



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 20 August 2020
Ref. no.: RK1607/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI19/20

Applicant

Lutfi Shantir

**Constitutional review of Decision CP. No. 2739/2014, of the Basic Court
in Prizren of 27 January 2020**

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 Lutfi Shantir from Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Decision CP. No. 2739/2014 of the Basic Court in Prizren of 27 January 2020.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision, which allegedly violates the Applicant's rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and Article 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 [Right to a fair trial] and Article 14 (Prohibition of discrimination) 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, Article 22 [Processing Referrals] and 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 27 January 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 30 January 2020, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzie Istrefi-Peci and Nexhmi Rexhepi.
7. On 13 February 2020, the Applicant submitted additional documents containing the appeal filed with the Court of Appeals of Kosovo against Decision CP. No. 2739/2014, of the Basic Court in Prizren of 27 January 2020 as well as a copy of the decision in question.
8. On 21 February 2020, the Applicant submitted additional documents entitled "submission-urgency".
9. On 26 February 2020, the Court notified the Applicant about the registration of the Referral and a copy of the Referral was sent to the Basic Court in Prizren.
10. On 22 November 2020, 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. From the documents included in the Referral, it results that on 4 November 2002, the Applicant, as the owner of the tourist agency "Express-tur" from Prizren, in the capacity of seller, entered into a contract for the sale-purchase of three buses, at a price of 55,000 euro, with NTU "Kosovatrans" from Prizren. The dispute between the Applicant and NTU "Kosovatrans" arose due to the suspicion that the documentation for one of the buses was forged. Therefore, the Applicant sued NTU "Kosovatrans" in the Municipal Court in Prizren.
12. On 23 May 2004, the Municipal Court in Prizren by Judgment C. No. 328/08 decided: (i) to partially approve the Applicant's statement of claim and the respondent NTU "Kosovatrans" from Prizren is obliged to pay the amount of 27,000 euro to the Applicant on behalf of the debt with legal interest starting to run from the day of filing the claim on 21.05.2003 until the final payment, all within 15 days after the judgment becomes final, under the threat of forced execution; (ii) the part of the statement of claim from the adjudicated amount of 27,000 euro up to the claimed amount of 28,000 euro is rejected as ungrounded; and, (iii) the respondent NTU "Kosovatrans" from Prizren is obliged to pay the amount of 500 euro to the Applicant on behalf of the court costs, within 15 days after the Judgment becomes final, under the threat of forced execution.
13. The Municipal Court explained that the objections of the responding party NTU "Kosovatrans" that the remaining debt of 27,000 euro was not paid to the Applicant, because a bus from the sale-purchase contract was stopped by the Customs Service in Podgorica, because there was a suspicion that the chassis number was forged are ungrounded, because from the decision of the customs service in Podgorica No. 381/03-1-I of 10 December 2003, it was established that the minor offence proceedings against RB from Prizren were terminated, namely the driver of NTU "Kosovatrans" and "Mercedes" bus with registration 320-KS-013 was returned to him.
14. On an unspecified date, the Applicant, in his capacity as creditor, proposed to allow the enforcement of Decision C. No. 328/08 of the Municipal Court in Prizren, of 23 May 2004.
15. On 22 September 2006, the Municipal Court in Prizren by Decision E. No. 63/06, based on the final judgment of the Municipal Court in Prizren C. No. 328/08 of 23 May 2004, allowed the enforcement according to the proposal of the creditor (Applicant) against the debtor NTU "Kosovatrans" for the payment of the claim in cash in the amount of 27,000 euro, on behalf of the costs of the contested procedure in the amount of 500.00 euro, on behalf of the interest in the amount of 11,445.40 euro, on behalf of the drafting of the enforcement proposal in the amount of 101.04 euro, on behalf of the costs of the financial expert 100.00 euro and on behalf of the costs of the enforcement procedure in the amount of 442 , 50 euro, the total amount of 39.588, 94 euro.
16. On an unspecified date, the respondent NTU "Kosovatrans" challenged the execution of the Decision of the Municipal Court in Prizren C. No. 328/08, of 23 May 2004, alleging that "the matter has not been fully clarified".

17. On 3 September 2007, the District Court in Prizren by Decision Ac. No. 277/2007 rejected the appeal of the responding party NTU "Kosovatrans" as ungrounded and upheld Decision E. No. 63/06 of the Municipal Court in Prizren of 6 March 2007. The District Court in Prizren explained that the allegation of the debtor NTU "Kosovatrans" that the case has not been fully clarified cannot be subject to review in the court of second instance as execution is allowed under the executive title namely the final judgment of the Municipal Court in Prizren C. No. 328/08 of 23 May 2004.
18. On 3 February 2010, the Municipal Court in Prizren by Order E. No. 63/06, ordered Pro Credit Bank - branch in Prizren to transfer the total amount of 43,563, 40 euro from the account of the debtor NTU "Kosovatrans" to the account of the creditor (Applicant).
19. The Court notes that from the documents included in the Referral, it cannot be understood how all the different enforcement proceedings of the proposal for granting enforcement were conducted by the Applicant on the one hand, and the objection of allowing the proposal for enforcement by the responding party NTU "Kosovatrans", on the other hand. Consequently, the summary of the facts is presented based only on the documents included in this referral.
20. On 27 January 2020, the Basic Court in Prizren by Decision CP. No. 2739/2014, established:

*"I. The enforcement creditor, Lutfi Shantir from Prizren is **ORDERED** that in the period of 7 (**seven**) **days** after the date of receipt of this decision, to prepay and deposit in the deposit of this court, as an enforcement body, the amount of cash of **150.00 € (one hundred and fifty)** and that in the account of the court revenues-Kosovo Judicial Council, which finances the court as an enforcement body **no. 1000 4300 7000 0518 CBK** and in the name of covering the costs for the economic-financial expertise for the calculation of the legal interest which starts to run from the date of filing the claim on 21.5.2003 until the final payment of the obligation in cash in the remaining amount of about **17.038.52 €** which derives from the enforcement document-judgment of the Municipal Court in Prizren, C. No. 328/03 of 23.6.2004.*

II. In case the creditor does not prepay the costs in the specified amount and in the deadline set as in item I of the enacting clause of this decision, the court as an enforcement body will suspend the enforcement and the concrete enforcement action will not be performed, with the description made as in item I of the enacting clause of this decision".

21. The Basic Court in Prizren by the above mentioned Decision explained that the creditor (Applicant) based on Article 13.1 of Law No. 04/L-139 on Enforcement Procedure (hereinafter: LEP) regarding the costs of expertise for the calculation of legal interest and the appointment and conduct of the enforcement must deposit the amount of 150.00 euro (one hundred and fifty).
22. The Basic Court explained that: "[...] in the present case, according to the state of the case file, it is necessary to assign the relevant financial expertise to

clearly determine the legal interest for the respective obligation in cash and that for this reason this court by its decision CP. No. 2739/20 14 of 9.10.2019, ordered the creditor to make the cash deposit in the amount of € 150.00 in the legal matter of enforcement, CP. No. 2739/2014 and more broadly has decided as in the enacting clause of this decision, but that the creditor did not make their deposit”.

23. The Basic Court further added that based on Article 13.2 of the LEP, the enforcement procedure may be suspended in case the creditor (the Applicant) does not deposit the required funds to cover the costs of the enforcement procedure.
24. The Basic Court in Prizren by Decision CP. No. 2739/2014, stated that the dissatisfied party has the opportunity to file an appeal *“against this decision, an appeal is allowed within 7 (seven) days from the date of the receipt of the latter, in the Court of Appeals in Prishtina, and through this court”*.
25. On 10 February 2020, the Applicant filed an appeal with the Court of Appeals requesting that his appeal be upheld in its entirety, and Decision CP. No. 2739/2014 of the Basic Court in Prizren of 27 January 2020 be annulled.

Applicant's allegations

26. The Applicant does not refer to any constitutional provision in particular, but from his Referral it follows that he complains: (i) about the non-enforcement of the enforcement case in his favor which is related to the right 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; and (ii) that he has been discriminated against because he is a member of the minority community in Kosovo, which is related to Article 24 [Equality Before the Law] and Article 14 (Prohibition of discrimination) of the ECHR.
27. The Applicant alleges: *“I have submitted facts now in the appeal that I have won the case and I ask to be executed by this court as the highest body because it is the final case. Here is evidence that the case was won in the court earlier against “Kosovatrans” as a debtor with case number C. No. 328/03”*.
28. The Applicant alleges: *“The first instance court approved the claim, against this debtor filed an appeal, and this appeal was rejected, after which they rendered a final decision, but the court has not yet executed the case, which I won in the District Court in Prizren with number Ac. No. 277/2007, the Court is partial to bring new expertise, while the expertise until 2013 is final”*.
29. The Applicant also alleges that as *“a member of the minority community in Kosovo, he has been discriminated against”*.
30. The Applicant requests the Court: *“I request that this Court execute the case correctly as decided in these decisions by the court of Prizren. Because the court is violating my rights”*.

Relevant legal provisions

LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE

Article 13

The costs of enforcement

1. The procedural expenses regarding the determination and commission of enforcement shall be paid by the creditor in advance.

2. The enforcement proposal shall pay in advance the expenses from paragraph 1 of this article within deadline assigned by the enforcement body. The enforcement body shall suspend the enforcement if the expenses are not paid in advance within such deadline. If the expenses are not paid within deadline set by the enforcement authority for a certain activity, such activity shall not be completed.

Admissibility of the Referral

31. 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.

32. 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”.

33. The Court also examines whether the Applicant has fulfilled the admissibility requirements, which are further prescribed in the Law. In this regard, the Court first refers to Article 47 [Individual Requests] of the Law, which establishes:

Article 47

[Individual Requests]

“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.

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

34. The Court also refers to Rule 39 (1) (b) of the Rules of Procedure, which specifies:

“(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”.

35. The Court recalls that the rule for exhaustion of legal remedies under Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, obliges those who wish to bring their case before the Constitutional Court that they must first use the effective legal remedies available to them in accordance with law, against a challenged judgment or decision.
36. In that way, the regular courts must be afforded the opportunity to correct their errors through a regular judicial proceeding before the case arrives to the Constitutional Court. The rule is based on the assumption, reflected in Article 32 of the Constitution and Article 13 of ECHR that under the domestic legislation there are available legal remedies to be used before the regular courts in respect of an alleged breach regardless whether or not the provisions of the ECHR are incorporated in national law (see, *inter alia*, *Aksoy v. Turkey*, paragraph 51 of Judgment of the ECtHR of 18 December 1996).
37. The principle is that that the protection mechanism established by the Constitutional Court is subsidiary to the regular system of judiciary safeguarding human rights (see, *inter alia*, *Handyside v. United Kingdom*, paragraph 48 of the ECtHR Judgment of 7 December 1976).
38. Under Article 113.7 of the Constitution, the Applicant should have a regular way to the legal remedies which are available and sufficient to ensure the possibility to put right the alleged violations. The existence of such legal remedies must be sufficiently certain not only in theory but also in practice, and if this is not so, those legal remedies will lack the requisite accessibility and effectiveness (see, *inter alia*, *Vernillo v. France*, paragraph 27 of the ECtHR Judgment of 20 February 1991, and *Dalia v. France*, paragraph 38 of the ECtHR Judgment of 19 February 1998).
39. It falls to the Court to examine whether the legal remedies have been exhausted, and whether it was effective, available in theory and practice at the relevant time, that is, that the remedy was accessible, and that it could redress the violations in relation to the objections of the Applicant and that it enables reasonable prospect for success (see, *inter alia*, *Civet v. France* paragraphs 42-44, of the ECtHR Judgment of 28 September 1999).
40. However, when a legal remedy is provided by law, it is up to the Applicant to prove that the legal remedy provided by law has in fact been exhausted or that for any reason it was not available and effective in the particular circumstances of the case, or that there have been special circumstances due to which he or she is exempted from the requirements of exhaustion of legal remedies.

41. In the present case, the Court notes that against the challenged decision of the Basic Court in Prizren CP. No. 2739/2014, of 27 January 2020, there is a possibility to file an appeal as a regular legal remedy against the challenged decision, as stated by the Basic Court in its legal remedy *"against this decision, an appeal is allowed within 7 (seven) days from the date of the receipt of the latter, in the Court of Appeals in Prishtina, and through this court"*.
42. The Court further concludes that on 10 February 2020, the Applicant filed an appeal with the Court of Appeals requesting that his appeal be approved in its entirety and that Decision CP. No. 2739/2014 of the Basic Court in Prizren of 27 January 2020, be annulled.
43. Therefore, the Court finds that the proceedings before the regular courts regarding the subject of the dispute between the Applicant and the responding party are still ongoing and are pending before the Court of Appeals based on the appeal filed by the Applicant and that the Applicant does not reason that the appeal in the Court of Appeals for some reason was not available and was ineffective in the particular circumstances of the case or that there were special circumstances due to which he or she was exempted from the requirement of exhaustion of legal remedies.
44. Based on the above, the Court concludes that the Applicant's Referral is to be declared inadmissible, as the Applicant has not exhausted all legal remedies in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (1) (b) and 59 (2) of the Rules of Procedure, on 22 July 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;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Radomir Laban

Kopje e vërtetuar
Overena kopija
Certified Copy

Arta Rama-Hajrizi

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