



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

Prishtina, 26 June 2014
Ref. no.:AGJ648/14

JUDGMENT

in

Case no. KI10/14

Applicant

Joint Stock Company Raiffeisen Bank Kosovo J.S.C.

**Request for constitutional review of
Judgment CN. No. 7/2013 of Supreme Court of Kosovo,
dated 19 October 2013**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

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

Applicant

1. The Referral was filed by the Joint Stock Company Raiffeisen Bank Kosovo J.S.C., based in Prishtina (hereinafter, the Applicant), represented by Mr. Dastid Pallaska, a practicing lawyer from Prishtina.

Challenged decision

2. The challenged decision is Judgment CN. No. 7/2013 of Supreme Court of Kosovo, of 19 October 2013, which allegedly was taken without informing and summoning the Applicant to take part in the proceedings on a request for return to previous situation.
3. The Judgment was served on the Applicant on 5 December 2013

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly “*violated constitutional rights of Applicant guaranteed by Article 3.2 [Equality before the Law], Article 24.1 [Equality before the Law], Article 31 [The right to fair and impartial trial] of the Constitution of the Republic of Kosovo and Article 6 of European Convention for Protection of Human Rights and Fundamental Freedoms*” [hereinafter, the ECHR].

Legal basis

5. The Referral is based on Articles 21 (4) and 113 (7) of the Constitution of Republic of Kosovo (hereinafter, the Constitution) and Article 47 of the Law No. 03/L-121 on Constitutional Court (hereinafter, the Law).

Proceedings before the Constitutional Court

6. On 28 January 2014, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 7 February 2014, the President of the Court appointed the Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy, Kadri Kryeziu and Arta Rama-Hajrizi
8. On 10 February 2014, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 20 May 2014 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

Summary of facts

10. On 18 June 2002, the American Bank of Kosovo, as legal predecessor of the Applicant (hereinafter, the predecessor of the Applicant), signed an employment contract with E. N. citizen of Kosovo. Article 1 of this contract provided a duration of 3 months as probation work. During that period, both parties had the right to

terminate the contract with 24 hours notice, without any reimbursement or compensation.

11. On 13 September 2002, the predecessor of Applicant sent to E. N. a notice in relation to termination of contract, recognizing to him the right of payment until the end of September and a bonus salary for October 2002.
12. On 30 October 2002, E. N. submitted to the Applicant a request for review of the decision for non-extension of contract in order to engage him in a Branch of the Applicant, in one of the Kosovo cities.
13. On 10 November 2002, the Applicant confirmed that the decision for non-extension of employment contract was final.
14. On 21 November 2002, E. N. requested the Municipal Court in Prishtina to quash the Decision on termination of employment contract.
15. On 14 October 2009, the Municipal Court (Judgment No. C1. 32/2006) approved as grounded the claim of E. N. and annulled the Decision of the Applicant of 10 November 2002.
16. On 8 December 2009, the Applicant appealed the Judgment of the Municipal Court, due to erroneous and incomplete determination of factual situation and erroneous application of substantive law.
17. On 16 September 2011, the District Court in Prishtina (Judgment Ac. No. 118/2010) approved as grounded the appeal of Applicant and modified the Judgment of Municipal Court. The District Court reasoned that *“the first instance court based on reviewed evidence determined correctly the factual situation and in the reasoning of the appealed judgment presented complete and understandable reasons in relation to crucial facts, however has erroneously applied the substantive law whereby assessed that the statement of claim of claimant is grounded”*.
18. On 12 October 2011, E. N. filed a revision with the Supreme Court, due to erroneous application of substantive law.
19. On 03 November 2013, the Applicant submitted a written response on the Revision, stating that E. N. was fully aware of the conditions of the labor contract and indicating that in similar circumstances in the case Rev 49/2005, the Supreme Court decided to refuse the revision and that this decision should be considered in reviewing the E. N. case.
20. On 21 January 2013, the Supreme Court (Rev. No. 333/2011) rejected the revision as out of time. The Supreme Court concluded that Judgment of District Court was received by the representative of E. N. on 3 September 2011, whereas the request

for Revision was submitted on 12 October 2011, meaning 9 days after the established deadline of 30 days.

21. E. N. filed with the Supreme Court a request to return to the previous situation.
22. On 19 October 2013, the Supreme Court rendered the challenged Judgment C. no. 7/2013, approving the request of E. N. for returning to the previous situation. The judgment notes that the representative of E. N. received the Judgment of District Court on 1 October 2011, whereas the date 3 September 2013 was written in the returning receipt. The Revision was submitted on 12 October 2011. Thus the Supreme Court concluded that Revision was submitted within 30 days, as it is required pursuant to Article 211 of Law No.03/L-006 on Contested Procedure.
23. The operative part of the challenged judgment reads as follows:

“I. The request of claimant for returning to previous state IS ADMISSIBLE, whereas the ruling of Supreme Court of Kosovo Rev. no. 333/2011 of 21.01.2013 is quashed.

II. The revision of claimant filed against judgment of District Court in Prishtina, Ac. no. 118/2010 of 16.09.2011 is approved as grounded, so that the Judgment of District Court in Prishtina Ac. no. 118/2010 of 16.09.2011 IS MODIFIED, whereas judgment of Municipal Court in Prishtina Ci. no. 32/2006 of 14.10.2009 remains applicable in part I of enacting clause, which refers to annulment of decision of the respondent of 10.11.2002, based on which in the review procedure according to the request of claimant is approved the first instance decision of 13.09.2002, based on which to the claimant was terminated the employment relationship and the part II of enacting clause, which refers to obligation of the respondent to return the claimant to the previous workplace, which corresponds to his professional background.

Part II of enacting clause, of judgment of Municipal Court in Prishtina, CI. no. 32/2006 of 14.10.2009, in the part, which refers to return of claimant to work with all rights stemming from employment relationship from 01.10.2002, within 7 days, from the day of rendering this judgment, IS QUASHED, and the case is remanded to first instance court for retrial.

Part III of enacting clause of judgment of Municipal Court Prishtina, CI. no. 32/2006 of 14.10.2009, which refers to the expenses remains un reviewed”.

Applicant’s allegations

24. The Applicant claims that the challenged Judgment constitutes a violation of Article 3.2 [Equality before the Law], Article 24.1 [Equality before the Law], Article 31 [The right to fair and impartial trial] of the Constitution and Article 6 of Convention for the Protection of Human Rights and Fundamental Freedoms

25. The Applicant alleges that the Supreme Court has seriously violated the contradictory principle, because it declared as admissible the E. N. request for return to the previous situation, without informing and summoning the Applicant to take part in the procedure.
26. The Applicant further founds its reasoning on the basis of the Court case law, namely on cases KI103/10 and KI108/10.
27. In the end, the Applicant requests the Court to “*Declare invalid the Judgment of Supreme Court of Kosovo CN. No. 7/2013 of 19 October 2013, and remand the case for review in compliance with Judgment of Constitutional Court*”.

Admissibility of the Referral

28. First of all, the Court examines whether the Applicant has fulfilled the Referral admissibility requirements.
29. In that respect, the Court refers to Article 113 of the Constitution, which establishes:
 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 exhausting all legal remedies provided by law.*
30. In addition, the Court also refers to Articles 48 and 49 of the Law, which provide what follows.

Article 48

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.

Article 49

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision.

31. In this regard, the Court notes that the Applicant is an authorized party, filed the Referral within the timeline of 4 months as provided by law, has exhausted all legal

remedies provided by law, and has accurately clarified what rights and freedoms have been violated as well he has indicated the challenged act of public authority.

32. Therefore, the Referral meets the requirements of admissibility.

Relevant legal provisions on the request to Return to the Previous Situation

33. The request to Return to previous situation is regulated by the Law No. 03/L-006 on Contested Procedure, of 20 September 2008, namely in the Articles that follow.

Article 129

1. When the party does not take part in the proceeding or misses the due date for Completion of any procedural action and due to this it loses the right to complete the procedural action bound to the prescribed period of time, the court may permit this party to complete this action with delay if there are reasonable circumstances which cannot be determined or avoided.

2. If the return to previous situation is permitted, the contentious procedure returns to the situation in which was before failure to act and all the decisions rendered to the court due to failure to act are cancelled.

Article 131

The return to previous situation shall not be permitted if the period for submission of proposals for return to previous situation is not met or the party did not show himself at the proceeding for review of the proposal for return to previous situation.

Article 132

1. Proposal for return to previous situation, in general, shall not influence the proceeding but the court may order to halt the proceeding until the decision on proposal is rendered.

2. If the proposal for return to previous situation is presented during the proceeding of the second instance, the court of first instance shall inform the court of second instance on the proposal.

Article 133

1. The court rejects by rendering a decision the proposal that is submitted after the prescribed period of time or the non-permitted proposal for return to previous situation.

2. The court initiates the proceeding only when the party expressively proposes return to previous situation. The court shall not initiate a proceeding if the facts of the proposal are widely known. The court acts in the same way also when the proposal is based on clearly unfounded facts or when the court has

sufficient evidence in the file of the subject to render the decision for return to previous situation.

3. The appeal against the decision which allows return to previous situation shall not be permitted.

4. The appeal against the decision for rejection of proposal for return to previous situation shall not be permitted unless the decision is rendered due to absence of the defendant in the proceeding.

Substantive legal aspects of the Referral

34. As stated earlier, the Applicant claims that the Judgment of the Supreme Court violated his right to fair trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR and also Articles 3.2 and 24.1 (Equality before Law) of the Constitution.

35. In this regard, the Court refers to Article 31 (1 and 2) of the Constitution, which establishes:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

36. On the other hand, Article 53 of the Constitution establishes:

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

37. Furthermore, Article 6 (1) of the ECHR:

"In the determination of his civil rights and obligations, everyone is entitled to a fair hearing by [a] tribunal".

38. In fact, the Applicant has the right to obtain a court ruling in conformity with the law. In addition, the right to a fair hearing, as embodied in Article 31 of the Constitution and Article 6 of the ECHR, is of fundamental nature to safeguard fundamental rights.

39. The Court emphasizes that the fundamental right to a fair trial is derived from the fundamental right to judicial protection, guaranteed by Article 54 of the Constitution. More than other fundamental rights, the right to a fair trial demands that judges be careful, as they are always in danger of violating it. In fact, the right to a fair trial is a general reference to a complex of other rights: namely, the right to

access to the courts, to present arguments and evidence, the adversarial and equality of arms principles.

40. The Court also recalls that the effect of Article 6 (1) is, *inter alia*, to place a "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision. (See the ECtHR *Kraska v. Switzerland* judgment of 19 April 1993, Series A no. 254-B, p. 49, § 30).
41. The principle of "equality of arms" between the parties in a case is an essential criterion of a fair hearing. Equality of arms, which must be observed throughout the trial process, means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case. (See ECtHR judgments in the cases of *Ofrer* and *Hopfinger*, Nos. 524/59 and 617/59, 19.12.60, Yearbook 6, p. 680 and 696). It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage *vis à vis* the opposing party.
42. The Court further recalls that the ECtHR case law established that "*the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to such cases [civil cases concerning civil rights and obligations] as well as to criminal cases" and "litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".* (See *Dombo Beheer B.V. v. the Netherlands*, judgment of 27 October 1993, Series A, No. 274).
43. The lack of summons for a case or notification of the decision taken in the case, which impacts on or interferes with the exercise of one person's (civil) rights, is *a fortiori* a substantial disadvantage *vis à vis* the opposing party. Moreover, where there are two (or even three) levels of jurisdiction, the appeals procedure must always be accompanied by the safeguards set out in Article 6. (See *Ekbatani v. Sweden* Judgement, 26.5.1988, no. 10563/83 §26ss).
44. The Court considers that the reviewed case law reasonably allows to conclude that the equality of arms "*is not applicable solely to proceedings which are already in progress*", but also when one party "*has not had the possibility of submitting*" its view to the tribunal in whatever stage of the proceedings.
45. The facts of the case show that the Supreme Court has not notified the Applicant of the existence of the proceedings regarding the request to return to the previous situation filed by E. N. In fact, the Applicant has been aware of the proceedings on the request to return to the previous situation only when the challenged judgment was received.

46. Thus, the Applicant did not have any opportunity to present his case, including the evidence, as the case was already finished, and, as a party interested in the proceedings, he was placed at a substantial disadvantage *vis-à-vis* his opponent E. N.
47. Moreover, the Court takes into account that the Applicant was aware of that "*The Supreme Court of Kosovo is the highest judicial authority*" (Article 103 of the Constitution). Thus, the Applicant could have been reasonably convinced that already got a final and binding decision by which the labour dispute was definitively closed.
48. The Court considers that the Supreme Court committed a violation of Articles 31 of the Constitution and 6 of the ECHR while reopening the case without notifying the Applicant, without providing the opportunity to present arguments, without hearing the other party.
49. In this regard, the Court refers to the Grozdanoski case (see *Grozdanoski v. The Former Yugoslav Republic of Macedonia*, no. 21510/03, of 31 May 2007). In that case, the Public Prosecutor filed a request for the protection of legality with the Supreme Court. The other party has never been notified about that request. The request for the protection of legality led to the Supreme Court's decision which was to the other party's significant disadvantage. The ECtHR considered that the procedural failure to not notify the other party has prevented it from effectively participating in the proceedings before the Supreme Court of Macedonia.
50. Furthermore, the Court refers to its legal practice noting that, in similar circumstances, it declared a referral admissible and found a violation of the Article 31 of Constitution and article 6 of the ECHR (See Constitutional Court case KI103/10, Judgment of 12 April 2012) Similarly, the Court ruled that "*the Applicant should have been summoned to the court proceedings in such a way as not only to have knowledge of its existence, but also to present arguments and evidence during the course of the proceedings*" (See also Constitutional Court Case KI108/10, *Fadil Selmanaj* - Constitutional Review of Judgment of the Supreme Court of Kosovo, A. no. 170/2009 of 25 September 2009).
51. Therefore, the Court concludes that there was a violation of the Applicant's right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rules 56 (1) and 74 (1) of the Rules of Procedure, unanimously, at its session held on 20 May 2014,

- I. DECLARE the Referral admissible;
- II. HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (1) [Right to Fair Trial] of the Convention for the Protection of Human Rights and Fundamental Freedoms;
- III. DECLARE invalid the Judgment CN. No. 7/2013 of the Supreme Court of 19 October 2013;
- IV. REMAND the Judgment CN. No. 7/2013 of 19 October 2013 to the Supreme Court for reconsideration in conformity with this judgment of the Court;
- V. TO ORDER the Supreme Court, pursuant to Rule 63 (5) of the Rules of Procedure, to submit information to the Constitutional Court about the measures taken to enforce this Judgment of the Court;
- VI. REMAIN seized of the matter pending compliance with that Order;
- VII. ORDER this Judgment to be notified to the Parties;
- VIII. PUBLISH this Judgment in the Official Gazette, in accordance with Article 20 (4) of the Law;
- IX. DECLARE this Judgment effective immediately.

Judge Rapporteur



Almiro Rodrigues

President of the Constitutional Court



Prof. Dr. Enver Hasani