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

Prishtina, 10 September 2020
Ref. no.:RK 1618/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI69/19

Applicant

Nazim Kolukaj

Constitutional review of Decision Rev. no. 360/2018 of the Supreme Court, of 26 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 Referral was submitted by Nazim Kolukaj from the village of Vërbnicë (hereinafter: the Applicant). The Applicant is represented by Ibrahim Dobruna, attorney at law from Gllogovc.

Challenged decision

2. The Applicant challenges the decision Rev. no. 360/2018 of the Supreme Court, of 26 November 2018, rejecting the Applicant's request for revision of filed against the decision AC. no. 2289/2017 of the Court of Appeals, of 23 April 2018, as well as the decision C. no. 1335/16 of the Basic Court, of 13 April 2017.

3. The challenged decision Rev. no. 360/2018 of the Supreme Court was served on the Applicant on 31 January 2019.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decisions of the regular courts, which allegedly violate the Applicant's rights and freedoms guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial], Article 53 [Interpretation of Human Rights Provision], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Articles 5.3 and 5.4 (Right to liberty and security), Article 6 (Right to a fair trial), of the European Convention on Human Rights (hereinafter ECHR) , as well as Article 14.1 of the International Covenant on Civil and Political Rights.

5. In addition, the Applicant requests from the Court to hold a public hearing on the grounds that *"the Basic Court in Prizren, the Court of Appeals and the Supreme Court of Kosovo suspended the court proceedings contrary to procedural and substantive law, and therefore he considers it necessary to have a hearing scheduled"*.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47[Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo No. 03/L-121 (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

7. On 25 April 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 26 April 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (presiding), Remzie Istrefi Peci and Nexhmi Rexhepi (members).

9. On 10 July 2019, the Court notified the Applicant's legal representative about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.

10. On the same day, the Court sent a letter to the Basic Court requesting from it to provide evidence when the challenged decisions of the Supreme Court and the Court of Appeals were served on the Applicant or his legal representative.

11. On 18 July 2019, the Basic Court submitted the requested information to the Court.

12. On 22 July 2020, having considered the report of the Judge Rapporteur, the Review Panel unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. On the basis of the case file it results that the Applicant, and the persons F.K., Z.K., filed a statement of claim with the Basic Court whereby they requested the revocation of the contract of gift Vr.no. 5517/2010, which they concluded on 22 July 2010, at the Municipal Court in Prizren with persons B.K., Xh.K., LI.K., F.K., and R.K.

14. On 13 April 2017, the Basic Court issued Decision C. no. 1335/16, whereby the claim of the Applicant and persons F.K., Z.K., is considered withdrawn. By the same decision, the Basic Court obliged the claimants (the Applicant and persons F.K., Z.K.) to pay the costs of the proceedings in the amount of EUR 2,700 to respondents B.K., Xh.K., LI.K., F.K., and R.K.,

15. The reasoning of the decision C. no. 1335/16 of the Basic Court reads;

> *„On 13.04.2017 the court scheduled the main hearing session, which was not attended by the claimant's authorized representative, Attorney at Law Ibrahim Dobruna, although there was evidence in the case file that he had been duly summoned and did not justify his absence.*
>
> *Pursuant to Article 423.3 of the Law on Contested Procedure (LCP), it is prescribed that "If the plaintiff does not come to the main hearing session even though he's been summoned regularly, it is considered that he/she has dropped the charges except if the plaintiff declares that he/she requests the process to continue in his/her absence". The authorized representative of the respondents who attended this hearing, Attorney at Law Et-hem Rogova from Prizren did not request to have the main hearing session held in the absence of the claimants."*

16. Acting within the legal deadline, the claimants' (Applicant and persons F.K., Z.K.) authorized representative filed an appeal with the Court of Appeals against the decision C.no.1335/16 of the Basic Court, alleging essential violations of the provisions of contested procedure, erroneous application of substantive law, by proposing to the second instance court to uphold the

appeal, annul the challenged decision and remand the case to the first instance court for reconsideration.

17. On 23 April 2018, the Court of Appeals issued the decision AC. no. 2289/2017, whereby it rejected the appeal of the claimants' (Applicant and persons F.K., Z.K.) representative as unfounded, while it confirmed the decision of the Basic Court in its entirety.

18. The reasoning of the decision AC. br. 2289/2017 of the Court of Appeals reads:

> *"Considering the conclusion of the first instance court, respectively the challenged decision, this Court finds that such a conclusion of the first instance court is founded and is based on the case file and legal provisions.*
>
> *The appeal claims of the claimants' authorized representative, this court finds unfounded, because the first instance court did not violate the provisions of contested procedure, nor did it erroneously apply the substantive law, for which this court takes care ex officio, whilst on the other hand on the basis of the case file it results that the hearing was scheduled by the court for 13.04.2017, while the claimants' authorized representative compiled a submission to postpone the hearing on 11 April 2017, that is two days before the hearing scheduled by the court, which, as stated in the written submission, he had submitted by mail, respectively in a time interval that is insufficient for it to arrive in court."*

19. The claimants' (Applicant and persons F.K., Z.K.) representative filed a revision with the Supreme Court against the decision of the Court of Appeals due to essential violations of the provisions of contested procedure, erroneous application of substantive law, by proposing to have the decisions of both lower courts annulled and the case to be remanded to the court of first instance for retrial.

20. On 26 November 2018, the Supreme Court issued the Decision Rev.no. 360/2018, rejecting the request for revision of the claimants'(Applicant and persons F.K., Z.K.) as inadmissible, by stating, inter alia,:

> *„ The provision of Article 228.1 of the LCP stipulates that the parties may file a revision only against a final verdict whereby the court proceedings in the second instance court were concluded.*
>
> *Revision is not allowed against the decision of the second instance court which confirmed the decision of the first instance court, whereby the claimants' claim was considered withdrawn, due to the fact that we do not have a final decision in the sense of Article 228.1 of the LCP. „*

Applicant's allegations

21. The Applicant tries to build his allegations on alleged violations of constitutional rights and the rights guaranteed by the ECHR, as well as on the allegations that the said decisions of regular courts are illegal, and at the same

time unconstitutional, thus violating his rights guaranteed by Article 22, Article 31, Article 53 of the Constitution, and Article 5.3 and 5.4, Article 6 of the ECHR, as well as Article 14.1 of the International Covenant on Civil and Political Rights.

22. More specifically, in relation to the alleged violations, the Applicant states that the first instance court, by failing to consider the LCP in its entirety, did not carefully review the case, did not take into account the obvious evidence presented by the claimants, and finally, *"by doing so it apparently committed procedural violations, when deciding to consider the claim withdrawn."*

23. The Applicant further adds that the second instance court followed the same model of fatal errors, by failing to carefully consider the evidence and not considering the law in its entirety, by deciding in the same way as the first instance court, and thus incorrectly and with enormous violations, prevented the claimants from exercising their right to fair and impartial trial, *"which would result in a meritorious decision in relation to the rights of the claimants, and only in the case where both courts would have not committed the above-mentioned violations of the proceedings."*

24. In addition, the Applicant claims that the Supreme Court continued with the violation of his rights when assessing that the revision was inadmissible, thus in addition to the violation of the constitutional rights and the rights guaranteed by the ECHR, is also violated the Article 182.2 item (n) of the LCP. According to the Applicant, the Supreme Court would not have rendered such a decision if the first or second instance court would have rendered a merited decision related to the claim filed by the claimants - now the Applicants. *"By doing so it has violated Article 31 of the Constitution of the Republic of Kosovo, which guarantees to the citizens an impartial and, more importantly, a fair trial. In this case, the claimants were prevented the exercise this basic right to a fair and impartial trial."*

25. In addition to the above, the Applicant also adds that it is not disputable that the claimant's authorized representative was not able to attend the main hearing session. Also, the fact that the attorney was duly summoned is not disputable. What is disputable is in fact the insufficient legal analysis by the regular courts of the provisions of the contested procedure Article 423.3 and Article 127.2 of the LCP.

26. The Applicant requests from the Court to declare his application admissible, to establish that the decisions of the Basic Court, Appeal Court and Supreme Court violate his individual rights guaranteed by Articles 22.31 and 53 of the Constitution of the Republic of Kosovo, Articles 5.3 and 5.4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, as well as Article 14.1 of the International Covenant on Civil and Political Rights; in this respect, the Applicant requests that the decisions be revoked and the case be returned for retrial.

Admissibility of the Referral

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

28. 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."*

29. In addition. the refers to Article 47[Individual Requests] of the Law which stipulates:

> *"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."*

30. The Court also refers to Article 49 [Deadlines] of the Law, which stipulates:

> *"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. [...]."*

31. The Court also takes into account Rule 39 (Admissibility Criteria), sub-rule (1) (b) and (c) of the Rules of Procedure, which provides:

> *"(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;*
> *c) the referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant*
> *[...]."*

32. The Court first recalls that the period of 4 (four) months begins to count from the "last decision" in the procedure of exhaustion of legal remedies by which the Applicant's request has been rejected (*mutatis mutandis*, the ECtHR Case *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, decision of 14 March 2002).

33. The Court also recalls that the Applicant must exhaust only those remedies that are expected to be effective and sufficient. Only effective remedies can be considered by the Court, as the Applicant cannot extend the strict deadlines prescribed by the Law and the Rules of Procedure, by trying to use legal remedies in institutions and courts, which do not have legal jurisdiction or the capacity to provide protection of rights for which the Applicant complains. (See: *mutatis mutandis*, the ECtHR Case, *Fernie v. The United Kingdom*, no. 14881/04, decision of 5 January 2006, see also the Court's decision in case KI 120/17, Applicant *Hafiz Rizahu*, Resolution on Inadmissibility of 26 December 2017).

34. Returning to the specific case, the Court finds that the Applicant, together with two other persons, initiated court proceedings by filing a claim with the Basic Court whereby they sought the revocation of the contract of gift Vr.no. 5517/2010, which they had concluded with several other persons.

35. The Court also notes that the Basic Court rejected their statement of claim by a decision for purely procedural reasons in accordance with Article 423.3 of the LCP, without going into the substance of the claim. More specifically, the Basic Court concluded that neither the Applicant nor his authorized representative appeared at the scheduled hearing, even though, according to the case file, they were duly summoned.

36. The Court notes that this position was taken by the Basic Court pursuant to Article 423.3 of Chapter XXIV, of the LCP, which regulates the rules and procedures for conducting the main hearing. The Court recalls that Article 423 of the LCP, in relevant paragraphs 1, 2 and 3, reads:

> *„423.1 The judge declares the beginning of the session and the subject of the discussion.*
>
> *423.2 After this the court takes note of the present invitees and investigates reasons if someone is not attending the session.*
>
> *423.3 If the plaintiff does not come to the main hearing session even though he's been summoned regularly, it is considered that he/she has dropped the charges except if the plaintiff declares that he/she requests the process to continue in his/her absence."*

37. The Court further finds that the Court of Appeals, despite analysing the appeal claims raised by the Applicant's authorized representative against the decision of the Basic Court, reached the same legal conclusion, on which occasion it upheld the legal position and arguments of the Court of Appeals, without elaborating on the merits of the claim concerning the revocation of the contract of gift Vr.no. 5517/2010.

38. As to the revision procedure before the Supreme Court itself, the Court finds that the Supreme Court did not deal with that request in the substantive sense, because the request for revision as a remedy cannot be filed against court decisions that have not been concluded by a final decision of the second

instance court. In fact, Article 228 (Revision against the verdict) explicitly prescribes:

> *"228.1 The parties may file a revision only against the decision of the second instance court whereby the appeal filed against the final decision is dismissed, respectively whereby the first instance decision dismissing the revision submitted against the final decision is confirmed."*

39. Based on the foregoing, it can be concluded that the Supreme Court could not approve the Applicant's request for revision, because as such, in a concrete sense, it cannot even be submitted to the Supreme Court, since the Court of Appeals, which in this case is the second instance court, did not render a final decision based on the merits regarding the claimant's statement of claim, which concerns the revocation of the contract of gift Vr.no. 5517/2010.

40. Having all this in mind, the Court finds that the Applicant's court procedure, in fact, was concluded by the decision AC.no. 2289/2017 of the Court of Appeals, of 23 April 2018, which, according to the information which the Court has received from the Basic Court, was served on the Applicant on 10 May 2018.

41. The Court also would like to add that there was nothing that prevented the Applicant from addressing the Constitutional Court within a deadline of 4 months from the time when the decision AC.no. 2289/2017 of the Court of Appeals was served on him, that is 10 May 2018. However, based on the insight into the procedural steps, the Court notes that he has used the request for revision which, in the circumstances of the present case, could not have been an effective remedy under the law.

42. Accordingly, as the "last decision" in accordance with Article 49 of the Law, would normally be the decision AC.no.2289/2017 of the Court of Appeals, which confirmed the decision of the Basic Court (C. no. 1335/16) and which is final, and against which no request for revision can be filed (see: the ECtHR Decision *Çelik v. Turkey*, decision no. 52991 / 99, of 23 September 2004).

43. Therefore, having in mind the date of delivery of the decision AC.no. 2289/2017 of the Court of Appeals, which is 10 May 2018, as well as the date of submission of this Referral, which is 25 April 2019, the Court concludes that the applicant's request was submitted after the legal deadline of 4 (four) months.

44. The Court recalls that the purpose of the 4 (four) months legal deadline under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedures, is to promote legal certainty by ensuring that cases raising constitutional matters are dealt with in a reasonable time and that past decisions are not continually open to constitutional review (see: the EctHR Case *P.M. v. The United Kingdom*, Application no.6638/03 of 24 August 2004).

45. Bearing in mind the findings on the admissibility of this Referral, the Court adds that it will not further analyse the other allegations of the Applicant stated in the Referral.

46. For the above reasons, the Court finds that the Referral does not meet the procedural conditions of admissibility set out in Article 113.7 of the Constitution, Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, therefore, the Referral must be declared inadmissible.

Request for holding a public hearing

47. The Court noted, among other allegations in the Referral, that the Applicant also requested a public hearing stating "that the Basic Court in Prizren, the Court of Appeals and the Supreme Court of Kosovo suspended the proceedings contrary to procedural and substantive law; hence he considers it necessary to schedule a hearing."

48. In this respect, the Court refers to Article 20 of the Law:

> *"1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files."*

49. The Court considers that the documents contained in the Referral are sufficient to decide on this case as per the wording of Article 20, paragraph 2 of the Law (see, mutatis mutandis, Constitutional Court Case No. KI34/17, Applicant *Valdete Daka*, Judgment of 12 June 2017, paragraphs 108-110).

50. Consequently, the Applicant's request to hold an oral hearing is rejected as unfounded.

The Constitutional Court of Kosovo, pursuant to Article 113.1 and 113.7 of the Constitution, Article 20 of the Law and Rule 39 (1) (c) of the Rules of Procedure, in the session held on 22 July 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for holding a public hearing

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;

V. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Safet Hoxha Arta Rama - Hajrizi

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