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

Prishtina, 3 March 2014
Ref. no.: RK 563/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI144/13

Applicant

Ramë Hoxha

Constitutional review of Judgment, Rev. no. 300/2011, of the Supreme Court of Kosovo, dated 3 May 2013

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 Referral was submitted by Mr. Ramë Hoxha (hereinafter: the "Applicant") residing in Peja.

Challenged decisions

2. The Applicant challenges Judgment Rev.no.300/2011, of the Supreme Court of Kosovo, dated 3 May 2013, which was served on him on 28 May 2013; and Judgment Ac. no. 346/2010, of the District Court of Peja, dated 19 July 2011.

Subject matter

3. The subject matter is the constitutional review of the challenged decisions of the regular courts which upheld the allegedly *"wrongful and unfair decision of the Employer of the Applicant to dismiss him from work"*.

4. In this respect, the Applicant claims that Articles 31 [Right to Fair and Impartial Trial], 49 [Right to Work and Exercise Profession], 102 [General Principles of the Judicial System] of the Constitution as well as Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the "Convention) were violated.

Legal basis

5. The Referral is based on Article 113 (7) of the Constitution of the Republic of Kosovo (hereinafter the "Constitution), Article 47 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law"), and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter the "Rules of Procedure").

Proceedings before the Court

6. On 10 September 2013, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter the "Court").

7. On 24 September 2013, the President of the Constitutional Court, by Decision No. GJR. KI144/13, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Constitutional Court, by Decision No. KSH. KI144/13, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Enver Hasani.

8. On 21 October 2013, the Court notified the Applicant about the registration of the Referral. On the same date, the Supreme Court of Kosovo was notified of the Referral.

9. On 2 December 2013, the President of the Court, based on Article 11 of the Law and Rule 9 (1) of the Rules of procedure, by Decision No. KSH. KI144/13, appointed Judge Altay Suroy as member of the Review Panel, instead of Judge Robert Carolan.

10. On 3 December 2013, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 1999, the Applicant was hired as an employee of the petrol company "KOSOVA PETROLL" (hereinafter the "Employer") for an indefinite time.

12. On 14 October 1999, the Employer by Decision no.05-114 prohibited the Applicant to work in the petrol station no.1 in Peja, which was allegedly usurped by third persons and was out of factual authority of the Employer. The Decision, inter alia, stated:

> *"All employees of the State Enterprise for Distribution of Oil Products "Kosova Petrol" are hereby strictly prohibited to work in petrol stations owned by the enterprise which are temporarily used by illegal occupiers".*

13. On 27 March 2003, the Employer by Decision no. 05-312, renders the following:

> *"All working contracts of the employees of Enterprise for Distribution of Oil Products "Kosova Petrol", signed before 01.01.2003, and not extended during 2003, are hereby terminated unilaterally from 01.03.2003.*
>
> *From 01.03.2003, new working contracts will be signed for all employees needed for the enterprise, while the employees who will not have new contracts shall enjoy social assistance".*

14. The Applicant, then, lodges a lawsuit against the Employer, for compensation of unpaid income.

15. On 9 October 2003, the Employer by decision no. 05-671 orders the Applicant to an unpaid leave, for 3 months, starting from 8 October 2003 until 8 January 2004, allegedly without his request and against his will.

16. On 23 December 2003, the Municipal Court in Peja, by Judgment C.nr.15/03 obliged the Employer that in the name of unpaid personal income to pay to the Applicant the amount of 3.520.00 euro, for the period 1 March 2001 until 31 June 2003.

17. On 6 March 2006, the Municipal Court in Peja, by Judgment C. no. 1152/05 annulled the decision of the Employer to order the Applicant to an unpaid leave as unlawful, and obliged the Employer to pay procedural expenses under the threat of compulsory enforcement.

18. On 26 October 2007, the Municipal Court in Peja, by Judgment C. no. 422/06 obliged the Employer to pay to the Applicant in the name of compensation of personal income the amount of 15.340.80 euro, for the period 1 October 2003 until 30 September 2007, including annual interest.

19. In the above mentioned Judgment C. no. 422/06, the Municipal Court in Peja, further argued:

"... upon assessment of relevant facts, based on the ascertained factual situation by the Court in its main hearing, it derives that the claim suit of the plaintiff is legally grounded, and therefore, the Court approved it as grounded.

The court reached such a conclusion based on the fact that the respondent (Employer) ordered the plaintiff (Applicant) to an unpaid leave, as per decision no. 05-671, of 09.10.2003, for 3 months, starting from 08.10.2003 to 08.01.2004. Such a decision is in violation of legal provisions currently applicable in Kosovo. The Law on Working Relations of Kosovo, which is currently applicable according to the UNMIK Regulation 1999/1 and 1999/20, the matter of sending employees to unpaid leave is not provided upon, but the matter of unpaid leaves of employees is provided upon by the Essential Labour Law in Kosovo, which according to Regulation no. 2001/27, of 08.10.2001, is still in force and applicable.

This matter is provided upon by Article 21 of the Essential Labour Law (UNMIK Reg.no. 2001/27). It stipulates that "An employer may, at the request of the employee, approve unpaid leave". Therefore, according to this provision, unpaid leave may be allowed by an employer upon request of an employee.

In the concrete case, the plaintiff never filed any request to be allowed unpaid leave. Having this in consideration, it may be derived that the disputed decision of the respondent ordering unpaid leave of the plaintiff is in contradiction to the legal provision, and therefore, the Court annulled it as unlawful".

20. On 16 October 2008, the District Court in Peja, by Decision Ac. no. 125/08 quashed Judgment C. no. 422/ 06, of the Municipal Court in Peja, and remanded the case for a retrial.

21. On 19 June 2010, the Municipal Court in Peja, by Judgment C. no. 771/08, obliged the Employer to pay to the Applicant in the name of compensation of personal income the amount of 15.340.80 euro, for the period 1 October 2003 until 30 September 2007, including annual interest.

22. On 19 July 2011, the District Court in Peja, by Judgment Ac. no. 346/2010 changed Judgment C. no. 771/08, of the Municipal Court in Peja, and rejected the claim suit of the Applicant as unfounded.

23. In the above mentioned Judgment Ac. no. 346/2010, the District Court in Peja, further argued:

"... The respondent (Employer) never used the petrol station Peja 1, despite its legal rights to do so, and despite the fact that it compensated personal salaries to the plaintiff (Applicant) until the period in dispute, similar to other employees working in facilities under the management of the respondent. In relation to such facilities, namely for their release from the persons using them temporarily, a separate case is being proceeded by the Municipal Court in Peja.

... for this reason, technological redundancy occurred, and many working positions were closed. Pursuant to Article 12 of the Essential Labour Law, Regulation 2001/27, and pursuant to the decision no. 05-312, of 27.03.2003, the Enterprise has not extended working contracts with many employees, the plaintiff included, due to the reason that there were no working positions for the employees, since the majority of these facilities are being used by other persons. For an obligation to exist to compensate personal incomes, conditions must be met to have an unlawful action of the respondent, the damage caused in the form of lost profits, and causal link between the harmful action and damage caused. Due to the fact that the plaintiff was not involved in work for the period in dispute, and the working contract was not extended for objective reasons, this Court finds that there is no unlawful action of the respondent, there is no objective obligation of the respondent, and neither guilt, since the plaintiff has not worked for such time, and has not contributed to income generation, the claim suit of the plaintiff cannot be accepted, and therefore, it is ungrounded.

On the other hand, since the respondent is not using the petrol stations, including the one where the plaintiff used to work, and since those facilities are used by other persons, this Court finds that the respondent is not part of the legal and obligations relationship under review in this legal matter, it is not a subject in the material and legal relationship from which the plaintiff derives his rights, independently of the fact that the plaintiff had a formal decision assigning him to working duties and position as Chief Worker at PS Peja 1, starting from 17.12.1999..."

24. On 3 may 2013, the Supreme Court of Kosovo, by Judgment Rev. no. 300/2011 rejected the revision of the Applicant lodged against Judgment Ac. no. 346/2010, of the District Court in Peja, as unfounded.

25. In the above mentioned Judgment Rev. no. 300/2011, the Supreme Court of Kosovo, further argued:

"... Setting from such a situation, the Supreme Court of Kosovo found that the second instance court, based on a fair and complete factual situation ascertained, has fairly applied contested procedure provisions and material law, when finding that the claim suit of the plaintiff (Applicant) is ungrounded. This due to the fact that the respondent (Employer) was not using the petrol stations during the period in dispute, including the petrol station 1 in Peja, where the plaintiff was working. For this reason, technological redundancy of employees appeared, and many working conditions were terminated. In compliance with Article 12 of the Essential Labour Law in Kosovo, Regulation No. 2001/27, and pursuant to decision no. 05-312, of 27.03.2003, the respondent did not extend working contracts with many employees, including the plaintiff. In these circumstances, this Court finds that the respondent had no obligation to compensate personal salaries, since the conditions for an unlawful decision were not met, and there is no causal link between the decision of the respondent and the damage caused in the form of lost profits, and therefore, there was no

objective liability of the respondent, as found rightfully by the second instance court, and is accepted as such by this court.

The allegations in the revision, that he never received any decision or notice on 27.03.2003, which according to the plaintiff, did not exist, and it was only done by the respondent to manipulate, are found by this Court to be ungrounded, since these allegations, including others, refer to the factual situation, and therefore, the Court did not review such allegations, pursuant to Article 214 of the CPL, since revisions cannot be filed on these causes".

Applicant's allegations

26. The Applicant alleges that *"regular courts have violated the constitutional principle of prohibition of arbitrariness in decision making since their statements of facts fail to present facts as found in case files and courts have failed in applying legal provisions and the logical relation between them".*

27. The Applicant claims that *"the Constitutional Court had found the Referral of Zyma Berisha, in the case KI120/10 admissible, for the same causes, and therefore, the Applicant believes that this referral should also be found admissible".*

28. The Applicant claims that *"the respondent (employer) never officially served him with a decision for termination of the labor relationship".*

29. Furthermore, the Applicant claims that *"the rationale of regular courts, that the respondent had no legal obligation to compensate personal salaries, since the facility where he was assigned to work was occupied, and consequently there is no blame, according to the Applicant is untenable, when taking into account the fact that the respondent (Employer) rendered decision no. 05-114, of 14.10.1999, thereby removing the Applicant from his working place, and this is proof that directly renders the enterprise liable and culpable. This evidence was not elaborated or assessed at all by the courts".*

30. The Applicant claims a violation of Article 31 [Right to Fair and Impartial Trial], Article 49 [Right to Work and Exercise Profession], and Article 102 [General Principles of the Judicial System] of the Constitution as well as Article 6 [Right to a fair trial] of the Convention.

31. Finally, the Applicant requires the Court to render invalid the judgment of the Supreme Court of Kosovo, Rev. no. 300/2011, dated 3 May 2013, and final judgment of the District Court in Peja, Ac. no. 346/2010, dated 19 July 2011.

Assessment of the admissibility

32. The Court observes that, in order to be able adjudicate the Applicants complaint, it is necessary to first examine whether they have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

33. In this respect, the Court refers to Article 113.7 of the Constitution, which provides:

> *"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

34. Furthermore, the Court refers to Rule 36 (1) c) of the Rules of Procedure, which provides:

> *"(1) The Court may only deal with Referrals if*
> ...
>
> *(c) the Referral is not manifestly ill-founded".*

35. In the concrete case, the Court notes that procedural guarantees of the right to a fair trial as prescribed by the Constitution and the Convention were met; there is no trace of arbitrariness on the part of the regular courts. The Applicant's referral, by and large, raises substantive law questions, and in this regard, the Court considers questions of fact and of law to be within the ambit of the regular courts. The Court cannot substitute its own findings with those of regular courts because it is neither a court of appeal nor a court of fourth instance.

36. With regard to the Applicant's claim that his case should be deemed admissible because it raises the same arguments that were raised in case KI120/10, Applicant Zyma Berisha, the Court notes that this case is different and dissimilar to the case KI120/10, in several aspects, but one key aspect is that in case KI120/10, the Court found that the Supreme Court had acted in an "evidently arbitrary manner" because it had ruled to the detriment of the Applicant (Zyma Berisha), in comparison to favorable rulings for the Applicant's colleagues for the same set of circumstances and facts, there was thus, "a profound inconsistency" in the decision-making of the Supreme Court in that particular case. The Court considers that the case at issue, is different and dissimilar to the case KI120/10, because it does not substantiate such or similar arguments.

37. In the abovementioned case KI120/10, Applicant Zyma Berisha, the Court reasoned: *"...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."*

38. Furthermore, in case KI120/10, Applicant Zyma Berisha, the Court reasoned: *"...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 fulfill the obligation to state reasons".*

39. As to the reasoning of the regular courts, in the case at issue, the Court considers that the regular courts did not fall short of their obligation to reason their decisions; indeed the Court considers that the regular courts have provided sufficient, logical and clear reasoning which explains the relationship between the Applicant as the employee, his Employer as well as the relationship of the latter with the third parties who have usurped its facilities.

40. The Constitutional Court notes that it is not a fact finding Court, the Constitutional Court wishes to reiterate that the correct and complete determination of the factual situation is a full jurisdiction of regular courts, and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (See case, Akdivar v. Turkey, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI 86/11, Applicant Milaim Berisha, Resolution on Inadmissibility of 5 April 2012).

41. Moreover, the Referral does not indicate that the regular courts acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Constitutional Court's task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way in which evidence were taken (See case Edwards v. United Kingdom, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).

42. The fact that the Applicant disagrees with the outcome of the case cannot of itself raise an arguable claim of a breach of Articles 31 [Right to Fair and Impartial Trial] and 49 [Right to Work and Exercise Profession] of the Constitution (See case Mezotur-Tiszazugi Tarsulat us. Hungary, No. 5503/02, ECtHR, Judgment of 26 July 2005).

43. In these circumstances, the Applicant has not substantiated his allegation for violation of Articles 31 [Right to Fair and Impartial Trial] and 49 [Right to Work and Exercise Profession] of the Constitution, because the facts presented by him do not show in any way that the regular courts had denied him the rights guaranteed by the Constitution.

44. Consequently, the Referral is manifestly ill-founded and should be rejected as inadmissible pursuant to Rule 36 (1) c) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 (7) of the Constitution, Article 47 of the Law, and Rule 56.2 of the Rules of procedure, on 3 December 2013, unanimously:

DECIDES

I. TO REJECT the Referrals as inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Prof. Dr. Enver Hasani