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

Prishtina, 22 April 2014
Ref. no.: AGJ602/14

JUDGMENT

in

Case no. KI89/13

Applicant

Arbresha Januzi

Constitutional Review of the Judgment of the Supreme Court Rev. no. 74/2011 of 12 March 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalovič, 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 has been submitted by Mrs. Arberesha Januzi, residing in Prishtina.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court, Rev. no. 74/2011, of 12 March 2013, which was served on the Applicant on 29 May 2013.

Subject matter

3. The subject matter of the Referral is the constitutional review of the Judgment of the Supreme Court, Rev. No. 74/2011, of 12 March 2013, regarding the alleged violations of the constitutional rights as guaranteed by Article 49 [Right to Work and Exercise Profession]; Article 53 [Interpretation of Human Rights Provisions]; Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, and in particular regarding violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

Legal basis

4. Article 113.7 of the Constitution, Article 20 and 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 (hereinafter: Rules of Procedure).

Proceedings before the Court

5. On 19 June 2013, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 24 June 2013, the President of the Court by Decision no. GJR. KI89/13 appointed Deputy President Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Court, by Decision no. KSH. KI89/13 appointed the Review Panel composed of judges: Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

7. On 2 July 2013, the Court notified the Supreme Court and the Applicant of the registration of the Referral.

8. On 26 August 2013, the Applicant submitted the Judgment of the Supreme Court Rev. no. 32/2013 to the Court.

9. On 30 August 2013, the Court requested from the Supreme Court to submit the certified copy of the Judgment Rev. no. 32/2013 of 30 July 2013.

10. On 4 September 2013, the Applicant again submitted additional documents.

11. On 5 September 2013, the Supreme Court submitted a copy of the Judgment Rev. no. 32/2013 of 30 July 2013, as requested by the Court.

12. On 23 September 2013, the Applicant once again submitted additional documents in relation to her case. In this submission, the Applicant mentioned

several judgments of the Supreme Court where the latter had decided prior to her case which she considers them to be similar to her case. Among others, she claims that "*the legal provisions of the Regulation 2001/27 on ELLK and the normative act had provided for a disciplinary proceeding to be conducted and in my case no disciplinary proceeding was conducted*".

13. On 12 March 2013, the Court reviewed the Referral and voted on the admissibility and the merits of the Referral.

Summary of the facts

14. On 17 March 2004, the Applicant concluded an employment contract (contract: no. 446/04) with the International Airport of Prishtina (hereinafter: employer) for an indefinite period of time in the position: Ground Stewardess.

15. On 18 May 2005, the Applicant was notified by her employer of the immediate termination of the employment contract. The employer based the termination of the employment contract on the initiation of the criminal proceedings by the Border Police of Kosovo, pursuant to Article 13 of the employment contract and Article 11.3 of UNMIK Regulation No. 2001/27 on Essential Labor Law of Kosovo (hereinafter: Regulation 2001/27 on ELLK).

16. On 18 May 2005, the Applicant filed an appeal against the notification, without number, of 17 May 2005 with the Director of the Management of the Airport.

17. The response to the Applicant's appeal, based on the case file, is dated 26 June 2005, but the said response was served on her by the Employer on 15 February 2006 in the main hearing.

18. On 25 August 2005, the Applicant filed a claim with the Municipal Court in Prishtina against the notification on termination of the employment contract. By this claim, the Applicant requested the annulment of the notification, without number, of 17 May 2005, as unlawful, since according to the Applicant's authorized representative, "*pursuant to the applicable legal provisions the Applicant could have been suspended pending the completion of the proceedings, and under no circumstances was her employment relationship to be terminated.* The Applicant's authorized representative also stated that "*the assessments of the employer that the Applicant has allegedly disclosed 'the business secret' do not stand*". For these reasons, according to the Applicant, the termination of the employment contract by the employer was done in violation of the provisions of the Regulation 2001/27 on ELLK.

19. On 19 December 2007, the Municipal Court in Prishtina (Judgment: Cl. No. 208/06) approved the Applicant's claim and annulled as unlawful the Employer's decision on termination of the employment relationship. The Court in question ordered the employer to reinstate the Applicant to her previous position or to another position, which corresponds to her professional qualification, with all rights that derive from the employment relationship, starting from 14 May 2005, and obliged the employer to compensate the salary to the Applicant, by applying also the legal interest for the lost salaries. The following are parts quoted from the Judgment:

"In order that the Court determines in a correct and complete manner the factual situation in this legal matter conducted the procedure of evidence: by examination of the employment contract no. 446/04 dated 17.03.2004, notification on termination of the employment contract without number dated 17.05.2005, the claimant's appeal dated 17.05.2005, the respondent's response to appeal dated 26.05.2005, submitted to the court on 15.02.2006 as well as the judgment of this Court P.no. 1388/05 dated 10.10.2005
[...]
According to the assessment of this court, the termination of the claimant's employment contract by the respondent, pursuant to the abovementioned legal provisions is in contradiction to the provisions of Article 11, 11.1, 11.2 and 11.3 of the Essential Labour Law of Kosovo, UNMIK Regulation no. 2001/27, because the abovementioned legal provisions were included in item 11.3, where as serious cases of misconduct are mentioned: unjustified objection to the duties specified in the contract of employment, theft, destruction, damage or unauthorized use of employer's assets, the disclosure of business secrets, the consumption of drugs and alcohol at work and behaviour of such nature, as a result of which would be unreasonable to expect further extension of employment relationship. From this results that none of these cases of misconduct have to do with the case of the claimant 208/06 *who did not refuse without any reason finishing of work duties, did not steal, destroy, damage and used without authorization the assets of the employer, did not disclose business secrets, did not use drugs and alcohol [...].*

From this determined factual situation, the Court assesses that the employee is responsible only for the violations of labor obligations, which at the time of commission were provided by legal provisions and by general legal act of the enterprise, provided by provision of Article 111, para. 2 of the Law on Employment Relationship (Official Gazette of SAPK, no. 12/89). From these reasons it finds that the employment contract no. 446/04 dated 17.03.2004 was *terminated to claimant Arberesha Januzi in unlawful manner, respectively her employment relationship was terminated, therefore it approves the claimant's statement of claim in entirety as grounded."*

20. The Applicant's employer filed an appeal against the Judgment of the Municipal Court of Prishtina with the District Court in Prishtina.

21. On 30 December 2010, the District Court in Prishtina (Judgment: Ac. no. 421/2008) rejected the appeal of the Employer as ungrounded, thereby upholding the judgment of the first instance court as being correct and lawful.

22. The Applicant's employer filed a revision with the Supreme Court of Kosovo against Judgment Ac. no. 421/2008 of the District Court in Prishtina. The appeal of the Applicant's Employer was based on substantial violations of the provisions of the contested procedure and erroneous application of the substantive law.

23. On 13 March 2013, the Supreme Court (Judgment: Rev. no. 74/2011) approved the revision filed by the Applicant's employer and modified the decisions of the lower instance courts. The Supreme Court justified its Judgment by the fact that the lower instance courts have correctly and completely determined the factual situation, but they erroneously applied the substantive law (law), when adjudicating that the Applicant's claim was grounded. The reasoning of the judgment in question is as follows:

> *"The Supreme Court of Kosovo, setting from such a situation of the matter, concluded that the first instance court determined factual situation in a correct and complete manner, it has erroneously applied the substantive law when it approved the claimant's statement of claim as grounded. The first instance court wrongly concluded that pursuant to Article 13.3 (a,b,c,d,e) (note: it should be Article 11.3) of the Essential Labour Law, UNMIK Regulation no. 2001/27, the claimant's actions are not qualified as serious violations of work duties, since the misconduct, pursuant to item b), have to do with employer's assets and not with assets of the third person.*
>
> *Such legal stance of the first instance court cannot be accepted as correct since Article 11.3 of the Essential Labour Law provides that the employment contract is terminated by the Employer in serious cases of misconduct or of unsatisfactory performance of work duties by the employee. In Article 11.3 explicitly are enumerated cases of misconduct. [...] According to the assessment of this court, theft at the workplace is qualified as misconduct of serious nature, after which it would be unreasonable to expect the extension of the employment relationship to the claimant due to the fact that the claimant's behavior questions her moral integrity in performing those duties and this is reflected also on other employees and on the image of the respondent [...]. From the reasons above, it is rightly stated in the revision that the appealed judgment was rendered based on erroneous application of the substantive law and both judgments had to be modified and the claimant's claim had to be rejected."*

Applicant's allegations

24. The Applicant alleges that the Supreme Court by Judgment Rev. no. 74/2011 of 12 March 2013 has violated her constitutional rights, as guaranteed by Article 49 [Right to Work and Exercise Profession]; Article 53 [Interpretation of Human Rights Provisions]; Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, and in particular Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

25. The Applicant further argues that the Supreme Court, on the same legal basis as in her case, by Judgment Rev. no. 32/2013 approved the claim of the other two employees under completely identical circumstances. She claims that "the Supreme Court has established diverse case law on completely identical cases and this undoubtedly confirms that" as the Applicant claims "my right to fair trial was violated".

26. The Applicant also refers to the Judgment of the Constitutional Court, namely Case KI120/10 of 29 January 2013, where the Court found a violation of Article 31 of the Constitution and Article 6.1 of the ECHR with respect to the Supreme Court's failure to give proper reasoning in its Judgment.

The case of the other two employees, Judgment of the Supreme Court Rev. no. 32/2013, of 30 July 2013, for which the Applicant alleges that it is completely identical with her case

27. For the purposes of substantiating her Referral and in support of her allegation of the violation of the constitutional rights, the Applicant in the meantime attached to the Referral the Judgment of the Supreme Court Rev. no. 32/2013 of 30 July 2013, where, according to the Applicant, her case and the case of her two colleagues are completely the same. In that Judgment, the Supreme Court rejected the Employer's Revision (Prishtina International Airport) and approved the claimant's claim, finding that the lower instance courts decided correctly when they annulled the employer's decisions, regarding the termination of their employment contract. The lower instance courts assessed that the termination of employment contract was contrary to the provisions of Regulation 2001/27 on ELLK and of the normative act of the employer because the employer did not comply with the procedures set forth in Article 11.5 of the Regulation 2001/27 on ELLK, namely it did not conduct the disciplinary proceedings provided by the applicable law and by employer's normative act.

28. Below is the reasoning of the judgment: *"The respondent was notified of this case by the airport border police and the respondent's managing director on 23.12.2008 rendered the decisions to terminate the employment relationship to both claimants. The decisions were rendered pursuant to the provision of Article 8 of Airport Staff Policies Regulation and Article 11.3 of the Essential Labour Law – UNMIK Regulation no.2001/27, with the justification that the claimants had committed serious misconduct, after which it would be unreasonable to expect the continuation of the employment relationship.*
[...]
Setting from such a factual situation of the matter, the Supreme Court found that the lower instance courts, by determining the factual situation in a correct and complete manner, have correctly applied the provisions of the contested procedure and the substantive law, when finding as grounded the claimant's claim in the part I of the enacting clause of the first instance judgment.

It is correct the conclusion of the lower instance courts that the provision of Article 11.3 (e) of the Essential Labor Law, provides as a serious case of misconduct, which is the ground for termination of the employment contract by the Employer, the behavior of a very serious nature, as a result of which would be unreasonable to expect further extension of the employment relationship.

However, in order to terminate the employment contract on this legal ground, the same law in Article 11.5 provides that, in this case, the employer shall notify the employee in writing that it intends to terminate the labour contract. Such notice shall include the grounds for termination and a meeting shall be held between the employer and the employee, and at such meeting the

employer shall provide the employee with an oral explanation of the grounds for termination. In the present case it was not acted like this, but the managing director took the written decisions, and they were served on the claimants, by disregarding the procedures described above.

Therefore, the Supreme Court approved as correct the finding of the lower instance courts, in the part it has to do with approval of the claimant's claim and the confirmation that the decisions of the managing director of the respondent on termination of claimant's employment contract are null and void-the enacting clause I of the first instance judgment as well as in part II of enacting clause, which has to do with reinstatement of claimant to her previous working place. In this part, the challenged judgment was rendered by correct application of the provisions of the contested procedure and of the substantive law".

The Judgment of the Constitutional Court in case KI120/10, Zyma Berisha, adopted on 29 January 2013, for which the Applicant alleges that it is applicable to her case

29. In that case (KI120/10, Zyma Berisha of 29 January 2013), Mrs. Berisha had alleged that: *"the Supreme Court, by Judgment Rev. 308/2007, dated 10 June 2010, placed her in an unequal position vis-a-vis her former colleagues who were in the same situation, i.e. had permanent employment status within the same company and won their cases before the Supreme Court, whereafter they were reinstated into their previous workplaces.*

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

30. This Court's findings in that case are as follows: *"In the instant case, the Court notes that the Applicant requested the ordinary courts to confirm her permanent employment status in the same way as they had done in the case of her former colleagues. She referred, in particular, to the provisions of the Collective Agreement applicable to her employment status as well as to the relevant provisions of the UNMIK Regulation on Essential Labour Law in Kosovo and also presented the evidence that she was entitled to enjoy all rights from the permanent employment status, as the findings of the Labour Inspectorate had also confirmed. In view of the previous judgments of the Supreme Court in the identical cases of her former colleagues based on similar facts as the Applicant's case, the Applicant could legitimately expect that the revision initiated by "Kosova e Re" would be rejected.*

However, although the Supreme Court, as the text of the contested judgment shows, found that the lower instance courts had fairly and fully ascertained the factual situation related to the decisive facts for a fair adjudication of the

case, it apparently did not analyze the Applicants' claim in a similar way as it had done in the cases of her former colleagues and as the lower instance court had done in the Applicant's case. Instead the Supreme Court viewed that, contrary to the Applicant's submissions, the subject matter of her case concerned the extension of the fixed term contract and did not at all consider the Applicant's arguments and evidence related to her claim to be entitled to permanent employment status and reinstatement into her working place.

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

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

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

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

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

Moreover, the Court notes that the Supreme Court, in its Judgment Rev.nr.154/2008, dated 7 February 2011 i.e. 7 months after its judgment in the Applicant's case, did not repeat its findings in the Applicant's case, but again ruled in the same way as it had done in the four cases prior to the Applicant's case, considering the confirmation of the permanent employment status as the

subject matter of the disputes and using similar extensive and thorough reasoning to reject the revision submitted by "Kosova e Re".

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

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

Admissibility of the Referral

31. In order to be able to adjudicate the Applicant's Referral, the Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, and further specified in the Law and the Rules of Procedure.

32. The Court first determines whether the Applicant is an authorized party within the meaning of Article 113.7 of the Constitution, which provides that "*Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution [...].*" In this respect, the Referral was submitted by the Applicant pursuant to Article 113.7 of the Constitution (Individual Referrals). Therefore, the Court considers that the Applicant in this case is an authorized party, entitled to refer this case to the Court.

33. The Court should also determine whether the Applicant has met the requirements of exhaustion of effective legal remedies, as stipulated by Article 113.7 of Constitution and Article 47.2 of the Law which provides: "*[...] The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*"

34. In that regard, the Court refers to its Case KI41/09 where it is stated: "*The Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human of Rights (see Article 53 of the Constitution), is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).*

In this connection, the Court would like to stress that applicants are only required to exhaust remedies that are available and effective. Discretionary or extraordinary remedies need not to be exhausted, for example requesting a

court to revise its decision (see, mutatis mutandis, ECHR, Cinar v. Turkey, no 28602/95, decision of 13 November 2003).

Where an applicant has tried a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the four-month time limit (Art. 49 "Deadlines" of the Law), which may lead to the complaint being rejected as out of time (see, mutatis mutandis, ECHR, Prystavka, Rezgui v. France, no 49859/99, decision of 7 November 2000).

35. In the present case, the Applicant challenges the Judgment of the Supreme Court of Kosovo (extraordinary legal remedy) which approved the revision filed by her employer. Thus, in absence of another available legal remedy, the Court concludes that the Applicant has met the requirement for exhaustion of effective legal remedies.

36. The Applicant should also comply with the requirements of Article 49 of the Law and Rule 36 (1) b) of the Rules of Procedure, regarding the submission of Referral within prescribed legal time limit. From the case file it can be clearly seen that the last decision in the case of the Applicant is the Judgment of the Supreme Court Rev. no. 74/2011 of 12 March 2013. The Applicant submitted the Referral to the Court on 19 June 2013, which means that the Referral was submitted within the four (4) month time limit, as prescribed by the Law.

37. The Court also assesses whether the Applicant has specified and clarified in her Referral what rights and freedoms she claims that have been violated, by what act and by what court or public authority. In her Referral, the Applicant has accurately mentioned the alleged violations of the constitutional rights and she has also filed various documents, supporting her allegation, regarding the fact that the Supreme Court has violated her fundamental rights and freedoms, guaranteed by the Constitution.

38. Since the Applicant's Referral has met the procedural requirements for admissibility also based on the fact that the Referral is not manifestly ill-founded, the Constitutional Court decides that the Applicant's Referral is admissible for review, and, therefore it will deal with the assessment of the merits of the Referral.

Merits of the Referral

39. The Applicant alleges that the Judgment Rev. no. 77/2011 of the Supreme Court of 12 March 2013, violates her fundamental rights, guaranteed by Article 49 [Right to Work and Exercise Profession], Article 53 [Interpretation of Human Rights Provisions], Article 55 [Limitations on Fundamental Human Rights and Freedoms] of the Constitution, and in particular violates Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR.

40. Regarding the rights sought by the Applicant, the Court recalls that "*it is master of the characterization to be given in law to the facts of the case and is not bound by the characterization given by an applicant or a government. A complaint is characterized by the facts alleged in it and not merely by the legal*

grounds or arguments relied on." (See *Judgment of ECtHR in case Stefanica and others v. Romania, of 2 November 2010, paragraph 23*).

41. Therefore, the Court will analyze the complaints of the Applicant based on the alleged facts and the evidence attached to the Referral regarding her allegations of a violation of fundamental rights guaranteed by the Constitution and the ECHR.

42. The Applicant argues that the Supreme Court, only three months later, in completely identical circumstances, by Judgment Rev. no. 32/2013, approved the claim of the other two employees. On the other hand, in her case, the same court with the same legal basis rejected the Applicant's statement of claim. She alleges that the development by the Supreme Court of an inconsistent case law, confirms the lack of a fair trial, which not only contradicts with the case law of the court itself, but it also violates her right to a "fair trial" because the administration of justice in her case does not guarantee for an equal protection of the parties to proceedings before that court.

43. As to allegations of the violation of Article 31 of Constitution, in conjunction with Article 6 of ECHR, the Court refers to the following constitutional provisions:

Article 31.1 [Right to Fair and Impartial Trial] of the Constitution, provides that: *"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers."*

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

In addition, Article 6 of the European Convention on Human Rights provides: *"In determination of his civil rights and obligations [...] everyone is entitled to a fair ... hearing ... by ... a tribunal..."*

Supreme Court's divergences in the case of the Applicant and the other two employees

44. According to the Applicant, only a few months following her case, the Supreme Court issued Judgment Rev. no. 32/2003, approving the claim of the other two employees as well-founded under completely identical circumstances to those of the Applicant.

45. The Constitutional Court, after the findings it made from the case file, notes that Judgment Rev. no. 74/2013, (the Applicant's case) and Judgment Rev. no. 32/2013 (the case of the other two employees) are identical in the legal basis, facts and evidence.

46. According to Judgment Rev. no. 74/2011, the Applicant's case: a) The responding party before the Supreme Court is Prishtina International Airport (Employer); b) The subject matter is the violation of procedures provided by the

law and the normative act of the employer; c) the termination of the employment contract was based on the initiation of the criminal proceedings by the Airport Border Police; The legal ground for the rejection of the Applicant's statement of claim is Article 11.3 item e) of the Regulation 2001/27 on Essential Labor Law in Kosovo: *"behavior of such a serious nature that it would be unreasonable to expect the employment relationship to continue".*

47. According to Judgment Rev. no. 32/2013 of 30 July 2013, the case of the other two employees: a) The responding party before the Supreme Court in this case too is Prishtina International Airport (Employer); b) The subject matter in this case is the violation of procedures provided by the law and the normative act of the employer, c) the termination of the employment contract, in this case too, was based on the initiation of the criminal proceedings by the Airport Border Police; d) The legal basis for the approval of the statement of claim, in this case too, is Article 11.3 item e) of the Regulation 2001/27 on ELLK: *"behavior of such a serious nature that it would be unreasonable to expect the employment relationship to continue".*

48. It is evident that the claim of the Applicant was rejected on the same legal basis, on which the claim of the other two employees was approved. Therefore, as we are dealing with completely identical cases, it is necessary to understand where lie the conflicting differences in the treatment of these cases.

49. In the Applicant's case, the Supreme Court concluded that the lower instance courts established the facts and the evidence in a correct manner, but according to it, *"they erroneously applied the substantive law"*, because in this case the violation of work duties is based on item "e)" of Article 11.3 of the Regulation 2001/27 on ELLK, which provides *"behavior of such a serious nature that it would be unreasonable to expect the employment relationship to continue".*

50. Meanwhile, in the case of the other two employees, on the same legal basis, the same court endorsed the conclusions of the lower instances as being correct, both in terms of the administration of evidence and the application of the procedural and substantive law, the reasoning of the court in that case being as follows: *"It is correct the conclusion of the lower instance courts that the provision of Article 11.3 (e) of the Essential Labor Law, provides as a serious case of misconduct, which is the ground for termination of the employment contract by the Employer, the behavior of a very serious nature, as a result of which would be unreasonable to expect further extension of the employment relationship. However, in order to terminate the employment contract on this legal ground, the same law in Article 11.5 provides that, in this case, the employer shall notify the employee in writing that it intends to terminate the labour contract. Such notice shall include the grounds for termination and a meeting shall be held between the employer and the employee, and at such meeting the employer shall provide the employee with an oral explanation of the grounds for termination.*

51. What does Regulation 2001/27 on ELLK applied in these cases provide:

"Article 11, Termination of Labour Contract
11.1 A labour contract shall terminate:

[...]
(c) on the grounds of serious misconduct by the employee;
(d) on the grounds of unsatisfactory performance by the employee;
[...]
11.2 A labour contract shall be terminated by the employer on the grounds of serious misconduct or unsatisfactory performance by the employee.
11.3 Serious misconduct shall include the following:
(a) unjustified refusal to perform the obligations set out in the labour contract;
(b) theft, destruction, damage or unauthorized use of the employer's assets;
(c) disclosure of business secrets;
(d) consumption of drugs or alcohol at work; and
(e) behavior of such a serious nature that it would be unreasonable to expect the employment relationship to continue.

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

52. The Supreme Court's differences in treatment of these cases lie in the fact that in the Applicant's case, that court selectively applied the legal norms which fulfilled the requirements of one party only, in the present case, of the employer only, because the Supreme Court did not take into consideration the Applicant's rights deriving from Article 11.5, as it did in the cases of the other two employees. This legal norm provided for the conduct of administrative proceedings before the Employer would take a decision to terminate the employee's contract. Pursuant to the applicable laws normative acts have been adopted which provide for the initiation of the disciplinary proceedings.

53. The Supreme Court has maintained this stance in all other cases, when it adjudicated on the same legal basis pursuant to Regulation 2001/27 on ELLK and Law no. 12/1989 on the Employment Relationship in Kosovo. These legal norms expressly provide that the employer must conduct administrative/disciplinary proceedings in order to assess and qualify the violations of work duties. The establishment of the disciplinary committees is regulated by law and by legal normative acts of each employer.

54. In her Referral, the Applicant has cited some cases in which the Supreme Court had decided prior and subsequent to her case, regarding proceedings that an employer is obliged to conduct in relation to the employee before an employee's employment contract is terminated. Such cases include: Judgment, Rev. no. 126/2007, of 17 January 2008; Judgment, Rev. no. 177/2007, of 17 January 2008; and Judgment Rev. no. 32/2013, of 30 July 2013, to which the Applicant precisely refers.

55. The Constitutional Court notes that the Supreme Court like in Judgment Rev. no. 32/2013 (the case of the other two employees) has maintained this stand in all other cases raised before it, such as:

> Judgment Rev. no. 43/2006 of 21 September 2006 which approved the plaintiff's revision and quashed the decisions of the lower instance courts and the case was remanded to the first instance court for retrial, precisely due to the violation of procedures and obligations that derived from Article 11.5 of Regulation 2001/27 on ELLK (See case KI 103/13 of this Court Mazllum Zena, under paragraph 18 of the Resolution on Inadmissiblity);
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> Judgment Rev. no. 368/2011 of 2 May 2013 which approved the plaintiff's claim and modified the decisions of the lower instances due to non-initiation of the disciplinary proceedings by the employer to assess the violation of work duties. In that case, the Supreme Court has emphasized that in order to assess the violations of employment relationship, the applicable Law no. 12/1998 on Employment Relationship in Kosovo provides the initiation of the disciplinary proceedings and the setting up of disciplinary committees to qualify the violations committed in the employment relationship (See, Resolution on Inadmissibility, Case KI185/13, Kosovo Energy Corporation, under paragraph 21);
>
> Judgment Rev. no.151/2003 of 5 June 2013 which also approved the plaintiff's claim upon revision and modified the decisions of the lower instances due to non-initiation of the disciplinary proceedings by the employer to assess the violation of work duties (See Resolution on Inadmissibility, Case KI186/13, Kosovo Energy Corporation, paragraph 20).

56. However, it is evident that the Supreme Court only in Applicant's case decided differently from abovementioned cases. In this respect, the Supreme Court has failed to equally treat the parties to proceedings for the reason that it based itself on a norm which satisfied the requirements of one party only and it did not base itself on the norm which presented an obligation for the employer and a right for the Applicant. In the present case, it cannot be said that the Supreme Court maintained the same position in completely analogous cases (see how it was acted in the case of the other employees, Judgment Rev. No. 32/2013, of 30 July 2013).

57. The Supreme Court applied Regulation no. 2001/27 on ELLK and in all cases where it applied Article 11.1, 11.2 and 11.3, it recalled on the lower instances that in relation to this legal basis, the legislator had provided for the application of Article 11.5 which obliges the employers to conduct the respective proceedings. However, this was not the case with the Applicant.

58. Even in cases when the Supreme Court applied the Law on Employment Relationship no. 12/1989, the main ground for quashing and modifying the decisions of lower instances was precisely the fact that the employers had arbitrarily terminated the employees' contracts without having conducted the respective proceedings.

59. Regarding the test whether this machinery has been applied, based on the quoted Judgments of the Supreme Court we understand that in most of the cases a unified position has been maintained in the application of those legal norms, except for the Applicant's case. Building a different case law, in the concrete case, cannot be said to have been done for the purposes of sustainable reform and administration of justice.

As to the inconsistency of the decisions on completely identical cases

60. In this respect, the Court refers to ECtHR case law, namely case Beian v. Rumania, 30658/05 of 6 December 2007, where ECtHR held that: "the high level of inequality of judgments of the Cassation Court in Romania on same legal issues is in itself contrary to the principle of legal certainty, which is implicit in all articles of the Convention and is one of the fundamental elements of the rule of law.

61. Further it reads that this inequality has become itself a source of legal uncertainty, undermining public confidence in the judiciary. The ECtHR concluded that this uncertainty has had precedential effect of depriving the applicant of any opportunity to enjoy the rights provided by law, while other people in the same situation enjoyed these rights. The reasoning of the decision in question is as follows: *"The practice which developed within the country's highest judicial authority is in itself contrary to the principle of legal certainty, a principle which is implicit in all the Articles of the Convention and constitutes one of the basic elements of the rule of law (see, mutatis mutandis, Baranowski v. Poland, no. 28358/95, § 56, ECHR 2000-III). Instead of fulfilling its task of establishing the interpretation to be followed, the HCCJ itself became a source of legal uncertainty, thereby undermining public confidence in the judicial system (see, mutatis mutandis, Sovtransavto Holding v. Ukraine, no. 48553/99, § 97, ECHR 2002-VII, and Păduraru, cited above, § 98; see also, by contrast, Pérez Arias v. Spain, no. 32978/03, § 27, 28 June 2007). The Court therefore concludes that this lack of certainty with regard to the case-law had the effect of depriving the applicant of any possibility of obtaining the benefits provided for by Law no. 309-2002, while other persons in a similar situation were awarded those benefits. Accordingly, there has been a violation of Article 6 § 1 of the Convention".*

62. In this case, the Supreme Court *ex officio* should have taken care of applying its case law by avoiding violations of the rights of the parties to proceedings before it, and not to become itself a source of legal uncertainty. This way of administering justice surely influences the decrease of citizens' trust in the judicial system.

As to the discriminatory differences in treatment of completely identical cases

63. Article 24 paragraph 1 [Equality before the Law] of the Constitution provides that: *"All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination".*

64. This Article first and foremost guarantees the equality of all citizens before the law and provides for their right to equal judicial protection without making any difference between them. In fact, the meaning of this Article is the constitutional prohibition of discrimination as a fundamental prerequisite to ensuring the respect of all other human rights guaranteed by the Constitution and the exercise of the these rights under equal terms.

65. Regarding the ensuring of the equality before the law, consequently the prohibition of the discrimination on any grounds, it should be stressed that this Article contains constitutional provisions with a purpose to eliminate or change the circumstances that impede the realization of the equality of persons or groups of persons who are in fact in unequal position *vis-à-vis* other citizens.

66. With regard to discriminatory differences in the treatment of the parties before the law, the Court has already established its own case law. Therefore, in analogy with the circumstances of the present Applicant, the Court refers to its Judgment in case KI04/12 of 11 July 2012, published on 20 July 2012, where the Court, *inter alia*, found a violation of Article 24 of the Constitution.

67. In this regard, the Court referred to ECtHR case law and quoted parts of ECtHR decisions*: "In this respect, the ECtHR in the Lithgov case, the ECtHR stressed that Article 14 of ECHR protects persons [...] who are placed in similar situations against discriminatory differences in treatment (Lithgow and others v. United Kingdom, Judgment of 8 July 1986, Series A, No. 102; (1986) 8 EHRR 329). Further, the ECtHR in Fredrin case stressed that, in order for the Applicant's referral to be successful, it should be ascertained, inter alia, that the situation the alleged victim is in can be considered similar to the situation of persons who had a better treatment (see Fredrin v. Sweden, Judgment of 18 February 1991, Series A, No. 192; (1991) 19 EHRR 784).*

68. Further, ECtHR stressed 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. In this respect, in the Lithgov case, the ECtHR stated that: [...] for the purpose of Article 14, discriminatory difference in treatment is discriminatory if this difference has no objective or reasonable justification, i.e. if it does not pursue a legitimate aim.*

69. In its Judgment KI04/12, the Constitutional Court concluded that*: the District Court did not take into account its previous decisions in order to qualify and adjudicate Applicant's case pursuant to its decisions based on the principle of the right to equal treatment, as it had previously decided in cases with completely similar circumstances such as the Applicant's case. In these circumstances, the Court holds that this discriminatory difference in treatment constitutes a violation of the right to equal treatment before the law".*

70. Consequently, in this sense too, the Applicant was placed in an unequal position with other persons who won their cases on the same legal basis and under completely identical circumstances as the Applicant.

Lack of reasoning in the Judgment in Applicant's case and application of general principles to the concrete case

71. In order to apply the test of the ECtHR to this case, the Court needs to examine whether in the Applicant's case, the Supreme Court had given sufficient and convincing reasons for rejecting her arguments or whether its judgment shows "*evident arbitrariness*".

72. In this respect, the Court refers to its well-established case law regarding the obligation of the regular courts to give reasons for their judgments.

73. For instance in its case Judgment KEK I and later on in Judgment KI72/12 Veton Berisha and Ilfete Haziri, of 7 December 2012, Constitutional review of the Supreme Court Judgment A.nr. 1053/2008 dated 31 May 2012, where the Court found a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6.1 of ECtHR.

74. In its first judgment on KEK cases, the Court recalled the case law of the European Court of Human Rights as follows: *"Article 6.1 ECtHR obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. Thus the question whether a court has failed to fulfill the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see Ruiz Torija v. Spain, judgment of 9 December 1994, Series A no. 303-A, § 29).*

75. And finally, in Case KI120/10 Zyma Berisha, adopted on 29 January 2013, Constitutional review of the Supreme Court Judgment Rev. no. 308/2007, of 10 June 2011, the Court found that there was a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 paragraph 1 [Right to a Fair Trial] of the European Convention on Human Rights, precisely due to the failure to taking into consideration the arguments raised by the Applicant in her claim.

76. As noted above, the Applicant through her claim requested the annulment of the employer's decision as being unlawful, particularly emphasizing that this was so due to her employer not having taken into consideration any preliminary procedure for dismissing her, as provided by the law and normative act of the employer. The authorized representative of the Applicant has argued that the Applicant's employment contract was terminated in contradiction with the applicable law, because pursuant to the law and the normative act *"the Applicant should have been preliminarily suspended until the conclusion of the proceedings and by no means was her employment contract to be terminated."*

77. Instead, the Supreme Court's view despite the submissions filed by the Applicant was to consider as a subject matter in her case the nature of the

violation of work duties under Article 11.3 item e), a basis which was applied by the lower instance courts and it did not consider the Applicant's allegations regarding the violation of procedures by her employer (Article 11.5), which was a legal obligation for the employer and a legitimate right for the Applicant. This relevant fact in the Applicant's case is the best proof of the absence of objective assessment and reasoning of Judgment.

78. Furthermore, the Court notes that on the same legal basis, the same court by Judgment Rev. no. 32/2013 approved the claim of the other two employees (Applicant's colleagues), upholding the decisions of the lower instance courts which had ordered the employer to reinstate them to their workplace. Below is the finding of the Supreme Court in that case:

> *"It is correct the finding of lower instance courts that the provision of Article 11.3 (e) of the Basic Law on Labour, envisages as a serious case of misconduct that serves as ground to terminate the employment contract by the employer, the serious misconduct after which it would be unreasonable to further expect the continuation of the employment relation.*
>
> *But, in order to terminate the employment contract pursuant to these legal grounds, the same law in Article 11.5 envisages that in this case the employer will notify the employee in writing of his intent to terminate his employment contract and this notification will also include the reasons for the termination of the employment contract and the employer will have a meeting with the employee to also explain orally to the employee the reasons for the termination of the contract."*

79. However, in the Applicant's case the Supreme Court did not reason why it was not necessary to conduct procedures provided by the applicable law (Article 11.5), whereas in the other completely identical cases, prior and subsequent to her case, Supreme Court deemed that conducting administrative procedures before the termination of the employment contract was necessary.

80. In these circumstances, in the Applicant's case, the Supreme Court did not fulfill its obligations under Article 6.1 of the ECHR to sufficiently give proper reasons for rejecting the Applicant's claim upon revision. Based on the completely identical facts and circumstances as in her case, the Applicant had a legitimate expectation that the revision filed by her employer would be rejected.

81. Proper treatment of submissions by the Court in civil proceedings is essential for correctness of the civil contested procedure. When reviewing a case, the court is obliged to efficiently review grounds, arguments and evidence presented by the parties. The failure of the court to properly review the specific, pertinent and important arguments of the party was continuously considered by the European Court on Human Rights (ECtHR) as a violation of Article 6 of ECHR.

82. The reasoning of a judgment is a key component of the fair trial and it is essential to the delivering of justice and it is the best indicator which proves that the courts' statements in their decisions are well-founded. The function of a well reasoned decision is to show to the parties that they have been heard. On the

other hand, it is only by giving a reasoned decision that there can be public scrutiny of the administration of justice (see, Tatishvili v. Russia, ECtHR Judgment of 9 July 2007, paragraph 58 and Case Hirvisaari v. Finland, with respective amendments, paragraph 30, ECtHR Judgment of 27 September 2001).

83. The principle of the rule of law, on which a democratic state is based, entails rule of law and avoiding arbitrariness, in order to achieve respect and guarantee for the human dignity, justice and legal certainty. Legal certainty, as a constitutional concept, includes clarity, comprehensibility and sustainability of the normative system.

84. Finally, the Constitutional Court, considering all the principles elaborated above, concludes that the challenged decision violates the Applicant's rights to a fair trial; it violates the Applicant's right to equal treatment before the law; it is in contradiction with the case law of that very court and in contradiction with the principles of rule of law and legal certainty.

FOR THESE REASONS

The Constitutional Court, in its session of 12 March 2014, by majority:

DECIDES

I. TO DECLARE the Referral admissible.

II. HOLDS that there has been a breach of Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial] of the Constitution, Article 6 [Right to a Fair Trial] of the European Convention on Human Rights.

III. DECLARES invalid the Judgment of the Supreme Court of Kosovo Rev. No. 74/2011, dated 12 March 2013.

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

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

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

VII. This Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

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