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

Prishtina, on 13 March 2017
Ref. No.:RK 1049/17

RESOLUTION ON INADMISSIBILITY

in

Cases nos. KI73/15 and KI85/15

Applicant

Hysni Gashi and Ali Rashani

Request for constitutional review of two judgments of the Supreme Court of Kosovo: Judgment Rev. no. 346/2014 of 24 March 2015, and Judgment Rev. no. 349/2014 of 3 February 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral KI73/15 was submitted by Hysni Gashi from Prizren (hereinafter: the first Applicant). He is represented by Ndue Kurti, a lawyer from Prishtina.

2. The Referral KI85/15 was submitted by Ali Rashani from village Lutogllavë, Municipality of Prizren (hereinafter: the second Applicant). He is represented by Ndue Kurti, a lawyer from Prishtina.

Challenged decision

3. The first Applicant challenges Judgment Rev. no. 346/2014 of the Supreme Court, of 24 March 2015, which was served on him on 5 May 2015.

4. The second Applicant challenges Judgment Rev. no. 349/2014 of 3 February 2015, which was served on him on 23 March 2015.

Subject matter

5. The subject matter of Referrals KI73/15 and KI85/15 is the constitutional review of two judgments of the Supreme Court, which allegedly violated the Applicants' rights and freedoms guaranteed by Article 21 (General Principles), Article 22 (Direct Applicability of International Agreements and Instruments), Article 24 (Equality Before the Law), Article 31 (Right to Fair and Impartial Trial), Article 32 (Right to Legal Remedies) Article 49 (Right to Work and Exercise Profession) and Article 54 (Judicial Protection of Rights) of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Articles 6 and 13 of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

6. The Referrals have been filed pursuant to Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 29 and 37.1 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 10 June 2015, the first Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 25 June 2015, the second Applicant submitted the Referral to the Court.

9. On 3 August 2015, in case KI73/15, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur. On the same date, the President appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Ivan Čukalović.

10. On 25 November 2015, the President in accordance with Rule 37 (1) of the Rules of Procedure rendered decision which joined the Referral KI85/15 to the Referral KI73/15.

11. On 29 April 2016, the Court notified both applicants that their Referrals were registered in the Court Registry, and, in accordance with the Decision of 25

November 2015, the Referrals were joined for consideration. The Court also sent copies of the Referrals of both Applicants to the Supreme Court.

12. On 2 December 2016, the President rendered a decision replacing in the Review Panel Judge Robert Carolan who had resigned from his post in the Court on 9 September 2016. Judge Almiro Rodrigues was appointed as presiding of the Review Panel and Judge Arta Rama-Hajrizi was appointed as a member in the Review Panel.

13. On 17 January 2017 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referrals.

Summary of facts in Case KI73/15

14. From the case file it follows that the Applicant established an employment relationship with UNMIK Railways.

15. On 7 February 2001, the administration of UNMIK Railways sent to the Applicant a notification that his employment relationship was terminated.

16. On 30 May 2001, the Applicant filed a claim with the Municipal Court in Prizren against UNMIK Railways due to termination of his employment relationship.

17. On 26 June 2002, the Municipal Court in Prizren approved the Applicant's statement of claim and by Judgment C. no. 311/2001 ordered UNMIK Railways to reinstate the Applicant to his working place.

18. Within the legal deadline, the respondent (UNMIK Railways) filed an appeal with the District Court in Prizren against Judgment C. no. 311/2001 of the Municipal Court.

19. On 9 September 2003, the District Court in Prizren rendered Judgment Ac. no. 18/2003 which upheld the Judgment of the Municipal Court.

20. UNMIK Railways submitted a request for revision to the Supreme Court against that Judgment.

21. On 13 November 2003, the Supreme Court approved the request for revision and, by its Decision Rev. no. 131/2003 remanded the case to the Municipal Court for retrial. The reasoning of the decision states:

> *„In the case file, as well as in the Judgment of the first instance court there are no data on what legal basis was the employment relationship of the claimant terminated, as well as other flaws, therefore, the first instance court is obliged that during a reopened procedure, with necessary evidence, to establish the facts mentioned above, and, after the fair assessment of evidence, to render a lawful decision."*

22. On 28 September 2010, the Municipal Court in Prizren by Decision C. no. 787/03 dismissed the Applicant's statement of claim against the UNMIK Railways as out of time. The decision states that, *"Based on these material pieces of evidence which are found in the case file, and uncontested facts, the Court ascertains that this claim of the claimant is out of time, therefore the Court decided as in the enacting clause of this Decision, at the same time considering also the legal provisions provided by Article 181 of the Law on Associated Labor, as well as the provisions of Article 83 of the Law on Basic Rights of Labor Relations, - as the most favorable law for workers, and that based on these reasons it should have been decided as in the enacting clause of this Decision."*

23. The Applicant filed an appeal with the District Court against Decision C. no. 787/03 of the Municipal Court.

24. On 3 June 2011, the District Court in Prizren approved the Applicant's appeal and quashed Decision C. no. 787/2003 of the Municipal Court of 28 September 2010. In the reasoning part of the decision of the District Court, among other things, it was established the following:

> *„In the enacting clause of the Basic Court, the Claim is rejected as out of time, however, based on the reasoning and pieces of evidence found in the case file, it cannot be confirmed on what basis the first instance court reaches the conclusion that the claim of the claimant is out of time.*
>
> *The first instance court is obliged to correct the flaws mentioned above in the reopened procedure, to assess the fact if the claimant has erred and if so, then his right to enjoy judicial protection cannot be denied, as well as to administer the necessary pieces of evidence, and after their assessment, to render a lawful decision."*

25. On 6 April 2012, the Municipal Court in Prizren rendered Judgment C. no. 436/11, which rejected the Applicant's statement of claim as ungrounded. In the reasoning of the Judgment, the court stated that:

> *"[...] based on the facts which can be found in the case file, it results that the title of the registry is UNMIK Railways, by which the fact that UNMIK administered the Kosovo Railways is confirmed, thus Kosovo Railways have not existed as an independent business entity.*
>
> *Based on the statements mentioned above, the court reached the conclusion that in this legal matter, Kosovo Railways (INFRAKOS) cannot be a responding party, neither can UNMIK Railways, due to the fact that pursuant to Article 3.1 of UNMIK Regulation No. 2000/47, of 18 August 2000, a legal provision based on which UNMIK, its property, funds and assets shall be immune from any legal process."*

26. On 18 May 2012, the Applicant filed an appeal with the Court of Appeal against the Judgment of the Municipal Court of 6 April 2012.

27. On 22 September 2014, the Court of Appeal rendered Judgment CA. no. 3424/2012 which annulled Judgment C. no. 436/11 of the Municipal Court in Prizren of 6 April 2012. The reasoning of the judgment states:

> *„By Article 181 of the Law on Associated Labor ("Official Gazette of SFRY" No. 11/88) which represented an applicable law in Kosovo, based on UNMIK Regulation No. 1999/24, the following was provided: "If dissatisfied with a decision, or the competent body of the employer does not render a decision within a time limit of 15 days, starting from the date when the request was filed, the employee has the right to request the protection of his rights before the court within the time limit of 15 days.*
>
> *The claimant had the right to request judicial protection within time limit of 15 days, starting from 25 March 2001, which means until 10 April 2001, but he had filed the claim with the court on 30 May 2001, which means after the expiration of the legal time limit."*

28. Within the legal deadline, the Applicant filed a request for revision with the Supreme Court against Judgment CA. no. 3424/2012 of the Court of Appeal.

29. On 24 March 2015, the Supreme Court rendered Judgment Rev. no. 346/2014, which partly approved as grounded the claimant's request for revision, modified Decision Ca. no. 3424/2012 of the Court of Appeal of Kosovo of 22 September 2014, which had dismissed the claim as out of time, whereby the Supreme Court decided that the claim was submitted in time, and upheld Judgment C. no. 436/2011 of the first instance court of 6 April 2012 whereby it was decided that the Responded lacks passive legitimacy. The reasoning of the Judgment states:

> *„Based on the assessment of the Supreme Court, the first instance court has correctly assessed that the respondent lacks the passive legitimacy, because immediately after the war of 1999, Kosovo Railways was managed by UNMIK.*
>
> *As such, UNMIK Railways, due to the status, privileges and immunity provided by Article 3.1 of UNMIK Regulation No. 2000/47, of 18 August 2000, a provision based on which, UNMIK, its property, funds and assets, shall be immune from any legal process and cannot be a party in a proceeding."*

Summary of facts in case KI85/15

30. From the case file it follows that the Applicant established an employment relationship with UNMIK Railways.

31. On 7 February 2001, the administration of UNMIK Railways sent to the Applicant a notification that his employment relationship was terminated.

32. In 2001, the Applicant filed a claim with the Municipal Court in Prizren against UNMIK Railways due to termination of his employment relationship.

33. On 28 May 2002, the Municipal Court in Prizren approved the Applicant's statement of claim and by Judgment C. no. 317/2001 ordered UNMIK Railways to reinstate the Applicant to his working place.

34. Within the legal deadline, the respondent filed an appeal with the District Court against Judgment C. no. 317/2001 of the Municipal Court.

35. On 31 October 2002, the District Court rendered Judgment Ac. no. 229/2002, which upheld the Judgment of the Municipal Court in Prizren.

36. UNMIK Railways submitted a request for revision to the Supreme Court against that Judgment.

37. On 1 April 2003, the Supreme Court approved the request for revision of the respondent and by Decision Rev. no. 22/2003 remanded the case to the Municipal Court for retrial. In the reasoning part of the decision it is established that:

> *"In the case file and in the judgment of the first instance court there are no data regarding the status of the claimant as an employee-whether the claimant was employed for an indefinite period of time, was he temporarily systemized by the decision of the competent authority of the enterprise Kosovo Railways, or was he employed under the contract.*
>
> *The first instance court is obliged that during a reopened procedure, with necessary evidence, to confirm the facts mentioned above, and, after the fair assessment of the evidence, to render a lawful decision."*

38. On 28 September 2010, the Municipal Court in Prizren by Decision C. no. 656/02 dismissed the Applicant's claim as invalid on the grounds that it was filed out of time.

39. The Applicant filed an appeal with the District Court in Prizren against Decision C. no. 656/02 of the Municipal Court.

40. On 3 June 2011, the District Court in Prizren rendered Decision Ac. no. 672/2010, which quashed Decision C. no. 656/2002 of the Municipal Court in Prizren of 28 September 2010 and remanded the case to the first instance court for retrial. The District Court based its Decision on the reasoning that, *"[...] in the enacting clause, the claim is rejected as out of time, but by the reasoning and the evidence which are in the case file, it cannot be determined on which basis the first instance court concluded that the claim of the claimant is out of time."*

41. On 6 April 2012, the Municipal Court rendered Judgment C. no. 437/11, which rejected the Applicant's statement of claim as ungrounded, based on the reasoning that, *„ The court, having reviewed the claim, the response to the claim, other case file, as well as the allegations of the litigants, in accordance with Article 8 of the Law on the Contested Procedure (the LCP), found that the statement of claim of the claimant is ungrounded and it should be rejected, due to lack of the real passive legitimacy of the respondent [...] Kosovo*

Railways cannot be a responding party, because the legal provision of Article 3.1 of the UNMIK Regulation no. 2000/47, of 18 August 2000, foresees that UNMIK, its property, funds and assets shall be immune from any legal process."

42. The Applicant filed an appeal with the Court of Appeal against Judgment C. no. 437/11 of the Municipal Court.

43. On 22 October 2014, the Court of Appeal rendered Judgment CA. no. 3425/2012, which rejected the Applicant's appeal as ungrounded and upheld Judgment C. no. 437/11 of the Municipal Court, with the reasoning that,

> *"The Trial Panel considers that the first instance court has correctly determined the factual situation when it concluded that the statement of claim of the claimant is ungrounded, however the decisive fact was that he and the respondent had concluded another employment relationship, therefore, within the meaning of Article 11 of the abovementioned Law, he terminated the employment relationship by a written agreement, for the job position claimed by his statement of claim, filed on 04 June 2001, which he did not modify until the end of the main hearing session."*

44. Within the legal deadline, the Applicant filed a request for revision with the Supreme Court against Judgment CA. no. 3425/2012 of the Court of Appeal.

45. On 3 February 2015, the Supreme Court rendered Judgment Rev. no. 349/2014, which rejected the Applicant's request for revision as ungrounded. The conclusion of the judgment states that, *"Setting from the abovementioned circumstances, it may be concluded that in this legal matter, neither the Kosovo Railways, nor the UNMIK Railways can be a responding party because of the statute, privilege, and immunity foreseen by the legal provision, according to which UNMIK, its property, funds and assets shall be immune from any legal process."*

Applicant's allegations

46. The allegations of the first and second Applicant are identical, therefore, the Court will present them together as a single allegation.

47. Both Applicants allege that the Railways, its assets and its employees are not the property of UNMIK, but that they existed before UNMIK and that UNMIK 'found' the Railways in Kosovo after it arrived. Due to these facts, the Supreme Court erroneously found that UNMIK Railways cannot be a respondent party pursuant to Article 3.1 of UNMIK Regulation no. 2000/47 on the status, privileges and immunities of KFOR and UNMIK and its personnel (hereinafter: UNMIK Regulation). With this Judgment, the Supreme Court committed a violation of the rights and fundamental freedoms guaranteed by the Constitution and the European Convention on Human Rights (hereinafter: ECHR).

48. Both Applicants further allege that this interpretation of UNMIK regulation violated their rights and freedoms guaranteed by Article 21 (General

Principles), Article 22 (Direct Applicability of International Agreements and Instruments), Article 24 (Equality Before the Law), Article 31 (Right to Fair and Impartial Trial), Article 32 (Right to Legal Remedies), Article 49 (Right to Work and Exercise Profession) and Article 54 (Judicial Protection of Rights) of the Constitution, as well as Articles 6 and 13 of ECHR.

49. Both Applicants request the Court:

„a) to declare that the Referrals of both Applicants are admissible,

b) to hold that there has been a violation of the constitutional rights as mentioned above,

c) to declare invalid the Judgments of the Supreme Court of Kosovo, both in the case of the first Applicant Judgment Rev. no. 346/2014, and in the case of the second Applicant Judgment Rev. no. 349/2014."

Relevant law

50. UNMIK Regulation no. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo.

Article 3 Status of UNMIK and its Personnel

„UNMIK, its property, funds and assets shall be immune from any legal process."

Admissibility of the Referral

51. In order to be able to adjudicate the Referrals of both Applicants, the Court shall first examine whether the Referrals met the admissibility requirements laid down in the Constitution, and as further specified in the Law and the Rules of Procedure.

52. In that respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. 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."

53. The Court also refers to Article 48 of the Law, which provides:

„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 public authority is subject to challenge."

54. In this case, the Court refers to Rule 36 (1) d) and (2) (b) of the Rules of Procedure, which foresees:

> *"(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) the presented facts do not in any way justify the allegation of a violation of the constitutional rights."*

55. In the present Referrals, the Court notes that both Applicants began their proceedings in 2001, by filing a statement of claim against UNMIK Railways, as a respondent party, for reinstatement to their job positions, and that the proceedings were completed in 2015 by judgments of the Supreme Court, which are challenged by the Applicants.

56. The Court notes that the Supreme Court in both cases decided on the same grounds, based on its interpretation that under UNMIK Regulation No. 2000/47, UNMIK Railways could not be a respondent party in employment relationship proceedings because it was immune from legal suit.

57. Based on this, the Court finds that the allegations of both applicants for erroneous application and inconsistent interpretation by the regular courts of UNMIK Regulation No. 2000/47 are concerned with the question of interpretation and qualification of legal provisions, which falls within the scope of the regular courts' jurisdiction (legality), and does not come within the domain of the Constitutional Court (constitutionality).

58. In this respect, the Court refers to the case law of the European Court of Human Rights (hereinafter: ECtHR) where it is clearly determined that *"it is the role of the regular courts to interpret and apply pertinent rules of procedural and substantive law"* (See *mutatis mutandis* Judgment of the European Court of Human Rights (hereinafter: ECtHR) of 21 January 1999, *Garcia Ruiz v. Spain,* no. 30544/96, para. 28).

59. The Constitutional Court shall only intervene when the regular courts, through their actions, infringe on the constitutional rights and standards. In such cases, the Court does not conduct a reassessment of the facts and circumstances, or a reinterpretation of laws, but it conducts an assessment of constitutional nature, different from that conducted by courts of regular jurisdiction.

60. Consequently, the role of the Constitutional Court is solely to ensure compliance of court proceedings with standards and rights guaranteed by the Constitution. Thus, the Constitutional Court cannot act as a "fourth instance court" (See ECtHR Judgment of 16 September 1996 *Akdivar v. Turkey,* No. 21893/93, para. 65;see also *mutatis mutandis* Case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

61. In sum, the Court considers that the Applicants have not submitted any *prima facie* evidence in support of their Referrals and nor have they justified the allegations for violation of their constitutional rights (See, case No. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, Constitutional Court of the Republic of Kosovo, Constitutional Review of Decision CA. no. 2129/2013 of the Court of Appeal of Kosovo, of 5 December 2013, and Decision CA. no. 1947/2013 of the Court of Appeal of Kosovo, of 5 December 2013).

62. The Court considers that the Applicants' Referrals have not met the requirements established by the Constitution, and as further foreseen by the Law and specified by the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rules 36 (2) (d) and (2) (b) and 56 of the Rules of Procedure, on its session held on 17 January 2017, 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. This Decision is effective immediately;

Judge Rapporteur

Bekim Sejdiu

President of the Constitutional Court

Arta Rama-Hajrizi