



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

Prishtina, 23 January 2015
Ref. No.: RK757/15

RESOLUTION ON INADMISSIBILITY

in

Case no. KI51/14

Applicant

Radomir Radosavljević

**Constitutional review of the Decision of the Supreme Court of Kosovo,
Rev.no.301/2013, dated 17 December 2013**

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 Applicant is Radomir Radosavljević. He is represented by Agim Lushta, a lawyer resident in Mitrovica.

Challenged decision

2. The Applicant challenges the Decision of the Supreme Court of Kosovo, Rev. no. 301/2013, dated 17 December 2013. This decision was served on the Applicant approximately on 08 February 2014.

Subject matter

3. The Applicant alleges that the aforementioned Decision of the Supreme Court violated his constitutional rights as guaranteed by Article 24 [Right to Equality Before the Law], Article 31 [Right to a Fair Trial], Article 49 [Right to Work and Exercise Profession], and Article 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 56 (b) of the Rules of Procedure (hereinafter: the Rules).

Proceedings before the Constitutional Court

5. On 19 March 2014, the Applicant submitted the Referral to the Court.
6. On 02 April 2014, the President appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (presiding), Ivan Čukalović and Enver Hasani.
7. On 21 May 2014, the Court notified the Applicant of the registration of the Referral. On the same date, copies of the Referral were communicated to the Supreme Court, to the Ministry of Internal Affairs and to the Kosovo Police.
8. On 06 June 2014, the Ministry of Internal Affairs – Kosovo Police (MIA-KP), through its legal representative, the Division for Legal Representation at the Ministry of Justice, submitted additional observations.
9. On 09 December 2014, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the inadmissibility of the Referral.

The facts of the case

10. It appears from the file that the Applicant was employed in the Kosovo Police at police station Zvečan, in the Regional Directorate Mitrovica, in the position of Police Lieutenant. At the time of the events described below he was deployed as Head of Security Unit at the Court in Mitrovica-North.

11. On 13 May 2011, the Applicant was appointed Station Commander of the police station in Zvečan. This decision was to become effective on 16 May 2011, on which date the Applicant was expected to report for duty in this new function. It appears from the file that the Applicant was on Annual Leave at this time.
12. On 24 May 2011, when the Applicant had still not reported for duty as Station Commander of Police Station Zvečan, an Internal Disciplinary Investigation was started against him, and the Applicant was suspended from duty for 48 hours, effective from 25 May 2011. Apparently, at this time the Applicant reported for duty once again at his previous place of deployment as Head of Security Unit at the Court in Mitrovica-North.
13. On 04 July 2011, the Applicant's employment with the Kosovo Police was terminated by the General Director of the Kosovo Police on the basis of "serious insubordination" under Article 46 (b) of Law No. 03/L-035 (Law on Police) of 20 February 2008, and as further defined in relevant Administrative Instructions. The Applicant submitted an appeal against this decision to the Minister of Internal Affairs.
14. On 19 August 2011, the Minister of Internal Affairs rejected the Applicant's appeal. The Applicant introduced a claim against this decision with the Municipal Court in Mitrovica.
15. On 24 December 2012, by Decision C.no.188/2011, the Municipal Court in Mitrovica quashed the Decision of the Minister of Internal Affairs of 19 August 2011 and the Decision of the General Director of Kosovo Police of 04 July 2011 terminating the Applicant's employment. The Municipal Court of Mitrovica ordered the Ministry of Internal Affairs to re-instate the Applicant in his previous employment and position with the Kosovo Police, and to compensate the Applicant for the costs of the court proceedings.
16. The Municipal Court of Mitrovica based its Decision, *inter alia*, on the following considerations:

"In order to determine the correct and complete factual situation, the Court went into the assessment of the legality of the nomination decision, which was requested also by the [Applicant], while in the case this matter consists as a preliminary matter, because it is tightly connected to the decision on termination of the employment relationship and only in this way the factual situation may be fully determined.

According to the Law on Police [Law No. 03/L-035 of 20 February 2008], Articles 40 and 41 demand as a condition that the selection or nomination of police station commanders must be performed in cooperation with local government authorities (local communities), particularly in places or locations where the majority belongs to the Serbian community. According to the same law, the local governance proposes three candidates for commanders upon the request of the General Director of Kosovo Police addressed to them. In this case, in case files there is no letter that would prove that the General Director of Kosovo Police addressed a request to local authorities for

nomination of respective station commanders and the respondent [i.e. the Ministry of Internal Affairs] was unable to prove otherwise during the proceedings.

[...]

The [Applicant] is accused of serious insubordination (disobeying an order and absence from work without justification for more than three days) which is sanctioned as a serious violation pursuant to the Law on Police and Administrative Instructions.

[...]

It was mentioned above that the decision for nomination is unlawful, precisely because it was conducted without consulting the local authorities of that municipality and this then resulted with the [Applicant's] inability to obey the decision, but not with a refusal to comply. Inability and refusal are diametrically opposed terms, while inability has to do with lack of conditions or danger of obeying a decision despite the [Applicant's] will or desire, while refusal has to do with a rejection or unwillingness for obedience.

[...]

It is clearly determined from the case files that the [Applicant] was unable to exercise the new position, so he went back and continued his previous duties as Head of Security Unit of the Court in the North, meaning that absence without justification also does not exist, [...].

In the end, the Court considers that the claimant, anyway, was not obliged to implement the nominating decision as this decision was unlawful, where Article 13, paragraph 2, [of the Law on Police] says: "A Police Officer shall have a duty to refuse such orders when they are clearly unlawful and to report such orders, without fear of sanction."

[...]"

17. On 05 July 2013, by Decision AC.no.419/2013, the Court of Appeal rejected as unfounded the appeal by the Ministry of Internal Affairs, and confirmed the Decision of the Municipal Court of Mitrovica. The Ministry of Internal Affairs submitted a request for Revision at the Supreme Court.
18. On 17 December 2013, by Decision Rev.no.301/2013, the Supreme Court approved the Revision as founded. The Supreme Court considered that the lower courts had correctly determined the facts of the case, but had incorrectly applied the law. In particular, the Supreme Court rejected the argument that the decision to nominate the Applicant to the post of Station Commander of Zvečan was unlawful, and that, therefore, the decision to terminate his employment was unlawful. On this point, the Supreme Court considered that,

"Such a legal stance is unacceptable for this Court considering that the subject matter of this proceeding is not assessing the legality of the decision on nomination of the [Applicant] to the position of Commander of Zvečan Police Station, but it was the decision to terminate the [Applicant's] employment relationship."

19. As a consequence, the Supreme Court concluded that,

“From what was said, the revision allegations are founded, alleging that both Judgments were rendered with erroneous application of material law, therefore these Judgments are amended and the statement of claim of the [Applicant] is rejected.”

Applicant’s allegations

20. The Applicant claims a violation of his constitutional rights as guaranteed by Article 24 [Right to Equality Before the Law], Article 31 [Right to a Fair Trial], Article 49 [Right to Work and Exercise Profession], and Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

21. The Applicant alleges that the Supreme Court denied him the right to a fair trial because it failed to address the object of the claim before it.

22. The Applicant states that,

“The object of the challenge was the legality of the decision of the Director General of the Kosovo Police of 13 May 2011 that nominates the [Applicant] as Station Commander of Zvečan Police Station. [...] The Supreme Court did not express itself whether the decision of the Director General of the Kosovo Police of 13 May 2011 is lawful or not.

[...]

The duty of the Supreme Court of Kosovo [...] was to conduct a full judicial investigation in compliance with the Law (Articles 7 and 8 of the Law on Contentious Procedure) in order to clarify if the decision of the Director General of the Kosovo Police is in line with- or in contradiction with- the Law. By not providing a statement on the legality of the Decision of the Director General of the Kosovo Police of 13 May 2011 the Supreme Court left the dispute, object of this trial, unresolved.”

23. In particular, the Applicant considers that,

“The Supreme Court of Kosovo, in regards to the enforcement of the decision for nominating commanders in new commanding positions in the northern part of Kosovo, should have taken into consideration that the Kosovo Police, which has about 10,000 members, was unable to penetrate in this region, despite the force which it possesses. In the course of an attempt to take over this region the police officer Enver Zymeri was killed and many others wounded. This shows that the will of the [Applicant] and the likelihood of implementing the decision of the Director General of the Kosovo Police [for the Applicant] to become Station Commander of Zvečan Police Station are equal to zero, because we would face the situation of one person being left alone at the hands of mercy and not assisted by the institutions relevant for enforcement of the decision of the Director General.”

24. In addition, the Applicant alleges that he was not treated equally in violation of Article 24 of the Constitution, because, *“[...] the shifting of Station Commanders was conducted selectively, respectively only in regions where the majority of residents belong to Serbian ethnicity, but not in other regions,*

which clearly shows the political intentions of the decision of the Director General of the Kosovo Police, instigating national discrimination in breach of Articles 2 and 3 of the Law Against Discrimination.”

Admissibility of the Referral

25. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

26. The Court has also to determine whether the Applicant has met the requirements of Article 113 (7) of the Constitution and Article 47 (2) of the Law. Article 113, paragraph 7 provides 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.”

27. The final decision on the Applicant's case is the Decision of the Supreme Court Rev.no.301/2013 dated 17 December 2013. As a result, the Applicant has shown that he has exhausted all legal remedies available under the law.

28. The Applicant must also prove to have met the requirements of Article 49 of the Law concerning the submission of the Referral within the legal time limit. It can be seen from the case file that the final decision on the Applicant's case is the Decision of the Supreme Court Rev.no.301/2013 dated 17 December 2013, which was served on the Applicant on or around 08 February 2014, whereas the Applicant submitted the Referral with the Court on 19 March 2014, meaning that the Referral has been submitted within the four month deadline prescribed by the Law and Rules of Procedure.

29. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). Thus, the Court is not to act as a court of fourth instance when considering the decisions taken by the regular courts. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).

30. The Court can only consider whether the proceedings as a whole, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see among other authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

31. In the present case the Applicant was afforded ample opportunities to present his case and to contest the interpretation of the applicable law before the

Supreme Court. It is within the purview of the Supreme Court to interpret the subject matter of the case before it. Having examined the proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision as to the Admissibility of Application no.17064/06 of 30 June 2009).

32. The Court notes that the Applicant also invokes Article 49 [Right to Work and Exercise Profession] of the Constitution. However, the Court finds that the decision of the Supreme Court contested by the Applicant does not in any way prevent the Applicant from working or exercising a profession. With its decision Rev.no. 301/2013 the Supreme Court merely confirmed that the Applicant's specific employment with the Kosovo Police had been lawfully terminated. This does not in any way prevent or prohibit the Applicant from taking up any other employment which he may choose. As such, there is nothing in the Applicant's claims that justifies a conclusion that his Constitutional right to work has been infringed.
33. Furthermore, the Court observes that the Applicant's claim in relation to discrimination in violation of Article 24 of the Constitution is based on his allegation that at the time of his dismissal new Station Commanders were only being appointed in areas populated in majority by members of the Serbian community. The Applicant has not indicated how this relates to the appointment of Station Commanders in other areas of Kosovo, nor in what way his appointment was different from that of other Station Commanders.
34. The Court finds that the Applicant has not clarified how his appointment and subsequent dismissal constituted unequal treatment with respect to others in similar situations.
35. In conclusion, the Court considers that the Applicant has failed to substantiate his claims on constitutional grounds and did not provide any evidence that his rights and freedoms have been violated by the regular courts.
36. Rule 36 (2) (d) of the Rules foresees that "*the Court shall reject a Referral as being manifestly ill-founded when it is satisfied that (...) the Applicant does not sufficiently substantiate his claim.*"

FOR THESE REASONS

The Constitutional Court, pursuant to Article 48 and Rules 36 (2) (d), and 56 (b) of the Rules of Procedure, on 9 December 2014, unanimously:

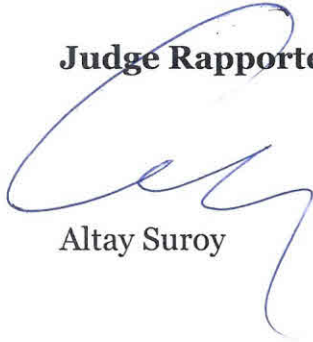
DECIDES

- 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;

IV. TO DECLARE this Decision effective immediately

Judge Rapporteur



Altay Suroy



President of the Constitutional Court



Prof. Dr. Enver Hasani