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

Prishtina, 18 November 2013
No. ref: RK492/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI103/13

Applicant

Mazllum Zena

Constitutional review of the Judgment of the Supreme Court, Rev. No. 297/2010 of 2 May 2013 and the Judgment of the District Court in Peja AC. no. 73/2009 of 28 June 2010

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
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Mazllum Zena, from village Malësi e vogël (Radostë), Municipality of Rahovec.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court, Rev. no. 297/2010 of 18 April 2013 and Judgment of the District Court of Peja AC. no. 73/2009 of 28 June 2010. The Judgment of the Supreme Court Rev. no. 297/2010 was served on the Applicant on 25 June 2013.

Subject matter

3. The subject matter of this Referral is the constitutional review of the Judgment of the Supreme Court, Rev. no. 297/2010 of 2 May 2013 and of the Judgment of the District Court of Peja AC. no. 73/2009 of 28 June 2010, regarding the alleged violation of the right to work.

Legal basis

4. Article 113.7 of the Constitution, Article 47 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008, which entered into force on 15 January 2009 (hereinafter: the Law) and Rule 56 (2) of the Rules of Procedure of the Constitutional Court (hereinafter: Rules of Procedure).

Proceedings before the Constitutional Court

5. On 16 July 2013, the Applicant submitted the Referral to the Constitutional Court.

6. On 5 August 2013, the President appointed Deputy President Ivan Čukalović, as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova (member) and Arta Rama-Hajrizi (member).

7. On 13 September 2013, the Constitutional Court, through the Secretariat notified the Applicant and the Supreme Court on the registration of the Referral.

8. On 16 October 2013, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts

9. On 1 June 2002, the Applicant concluded employment contract (contract: No. 630, of 24 June 2002) with the Regional Water Supply Company of Hidrosistemi Radoniq in Gjakova (hereinafter: Employer). According to the employment contract No. 630, Mr. Mazllum Zena was assigned in the job position Cash collector/Fitter, for fixed-term period, from 1 June 2002 until 31 August 2002, in order that after three months his employment relationship be turned into indefinite time, if the latter performs his work duties in accordance with the terms and conditions provided in the contract.

10. On 25 July 2002, the Applicant received remark for non-submission and non-reconciliation of bills as well as of his poor performance in work under 37 %. By the last remark, before his possible dismissal, he was asked to reach the collection of financial means over 70% and improvement of his behavior with the consumers.

11. On 5 November 2003, the Employer (notification: no. 2008) terminated to Applicant his employment relationship, due to irregularities found in the area where the Applicant collected financial means.

12. On 19 November 2003, the Applicant filed an appeal against the notification No. 2008, by his Employer, respectively, the director of the company in question, due to: a) violation of the Law on administrative procedure, b) erroneous determination of factual situation and c) violation of substantive law. The Employer did not respond to the Applicant's appeal.

13. On 10 December 2003, the Applicant filed a claim in the Municipal Court in Gjakova against the Employer's notification no. 2008, as the Applicant claimed, because the Employer has terminated his employment relationship, without initiating disciplinary procedure, therefore he called the notification on termination of employment relationships unlawful.

14. On 30 September 2004, the Municipal Court in Gjakova, (Judgment: C.no. 876/2003), approved the Applicant's claim as grounded and annulled as unlawful the Employer's decision no. 2008, obliging the Employer to reinstate the Applicant to his previous job position "Cash collector/Fitter" with all rights deriving from the employment relationship. The reasoning of the judgment is as following:

> *"Based on the determined factual situation and UNMIK Regulation no. 2000/49 of 19 August 2000 on the establishment of the Administrative Department of Municipal Public Services, Article 1.2, the department is responsible for supervision of leadership and regulation of matters that have to do with municipal public services in Kosovo which include supply, transfer and use of water supply, which can be offered by public, private or other institutions that provide such services. From this, it follows that according to UNMIK Regulation no. 2001/27, Article 1.2, the employment relationship in the public service cannot be regulated by that regulation. In this aspect in order to terminate the employment relationship to the employee the disciplinary procedure should have been initiated by respective authority, the violations of work duties or possible irregularities should have been verified, which would make the employee responsible and then to impose the disciplinary measure".*

15. Against this judgment, the Employer filed an appeal to the District Court in Peja.

16. On 5 December 2005, the District Court in Peja (Judgment: AC. no. 8/2005) modified the Judgment of the Municipal Court in Gjakova C. no. 876/2003 of 30 September 2004 and rejected the Applicant's claim as ungrounded, by which

he requested the annulment of the Employer's decision No. 2008 of 5 November 2003).

17. The Applicant filed revision to the Supreme Court against the Judgment of the District Court in Peja Ac. no. 8/2005, due to substantial violation of the contested procedure and erroneous application of substantive law.

18. On 21 June 2006, the Supreme Court (Judgment Rev. no. 43/2006), approved the revision filed by the Applicant as grounded and decided that the matter to be returned to the District Court in Peja for retrial, due to incomplete determination of factual situation. The reasoning of the judgment is as follows:

> *"Starting from such a situation of the matter, the Supreme Court of Kosovo found that such a stance of the second instance court cannot be accepted for the time being, as correct and lawful, since according to the assessment of this court of revision, due to erroneous application of the substantive law the factual situation has not been determined, for which reasons there are no conditions to amend the challenged judgment pursuant to the provision of Article 395 paragraph 1 of LCP, therefore, pursuant to paragraph 2 of this Article in conjunction with Article 399 and 374 of this law, the challenged judgment had to be quashed and the matter to be returned to the same court for retrial.*
>
> *[...]*
>
> *Regarding the termination of the employment contract due to serious cases of misconduct or unsatisfactory performance of work duties provided by Article 11.2 of the Regulation on Essential Labor Law in Kosovo (RELLK), the challenged judgment does not contain reasons which have to do with serious cases of misconduct or unsatisfactory performance and by which evidence it was determined in the first instance court due to the fact that the first instance court has not concluded that by administered evidence was not determined such a situation which may present ground for termination of employment relationship of the claimant. In cases when this provision is applied pursuant to Article 11.5 of this regulation a), the employer will notify the employee in written on his intent to terminate the employment relationship including the reasons for termination of such contract and will have a meeting with the employee to explain verbally to him the reasons for termination of the contract. In case the employee is member of any trade union, the employee is entitled to have present in the meeting also a representative of the trade union. In the procedure of the first instance has not been determined the fact that it was acted according to these provisions, therefore it is not sufficient that the employee is sent a written remark stating possible violations of his work duties or serious cases of misconduct, but pursuant to abovementioned provisions of this regulation the facts about these violations should be determined, respectively and the employee to be notified about them and to propose the court the evidence by which such facts were determined".*

19. On 15 June 2007, the District Court in Peja (Judgment: AC.no. 333/2006), modified again the Judgment of the Municipal Court in Gjakova C. no. 876/2003 of 30 September 2004 and returned the case to the same court for retrial.

20. On 19 June 2008, the Municipal Court in Gjakova (Judgment C. no. 422/2007), approved again the Applicant's claim as grounded and annulled as unlawful the Employer's decision no. 2008 of 5 November 2003, obliging the Employer to reinstate the Applicant to his previous job position as Cash collector/Fitter, with all rights deriving from employment relationship, from the day this decision became final.

21. The Employer filed an appeal to the District Court in Peja against the Judgment of the Municipal Court of Gjakova,C. no. 422/2007 of 19 June 2008.

22. On 28 June 2010, the District Court in Peja (Judgment: AC.no. 73/2009), modified the Judgment of the Municipal Court in Gjakova C1. no. 422/2007, of 19 June 2008 and rejected as ungrounded the Applicant's claim, by which he requested the annulment of the Employer's decision No. 2008 of 5 November 2003. The following is the reasoning of the Judgment:

23. The Applicant filed revision in the Supreme Court against the Judgment AC.no. 73/2009 of 28 June 2010 of the District Court in Peja, due to substantial violation of the contested procedure provisions and erroneous application of substantive law.

24. On 2 May 2013, the Supreme Court (Judgment Rev. no. 297/2012) rejected as ungrounded the revision filed by the Applicant, upholding the Judgment of the District Court of Peja, AC. no. 73/2009 of 28 June 2010, due to the following reasons:

> *"The Supreme Court of Kosovo assesses that the court of second instance has correctly concluded that the court of first instance has completely determined the factual situation in which has erroneously applied the substantive law, when it found that the claim of claimant is grounded. Judgment does not contain substantial violations of contested procedure provisions, which this court notices ex-officio.*
>
> *The court of second instance has given sufficient reasons on crucial facts, which this court also admits, by which is not put into doubt the legality of the appealed judgment. The court of second instance has correctly applied the substantive law when it found that legal terms and conditions as stipulated by Article 11.1 item (ç), Article 11.3 item (b) of Essential Labor Law of Kosovo were fulfilled in order to terminate to the claimant the employment relationship due to dissatisfactory performance of work duties, which include the repeated mistakes due to which is disrupted the normal course of employment relationship, situation in the company, his file and the last warning dated 25.07.2003, due to inefficiency of work, respectively low cash collection, due to passiveness at work and his behaviors with customers.*
>
> *Due to these violations, the claimant is reprimanded by the last warning in written, which is given as a last warning prior to dismissal. Behaviors with customers are proved by the facts that are found in the case files such as: requests submitted to the respondent by customers as well as the invoices*

for payment of debt by customers, since in the evidence of the respondent they are registered as debtors.

This court assesses that the respondent in entirety acted on this case pursuant to Article 11.5 item (a) and item (b) of the abovementioned law, particularly according to item (b) by which it is foreseen that the employer will organize a meeting with the employee in which case the employer explains verbally to the employee the reasons of termination of contract. In case the employee is a member of the trade union he has the right that a trade union representative to be present in the meeting. In the case of claimant the notice for termination of employment relationship was communicated to the claimant in the presence of the trade union representative to whom it was submitted this notice translated by a translator".

Applicant's allegations

25. The Applicant alleges that the judicial authorities in their decisions violated his rights guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution.

26. The Applicant requests from the Constitutional Court to quash the Judgment of the Supreme Court Rev. no. 297/2012 of 2 May 2013 and Judgment of the District Court in Peja AC.nr. 73/2009 of 28 June 2010, due to their partiality.

Admissibility of the Referral

27. In order to be able to adjudicate the Applicants' Referral, the Court needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, as further specified in the Law and the Rules of Procedure of the Court.

28. The Court needs first to determine whether the Applicant is authorized party to submit a Referral with the Constitutional Court in accordance with the requirements of Article 113 paragraph 1 and 7 of the Constitution. The Applicant in this case is legal entity and has shown that is authorized party as required by the abovementioned constitutional provisions.

29. The Court also determines whether the Applicant has proved that he met the requirements of Article 113.7 of the Constitution and Article 47.2 of the Law, regarding the exhaustion of legal effective remedies. The Applicant has submitted to the Court sufficient evidence for fulfillment of the requirement as provided by Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 36.1 (a) of the Rules of Procedures.

30. Furthermore, the Applicant must prove that he met the requirements of Article 49 of the Law and Rule 36.1 (b) of the Rules of Procedure, regarding the submission of the Referral within provided legal time limit. It is clear from the case file that the last decision on the case of the Applicant is the Judgment of the Supreme Court, Rev. no. 228/2012, of 2 May 2013, which was served on him on 25 June 2013. The Applicant submitted the referral on 16 July 2013, which

means that Referral was filed within four 4 (four) month provided by the above mentioned provisions.

31. The Court also assesses whether the Applicant has specified and clarified in his Referral what rights and freedoms he claims that have been violated to him (Article 48 of the Law), by what act and what court or public authority. The Applicant mentioned in his Referral Article 49 of the Constitution and violation of fundamental human rights, alleging that abovementioned rights have been violated by the challenged decisions of the court authorities.

32. However, the Applicant should convincingly substantiate that the facts he claims that have caused violation of his rights and freedoms, guaranteed by the Constitution, constitute incontestably, in their essence, the elements of the violation of a right.

33. In this respect, the Court also refers to Rule 36.1 (c) and Rule 36 (2) of the Rules of Procedure which provides:

"(1) The Court may only deal with Referrals if:

[...]

c) the Referral is not manifestly ill-founded.

(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

a) the Referral is not prima facie justified, or

b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights,

c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

d) when the Applicant does not sufficiently substantiate his claim".

34. The Court reiterates that one of the admissibility requirements of the Referral, is whether the Applicant's Referral is manifestly founded in order that this Court goes into its merits.

35. The Court notes that the Applicant has not proved in any manner that the challenged judgments contain violations of Article 49 and violation of fundamental human rights, guaranteed by the Constitution. He did not clarify why and how the court authorities have violated his rights from the abovementioned provisions of the Constitution.

36. It is not sufficient that the Applicant refers his allegation for violation of a constitutional right, by mentioning the Article, by which he alleges that his rights were violated. The allegation for violation of constitutional rights has to

be referred on the constitutional grounds, in order that the Referral is grounded.

37. The Supreme Court on this case gave sufficient reasons in its judgment, by reviewing and analyzing in entirety the circumstances of the case, based on which it has decided to uphold the Judgment of the second instance court, which is full jurisdiction of that court to assess the legality of the court decisions rendered by the lower instance courts.

38. Duty of the Constitutional Court regarding the alleged violations of the constitutional rights is to assess whether the proceedings, in their entirety were fair and in compliance with the protection, explicitly provided in the Constitution. Thus, the Constitutional Court is not a court of fourth instance, when considering the decisions taken by lower instance courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law *(See, mutatis mutandis, Garcia Ruiz against Spain [GC], no. 30544/96, paragraph. 28, European Court of Human Rights [ECHR] 1999-I).*

39. In the present case, the Applicant has not provided any *prima facie* evidence which indicate that the alleged violations, mentioned in the Referral, constitute incontestable elements of violation of constitutional rights *(see Vanek vs. Slovak Republic, ECHR Court on admissibility, Application no. 53363/99 of 31 May 2005).*

40. Therefore, the Court cannot consider that the pertinent proceedings in the Supreme Court and in other instance courts were in any way unfair or arbitrary *(see, mutatis mutandis, Shub v. Lithuania, ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).*

41. From the reasons above, the Court notes that the Applicant's Referral does not meet the admissibility requirements either on the ground of admissibility or on the merits, because the Applicant failed to prove that by the challenged decision were violated his rights and freedoms, guaranteed by the Constitution.

42. In sum, the Court concludes that the Applicant's Referral is manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, pursuant to Article 48 of the Law and pursuant to Rule 36 (2) b) and d) and Rule 56 (2) of the Rules of Procedure, on 16 October 2013, unanimously

DECIDES

I. TO REJECT 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. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Ivan Čukalović Prof. Dr. Enver Hasani