



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

Prishtina, on 12 November 2018
Ref. no.: RK 1287/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI131/17

Applicant

Uran Halimi

**Constitutional review of the lack of response by the Secretary General of
the Ministry of Education, Science and Technology**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Uran Halimi (hereinafter: the Applicant) from village Blaq, Municipality of Dragash.

Challenged decision

2. The Applicant does not challenge any specific act of a public authority. He complains about the lack of response by the Secretary General of the Ministry of Education, Science and Technology (hereinafter: MEST), emphasizing that this institution did not respond to his complaint.

Subject matter

3. The subject matter is the constitutional review of the lack of response from the General Secretary of the MEST.
4. The Applicant alleges violation of paragraph 5, Article 31 [Right to Fair and Impartial Trial], Article 49 [Right to Work and Exercise Profession], and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law) and Rule 59 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
6. On 31 May 2018, in an administrative session the Court adopted amendments and supplementation to the Rules of Procedure which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Consequently, in reviewing the Referral the Court refers to the legal provision of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

7. On 8 November 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 14 November 2017, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović (judges).
9. On 14 December 2017, the Court notified the Applicant about the registration of the Referral.
10. On the same date, the Court sent a copy of the Referral to the Secretary General of MEST. On this occasion, the Court notified him that the Applicant did not challenge any specific act of a public authority, but complained that the Secretary General of MEST did not respond to his complaint. The Court invited the Secretary General of MEST to submit his comments regarding this allegation of the Applicant.

11. On 4 January 2018, the Secretary General of MEST submitted a letter to the Court, notifying the Court that a decision was rendered on the complaint filed by the Applicant. However, even though in the letter of the Secretary General of MEST it is stated that "*Please find attached the decision No. 2/2635 of 03.01.2018*", such a decision was not submitted to the Court.
12. On 27 March 2018, the Court requested the Secretary General of MEST to attach a copy of the aforementioned decision.
13. On 28 March 2018, the Secretary General of MEST submitted the requested decision to the Court.
14. On 3 April 2018, the Court sent to the Applicant a copy of the comments submitted by the Secretary General of MEST and requested him to notify the Court whether he had taken any legal action against Decision No. 2/2635 of the Secretary General of MEST of 3 January 2018. The Court requested the Applicant to reply within a period of 7 (seven) days from the date of receiving the request. The Court did not receive any response from the Applicant within legally prescribed time limit.
15. On 24 April 2018, the Court sent a repeated request to the Applicant requesting him to complete his Referral with the additional information requested by the Court. The Court also reminded the Applicant that the Court may summarily reject the Referral if the Referral is incomplete or unclear, despite the requests from the Court to the party to supplement or clarify the Referral.
16. On 25 April 2018, the Applicant submitted a reply to the Court.
17. On 16 June 2018, the mandate of judges: Almiro Rodrigues and Snezhana Botusharova was terminated. On 26 June 2018, the mandate of judges Altay Suroy and Ivan Čukalović was terminated.
18. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
19. On 11 September 2018, the President of the Court appointed a new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
20. On 10 October 2018, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts of the case

21. The Applicant applied for the position "Teacher of English Language and Literature" in the secondary school "Sezai Surroi" in village of Bellobrad of Municipality of Dragash. Later, he applied for the same position in the vacancy announced for the high school "İlmi Bahtijari" in village of Blaq of the Municipality of Dragash.

22. According to the Applicant's allegations, he was not invited to interview in either of these and both vacancy announcements were annulled despite the fact that, as the Applicant claims, there were candidates who met the required conditions.
23. In September and December 2016, the Applicant contacted the Municipal Education Directorate of the Municipality of Dragash (hereinafter: the MED) asking for written reasons why he was not invited to the interview and why the aforementioned vacancies were annulled. The Applicant alleges that MED did not reply to his request.
24. On 13 March 2017, the Applicant, in the absence of a response from the MED, addressed the Education Inspectorate Sector in the Municipality of Prizren as a second instance requesting clarification regarding the actions of the MED.
25. On 6 April 2017, the Education Inspectorate Sector in the Municipality of Prizren, through the response No. 10/1-4, responded to the Applicant's request, justifying the actions of MED as legitimate and fair. In the reasoning given it was stated that according to item 1 of Article 5 of Administrative Instruction No. 14/2011 for the Regulation of Procedures for the Establishment of Labour Relations in the Public Sector, the MED acted in a correct way when it did not invite the Applicant to interview, as an indictment was filed against him with a court in the Municipality of Dragash.
26. On 28 April 2017, the Applicant filed a complaint with the General Director of the Education Inspectorate at MEST, according to the legal remedy provided by the Education Inspectorate Sector in the Municipality of Prizren.
27. On 8 May 2017, the General Director of the Education Inspectorate at MEST, through Decision No. 10/276, rejected the Applicant's complaint as ungrounded and upheld the aforementioned response of the Education Inspectorate Sector in the Municipality of Prizren. In the reasoning of the Decision, it was said: *"The candidate Mr. Uran Halimi does not meet the criteria required by the vacancy, since [...] the candidates applicants must possess proof-certificate confirming that they are not under investigations, whilst the complainant has brought the certificate no. 1589/16 of 08.12.2016 wherein was confirmed that a criminal procedure was ongoing against the person submitting the complaint-Uran Halimi"*.
28. On 23 May 2017, the Applicant addressed the MEST General Secretary requesting that all actions taken by the MED be declared as unlawful. In his request, the Applicant also requested the Secretary General of MEST to notify what criteria of the vacancy he did not meet and by which legal act or sub-legal act it was decided to annul the vacancies in which, according to the Applicant, there were applicants who fulfilled the requirements.
29. On 8 November 2017, the Applicant submitted the present Referral to the Court, complaining that MEST Secretary General had not responded to his complaint of 23 May 2017.

30. On 3 January 2018, the Secretary General of MEST, by Decision No. 2-2635, rejected the Applicant's appeal, filed on 23 May 2017, as ungrounded and reasoned as follows:

“Uran Halimi complained that the Municipal Education Directorate (MED) in Dragash, for the announced vacancy for English language teachers at the “Sezai Surroi” school in Bellobrad-Dragash, denied him the right by not inviting him at all to interview for the job position listed above.

MED in Dragash acted in the same way for “Ilmi Bahtijari” school in Blac-Dragash, for the position of the English Language Teacher (replacement). The reason for not inviting Mr. Uran Halimi to an interview was that he had a certificate issued by the Court that he is [not] under investigation for a criminal offense.

By vacancy No. 13-682/16, of 01.12.2016, the MED in Dragash announced a vacancy, where one of the criteria was a certificate that he is not under investigation.

According to the legislation in force, the relevant MED is competent to announce the vacancy and to set the vacancy requirements, and in this case the MED in Dragash has not committed any legal violation.

Based on all these, it was decided as in the enacting clause of this decision.

Legal remedy

Against this decision may be filed a claim with the competent court within 15 days”.

31. The Court requested the Applicant to inform him whether he had taken any legal action against the abovementioned Decision. The Applicant replied to the Court's request stating the following:

“[...] In accordance with Article 130, paragraph 2 and 131 par. 1 and 2 of the Law No. 02/L-28 on Administrative Procedure, we as a party have been given the right to address the Constitutional Court to find a violation of the constitutional norms that have been committed by the institutions of public administration, in this case by the Municipal Education Directorate in Dragash due to the fact that the second instance authority, in this case the Office of the Secretary General of MEST, in accordance with Article 131 par. 1 of the Law on Administrative Procedure was obliged within the time limit of 30 days to reply to our complaint, whereas from MEST we received the response on 8 January 2018, namely about seven and a half months after filing the complaint.

[...] we have exhausted all legal remedies in an administrative procedure in order to seek our rights recognized by the Constitution of the Republic of Kosovo and other positive applicable laws, namely Article 31, paragraph 5 of the Constitution [...]”.

32. The Applicant further in his response stated that “[...] against this decision is not allowed the right of appeal, but an administrative conflict may be initiated with a lawsuit at the Basic Court in Prishtina, the Department for Administrative Affairs”.

Applicant's allegations

33. The Applicant alleges a violation of his rights guaranteed by the Constitution, namely the right established in paragraph 5 of Article 31 [Right to Fair and Impartial Trial], Article 49 [Right to Work and Exercise Profession] and Article 55 [Limitation on Fundamental Rights and Freedoms].
34. In essence, the Applicant complains that in his case the presumption of innocence has been violated, since he was not invited to the interview, only because he did not submit a certificate proving that he is not under investigation. In this regard, he claims that the vacancy announced by the MED was "*not regular and discriminatory*", as he was requested a certificate that he is not under investigation despite the fact that such a thing "*is not envisaged by the law nor any other legal act*".
35. As an argument for his allegations, the Applicant reiterates that similar vacancies, which are announced in the Municipality of Prizren and in the Municipality of Prishtina for the selection of teachers do not require such a certificate. Moreover, he states that only two weeks after the closure of the vacancy he was found innocent, and according to his words, in primary and secondary schools in the municipality of Dragash "*there are dozens of teachers accused and even convicted of serious criminal offenses and who exercise the teacher's profession*".
36. The Applicant claims that the MED, by failing to invite him to the interview, has violated his right to work and exercise te profession and has limited his fundamental rights and freedoms which, according to him, "*can be limited only by law, and not by other means*"- as the MED acted.
37. Finally, the Applicant requests the Court to find that there has been a violation of Articles 31.5, 49 and 55 of the Constitution. He also requests the Court to "*establish a general standard that nobody in the future should be denied the right to employment in school and similar institutions, because there may be an indictment against a candidate that in most of cases cannot be proved by the court, as it was my case, thus, the presumption of innocence as a constitutional right to be recognized to all citizens without any difference*".

Admissibility of the Referral

38. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and as further specified by the Law and the Rules of Procedure.
39. In this respect, the Court refers to Article 113.7 of the Constitution, which establishes:

"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".
40. The Court also refers to Article 47 of the Law, which foresees:

“1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law”.

41. The Court further considers the Rule 39 (1) (b) of the Rules of Procedure, which specifies:

*Rule 39
Admissibility Criteria*

“(1) The Court may consider a referral as admissible if:

[...]

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted”.

42. In the present case, the Court notes that the Applicant alleges a violation of his rights guaranteed by the Constitution as regards the issue of the presumption of innocence and his right to work and exercise profession, guaranteed by Articles 31.5 and 49 of the Constitution. He alleges that MED has limited these constitutional rights, contrary to Article 55 of the Constitution, by not inviting him to the interview as well as by annulling the announced vacancies despite the fact that there were candidates who fulfilled the requirements.
43. With regard to these complaints, the Court notes that the Applicant addressed the MED, the Education Inspectorate Sector in the Municipality of Prizren, the General Director of the Education Inspectorate at MEST and, finally, the Secretary General of the MEST.
44. The Court recalls that the Applicant filed the present Referral with the Court on 8 November 2017, at a time when the Secretary General of MEST had not yet responded to his complaint of 23 May 2017.
45. The Court also recalls that the Applicant had submitted the present Referral to the Court, emphasizing that *“the MEST Secretary General did not answer to my appeal”*. Thus, in the part of the form requesting to mention the last decision that is challenged, the Applicant stated that he does not challenge any specific decision but he complains about the lack of response by the Secretary General of MEST.
46. For the purpose of clarification of the Referral, the Court contacted the Secretary General of MEST, who, upon communication with the Court, on 3 January 2018 issued Decision No. 2-2635, by which he rejected the Applicant's appeal as ungrounded. Legal advice at the end of this decision stated: *“Against this decision a lawsuit may be filed with the competent court within 15 days”*.

47. Upon receipt of this Decision by the Court, the Court contacted the Applicant asking him whether he had taken any legal action in challenging the aforementioned MEST decision. In his response, the Applicant did not respond directly to the Court's question, but he stated that *"all legal remedies were exhausted in the administrative procedure"* and that *"[...] against this decision [of the Secretary of General of MEST] is not allowed the right of appeal, but an administrative conflict with a lawsuit at the Basic Court in Prishtina, Department for Administrative Matters"*.
48. In this regard, the Court notes that the Applicant has not initiated (or he has not informed the Court that he initiated) any legal action against administrative authorities which, according to his allegations, remained silent and did not respond to his complaint; nor has he confirmed that he initiated any legal action against the last decision of the Secretary General of MEST. The legislation in force stipulates that the administrative silence, which is defined as the inaction of the *"public organ within the established deadline set for the completion of the administrative procedure"*, is in fact a response by the administrative body, and as such, can be challenged in the regular proceedings (see: Article 125.1 of the Law No. 05/L-031 on the General Administrative Procedure as well as Article 13 of the Law No. 03 / L-202 on Administrative Conflicts).
49. In addition, the Court notes that the Applicant also had the opportunity to initiate an administrative conflict against the decision of the MEST Secretary within 15 (fifteen) days with the competent court, as set out in the legal advice provided in that same decision. Although the Applicant admitted that he was be able to initiate an administrative conflict, he did not immediately notify the Court whether he did or did not initiate such a procedure. In his response, he stated that he exhausted all legal remedies in the administrative procedure; however, the Court notes that he did not present any evidence that he had exhausted legal remedies in the court proceedings.
50. In this regard, the Court emphasizes that all Applicant's allegations can be reviewed by the regular courts, which have the mandate to review those constitutional allegations. Therefore, the Court finds that the Applicant has submitted his Referral to the Constitutional Court before exhausting all effective remedies provided for in the relevant legislation.
51. Based on the principle of subsidiarity, the Court is obliged to provide the opportunity to regular courts to deal with constitutional claims raised by citizens - in this case by the Applicant - before they are examined by the Constitutional Court. The rationale for the exhaustion rule of legal remedies is to afford the public authorities, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that legal order of Kosovo will provide an effective remedy for protection from violation of constitutional rights. (See, *mutatis mutandis*, ECtHR, *Civet v. France*, No. 29340/95, Judgment of 28 September 1999, para. 44).

52. The case law of the Court is clear in terms of referrals similar to the Referral of the Applicant. In cases where proceedings are pending before the regular courts, or when those proceedings have not yet been initiated, but there is a possibility to be initiated, then the Applicant's Referral is considered premature (see, for example, Resolution on Inadmissibility in individual cases. KI107/17 & KI129/17, KI17/16, KI 38/17, KI44/17).
53. The Court emphasizes that this Resolution on Inadmissibility does not prevent the Applicant from submitting a constitutional referral within the legal deadline of 4 (four) months from the day of receipt of the final decision in his case by the regular courts. This decision of the Court finds that, for the time being, the Applicant's Referral is premature because the applicable legislation provides for effective legal remedies through which the court proceedings may be initiated, in which the Applicant may seek protection of his legal and constitutional rights.
54. Therefore, the Court concludes that the Applicant's Referral is premature and is to be declared inadmissible on constitutional basis, as established by Article 113.7 of the Constitution, foreseen by Article 47 of the Law and further specified by Rule 39 (1) (b) 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 in accordance with Rules 39 (1) (b) and 59 (2) of the Rules of Procedure, on 10 October 2018, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

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