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

Prishtina, 24 November 2014
Ref. No.: RK734/14

RESOLUTION ON INADMISSIBILITY

in

Case no. KI09/14

Applicant

Skender Çoçaj

Constitutional review of the Decision of the Supreme Court of Kosovo, Rev.399/2012, dated 22 August 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge, and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Skender Çoçaj, resident outside of Kosovo. He is represented by Vahide Braha, a lawyer resident in Prishtina.

Challenged decision

2. The Applicant challenges the Decision of the Supreme Court of Kosovo, Rev. 399/2012, dated 22 August 2013. This decision was served on the Applicant on 07 October 2013.

Subject matter

3. The Applicant alleges that the aforementioned Decision of the Supreme Court violated his constitutional rights as guaranteed by Article 49 [Right to Work and Exercise Profession], Article 24 [Right to Equality Before the Law], and Article 31 [Right to a Fair Trial] of the Constitution, and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights.

Legal basis

4. 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 the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 56, paragraph 2, of the Rules of Procedure (hereinafter: the Rules).

Proceedings before the Constitutional Court

5. On 23 January 2014, the Applicant submitted the Referral to the Court.

6. On 07 February 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 26 February 2014, the Referral was communicated to the Supreme Court.

8. On 15 September 2014, the President appointed Judge Kadri Kryeziu to replace Judge Robert Carolan on the Review Panel.

9. On 16 September 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 from 19 November 1973 the Applicant was employed on an indefinite contract of employment as a Bailiff with the Municipal Court of Prishtina.

11. During the war in 1999, the Applicant fled first to Macedonia and subsequently to Australia. He returned to Kosovo at some point in 2000, following the end of the war. Following his return, the Applicant reported for work in order to continue his duties as Bailiff at the Municipal Court of Prishtina. However, he

was not reinstated. Allegedly, other former workers at the Municipal Court of Prishtina had been reinstated.

12. At some point in 2000, the Applicant suffered a heart attack and returned to Australia for medical treatment. Over the course of the following years, he continued to receive medical treatment, but returned to Kosovo on various occasions in order to seek to be reinstated in his job, but without success.

13. Between 2004 and 2007, the Applicant applied on several occasions to vacancy announcements published by the Kosovo Judicial Council for Bailiff positions with the Municipal Court of Prishtina. However, the Applicant apparently never received any notification from the Kosovo Judicial Council regarding his various applications.

14. On 09 February 2009, the Applicant filed a claim against the Kosovo Judicial Council, requesting that his indefinite employment relationship from 1973 as Bailiff with the Municipal Court of Prishtina be confirmed. The Applicant claimed that his indefinite employment relationship had never been terminated, and that under the Applicable Law as established by UNMIK, his employment contract from 1973 was still valid.

15. On 19 January 2011, with Judgment C.no.276/09, the Municipal Court of Lipjan rejected the Applicant's claim as ungrounded. The Municipal Court reasoned that the establishment of UNMIK following the war had created a new legal reality. The Court stated, *inter alia,* that:

"As a consequence of UNMIK Regulation no. 1999/1, Section 1, which explicitly provides that all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General, and based on UNMIK Regulation no. 1999/6, On Recommendations for the Structure and Administration of Judicial and Prosecutorial Services, and UNMIK Regulation 1999/7, On the Appointment and Dismissal of Judges and Prosecutors, it is established that the continuity of the Municipal Court in Prishtina, and other courts, was suspended and restarted with the entry into effect of these Regulations, and, therefore, the allegation of the claimant of having been under a permanent employment relationship as bailiff with the Municipal Court of Prishtina, since 19 November 1973, is not founded. Based on these Regulations, with the establishment of new judicial system, all competencies were vested exclusively in UNMIK, repectively the SRSG."

16. On 13 September 2012, with Judgment AC.no.275/2011, the District Court of Prishtina, rejected as ungrounded the Applicant's appeal against the decision of the Municipal Court of Lipjan. The Applicant submitted a request for Revision to the Supreme Court.

17. On 22 August 2013, with Judgment Rev.no.399/2012, the Supreme Court rejected the Applicant's request for Revision as ungrounded. The Supreme Court agreed with the lower instance courts that the quoted UNMIK

Regulations had terminated the continuity of the judicial system and, thereby, also the status of the Applicant's contract of employment. The Supreme Court found that,

"[...] the second instance court fairly applied the material law when finding that the first instance court had fairly and fully ascertained the factual situation, [...]"

Applicant's allegations

18. The Applicant claims that the Supreme Court and the lower courts incorrectly determined the law applicable in Kosovo under the authority of UNMIK. The Applicant points out that under UNMIK Regulation no. 1999/1, as well as under UNMIK Regulation no. 1999/24, the laws that had applied on the territory of Kosovo prior to 24 March 1999, respectively 22 March 1989, continued to apply. He states that his contract of employment was regulated by Yugoslav Law, specifically the law published in the Official Gazette no. 60/89 and no. 42/90, which stipulated in Article 78 that,

    "The decision on termination of the working relationship of the employee, including the reasons for such a decision, shall be sent to the employee in writing, and containing an instruction on the right to file an appeal."

19. On the basis of the continuous validity of this law, the Applicant claims that his contract of employment had also continued to be valid, because he had never received a written notice of termination. As such, he, therefore, alleges that his right to work as a bailiff at the Municipal Court of Prishtina, as guaranteed by Article 49 of the Constitution, was violated.

20. Furthermore, the Applicant notes that other employees of the Municipal Court of Prishtina were in fact reinstated following the war. As such, he alleges that he has not been treated equally with his former colleagues, in violation of Article 24 of the Constitution.

21. Finally, the Applicant claims that, because of their interpretation of the UNMIK Regulations establishing the law applicable in Kosovo, and by disregarding the unequal treatment to which he was subjected, the Supreme Court and the lower courts have failed to provide him with a fair proceeding on his claim against the Kosovo Judicial Council, in violation of his right to a fair trial as guaranteed by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights.

Assessment of the admissibility of the Referral

22. 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.

23. 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."

24. The final decision on the Applicant's case is the Decision of the Supreme Court Rev.no.399/2012 dated 22 August 2013. As a result, the Applicant has shown that he has exhausted all legal remedies available under the law.

25. 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.399/2012 dated 22 August 2013, which was served on the Applicant on 7 October 2013, whereas the Applicant submitted the Referral with the Court on 23 January 2014, meaning that the Referral has been submitted within the four month deadline prescribed by the Law and Rules of Procedure.

26. 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).

27. 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).

28. 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 District Court of Prishtina and before the Supreme Court. 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).

29. Furthermore, the Court notes that the Applicant 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. 399/2012 the Supreme Court merely confirmed that the

Applicant's specific employment dating from 1973 to 1999 had come to an end. 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.

30. 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.

31. 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), (a) and (d) and 56 (2) of the Rules of Procedure, on 16 September 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