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

Prishtina, on 27 January 2020
Ref. no. RK 1504/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI143/19

Applicant

Agim Thaqi

Constitutional review of the Decision of the Court of Appeals [Ac. no. 3297/15], of 8 March 2019

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 Agim Thaqi from Prizren, represented by Miftar Qelaj, a lawyer from Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision [Ac. no. 3297/15] of the Court of Appeals (hereinafter: the Court of Appeals), of 8 March 2019 in conjunction with Decision [CP. no. 1521/13] of the Basic Court in Prizren (hereinafter: the Basic Court), of 2 March 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged decisions which allegedly violated of the Applicant's fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121 (hereinafter: the Law), and Rule 29 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 13 September 2019, the Applicant submitted by mail the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 18 September 2019, the President of the Court, by Decision no. GJR. KI143/19, appointed Judge Remzije Istrefi-Peci as Judge Rapporteur. On the same day, the President of the Court, by Decision no. KSH. KI143/19, appointed the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Gresa Caka-Nimani and Safet Hoxha.

7. On 2 October 2019, the Court notified the Applicant's representative about the registration of the Referral and sent a copy thereof to the Court of Appeals.

8. On the same day, the Court sent a written request to the Basic Court requesting a copy of the acknowledgment of receipt proving that the Applicant has received the Decision [Ac.no.3297/15] of the Court of Appeals, of 8 March 2019.

9. On 14 October 2019, the Basic Court submitted to the Court the acknowledgment of receipt proving that the Applicant had received the Decision of the Court of Appeals.

10. On 16 January 2020, 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

11. On 2, respectively on 12 April 2019, the Kosovo Energy Corporation (hereinafter KEK) through Notification no. 499/1 as well as the decision of the Executive Director no.85 had terminated the employment relationship of the Applicant.

12. On an unspecified date, the Applicant filed a claim with the Municipal Court in Prizren (hereinafter: the Municipal Court) seeking the annulment of the respondent's decision, respectively his reinstatement to his job position.

13. On 23 May 2011, the Municipal Court by Judgment [C. no. 309/2010] rejected as unfounded the Applicant's claim, seeking the annulment of the Respondent's notification no. 499/1 of 2 April 2010, as well as of the decision of the Executive Director no. 85, of 12 April 2010, on termination of employment relationship, and his reinstatement to the job position.

14. The Applicant filed an appeal with the District Court of Prizren (hereinafter: the District Court) against the Judgment [C. nr. 309/2010] of 23 May 2011.

15. On 14 November 2012, the District Court by Judgment [Ac.no.362/2011] rejected the Applicant's appeal and upheld the Judgment [C. no. 309/2010] of the Municipal Court.

16. The Applicant filed a revision with the Supreme Court against the judgment of the District Court, alleging a substantial violation of the provisions of the contested procedure and erroneous application of substantive law, by proposing that the judgments in question be amended.

17. On 5 June 2013, the Supreme Court by Judgment [Rev. no. 151/2013] approved as founded the revision of the Applicant's and his representative and decided to amend the judgments of the Municipal and District Court, as they had erroneously applied the substantive law, thereby deciding to approve the Applicant's statement of claim as regards the annulment of the Respondent's notification no. 499/1 of 2 April 2010, and the decision of the Executive Director no. 85 of 12 April 2010, and obliging the respondent KEK to reinstate the Applicant to his job position.

Facts with respect to the enforcement procedure

18. On 15 July 2013, the Applicant submitted a proposal for the enforcement of the Judgment [Rev. no. 151/2013] of the Supreme Court.

19. On 20 September 2013, the Municipal Court by Decision [CP. no. 1521/13] allowed the enforcement, and ordered KEK to have the Applicant returned to work.

20. Acting within the legal deadline, KEK filed an objection with the proposal to amend the Decision of Municipal Court [CP. no. 1521/13], of 20 September 2013, in the part concerning the Applicant's return to work, by pledging that it will fulfil the part of the judgment which concerns the Applicant's reinstatement to the job position.

21. On 21 February 2014, the responding party KEK by notification [no. 11568] addressed to the Applicant, notified him about the reinstatement of employment as an engineer in charge of electrical maintenance in the Department of Mining Services - Coal Production Division. The Applicant did not accept to return to work.

22. On 17 April 2014, the responding party KEK addressed the Basic Court with a submission to which it attached to the notification [no. 11568] of 21 February 2014, whereby it had informed the Court that it had carried out its obligation from the enforcement decision.

23. On 2 March 2015, the Basic Court in Prizren, by Decision [CP. no. 1521/13] (i) approved the objection of the enforcement debtor KEK as founded in its entirety; (ii) quashed the decision of this court CP. no. 1521/13, of 20 September 2013; and (iii) concluded the enforcement procedure in the enforcement legal matter no. 1521/13 according to the proposal of the enforcement creditor.

24. The Basic Court, inter alia, based the Decision [CP. no. 1521/13] of 2 March 2015 upon: (i) the finding that in the present case KEK with its notification no. 11568, dated 21 February 2014 addressed to the creditor informing the latter about the return to work – as engineer in charge of electrical maintenance in the Department of Mining Services - Coal Production Division, but the creditor did not accept the notification on reinstatement of employment, which implies that he has not been notified about the workplace offered by the debtor (ii) the debtor KEK, even prior to this Court ordering it, has notified the Court that it will fulfil its obligation in respect of compensation, whereas as regards the reinstatement of the party to his job position at KEDS in Prizren, it has no competence to do so because the District of Prizren is now privatized and consequently it cannot oblige KEDS as an entity to have the creditor returned to that job position, and (iii) the debtor acting upon its obligation stemming from the Judgment of the Supreme Court which is an enforcement document, reinstated the Applicant to the aforementioned job position, but the latter refused to report to the workplace, hence this court decided to approve the debtor's objection in its entirety, thus finding that the creditor's credit for reinstatement to the job position has been fulfilled.

25. On 30 March 2015, the Applicant filed an appeal with the Court of Appeals against the Decision [CP. no. 1521/13] of the Basic Court, of 2 March 2015 due to erroneous and incomplete determination of factual situation and essential violations of procedural provisions.

26. On 8 March 2019, the Court of Appeals by Decision [Ac. no. 3297/15] rejected the Applicant's appeal as unfounded and confirmed the Decision [CP. no. 1521/13] of the Basic Court, of 2 March 2015.

27. The Court of Appeals based its Decision, inter alia, upon *"the Court of Appeals approves as lawful the legal assessment and standpoint of the first instance court, because the challenged decision does not contain violations of the provisions of the contested procedure under Article 182 paragraph 2, item b), g), j), k) and m) of the LCP, as well as the substantive law has been correctly applied"*. The Court of Appeals further states that on the basis of the case file it results that the debtor has notified the creditor about his return to the job position as an engineer in charge for electrical maintenance in the Department of Mining Services - Coal Production Division, for the reason that the KEK District in Prizren has now been privatized and transferred to KEDS, but the creditor did not accept to return.

28. On 30 April 2019, the Applicant's representative filed a request with the Office of the Chief State Prosecutor for the initiation of the procedure for protection of legality.

29. On 17 May 2019, the State Prosecutor, in his Notice KMLC. no. 82/2019, concluded that the proposal was not approved, *"because in this matter there is no sufficient legal basis to file a request for protection of legality"*.

Applicant's allegation

30. The Applicant alleges that the judicial decisions of the regular courts, namely Decision [Ac. no. 3297/15] of the Court of Appeals, of 8 March 2019, violates his rights guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 49 [Right to Work and Exercise Profession] of the Constitution.

31. The Applicant alleges that the Second and First Instance Court in their actions failed to respect equality before the law, for the reason as he states, the court proceedings were concluded without providing protection to him on the ground that he has claimed legal protection in the enforcement proceedings but the proceedings have concluded without the fulfilment of this legitimate request.

32. The Applicant further states that he is still unemployed because *"the court has unilaterally ruled in favour of one of the parties, this proves that the judicial decisions are not in line with the principle of equality before the law, Article 24 of the Constitution"*.

33. Among other things, the Applicant alleges that the court was biased in its legal position and thus did not guarantee him a fair and impartial trial, due to the fact that *"the court allowed the other party to claim the fulfillment of the legal obligations, contrary to the court order expressed by a judicial decision, which is filed as an enforcement title, the Judgment of the Supreme Court Rev. no. no.151/2013"*. In this regard, the Applicant states that the Court in enforcement proceedings is obliged to act in full compliance with the obligation arising from the enforcement title, and that in the present case the court was obliged to reinstate him to his previous job position.

34. As regards the allegation for a violation of the right to legal remedies guaranteed by Article 32 of the Constitution, the Applicant states that the Court of Appeals failed to examine and consider his appeal and thereby deprived him of the right to effective legal remedy. He states that the Court of Appeals by the Decision has upheld the legal position of the Court of First Instance, finding that the debtor has returned him to his job position and thus acted pursuant to the enforcement document, but by doing so the Court of Appeals failed to review the case file, did not review the appeal and did not act according to its competences to eliminate the violations that the decision of the first instance court may have contained.

35. Finally, the Applicant requests from the Court (i) to declare the Referral admissible; (ii) find that there has been a violation of Articles 24, 31 and 32 of the Constitution; (iii) declare invalid the Decision of the Basic Court [CP. no. 1521/13] of 2 March 2015 and the Decision of the Court of Appeals [Ac. no. 3297/15] of 8 March 2019 ; and (iv) remand the Decision of the Basic Court[CP. no. 1521/13] of 2 March 2015 for retrial.

Admissibility of the Referral

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

37. In this respect, the Court refers to Article 113, paragraph 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".*

38. In addition, the Court considers whether the Applicant has filed the Referral within the prescribed deadline by referring on this occasion to Article 49 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against the law, then the deadline shall be counted from the day when the law entered into force".*

39. In order to verify whether the Applicant has filed the Referral within the deadline of 4 (four) months, the Court refers to the date of receipt of the last decision by the Applicant and the date of submission of the Referral to the Constitutional Court.

40. The "last decision", according to Article 49 of the Law will normally be the last decision rejecting the Applicant's appeal (see *mutatis mutandis Paul and Audrey Edwards v. The United Kingdom*, no. 46477/99, ECtHR Decision of 14 March 2002). The deadline begins to count from the final decision as a result of the exhaustion of adequate and effective legal remedies to ensure that the case is remedied (see *mutatis mutandis Norkin v. Russia*, Application no.

21056/11, ECtHR Judgment of 5 february 2013, and see also, the ECtHR Judgment *Moya Alvarez v. Spain*, No. 44677/98, of 23 November 1999).

41. As to the request for protection of legality filed with the State Prosecutor, the Court notes that it is a legal remedy that is not directly accessible to the Applicant but depends on a "mediating party", and in the present case the "mediating party" is the State Prosecutor, and as such, is not considered by the Court (see *Tanase v. Moldova*, [DHM], paragraph 122; see also the case KI184/18, Applicant *Ilir Gashi*, Ruling on Inadmissibility, i. August 2019, paragraph 49).

42. For the reasons mentioned above, the Court considers that the last decision in the present case is the Decision of the Court of Appeals [Ac. no. 3297/15] of 8 March 2019, and the deadline begins to run from the day on which the abovementioned decision was received by the Applicant's representative (see the ECtHR Decision *Bayram and Yildirim v. Turkey*, Reference No. 38587/97, of 29 January 2002).) and cannot take into consideration the notice of the Chief State Prosecutor.

43. Therefore, on the basis of the submissions it results that the Applicant's representative has received the Decision of the Court of Appeals on 28 March 2019, which is confirmed by the acknowledgment of receipt submitted to the Court, while the Applicant has submitted the Referral to the Court on 13 September 2019 (see, inter alia, the Constitutional Court's Resolution on Inadmissibility KI201/13, of Applicant *Sofa Gjonbalaj*, of 17 April 2013).

44. In the circumstances where the Referral is out of time, the Court cannot examine the allegations raised in respect of the alleged violations of Articles 24, 31, 32 and 49 of the Constitution.

45. On the basis of the foregoing, it results that the Referral has not been filed within the legal deadline provided by Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, and must be declared inadmissible because it is out of time.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 and 113.7 of the Constitution, Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, on 16 January 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

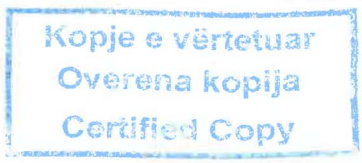
II. TO NOTIFY this Decision to the Parties;

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**

Remzije Istrefi-Peci Arta Rama-Hajrizi



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