



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

Prishtina on 16 January 2020
Ref. no.:RK 1500/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI24/18

Applicant

Jadranka Šapić

Request for constitutional review of the response of the Privatization Agency of Kosovo of 8 February 2018 in conjunction with Decision of PAK No. MIT014-0020 of 12 January 2011

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 Jadranka Šapić from the village Banja, Municipality of Skenderaj (hereinafter: the Applicant), who before the Court is represented by Safet Voca, a lawyer from Mitrovica.

Challenged decision

2. The Applicant challenges the constitutionality of the response of the Privatization Agency of Kosovo (PAK) of 8 February 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the PAK response, in conjunction with Decision No. MITO14-0020 of the PAK – Liquidation Commission of the Plastics Factory, which rejected the claim for material compensation, and which allegedly violated 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 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 1 of Protocol No. 1 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 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).
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 16 February 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 22 February 2018, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and also appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani (members).
8. On 8 March 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the PAK.
9. On 30 March 2018, the PAK submitted the written response to the Court.
10. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the term of office of the Judges: Altay Suroy and Ivan Čukalović ended.

11. On 9 August 2018, the President of the Republic of Kosovo appointed the Judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Nexhmi Rexhepi and Remzije Istrefi- Peci.
12. On 23 August 2018 the President of the Court by Decision GJR. KI24/18 appointed Judge Nexhmi Rexhepi as Judge Rapporteur in the case and on 12 September 2019 appointed Judge Safet Hoxha as member of the Review Panel replacing Judge Altay Suroy, whose term of office ended.
13. On 13 December 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

14. On 19 June 2007, the Applicant submitted a claim to the Regional Office of the Kosovo Trust Agency (hereinafter: the KTA) - Branch in Mitrovica requesting the Liquidation Commission of the SOE "Plastics Factory" in Skenderaj to pay her in a capacity of a creditor an amount of € 37,000 (thirty seven thousand) euro on behalf of the damage suffered as a result of a work injury in that company.
15. The Applicant based her claim on Judgment P. No. 333/94 of the Municipal Court in Mitrovica of 9 August 1995, which, according to the Applicant, is final.
16. On 12 January 2011, the Liquidation Commission of S.O.E.. "Plastics Factory" from Skenderaj issued Decision No. MIT014-0020, which rejected the Applicant's claim on the ground that her claim was statute-barred. In the legal advice of the decision, the party was advised that she has the right to file a request for reconsideration of the decision in accordance with Article 24.3 of Law No. 03/L-067.
17. The Applicant alleges that she never received the decision of the Liquidation Commission and that she was unaware of its existence until, on 24 January 2018, she personally went to the PAK Regional Office in Mitrovica to take an interest in her claim, on which occasion the responsible officials explained that the abovementioned decision was mailed to her and at the same time they submitted the case file.
18. On 25 January 2018, the Applicant, through her representative, submitted a request to the Chairman of the PAK Board in Prishtina, clarifying the facts of the case and requesting him to oblige the Liquidation Commission to reconsider Decision MIT014-0020.
19. On 8 February 2018, the PAK returned the reply to the Applicant.

Applicant's allegations

20. The Applicant alleges that she never received the decision of the PAK Liquidation Commission, which rejected her claim for indemnity until she personally went to the PAK and became aware of the existence of the decision.

She alleges that she was thus denied the right to appeal, as well as to exercise her right to compensation of damage for her injury at work.

21. According to the Applicant, these actions violated her fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 46 [Protection of Property] of the Constitution.
22. The Applicant requested the Court to declare her Referral admissible, to declare Judgment P. No. 333/94 of the Municipal Court in Mitrovica of 9 August 1995 as adjudicated matter or “*Res Judicata*” decision, to declare invalid Decision MIT014-0020 of the Liquidation Commission and order PAK to compensate the Applicant.

Admissibility of the Referral

23. The Court first examines whether the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure have been met.
24. In this respect, the Court refers to of Article 113 [Jurisdiction and Authorized Parties] paragraphs 1 and 7 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”.

25. The Court also examines whether the Applicant has met the admissibility requirements as further specified by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests] and 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”.

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”.

26. As regards the fulfillment of these criteria, the Court finds that the Applicant is an authorized party challenging the acts of a public authority. The Applicant

also emphasized the rights and freedoms which she claims to have been violated by specific decisions of the public authority, in accordance with the requirements laid down in Article 48 of the Law, and also submitted her Referral in accordance with the deadline set out in Article 49 of the Law.

27. However, the Court should further assess whether the criteria provided for exhaustion of legal remedies (Article 113.7 of the Constitution) are fulfilled, as well as the criteria provided for in Rule 39 [Admissibility Criteria], which *inter alia*, establishes:

**Rule 39
Admissibility Criteria**

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

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

28. In this regard, the Court notes that the fundamental allegation of the Applicant relates to a violation of the right to fair and impartial trial, the right to legal remedies and the right to property, the individual rights protected by Articles 31, 32 and 46 of the Constitution of Kosovo, the content of which is as follows:

Article 31 [Right to Fair and Impartial Trial]

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 or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

Article 32 [Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law.

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

[...]

29. The Court recalls that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution: *“Human rights and fundamental freedoms guaranteed by this Constitution [...] shall be interpreted consistent with the court decisions of the European Court of Human Rights”*, therefore, in individual cases, when the Court considers alleged violations of human rights, takes into account the case law of the European Court of Human Rights (hereinafter: the ECtHR) and, consequently, when considering the alleged violation of the right to fair and impartial trial, also invokes Article 6 of the European Convention for the Protection of Human Rights (hereinafter: the ECHR), which provides:

Article 6.1 of the ECHR [Right to a fair trial]

1. *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 within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

and accordingly, also Article 1 of Protocol 1 to the ECHR, which relates to the right to property which establishes:

Article 1 [Protection of property] of Protocol 1 to the European Convention on Human Rights (ECHR)

“(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law..

(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. ”.

Relevant legal provisions

30. With regard to the relevant legislation that was applicable at the time of the submission of the Applicant’s Referral, the Court notes the following:

**Law No. 03/L-067 on Privatization Agency of Kosovo
(subsequently repealed by Law No. 04/L-034 on the Privatization
Agency of Kosovo)**

Article 24 Review Committees

24.3 Any person or entity aggrieved by any act or omission of the Agency or a liquidation committee shall have the right to file a written application requesting that a Review Committee review such act or omission. The application shall be made within sixty days after the complainant becomes or should reasonably have become aware of such act or omission. Failure of a Review Committee to take a decision within sixty days - or such longer period as may be established under Article 24.7 - after the filing of the application shall be construed as a decision rejecting the application.

**Law No. 04/L-034 on Privatization Agency of Kosovo
(Annex to the Law)**

Article 37 Calculation and Set Off of Claims

7. The affected creditor is entitled to apply to the Court within thirty (30) days of the dispatch of such notice by the Liquidation Authority for determination of his claim and failing such timely application the creditor shall be precluded from objecting further to the Liquidation Authority's decision.

For the case are also relevant:

ANNEX TO LAW NO. 04/L-033 ON THE SPECIAL CHAMBER OF THE
SUPREME COURT OF KOSOVO ON THE PRIVATIZATION AGENCY OF
KOSOVO RELATED MATTERS

CHAPTER V PRIMARY COMPETENCE OF SPECIALIZED PANELS

**Article 12
Primary Competences and Case Allocation**

1.4. cases involving a complaint or other matters related to or arising in connection with the liquidation of an Enterprise or its assets shall be referred to a Specialized Panel having competence for matters related to the liquidation of Enterprises.

CHAPTER VII SERVICE

Article 18

3. Service shall be deemed to have been effected:

3.1. in the case of dispatch of a copy of the document by registered mail pursuant to paragraph 1 of Article 18 of this Annex, on the day on which the addressee acknowledges receipt or, if the addressee has refused to accept the document or to sign the receipt, on the fifth day following the

mailing of the registered letter at the post office of the place where the Special Chamber has its seat.

Article 70 Review of Liquidation Decisions

2. A creditor of the Enterprise who has timely filed a claim with the Agency and who is prejudiced by a decision of a Liquidation Authority may challenge such decision by filing a complaint against the Agency with the Special Chamber within thirty (30) days after being served with such decision. Any such complaint must be based on an allegation that the liquidation process has not complied with the Law on the Privatization Agency of Kosovo. The compliant shall comply with the requirements of paragraph 2 of Article 27 of this Annex and attach a copy of the decision being challenged.

As to the right to fair and impartial trial

31. The Court notes that the substance of the Applicant's Referral lies in the fact that, according to her, the PAK Liquidation Commission for the Plastics Factory in Skenderaj never submitted to her Decision MITO14-0020, which rejected her claim for compensation based on Judgment P. No. 333/94 of the Municipal Court in Mitrovica of 9 August 1995 which recognized her the right to monetary compensation as a result of the injury at work.
32. The Court further finds that, as a result of the PAK failure to serve on her the decision, the Applicant lost her right to appeal and was thereby denied the right to use the legal remedies guaranteed by Article 32 of the Constitution.
33. In examining allegations of a violation of the right to fair and impartial trial, the Court assesses whether the court proceedings in their entirety have been fair and impartial, as required by Article 31 of the Constitution (*see, mutatis mutandis, Edwards v. United Kingdom*, 16 December 1992, p. 34, Series A, No. 247 and *B. Vidal v. Belgium*, 22 April 1992, p. 33, Series A. No. 235).
34. In relation to the above, the Court recalls that one of the Applicant's allegations was that the Law on Obligations was not correctly applied by the PAK in the decision rejecting her request because, according to her, PAK had taken as its basis Article 379 of the Law, finding that the claim was out of time and did not take into account Article 383 of the same Law, which foresees the circumstances of interruption of the statute of limitation.
35. The Court also concludes from the above that the question whether the Judgment P. No. 333/94 of the Municipal Court in Mitrovica of 9 August 1995 constitutes a "res judicata" decision was never raised as a matter of dispute because it was never considered in that aspect. PAK, that is, the Liquidation Commission of the company to which the Applicant submitted the claim for indemnity, did not question the validity of the judgment because in the reasoning of the decision, which rejected the Applicant's claim, by referring to Article 379 of the LOR, clearly stated. "*All claims determined by a final court decision or decision of other competent agency, or by settlement at court, or*

at some other competent body, shall expire after a ten year period, including ones which are subjected by statute to a shorter limitation period due to the statute of limitations (Official Gazette SFRY, 29/78;39/85;45/89)“.

36. Namely, in its decision PAK itself referred to the Applicant's claim as a claim submitted on the basis of a final court decision, and what according to the PAK constituted the basis for the rejection was the deadline within which the claim was submitted, that is, the limitation period for filing a claim for monetary compensation, based on a final court decision.
37. In relation to the Applicant's allegations, the Court finds that, as it has consistently pointed out, that it is not its task to determine whether or not the law or any specific provision of that law has been correctly applied, but it is its duty to determine whether the proceedings as a whole fulfilled the guarantees provided for in Article 31 of the Constitution and Article 6 of the ECHR.
38. The Court has consistently reiterated that it is not its task to deal with errors of fact or law allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution and the ECHR. The Court may not itself assess the facts which have led the regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a "court of third or fourth instance", which would be to disregard the limits imposed on its jurisdiction (See the ECtHR case *Perlala v. Greece*, Judgment of 22 February 2007, paragraph 25; and see the case of Court KI119/17 Applicant *Gentian Rexhepi*, Resolution on Inadmissibility of 3 April 2019, paragraph 87).
39. The Court also notes that based on the ECtHR case law, it is not its task to question the interpretation of law by the regular courts, except when there is evident arbitrariness (see *mutatis mutandis*, the ECtHR case *Adamsons v. Latvia*, Judgment of 24 June 2008, paragraph 118 and cases of the Court KI42/17, Applicant *Kushtrim Ibraj*, Resolution on Inadmissibility of 5 December 2017, paragraph 38 and KI122/16, Applicant *Riza Dembogaj*, Judgment of 30 May 2018, paragraph 60).
40. The Court further assessing the Applicant's allegations, the evidence presented by the Applicant, the PAK response to the Court, as well as the relevant provisions of the applicable laws pertaining to the present case, finds that in this case the essential issue is whether the Applicant was denied the right to a legal remedy or the Applicant herself failed to use the available legal remedy.
41. In the light of the foregoing, the Court notes that the decision of the PAK Liquidation Commission MIT014-0020, which rejected the Applicant's claim for compensation, stated in the legal advice that "in accordance with Article 24.3 of Law no. 03/L-067, the Applicant may request that the reconsideration of the decision of the Liquidation Commission by the Review Committee - see annex L5ob".
42. The Court further, referring to the provision of the abovementioned Law, notes that Article 24.3 of Law 03/L-067 also specifies: „The application shall be

made within sixty days after the complainant becomes or should reasonably have become aware of such act or omission“.

43. It is clear from the foregoing that the law established that the Applicant could have requested the reconsideration of the decision within 60 days from the day she became aware of the decision.
44. Law No. 04/L-034 on the Privatization Agency of Kosovo, which repealed Law No. 03/L-067, provided in its annex, in Article 37.7, that: *“The affected creditor is entitled to apply to the Court within thirty (30) days of the dispatch of such notice by the Liquidation Authority for determination of his claim...”*.
45. Accordingly, the new law also made it clear that the appeal could be filed within 30 days of the notification by the Liquidation Authority.
46. In view of the foregoing, the Court finds that, even assuming that the Applicant did not find out about the decision of the PAK Liquidation Commission, which rejected her claim on the grounds of the statutory limitation, until 24 January 2018 when she personally went to the PAK, there was no legal obstacle to prevent or impede the Applicant from seeking reconsideration of the decision before the Specialized Panel of the Special Chamber of the Supreme Court on PAK related matters.
47. In these circumstances, if she were eventually dissatisfied with the decision of the Specialized Panel, the Applicant would be able to file appeal against the decision with the Appellate Panel of that Chamber of the Supreme Court.
48. On the basis of the above, the Court finds that the Applicant failed to use the legal remedies available to her with the regular courts before addressing the Constitutional Court.
49. The Court reiterates that the principle of exhaustion of legal remedies is to give the competent authorities, and above all the regular courts, the opportunity to prevent or put right the alleged violations of the Constitution.
50. The rule is based on the assumption, which is reflected in Article 32 of the Constitution and in Article 13 of the ECHR, that the Kosovo legal order will provide an effective legal remedy for the violation of the constitutional rights. This is an important aspect of the subsidiary character of the constitutional justice. (See, the case of ECtHR *Civet v. France*, Judgment of 28 September 1990, paragraphs 42-44, see also, *inter alia*, cases of the Constitutional Court, KI158/18, Applicant *Ajet Ajeti*, Resolution on Inadmissibility, of 13 April 2019, paragraphs 40-42; KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility, of 8 December 2016, paragraph 61).
51. Therefore, for the reasons mentioned above, the Court finds that the Applicant’s Referral does not meet the admissibility requirements as the Applicant has not exhausted legal remedies under Article 113.7 of the Constitution, Article 47 paragraph 2 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

52. In the circumstances of the case, when the Applicant's Referral is premature, the Court cannot examine the alleged violation of the right to property, guaranteed by Article 46 of the Constitution, namely Article 1 of Protocol 1 to the ECHR.
53. Therefore, in accordance with Rule 39 (1) (b) of the Rules of Procedure, the Referral is to be declared inadmissible on the grounds of non-exhaustion of legal remedies provided for by law.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 39 (1) (b) of the Rules of Procedure, on 13 December 2019, unanimously:

DECIDES

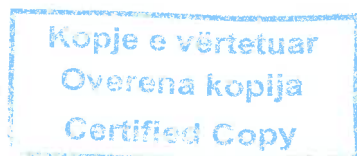
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Nexhmi Rexhepi

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.