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

Pristina, 29 December 2016
Ref. No.:RK 1027/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI84/15

Applicant

Selman Mustafa

Constitutional review of Judgment REV. 3 /2015 of the Supreme Court of the Republic of Kosovo of 28 April 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 is submitted by Selman Mustafa from Vushtrri (hereinafter: the Applicant), who is represented by Nexhat Beqiri, a lawyer practicing in Pristina.

Challenged decision

2. The Applicant challenges Judgment Rev. 3/2015 of the Supreme Court, dated 23 March 2015, by which his request for revision filed against Judgment Ac. No. 4895/2012 of the Court of Appeals in Pristina of 1 October 2014 was rejected.

3. The challenged decision of the Supreme Court was served on the Applicant on 23 May 2015.

Subject matter

4. The subject matter of the Referral concerns the constitutional review of Judgment REV. 3/2015 of the Supreme Court, which, according to the Applicant, *"is in contradiction with the International Convention for the Protection of Human Rights and Fundamental Freedoms, as in its Protocols, where the right to work of the citizen is regulated."*

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, in conjunction with Article 22 [Processing referrals] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 19 June 2015 the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 29 June 2015 the President, by Decision GJR. KI84/15, appointed Judge Ivan Čukalović as Judge Rapporteur and, by Decision KSH. KI84/15, the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Butosharova and Arta Rama-Hajrizi.

8. On 23 September 2015, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 14 March 2016, the Applicant replied to a number of questions of the Judge Rapporteur.

10. On 14 September 2016, after having considered the report of the Judge Rapporteur, the Review Panel recommended to the full Court to declare the Referral inadmissible, as manifestly ill-founded.

Summary of facts

11. At the beginning of the school year 2008/2009, the Applicant signed a contract to teach at the "Eqrem Çabej" Gymnasium in Vushtrri from 1 September 2008 to 31 August 2009.

12. By Decision 10 No. 467 of 21 October 2008, , the Director of the Directorate for Education and Culture of the Municipality of Vushtrri (hereinafter: the Director), pursuant to Article 35.1 (a) of Administrative Instruction No. 2003/2 on the application of UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo, notified the Applicant that his employment contract would be terminated, for the reason that the latter would complete his employment in the civil service on the day of reaching the age of 65 years, that is, on 28 October 2008.

13. To that effect, the Director had allegedly removed the end date of the contract (31 August 2009) by pencil and had changed it into 28 October 2008.

14. On 13 November 2008, the Applicant went to the Police Station in Vushtrri in order to report upon a case of "Falsifying Documents."

15. Against the Director's Decision, the Applicant appealed to the Independent Oversight Board (hereinafter: IOB), claiming that, pursuant to Administrative Instruction No. 18/2005 of 12 May 2005 on Amending Administrative Directive No. 345/2-1 of 2 March 2004 on Retirement of Teachers (hereinafter, the Administrative Instruction No. 18/2005) of the Ministry of Education, Science and Technology, the Director had entitled all other teachers to complete the school year, even though they had reached the age of 65 years, but had denied this right to him.

16. By Decision No. 333 of 18 February 2009, the IOB rejected the Applicant's appeal.

17. On 23 March 2009, the Applicant submitted an administrative claim to the Supreme Court, requesting it to annul Decision No. 333 of the IOB, for the reason that the IOB had not given any reasons for its rejection of the Applicant's Claim and had not explained whether Administrative Instruction No. 18/2005 of 12 May 2005 was still in force.

18. By Decision A. No. 244/2009 of 24 July 2009, the Supreme Court ruled that, since the case concerned an employment dispute, not the Supreme Court, but the municipal courts had jurisdiction to render a decision. As a consequence, the Supreme Court passed the case file on to the Municipal Court in Vushtrri.

19. On 17 December 2009, the Municipal Court in Vushtrri, by Judgment C.No.247/2009, granted the Applicant's statement of claim in its entirety and annulled Decision No. 333 of the IOB of 18 February 2009.

20. The Municipal Court reasoned that, *"[...] since the respondent* [the Municipality of Vushtrri] *had not submitted a reply to the claim within the legal deadline, the municipal Court had approved the claim."*

21. On 10 January 2010, the Municipality of Vushtrri filed an appeal with the District Court in Mitrovica, whereas the Applicant did not submit a response to the appeal within the legal time limit.

22. By Judgment Ac. No. 7/11 of 27 June 2011, the District Court in Mitrovica quashed the judgment of the Municipal Court in Vushtrri and remanded the case back to the Municipal Court for retrial.

23. In its judgment, the District Court reasoned that the Municipal Court in Vushtrri "[...] *should have scheduled a main review session and should have made it possible for the parties to have their case reviewed directly and publicly and based on the principle of objection, by considering the evidence.*"

24. On 21 December 2011, the Police Station Vushtrri addressed a letter to the President of the Municipal in Vushtrri, stating that, on 13 November 2008, the Applicant *[...] came to the Police Station in Vushtrri and wanted to report a case of falsifying documents.*" The letter continued that, "*after consultation with the Municipal Public Prosecutor, the Police was advised that there was no case to be investigated and that there was no criminal offence.*"

25. On 31 January 2012, the Municipal Court in Vushtrri, by Judgment C. No. 148/2011, partially granted the Applicant's claim and ordered the Municipality of Vushtrri to pay the Applicant two salaries as jubilee award as well as two average send-off salaries for the Applicant's retirement. In the Municipal Court's view, these salaries should be granted to the Applicant, *inter alia*, on the basis of Articles 43 and 44 of the General Collective Contract, which was in force since 1 January 2005.

26. The Municipal Court rejected the remaining part of the claim by which the Applicant had requested that the Municipality should pay him a personal income starting from 1 November 2008 until 31 August 2012.

27. As to the Applicant's claim that Administrative Instruction No. 18/2005 of 12 May 2005 was not applied in his case, the Municipal Court held that the Administrative Instruction was a lower act than the law which provided that the time of retirement was at the age of 65 years for civil servants and that, at the time of the retirement of the Applicant, the law was applicable by which teachers had the status of civil servants.

28. Both the Applicant and the Municipality of Vushtrri appealed to the Court of Appeals which, by Judgment AC. No. 4895/2012 of 1 October 2014, rejected the Applicant's appeal as ungrounded and granted the appeal of the Municipality of Vushtrri.

29. The Court of Appeals held that the Applicant had acquired the right to an old-age pension on 28 October 2008, at the time when UNMIK Regulation No. 2001/35 was applicable for pensions in Kosovo, whereas the payment of send-off salaries for retirement was not foreseen by any Article.

30. Furthermore, the Court of Appeals considered that the General Collective Contract, which was applied in Kosovo from 1 November 2005, was never applied to civil servants, such as the Applicant, who was a teacher.

31. On 1 October 2014, the Applicant submitted a request for revision to the Supreme Court, claiming, inter alia, that, if the Court of Appeals had applied the substantive law correctly and completely, it would not have rendered such a Judgment.

32. The Applicant further held that, on the basis of Administrative Instruction No. 18/2005 which had been in force at the moment of the termination of his employment relationship, it had to be concluded that the Administrative Instruction had been violated.

33. He, therefore, requested *"the Supreme Court to review the challenged Judgment ex officio, also in some part where it was not challenged by this revision."*

34. On 23 March 2015, by Judgment Rev.3/2015 the Supreme Court rejected the Applicant's request as ungrounded, reasoning, *inter alia*, that the Collective Agreement had entered into force on 1 January 2005 and had been applicable until 1 January 2008, whereas the Applicant retired on 28 October 2008. Therefore, at the time of the Applicant's retirement, the Collective Agreement was no longer applicable.

35. The Supreme Court further held that the second instance court, by rejecting the statement of claim of the Applicant, had correctly applied the substantive law.

36. The Supreme Court concluded that the Applicant was also not entitled to the reimbursement of ordinary damage and lost profit under Article 189 (1) of the Law on Obligations, because after the termination of his employment the Applicant, due to his retirement on 28 October 2008, did no longer work and, therefore, was not entitled to a compensation for damage or lost profit.

Applicant's allegations

37. The Applicant alleges that, at the beginning of the school year 2008/2009, he had signed a contract as a teacher with the starting date of 1 September 2008 and the expiration date of 31 August 2009.

38. According to the Applicant, on 30 October 2008, after the commencement of the school year a decision on retirement was served on him and his employment contract, wherein the Director of Education had erased the original date of expiry [31 August 2009] and replaced it by a different date [28 October 2008], was terminated.

39. As a result, the Applicant denounced the case to the police and started an administrative procedure followed by a procedure before the regular courts.

40. As to his claims before the regular courts, the Applicant argued that, at the moment of the termination of his employment relationship [on 28 October

2008], Administrative Instruction 18/2005 of the Ministry of Education, dated 12 May 2005, was in force, providing in its Article 1, item 1.1 : "*Mandatory age of retirement is sixty-five (65) years*" and in item 1.2 : "*For teachers who meet the conditions for retirement, after the beginning of the academic/school year, the legal provisions of Article 1.1 are not applied at the moment of reaching 65 years, but their employment contract is extended until the end of the academic/school year.*"

41. In the Applicant's opinion, "[...] *the courts have violated Administrative Instruction No. 18/2005* [...] *which foresees the manner of retirement of teachers.*

42. The Applicant further claims that the Supreme Court's Judgment *"is in contradiction with the International Convention on the Protection of Human Rights and Fundamental Freedoms, as in its protocols, where the right to work of the citizen is regulated, which is one of the fundamental rights; furthermore this Convention is directly applicable with the Constitution of the Republic of Kosovo."*

43. The Applicant also alleges that "*the Supreme Court applied the substantive law erroneously, since our* [his] *request was not a request for compensation of damages and earnings lost."*

Admissibility of the Referral

44. The Court must first examine whether the Applicant has met the requirements of admissibility which are foreseen by the Constitution and as further specified by the Law and Rules of Procedure.

45. In this regard, the Court refers to Article 113.7 of the Constitution which stipulates:

> *"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."*

46. 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 a public authority is subject to challenge".*

47. The Court also takes into account Rule 36 (1) (d) and (2) (b) of the Rules of Procedure which foresees:

> *"(1) The Court may review referrals only if: (d) The referral is prima facie justified or not manifestly ill-founded."*
>
> *"(2) The Court shall reject 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."*

48. The Court notes that Applicant claims a violation of *"the International Convention for the Protection of Human Rights and Fundamental Freedoms, wherein the right to work is guaranteed pursuant to this Convention, which is directly foreseen by the Constitution of Kosovo and the Convention mentioned above ."*

49. Moreover, in the Applicant's view, Judgment Rev.3/2015 of the Supreme Court of 23 March 2015, relating to Decision P. no. 42/2013 of the Basic Court in Mitrovica of 26 August 2014 and Decision PAKR. No. 463/2014 of the Court of Appeals of 6 November 2014, also violated his right to work.

50. However, in respect of these allegations, 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 or other public authorities, unless and in so far they may have infringed rights and freedoms protected by the Constitution (constitutionality).

51. Therefore, the Court cannot act as a court of fourth instance in respect of decisions taken by the regular courts or other public authorities, since it is their role, when applicable, to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis*, *García Ruiz v. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28. See also Constitutional Court case No. KI70/11, *Applicants Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

52. The Constitutional Court can only consider whether the proceedings in general and viewed in their entirety have been conducted in such a way that the Applicant has had a fair trial. (See, *inter alia*, *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission of Human Rights of 10 July 1991).

53. In this respect, the Court notes that, in all proceedings, the Applicant was assisted by a lawyer and that the courts carefully looked at the arguments and thoroughly reasoned their decisions.

54. In these circumstances, the Constitutional Court considers that the proceedings before the District Court, the Court of Appeals and the Supreme Court were fair and well-conducted (See, *mutatis mutandis, Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009) and that the Applicant has not specified how *"the internal and international legal provisions"* referred to by him, were violated, as required by Article 113.7 of the Constitution and Article 48 of the Law.

55. Moreover, the Court considers that the Applicant has neither substantiated his claim, nor has he submitted any evidence that the Supreme Court has violated his right to work.

56. Furthermore, the Applicant has not specified how the Constitution was violated, as required by Article 113.7 of the Constitution and Article 48 of the Law.

57. Therefore, the Court concludes that the Referral is manifestly ill-founded, on a constitutional basis, and is inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 14 September 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; and

IV. This Decision is effective immediately;

Judge Rapporteur **President of the Constitutional Court**

Ivan Čukalović Arta Rama-Hajrizi