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

Prishtina, on 8 March 2013
Ref.No.:AGJ385/13

JUDGMENT

in

Case No. KI 120/10

Applicant

Zyma Berisha

Constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo, Rev. 308/2007, dated 10 June 2010

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 Mrs. Zyma Berisha (hereinafter: the Applicant), residing in Peja.

Challenged decision

2. The challenged decision of a public authority is the Judgment of the Supreme Court of the Republic of Kosovo, Rev. 308/2007, dated 10 June 2010, which the Applicant received on 13 September 2010.

Subject matter

3. The Applicant's Referral relates to the alleged violation of her human rights under Articles 3.2 [Equality before the Law] and 24.1 [Equality before the Law] of the Constitution by Judgment Rev. 308/2007 of the Supreme Court of 10 June 2012. By which the decisions of the lower instance courts in favour of the Applicant, wwere quashed and the revision submitted by "Kosova e Re" [New Kosova] Insurance Company (hereinafter "Kosova e Re") was upheld. The subject of these civil proceedings was to obtain confirmation of the Applicant's permanent employment status at "Kosova e Re", and her consequent reinstatement into her earlier workplace. The proceedings were terminated on 10 June 2012 when the Supreme Court issued the challenged judgment Rev. 308/2007.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 22 of the Law on Constitutional Court of Kosovo (hereinafter: the Law) and Rule 56 (1) of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 3 December 2010, the Applicant submitted the Referral to the Court.

6. On 27 January 2011, the Court notified the Applicant and the Supreme Court of Kosovo of the registration of the Referral.

7. On 2 June 2011, the President appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President, appointed the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Enver Hasani and Iliriana Islami.

8. On 21 September 2011, the Court requested from the Applicant additional documents regarding her case.

9. On 26 September 2011, the Applicant submitted to the Court additional documents that were requested and further clarified the referral.

10. On 24 May 2012 the Applicant submitted additional written submissions to the Court.

11. On 19 June 2012, the Review Penal deliberated on the report of Judge Report.

12. On 2 July 2012, the President appointed Judge Altay Suroy as a new member of the Review Panel, replacing Judge Iliriana Islami, because her mandate as a judge of the Court had expired on 26 June 2012, and replacing Judge Snezhana Botusharova as Presiding Judge.

13. On 13 September 2012, the Applicant submitted further written materials to the Court.

14. On 6 December 2012, the Review Panel deliberated further on the Preliminary Report of the Judge Rapporteur.

15. On 7 December 2012 the Court received additional documents.

16. The full Court deliberated in private on the Referral on 29 January 2013.

Summary of the facts

17. The Applicant has been an employee of "Kosova" Property and Insurance Company in Prishtina since 1986, on the basis of an "employment relationship for an indefinite period of time", i.e. permanent employment. She occupied the position of translator in the Business Unit for Common Services in "Kosova" Insurance Company, which later on was alienated and transformed into "Kosova e Re" [New Kosova] Insurance Company (hereinafter "Kosova e Re"). In connection with this transformation, a Collective Agreement was concluded between the General Manager of "Kosova e Re"and the President of the Trade Union, providing, inter alia, that the employees of the transformed company would remain in the same employment relationship in the new entity.

18. On 13 September 2000, "Kosova e Re", by Decision no. 345, moved the Applicant to the position of proofreader archivist and media monitor, in which position she had already been working until she was transferred, pursuant to the Agreement for the transfer of the profile between Kosova Insurance Company and Kurum Commerce Group known as "Kurum".

19. Thereafter, "Kosova e Re", through a new contract, changed the Applicant's status, from employment for an indefinite period of time to employment for a definite period of time, and extended the new contract several times during the period 2001 to 2004.

20. On 25 October 2002, the Applicant was served with a decision of temporary dismissal from work.

21. On 18 September 2003, the Applicant received a one-month employment contract No. 1523/08. 09. 2003, for a definite period of time, valid from 1 September 2003 to 31 September 2003, about which she complained on the same date stressing that *"I am accepting the contract but contrary to my will because I am being imposed such a thing to provide for my subsistence"*.

22. On 1 January 2004, the Applicant received once more a fixed time contract, valid for one month, from 1 January 2004 to 31 January 2004.

23. On 9 January 2004, the Applicant addressed an appeal to the General Manager of "Kosova e Re", objecting to the one-month contract, and requested the Collective Agreement to be respected. The Applicant claimed to have signed the contract under pressure and against her will, out of fear that she would remain jobless.

24. On 3 February 2004, the Applicant was notified, by Notification No. 9, that as off 4 February 2004, she would no longer be obliged to report to work due to the termination of her fixed term contract. In the notification no reasons were given for the termination of her labour relationship with the company.

25. On the same date, the Applicant, together with two colleagues (S.B. and R.B.) who were in an identical situation, submitted an appeal against the Notification.

26. On 5 February 2004, the Applicant presented her case to the Labour Inspectorate in Pristina, a body of the Ministry of Labour and Social Welfare, and requested it to undertake legal action to protect her rights derived from her employment.

27. On 23 February 2004, the Labour Inspectorate replied to the Applicant and her two colleagues, S.B. and R.B, as follows:

"Article 16 of the Collective Agreement of Company 'Kosova e Re' [...] clearly foresees that the employment relationship for a fixed-term can be established in the following cases: replacing the employee who is absent; temporary increase of workload; hiring internees for a definite period of time; and in other cases foreseen in the collective Agreement. It is not disputable that the complainants were in an indefinite employment relationship with the former "Kosova" Insurance Company, therefore, in compliance with the respective provisions stated above, the employment relationships concerned were established for an INDEFINITE term[...]. In these circumstances, the employer was obliged to sign an employment contract for an indefinite term with the employees ..."

28. In March 2004, the Applicant and her two colleagues requested the Management Board of "Kosova e Re" to enforce the conclusions of the Labour Inspectorate and to reinstate them into their workplace.

29. Since the above mentioned request was not successful, the Applicant filed a lawsuit with the Municipal Court in Pristina against "Kosova e Re".

30. In her lawsuit the Applicant requested the Court to confirm her permanent employment status and to order her reinstatement into the workplace of the respondent "Kosova e Re".

31. On 20 September 2004, the Municipal Court in Pristina, by Judgment C1. nr. 31/04, approved the Applicant's lawsuit as grounded and confirmed that the

Applicant enjoyed the status of employee for an undefinite period of time at the respondent, "Kosova e Re" in Pristina, i.e. permanent employment status, with all the rights and duties deriving from that status. Moreover, the Court ordered the respondent to restore the Applicant into duties and tasks corresponding with her qualifications and skills, within a deadline of 8 days from the date of the judgment, under liability of forced execution.

32. In its reasoning the Municipal Court held, inter alia, that:

"After the assessment of the evidence filed under Article 8 of the LCP and on the basis of the facts assessed, the Court finds the claim of the plaintiff grounded.

[...].

In the concrete case, from the beginning of her employment, the plaintiff had a contract for an undefinite period of time and, without her consent, this contract could not be transformed into a fixed term employment contract, and it can be proven that the plaintiff has filed many objections in relation to her status with the respondent.

The conclusion of the Labour Inspectorate of 15 October 2003 speaks for the finding of the Court above, including conditions of the BPK tender of 7 February 2002, which provide that existing staff of the former Insurance Company shall be transferred to the new Insurance Company "Kosova e Re".

[...] On the basis of the evidence examined, the Court finds that the respondent "Kosova e Re" has violated the procedure as provided by Law, and for this reason, the plaintiff must be recognized the Status of Employee for an Undefinite Term, since the duties she carried out are not of temporary nature, be that by Law or by acts of the respondent, while the volume of the work has neither diminished nor been removed, and furthermore, the job which was initially done by the plaintiff is now carried out by a new employee, on which grounds the respondent is found to violate the Article 12 of the Regulation on Essential Labour 2001/27. The Court also finds that the Collective Agreement which is applicable to all staff of the Insurance Company does not provide for the possibility of terminating the employment relationship as used by the respondent in this case."

33. On 29 March 2007, following the submission of an appeal by "Kosova e Re", the District Court in Pristina, by Judgment Ac. nr. 234/2005, decided to reject the appeal as unsubstantiated and confirmed the Judgment of the Municipal Court in Pristina, C1.nr.31/2001, dated 29 September 2004.

34. The District Court in Pristina, by Judgment Ac. nr. 234/2005, reasoned, inter alia, that:

"According to the opinion of the Panel, the appeal allegations of the respondent [Insurance Company "Kosova e Re"] that the first instance court has erroneously applied material law are found ungrounded, because the provisions of Article 16 of the Collective Agreement [...] provide explicitly for

cases in which employment relations with the respondent can be established for a fixed term. The same regulation does not provide for the establishment of such employment relations with the transferred staff, and the amendment of the legal status of the transferred employees, as was done by the respondent. The Panel maintains that the plaintiff, as an employee transferred to the respondent on the basis of the Agreement mentioned, enjoys the same legal status as other employees of the respondent, and that the change of status from an undefinite period to a fixed term employment in the concrete case was unlawful, therefore, the first instance court has fairly found that the plaintiff enjoys all rights deriving from the employment relations with the respondent, starting from 4 February 2004, and until the reinstatement into work and duties as before".

35. On 10 June 2010, following the revision submitted by "Kosova e Re" Insurance Company, the Supreme Court, by Judgment nr. Rev. 308/2007, upheld the revision as grounded and amended Judgment Ac. nr. 234/2005, of the District Court in Pristina, dated 29 March 2007, and Judgment C1. n3. 31/2004 of the Municipal Court in Pristina, dated 29 September 2004.

36. The Supreme Court held, inter alia, that:

"The Supreme Court of Kosovo finds that the lower instance courts have fairly and fully ascertained the factual situation related to the decisive facts for a fair adjudication of this case, but pursuant to such a situation, according to the view of this Court, they have erroneously applied material law when finding that the claim suit of plaintiff is grounded. This due to the fact that the plaintiff, with the last contract she personally signed, was extended her employment relations for a fixed term from 01.01.2004 until 31.01.2004, which expired on the expiry date, according to Article 11.1 (d) of the Essential Labour Law in Kosovo. The respondent, pursuant to Article 11.5 (a) of the Law, has notified in written, no. 9, dated 03.02.2004, the plaintiff on the termination of the contract, and, therefore, the finding of the lower instance courts that the fixed term contract for the period from 01.01. to 31.01.2004 is unlawful, according to the view of this Court, is ungrounded.

The legal stance of the lower instance courts that the plaintiff's contract should have been extended, because her working position exists in normative acts of the respondent, in the view of this Court, is in violation of provisions of the Law, considering that the contract extending the employment relationship may be signed with the consent of the employer and the employee, if it is not in contradiction with the law and normative acts, and therefore, the plaintiff's working contract was terminated with the expiry of the duration of the contract."

37. On 8 November 2010, the Applicant submitted an open letter to the President of the Supreme Court and the European Union Rule of Law Mission (hereinafter: "EULEX"), claiming a violation of the Constitution, in particular, the right to equal treatment.

38. The Applicant stated as follows: *"[...] I have three judgments before me: Rev.no 126/2007, Rev. no 177/2007, and Rev no 308/2007, the latter being my case. Two other revisions, and 3-4 other cases of my former colleagues, were adjudicated by the Supreme Court of Kosovo to the benefit of my colleagues, and the Insurance Company was ordered to restore them into their previous positions, and compensated them for the material damage incurred. The reasoning in both judgments on revision mentioned above is full, and confirming the justice of the lower instance courts' judgments. Only the opposite happened in adjudicating the revision in my case, which is exclusive, partial and lacking relevant element. [...]"*

39. The Applicant continued that: *"Provisions of Articles 11 and 12 of the Essential Labor Law, and Articles 89-95 of the Collective agreement on employment relations of the respondent, provide the legal basis of the termination of employment, but none of the case files prove that any of the legal grounds has been met for termination, and, therefore, the notice to the plaintiff notifying [him/her] that the contract shall not be extended, cannot have legal effect on the termination of the employment relations with the plaintiff [the Applicant]. This is missing in the reasoning of the judgment on the revision in my case."*

Applicant's allegations

40. The Applicant claims that the Supreme Court, by Judgment Rev. 308/2007, dated 10 June 2010, placed her in an unequal position vis-a-vis her former colleagues who were in the same situation, i.e. had permanent employment status within the same company and won their cases before the Supreme Court, whereafter they were reinstated into their previous workplaces.

41. The Applicant argues that only her case was decided differently by the Supreme Court and that, therefore, she became the victim of injustice and discrimination. Initially, she attached to her referral two judgments of the Supreme Court both issued on 17 January 2008 (under Rev. nr. 126/2007 and Rev. nr. 177/2007) which related to two of her former colleagues, while, in her written submission of 26 September 2011, she listed the names of 6 former colleagues who had won their cases before the Supreme Court, including the names of the two colleagues whose judgments she already had submitted.

42. The Applicant alleges a violation of Article 3.2 [Equality before the Law] and Article 24.1 [Equality before the Law] of the Constitution.

Relevant legal background

Relevant provisions of UNMIK Regulation No. 2001/27, on Essential Labour Law in Kosovo

Article 10. Labour Contract

10.1 A labour contract may be concluded for:
(a) an indefinite period of time; or

(b) a definite period of time.

Article 11. Termination of a labour contract
11.1 A labour contract shall terminate:
(a) upon the death of the employee;
(b) by a written agreement between the employee and employer;
(c) on the grounds of serious misconduct by the employee;
(d) on the grounds of unsatisfactory performance by the employee;
(e) following the expiration of the term of employment; and
(f) by operation of law.

11.2 A labour contract shall be terminated by the employer on the grounds of serious misconduct or unsatisfactory performance by the employee.
[...]

11.5 Where Article 11.2 applies:
(a) the employer shall notify the employee in writing that it intends to terminate the labour contract. Such notice shall include the grounds for termination; and
(b) a meeting shall be held between the employer and the employee, and at such meeting the employer shall provide the employee with an oral explanation of the grounds for termination. If the employee is a member of a union, the employee shall be entitled to have a union representative present at such meeting.

Article 12. Termination of a Labour Contract due to Economic, Technological or Structural changes to the Enterprise:

12.1 A labour contract may be terminated by an employer due to economic, technological, or structural changes to the enterprise. Such changes occur where the employer introduces major changes in production, programming, organization, structure and technology that require a reduction in the number of its employees. Where a minimum of 50 employees are discharged within a 6 month period, it shall be considered a large-scale lay off.

Relevant provisions of the Collective Agreement with the IC "Kosova e Re" no. 686, dated 7 October 2002

Article 1

This Agreement defines the rights and obligations between the Insurance Company "Kosova e Re" based in Pristina, hereinafter the employer, and the employees of this Company, pursuant to the law, collective agreement at national level, sector level and other legal acts.

Article 2:

The other rights and obligations, which are not included in this Agreement, shall be implemented on the basis of Law and other collective agreements.

[...]

Article 15:

Employment relationship may be established for an indefinite and definite period of time.

Article 16:

Employment relationship for a definite period of time can be established when:
- *replacing the employee, who is absent;*
- *there is a temporary increase of workload;*
- *hiring internees for a definite period of time;*

[...]

Article 103:

This contract will be in force for three years.
Article 104:

This Agreement enters into force, 8 days after its publication.

[...]

Relevant provision of the BPK Tender

"IV. BPK provides that the successful bidding company will make the transfer of all employees of the company in the new Company "Kosova e Re".

Admissibility

43. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court needs first 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.

44. The Court has first to determine whether the Applicant is an authorized party to submit a Referral to the Court, pursuant to the requirements of Article 113.7 of the Constitution. As to the present Referral, the Court notes that the Applicant is a natural person and an authorized party, pursuant to the requirements of Article 113.7 [Individual Referrals] of the Constitution.

45. The Court also has to determine whether the Applicant has met the exhaustion of domestic remedies requirement, prescribed by Article 113.7 of the Constitution and Article 47.2 of the Law, stipulating: *"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law"*.

46. In this connection, the Court refers to its Case KI. 41 /09, where it stated:

"The Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human of Rights (see Article 53 of the Constitution), is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of28 April 200")."

In this connection, the Court would like to stress that applicants are only required to exhaust remedies that are available and effective. Discretionary or extraordinary remedies need not to be exhausted, for example requesting a court to revise its decision (see, mutatis mutandis, ECHR, Cinar v. Turkey, no 28602/95, decision of 13 November 2003).

Where an applicant has tried a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the four-month time limit (Art. "9 "Deadli"es" of the Law), which may lead to the complaint being rejected as out of time (see, mutatis mutandis, ECHR, Prystavka, Rezgui v. France, no 49859/99, decision of 7 November 2000)."

47. As to the present case, the Court notes that the Applicant challenges the judgment of the Supreme Court, whereby the latter granted the revision filed by "Kosova e Re" against the decision of the District Court in Pristina and amended the judgments of the lower instance courts. In the absence of any further available legal remedy in the circumstances of the case, the Court concludes that the Applicant has met the exhaustion requirement.

48. Since the referral is also not manifestly-ill-founded, the Constitutional Court rules that the Applicant's referral is admissible.

Merits

49. The Applicant alleges that Judgment Rev. nr. 308/2007 of 10 June 2010 of the Supreme Court violated her rights guaranteed by Articles 3.2 [Equality before the Law] and 24.1 [Equality before the Law] of the Constitution.

50. In respect of the rights invoked by the Applicant, the Court recalls that it "*is master of characterization to be given in law to the facts of the case and is not bound by the characterization given by an applicant or a government. A complaint is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on*" (see, ECtHR judgment in case of Ştefanica and others v. Romania of 2 November 2010, para 23).

51. Therefore, the Court will examine the Applicant complaints rather under Article 31 [Right to Fair and Impartial trial] of the Constitution taken in conjunction with Article 6.1 ECHR [Right to a fair trial] and Article 24 Equality before the Law] of the Constitution taken in conjunction with Articles 14 [Prohibition of discrimination] and 6.1 ECHR.

Judgments of the Supreme Court related to the Applicant's former colleagues

52. The Applicant argues that all her former colleagues who were in an identical position as she was, won their cases before the Supreme Court and that, as a consequence, she has been the victim of discrimination.

53. In this connection, the Court obtained, on 7 December 2012, certified copies of six judgments of the Supreme Court, the first three having been issued on 17 January 2008 (Rev. nr. 126/2007, Rev. nr. 177/2007 and Rev. nr. 183/2007), while one judgment was issued on 28 January 2008 (Rev 180/2006. The fifth one was the one issued in the Applicant's case on 10 June 2010 (Rev 308/2007), while the sixth one was issued on 7 February 2011(Rev 154/2008), i.e. 7 months after the judgment in the Applicant's case.

54. The Court notes that in all cases before the Supreme Court the respondent was the same, namely "Kosova e Re", but that the Supreme Court considered the subject matter in the Applicant's case different from the one in the case of her colleagues.

55. Thus, while in the cases of the Applicant's former colleagues the Supreme Court qualified the subject matter as the confirmation of their permanent employment status and their subsequent reinstatement into their workplaces within "Kosova e Re", in the Applicant's case the Supreme Court considered the subject matter to be an issue relating to the extension of her contract with "Kosova e Re".

56. The Court also notes that the operative part in the Supreme Court judgments in the case of the Applicant's colleagues reads:

"The revision of the defendant filed against the judgment of the District Court in Pristine is refused as unfounded".

57. The Court further notes that the reasoning given by the Supreme Court in these cases is substantially the same and considers it relevant to quote, as an example, the pertinent part of the Supreme Court's judgment issued on 7 February 2011 (Rev 54/2008), i.e. 7 months after the judgment in the Applicant's case:

"As to the fact that the works the plaintiff carried out in the positions he was assigned to are not of a temporary or occasional nature, but of a permanent nature, it results that the plaintiff has established employment for an indefinite period of time. This type of employment is established pursuant to Article 10.1, item (a) of UNMIK Regulation nr.2001/27 On Essential Labour Law in Kosovo and Article 15 of the defendant's Collective Agreement on

Employment Relationship, because, pursuant to Article 16 of this Agreement, the employment relationship can be established in the following cases: the replacement of the worker who is absent from work; the temporary increase of the work volume; internship; and in other cases provided by the law and the Collective Agreement. Despite the fact that the defendant, through the above contracts, has extended plaintiff's employment relationship for a definite period of time, the lower instance courts have duly concluded that such contracts are in violation of the above mentioned legal provisions, because the duties of the job have been of a permanent nature and that such a contract is not only contrary to the legal provisions mentioned, but also contrary to the principle of consciousness and fairness - bona fide, since the plaintiff was held in a state of legal uncertainty, therefore, the lower instance courts have duly concluded that the plaintiff has the status of employment relationship for an indefinite period of time.

The provisions of Articles 11 and 12 of the mentioned Labour Law and Article 89 – 95 of the defendant's Collective Agreement on the Employment Relationship have established the legal basis for the termination of the employment relationship, but from the case file it does not appear that any of the legal requirements have been fulfilled for the termination of the employment relationship; therefore, the defendant's announcement informing the plaintiff about the non extension of the contract cannot have legal influence on the termination of the employment relationship of the plaintiff."

As to Article 31 of the Constitution in conjunction with Article 6 ECHR:

58. The Applicant's expresses her complaints under the Constitution and the ECHR as follows: "*The reasoning in both judgments on revision mentioned above is full, and confirms the justice of the lower instance courts' judgments. However, the opposite happened in the adjudication of the revision of my case, which is exclusive, partial and lacking relevant elements.*"

59. The Applicant asserts that the Supreme Court violated her rights since in her case it issued a judgment which is different from the judgments that were issued by the same Court in the cases of her former colleagues who sued the same respondent ("Kosova e Re") and that the subject matter of their petitions was the same, i.e. the confirmation of their permanent employment status).

60. In this respect, the Court refers to the following legal provisions:

Article 53 [Interpretation of Human Rights Provisions] of the Constitution, providing that "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

Article 31 [Right to Fair and Impartial Trial] of the Constitution, providing that

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

Article 6 ECHR, providing that

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

61. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of decisions taken by ordinary courts, including the Supreme Court. In general, "*Courts shall adjudicate based on the Constitution and the law*" (Article 102 of the Constitution). More precisely, the role of the ordinary courts is to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

General principles as to conflicting court decisions

62. For a better understanding of these general principles, the Court refers to the recent Grand Chamber judgment in the case *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, 20 October 2011), where the ECtHR reiterated the main principles applicable in cases concerning conflicting court decisions. These can be summarized as follows:

"(i) It is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see García Ruiz v. Spain [GC], no. 30544/96, § 28, ECHR 1999-I). Likewise, it is not its function, save in the event of evident arbitrariness, to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence of those courts must be respected (see Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008);
(ii) The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see Santos Pinto v. Portugal, no. 39005/04, § 41, 20 May 2008, and Tudor Tudor, cited above, § 29);
(iii) The criteria that guide the Court's assessment of the conditions in which conflicting decisions of different domestic courts' ruling at last instance are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of the domestic courts, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see Iordan Iordanov and Others, cited above, §§ 49-50; see also Beian (no. 1), cited above, §§ 34-40; Ştefan and Ştef v. Romania, nos. 24428/03 and

26977/03, §§ 33-36, 27 January 2009; Schwarzkopf and Taussik, cited above, 2 December 2008; Tudor Tudor, cited above, § 31; and Ştefănică and Others, cited above, § 36);
(iv) The Court's assessment has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see, amongst other authorities, Beian (no. 1), cited above, § 39; Iordan Iordanov and Others, cited above, § 47; and Ştefănică and Others, cited above, § 31);
(v) The principle of legal certainty, guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see Paduraru v. Romania, § 98, no. 63252/00, ECHR 2005-XII (extracts); Vinčić and Others v. Serbia, nos. 44698/06 and others, § 56, 1 December 2009; and Ştefănică and Others, cited above, § 38);
(vi)However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see Unédic v. France, no. 20153/04, § 74, 18 December 2008). Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see Atanasovski v. "the Former Yugoslav Republic of Macedonia", no. 36815/03, § 38, 14 January 2010)."

Applying the general principles to the case at issue

63. In order to apply the test derived from the above judgment of the ECtHR to the decision of the Supreme Court in the Applicant's case and the ones issued in the other five cases which are identical to the Applicant's case, the Court needs to examine whether in the Applicant's case the Supreme Court had given sufficient reasons for the rejection of the Applicant's arguments or whether its judgment showed "evident arbitrariness".

64. In this respect, the Court's refers to its well-established case law regarding the obligation of ordinary courts to give reasons for their judgments, for instance in its "KEK I judgment" as well as in its recent judgment adopted on 7 December 2012 in Case KI 72/12, Veton Berisha and Ifete Haziri, Constitutional review of the Supreme Court Judgment A.nr. 1053/2008 dated 31 May 2012, where the Court found a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6.1 ECHR.

65. In its KEK I judgment the Court recalled the jurisprudence of the European Court of Human Rights as follows:

"Article 6.1 ECHR obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account,

inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. Thus the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see Ruiz Torija v. Spain, judgment of 9 December 1994, Series A no. 303-A, § 29).

66. In Case KI 72/12, Veton Berisha and Ifete Haziri, the Court further stated "*the ECtHR has held that, while authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6(1) of the Convention, their courts must 'indicate with sufficient clarity the grounds on which they based their decision'. (See Hadjianastassiou v. Greece, EcHR Judgment of 16 December 1992, paragraph 33). In a recent judgment, the ECtHR reiterated that 'judgments of courts and tribunals should adequately state the reasons on which they are based' (See Tatishvili v Russia, ECtHR Judgment of 22 February 2007, paragraph 58).*"

67. Consequently if a submission is fundamental to the outcome of the case, as it is this case the permanent employment status of the Applicant, the court must then specifically deal with it in its judgment.

68. In the case KI 72/12, Veton Berisha and Ifete Haziri the Court also stated that in "*In Hiro Balani v. Spain, the applicant had made a submission to the court which required a specific and express reply. The court failed to give that reply making it impossible to ascertain whether they had simply neglected to deal with the issue or intended to dismiss it and if so what were the reasons for dismissing it. This was found by the ECtHR to be a violation of Article 6 (1) of the Convention. Consequently, the statement of reasons must enable the person for whom the decision is intended and the public in general, to follow the reasoning that led the court to make a particular decision. Thus, the justification of the decision must state the relationship between the merit findings and reflections when considering the proposed evidence on the one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them.*"

69. In the instant case, the Court notes that the Applicant requested the ordinary courts to confirm her permanent employment status in the same way as they had done in the case of her former colleagues. She referred, in particular, to the provisions of the Collective Agreement applicable to her employment status as well as to the relevant provisions of the UNMIK Regulation on Essential Labour Law in Kosovo and also presented the evidence that she was entitled to enjoy all rights from the permanent employment status, as the findings of the Labour Inspectorate had also confirmed. In view of the previous judgments of the Supreme Court in the identical cases of her former colleagues based on similar facts as the Applicant's case, the Applicant could

legitimately expect that the revision initiated by "Kosova e Re" would be rejected.

70. However, although the Supreme Court, as the text of the contested judgment shows, found that the lower instance courts had fairly and fully ascertained the factual situation related to the decisive facts for a fair adjudication of the case, it apparently did not analyze the Applicants' claim in a similar way as it had done in the cases of her former colleagues and as the lower instance court had done in the Applicant's case. Instead the Supreme Court viewed that, contrary to the Applicant's submissions, the subject matter of her case concerned the extension of the fixed term contract and did not at all consider the Applicant's arguments and evidence related to her claim to be entitled to permanent employment status and reinstatement into her working place.

71. Thus, while the Applicant had clearly raised the issue of her permanent employment status in the same way as her former colleagues had done before the Supreme Court, the Supreme Court considered her claim only as a matter of extension of her contract.

72. As a consequence, the Supreme Court, in its judgment in the Applicant's case, ruled differently than in the identical cases of the Applicant's former colleagues. Instead of finding in those cases that the lower instance courts had "*fairly applied provisions of contested procedure and material law when finding that the claim suit of plaintiff is grounded*", the Supreme Court found in the Applicant's case that the lower instance courts had "*erroneously applied material law when finding that the claim suit of the plaintiff is grounded*".

The Supreme Court further held that "*The legal stance of the lower instance courts that the plaintiff [Applicant]'s contract should have been extended, because her working position exists in normative acts of the respondent ["Kosova e Re"], to the view of this Court, is in violation of provisions of the Law, considering that the contract extending the employment relationship may be signed with the consent of employer and employee, if not in contradiction with the law and normative acts, and, therefore, the plaintiff's working contract was terminated with the expiry of the duration of the contract*".

73. It is not the task of the Constitutional Court to decide what would have been the most appropriate way for the Supreme Court to deal with the Applicant's arguments regarding the status of her permanent employment based on the above mentioned Collective Agreement and applicable law.

74. However, in this Court's opinion, the Supreme Court's judgment, by neglecting the proper assessment of the Applicant's arguments regarding her permanent employment status, even though they were specific, pertinent and important, fell short of the Supreme Court's obligations under Article 6.1 of the ECHR to fulfil the obligation to state reasons (see *mutatis mutandis*, ECtHR Judgment of 18 July 2006 in the case *Pronina v. Ukraine*, Application no. 63566/00; see also the Court's Judgment in Case No. 40/09 Imer Ibrahimi and 48 other employees of the KEK i.e. "KEK I judgment).

75. Moreover, the Court notes that the Supreme Court, in its Judgment Rev.nr.154/2008, dated 7 February 2011 i.e. 7 months after its judgment in the Applicant's case, did not repeat its findings in the Applicant's case, but again ruled in the same way as it had done in the four cases prior to the Applicant's case, considering the confirmation of the permanent employment status as the subject matter of the disputes and using similar extensive and thorough reasoning to reject the revision submitted by "Kosova e Re".

76. In these circumstances, the Court finds that the Supreme Court has dealt with the Applicant's case in an evidently arbitrary manner, contrary to the principles elaborated by the ECtHR in its above mentioned judgment in *Nejdet Sahin and Perihan Sahin v. Turkey* [GC], no. 13279/05, 20 October 2011.

77. The Court, therefore, concludes that there has been a violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR.

As to the alleged violation of Articles 3.2 and 24.1 of the Constitution

78. The Court notes that the Applicant also argued that the Supreme Court, by Judgment Rev. 308/2007, dated 10 June 2010, placed her in an unequal position vis-a-vis her former colleagues and claimed a violation of Articles 3.2 [Equality before the Law] and 24.1 [Equality before the Law] of the Constitution.

79. In view of the above finding with respect to Article 31 of the Constitution in conjunction with Article 6 ECHR, the Court considers it not necessary to pursue the examination of this complaint.

FOR THESE REASONS

The Constitutional Court, in its session of 29 January 2013 by majority:

I. DECLARES the Referral admissible.

II. HOLDS that there has been a breach of Article 31 [Right to Fair and Impartial Trial] in conjunction with paragraph 1 of Article 6 [Right to a Fair Trial] of the European Convention on Human Rights.

III. DECLARES invalid the Judgment of the Supreme Court of Kosovo Rev. 308/2007, dated 10 June 2010.

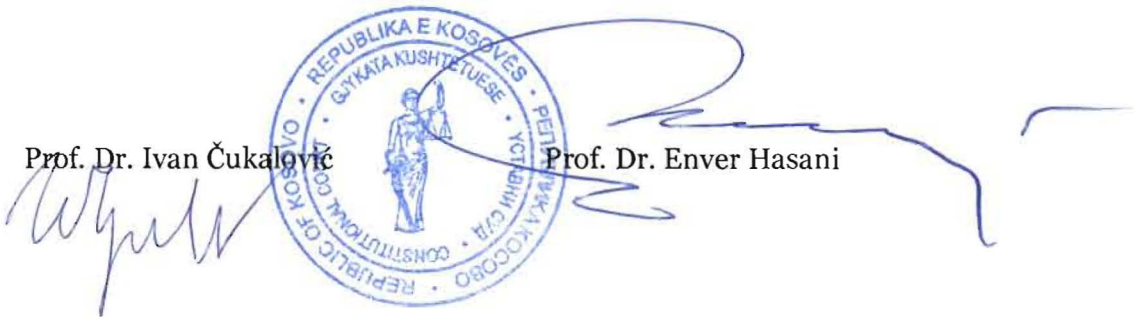
IV. REMANDS the Judgment of the Supreme Court for reconsideration in conformity with the judgment of this Court;

V. REMAINS seized of the matter pending compliance with that order;

VI. ORDERS this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VII. DECLARES that this Judgment is effective immediately.

Deputy-President **President of the Constitutional Court**



Prof. Dr. Ivan Čukalović Prof. Dr. Enver Hasani