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

Prishtina, 22 July 2019
Ref. no.: RK1400/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI161/18

Applicant

Ejup Koci

Constitutional review of
Decision Rev. No. 105/2018 of the Supreme Court of Kosovo
of 4 May 2018

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 Ejup Koci from village Polac, Municipality of Skenderaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Decision Rev. No. 105/2018 of the Supreme Court (hereinafter: the challenged Decision), which was served on him on 22 June 2018, in conjunction with Decision Ac. No. 2176/2016 of the Court of Appeals of 7 February 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property], 54 [Judicial Protection of Rights], 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, as well as Article 6 [Right to a fair trial] and Article 1 of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the Convention).

Legal basis

4. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 22 October 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 23 October 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding) Gresa Caka-Nimani and Safet Hoxha (members).

7. On 30 October 2018, the Court notified the Applicant about the registration of the Referral and requested the additional documents, namely to attach the challenged decision.

8. On 24 December 2018, the Applicant submitted the documents requested by the Court.

9. On 17 April 2019, the Applicant submitted further documentation to the Court, but the documents in question cannot be accepted by the Court because of the expiry of the deadline established in Rule 33 (3) of the Rules of Procedure.

10. On 6 June 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. The Applicant submits a Referral to the Court for the second time on the same issue.

Facts of the case regarding first Referral KI109/17

12. On 8 September 2017, the Applicant submitted the Referral KI109/17 to the Court, challenging the length of proceedings, namely the delay to decide on the civil case C. No. 0355/2011, which concerned the expropriation of immovable property due to the construction of the inter-municipal road Skenderaj-Vushtrri. The Applicant in this case alleged that the regular courts violated his constitutional rights guaranteed by Articles: 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity] and 46 [Protection of Property] of the Constitution, as well as Article 6 [Right to a fair trial], in conjunction with Article 13 (Right to an effective remedy) of the Convention.

13. On 15 November 2017, at the request of the Court, the Court of Appeals submitted additional information regarding the Applicant's allegations, notifying the Court that: "*...this case with No. C. No. 0355/11, by Decision of the Municipal Court in Skenderaj of 25.09.2012, is declared incompetent. Then the case is transferred under the jurisdiction of the Basic Court in Prishtina Department for Administrative Matters. This Department acts to complete the claim, and then to establish the competence. The Court of Appeals of Kosovo with AA. No. 1/15 of 23.04.2015 assigns the Basic Court in Mitrovica - Branch Skenderaj to decide, and the case here receives the number C. No. 145/15, and it is decided by the Decision of 14.03.2016, then we have the appeal against this Decision and the case now is with us for decision with number AC. No. 2176/2016*".

14. On 30 May 2018, the Court rendered the Resolution on Inadmissibility, concluding that the Applicant did not sufficiently substantiate his allegation of a violation of the fundamental rights guaranteed by the Constitution and the Convention (namely the right to a fair trial, within a reasonable time limit).

Facts of the case regarding the current Referral KI161/18

15. On 14 March 2016, the Basic Court in Mitrovica, Branch in Skenderaj, by Decision C. No. 145/2015, decided to terminate the contested procedure initiated by a lawsuit by the Applicant, because he did not have the legitimacy of the party to the proceedings. This is because the heir of the cadastral parcels for which the court dispute has been initiated turned out to be the mother of the Applicant who died in 1991, and since that time the inheritance proceedings have not been conducted. Against this Decision, the Applicant filed an appeal with the Court of Appeals.

16. On 7 February 2018, the Court of Appeals, by Decision Ac. No. 2176/2016, rejected as ungrounded the Applicant's appeal and upheld in entirety Decision C. No. 145/2015 of the first instance of 14 March 2016.

17. Against the Decision of the Court of Appeals, the Applicant submitted a request for revision to the Supreme Court, on the grounds of erroneous application of the procedural and substantive law.

18. On 4 May 2018, the Supreme Court rendered Decision Rev. No. 105/108, by which dismissed as inadmissible the request for revision, in accordance with Article 228.1 of the Law on Contested Procedure, against the Decision of the Court of Appeals, no request for revision could be filed.

Applicant's allegations

19. The Applicant alleges that the decisions of the regular courts violated his constitutional rights as follows:

    1) Right to fair and impartial trial, because:

        a) the right to access to the court was not respected, because the Court of Appeals and the Supreme Court did not take into account the evidence, namely the change of circumstances which, according to the Applicant, could not be raised before the first instance court due to the creation of later circumstances which would have an impact on deciding the case;

        b) the right to be heard was denied, because the Court of Appeals and the Supreme Court did not convene a hearing, further alleging that "*even in cases when these courts hold hearings, they do not take into account the statements or the evidence presented*". He specifically refers to the session of 27 February 2015 of the Basic Court in Prishtina;

        c) right to a decision within a reasonable time has been violated, because the case by nature is not complex in itself, due to the fact that it concerns the expropriation of immovable property and that his conduct was correct in relation to the regular courts;

    2) Right to effective legal remedies because the Supreme Court, referring to Article 228.1 of the LCP, denied him this right guaranteed by the Constitution and the Convention.

    3) Right to property, claiming that the expropriation of immovable property, the cadastral parcels inherited by his parents was unlawful and arbitrary.

20. In addition, the Applicant alleges that the restriction of his rights, which according to him, is caused by the challenged decisions, is in contradiction with Article 55.5 of the Constitution, because they "deny the essence of the guaranteed right".

21. The Applicant requests the Court to annul as unconstitutional the challenged Decision Rev. No. 105/2018, of the Supreme Court, to approve his Referral as admissible and to hold the violation of the aforementioned constitutional rights, as well as to grant compensation based on Article 41 of the Convention for material and non-material damage.

Admissibility of the Referral

22. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.

23. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *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".*

24. The Court also refers to Article 47 [Individual Requests] and Article 48 [Accuracy of the Referral] of the Law, which stipulate:

> Article 47
> [Individual Requests]
>
> *"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.*
>
> Article 48
> [Accuracy of the Referral]
>
> *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".*

25. Regarding the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party, has exhausted available legal remedies, has clarified the rights and freedoms, which have allegedly been violated by the concrete acts of public authorities (namely the court decisions of the regular courts, mentioned above).

26. However, the Court also takes into account 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 [...]".*

27. In addition, the Court also refers to Rule 39 (1) (c) of the Rules of Procedure, which foresees:

> *"The Court may consider a referral as admissible if:*
>
> *[...]*
> *(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant, and*
> *[...]".*

28. In assessing whether the requirements of Article 49 of the Law have been met, in conjunction with Rule 39 (1) (c) of the Rules of Procedure, the Court must consider whether the requirement of the 4 (four) month deadline has been met, in relation to the "final decision" rendered as a result of "effective legal remedy" as required by the admissibility criteria established by the Law and further specified by the Rules of Procedure.

29. Therefore, in assessing whether the admissibility requirements have been met, the Court should examine whether the challenged decision, namely Decision Rev. No. 105/2018 of the Supreme Court of 4 May 2018, was rendered as a result of an effective legal remedy. This means that it must be assessed whether the request for revision filed against Decision Ac. No. 2176/2016 of the Court of Appeals of 7 February 2018 was a legal remedy permitted and prescribed by law.

30. In this regard, the Court emphasizes that the Law on Contested Procedure, namely Article 228, paragraph 1, establishes:

> *Revision against the verdict*
> *Article 228*
>
> *228.1 Sides can present revision against verdict of absolute decree though which the procedure in court of second instance will finish.*
> *[...]*

31. In this connection, the Supreme Court reasoned as follows: *"Pursuant to the provision of Article 228.1 of the LCP, the parties may submit a revision only against final decisions by which the procedure of the second instance court ends. Considering that the contested procedure for the disputed parcel may continue after the end of the inheritance procedure, the decision of the second instance court does not have the meaning of the final decision by which the proceedings in the second instance court is completed".*

32. In light of this, the Court notes that, by filing a "request for revision", the Applicant in fact used a legal remedy which was not foreseen by the Law. This was also clearly confirmed by the challenged Decision of the Supreme Court. The latter, however, is not a decision related to the last effective legal remedy, as provided by Rule 39 (1) (c) of the Rules of Procedure, in relation to the requirements of Article 49 [Deadlines] of the Law.

33. Therefore, the Court considers that the "final decision", as to the suspension of the proceedings due to the question of the Applicant's procedural legitimacy, within the meaning of Rule 39 (1) (c) and the case law of the Court, in the Applicant's case, is Decision Ac. No. 2176/2018 of the Court of Appeals. The decision in question of the Court of Appeals was rendered on 7 February 2018, meaning that from its receipt by the Applicant up to the submission of the Referral to the Court, more than 4 (four) months have passed (See, *Paul and Audrey Edwards v. United Kingdom*, No. 46477/99, ECtHR, Decision of 14 March 2002; see also the Constitutional Court, Case KI120/17, Applicant *Hafiz Rizahu*, Resolution on Inadmissibility of 7 December 2017, paragraph 36, also Resolution on Inadmissibility in case KI18/17, Applicant *Isuf Bajrami*, of 19 April 2018, paragraph 33, and recently case KI41/18 Applicant *Gordana Dončić,* Resolution on Inadmissibility of 26 September 2018, paragraph 40).

34. The Court also notes that such a position is in accordance with the case law of the European Court on Human Rights (hereinafter: the ECtHR), in harmony with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court interprets the fundamental rights and freedoms guaranteed by this Constitution. As it is applicable to the present case, the ECtHR case law has established that the actions of the applicants cannot be justified if they tried to exercise inadequate legal remedies with the institutions or courts which, according to the law, are not competent to provide protection of rights for the alleged violation of which, they complain. (See, *mutatis mutandis*, ECtHR case, *Fernie v. United Kingdom*, No. 14881/ 04, Decision of 5 January 2006).

35. The Court has consistently reiterated that the applicants must exhaust all legal remedies which, *inter alia*, are expected to be effective. Only effective legal remedies can be taken into account by the Court, since the applicants, cannot extend the strict deadlines provided by the Law and the Rules of Procedure, through use of legal remedies, which are not foreseen (permitted) by law. (see, *mutatis mutandis*, ECtHR case, *Fernie v. United Kingdom*, No. 14881/04, Decision of 5 January 2006; see also the Constitutional Court, Case KI120/17, Applicant *Hafiz Rizahu* Resolution on Inadmissibility of 7 December 2017, paragraph 31, case KI18/17 Applicant *Isuf Bajrami*, Resolution on Inadmissibility of 19 April 2018, paragraph 37, and recently case KI41/18 Applicant *Gordana Dončić,* Resolution on Inadmissibility of 26 September 2018, paragraph 42).

36. In addition, the Court notes that upon the receipt of Decision Ac. No. 2176/2018 of the Court of Appeals of 7 February 2018, nothing prevented the Applicant from addressing the Court with a request for constitutional review of the Decision in question. However, the Applicant did not do so, and by using a legal remedy, which is not permitted by law and therefore ineffective, he missed the deadline of 4 (four) months to address the Court with a referral. (see, *mutatis mutandis* the Constitutional Court cases: KI120/17, Applicant *Hafiz Rizahu,* Resolution on Inadmissibility, of 7 December 2017, paragraph 35, Case KI18/17, Applicant *Isuf Bajrami*, Resolution on Inadmissibility of 19 April 2018, paragraph 38, KI41/18 Applicant *Gordana Dončić,* Resolution on Inadmissibility of 26 September 2018, paragraph43).

37. The deadline starts to run from the final decision, resulting from the exhaustion of accessible legal remedies, which are adequate and effective in providing redress in respect of the matter which is a subject of complain. *(See Norkin v. Russia,* App. 21056/11, ECtHR, Decision of 5 February 2013, and see also *Maya Alvarez v. Spain*, No. 44677/98, ECtHR, Decision of 23 November 1999).

38. The Court recalls that the purpose of the 4 (four) months legal deadline under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedures, is to promote legal certainty by ensuring that cases raising constitutional matters are dealt with within a reasonable time and that past decisions are not continually open to be challenged. (See, case *O'Loughlin and Others v. United Kingdom*, Application No. 23274/04, ECtHR, Decision of 25 August 2005, see also the Constitutional Court, case no. KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility of 17 March 2014, paragraph 24).

39. In addition, the Court emphasizes the argument of the Supreme Court that, following the resolution of the issue of inheritance, namely the procedural legitimacy of the Applicant, the contested procedure may be conducted with regard to the expropriation of the parcels in question. In this connection, the Court notes that its decision does not prejudge the eventual epilogue of the contested procedure.

40. In conclusion, based on the foregoing considerations, the Court concludes that the Referral was not filed within the legal deadline established in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure and, therefore, the Referral is to be declared inadmissible as out of time.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (1) (c) and 59 (b) of the Rules of Procedure, on 6 June 2019, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

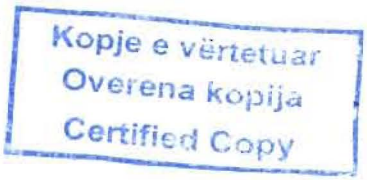
II. TO NOTIFY this Decision to the Parties;

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**

Bekim Sejdiu



Arta Rama-Hajrizi

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