



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

Prishtina, on 10 November 2016
Ref. No.:RK1002/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI39/16

Applicant

Non-Governmental Organization FINCA - Kosovo

**Request for constitutional review of Judgment Rev. no. 214/2015, of the
Supreme Court of Kosovo, of 1 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
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Applicant is the Non-Governmental Organization FINCA - Kosovo, which is represented by lawyer Mr. Vigan Rogova from Prizren.

Challenged decision

2. The challenged decision is Judgment Rev. no. 214/2015, of the Supreme Court, of 1 September 2015, which was served on Applicant on 20 October 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment for which according to the Applicant's allegations violated the rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), under Article 31 [Right to Fair and Impartial Trial] and Article 49, paragraph 1 [Right to Work and Exercise Profession].
4. The Applicant also requests the Court to impose Interim Measure, regarding the suspension of all enforcement actions and the court proceedings until the final decision of this court.

Legal basis

5. Article 113.7, in conjunction with Article 21.4, of the Constitution; Article 47 of the Law No. 03/L-121 of the Law on Constitutional Court of the Republic of Kosovo, (hereinafter: the Law); and Rule 29 of the Rules of Procedure of the Constitutional Court of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 20 February 2016, the Applicant submitted by mail the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 14 March 2016, the President of the Court, by Decision, appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and appointed the Review Panel, composed of judges: Robert Carolan, Ivan Čukalović and Artta Rama-Hajrizi.
8. On 8 April 2016, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 14 June 2016, 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

10. On 22 March 2004, the Applicant, in a capacity of an Employer concluded an employment contract with M.B., in a capacity of an employee, and that contract was terminated by the Applicant in 2010, due to violation of labor duties by the employee.
11. On 28 October 2011, the Municipal Court in Prizren approved the claim of M.B. and obliged the Applicant to reinstate the claimant to his working place,

finding that *did not hold the responsibility for issuing the loan in case "B", as this was an exclusive responsibility of the credit committee of the Respondent.*

12. On 5 November 2012, the District Court in Prizren by Judgment AC. no. 519/11 upheld the Judgment of the Municipal Court.
13. On 19 November 2012, based on the Judgment of the District Court, the Applicant reinstated M.B. to his working place, with whom he concluded new employment contract on definite time.
14. Parallel to the reinstatement of M.B. to work, the Applicant submitted to the Supreme Court the request for revision, challenging the Judgment of the District Court, which was rejected as ungrounded by the Supreme Court of Kosovo by Judgment Rev. no. 66/2013.
15. On 10 December 2012, the Applicant by Decision HR 2012/89 suspended M.B. from work against him, after it filed criminal charge of abuse of office. He was suspended for definite time limit, namely until 31 December 2013.
16. On 4 January 2013, the Applicant sent to M.B. a notice of termination of employment relationship, HR 2013/07, informing him that as of 31 January 2013, his employment contract has expired and that it will not be extended anymore.
17. On 15 January 2013, the employee filed a claim with the Basic Court in Prizren, challenging the non-extension of his employment contract.
18. On 16 December 2014, the Basic Court in Prizren rendered Judgment C. No. 34/2013, which approved the statement of claim, so that the Applicant is obliged to reinstate the claimant to his working place and to compensate him the personal income.
19. The Basic Court, in its Judgment, among other, reasoned:

“Following the assessment of the evidence mentioned above, the Court considers that in the case of terminating the employment contract of the claimant, the respondent has not applied the legal provisions of the Law on Labor, and as a result of this, the Decision on the termination of the employment relationship is unlawful; this is due to the fact that based on the presented evidence, it was not confirmed that the claimant shall be held accountable for the violations in work in case ‘B’.” The Basic Court also presented the fact that the Executive Body of the Labor Inspectorate ordered the Applicant to reinstate M.B. to work, and the fact that the Basic Prosecution Office in Prizren, rejected the criminal report of the Applicant towards M. B. with an allegation of abuse of duty.
20. On 9 February 2015, the Applicant filed an appeal with the Court of Appeal in Prishtina on the grounds of substantial violation of the contested procedure provisions erroneous and incomplete determination of the factual situation and erroneous application of the substantive law.

21. On 5 May 2015, the Court of Appeal of Kosovo rendered Judgment AC no. 833/2015, which rejected as ungrounded the Applicant's appeal and upheld the Judgment of the first instance court.
22. The Court of Appeal, in the reasoning of its judgment, held:

"In this situation of the legal – civil matter, this court assessed the conclusion of the first instance court and found that it is fair and grounded, that it is supported by the presented evidence and the case file, and that justifying reasons have been provided which are accepted by this court as well."
23. On 3 June 2015, the Applicant submitted a request for a revision to the Supreme Court of Kosovo, on the grounds of essential violation of the contested procedure provisions and erroneous application of the substantive law.
24. On 1 September 2015, the Supreme Court of Kosovo, by deciding on the request for revision of the Applicant rendered Judgment Rev. no. 214/2015, which rejected as ungrounded the request for revision.
25. The Supreme Court assessed the findings of the lower instance courts and held that *"the legal stance of the lower instance courts is entirely admissible, in relation to the approval of the statement of claim of the claimant as grounded"*.
26. The Supreme Court also found that within the meaning of Article 215 of the LCP, *"takes care ex officio"* if there was essential violation of the contested procedure provisions during the procedures conducted in the lower instance courts and in this case the judgments of the lower instance courts contain reasons for decisive facts valid for a fair adjudication in this case.
27. The Supreme Court assessed allegations of the applicant in the Revision regarding *"the replacement of the contract of indefinite duration with fix-term contract does not present discrimination, and that the termination of employment contract of the claimant does not present discrimination."* However, the Court states that these allegations are unfounded because *"it is universal principle in all the legal procedures that no one may be declared liable twice for the same case, therefore, the claimant may not be declared liable twice for the case 'Braha'."*

Applicant's allegations

28. The Applicant alleges that the challenged decisions violated the right to fair and impartial trial (Article 31 of the Constitution), claiming that the courts made the interpretation of the applicable law and Article 49, paragraph 1 [Right to Work and Exercise Profession] in a manifestly arbitrary manner. During the elaboration of its allegations, the Applicant took into account some of the Court's previous decisions and the case law of the European Court of Human Rights (ECHR), which, according to it, are applicable in this case.

Assessment of the admissibility of the Referral

29. In order to adjudicate the Applicant's Referral, the Court first examines whether the Applicant met the admissibility requirements laid down in the Constitution as further specified in the Law and Rules of Procedure.

30. In this respect, the Court refers to Article 113.7 of the Constitution, where is provided:

"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".

and

Article 21 [General Principles], item 4, where is foreseen:

"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".

31. In addition, the Court takes into account Article 48 of the Law [Accuracy of the Referral], which states:

"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 a public authority is subject to challenge".

32. In addition, the Court also recalls Rule 36 of the Rules of Procedure, which provides:

"(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:

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or..."

33. In assessing the allegations made by the Applicant, the Court notes that Decision Rev. no. 214/2015, of 1 September 2015, is challenged.

Article 31 [Right to Fair and Impartial Trial]

"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”.

[...]

Article 49 [Right to Work and Exercise Profession]

“The right to work is guaranteed.

2. Every person is free to choose his/her profession and occupation”.

34. Assessing the constitutionality of the challenged judgment in relation to allegations of violations of the Constitution and the European Convention for the Protection of Human Rights (ECHR) and the facts presented by the Applicant, by comparing these facts with the content of the provisions above, the Court shall examine separately each of the allegations raised by it.

Alleged violation of Article 31 of the Constitution – Article 6 of ECHR

35. The Applicant alleges before the Court that there has been a violation of the right to fair and impartial trial as a result of “manifestly arbitrary interpretation of the law” because, in its view, from the reasoning of the Supreme Court’s decision, it follows that *“the replacement of the employment contract with an indefinite to fixed term represents analogous situation with discrimination.”*
36. Regarding above, the Court finds that the Supreme Court had reasoned clearly the Applicant's allegation, stating that nobody can be held liable twice for the same matter, as the Applicant acted against the employee M.B. and the issue raised by the Applicant did not have anything to do with analogous situation of discrimination but with a matter of assessing the possible liability already established by a court decision. The Court also clearly assessed the allegations of possible violation of provisions of the contested procedure by stating that it did not find such violations.
37. The Court consistently reiterates that the interpretation of the law, its application on specific issues, as well as the assessment of the facts and circumstances, are issues that divide the jurisdiction of the regular courts from the constitutional jurisdiction. The constitutional control exercised by this Court over the court decisions is limited only to protect the constitutional rights of the individuals, in the present case, the right to fair and impartial trial, whereas the problems of interpreting and applying the law to solve the concrete issues do not constitute the constitutional jurisdiction, if they are not followed by the violation of these rights. (See, among others, Case KI47-48/15, constitutional review of Judgment of the Special Chamber of the Supreme Court of Kosovo, AC- II-14-0057, of 12 March 2015, Applicants *Beqir Kosokoviku and Mustafë Lutolli*).
38. It is not the jurisdiction of this Court to substitute by its own assessment of the facts the assessment of the regular courts and, as a general rule, it is the duty of

these courts to assess whether the regular court's proceedings was fair and impartial in its entirety, as it is required by Article 6 of the ECHR, namely by Article 31 of the Constitution (See *inter alia Edwards v. United Kingdom*, 16 December 1992, p. 34, series A. no. 247 and *Vidal vs. Belgium*, 22 April 1992, p. 33, series A, no. 235).

39. Based on the principle of subsidiarity, the Court cannot act as a fourth instance court by calling into question the final outcome of the court proceedings (See case *FcMetrebi vs. Georgia*, par.31, ECtHR Judgment, of 31 July 2007), and this fact is emphasized by the Applicant itself, stating that it is aware of the competence of the Constitutional Court, although judged by the circumstances of the case, it appears that its primary goal seems to have been precisely the challenging of the outcome of the trial.
40. The Court further finds that the Applicant's allegation, regarding the applicability of the determined legal standards and concrete findings by the ECHR in case *Barac and others vs. Montenegro*, the ECHR Judgment, of 13 December 2011, in its case with this Court is not the correct legal reference.
41. The ECtHR, in the case above, where it found a violation of Article 6 of the ECHR concluded that the decision of the Supreme Court of the Republic of Montenegro was based entirely on the law that was not applicable at the time of the receipt of the decision, because that law had previously been declared unconstitutional by the Constitutional Court, and this fact was crucial for the outcome of the trial, whereas in the present case of the Applicant, here, all the court decisions are based on the law which is applicable to the case, whereas how the law is interpreted and how the factual situation was determined, the Constitutional Court, based on its already consistent case law, cannot declare itself, because it is not within its jurisdiction.
42. In these circumstances, the Court does not find that there has been a (manifestly) arbitrary application of the law, and therefore, nor a violation of the right to fair and impartial trial.
43. Moreover, the Court finds that nothing in the case presented by the Applicant proves that the regular courts failed to reason their decisions and that the court proceedings in entirety, in this case was unfair or arbitrary in order that the Constitutional Court finds that the very essence of the right to fair and impartial was violated.

Alleged violation of Article 49 of the Constitution [Right to Work and Exercise Profession]

44. The Applicant also alleged that the Judgment of the Supreme Court violated the rights guaranteed by Article 49 of the Constitution [Right to Work and Exercise Profession] and, to substantiate this violation, in the Referral cited the Commentary on the Constitution of Kosovo, in particular "... *the right to work does not mean that everyone has the right to be provided with employment, but the possibility for everyone to secure means for living by the work which was chosen and accepted freely.*" And also, further "... *this right does not*

enable every individual to request a job position from the state, through a court..." (Commentary, page 182, paragraph no. 3).

45. And, further, *"the owners of private enterprises are free during the admission and dismissal of the workforce, therefore the limitations in view of the dismissal most frequently are reduced by severance payment in case of not adhering to the time limit of dismissal, dismissal of protected categories of employees, of elderly employees..."* (Commentary, page 183, paragraph No. 4).
46. Regarding the above, the Court recalls that Article 112 [General Principles] of the Constitution provides:
 - "1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.*
 - 2. The Constitutional Court is fully independent in the performance of its responsibilities".*
47. In this respect, the Court emphasizes that, by the Constitution of Kosovo, it has been entrusted to it to interpret the Constitution and that, by assessing the constitutionality, it is *fully independent*, which means it is not subject to any other binding mandate, therefore, the interpretation of the right to work guaranteed by the Constitution is performed in an original manner, depending on the circumstances of the present case, on the evidence presented in the Referral and unaffected by any other external influence.
48. The Court notes that the reference, although disconnected and selective, of the *Commentary* on the Constitution with regard to Article 49 of the Constitution, cannot be a substantiated reference for violation of the Constitution and, moreover, even the authors of the *Commentary* stated that *"this book can serve as introductory material"* without giving attributes of the source of law, which could possibly serve as a binding legal norm to be followed.
49. The Applicant, a legal person, did not clarify how the right to work and choice of profession is applicable in this case and, if applicable, how it was violated. In circumstances where by the court decisions based on the applicable law and reasoned comprehensively, the Applicant is obliged to reinstate to work an employee, cannot be proven that there has been a violation of Article 49 of the Constitution.
50. From the above, the Court finds that the Applicant's allegations for violation of Articles 31 and 49 of the Constitution are not substantiated by evidence, based on which the Court could conclude that there has been a violation of human rights and, therefore, the Referral must be declared as manifestly ill-founded.

Request for Interim Measure

51. The Court finds that, as the Applicant's Referral is manifestly ill-founded, and as such, inadmissible, the request for Interim Measure cannot be subject to review, therefore, it should be rejected.

52. In sum, the Court finds that the facts presented by the Applicant do not in any way justify the allegation of a violation of a constitutional right or a right guaranteed by the ECHR, therefore, in accordance with Rule 36, paragraph 2, item b and d, the Court finds that the Referral is inadmissible as manifestly ill-founded.

FOR THESE REASONS

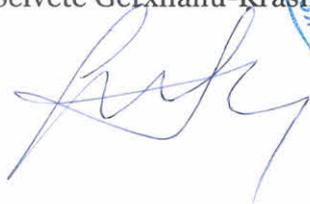
The Constitutional Court of Kosovo, pursuant to Article 48 of the Law, and Rule 36 (2) (b) and (d) of the Rules of Procedure, on xx 2016, unanimously

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

Selvete Gërxhaliu-Krasniqi



President of the Constitutional Court

Arta Rama-Hajrizi

