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

Prishtina, on 26 August 2019
Ref. no.:RK 1420/19

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RESOLUTION ON INADMISSIBILITY

Case No. KI184/18

Applicant

Ilir Gashi

Constitutional Review of Decision Ac.nr. 2783/18 of the Court of Appeals of Kosovo, of 18 September 2018

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 Ilir Gashi, from Mitrovica (hereinafter: the Applicant), represented by Adem Vokshi, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Decision [Ac. nr. 2783/18] of the Court of Appeal of Kosovo, of 18 September 2018, in conjunction with the Decision [E.nr.557/12] of the Basic Court in Mitrovica, of 15 January 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which has allegedly violated Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 47 [Individual Requests] and 48 [Accuracy of the Referral] 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 21 November 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 29 November 2018, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu Krasniqi.

7. On 13 February 2019, the Court notified the Applicant about the registration of the Referral and a copy of it was sent to the Court of Appeal of Kosovo.

8. On 23 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. From the documents included in the Referral, it results that the Applicant owed a debt to the Municipality of Mitrovica for payment in the name of a fee for the regulation of construction land, related to the construction of a residential business building, in the amount of Euro 10,000.00. Based on the conclusion of the Municipality of Mitrovica (Pr. Nr. 08-20/12 of 11 May 2012), the Applicant was obliged to pay the aforementioned fee within 15 days from the day of receiving the conclusion. After the Applicant failed to pay the aforementioned obligation within the deadline, the Municipality of Mitrovica addressed to the Basic Court in Mitrovica with a proposal to allow the execution of the payment in the amount of EUR 10,000.00.

10. On 18 September 2012, the then Municipal Court in Mitrovica (Decision E. Nr. 557/12) had allowed the execution of the aforementioned conclusion of the Municipality of Mitrovica.

11. On an unspecified date, the Applicant objected to the aforementioned decision of the Municipal Court in Mitrovica.

12. On 15 January 2016, the Basic Court in Mitrovica (Decision E.nr.557/12) rejected the debtor's objection against the aforementioned Resolution on allowing the enforcement. The Basic Court reasoned that the objection is ungrounded because none of the reasons provided for in Article 71 of Law no. 04/1-139 on Enforcement Procedure have been met.

13. On 19 April 2018, the Applicant filed an appeal against Decision E.nr.557/12 of 15 January 2016, alleging violation of the contested provisions and erroneous application of substantive law, proposing that the challenged Decision be quashed and the case be remanded to the same court for reconsideration and retrial.

14. On 11 May 2018, the Basic Court in Mitrovica (Decision E.nr.557/2012) dismissed the Applicant's appeal as out of time. The Basic Court explained that the deadline for appeal is seven (7) days from the date of receipt of the decision. The Basic Court further added that the execution clerk of that court served the challenged decision to the Applicant's family members on 22 January 2016, at the Applicant's work place, while the Applicant filed his appeal on 19 April 2018.

15. On 17 May 2018, the Applicant filed an appeal with the Court of Appeal challenging the aforementioned decision and alleged a violation of the provisions of the contested procedure and wrongful application of the substantive law. The Applicant alleged that the appealed decision was never served on him, and therefore the appeal cannot be rejected as out of time by the Basic Court.

16. The Applicant further alleged that he received the challenged decision [E.nr. 5557/12] of the Basic Court of 15 January 2016, on 17 April 2018 after having addressed the President of the Basic Court. The Applicant proposed that the challenged decision be quashed and the case remanded to the same court for reconsideration and retrial.

17. On 18 September 2018, the Court of Appeal through decision [Ac.nr.2783/18]: (i) approved as grounded the Applicant's appeal against decision [E.nr.557/123] of the Basic Court of 11 May 2018; and, (ii) rejected as ungrounded the Applicant's appeal against decision [E.nr.557/12] of the Basic Court of 15 January 2016.

18. The Court of Appeal concluded that decision [E.nr.557/12] of 11 May 2018 was characterized by substantial breach of the provisions of contested procedure from Article 182, paragraph 1, in conjunction with Article 107, paragraph 1, of

the LCP since the challenged decision had to be served to the Applicant's legal representative.

19. In this regard, the Court of Appeal explained: "*Pursuant to Article 107, paragraph 1 of the LCP, it is stipulated that when a party is represented by its legal representative or by authorised representative, the document is served to the legal representative, respectively authorised representative, in the particular case the Basic Court should have served decision [E.nr. 557/12] of 15 January 2016 to the authorised representative.*"

20. The Court of Appeal concluded that decision [E.nr.557/12] of 15 January 2016 is fair and is not characterized by a substantial violation of the provisions of the Contested Procedure.

21. The Court of Appeal concluded that the Applicant's allegation that the conclusion of the Municipality of Mitrovica, based on which the enforcement was allowed, was never served on him, was ungrounded because the case file contained the service note [no. 08-20/12] of 15 May 2012 proving that the conclusion was served on the Applicant in the office in the presence of employees. Consequently, the Court of Appeal concluded that the decision of the first instance court must be upheld and the Applicant's appeal rejected as unfounded.

22. Regarding the conclusion of the Municipality of Mitrovica (Pr. nr. 08-20/12 of 11 May 2012) which was affirmed by the Basic Court in Mitrovica (Decision E. nr. 557/12 of 15 January 2016), the Court of Appeal reasoned: "*Taking into consideration that in the present case we are dealing with a proposal for enforcement, on the basis of the enforcement document, the enforcement body determines the enforcement only on the basis of the enforcement title under Article 23, and in the present case the enforcement title is the conclusion issued by Municipality of Mitrovica-Directorate of Planning and Urbanism, nr. prot. 08-20/12 dated 11.05.2012 [...] Decision of the administrative body, according to this law, is considered the decision and conclusion rendered in administrative procedure by the administrative body or service or by the legal person in charge of public authorizations [...] and in this case we are dealing with a conclusion as determined by the legal provisions.*"

23. On 31 October 2018, the Applicant filed a request for protection of legality with the Office of the Chief State Prosecutor against the aforementioned decision of the Court of Appeal on the ground of erroneous application of substantive law as he alleged that he had not received the conclusion of Municipality of Mitrovica.

24. On 14 November 2018, the Office of the Chief State Prosecutor rejected the request for the protection of legality on the ground that the conditions under Article 247.1 (b) of the Law on Contested Procedure were not met and informed the Applicant that on the basis of case file, respectively the service note, it turns out that the Applicant had received the conclusion in his office in the presence of the employees.

Applicant's allegations

25. The Applicant alleges that Decision [Ac.nr.2783/18] of 18 September 2018 of the Court of Appeal and Decision of the Basic Court in Mitrovica [E.nr.557/12] of 15 February 2016 violate his rights to fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a Fair Trial] of the ECHR.

26. The Applicant specifically alleges that the conclusion rendered by the Municipality of Mitrovica on the basis of which the Basic Court allowed the enforcement was never served on him and thus prevented him from exercising legal remedies.

27. The Applicant alleges that the Basic Court Decision [E.nr.557/12] of 15 January 2016 was not served on to his authorized representative.

28. The Applicant alleges: *"For this reason the petitioner considers that the process conducted by the Basic Court in Mitrovica and that of the Court of Appeal of Kosovo in Prishtina are not regular processes since they violate the Applicant's legal certainty when the same has been given the opportunity to be informed of the conclusion of the opposing party although this issue is also guaranteed by the Constitution of Kosovo - Article 31 of the Constitution which deals with a fair and impartial trial which right is also guaranteed to the petitioner by Article 6 of the European Convention for the Protection of Human Rights."*

29. Finally, the Applicant requests the Court to declare the challenged decisions of the Court of Appeal and the Basic Court in Mitrovica null and void.

Relevant legal provisions:

LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE

Article 71
Reasons for objection

Objection under article 69 of this Law may be based only on findings that:

1.1. the document, based on which the enforcement decision or enforcement writ has been issued, does not have an executive title, or if it does not have any feature of enforceability;

1.2. the document, based on which the enforcement decision or enforcement writ has been issued, is overruled, annulled, amended or in other way invalidated, respectively if in other way has lost its effect or it is concluded that it is without legal effect;

1.3. parties, through the public document or certified document according to the law drafted after the creation of enforcement document, have agreed not to require, for a limited time or permanently, the enforcement based on enforcement document;

1.4. deadline by when, according to the law the enforcement may be requested, has expired;

1.5. the enforcement is assigned for items which are excluded from compulsory enforcement, and as a result of that exclusion the possibilities for enforcement are limited;

1.6. enforcement creditor is not authorized to request enforcement on the basis of enforcement document, respectively he is not authorized to request the enforcement against the debtor;

1.7. the condition given in the enforcement document has not been met, unless otherwise foreseen by the law;

1.8. the credit ceases to exist as a result of a fact that occurred at a time when debtor could no longer submit evidence of such fact in the procedure from which the decision has derived, that is, after the conclusion or a court settlement or an administrative settlement or in some other way;

1.9. the settlement of the credit is postponed, prohibited, altered, or in some other way prevented, whether permanently or for a limited time, as the result of an event that occurred at a time when the enforcement debtor could no longer made it known in the procedure rendering the decision, that is, after the conclusion of a court or administrative settlement or in some other way;

1.10. the claim from the enforcement document is barred by a statute of limitations;

1.11. if the court that issued the enforcement decision is not competent;

1.12. if the private enforcement agent who issued the enforcement writ is not competent.

Admissibility of the Referral

30. The Court first examines whether the Referral has met the admissibility requirements laid down in the Constitution, provided by Law, and further specified in the Rules of Procedure.

31. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides:

    "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."

32. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as set out in the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

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."

Article 49
[Deadlines]

"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... ."

33. As to the fulfilment of these criteria, the Court concludes that the Applicant is an authorized party, challenging an act of a public authority, namely Decision [Ac.nr.2783/18] of 18 September 2018 of the Court of Appeal, after having exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms he claims he has been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set forth in Article 49 of the Law.

34. In addition, the Court examines whether the Applicant has fulfilled the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure sets out the criteria on the basis of which the Court may consider the Referral, including the criterion that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) provides that:

"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."

35. In this regard, the Court notes firstly that the Applicant alleges a violation of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution.

36. The Court recalls that the Applicant specifically alleges that he was not served with the conclusion of the Municipality of Mitrovica and the Basic Court Decision of 15 January 2016.

37. In addressing the Applicant's allegations, the Court first notes that the Applicant's substantive allegations concerning the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR have been interpreted in detail through the case law of the ECtHR, in accordance with which the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, in interpreting the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECHR.

38. The Court notes that the ECtHR's case law maintains that the fairness of a procedure is assessed based on the proceedings as a whole (see ECtHR Judgment of 6 December 1988, *Barberà, Messegué and Jabardo v. Spain,* no. 10590/83, paragraph 68). Consequently, in assessing the Applicant's allegations, the Court shall adhere to this principle (see also the case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and case KI143/16, Applicant *Muharrem Blaku* and Others, Resolution on Inadmissibility of 13 June 2018, paragraph 31).

39. The Court recalls that the Applicant alleges that: (i) the Basic Court in Mitrovica had not served Decision [E.nr.557/12] of 15 January 2016 with the Applicant's authorised representative in order for the Applicant to be able to challenge within the deadline; and, (ii) that the conclusion of the Municipality of Mitrovica Pr. nr. 08-20/12 of 11 May 2012 was not served on him so that he could exercise effective legal remedy.

40. The Court notes that the Court of Appeal responded to the Applicant's allegations by annulling the Decision of the Basic Court of 15 May 2018 as the Decision was not served on the Applicant's legal representative but only on his family members, and that, consequently, the Applicant's appeal could not be considered out of time.

41. In this regard, the Court notes that the requirement of "fairness" as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the Convention covers the proceedings as a whole, and the question of whether a person has had a "fair" trial is examined by cumulative analysis of all stages, not merely of a particular incident or procedural deficiency, as such deficiencies at one stage may be corrected at a later stage (see, for example, *Monnell and Morris v. the United Kingdom*, §§55-70).

42. Accordingly, the Court notes that the Court of Appeal corrected the Decision of the Basic Court of 15 May 2018 concerning the improper service of the Decision of the Basic Court [E.nr.557/12] of 15 January 2016, indicating that the flaw in a lower instance was corrected in the next higher instance.

43. With regard to the conclusion for enforcement of the Municipality of Mitrovica, the Court notes that the Court of Appeal has established: (i) that the case file contained the service note of 15 May 2012 proving that the conclusion of the Municipality of Mitrovica for enforcement was served on the Applicant in the office and in the presence of employees; and (ii) that the contested conclusion of the Municipality of Mitrovica is an enforcement title in accordance with the Law on Enforcement Procedure.

44. In this regard, the Court refers to the relevant part of the Court of Appeal's decision which states: *"The Court of Appeal assesses that the first instance court, on the basis of the evidence in the case file, Decision E.nr.557112 dated 15.01.2016, is fair and based on concrete legal provisions, the same is understandable and clear, therefore the conclusion of the first instance court on this matter is also accepted by the Court of Appeal, also assessing that the challenged Decision is regular and lawful, because the same has not been involved in a substantial violation of the provisions of contested procedure under Article 182, paragraphs 1 and 2 of the LCP, and the factual situation is rightly established, so that its legality can be investigated and assessed, violations which the second instance court investigates ex officio pursuant to Article 194 of LCP. The Court of Appeal assesses that the appellate claim of the debtor's representative that the conclusion based on which the enforcement was allowed was never served to the debtor and cannot be final, is unfounded and unsubstantiated claim, as in the case file there is the service note nr.08-20/12 dated 11.05.2012, with the conclusion that the conclusion was served in the office in the presence of the employees. Therefore, from the aforementioned, this Court considers that the decision of the first instance court must be upheld and the appeal of the debtor's authorised representative be rejected as unfounded [...] Considering that in the present case we are dealing with a proposal for enforcement, based on the enforcement document, the enforcement body determines the enforcement only based on the enforcement title according to Article 23, and in this case the enforcement title is the conclusion issued by the Municipality of Mitrovica-Directorate for Planning and Urbanism, nr. prot. 08-20/12 dated 11.05.2012 [...] Decision of the administrative body, according to this law, is considered the decision and conclusion rendered in administrative procedure by the administrative body or service or by the legal person in charge with public authorizations [...] and in this particular case, we are dealing with a conclusion as provided by legal provision."*

45. Furthermore, the Court notes that the Applicant has been allowed to pursue proceedings based on the principle of contradiction; that he was able, during various stages of the proceedings, to present arguments and evidence that he considered relevant to his case; that he has been given the opportunity to effectively contest the arguments and evidence presented by the opposing party; and that all arguments, viewed objectively, which were relevant to the decision of his case have been duly heard and considered by the courts; that the factual and legal reasons for the challenged decisions were presented in detail; and that, according to the circumstances of the case, the proceedings, in their entirety, were fair (see, inter alia, the case of the Court no. KI118/17, Applicant *Şani Kervan and Others*, Resolution on Inadmissibility, of 16 February 2018,

paragraph 35; see also, mutatis mutandis, the case *García Ruiz v. Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

46. The Court notes that Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, does not guarantee anyone a favourable outcome in litigation nor does it require the Court to challenge the application of substantive law by a regular court in a civil dispute, where one of the parties to the proceedings usually wins and the other loses (*ibidem*, Case no. KI118/17; see also, the case of the Court no. KI142/15, Applicant *Habib Makiqi*, Resolution on Inadmissibility of 1 November 2016, paragraph 43).

47. In this respect, the Court notes that it is not its task to deal with the errors of law alleged to have been committed by the regular courts (legality), unless and to the extent that such errors might have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that has led a regular court to adopt a decision in lieu of another. If it were otherwise, the Court would act as a "fourth instance" court, which would result in exceeding the limits established in its jurisdiction. Indeed, it is the role of the regular courts to interpret and apply the relevant rules of substantive and procedural law (see Case *García Ruiz v. Spain*, ECtHR No. 30544/96, 21 January 1999, paragraph 28, and see also Case KI70/11, Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).

48. The Court further notes that the Applicant does not agree with the outcome of the proceedings before the regular courts. However, the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts cannot by itself raise a substantive claim for a violation of the right to a fair and impartial trial (see, *mutatis mutandis*, Case *Mezotur - Tiszazugi Tarsulat v. Hungary,* ECtHR), Judgment of 26 July 2005, paragraph 21; and see also Case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 42).

49. As to the request for protection of legality filed with the State Prosecutor, the Court notes that it is a remedy that is not directly accessible to the Applicant but depends on a "mediating party", where in the present case "mediating party" is the State Prosecutor, and as such, is not examined by the Court (see *Tanase v. Moldova,* [GC], paragraph 122).

50. In regard to the above, the Court considers that the Applicant did not substantiate the allegations that the proceedings in question were in any way unfair or arbitrary and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR (see, *mutatis mutandis, Shub v. Lithuania*, complaint no. 17064/06, ECtHR, Decision of 30 June 2009).

51. Accordingly, the Referral is clearly ungrounded on constitutional grounds, and should be declared inadmissible, as stated in Article 113.7 of the Constitution, provided for by Article 48 of the Law and further specified in Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 47 and 48 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 23 July 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**
Nexhmi Rexhepi	Arta Rama-Hajrizi

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