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

Prishtina, 30 September 2019
Ref. no.:RK1435/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI67/19

Applicant

Hajrije Rina Zhitija Ajeti

Request for constitutional review of Judgment C. No. 571/18 of the Basic Court in Ferizaj of 12 November 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 Applicant is Hajrije Rina Zhitija Ajeti from the Municipality of Ferizaj, who is represented by Teki, Ylli and Korab Bokshi, lawyers from Gjakova (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [C. No. 571/18] of 12 November 2018 of the Basic Court in Ferizaj (hereinafter: the Basic Court), by which the marriage between her and B.A. was dissolved.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated the Applicant's fundamental rights and freedoms 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 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on 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 24 April 2019, the Applicant, by mail service, sent the Referral to the Constitutional Court (hereinafter: the Court).

6. On 26 April 2019, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Safet Hoxha (member) and Remzije Istrefi-Peci (member).

7. On 3 May 2019, the Applicant's representatives submitted the power of attorney to represent the Applicant before the Court.

8. On 22 May 2019, the Court notified the Applicant's representatives about the registration of the Referral.

9. On 22 May 2019, the Court also notified the Basic Court about the registration of the Referral and requested it submit to the Court a copy of the complete case file in the Applicant's case.

10. On 11 June 2019, the Court received a letter from the Basic Court notifying that '*the* case *file [C. No. 571/2018] with an appeal is in the Court of Appeals, since 15 April 2019 for the* consideration *of the appeal*'.

11. On 25 June 2019, the Court sent a letter to the Applicant requesting her to notify the Court if they had exercised any legal remedy against Judgment [C. No. 571/18] of the Basic Court of 12 November 2018, in addition to submitting the present Referral before this Court.

12. On 25 June 2019, the Court notified the Court of Appeals about the registration of the Referral and requested it to (i) submit a copy of the respective case file and (ii) inform the Court of about the status of the latter.

13. On 3 July 2019, the Applicant notified the Court that against the Judgment [C. No. 571/18] of the Basic Court of 12 November 2018, she filed with the Court of Appeals a proposal for reopening the proceedings.

14. The Court of Appeals did not respond to the Court's request to submit the case file.

15. On 5 September 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 of the case

16. On 9 September 2005, the Applicant married B.A.

17. On an unspecified date, B.A., namely the Applicant's former spouse, filed a lawsuit with the Basic Court for dissolution of the Applicant's marriage on the grounds that "the *marital relations were good at the beginning but deteriorated in the meantime to the extent that marital life has become unbearable*".

18. On 17 September 2018, the Basic Court by Decision [C. No. 571/18] appointed a lawyer M. Ll. as a temporary legal representative of the Applicant.

19. On 12 November 2018, the Basic Court by Judgment [C. No. 571/18] approved the lawsuit of B.A. and decided to allow the dissolution of marriage by divorce.

20. On 24 December 2018, the abovementioned Judgment of the Basic Court became final, as no appeal was filed against it by any of the parties to the proceedings.

21. On 16 March 2019, according to the Applicant's allegation, she was for the first time informed about the Judgment [C. No. 571/18] of 12 November 2018 of the Basic Court, by which her marriage was dissolved.

22. On 28 March 2019, the Applicant, based on items a) and c) of Article 232 (Repeating Procedures) of Law No. 03/L-006 on Contested Procedure (hereinafter: LCP), filed a proposal for reopening of the proceedings before the Court of Appeals, alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

23. So far, it appears from the case file that the Court of Appeals has not yet decided regarding the aforementioned proposal of the Applicant to reopen the proceedings submitted to the Court of Appeals on 28 March 2019.

Applicant's allegations

24. The Applicant states, *inter alia*, that (i) until 2015, she lived with her husband in Canada, namely at the respondent's address; (ii) despite the fact that the spouse returned to Kosovo from 2015 to 2018, they maintained contacts and the spouse visited her and their daughter in Canada several times; (iii) in 2018, through a common friend, she realized that her marriage was dissolved by a final Judgment; (iv) to that date, she was not informed about any proceedings regarding the dissolution of her marriage; (v) her husband, together with his lawyer as well as her legal representative appointed by the Basic Court, were aware of her address in Canada; and in spite of this fact, (vi) her representative appointed by this Court has never attempted to contact or file appeal against the Judgment of the Basic Court.

25. Accordingly she alleges that the challenged Judgment of the Basic Court, namely Judgment [C. No. 571/18] of 12 November 2018, was rendered in violation of her fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

26. With regard to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant alleges a violation of the principle of equality of arms and non-participation in the court hearing. The Applicant in particular states that (i) she was not summoned to a hearing in the Basic Court and was consequently not given the opportunity to attend the main trial; and (ii) the court's decision is based on false statements of witnesses and false documents, in violation of items a) and c) of Article 232 of the LCP. In support of her allegations of constitutional violations, the Applicant also refers to the Judgment of the Court in Case KI47/17 of 28 December 2018, with Applicant Selvete Aliji (hereinafter: Case KI47/17).

27. Finally, the Applicant requests the Court to declare her Referral admissible; to find that there has been a violation of Article 31 in conjunction with paragraph 1 of Article 6 of the ECHR; declare invalid the challenged Judgment of the Basic Court and remand the case for retrial.

Admissibility of the Referral

28. The Court examines whether the Referral has fulfilled the admissibility requirements established in the Constitution and further specified in the Law, and in the Rules of Procedure.

29. 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."

30. In this regard, the Court notes that the Applicant is an authorized party challenging an act of a public authority, namely Judgment [C. No. 571/18] of 12 November 2018 of the Basic Court in Ferizaj.

31. However, the Court notes that paragraph 7 of Article 113 of the Constitution also establishes the obligation to exhaust *"all legal remedies provided by law"*. This constitutional obligation is also defined by paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure. The latter stipulate:

Article 47
[Individual Requests]

"[...]

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

Rule 39
[Admissibility Criteria]

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

(..)

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

32. In this respect, the Court reiterates that paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, *inter alia,* clearly set out the obligation of *"exhaustion of legal remedies provided by law"*, in order that a referral is declared admissible and its merits are examined.

33. The assessment criteria whether this obligation is fulfilled, are also well-established in the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, based on Article 53 [Interpretation of Human Rights

Provisions] of the Constitution, the Court is obliged to interpret the human rights and fundamental freedoms guaranteed by the Constitution.

34. The rationale of a request to exhaust legal remedies or the exhaustion rule is to provide the relevant authorities, first of all the regular courts, the opportunity to prevent or put right the alleged violations of the Constitution.The rule is based on the assumption reflected in Article 32 [Right to Legal Remedies] of the Constitution and Article 13 (Right to an effective remedy) of the ECHR, that the Kosovo legal order provides an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery (see ECtHR case, *Selmouni v. France*, Judgment of 28 July 1999, paragraph 74 and, *inter alia*, cases of Court, No. KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility of 8 December 2016, paragraph 61, No. KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility, of 7 August 2017, paragraph 35, KI41/09, Applicant *University AAB-RIINVEST LLC*, Resolution on Inadmissibility, of 3 February 2010, paragraph 16; and KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).

35. The Court reiterates that this approach requires that, before addressing the Court, the Applicants must exhaust all procedural possibilities, in regular administrative or judicial proceedings, to prevent violations of human rights and freedoms guaranteed by the Constitution or, if any, to remedy such a violation of the rights guaranteed by the Constitution (see, in this context, cases of the Court: KI62/16, Applicant *Bekë Lajçi*, Resolution on Inadmissibility, of 10 February 2017, paragraphs 59-60; KI07/09, Applicant: Demë *Kurbogaj and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 18-19; KI109/15, Applicant: *Milazim Nrecaj*, Resolution on Inadmissibility of 17 March 2016, paragraphs 27-28; and KI148/15, Applicant: *Xhafer Selmani*, Resolution on Inadmissibility of 15 April 2016, paragraphs 27-28).

36. However, the ECtHR case law also specifies the exemptions and criteria on the basis of which these exemptions may apply, stating that the exhaustion rule, is to be applied with some "*degree of flexibility and without excessive formalism*", given the context of protecting human rights (see in this context, and, *inter alia*, the case of Court KI84/17, Applicant *Bahri Maxhuni*, Resolution on Inadmissibility of 31 May 2018, paragraphs 25, 26 and 27).

37. One of these exceptions is the non-obligation on individuals to exhaust, in principle, the discretionary or extraordinary remedies at their disposal (see, in this context, the ECtHR case, *Cinar v. Turkey*, Judgment of 13 November 2013 and *Prystavka v. Ukraine*, Judgment of 17 December 2002; see also Practical Guide to the ECtHR on Admissibility Criteria of 30 April 2019, I. Procedural Grounds for Inadmissibility, A. Non-exhaustion of domestic remedies, 2. Application of the rule, e. Existence and appropriateness, paragraph 77).

38. In the circumstances of the present case, the Court notes that the Applicant after being notified about the contents of the Judgment [C. No. 571/18] of 12 November

2018 of the Basic Court, filed a proposal to reopen the proceedings before the Court of Appeals, a procedure which has not yet been completed and is registered under the number [AC. No. 1846/19].

39. The Court has already established in its case law that if the proceedings are pending before the regular courts, then the Referral of the respective Applicants is considered premature. (See, in this context, the cases of the Court, KI23/10, Applicant *Jovica Gadzic*, Resolution on Inadmissibility, of 19 September 2013; KI32/11, Applicant *Lulzim Ramaj*, Resolution on Inadmissibility, of 20 April 2012; KI113/12, Applicant *Haki Gjocaj*, Resolution on Inadmissibility of 25 January 2013, paragraph 34; KI114/12, Applicant *Kastriot Hasi*, Resolution on Inadmissibility, of 3 April 2013, paragraph 33; KI07/13, Applicant *Ibish Kastrati*, Resolution on Inadmissibility of 5 July 2013, paragraphs 28-29; KI58/13, Applicant *Sadik Bislimi*, Resolution on Inadmissibility, of 25 November 2013, paragraph 31; and KI102/16, Applicant *Shefqet Berisha*, Resolution on Inadmissibility, of 2 March 2017, paragraph 39).

40. Therefore, in the circumstances of the present case, based on the principle of subsidiarity, the Court is required to declare the Applicant's Referral inadmissible because it is premature, thereby providing the opportunity and priority to the regular courts to address the issues raised in the Applicant's Referral.

41. The Court notes that the circumstances of the Applicant's case differ from those of the Applicant in the case of the Court KI47/17, which the Applicant refers to. In the abovementioned case, the Court notes that after rendering the Judgment [C. No. 280/2014] of the Basic Court, the Applicant submitted a proposal for reopening the proceedings before the Court of Appeals. The Court of Appeals, by Decision [CN. No. 49/2016] rendered by the individual judge, dismissed the Applicant's request for reopening of the proceedings. The Applicant subsequently challenged the Decision of the Court of Appeals. The Court of Appeals, by Decision [AC. No. 2812/2016], again rejected as ungrounded the Applicant's appeal and upheld the Decision [CN. No. 49/2016] of the same court rendered in the first instance. Finally, after rejecting the appeal as ungrounded by the Court of Appeals, the Applicant filed a request for constitutional review of Decision [AC. No. 2812/2016] of 9 December 2016 of the Court of Appeals with the Court. Consequently, in the circumstances of the referred case, the Applicant had exhausted all legal remedies before the regular courts before addressing the Court for constitutional review of the challenged Decision.

42. The Court finally notes that, notwithstanding the proceedings pending before the regular courts and without prejudice to those proceedings, nothing prevents the Applicant from submitting again constitutional referral in the future within the legal time limit of four (4) months from the date she was served with the final decision regarding her case by the regular courts.

43. Therefore, in these circumstances, the Applicant's Referral is premature and is to be declared inadmissible as established in paragraph 7 of Article 113 of the

Constitution, paragraph 2 of Article 47 of the Law and further specified in item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 113.7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure, on 5 September 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; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka- Nimani	Arta Rama-Hajrizi

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