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

Date: 13 May 2014
Ref.no.: MM 630/14

Case no. KI89/13

Applicant

Arbresha Januzi

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

Dissenting Opinion of Judge Almiro Rodrigues and Arta Rama-Hajrizi

We welcome the judgment of the Majority judgment of the Judges of the Constitutional Court (hereinafter, the Majority judgment). However, with all respect, we cannot agree with it for the reasons that follow hereunder.

In fact, in our view, the Majority judgment went beyond the scope of the Referral (I) and has not met the European Court of Human Rights (hereinafter, the ECtHR) principles as to the conflicting regular court decisions (II), namely, in relation to the question (a) whether there is a difference, (b) whether profound and long-standing differences exist in the case-law of a supreme court, (c), whether the domestic law provides for machinery for overcoming these differences and, if so, (d) whether that machinery has been applied and (e) if appropriate, to what effect. In addition, the Majority judgment considered allegations going beyond the scope of the Referral (III).
We will be short and going straightforward to the three pointed out main subjects.

I. Beyond the scope of the Referral

1. The Applicant, after having filed her Referral on 19 June 2013, submitted additional allegations and arguments on 3, 6, 17 and 23 September 2013.

2. Taking them all into account, the Majority judgment states that the Applicant alleges that the Judgment Rev. no. 74/2011 of the Supreme Court, dated 12 March 2013, *"has violated the Applicant's fundamental 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], 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".*

3. Thus, the Applicant mainly alleges two violations: her right to work and exercise profession (Article 49 of the Constitution) and her right to fair and impartial trial (Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR).

4. We concur with the Majority judgment saying that *"A complaint is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on"* (See, ECtHR judgment in the case of *Ştefanica and others v. Romania*, of 2 November 2010, para. 23).

5. However, the facts alleged in the Referral are not sufficient for the legal grounds and arguments built by the Majority judgment. Therefore, the legal grounds or arguments relied on by the Majority judgment could not go beyond the facts alleged in the Referral.

6. In fact, the Majority judgment went beyond the scope of the Referral, namely when considering the displaced allegation as to discriminatory differences in treatment of the Applicant and the lack of the judgment's reasoning.

II. Principles as to the conflicting regular court decisions

7. The ECtHR (see, *Iordan Iordanov and Others*, cited above, paras. 49-50) established the criteria for assessment of the conditions in which conflicting decisions of different domestic courts at last instance are in breach of the fair trial requirement enshrined in Article 6.1 of the Convention.

8. These criteria consist in establishing whether profound and long-standing differences exist in the case-law of the domestic courts, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect.

9. The Majority judgment acknowledged these criteria. However, in our view, these criteria were misinterpreted and misapplied by the Majority judgment.

a) Whether there is a difference

10. In general, each case is an individual case and as such is indivisible. In the case under review, either the alleged difference is related to previous cases and it would be only one case to diverge or the alleged difference is related to a case delivered three months later and could not have been foreseen. Nevertheless, the case is different and a different decision is to be expected.

11. The ECtHR holds that giving different treatment cannot be considered to give rise to conflicting case-law, when this is justified by a difference in the factual situations at issue (see, *Erol Ucar v. Turkey* (dec.), no. 12960/05, 29 September 2009). Then, let us compare the factual situations at issue, in order to see whether there is a difference.

Factual situation in the case of the Applicant (Judgment Rev. no. 74/2011 of the Supreme Court, of 12 March 2013)

12. On 17 May 2005, the Applicant allegedly committed a criminal offence in the working place premises. When it was discovered, the Applicant was notified that her employment contract was terminated, based on Article 13 of the employment contract and Article 11.3 (*termination of employment contract for serious cases of misconduct*) of the Essential Labor Law (UNMIK Reg. 2001/27).

13. On 25 August 2005, the Applicant complained to the Municipal Court in Pristina, claiming that, according to applicable legal procedures, the Employer should have suspended the termination until the criminal proceedings would have been terminated. The Applicant also submitted that the serious cases of misconduct had to do with the Employer's property and not with the property of third persons, as was the case in her situation; therefore, in her opinion, the termination of employment was unlawful.

14. On 10 October 2005, the Applicant was convicted and sentenced to the payment of a fine of 350 Euro for the alleged criminal offence.

15. On 19 December 2007, the Municipal Court decided that the termination of the Applicant's contract was unlawful, since *serious cases of misconduct* only concern the property of the Employer and not that of third persons as was the case in the Applicant's situation; the employee is only responsible for violations of labor obligations.

16. On 30 December 2010, the District Court in Pristina rejected the appeal of the Employer on the ground that the employment contract of the Applicant was immediately terminated, pursuant to Article 13 of the employment contract and Article 11.3 of the Essential Labor Law, for the reason that the Applicant committed the criminal offence as alleged.

17. On 12 March 2013, the Supreme Court approved the revision of the Employer and modified the judgments of the Municipal and District Courts for the reason that *Article 11.3 (e) of the Essential Labor Law it was provided that the labor contract may be terminated in cases of behavior of such a serious nature that*

it would be unreasonable to expect the employment relationship to continue. According to the assessment of this court, the theft in the workplace is qualified as misconduct of a serious nature, after which it would be unreasonable to expect the employment relationship with the claimant [the Applicant] to continue due to the fact that the claimant's behavior questions her moral integrity to perform such duties and this is reflected also on other employees and on the image of the respondent [the Employer]...."

<u>Factual situation in the case of the Applicant's colleagues</u> (Judgment Rev. no. 32/2013 of the Supreme Court, of 30 July 2013)

18. On 17 December 2008, other employees of the Employer committed similar criminal offence in the working place premises. When it was discovered, the Employer rendered the decision, dated 23 December 2008, to terminate the employment contract of the two employees.

19. On 10 May 2012, the Municipal Court approved the claim of the Applicant's colleagues and confirmed that the decision of the Employer of 23 December 2008 was null and void. The Municipal Court found that the Employer had erroneously applied the provisions of Article 11 and 11.5 of the Essential Labor Law as invoked by the Applicant's colleagues, since they were not notified of the intent to terminate their employment relation. Moreover, the notification should have included the reasons for the termination and the provisions of the Airport Staff Policies Regulation should have been respected, since, pursuant to its Article 10, the Disciplinary Committee should have conducted the disciplinary procedure [the Regulation was not yet in force at the time of the events which happened in the Applicant's case].

20. On 23 November 2012, the District Court accepted the factual findings and legal stance of the Municipal Court, rejected as not grounded the Employer's appeal and confirmed the Municipal Court's judgment by finding that it did not contain any violations.

21. On 30 July 2013, the Supreme Court, in a different composition of judges as in the Applicant's case, upheld the lower courts' decisions by which the Employer's claim had been rejected, stating that, in order to terminate the employment contract under Article 11.3 of the Essential Labor Law, the same Law, in its Article 11.5, envisages that the Employer has to notify the employee in writing of his intent to terminate the employment contract and to include the reasons for the termination, while the Employer should also have a meeting with the employee to orally explain such reasons.

22. The Supreme Court further considered that the Employer had rendered the decisions in writing and served them upon the Applicant's colleagues without following the proper procedures under the Law. The Supreme Court also referred to Article 8.3 of the Airport Staff Policies Regulation of 26 June 2005, according to which the Employer can terminate a contract without warning or compensation, in case it considers that there is sufficient ground to do so, like serious lack of discipline, continuous incomplete and inconsistent performance of the duties or serious professional insults. Such sufficient ground for

termination would have to be determined by the Disciplinary Committee, whose work is regulated by Article 10 of the Regulation.

23. The Supreme Court's considered that neither of these procedures had been respected in the case of the Applicant's colleagues.

Comparison of both cases

24. As set out above, the factual situations in the Applicant's case and the one of the Applicant's colleagues are not identical for the reasons that follow.

25. According to the submissions of the Applicant, unlike her colleagues, the Applicant has been convicted and sentenced for the alleged criminal offence during the proceedings initiated by the Applicant for unlawful termination of contract.

26. Moreover, it appears that the Applicant, unlike her colleagues, has not invoked Article 11.5 of the Labor Law in the proceedings before the Municipal, District and Supreme Court, but based her arguments on Article 11.3 of the Law, which speaks of theft of "the Employer's assets" and not of theft of assets of a "third person", as happened in the present case.

27. The case of the Applicant's colleagues is, thus, not based on similar arguments used by the Applicant in her case, but exclusively on Article 11.5 of the Law.

28. Therefore, we conclude that the Applicant's case and the one of the Applicant's colleagues are not identical; even if they would be identical, they would not entail violation, as we further explain.

b) Whether "profound and long-standing differences" exist in the case-law of a supreme court

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

> *"50. [...] save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of the domestic law by the national courts (see, for example, Ādamsons v. Latvia, no. 3669/03, para. 118, 10 May 2007). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see Engel and Others v. The Netherlands, 8 June 1976, para. 103, Series A no. 22; Gregório de Andrade v. Portugal, no. 41537/02, para. 36, 14 November 2006; and Ādamsons, cited above, para. 118).*
>
> *58. The Court points out, however, that the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see Unédic v. France, no. 20153/04, para. 74, 18 December 2008). [...]"*

30. In reaching its conclusion, the Majority judgment has relied on the interpretation provided of the facts and the law in a judgment of the Supreme Court wherein the situation is alleged to be identical to that of the Applicant.

31. However, the Majority judgment has based its decision on the alleged inconsistency between the judgment of the Supreme Court (Judgment Rev. no. 74/2011, of 12 March 2013) and the one in the Applicant's colleagues case delivered four months later (Judgment Rev. no. 32/2013 of the Supreme Court, of 30 July 2013). In this respect, reference is made to paras. 44 and 45 of the Majority Judgment reading as follows: *"44. According to the Applicant, only a few months following her case, the Supreme Court issued Judgment no. 32/2003, approving the claim of the other two employees as well-founded under completely identical circumstances to that of the Applicant. 45. The Constitutional Court, after the findings 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 two other employees) are identical in the legal basis, facts and evidence."*

32. We note that the ECtHR, on a variety of occasions, has had to decide on the implications of inconsistent judicial decisions on the right to a fair trial. In some of those ECtHR cases, a number of them have concerned conflicting decisions of domestic Supreme Courts.

33. The Majority has justified its decision with reference to the judgment of the ECtHR in the case of *Beian v. Romania* (No.1), (No. 30658/05, 6 December 2007).

34. In the Applicant's case, the Supreme Court judgment is contrasted with only one other judgment of the Supreme Court which was delivered four months later in Applicant's colleagues case concerning allegedly similar facts, evidence and law.

35. Therefore, based on only one judgment of the Supreme Court (Rev. no. 32/2013), and, even more, delivered four months later in a different composition of judges, it is difficult to see how to conclude that there are profound and long-standing differences in the case-law of the Supreme Court which threaten the principle of legal certainty and, thereby, undermine the rule of law. It is almost logically impossible to say that there is a profound and long-standing divergence when it occurs in between only two judgments or only one set of judgments and one another judgment.

36. In contrast, the case of *Beian v. Romania* concerns the determination of entitlements to special social benefits provided under a new law for persons who had been compelled to undergo compulsory non-military public service in the 1950s. The law specified that beneficiaries were persons who had been engaged in compulsory service under the authority of a particular agency called the DGT. The Applicant in that case had performed compulsory service, but not under the authority of the DGT. Over the period 2003-2006 the supreme court of Romania had been called upon to rule whether persons having performed compulsory service not subject to the DGT were nevertheless eligible for the benefits specified in the law. During this time-frame the supreme court of

Romania ruled 18 times in favor of persons not subject to the DGT, and 17 times against such persons. Sometimes, contradictory rulings were even made on the same day. The ECtHR was particularly concerned that the Supreme Court itself was the source of legal uncertainty, given the importance of a supreme court's role to resolve contradictions in judicial interpretation.

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

38. The contrast with the case under consideration by the Constitutional Court is significant. In fact, as mentioned in the Majority Judgment in paras. 44 and 45, the Applicant only presented the details of one case of the Supreme Court, which was delivered four months later and, therefore, could not have been known by the Applicant at the time of the court proceedings in her case. Nevertheless, even assuming that the Applicant's case could be compared with a later case,, the time-frame during which these allegedly inconsistent Supreme Court judgments were made comprises a short period of some four months and only with two judgments in that period.

39. The Supreme Court's interpretation of the material law was allegedly different in the two cases. Neither the number of these allegedly inconsistent judgments, nor the time-frame wherein these judgments occurred, reach the level of severity or legal uncertainty, which would warrant the Majority's conclusion of manifest arbitrariness nor a consequent violation of the Applicant's right to a fair and impartial trial.

40. Consequently, we cannot agree that the assumed divergence of legal interpretation in the Supreme Court judgment in the Applicant's case vis-à-vis the other judgment taken four months later demonstrates a profound and long-lasting difference in the case-law of the Supreme Court.

c) Whether the domestic law provides for machinery for overcoming these differences

41. We recall two of the most repeated principles in the Constitutional Court decisions.

42. One is that it is not the task of the Constitutional Court to deal with errors of fact or of law (legality) allegedly committed by regular courts, unless they may have infringed rights and freedoms protected by the Constitution (constitutionality). Thus, the Court should not act as a court of fourth instance, when considering the decisions rendered by the regular Courts.

43. The other is that the rationale for the exhaustion rule is to afford the authorities concerned the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo

will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution.

44. In the present case, the Applicant's submissions do not show that, when the Employer submitted revision to the Supreme Court against the District Court's ruling (which was in the Applicant's favor), she made explicit reference in those revision proceedings to Article 11.5 of the Essential Labor Law or used any other arguments as used by the two other employees in their case or which were used in the unspecified previous cases, mentioned by the Applicant.

45. Moreover, the Supreme Court is competent to unify the application of laws and may call a General Session of all its judges to issue decisions that promote unique application of the Laws (Articles 22. 1.3 and 23.1 of the Law 03/L-199 on Courts). The Applicant could have requested the Supreme Court to review her case under such competence.

46. Finally, we note that the Supreme Court was not given the opportunity to prevent or put right the alleged violation of the Constitution, nor did the Applicant raise this issue before it.

d) Whether that machinery has been applied and, if appropriate, to what effect

47. There is no indication that the Applicant before coming to the Court has used any of the tools provided by the domestic law machinery for overcoming these differences.

III. Allegations beyond the scope of the Referral

a) Discriminatory differences in treatment

48. As said above, none of the allegations regarding discriminatory differences in treatment were substantiated and proven by the Applicant and thus the Majority judgment went beyond the scope of the Referral.

49. Nevertheless, the Majority judgment considered that this difference in the judgment in the Applicant's case, versus the Applicant's colleagues case, amounted to unequal treatment before the law in violation of Article 24, para. 1, of the Constitution.

50. Article 24 [Equality Before the Law] of the Constitution establishes:

> *"1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*
>
> *2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status."*

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

52. The Applicant has not substantiated and proven any discrimination "*on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status*".

53. In fact, there is no allegation and evidence that the Applicant was allegedly treated differently for any reason linked with the grounds mentioned in Article 24 (2) of the Constitution and there is no evidence either that the Supreme Court's judgment with respect to the Applicant was, for any reason other than the Court's clarification of the applicable law, discriminatory in the sense of that Article.

54. Therefore, even if alleged, there has been no violation of the Applicant's rights to equality before the law or equal protection by the law as defined by Article 24 of the Constitution.

b) Lack of reasoning of the Supreme Court's decision

55. Again, no allegation as to the lack of reasoning of the Supreme Court's decision was substantiated and proved by the Applicant, and, thus, the Majority judgment went beyond the scope of the Referral.

56. One of the principles to be applied is that "*the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law* (see, *Unedic v. France*, no. 20153/04, § 74, 18 December 2008)."

57. In our view, the Chapter entitled "*Lack of reasoning in the Judgment in Applicant's case and application of general principles to the concrete case*" is displaced, illogical and irrelevant.

58. In fact, the failure of the Supreme Court to reason can only be understood in the following sense:

- either the failure is in relation to the Applicant's judgment and the Supreme Court could not decide in the future, in the abstract, as the other decision came out only four months later;
- or the failure is in relation to the set of judgments of the Supreme Court previously delivered to the Applicant's judgment and the Supreme Court is not obliged to give reasons, even more when an argument was not presented and there is not an acquired right to consistency of case law;

- or the failure is in relation to the judgment of the Applicant's case itself and there is a thorough and clear reasoning in that judgment of the Supreme Court.

59. Thus, the application to the case at issue of the general principles with respect to the "*Lack of reasoning in the Judgment [...]*" is displaced, illogical and irrelevant.

Conclusion

60. Therefore, we cannot agree with the Majority judgment finding a violation of the right to a fair trial and a violation of the right to equality before the law and we conclude that the Constitutional Court acted as a fourth instance court.

Respectfully submitted,

Judge Almiro Rodrigues

Judge Arta Rama-Hajrizi