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

Pristine, 15 February 2013
Ref.no.:MM386/13

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

Dissenting Opinion

of
Judge Robert Carolan

The Claim

The Applicant, in her referral, claims that the Supreme Court of the Republic of Kosovo, in its Judgment Rev. No. 308/2007 of 10 June 2010, violated the principle of equality before the law as protected by Article 24, para. 1, of the Constitution.

In support of her claim, the Applicant notes that the Judgment of the Supreme Court in her case differs from the Judgments of the Supreme Court in five other cases (Judgment Rev. No. 126/2007 of 17 January 2008, and Judgment Rev. No. 177/2007 of 17 January 2008 and there others). The Applicant claims that her situation is identical to that of the claimants in those other cases.

The Facts

The facts of this case concern the applicant, who was employed since 1986 in the insurance company "Kosova" with an employment contract of indefinite duration. In the year 2000, this company was reorganized, or otherwise its assets and liabilities were transferred, to an

insurance company named "Kosova e Re". Included in that transfer were all of the staff members employed by the former company, as had been stipulated in the transfer agreement between the two companies.

The Applicant continued to work with the new insurance company, but on the basis of a series of contracts of definite duration. Her functions within the company also changed from that of a translator to other functions. Initially, she had an employment contract with "Kosova e Re" of unspecified duration. Subsequently, she received a series of fixed-duration contracts. This situation continued until the Applicant received notice of a termination of her employment on 4 February 2004.

The Applicant points out that there existed a Collective Agreement (No. 686 of 7 October 2002) between her original employer and the staff members of insurance company "Kosova" which stipulated which types of work would be considered exclusively as 'employment of unlimited duration'. Allegedly, this Collective Agreement had formed part of the transfer of assets and liablities from the original company to the new company "Kosova e Re". The Applicant alleges that she had only accepted to sign the series of fixed-duration employment contracts under duress, given that she wished to continue her employment and was in need of an income. She claims that she fully expected the company "Kosova e Re" to acknowledge that she was entitled to an employment contract of unlimited duration, under the terms of the Collective Agreement.

Following her ultimate dismissal in 2004, the Applicant brought contested proceedings before the Municipal Court of Pristina, requesting that the court order the company "Kosova e Re" to reinstate her as an employee with a contract of indefinite duration. This court, by judgment C1. No. 31/03, of 20 September 2004, determined that that the Collective Agreement was binding on "Kosova e Re", and that under the applicable labour law, this company was bound to reinstate the Applicant. The respondent company "Kosova e Re" appealed to the District Court of Pristina, which by judgment Ac. No. 234/2005, of 29 March 2007, upheld the findings and determination of the Municipal Court.

Judgment of the Supreme Court

Subsequently the respondent company "Kosova e Re" requested a revision at the Supreme Court, claiming that the District Court had erroneously applied the material law. The Supreme Court, in its judgment Rev. No. 308/2007, of 10 June 2010, found the revision grounded. The Supreme Court found that *"the lower instance courts had fairly and fully ascertained the factual situation related to decisive facts for a fair adjudication of the case,*

but pursuant to such a situation, [...] they had erroneously applied the material law when finding that the claim suit is grounded." Specifically, the Supreme Court reasoned that:

> *"The legal stance of the lower instance courts that the plaintiff should have been extended her contract, 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 by the consent of employer and employee, if not in contradiction with the law and normative acts, and therefore, the working contract of the plaintiff was terminated with the expiry of the duraction of the contract."*

From the aforementioned proceedings it may be concluded that the lower instance courts had fairly and fully ascertained the facts of the Applicant's claim, as had the Supreme Court in its revision. The crucial difference lay in the legal interpretation given to the status of the Collective Agreement regarding employment in the respective insurance companies "Kosova" and, following transfer, "Kosova e Re". Whereas, the lower instance courts had determined that this Collective Agreement was binding on "Kosova e Re" and was in accordance with the material law, the Supreme Court found that parties had benefitted from the lawful freedom of contract, and, apparently, determined that the Collective Agreement was in violation of the material law. We note that the phrase, *"because her working position exists in normative acts of the respondent"* is not entirely clear in whether or not it refers to the Collective Agreement. Alternatively, it may simply refer to the job title and functions which the Applicant was exercising.

However, in whichever interpretation one makes of the Supreme Court's determination, it is clear that it was making a finding on the applicable material law, which is fully within its competencies. Indeed, it is not within the competencies of the Constitutional Court to make findings on the material law. In accordance with the clear case-law of the Constitutional Court, it is not a fourth instance court. As such, it is not up to the Constitutional Court to question the evaluation of the material law made by the Supreme Court in its judgment on the applicant's case.

Previous Judgments of the Supreme Court

The Applicant refers to five other decisions of the Supreme Court where co-employees received a different judgment than she received, and concludes that she was, therefore, not treated equally with her co-employees. Two of those judgments of the Supreme Court were

decided 17 months earlier, on 17 January 2008, by a substantially different panel of judges of the Supreme Court[1]. In those judgments that panel of the Supreme Court concluded:

> *"By evidence examined, the court of first instance has ascertained that the plaintiff, by contract no. 240, dated 27.06.2002, entered into employment relations with the defendant, which did not set a term of employment. Due to the fact that the duties carried by the plaintiff, in the working position she kept, bear not a temporary or sporadic nature, but are permanent, it derives that the plaintiff had entered into employment relations for an undefined period of time. This type of employment relations is established in compliance with Article 10.1, item (a) of the UNMIK Regulation No. 2001/27 on Essential Labour Law in Kosovo, and Article 15 of the Collective Agreement of the respondent on employment relations, because according to Article 16 of this Agreement, a fixed term employment relationship may be established only in the following cases: substitution of an absent employee, temporary increase of activity intensity, internship, and other cases as provided by law and collective agreement. Despite the fact that the respondent had extended employment relations with the respondent by contracts mentioned above, for fixed terms, lower instance courts have fairly found that such contracts are in contradiction with provisions mentioned above, because the duties of the working position were of a permanent nature, and such a contract is not only in violation of legal provisions, but also in violation of principles of consciousness and honour – bona fide, in which the plaintiff was kept in a situation of legal uncertainty, and instead of her, another employee was employed, and therefore, the lower instance courts have fairly concluded that the plaintiff enjoyed the status of employee for an undefined period of time."*

The Supreme Court of Kosovo, in its two other judgments issued on 17 January 2008, where the aggrieved employees were also females like the Applicant, concluded that the law required that the contracts be for an indefinite period of time because of the nature of the work performed by the respective employees. The Supreme Court in those cases never addressed the issue of whether the employees and their employer could mutually agree to change such an employment contract for this type of employment from an indefinite contract of employment to a definite contract of employment. 17 months later a substantially different panel of the Supreme Court, in the Applicant's case, addressed this issue and clarified, for the first time in Kosovo, that an employee with a permanent status employment position could lawfully agree to change her employment status to an appointment for a specific period of time.[2]

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[2] One of the judges who served on the five member panel of judges with the Supreme Court in Applicant's case also served on a different five member panel of judges of the Supreme Court in the cases referred to by the Applicant.

Right to a Fair Trial

The majority infers that the Applicant alleges a violation of the right to a fair trial, as guarateed by Artricle 31, para. 1, of the Constitution. This provision status:

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

In accordance with Article 53 of the Constitution, this article shall be interpreted consistent with the court decisions of the European Court of Human Rights. The equivalent article in the European Convention on Human Rights (ECHR) is Article 6, para. 1, which provides:

> 1. *In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]*

It is not contested that disputes regarding relations between employers and employees come within the scope of *"civil rights and obligations"* (*See e.g.* Buchholz v. Germany, No. 7759/77, para. 46). It is also not contested that the various court proceedings concerned a dispute regarding these civil rights, given that at issue was the termination of an employment relationship, which had implications for the Applicant which are "genuine and serious" (*See e.g.* Benthem v. the Netherlands, No. 8848/80, para. 32-33).

To the extent that the sequence of judgments by the ordinary courts in the Applicant's case were in fact, and in law, "directly decisive for the civil rights concerned", it can be concluded that the various court proceedings concerned a "determination" of the Applicant's civil rights and obligations (*See e.g.* Le Comte, Van Leuven and De Meyere, Nos. 6878/75 and 7238/75, para. 47).

It is not in dispute that the regular courts at Municipal, District and Supreme Court levels are duly established by Law and constitute 'tribunals" within the meaning of Article 6 ECHR. Also not in dispute is the duration of the proceedings at issue in this referral, which began with the introduction of the claim before the Municipal Court at some point in the first half of 2004, and which concluded with the judgment of the Supreme Court as served on the parties on 13 September 2010. In addition, the Applicant does not allege that the various courts were not independent and impartial.

It remains to be considered to what extent the Applicant benefitted from the procedural guaratees of a fair hearing. The Applicant had effective access to three levels of jurisdiction within the Kosovo court system. The Applicant benefitted from representation by a qualified attorney at all three levels of court. As such, the Applicant's "access to court" cannot be questioned (*See e.g.* Golder v. United Kingdom, No. 4451/70, para. 36). In addition, given that there do not appear to have been any aspects of the evidence presented which have not been taken into account by the courts (see *inter alia* below), coupled with the Applicant's assistance at all stages by a qualified attorney, it can be concluded that the applicant has fully benefitted from "equality of arms" with the respondent party in the proceedings.

What remains to be considered are the manner in which the regular courts have examined the Applicant's case and to what extent they have provided adequate reasoning to justify their decisions. In their judgments, both the first and second instance courts provided a comprehensive description of the facts in the applicant's case. In addition, both the lower courts clearly set out the applicable material Law, as well as expressly stating the continued validity of the Collective Agreement. The Municipal Court included a reference to an assessment of the validity of the Collective Agreement conducted by the Labour Inspectorate, apparently produced in a report dated 15 October 2003.

As such, the proceedings before both the Municipal Court and the District Court on appeal, can be considered to have addressed all of the salient facts of the case and to have properly examined the applicant's arguments (*See e.g.* Tatishvili v. Russia, No. 1509/02, paras. 58-63). Consequently, there does not appear to be any ground to question the fairness of the proceedings in the first and second instance courts. At any rate, the Applicant has not made any claim as to the fairness of this stage of the proceeding.

What remains to be considered is the fairness of the proceeding at the Supreme Court, and to take into account its impact on the fairness of the proceedings as a whole. In particular, all other elements of a fair trial being satisfied, it remains to be seen to what extent the Supreme Court had properly examined all elements of the case and that this was reflected in a properly reasoned judgment.

The determination of the Applicant's civil rights in this case hinges on the Collective Agreement of 2002 and its application to the Applicant's employment following the transfer from insurance company "Kosova" to insurance company "Kosova e Re". It cannot be the case that the Supreme Court was not sufficiently made aware of the existence of this Collective Agreement as it is mentioned by name and date in both the decision of the

Municipal Court and the decision on appeal by the District Court. The revision against the District Court's decision was made by the respondent company "Kosova e Re", and whether or not the Applicant's legal representative raised again the issue of the Collective Agreement, it can be considered to form part of the case file before the Supreme Court.

In its judgment on the revision, the Supreme Court does not mention the Collective Agreement by name. However, reference to it can be inferred from the phrase, *"because her working position exists in normative acts of the respondent"*, and the Supreme Court's finding that, *"The legal stance of the lower instance courts [on the basis of these normative acts] is in violation of provisions of the Law, [...]"*, that the Supreme Court was aware of the Collective Agreement and made general reference to it with the term 'normative acts of the respondent'.

The Supreme Court's ultimate reasoning that, *"[...] the contract extending the employment relationship may be signed by the consent of employer and employee, if not in contradiction with the law and normative acts, and therefore, the working contract of the plaintiff was terminated with the expiry of the duraction of the contract."* indicates that the Supreme Court's intention was sufficiently clear to exclude the validity of the Collective Agreement to the Applicant's employment relationship with the respondent company "Kosova e Re", even if it did not mention the Collective Agreement by name.

In these circumstances, the Supreme Court has adequately fulfilled its obligations to fully examine all the arguments in the Applicant's case, and to provide an adequately reasoned judgment. Consequently, there has not been any violation of the Applicant's right to a fair hearing under Article 31, para. 1, of the Constitution and Article 6, para. 1, of the European Convention on Human Rights.

Constitutional Question Before the Court

Is this simple clarification by the Supreme Court of the applicable law a Constitutional violation?

In reaching its conclusion, the majority of the Constitutional Court has relied on the interpretation provided of the facts and the law in the judgments of the Supreme Court in the cases of five other persons where the situation is alleged to be identical to that of the applicant (Rev. No. 126/2007 and Rev. No. 177/2007, both of 17 January 2008 and three other judgments). The majority considered that this difference in the judgment in the

applicant's case, *versus* in the judgments in those five other cases, amounted to unequal treatment before the law in violation of Article 24, para. 1, of the Constitution.

In accordance with the consistent case-law of the European Court of Human Rights it is incumbent upon the applicant to demonstrate in what way she has been treated differently, and on what grounds this difference in treatment has allegedly occured (*e.g.* Fredin v. Sweden (No. 1), No. 12033/86, 18 February 1991, paras. 60-61) . Only once the difference in treatment has been established and the nature of the grounds for this difference in treatment has been found can the justification for this differential treatment be tested for its reasonableness and objectivity.

The majority has based its decision on the alleged apparent inconsistency in the judgments of the Supreme Court in six cases. In arriving at this conclusion, the majority has relied on the judgment of the European Court of Human Rights in the case of Beian v. Romania (No. 1) (No. 30658/05, 6 December 2007).

Judgments of the European Court of Human Rights

We note that the European Court of Human Rights has had on a variety of occasions decided on the implications of inconsistent judicial decisions on the right to a fair trial. In the some of those cases the conflicting judicial decisions concerned different courts or jurisdictions, while in others it concerned divergent decisions issued by the same court given in apparently similar proceedings. A number of cases have concerned conflicting decisions of domestic Supreme Courts, as is the situation we are concerned with in this application.

In the case of Nejdat Şahin and Perihan Şahin v. Turkey, No. 13279/05 of 20 October 2011, the Grand Chamber of the Court set out the general principles to be applied in such cases (paras. 49-58). The ECtHR has stated, *inter alia*,:

> *"50. [...] save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of the domestic law by the national courts (see, for example, Ādamsons v. Latvia, no. 3669/03, para. 118, 10 May 2007). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see Engel and Others v. The Netherlands, 8 June 1976, para. 103, Series A no. 22; Gregório de Andrade v. Portugal, no. 41537/02, para. 36, 14 November 2006; and Ādamsons, cited above, para. 118).*

52. The Court has been called upon a number of times to examine cases concerning conflicting court decisions [...] and has thus had an opportunity to pronounce judgment on the conditions in which conflicting decisions of domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6. Para. 1, of the Convention (see Perez Arias v. Spain, no. 32978/03, Para. 25, 28 June 2007; Beian v. Romania (no. 1), 30658/05, paras. 34-40, 6 December 2007; Ştefan and Ştef v. Romania, nos. 24428/03 and 26977/03, paras. 33-36, 27 January 2009; Iordan Iordanov and Others v. Bulgaria, no. 23530/02, paras. 48-49, 2 July 2009; and Schwarzkopf and Taussik v. Czech Republic (dec.), no. 42162/02, 2 December 2008).

53. In so doing it has explained the criteria that guided its assessment, which consists in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, 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, paras. 49-50).

56. Its assessment of the circumstances brought before it for examination 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 [...]

57. In this regard the Court also reiterates that the right to a fair trial must be interpreted in the light of the Preamble of the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the fundamental aspects of the rule of law is the principle of legal certainty (see Brumărescu v. Romania [GC], n. 28342/95, para. 61, 28 October 1999), which, inter alia, guarantees 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 [...].

58. The Court points out, however, that 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, para. 74, 18 December 2008). [...]"

The key principle to be applied in cases of divergence of decisions of the Supreme Court in apparently similar cases or circumstances is whether or not "profound and long-standing differences exist" in the case-law of the Supreme Court (*see* Nejdat Şahin and Perihan Şahin, quoted above, para. 53). In the applicant's case, the Supreme Court decision on her Revision is contrasted with only five other decisions of the Supreme Court in five other cases

concerning apparently similar facts and law. It is difficult to see how, based on only six decisions of the Supreme Court, one could conclude that there are "profound and long-standing differences" in the case-law of the Supreme Court which threaten the principle of legal certainty and , thereby, undermine the rule of law.

In contrast, the case of Beian v. Romania concerns the determination of entitlements to special social benefits provided under a new law for persons who had been compelled to undergo compulsory non-military public service in the 1950s. The law specified that beneficiaries were persons who had been engaged in compulsory service under the authority of a particular agency called the DGT. The applicant in that case had performed compulsory service, but not under the authority of the DGT. Over the period 2003-2006 the supreme court of Romania had been called upon to rule whether persons having performed compulsory service not subject to the DGT were nevertheless eligible for the benefits specified in the law. During this time-frame the supreme court of Romania ruled 18 times in favour of persons not subject to the DGT, and 17 times against such persons. Sometimes, contradictory rulings were even made on the exact same day. The ECTHR was particularly concerned that the supreme court itself was the source of legal uncertainty, given the importance of a supreme court's role to resolve contradictions in judicial interpretation.

The case of Beian v. Romania involves a substantial series of contradictory decisions given by the Romanian supreme court over a period of more than three years, which alternate indiscriminately between one interpretation and another. The multitude of cases over a significant period of time lacking in all consistency is what leads to the conclusion of manifest arbitrariness in that case. It is this finding of manifest arbitrainess which leads to a conclusion of a violation of Article 6, para. 1, of the Convention.

The contrast with the current case under consideration by the Constitutional Court is significant. Only six cases of the Supreme Court have been presented of which two cases were decided on 17 January 2008, and Applicant's case was decided on 10 June 2010. The Supreme Court's interpretation of the material law was different in the first two cases than it was in the third case. Neither the numbers of allegedly inconsistent judgments, nor the time-frame wherein these judgments occured, reach the level of severity or legal uncertainty which would warrant a conclusion of manifest arbitrariness.

Conclusion

Consequently, the divergence of legal interpretation evident in the Supreme Court decision in the Applicant's case *vis-à-vis* those five other cases does not demonstrate a "profound and long-lasting difference" in the case-law of the Supreme Court.

The Supreme Court of Kosovo is the final interpreter of the correct application of the law in the Republic of Kosovo. Although pursuant to Article 102, paragraph 3 of the Constitution all courts in Kosovo are required to apply the Constitution in their decisions and judgments, the Constitutional Court is the final interpreter of the Constitution. The Constitutional Court does not have the authority to serve as the final interpreter of the correct application of the law in Kosovo even if the Constitutional Court disagrees with a legal interpretation by the Supreme Court unless such interpretation is a violation of the Constitution. Therefore, this Court must decide whether the judgment of the Supreme Court in the Applicant's case violated the Constitution regardless of whether the Court believes the Supreme Court applied the correct law in Applicant's case.

In this case the Applicant claims that the Supreme Court of Kosovo treated her differently than five other employees with different jobs with an identical employer in terms of deciding whether her employment status was permanent or for a fixed period of time. The decisions of the Supreme Court that she relies upon involve other employees of the same employer but with different job duties. Some of those decisions were decided 17 months earlier by substantially different judges of the Supreme Court who interpreted the labor law of Kosovo but did not specifically address the legal issue of whether an employee could lawfully agree to no longer be treated as a permanent employee. 17 months later the Supreme Court in Applicant's case addressed that legal question and concluded that it was lawful for a permanent employee like the Applicant to agree to be an employee for a definite term. The Supreme Court merely addressed that issue in a rational and objective manner in the Applicant's case. There is no evidence in the record or before this Court that the Applicant was treated differently for any other reason. There is no evidence that the Applicant was treated differently because of her gender or her ethnic background.

The Constitution of Kosovo requires that everybody receive equal protection of the law. It does not require that everybody be treated absolutely the same. Otherwise, everybody, from the President of the Republic to the highway maintenance officer, would have to receive equal compensation and other absolutely equal benefits regardless of their different job skills and duties. It does not require that every court decision where judges, whether they be judges of the Constitutional Court or of the regular courts, have to have the same

interpretation of the applicable law. It merely prohibits unequal treatment of people if the treatment is solely because of their gender or ethnicity or other protected grounds described in paragraph 2 of Article 24. In this case, there is absolutely no evidence that the Supreme Court's judgment with respect to the Applicant was for any reason other than the Court's clarification of the applicable law, not the Applicant's gender or ethnic background. There has been no violation of Applicant's rights to equal protection of the law as defined by Article 24 of the Constitution or a fair trial as defined by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights. Therefore, Applicant's referral should be rejected.

Respectfully submitted,

Robert Carolan
Judge