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

Prishtina, on 16 October 2017
Ref. No.: RK 1139/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI08/17

Applicant

NS

Constitutional review of
Decision CN. No. 89/2015 of the Basic Court in Mitrovica,
of 14 August 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral is submitted by NS from Mitrovica (hereinafter, the Applicant).

Challenged decision

2. The Applicant challenges Decision CN. No. 89/2015 of the Basic Court in Mitrovica, which recognized a Decision of a foreign country.

3. The Applicant states that he was informed indirectly of the content of that Decision on 20 January 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged Decision, which allegedly has violated the Applicant's rights guaranteed by Article 24 [Equality Before the Law] and Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution).

5. The Applicant also requests for his identity not to be disclosed to the public.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 1 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

8. On 20 March 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.

9. On 11 April 2017, the Court notified the Applicant about the registration of the Referral and, on 19 April 2017, sent a copy of it to the Basic Court in Mitrovica.

10. On 4 September 2017, the Applicant submitted additional documents to the Court, namely Decision no. 5799 of the Court of Judicial District in Tirana and the same Decision as verified by the notary in Prishtina.

11. On 5 September 2017, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

12. On 3 December 2012, the District Court in Tirana (Decision 5799) dissolved the marriage between the Applicant and his former spouse.

13. On an unspecified date, the Applicant's former spouse, who is a citizen of Albania, filed with the Basic Court in Mitrovica a proposal to recognize the decision of the Albanian court.

14. On 14 August 2015, the Basic Court in Mitrovica (Decision No. 89/2015) *"found that the proposal is grounded"* and recognized the Decision of the District Court in Tirana, *"in accordance with Article 86-101 of the Law on Resolving Conflicts of Local Laws with Foreign Laws, and on the grounds of reciprocity"*.

Applicant's allegations

15. The Applicant claims that the challenged decision violated his constitutional rights guaranteed by Article 24 [Equality Before the Law] and Article 32 [Right to Legal Remedies] of the Constitution.

16. The Applicant alleges that his right to equality before the law was violated, *"since the fact that I am a citizen of Kosovo was ignored, whereas the Court has considered the party that is not a citizen of Kosovo as being a citizen of Kosovo"*.

17. The Applicant further alleges a violation of his right to legal remedies, because he had no right to appeal *"a Decision which can produce legal consequences for me, as a citizen of Kosovo"*.

18. The Applicant states that "a *final Decision* [was] *rendered 2 years ago by the Basic Court in Mitrovica"* and *"I never received it. I came to know about it on 20 January 2017"*.

19. The Applicant requests for his identity not to be disclosed to the public, "*due to the reason that my name is irrelevant in reviewing the case, and publicity may indirectly affect my children*".

20. The Applicant concludes by requesting the Court *"to declare the recognition of the Decision of the foreign Court invalid (...), due to the approval made in violation of the procedure and the provision of the law in force"*.

Admissibility of the Referral

21. The Court refers to Article 46 [Admissibility], which provides:

> *The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.*

22. Thus the Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

23. In this respect, the Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes:

> *1. The Constitutional Court decides only on matters referred to the court in legal manner by authorized parties.*
> *(...)*
>
> *7. 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.*

24. The Court also refers to 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."*

25. Furthermore, the Court takes into account Rule 36 (1) (b) of the Rules of Procedure, which stipulates:

> *"(1) The Court may consider a referral if:*
>
> *(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted".*

26. The Court recalls that the Applicant claims that the Basic Court did not notify him about Decision CN. No. 89/2015 of 14 August 2015; he became indirectly aware of its content only after two years and, as a result, the Applicant did not have a right to appeal.

27. In addition, the Applicant states that "a *final Decision rendered 2 years ago (...) cannot be considered at the same instance, nor by the Court of Appeals, thus, the only Court having merits is the Constitutional Court".*

28. However, the Court notes that the Applicant, after becoming aware of the content of Decision CN. No. 89/2015 of the Basic Court in Mitrovica of 14 August 2015, could, at least, have requested the Basic Court to officially notify him of the Decision or have filed an appeal before the Court of Appeals.

29. Thus, the Court considers that the Applicant had available legal remedies before the regular courts which were effective and could have corrected the alleged violations; but the Applicant has not done so.

30. Moreover, the Court reiterates that a remedy available under applicable law cannot be considered as ineffective without the Applicant even trying to exhaust it and see whether it produces any results.

31. Therefore, the Court further considers that the Applicant has not exhausted all legal remedies afforded to him by the applicable law in Kosovo. See

Constitutional Court Case No. KI07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, §§ 28-29).

32. In this respect, the Court reiterates that the principle of subsidiarity and the exhaustion rule of legal remedies under Article 113 (7) of the Constitution, Article 47 of the Law and Rule 36 (1) (b) of the Rules of Procedure obliges those who want to bring their case to the Court, to previously use all effective remedies provided by law.

33. In fact, the principle and the rule are based on the assumption that there is an effective remedy available in respect of the alleged breach in the regular courts. In fact, the machinery of protection established by the Convention is subsidiary to the regular court system safeguarding human rights. See, *mutatis mutandis*, ECtHR cases *Akdivar and others v. Turkey*, 16 September 1996, § 51 and *Handyside v. the United Kingdom*, 7 December 1976, § 48; see also Constitutional Court case KI42/15, of 4 July 2016, §§ 34 and 35.

34. The considerations above are in conformity with the jurisprudence of the ECtHR, which upheld that *"the applicant has never raised this complaint (...). Thus this complaint needs to be rejected for non exhaustion of domestic legal remedies (...)"*. See ECtHR case *Erzebet PAP v. Serbia*, Application No. 44694, 21 June 2011, § 3.

35. Moreover, the Court considers that the additional documents filed on 4 September 2017 do not impact on the analysis made so far.

36. Thus, the Court considers that the Applicant has not exhausted all legal remedies provided by law and determines that he has not fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.

37. Therefore, pursuant to Article 113 (7) of the Constitution, Article 47 (2) of the Law and Rule 36 (1) (b) of the Rules of Procedure, the Court finds that the Referral is inadmissible.

Request to not disclose identity

38. The Court recalls that the Applicant requested for his identity not to be disclosed to the public, *"due to the reason that my name is irrelevant in reviewing the case, and publicity may indirectly affect my children"*.

39. In this connection, the Court refers to Rule 29 (6) of the Rules of Procedure, which provides:

> *"The party filing the referral may request that his or her identity not be publicly disclosed and shall state the reasons for the request. The Court may grant the request if it finds that the reasons are well-founded".*

40. The Court also refers to Article 8 (1) of the Convention on the Rights of the Child, which establishes;

> *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*

41. The Court considers that in a family case the publicity may, even indirectly, affect the identity, name and family relations of the children.

42. Therefore, pursuant to Article 8 (1) of the Convention on the Rights of the Child and Rule 29 (6) of the Rules of Procedure, the Court grants as well-founded the Applicant's request for not disclosing his identity to the public.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 47 of the Law and Rules 36 (1) (b) and 56 (b) of the Rules of Procedure, on 5 September 2017, unanimously

DECIDES

I. TO DECLARE the Referral 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;

IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Almiro Rodrigues

President of the Constitutional Court

Arta Rama-Hajrizi