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

Pristine, 18 February 2013
Ref.no.:MPM387/13

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

Joint Dissenting Opinion

of
Judges Almiro Rodrigues and Snezhana Botusharova

We note the judgment of the Majority of the judges of the Constitutional Court (hereinafter, "the Majority"). However, we cannot agree with it for the reasons that follow.

The Applicant claimed that the Supreme Court of the Republic of Kosovo, in its Judgment Rev. No. 308/2007 of 10 June 2010, had 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 two earlier cases (Judgment Rev. No. 126/2007 of 17 January 2008, and Judgment Rev. No. 177/2007 of 17 January 2008). The Applicant also made reference to an additional 4 other cases where judgments by the Supreme Court followed the reasoning in the mentioned two cases. The Applicant claims that her situation is identical to that of the claimants in all 6 of these other cases.

We concurr with the interpretation given by the Majority of judges of the Constitutional Court that "*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). As such, we accept the view that the Applicant's complaints are to be examined under Article 31 of the Constitution taken in conjunction with Article 6.1 of the Convention and Article 24 of the Constitution taken in conjunction with Article 14 and Article 6.1 of the Convention.

The facts of this case concern an 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, however, 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, apparently as of 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.

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, in the Applicant's case 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 and does not replace its own evaluation of the facts and the interpretation of the material law with that of the regular courts. 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.

To the extent that the Applicant's claim raises issues relating to a violation of the right to a fair trial, as guarateed by Artricle 31, para. 1, of the Constitution. This provision states that

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 regular courts in the Applicant's case were in fact, and in law, "directly decisive for the civil rights concerned", we can conclude 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).

Therefore, we conclude that the Applicant's case falls within the scope of Article 6, para. 1, of the ECHR and of Article 31, para. 1, of the Constitution. As such, the Applicant had a right to benefit from the guarantee of "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

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 guarantees of a fair hearing. We note that the Applicant had effective access to three levels of jurisdiction within the Kosovo court system. We note further, that 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, we are satisfied 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. We note that, 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 includes 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. Both courts found that the respondent company "Kosova e Re", in its dismissal proceedings against the Applicant,

had violated procedures contained in the Law, given the conditions attached to the tender issued by the Banking and Payments Authority of Kosovo regarding the transfer of existing staff members of the former company "Kosova", as well as the provisions of the Collective Agreement.

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 at first and second instance. At any rate, the Applicant has not made any claim as to the fairness or not of this stage of the proceedings.

What remains to be further considered is the fairness of the proceedings at the Supreme Court, and to take into account their 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.

We note that, in its judgment on the revision, the Supreme Court does not mention the Collective Agreement by name. However, we can infer 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, we find that 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, we cannot find that there has 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.

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 six other persons whereof the situation is alleged to be identical to that of the Applicant.

The text of the judgment of the Majority lists five other Supreme Court judgments: three judgments issued on 17 January 2008 (Rev 126/2007, Rev 177/2007, Rev 183/2007), a fourth one issued on 28 January 2008 (Rev. 180/2006), and a fifth one issued on 7 February 2011 (Rev 154/2008). Together with the Supreme Court judgment in the Applicant's case (Rev 308/2007 of 10 June 2010), that makes a total of six judgments of the Supreme Court in allegedly identical circumstances.

The majority considered that this difference in the judgment in the Applicant's case, versus in the judgments 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.

However, we understand that the majority has based its decision on the alleged inconsistency in the judgments of the Supreme Court in these six cases. The majority has justified its decision with reference to the judgment of the European Court of Human Rights in the case of Beian v. Romania (No. 1) (No. 30658/05, 6 December 2007).

We note that the European Court of Human Rights has had on a variety of occasions to decide 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). [...]"

We note that 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, we are to 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, we note that 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 three cases were decided on 17 January 2008, a fourth case was decided on 28 January 2008, a fifth case was decided on 10 June 2010, and the sixth case was decided on 7 February 2011. The time-frame during which these allegedly inconsistent Supreme Court judgments were made comprises a period of some 3 years.

The Supreme Court's interpretation of the material law was allegedly different in the fifth case than it was in the five other cases. 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.

Consequently, we find that we cannot agree that the divergence of legal interpretation evident in the Supreme Court decision in the Applicant's case vis-à-vis those five other cases demonstrates a "profound and long-lasting difference" in the case-law of the Supreme Court.

Therefore, we find that we cannot agree with the Majority finding of a violation of the right to a fair trial due to unequal treatment, and we conclude that there has been no violation of the 'right to equality before the law' as contained in Article 24, para. 1, of the Constitution.

Respectfully submitted,

Judge Almiro Rodrigues

Judge Snezhana Botusharova