued Decision nr. 02/11 not to renew the employment contract based on Decision nr. 02/7001 of 13 September 2006, according to which the Inspection Division had been dissolved and its employees had been transferred to respective municipal directorates. The position of the "Escort Officer", as it is said in the Decision, had been cut down because "there were no basic conditions for the existence of such a position".
11. On 10 April 2007, the Independent Oversight Board for the Civil Service of Kosovo (IOBCKS), following the appeal filed by the Applicant, issued Decision nr. 02/77/2007, partially approving Applicant's appeal, annulling the Decision of the Chief Executive Officer, nr 02/11, of 4 January 2007, as a decision of the employment authority that

was not competent to decide, and obliging the Acting Chief Executive Officer to review the said decision within 10 days and issue a decision on merits on this issue. This decision was final in the administrative proceedings, and it could not be appealed.

12. On 22 June 2007, in the repeated proceedings, the Acting Chief Executive Officer again cut down the position - Escort Officer, which was within the Department of the Executive – former Inspection Division. On 26 June 2007, the municipality of Gjilan notified IOBCSK and the Applicant on this decision.

Summary of facts in court proceedings

13. After having exhausted all legal remedies in administrative proceedings, the Applicant submitted a statement of claim with the Municipal Court in Gjilan against the municipality of Gjilan challenging the decision of the Acting Chief Executive Officer concerning the cutting down of the position and his dismissal from work.
14. On 14 July 2008, the Municipal Court in Gjilan issued Judgment C. nr 540/07, approving Applicant's statement of claim, annulling the Decision of the Chief Executive Officer, nr. 02/11 and 02/10, of 4 January 2007, and obliging the respondent, the municipality of Gjilan, to reinstate the Applicant to the workplace with all the rights deriving from the employment relationship, starting from 1 January 2007.
15. On 18 July 2008, the municipality of Gjilan, through its representative, used its right to appeal the Municipal Court Judgment, C. nr 540/07, of 14 July 2008, with the District Court in Gjilan, proposing the annulment of this decision.
16. On 26 November 2008, the District Court in Gjilan issued Judgment Ac. nr 328/2008, rejecting the appeal submitted by the representative of the municipality of Gjilan as ungrounded and confirming the Judgment of the District Court in Gjilan, C. Nr. 540/07, of 14 July 2008. Since the municipality of Gjilan was dissatisfied with this Judgment, it filed a revision with the Supreme Court of Kosovo.

Facts in the executive procedure

17. On 5 January 2009, the Applicant, in the capacity of the creditor, submitted a request for the execution of Judgment C. Nr. 540/07, of 14 July 2008, with the Municipal Court in Gjilan since the District Court, as a second instance, had rejected the appeal filed by the municipality of Gjilan.
18. On 12 January 2009, the Municipal Court in Gjilan issued Resolution E. nr. 1/2009, approving Applicant's proposal to allow the execution of Judgment, C. Nr. 540/07, of 14 July 2008, concerning his reinstatement to the workplace.
19. On 22 January 2009, the municipality of Gjilan submitted a request with the Municipal Court in Gjilan for the postponement of the execution of Resolution E. nr. 1/2009, of 12 January 2009, on accounts that it had filed a revision with the Supreme Court of Kosovo and it was waiting for their decision.
20. On 26 February 2009, the Municipal Court in Gjilan rejected the request of the municipality of Gjilan for the postponement of the execution of Resolution E. nr. 1/2009, of 12 January 2009.
21. Since the municipality was dissatisfied with the decision of the Municipal Court in Gjilan, it filed an appeal with the District Court in Gjilan, proposing the annulment of

Resolution E. nr. 1/2009, of 12 January 2009, and the postponement of the execution until the Supreme Court reaches a decision on the revision.

22. On 16 April 2009, the District Court in Gjilan issued Resolution Ac. nr. 107/09, rejecting as ungrounded the proposal of the municipality of Gjilan for the postponement of the execution of Resolution E. nr. 1/2009, of 12 January 2009, and the request for the annulment of this decision. Since this court, as a final instance in the execution procedure, had rejected the proposal of the municipality for the postponement of the execution of first instance Resolution E. nr. 1/2009, of 12 January 2009, the Applicant then submitted a proposal with the Municipal Court in Gjilan for the compensation of lost personal incomes.
23. On 28 July 2008, the Municipal Court in Gjilan, based on Applicant's proposal for the compensation of personal incomes, issued Judgment C. nr. 278/07 on this issue and obliged the municipality of Gjilan to compensate his personal incomes on behalf of salaries, according to the calculations of the finance expert for the period of time: from 1 January 2007 to 31 December 2007, from 1 January 2008 to 31 December 2008 and from 1 January 2009 to 13 May 2009, within 15 days after this judgment becomes plenipotentiary.
24. On 9 December 2010, the municipality of Gjilan filed an appeal with the District Court in Gjilan, within the legal time limit, against the resolution of the Municipal Court in Gjilan.

Facts in the contested procedure

25. On 10 June 2011, the Supreme Court of Kosovo issued Resolution, Rev. nr. 219/2009, approving the revision filed by the municipality of Gjilan, amending the Judgment of the District Court in Gjilan, Ac. nr 328/08, of 21 November 2011, and the Judgment of the Municipal Court in Gjilan C. nr. 540/07, of 14 July 2008, and rejecting as ungrounded Applicant's statement of claim for the annulment of the Decision of the Chief Executive Officer, nr. 02/11, of 4 January 2007. This Court reasoned its decision on the fact that lower instance courts had correctly determined the factual situation, but they had erroneously applied the substantive law when they assessed that Applicant's statement of claim was ungrounded. The Supreme Court further stresses that since Applicant's employment contract was not extended, it implied that his employment relationship as a civil servant had been terminated pursuant to Article 35.1, item (b) of the Law on the Civil Service of Kosovo, due to the expiration of employment duration. The termination of Applicant's employment relationship was therefore lawful.

Summary of facts in the administrative procedure, following court proceedings

26. On 19 July 2011, after having received the Supreme Court judgment, Gjilan MA had notified the Applicant regarding this judgment and attached a copy of Judgment Rev. nr. 219/2009, of 10 June 2011, to the notification.
27. On 21 July 2011, based on the said judgment, the mayor issued Recommendation nr. 02/16-20291, which says: *"The Office for Personnel is recommended to terminate the Mr. Ardian Hasani's employment contract, who is assigned to the position of the caretaker of the town stadium within DCYS, pursuant to the Judgment of the Supreme Court of Kosovo, Rev. nr. 219/2009, dated 10 June 2011"*.
28. On 25 July 2011, the municipality of Gjilan terminated Applicant's employment contracts in conformity with the Judgment of the Supreme Court of Kosovo, Rev. nr.

219/2009, of 10 June 2011, approving the revision filed by this municipality, and lower instance court judgments obliging the municipality to reinstate the Applicant to the workplace with all the rights deriving from the employment relationship have been amended.

Applicant's allegations

29. The Applicant claims that the Supreme Court judgment has violated his following rights guaranteed by the Constitution and the international Conventions:
 - Article 49.1 of the Constitution;
 - Article 23 of the Universal Declaration on Human Rights in conjunction with Article 21.1 [General Principles] of the Constitution; and
 - Article 6 of the Convention.
30. The Applicant claims that the Supreme Court reached a biased decision because it did not consider the fact that the Chief Executive Officer of the municipality of Gjilan had issued a decision to cut down a position and dismiss him from work whilst his employment contract had expired on 31 December 2006 and this decision, according to the Applicant, is unlawful and contrary to Section 11.3 of UNMIK Regulation No. 2000/45 on Self-Government of Municipalities.

Assessment of the admissibility of the Referral

31. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, further specified in the Law and the Rules of Procedure of the Court.
32. From the documents submitted with the Referral, the Constitutional Court notes that the Applicant has not fulfilled the admissibility requirements so that the Court could review the grounds of the Referral, because of the reasons we are going to mention in the following paragraphs.
33. The Court notes that Applicant's employment relationship had been terminated by Decision nr. 02/11, of 4 January 2007, of the Chief Executive Officer of the municipality of Gjilan, because of the cutting own of the position. Since the Applicant was not satisfied with the said decision, he pursued the realization of his rights through administrative proceedings, and then he filed a statement of claim with the Municipal Court in Gjilan, which decided on his reinstatement to the workplace. Since the second instance had also confirmed the first instance Judgment, C. Nr. 540/07, of 14 July 2007, as just, the Applicant submitted a proposal for the execution of the said judgment. As it can be seen from the case file, the municipality of Gjilan objected its execution, but its objection was rejected by the Municipal Court in Gjilan. The resolution had become final according to the Law on executive procedure (LEP) and then the municipality had complied and implemented Judgment, C. Nr. 540/07, of 14 July 2008, and Resolution E. nr. 1/2009, of the Municipal Court, according to Applicant's proposal for the execution of Judgment, C. Nr. 540/07, which obliged the municipality to reinstate the Applicant to work, and it was done by the municipality. But, later, the first and second instance court decisions have been amended by the Supreme Court Judgment Rev. nr 219/2009, of 10 June 2011.
34. The Constitutional Court notes that the Applicant claims that the Supreme Court has violated rights guaranteed by the Constitution and international Conventions when it decided to annul his Contract nr. 02/111/272, by assessing as lawful the decision of the

Chief Executive Officer to terminate the employment contract and not to extend it. It is obvious that the Supreme Court had decided pursuant to the revision filed by the municipality of Gjilan, and it reviewed the Decision of the Chief Executive Officer, nr. 02/11, and the decision of the Acting Chief Executive Officer, concerning the cutting down of the position – Escort Officer, which was within the executive of the municipality.

35. In this respect, the Court assesses that the Applicant has neither substantiated nor provided convincing evidence that the Supreme Court has arbitrarily violated his rights. The Court recalls that the assessment of the legality of decisions issued by lower instances is within the purview of the Supreme Court; it is the task of lower instance courts to completely and correctly determine the factual situation and implement the substantive law in conformity with the established circumstances of the case to avoid possible violations of rights guaranteed by the applicable legislation and the Constitution.
36. Further, the Court stresses that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as they may have infringed rights and freedoms protected by the Constitution. So, the Court should not act as a court of fourth instance when considering decisions issued by regular courts. It is the task and obligation of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis*, García Ruiz v. Spain [GC], no. 30544/96, § 28, European Court of Human Rights [ECHR] 1999-I).
37. The Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see among others authorities, Report of the European Commission on Human Rights in the case Edwards v. United Kingdom, App. No 13071/87, adopted on 10 July 1991).
38. In fact, the Applicant has not substantiated his claims on constitutional grounds and he did not provide evidence that his rights and freedoms have been violated by public authorities. So, the Constitutional Court cannot conclude that relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).
39. Having said that, the Court finds that Applicant's Referral does not fulfill the requirements of Article 46 of the Law and Rule 36.2 (b), and as such, it is manifestly ill-founded.
40. However, the Court has noticed a new reality in Applicant's case, which was established between the Applicant and the municipality of Gjilan, since the municipality is obliged to reinstate the Applicant to work pursuant to Resolution E. nr. 1/2009, of the Municipal Court in Gjilan, on the execution of Judgment C. Nr. 540/07, of 14 July 2008.
41. Since the Applicant concluded a new employment Contract nr. 02 nr. 1029, on 29 December 2009, whereby he was assigned to the duties of the Caretaker of Gjilan Stadium, from 1 January 2010 to 31 December 2012, he should have challenged the decision of the municipality of Gjilan concerning the annulment of the new employment Contract 02 nr. 1029, by initiating a labor dispute with the competent court against the municipality of Gjilan.

42. Based on this fact, it appears that the Applicant has not established that he has exhausted all legal remedies available to challenge the new employment contract concluded with the municipality of Gjilan.
43. The principle of subsidiarity requires that the Applicant should exhaust all procedural possibilities in regular proceedings in order to prevent violations of the Constitution or, if any, to remedy such violations of fundamental rights. Thus, by failing to take procedural steps in regular courts pursuant to determined time limits, the Applicant is, in fact, liable to have his case declared inadmissible.
44. In sum, the Court concludes that Applicant's Referral does not fulfill admissibility requirements pursuant to Articles 46 and 47.2 of the Law, and Rules 36.1 (a) and 36.2 (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 46 and 47.2 of the Law, and Rules 36.1 (a), 36.3 (h) and 56.2 of the Rules of Procedure, on 4 May 2012, unanimously

DECIDES

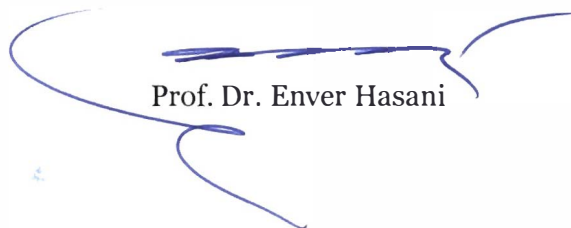
- I. TO REJECT the Referral as inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and
- III. This Decision is effective immediately.

Judge Rapporteur



Dr. Gjyljeta Mushkolaj

President of the Constitutional Court



Prof. Dr. Enver Hasani