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

Prishtina, 7 October 2013
Ref.no.:RK47513

RESOLUTION ON INADMISSIBILITY

in

Case no. KI124/13

Applicant

NLB Prishtina (j.s.c.) with seat in Prishtina

Constitutional Review of the Judgment of the Supreme Court Rev. No. 335/2013, of 2 May 2013
and
request for imposition of interim measure

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Applicant is NLB Prishtina (j.s.c.), with its seat in Prishtina, represented by Ms. Myjsere Mujku.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court, Rev. No. 335/2012 of 2 May 2013.

Subject matter

3. The Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) the constitutional review of the Judgment of the Supreme Court, Rev. No. 335/2013, of 2 May 2013, by which the court in question decided to quash the Judgment of the District Court in Prishtina, Ac. no. 542/2010, of 18 October 2010 and uphold the Judgment of the Municipal Court in Prishtina, C1. No. 575/2009, of 8 August 2009, regarding the labor contest between the former BRK (Employer), now the Applicant and Mr. Nazmi Vokshi (Employee).

Legal basis

4. The Referral is based on Article 113.7 in conjunction with Article 21 of the Constitution, Article 47 and 22 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law) and Rule 28 of the Rules of Procedure of the Constitutional Court (hereinafter: Rules of Procedure).

Proceedings before Constitutional Court

5. On 15 July 2013, the Applicant submitted request to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 24 June 2013, the President appointed Deputy President Ivan Čukalović as Judge Rapporteur and the Review Panel composed of judges: Altay Suroy (Presiding), Prof. Dr. Enver Hasani and Arta Rama-Hajrizi (members).

7. On 28 August 2013, the Constitutional Court notified the Applicant, the Supreme Court and the affected party in the procedure.

8. On 10 September 2013, the Review Panel reviewed the report of the Judge Rapporteur and recommended to the full Court, the inadmissibility of the Referral.

Summary of facts

9. On 12 February 2002, the Applicant NLB Prishtina (legal successor of the New Bank of Kosovo, BRK) claims that the former BRK concluded for the first time fix term employment contract with Mr. Nazmi Vokshi (hereinafter: Employee). According to the employment contract, no. 02-03/21, Mr. Vokshi was assigned to the job position “Head of loan services” in duration of 6 months. The BRK (Employer) extended several times the employment contract for definite time to Employee, while after expiration of the last contract, no. 02-57/4-5-6 of 29 October 2004, his employment contract was not extended anymore.

10. On 4 November 2004, the disciplinary committee of BRK rendered decision no. 3109 on imposition of public reprimand against the Employer. Against this decision, the Employee was entitled to file appeal to the BRK management board within 15 days from the service of the decision.

11. On 30 December 2004, the BRK management board, after expiration of the contract, rendered the decision to not extend the employment contract to the employee as the "the Loan Service Analyst" in the branch of the Bank in Peja.

12. On 18 January 2005, the Employee, after receiving notification of the decision on non-extension of the employment contract, addressed the management board of former BRK with the request no. 88, for reviewing the challenged decision of 30 December 2004. The Board in question did not review the decision, with a justification that the Employee was not engaged sufficiently and efficient, therefore it considered the case as closed matter.

13. On 28 February 2005, the Employee filed claim in the Municipal Court in Prishtina against the decision of 30 December 2004 of the management board of former BRK, now the Applicant (NLB Prishtina), by requesting the annulment of the decision in question as unlawful.

14. On 20 October 2005, the Municipal Court in Prishtina (Ruling C. no. 65/2005) rejrected the claim filed by the employee as out of time, by considering that the claim against the decision of the management board of former BRK was not filed in compliance with the provision of Article 181 paragraph 1 of the Law on Associated Labor (LAL). Against this decision, unsatisfied party was allowed to file appeal within 8 days.

15. Former BRK (Employer) duly filed appeal in the District Court in Prishtina against the Ruling of the Municipal Court in Prishtina, C. no. 65/2005, of 20 October 2005,.

16. On 13 September 2006, the District Court in Prishtina (Ruling Ac. no. 135/2006), quashed the Ruling of the Municipal Court in Prishtina and decided to return the case for retrial, because according to the court in question, the first instance court has erroneously applied the substantive law in counting the time limit, due to the fact that it was referred to the provisions of the Law on Associated Labor and in the present case the Law on Basic Rights from Employment Relationship should have been applied.

17. On 14 December 2006, the Municipal Court in Prishtina (Judgment C. no. 294/2006), based on the Ruling Ac. no. 135/2006 of the District Court in Prishtina, approved as grounded the claim of the Employee and annulled as unlawful the decision of the management board of former BRK and obliged it to reinstate the Employee to his previous job position or to another job position, which corresponds with his professional background.

18. On 25 January 2007, former BRK (Employer) filed appeal to the District Court in Prishtina against the Judgment C. no. 294/2006, of 14 December 2006 of the

Municipal Court in Prishtina,. The appeal is based on erroneous application of the substantive law and on incorrect determination of factual situation.

19. On 5 March 2009 the District Court in Prishtina (Judgment Ac. No. 347/2007) approved as grounded the appeal of former BRK, now the Applicant, and decided to quash the Judgment C. no. 294/2006, of 14 December 2006 of the Municipal Court in Prishtina, returning again the matter for retrial to the Municipal Court in Prishtina. The court in question based the reasoning of its judgment on the fact that "the judgment of the first instance court is in violation of the provisions of the Law on Contested Procedure, finding that the enacting clause of the judgment was in contradiction with the reasoning".

20. On 8 August 2009, the Municipal Court in Prishtina (Judgment C1.no. 575/2009), approved again the claim of the Employee as grounded and quashed the decision of the management board of former BRK, now the Applicant, as unlawful, by obliging it to return the employee to his previous job as the "Loan analyst" or to any other workplace that corresponds with his professional background, with all the rights deriving from the employment relationship.

21. On 19 February 2010, the Applicant filed the appeal against the Judgment C1. no. 575/2009, of 8 August 2009, to the District Court in Prishtina.

22. On 19 October 2010, the District Court in Prishtina (Judgment Ac. no. 542/2010), approved as grounded the Applicant's appeal and decided to quash the Judgment C1. no. 575/2009, of 8 August 2009, of the Municipal Court in Prishtina

23. The Employee (claimant) filed revision in the Supreme Court against the Judgment Ac. no. 542/2010 of 19 October 2010.

24. On 2 May 2013, the Supreme Court (Judgment Rev. no. 335/2012) approved the revision filed by the Employee (claimant) and quashed the Judgment Ac. no. 542/2010 of the District Court in Prishtina, of 19 October 2010, by upholding the Judgment of the Municipal Court in Prishtina, C1. No. 575/2009, of 8 August 2009. The following is the reasoning of the Judgment:

> *"The Supreme Court of Kosovo, setting from such a situation, found that the second instance court, based on correct determination of the factual situation, has erroneously applied substantive law when rejecting the claimant's statement of claim. The Supreme Court of Kosovo, setting from such determined factual situation found that such a legal stance of the second instance court cannot be accepted as fair and lawful, because according to the findings of this court on determined factual situation, the substantive law was erroneously applied when found that the statement of claim of the claimant is ungrounded. It cannot accept as fair and lawful the finding of the second instance court that the employment of the claimant with the respondent was terminated upon expiration of the contract term, due to the fact that from the challenged decision of the respondent, it results that the claimant's employment contract was not extended due to lack of engagement and poor performance at work, and therefore, it is rightly stated in the revision that the second instance judgment was rendered*

based on an erroneous application of substantive law, and for these reasons, the Court approved the revision of the claimant as grounded, modified the challenged judgment, and upheld the first instance judgment.

The Supreme Court of Kosovo finds that the first instance court has correctly applied the substantive law when finding that the decision of the respondent on non-extension of the employment contract is unlawful, because from evidence in case files, namely, the decision of the respondent, it does not result by which evidence were determined the facts charged upon the claimant, or in which proceedings. The challenged decision does not specify any period during which the claimant had not shown engagement or poor performance, while in the minutes of the labor committee of 28.12.2004, it is stated that it is about the lack of evidence and concrete results of the claimant in reclaiming bad loans for the period of 01.04.2003, and reduction of the number of employees. Despite the fact that the claimant was not performing satisfactorily during 2003, the respondent again decided to extend the employment contract even after this date, finally until 31.12.2004."

The reasons provided by the first instance court in approving the claim of the claimant are accepted as fair and lawful by this Court, due to the reason that the requirements as per Article 19.2 of the Rules of Procedures of the respondent have not been met, for the employment relationship of the claimant be taken as a temporary position, the working position Head of Loan Service still exists, it has never been terminated, and it is of permanent nature. The claimant has performed these works for a relatively extensive period, since 02.01.2001, and his contracts were continuously extended, until 31.12.2004, and on the other hand, there were no convincing arguments given on his lack of engagement in completing activities and duties assigned to him, and for the reasons mentioned, the Court assessed the first instance findings as fair, and that the failure to extend the contract is unlawful, and therefore, it decided as per enacting clause of the judgment."

Applicant's allegations

25. The Applicant alleges that the public authorities violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, by Article 6.1 of the ECHR and Article 24 [Equality before the Law] of the Constitution, in conjunction with Article 14 of the ECHR, due to the adjudication of the case by the Supreme Court in contradiction with the case law.

26. The Applicant, regarding the assumption that the Supreme Court ruled contrary to its own case law submitted to the Court the decisions as follows:

26.1 Decision Rev. no. 107/2006 of 17 April 2007; Judgment Rev. no. 138/2008, of 31 March 2009; Judgment Rev. no. 71/2008, of 24 December 2008 of the Supreme Court.

"*The Supreme Court of Kosovo cannot accept the legal position of the lower instance courts for the moment, because due to erroneous application of*

substantive law, the determination of the factual situation has remained incomplete" [...] The contract of claimant's employment cannot be found in the case file, from which could be concluded the duration of the establishment of the respondent's employment relationship. [...] For these reasons, the court of first instance was obliged to determine whether the contract concluded between the claimant and the respondent on the establishment of the fix-term employment relationship with expiration date on 31.12.2004 exists."

26.2 Judgment Rev. no. 71/2008 of 24 December 2008 of the Supreme Court. In this case, this court rejected the claimant's revision, due to following reasons:

"In the present case, the allegations filed in the revision that the claimant's employment relationship was terminated because of the elimination of the job position as a consequence of organizational changes in the bank (respondent) and not as a consequence of the expiration of the contract on employment, are ungrounded, because his employment relationship was terminated precisely on the date of expiration of the contract, therefore the conclusion of the second instance court in this respect is fair and lawful and as such is accepted by this court too."

26.3 Judgment Rev. no.138/2008 of 31 March 2009 of the Supreme Court. In this case the Supreme Court approved the respondent's revision due to following reasons:

"According to Article 11.1, item (e) of the Regulation 2001/27 on the Essential Labour Law in Kosovo, it is provided that the employment contract may be terminated by expiration of employment term. In the present case, the litigating parties had entered a fixed term employment contract from 01.06.2004 to 31.12.2004, and therefore, the claimant's contract was terminated upon the expiration of employment term. Therefore, according to this Court, the claimant is not entitled to rights from the employment relationship for the contested period, since he did not meet the abovementioned requirements, because the establishment of the employment relationship did not exist. There is no provision in the Regulation 2001/27 on the Essential Labour Law in Kosovo which provides that the employee would be recognized his employment rights after expiration of employment term, until the employee meets retirement conditions."

27. The Applicant also requests from the Constitutional Court to approve the request for imposition of interim measure regarding the suspension of execution of the Judgment C1.no. 575/2009 of the Municipal Court in Prishtina, on 8 August 2009. The Applicant alleges that the execution of the judgment in question will cause irreparable material damage if it is implemented.

Admissibility of the Referral

28. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has met the admissibility requirements laid

down in the Constitution, as further specified in the Law and the Rules of Procedure of the Court.

29. The Court should first determine if the Applicant is an authorized party to submit a Referral with the Court pursuant to the requirements of Article 113 paragraph 1 and 7 of the Constitution. In the present case, the Applicant is legal person and he has proved that he is an authorized party, as it is provided by the abovementioned provisions of the Constitution and the Law.

30. The Court also determines if the Applicant has tried to meet the requirements of Article 113.7 of the Constitution and of Article 47.2 of the Law, regarding the exhaustion of effective legal remedies. The Applicant submitted sufficient evidence that he has met requirements of Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 36.1 (a) of the Rules of Procedure.

31. The Applicant should also prove that he has met requirements of Article 49 of the Law and of Rule 36.1 (b) of the Rules of Procedure, concerning the timely submission of the Referral. It can be seen from the case file that the final decision on Applicant's case is the Judgment of the Supreme Court, Rev. no. 228/2012 of 12 May 2013. The Applicant submitted the Referral with the Court on 15 July 2013, meaning that the Referral was submitted within the four month deadline prescribed by the abovementioned provisions.

32. The Court also determines if the Applicant has specified and clarified in his Referral what rights and freedoms, have been allegedly violated, by what act and by what court or public authority. In his Referral the Applicant specified the alleged violations of the constitutional provisions. But, the Applicant should provide convincing arguments that the facts he alleges that have caused the violation of his rights and freedoms guaranteed by the Constitution incontestably constitute, in their essence, elements of violation of a right.

33. In this regard, the Court refers to the provisions of the Rule 36.1 (c) and Rule 36.2 (a) and (b) of the Rules of Procedures, which provide that*:*

> *"(1) The Court may only deal with Referrals if:*
> *[...]*
> *c) the Referral is not manifestly ill-founded."*
>
> *(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:*
>
> *(a) the Referral is not prima facie justified, or*
>
> *(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or*
>
> *c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or*
>
> *(d) when the Applicant does not sufficiently substantiate his claim*."

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

35. Based on the case file, the Court notes that the Applicant complains, in particular, on the Judgment of the Supreme Court, Rev. no. 335/2012 of 2 May 2013, by which was quashed the second instance judgment, Ac. no. 542/2010, of 18 October 2010, and was upheld the judgment of the first instance court, C. no. 575/2009, of 8 August 2009. The Applicant maintains that the Supreme Court decided in a partial way regarding the contest, in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as well as Article 24 in conjunction with Article 14 of the ECHR, due to adjudication of the case in contradiction with its case law.

As to the Applicant's allegation for violation of Article 24 [Equality before the Law] of the Constitution, in conjunction with Article 14 of ECHR

36. The Court notes that the Applicant in his Referral mentioned the Decision Rev. no. 107/2006 of 17 April 2007; Judgment no. 138/2008 of 31 March 2009 and Judgment Rev. no. 71/2008 of 24 December 2008 of the Supreme Court, alleging that his case is similar to the above cases for which the Supreme Court decided in favor of the Applicant (former BRK, now NLB Prishtina).

37. As for the differences in treatment, the Court is referred to the ECtHR case law, which in some cases mentioned that the Applicant has an obligation to show and prove why his/her case is treated differently from other similar cases. Regarding this, the ECtHR *(see case Lithgow and others vs. United Kingdom)* stated that, "*Article 14 of the Convention protects persons [...] that are put in the analogue situations against discriminatory differences in treatment [...], but in order that the Applicant's appeal succeeds, it should be determined, among others, that the situation in which the alleged victim may be considered similar to the situation of persons who are treated better (See case Fredrin vs. Sweden).*

38. The Court notes that the Applicant alleges that his case is identical with other cases, in which the Supreme Court has decided in favour of the Applicant. As to the referred allegation, the Court, carefully analyzed individually the cases above and considers that the Applicant's case cannot be considered in a similar way with the abovementioned cases, because as it is noticed from the decisions, attached to this Referral, the Supreme Court, gave reasoning for each case individually, by being based on the basic issues referred in the claim and appeal by the parties themselves *(see the reasonings of the judgments in paragraph 26 item 1,2 and 3)*

39. On the other hand, the ECtHR emphasizes that it is the obligation of local courts or authorities to show and prove that treatment of a case differently from other cases with similar circumstances should be substantiated, convincing and reasoned properly. (See case Lithgow and others vs. United Kingdom), where the ECHR stated that: [...] for the purpose of Article 14, discriminatory difference in treatment is discriminatory if this difference has no objective or reasonable justification, or it does not pursue a legitimate aim.

40. In this regard, the Court considers that it is not proved by any evidence that the Supreme Court has decided in a partial or unlawful manner or that it has not sufficiently reasoned its judgment. It is not sufficient that the Applicant substantiates his allegation for "partial trial", by supporting his allegation in other cases for which the court has decided individually based on the light of the case. Such an allegation for violation of constitutional rights must be convincingly justified and referred based on the constitutional grounds, in order that the appeal has success to the benefit of the claiming party.

As to the Applicant's allegation for violation of the right to "fair and impartial trial"

41. The Court notes that the Applicant failed to substantiate by evidence his allegation for violation of the right to *"fair and impartial trial"*, that is guaranteed by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights. The allegations for violation of a constitutional right, in their essence, should contain indisputable elements of violation of fundamental rights, guaranteed by the Constitution and international instruments, in order that the Court goes into its merits.

42. The Supreme Court, in this case, has given sufficient reasons in its judgment, by examining and analyzing in entirety the circumstances of the case, on the basis of which has decided to quash the judgment of the second instance court and to uphold the judgment of the first instance court, which is full jurisdiction of the Supreme Court, to assess the legality of the court decisions rendered by the lower instance courts.

43. It is not, therefore, the task of the Constitutional Court to assess the legality and accuracy of decisions issued by competent court institutions, unless there is convincing evidence that such decisions have been rendered in an evidently unfair and unclear manner.

44. As far as alleged violations of constitutional rights are concerned, it is the task of the Court to analyze and assess if proceedings, in their entirety, have been fair and in compliance with the protection, explicitly provided by the Constitution. So, the Constitutional Court is not a court of fourth instance when considering the decisions rendered by the lower instance courts. It is the duty of the regular courts to interpret and apply pertinent rules of both substantive and procedural law. (See, *mutatis mutandis*, Garcia Ruiz v. Spain [GC], no. 30544/96, paragraph 28, European Court on Human Rights [ECHR] 1999-I).

45. In the present case, the Applicant has not provided any evidence which would indicate that the alleged violation, mentioned in the Referral, constitute indisputable elements of violation of the constitutional rights (see Vanek vs. Slovak Republic, ECHR decision on admissibility of Application no. 53363/99 of 31 May 2005)

46. Therefore, the Court cannot consider that the relevant proceedings, conducted in the Supreme Court were in any way unfair or arbitrary (*see mutatis*

mutandis, Shub v. Lithuania, ECtHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

47. Finally, the Court finds that the Applicant's Referral does not meet the admissibility requirements, either on the ground of admissibility, or on the merits of the Referral, because the Applicant failed to provide evidence that the challenged decision, violated his rights and freedoms, guaranteed by the Constitution.

48. From the reasons above, the Court concludes that the Applicant's Referral is considered as manifestly ill-founded and in compliance with Rule 36.2 (b) and (d) of the Rules of Procedure, is rejected as inadmissible.

Assessment of the request for Interim Measures

49. The Applicant also requests from the Court to impose interim measure on suspension of execution of the Judgment of the Municipal Court in Prishtina, C1. No. 575/2009, of 8 August 2009. The Applicant alleges that the execution of the judgment in question will cause him irreparable material damage.

50. In this respect, the Court refers to Article 116.2 [Legal Effect of Decisions] of the Constitution which establishes: *"2.While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages".*

51. The Court also takes into account Article 27 of the Law, which provides:

> *"The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest."*

52. Furthermore, rule 54.1 of the Rules of Procedure, provides:

> *"At any time when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures."*

53. Finally, the Rule 55.1 of the Rules of Procedure, provides:

> *"A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals."*

54. In order that the Court to imposes interim measure pursuant to Rule 55.4 of the Rules of Procedure, it must find that:

> *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and

(c) the interim measures are in the public interest.

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.

55. The Court further concludes that since the Applicant's Referral is manifestly ill-founded and is declared inadmissible, the request for interim measure can no longer be a subject of review, therefore, the request for imposition of interim measures should be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 46 and Article 27 of the Law and Rule 36.2 (b) and (d) and Rule 55 and 56.2 of the Rules of Procedure, on 10 September 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the request for interim measure;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. This Decision is immediately effective.

Judge Rapporteur **President of the Constitutional Court**

Ivan Čukalović Prof. Dr. Enver Hasani