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

Prishtina, on 3 March 2016
Ref. No.:RK900/16

RESOLUTION ON INADMISSIBILITY

in

Case no. KI82/14

Applicant

Gani Lahu

Constitutional Review of Decision Rev. No. 297/2013 of the Supreme Court of the Republic of Kosovo of 18 December 2013

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 Referral was submitted by Mr. Gani Lahu represented by Mr. Adem Vokshi, a lawyer practicing in Mitrovica (hereinafter: the Applicant).

Challenged Decision

2. The Applicant challenges Decision Rev. No. 297/2013 of the Supreme Court of the Republic of Kosovo of 18 December 2013 in connection with the Decision AC. No. 190/2013 of the Court of Appeal of Kosovo of 12 July 2013. The Decision of the Supreme Court was served upon the Applicant on 19 February 2014.

Subject Matter

3. The subject matter of the referral is constitutional review of Decision Rev. No. 297/2013 of the Supreme Court of the Republic of Kosovo of 18 December 2013 in connection with the Decision AC. No. 190/2013 of the Court of Appeal of Kosovo of 12 July 2013.

4. The Applicant alleges violation of Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo in connection with Article 6 (Right to a fair trial) and Article 13 (right to an effective remedy) of the European Convention of Human Rights (hereinafter, the Convention) with regard to his dismissal from work.

Legal Basis

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

Proceedings before the Constitutional Court

6. On 8 May 2014 the Applicant submitted the referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 10 June 2014 the President of the Court by Decision No. GJR. KI82/14 appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Court by Decision No. KSH. KI82/14 appointed the Review Panel composed of judges Altay Suroy (presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 16 June 2014 the Applicant was notified about the registration of the Referral and a copy was sent to the Supreme Court of the Republic of Kosovo.

9. On 14 September 2015 the Applicant and the Basic Court in Prishtina were asked to submit evidence of service of the last challenged judgment.

10. On 21 September 2015 the Applicant submitted his comments in relation to the service of the last challenged judgment.

11. On 28 January 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

12. On 12 March 2002 the UNMIK Civil Administration notified the Applicant of his suspension from the position of General Manager of UNMIK Railways pertinent to procurement activities that were allegedly done in breach of UNMIK Regulations. In the notification letter it was stated that the duration of the applicant's suspension is pending on further investigations.

13. On August 2002 there was a job announcement for the position of General Manager of UNMIK Railways. The Applicant applied for that position in spite of suspension but another person was appointed in his stead.

14. On 22 October 2002 the Applicant was notified about termination of his employment with UNMIK Railways. The Applicant claims that in this notification letter there was no legal advice as to the legal remedies to his avail.

15. On 5 November 2002 the Applicant filed an objection against the above-stated notification requesting its annulment until the investigation is terminated or to provide him with another job position corresponding to his professional skills. The Applicant allegedly did not receive any information in this regard even though the UNMIK Railways were obliged to do so under Rule 44 of its Rules of Procedure.

16. On 18 February 2003 the Applicant filed a lawsuit against UNMIK Railways with the Municipal Court in Prishtina. The Applicant plead inter alia that he has worked for twelve years and that UNMIK Railways have unlawfully terminated his employment.

17. On 7 April 2003 the Municipal Court in Prishtina by Judgment C1. No. 39/2003 approved the lawsuit of the Applicant, annulled as illegal the notification of 22 October 2002 on termination of employment of the applicant by the UNMIK Railways, obliged UNMIK Railways to reinstate the applicant to job position corresponding to his professional skills and qualifications including – all the rights from the employment relationship – within the deadline of eight (8) days from the finality of that judgment.

18. On an unspecified date the UNMIK Railways filed an appeal with the District Court in Prishtina alleging that the judgment of the trial court was taken in breach of procedural rules, erroneous application of the substantive law, and that, it should be remanded to the trial court for fresh consideration.

19. On 24 April 2004 the District Court in Prishtina rejected as unfounded the appeal of the UNMIK Railways and upheld the impugned judgment of the trial court.

20. On an unspecified date the UNMIK Railways filed a request for revision with the Supreme Court against judgments of the trial and appeal courts respectively

by alleging essential violations of the procedural law, erroneous and incomplete assessment of the factual situation and wrongful application of the substantive law.

21. On 11 November 2004 the Supreme Court by Judgment Rev. nr. 84/2004 adopted the request for revision, quashed the decision of the trial and appeal courts and remanded the case to the trial court for fresh consideration.

22. On 25 October 2005 the Municipal Court in Prishtina by Judgment C1. No. 473/04 rejected the lawsuit of the Applicant pertinent to the annulment of the notification letter – for suspension from work and reinstatement to work -in UNMIK Railways with all the rights from the employment relationship.

23. On an unspecified date the Applicant filed a complaint with the District Court in Prishtina against the above-stated decision of the trial court due to erroneous assessment of the factual situation, proposal to adopt his lawsuit as founded and to quash the impugned decision or to remand the case to the trial court for fresh consideration.

24. On 14 October 2008 the District Court in Prishtina by Decision Ac. No. 57/2006 quashed the above-sated decision of the trial court and remanded the case to the trial court for fresh consideration.

25. In the interim the UNMIK Railways was succeeded by the JSC Infrastructure Railways of Kosovo (certification for registration of the business No. 70325327 of 23 August 2011).

26. On 6 September 2012 the Municipal Court in Prishtina by Judgment C1398/08 approved the lawsuit of the Applicant as grounded, annulled the notification on termination of the Applicant's employment as unlawful, obliged the JSC Infrastructure of Railways of Kosovo to reinstate the Applicant to work in accordance with his professional skills and qualification with all the rights from the employment relationship within a deadline of seven (7) days from the day of finality of that judgment under threat of forced execution.

27. In the above stated judgment the Municipal Court in Prishtina reasoned that it is indisputable that JSC Infrastructure Railways of Kosovo is successor to the UNMIK Railways, that the applicant was employed by the then UNMIK Railways for twelve years, that with suspension from the position of the General Manager the applicant should have been reassigned to another position corresponding to his professional skills and qualifications, that the investigation procedure about allegations of corruption against the applicant should have come to a conclusion, that the then UNMIK Railways did not corroborate the liability of the Applicant that he violated his work duties.

28. On an unspecified date the JSC Infrastructure Railways of Kosovo filed a complaint against the above-stated decision of the trial court with the Court of Appeal of Kosovo alleging essential violations of the procedural law, erroneous and incomplete assessment of the factual situation, wrongful application of the substantive law with the proposal to reject the Applicant's lawsuit and quash

the impugned decision or to remand the case to the trial court for fresh consideration.

29. On 12 July 2013 the Court of Appeal of Kosovo by Decision AC. No. 190/2013 accepted the complaint of JSC Infrastructure Railways of Kosovo, quashed the above-stated decision of the trial court and dismissed the lawsuit of the Applicant as untimely.

30. In the above-stated decision the Court of Appeal of Kosovo reasoned that it cannot accept the legal stance of the trial court because it is not founded on law and is marred by essential procedural violations, that Article 83 of the Law on Basic Rights from Employment Relationship foresaw that the employee who is dissatisfied with the final decision of his employer or if the employer does not make a decision within the thirty (30) day timeline - from the day the employee has filed his objection - then the employee is entitled to request protection of his rights before the competent court, that in the concrete case we are dealing with a preclusive deadline that cannot be changed by the litigating parties nor by the court, therefore, the Applicant's lawsuit must obligatorily be dismissed as untimely because it is filed beyond the preclusive legal deadline.

31. On an unspecified date the Applicant filed a request for revision against the above-stated decision of the appeal court with the Supreme Court of Kosovo alleging essential violation of the procedural law, wrongful application of the substantive law and proposing to change the decision of the appeal court and to uphold the decision of the trial court (see paragraph 32 above).

32. On 18 December 2013 the Supreme Court by Decision Rev. No. 297/2013 rejected the Applicant's request for revision as unfounded. The Supreme Court adopted the legal stance and the rationale of the appeal court that the applicant's lawsuit is untimely.

33. The relevant part of the above-stated Decision of the Supreme Court reads:

> *"In this particular case, the claimant submitted the claim out of the time limit envisaged pursuant to the above mentioned law, because the claim was submitted at the court on 18.2.2003, whereas the respondent's notification was serviced to him on 22.10.2002.*
>
> *Pursuant to the Supreme Court's assessment, the second instance court did correctly apply the provisions of Article 83 of the LBRER, because this time limit is preclusive and after its expiration the employee forfeits the right to judicial protection. Therefore, the claim submitted after this time limit had to be rejected as out of time. In this particular case, the claimant rejected the notification on the termination of employment on 5.11.2002, whereas he submitted the claim at the court on 18.2.2003, in other words more than three months later".*

Relevant provisions of civil disputes (labor disputes) before entry into force of the Law on Labor, No. 03/L-22 approved on 1 October 2010

Basic Labor Law in Kosovo (Official Gazette of SFRY, no. 60/89, 42/90, 42, 92 and 24/94)

"Article 83, an employee who is not satisfied with the decision of the competent authority of the organization, or if that authority fails to make a decision within 30 days from the day of filing the complaint, respectively the objection, has the right to another deadline of 15 days to seek protection of his rights before the competent court".

Applicant's allegations

34. In relation to the Judgment of the Supreme court, the Applicant inter alia alleges that: *"Upon deciding in relation to the Revision submitted against the Judgment of the Court of Appeals the Supreme Court also did not take into consideration and did not assess or respond to many of the allegations submitted in this matter, such as: "changing of the work status, lack of legal remedies, failure to conduct any disciplinary measure pursuant to the provisions of the above mentioned laws. Thus, the Applicant's fundamental rights of being equal before the law and to effectively protect his rights were violated. Moreover, the Supreme Court did not take into consideration all the evidences in the entirety of the matter pursuant to the practice of the ECtHR to provide sufficient reasons for the rejection of the submitted arguments or if its Judgments shows 'visible arbitrariness' ".*

35. In relation to the proceedings developed before his Employer, the Applicant added that: *"Grounded on the fact that the Applicant did not have the opportunity to use the effective legal remedy within his work organization due to the failure to provide the legal remedies in the respondent's decisions (notification on the termination of the employment at UNMIK Railways of date 17.10.2002) and failure to respond to the Applicant's written challenges, the Applicant was denied the opportunity to use effective remedies within the organization. Thus, the Applicant's fundamental right to effective appeal has been violated, a right guaranteed pursuant to Article 32 of the Constitution and Article 13 of the ECHR. Since the Applicant was denied the right to appeal within the employer, the judicial protection cannot be denied to the same and the courts should render merited decisions in relation to the Applicant's claim".*

36. As to the alleged inconsistencies in decision-making by the regular courts, the Applicant stated: *"Upon the changing of the adjudicating panels also changed opinions and stances pertaining to the same matter. How else can be understood the stances of the District Court (now Court of Appeals) and the Supreme Court on the same matter? If the claim would have been submitted out of the time limit, then certainly first the District Court and then the Supreme Court, when it decided the first time on 11.11.2004 would have rejected the Applicant's claim as out of time and not wait 8 long years and then render a totally opposite stance to the one from eight years ago".*

37. Furthermore, the Applicant requests the Court to: (i) to find the Referral admissible, (ii) to declare invalid Judgment Rev. No. 297/13 of the Supreme Court of Kosovo of 12 December 2013 and Decision Ac. No. 190/2013 of the

Court of Appeal of Kosovo of 12 July 2013 respectively, and (ii) uphold Judgment C. No. 1398/08 of the Municipal Court in Prishtina of 6 September 2012.

Assessment of admissibility

38. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

39. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

> *"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."*

40. 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".*

41. The Court further takes into account Rule 36 (2) (d) of the Rules of Procedure which foresee:

> *"(1) The Court shall declare a referral manifestly ill-founded when it is satisfied that:*
>
> ...
>
> *(d) the Applicant does not sufficiently substantiate his claim".*

42. As to the allegations regarding inconsistencies in decision-making of the regular courts made by the Applicant, the Court first of all notes that decisions in question relate to the period 1999-2005, meaning, that they were rendered under different circumstances and at a time when the Court had no temporal jurisdiction and are as such *ratione temporis* incompatible with the Constitution which entered into force on 15 June 2008. (See, for example, Case no. KI47/14, Applicant *Mustafë Zejnullahu,* Resolution on Inadmissibility of 11 August 2014, para.25).

43. The Court notes that the Applicant's allegation on inconsistency in decision-making of the regular courts is not a cogent one and sufficiently substantiated; but rather raises questions of interpretation and qualification of legal provisions which indeed falls in the domain of the regular courts conferred upon them by the Constitution and the law applicable in Kosovo.

44. The Court also notes that the regular courts have held that the Applicant's complaint was filed three months beyond the legal deadline which according to their interpretation precluded them to render a decision on the merits of the Applicant's case.

45. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

46. In this respect the Court reiterates that it is not its task to deal with errors of fact or law allegedly committed by a national court unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution. It may not itself assess the facts which have led the regular courts to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action (See *Garcia Ruiz v. Spain* [GC], No. 30544/96, para. 28 and also see *mutatis mutandis Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, and see Case no. KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

47. Moreover, the Referral does not indicate that the regular courts of the Republic of Kosovo acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Constitutional Court's task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way in which evidence were taken (See case *Edwards v. United Kingdom,* No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).

48. Bearing in mind all of the foregoing, the Court considers that the Applicant does not sufficiently substantiate his claim regarding the violation of rights guaranteed by the Constitution.

49. Consequently, the Referral is manifestly ill-founded and must be declared inadmissible pursuant to Rule 36 (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (2) (d) of the Rules of Procedure, on 28 January 2016, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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 **President of the Constitutional Court**

Ivan Čukalović Arta Rama-Hajrizi