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

Pristina, 03 November 2011
Ref. No.: AGJ82 /11

JUDGMENT

in

Case No. KI 39/09

Applicant

Avni Kumnova

Constitutional Review of the Decision of the Supreme Court of Kosovo No. 142/07, dated 27 May 2009

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

The Referral

1. The Applicant is Mr. Avni Kumnova from Pristina.

2. The Applicant challenges the Judgment of the Supreme Court of 27 May 2009, served upon him on 23 June 2009.

3. The Applicant requests the constitutional review of the judgment of the Supreme Court No. 142/07 of 27 May 2009, which, in the Applicant's opinion, has denied him the protection of Articles 23 [Human Dignity]; 24 [Equality before the Law]; and 49 [Right to Work and Exercise of Profession] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and as well as Article 13 [Right to Effective Remedy] of the European Convention on Human Rights (hereinafter: "ECHR").

4. The Referral is based on Article 113.7 of the Constitution, Article 22.7 and 22.8 of the Law (No. 03/L-121) on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: "the Law") and Section 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

5. On 18 September 2009, the Applicant filed a Referral with the Court challenging Decision No.142/07 of the Supreme Court, dated 27 May 2009.

6. On 8 February 2010, the Secretariat communicated the Referral to the Supreme Court, which submitted its reply on 10 February 2010.

7. On 15 March 2010, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Snezhana Botusharova and Ivan Čukalovič.

8. On 24 May 2010, the Constitutional Court requested to the Municipal Court of Pristina the complete file of the case of Mr. Avni Kumnova. The Municipal Court of Pristina sent to the Constitutional Court the entire file in respect to the proceedings before the regular Courts.

9. On 24 May 2010, the Constitutional Court requested the Applicant some clarification to certain questions. The Applicant has not replied to these questions and the letter of the Constitutional Court was returned by the Post Office to the Constitutional Court, since there was nobody to receive the letter at the address indicated by the Applicant.

10. On 9 July 2010, the President, by Order No.KSH.39-n/10, changed Order No.KSH. 39-09/10 of 15 March 2010, replacing Judge Robert Carolan as member of the Review Panel with Judge Iliriana Islami. The Presiding Judge is, therefore, now Judge Ivan Čukalovič.

Summary of facts

11. On 16 March 2005, the Applicant signed a labour contract with the company Iber-Lepenc for an indefinite period of time, by which the Applicant would be employed as engineer for electro-technical equipment maintenance at PS Hidrosistem in Pristina. The contract, inter alia, provided that "the contracting parties may resign from the contract, as per conditions provided by Law and Collective Contract"[1].

12. Iber-Lepenc decided, by Decision No. 01-1429 of 11 July 2005, signed by the General Director, to put an end to the labour relation with the Applicant for the following reasons: unsatisfactory performance of duties; unjustified refusal to perform the obligations of the labour contract; behaviour of such a serious nature that it would be unreasonable to expect the employment relationship to continue; and unjustified absence from work.

13. On 20 July 2005, the Applicant filed a complaint with the Management Board of Iber-Lepenc, challenging the termination of his labour contract.

14. At the same time, on 21 July 2005, the Applicant requested the Labour Inspectorate of the Ministry of Labour and Social Welfare to assess the legality of the employer's

[1] Article 12 of the labour contract of 16 March 2005

decision. On 28 July 2005, the Inspector, after having considered the submissions presented by both parties, replied that the decision, by which Iber-Lepenc had terminated the labour relation with the Applicant, did not have any legal effect.

15. The Inspector concluded that not the General Director, but a disciplinary commission appointed by the employer or the Management Council or Enterprise Board, pursuant to Article 24 of the Collective Contract (disciplinary accountability and procedure), should have been the body competent to impose disciplinary measures in cases of serious violation of job requirements. Therefore, Iber-Lepenc, as the employer, could not decide on disciplinary liability in cases of a serious violation of job requirements, but only a disciplinary commission.

16. The Inspector further ruled that the omission of legal advice in the Decision No. 01-1429 was in violation of the fundamental right to protect labour relations and ordered (1) Iber-Lepenc to eliminate the irregularities and (2) Iber-Lepenc's Management Board to annul Decision No. 01-1429.

17. On 20 July 2005, the Applicant submitted an objection. On 29 July 2005, the Management Board of Iber-Lepenc refused the submitted objection and confirmed the contested decision.

18. Thereupon the Applicant initiated proceedings before the Municipal Court of Pristina in order to assess the legality of Iber-Lepenc's decision to terminate his labour contract. On 24 April 2006, the Municipal Court found that Decision 01-1429 was not in compliance with the legal provisions applicable at the time, when Iber-Lepenc terminated the labour relation with the Applicant. It further concluded that the disputed decision was unlawful and, as such, had to be annulled, because it was in contradiction with UNMIK Regulation 2001/27 of 8 October 2001 on Essential Labour Law in Kosovo and the Law on Labour Relations. The Municipal Court ordered Iber-Lepenc to restore the Applicant in his position and duties and in all his rights based on the labour contract from 30 June 2005 - the date of termination - until the Applicant's return to work.

19. Iber-Lepenc filed an appeal against this judgment with the District Court in Pristina. On 2 February 2007, the District Court in Pristina rejected the appeal as unfounded and upheld entirely the factual conclusions and legal reasoning of the Municipal Court, stating that the latter's judgment did not contain any substantial violations of the provisions of the contested procedure, but was based on a fair assessment of the factual situation and rightful application of material rights. The District Court further argued that the Iber-Lepenc's disputed decision, by which the disciplinary measure of termination of the working relation with the Applicant was imposed, was a consequence of disciplinary procedure provisions, but that the employer had not initiated such a disciplinary procedure, pursuant to the normative acts applicable in the case of the Applicant as well as to Articles 59, 60 and 61 of the Law on Basic Rights of Labour Relations, applicable in Kosovo.

20. The employer then submitted a revision to the Supreme Court. On 27 May 2009, the Supreme Court found that the lower instance courts had erroneously applied the substantive law, since, in case of application of Article 11.2 of UNMIK Regulation 2001/27, the employer should only notify the employee in writing of his intentions to terminate the labour contract and that such notice should include the reasons for such termination.

21. The Supreme Court considered that "according to the provisions of UNMIK Regulation 2001/27 on Essential Labour Law in Kosovo", it was provided that the termination of the labour contract might occur without the obligation of initiating a disciplinary procedure,

and that the employer was only under the obligation to notify the employee on his intention of terminating the labour contract in serious cases of misconduct, or unsatisfactory performance of job duties by the employee, and that such notice should include the reasons for such termination, as had been done by Iber-Lepenc.

22. Hence, the Supreme Court granted the request for revision by Iber Lepenc, rejecting the Applicant's claim as ungrounded and finding that the judgments of both lower instance courts should be amended.

23. Thereupon, the Applicant submitted a request for protection of legality to the State public prosecutor and seized the Office of the Ombudsperson, but both actions were unsuccessful.

Applicant's allegations

24. The Applicant alleges that the Supreme Court, by its judgment No. 142/07 of 27 May 2009, violated his fundamental rights and freedoms as provided by Articles 23 [Human Dignity], 24 [Equality before the Law] and 49 [Right to work and Exercise of Profession] of the Constitution and Article 13 [Right to Effective Remedy] ECHR. In the Applicant's view, the Supreme Court erroneously found that Iber-Lepenc had acted fairly and in accordance with the law, when terminating the labour contract, and erroneously applied legal provisions, thus denying him the above fundamental rights.

Assessment of the admissibility of the Referral

25. The Court examined the documentation available and examined whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution.

Article 113 (7) 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."

26. The Court concludes, from the documentation filed, that the Applicant has exhausted all legal remedies provided by law in that he had a final Appeal rejected by the Supreme Court.

27. On the other side, Article 48 of the Law provides that:

"In his/her referral, the Applicant 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. The Applicant alleges that his rights as guaranteed by Articles 23 [Human Dignity], 24 [Equality before the Law] and 49 [Right to work and Exercise of Profession] of the Constitution and Article 13 [Right to Effective Remedy] ECHR have been violated.

29. In addition, Article 49 of the Law provides that:

"The referral should be submitted within a period of 4 months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, the deadline shall be counted from the day when the law entered into force."

30. The Applicant's referral was lodged with the Constitutional Court on 18 September 2009, whereas the latest decision in relation to the present case is that issued by the Supreme Court of Kosovo, dated 27 May 2009. Thus the Court concludes that the Referral is filed in compliance with Article 49 of the Law.

31. Therefore, the Court concludes that the legal criteria have been fulfilled and the Referral is admissible.

Assessment of substantive legal aspects of the Referral

32. The Applicant complains about a labour dispute between him and his employer, Iber-Lepenc, which ended with Judgment No. 142/07 of the Supreme Court of 27 May 2007.

33. In respect of the Applicant's claim, the Court notes that a labour dispute determines the civil rights and obligations of the employee and the employer and that, therefore, Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Fair Trial] of the ECHR are, inter alia, applicable (see, *mutatis mutandis, Judgment ECrtHR of 10 July 2003, Application 53795/00, Farinha vs. Portugal*).

34. In the present case, the Applicant submitted his request for judicial review of the decision of Iber-Lepenc to terminate his labour contract to the Municipal Court which ruled that the employer had violated applicable law, since he should have established a disciplinary commission in accordance with the provisions of the labour contract and Article 24 of the Collective Contract. Iber-Lepenc's appeal to the District Court was rejected for the same reasons.

35. However, the Supreme Court considered that the lower instance courts had erroneously applied the law and that, in accordance with UNMIK Regulation 2001/27 on Essential Labour Law in Kosovo, the termination of a labour contract might occur without the obligation for the employer to initiate a disciplinary procedure in serious cases of misconduct or unsatisfactory performance of job duties by the employee. The Supreme Court further considered that the employer was, therefore, only under the obligation to notify the employee of his intention to terminate the labour contract, and such notice should only include the reasons for such termination, as had been done by Iber Lepenc.

36. The Applicant complains that the Supreme Court erroneously found (1) that the employer had acted fairly and in accordance with the law, when terminating the labour contract, and (2) erroneously applied the legal provisions, thus denying him the above fundamental rights.

37. The Applicant alleges that, in these circumstances, his rights as guaranteed by Articles 23 [Human Dignity], 24 [Equality before the Law] and 49 [Right to work and Exercise of Profession] of the Constitution and Article 13 [Right to Effective Remedy] ECHR have been violated.

38. The Constitutional Court notes the Applicant's complaints stem from his disagreement with Decision 142/07 of the Supreme Court of 27 May 2009, rejecting his claim which had originally been successful before the District and Municipal Courts.

39. The Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts, including the decision of the Supreme Court. It is the role of these courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, Garcia Ruiz v. Spain, no. 30544/96, Para. 28, European Court of Human Rights [ECHR]

1999-I; and Resolution on Admissibility in Case KI 13/09, Sevdail Avdyli of 17 June 2010).

40. The Constitutional Court can only assess whether the evidence has been presented in such a way and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see mutatis mutandis, Application No. 13071/87, Edwards v. United Kingdom, Decision of the European Commission of Human Rights of 10 July 1991).

41. In the present case, the Constitutional Court examined the procedure before the Supreme Court on the basis of the submissions of the Applicant and found that neither has he provided any proof that the procedure before the Supreme Court did not constitute an effective remedy and that the Judgment of the Supreme Court was unjust or arbitrary, when his claim was rejected (see mutatis mutandis, Vanek v. Slovak Republic, Application No. 53363/99, Decision of European Court of Human Rights of 31 May 2005), nor has he been able to point to a breach of the Constitution that effected his constitutional rights. Therefore, the Court concludes that there has been no violation of the Applicant's rights, guaranteed by the Constitution.

FOR THESE REASONS

Pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56(2) of the Rules of Procedure, the Constitutional Court, by a majority, in its session held on 29 March 2011,

DECIDES

I. The Referral is admissible.

II. There is no violation of the rights as alleged by the Applicant.

III. 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.

IV. This Decision is effective immediately.

Judge Rapporteur

Almiro Rodrigues

President of the Constitutional Court

Prof. Enver Hasani