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

Prishtina, 4 March 2019
Ref. No.:RK 1331/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI09/18

Applicant

"FINCA" Kosovo

Request for constitutional review of Decision CML. No. 3/2017 of the Supreme Court of 21 September 2017

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 "FINCA" Kosovo, Microfinance Institution with its seat in Prishtina (hereinafter: the Applicant), represented by the authorized representative Auberon Kelmendi from Prishtina.

Challenged decision

2. The Applicant challenges Decision CML. No. 3/2017 of the Supreme Court of 21 September 2017, which approved as grounded the request for protection of legality of the state prosecutor filed against Decision AC. No. 1176/2015 of the Court of Appeals of Kosovo of 16 December 2016 and Decision CP. No. 1856/2013 of the Basic Court in Prizren of 26 January 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged decision of the Supreme Court, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 1 of Protocol No. 1 [Protection of property] of the European Convention on Human Rights (hereinafter: the ECHR). The Applicant also raises in essence the allegation of violation of the right to fair and impartial trial, but does not refer to any specific constitutional provision.

Legal basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

5. On 31 May 2018, the Court adopted in the administrative session the 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. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 15 January 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 16 January 2018, 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.

8. On 29 January 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 16 June 2018, the mandate of judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the mandate of judges: Altay Suroy and Ivan Čukalović ended.

10. 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.

11. On 22 August 2018, the President of the Court rendered decision on replacement of Judge Rapporteur Almiro Rodrigues, and appointed Judge Bajram Ljatifi as Judge Rapporteur.

12. On 10 October 2018, the President of the Court appointed a new Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gerxhaliu Krasniqi and Nexhmi Rexhepi.

13. On 30 January 2019, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

14. On 23 June 2010, based on the decision of the Disciplinary Committee, the Applicant terminated the employment relationship to the employee M.B. (hereinafter: M.B.).

15. On an unspecified date, M.B. filed a claim with the Municipal Court in Prizren requesting the annulment of that decision, the reinstatement to the previous working place and the payment of personal income for the period when his employment relationship was terminated.

16. On 28 October 2011, the Municipal Court in Prizren, (by Judgment C. No. 531/10), approved the statement of claim of M.B, annulled the decision of the Applicant which terminated the employment relationship of M.B. and obliged the Applicant to reinstate M.B. to his previous working place and to pay personal income for the period when his employment relationship was terminated.

17. The Applicant against the Judgment of the Municipal Court in Prizren filed appeal with the District Court *"on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and incorrect application of the substantive law"*.

18. On 5 November 2012, the District Court (by Judgment Ac. No. 519/11) rejected, as ungrounded, the Applicant's appeal and upheld in entirety the Judgment of the Municipal Court.

Enforcement procedure of Judgment of the Municipal Court

19. After the Judgment (C. No. 531/10) of the Municipal Court in Prizren became final, M.B initiated the enforcement procedure of the aforementioned judgment before the Basic Court in Prizren, specifically the part concerning the

payment of personal income for the period when his employment relationship was terminated.

20. On 11 February 2013, the Basic Court (by Decision E. No. 2192/12), allowed the enforcement of the Judgment of the Municipal Court.

21. On 27 May 2013, the Basic Court (by Decision E. No. 2192/12) ordered the competent bank to transfer funds from the account of the Applicant to the account of the employee, in the name of the payment of unpaid personal income and the court expenses.

22. After that, a payment was made from the account of the Applicant to the account of M.B.

Proceedings upon the Applicant's request for revision

23. On an unspecified date, the Applicant filed a request for revision with the Supreme Court against Judgment Ac. No. 519/11 of the District Court of 5 November 2012.

24. On 11 July 2013, the Supreme Court, (by Judgment Rev. No. 66/2013) partially approved the Applicant's revision so that it upheld the judgment of the first instance court in the part concerning the reinstatement of the employee to his previous working place, while the part regarding the payment of personal income for the period when his employment relationship was terminated remanded to the first instance court for retrial.

25. The enacting clause of the Judgment of the Supreme Court reads:

> *"I. The revision of the respondent submitted against the Judgment Ac. No. 519/2011 of the District Court in Prizren of 5.11.2012, and of the Judgment C. No. 532/201 of the Municipal Court in Prizren of 28.10.2011, by which the statement of claim of the claimant was approved as grounded and the decision of the respondent of 22.6.2010, was annulled as unlawful by which the claimant's employment relationship was terminated and the respondent was obliged to reinstate him at his working place, at the position that used to work, within period time of 7 days under the threat of forced execution, is rejected as ungrounded.*
>
> *I. The revision of the respondent in the part concerning the obligation of the respondent to acknowledge all claimant's rights that he has been entitled prior to the termination of employment relationship and compensate the personal income in accordance with the employment contract effectively form the date of termination and in the part that has to do with the compensation of the costs of the contested procedure in amount of 500 € is approved as grounded, and in these parts the Judgment Ac.nr. 519/2011 of the District Court in Prizren of 5.11.2012, and the Judgment C.nr. 531/2010 of the Municipal Court in Prizren of 28.10.2011, are quashed and the matter is remanded to the court of first instance for retrial".*

26. Following this, the proceedings before the Basic Court in Prizren was repeated, based on the statement of claim of M.B., specifically the part concerning the personal income for the period when his employment relationship was terminated.

27. On 21 January 2014, M.B at the main hearing stated that he "*withdraws the claim against the respondent, reasoning that the personal income that belonged to him was realized in the enforcement procedure E. No. 2192/12, while now there is no legal interest in proceeding with this procedure*".

28. On 22 January 2014, (by Decision C. No. 721/13), the Basic Court in Prizren in the repeated proceedings found that the claim of the employee was withdrawn because "*pursuant to Article 261, paragraphs 2 and 3 of the LCP, the court assesses that the legal requirements have been met to establish that the claimant withdrew the claim*".

Procedure for counter-enforcement after Judgment of the Supreme Court of 11 July 2013

29. After Judgment Rev. No. 66/2013 of the Supreme Court, the Applicant also initiated counter-enforcement proceedings before the Basic Court in Prizren in the enforcement case (Decision E. No. 2192/12) of the Municipal Court in Prizren.

30. On 19 September 2013, the Basic Court in Prizren, (by Decision CP No. 1856/13), permitted the counter-enforcement in the enforcement case (E. No. 2192/12) of the Municipal Court in Prizren.

31. On an unspecified date, the employee submitted an objection against the Decision of the Basic Court in Prizren of 19 September 2013.

32. On 18 April 2014, the Basic Court (CP No. 1856/13) rejected as ungrounded the objection of the employee and upheld the previous decision.

33. Against this decision, the employee filed an appeal with the Court of Appeals on the grounds of "*violation of the contested procedure, erroneous determination of factual situation and erroneous application of substantive law*".

34. On 17 December 2014, the Court of Appeals (by Decision CA No. 1754/14), approved the appeal of the employee, annulled the aforementioned decision and remanded the case for retrial to the Basic Court in Prizren. The Court of Appeals "*after review of the case file, found that part of this matter and the judgment of the Basic Court in Prizren C. No. 721/13 of 22.01.2014, which judgment in the proceeding of rendering the decision (C. No. 721/13) found that the claim was withdrawn (...)*".

35. On 26 January 2015, in the repeated proceedings the Basic Court (by Decision CP. No. 1856/13) considered again the proposal for counter-enforcement of the

Applicant, and found that: "*the objection of lawyer Ymer Kora from Prizren, the representative of the counter-enforcement debtor M.B from Prizren, filed against the decision of this court CP. No. 1856/13 of 19.09.2013 on the permission of the counter-enforcement, is ungrounded*". Accordingly, the decision (CP No. 1856/13) of the Basic Court of 19.09.2013 on the permission of the counter-enforcement was upheld.

36. On an unspecified date, against the Decision of the Basic Court of 26 January 2015, the employee filed the appeal with the Court of Appeals *„on the grounds of violation of the contested procedure, erroneous determination of factual situation and erroneous application of the substantive law.*

37. On 16 December 2016, the Court of Appeals (by Decision AC. No. 1176/15) rejected as ungrounded the appeal of the employee and upheld the decision of the Basic Court in Prizren (CP No. 1856/13) of 26.01.2015. The reasoning reads:

> *„The first instance court based on the evidence available in the case file rendered fair decision and based on the concrete legal provisions, therefore, the legal conclusion of the first instance court regarding this case is approved in entirety by the Court of Appeals of Kosovo, due to the reason the decision did not contain essential violation of provisions of the contested procedure pursuant to Article 182, paragraph 2 item (b), (g), (j), (k) and (m) of LCP, and the appealed reasons have been considered by the second instance court ex officio in compliance with Article 194 of LCP."*

38. On 15 March 2017, upon the proposal of the employee, the State Prosecutor submitted to the Supreme Court the request for protection of legality (KMLC No. 21/2017).

39. On 21 September 2017, the Supreme Court of Kosovo (by Decision CML. No. 3/2017) approved as grounded the request for protection of legality of the State Prosecutor, and reasoned:

> *"The request for protection of legality of the State Prosecutor of Republic of Kosovo, KMLC No. 21/2017 of 15.03.2017 is approved as grounded, the decision Ac. No. 1176/2016 of the Court of Appeals of Kosovo of 16.12.2016 and the decision CP.nr.1856/2013 of the Basic Court in Prizren of 26.01.2015 are modified and the proposal for counter-enforcement of creditor 'Finca – Kosovo' with the seat in Prishtina is rejected as ungrounded for realization of the debt in the amount of 17.703.12 euro against debtor M.B from Prizren".*

40. The Supreme Court approved as grounded the request for protection of legality of the Republic State Prosecutor. The Supreme Court by decision modified the decision of the Court of Appeals, as well as the decision of the Basic Court in Prizren, and rejected as ungrounded the proposal of the Applicant for counter enforcement.

41. In fact, the Supreme Court found that "*The provision of Article 21 of Law No. 04/L-139 of the Law on Enforcement Procedure stipulates that the enforcement authority shall award, respectively perform enforcement only on the basis of enforcement document (titulus executions) and authentic document unless otherwise foreseen by this law*".

Applicant's allegations

42. The Applicant alleges that the challenged decision "*is unconstitutional and in contradiction with Article 102 item 3 and 4 of the Constitution, which guarantees a fair and impartial trial based on the Constitution and law*".

43. The Applicant further alleges that the challenged decision denies it the rights to: "*counter-enforcement for the restitution of its property- as there is no and there was no court decision which obliges it to pay – is in contradiction with Protocol No. 1, Article 1 of the European Convention on Human Rights (...), which applicability and priority of which is guaranteed by Article 22 of the Constitution of the Republic of Kosovo*".

44. In fact, the Applicant considers that „*Decision 3/2017 of the Supreme Court denies it the enjoyment of legal certainty and of the constitutional principles by applying Rev. No. 66/2013 in a selective manner, as it takes into account only item I (whereby the revision of IMF against the reinstatement to work is rejected), by totally ignoring item II of the decision which concerns the amount of the compensation and the reasons for which the matter is remanded for retrial*".

45. The Applicant, finally requests the Court to declare the Referral admissible, to declare the Decision (CML No. 3/2017) of the Supreme Court invalid, and to take the necessary measures to ensure that it enjoys its rights.

Admissibility of the Referral

46. The Court first examines whether the Applicant has met the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.

47. In this respect, the Court refers to 21.4 and 113.7 of the Constitution which establish:

Article 21

[...]
4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.
[...]

Article 113

"1. The Constitutional Court decides only on matters referred to the court in a 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".

48. The Court also refers to Article 49 [Deadlines] of the Law, which provides:

> *„The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision".*

49. In this regard, the Court considers that the Applicant is an authorized party, that it has exhausted all legal remedies and filed the Referral within the prescribed time limit.

50. However, the Court further refers to Article 48 of the Law, which stipulates:

> *„In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*

51. In addition, the Court refers to Rule 39 (2) [Admissibility Criteria] of the Rules of Procedure, which stipulates:

> *"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".*

52. The Court notes that the Applicant first alleges that the challenged decision of the Supreme Court violated its rights guaranteed under Article 102 [General Principles of the Judicial System] of the Constitution.

53. The Court recalls that Article 102 of the Constitution falls within Chapter VII [Justice System] of the Constitution. As such, the Court considers that provisions of Article 102 of the Constitution do not contain individual rights and freedoms as protected by the provisions contained in Chapter II [Fundamental Rights and Freedoms] and Chapter III [Rights of Communities and Their Members] of the Constitution. Consequently, the Court finds that Article 102 cannot be relied upon in a Referral based on Article 113.7 of the Constitution (see: Constitutional Court case KI46/17, Applicants: *Privatization Agency of Kosovo*, Resolution on Inadmissibility of 7 September 2017, paragraph 39).

54. The Court notes that the Applicant essentially raises the allegation of violation of the right to fair and impartial trial without specifying concrete constitutional provisions. The Court recalls that the right to a fair trial is protected by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of ECHR.

55. The Court recalls Article 31 of the Constitution, which foresees:

"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations [...] within a reasonable time by an independent and impartial tribunal established by law".

56. The Court also refers to Article 6.1 of the ECHR, which establishes:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing [...] by [...] tribunal.

57. The Court takes into account Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which establishes: *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

58. In this respect, the Court recalls the case law of the ECtHR, which has established *mutatis mutandis "that the jurisdiction of the Court to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable".* (see: case of the European Court of Human Rights (hereinafter: ECtHR), *Anheuser-Busch Inc. v. Portugal*, application no. 73049/01, judgment of 11 January 2007, paragraph 83).

59. The Court also recalls that *"[...] the [ECtHR] will not question the interpretation of domestic law by the national courts, save in the event of evident arbitrariness (see, mutatis mutandis, Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008), in other words, when it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions and/or a denial of justice (see, mutatis mutandis, Farbers and Harlanova v. Latvia (dec.), no 57313/00 6 September 2001, and, albeit in the context of Article 1 of Protocol No. 1, Beyeler v. Italy [GC], no. 33202/96, para. 108, ECHR 2000-1; see also: ECtHR case Andjelković v. Serbia, application No. 1401/08, Judgment of 9 April 2013, para. 24).*

60. In light of the above, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (see: *mutatis mutandis*, ECtHR case *García Ruiz v. Spain*, Application No. 30544/96, Judgment of 21 January 1999, para. 28).

61. The Court notes that the Supreme Court in its decision reasoned: "*In the present case, in the repeated procedure, in the main hearing held on 22.01.2014, the claimant (here the debtor) stated that he will withdraw the claim against the respondent (here the creditor), with justification that the personal income which it has been entitled to, it realized it in the enforcement procedure E.nr. 2192/12, but now it has no legal interest to continue the procedure, whereas the representative of the respondent IMF 'Finca' did not object withdrawal of the claim. [...] Debtor IMF 'Finca – Kosove' has paid something that within the meaning of Article 315 of the Law on Enforcement Procedure, it has been obliged to pay. Therefore, according to the Supreme Court of Kosovo, the lower instance courts have erroneously applied the provisions of the LEP when they found that the enforcement court has enforced the executive title in the part in which the executive title has been quashed by the Supreme Court*".

62. In these circumstances, the Court considers that the reasoning provided by the Supreme Court when deciding on the Applicant's requests in clear, comprehensive and coherent, and that the proceedings before the regular courts were not unfair or arbitrary (see: the ECtHR Judgment of 30 June 2009, *Shub v. Lithuania*, No. 17064/06).

63. Therefore, the Court concludes that the Applicant did not substantiate the allegation of violation of the right to fair and impartial trial as provided for in Article 31 of the Constitution and Article 6.1 of the ECHR.

64. In the light of the other allegations of the Applicant, the Court recalls that the Applicant also states that the challenged decision of the Supreme Court was rendered in violation of the freedom guaranteed by Article 1 of Protocol No. 1 [Protection of property] of the ECHR. However, the Applicant does not justify the allegation that his constitutional right to property has been violated.

65. The Court recalls that Article 1 of Protocol No. 1 of ECHR and Article 46 of the Constitution do not guarantee the right to acquisition of property (See, *Van der Mussele v. Belgium*, paragraph 48, ECtHR Judgment of 23 November 1983, *Slivenko and others v. Lithuania,* paragraph 121, ECtHR Judgment of 9 October 2003).

66. The Applicant may further allege a violation of Article 1 of Protocol No. 1 of the ECHR and Article 46 of the Constitution only in so far as the challenged decisions relate to his "*possessions*"; within the meaning of this provision "*possessions*" can be "*existing possessions*", including claims, in respect of which the applicants can argue a "*legitimate expectation*" that they will acquire an effective enjoyment of any property right.

67. No "*legitimate expectation*" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and where the applicant's submissions are subsequently rejected by the national courts (see *Kopecký v. Slovakia*, paragraph 50 of the Judgment of the ECtHR, of 28 September 2004).

68. Accordingly, the Court finds that the Applicant has not submitted any *prima facie* evidence, nor has he substantiated the allegations as to how and why the Supreme Court violated his right to property guaranteed by this provision.

69. In conclusion, the Court considers that the Applicant has not presented any evidence indicating that the decisions of the regular courts have in any way caused a constitutional violation of his rights guaranteed by the Constitution.

70. Therefore, the Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39, paragraph (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 30 January 2019, 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.

Judge Rapporteur **President of the Constitutional Court**

Bajram Ljatifi Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.