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

Prishtina, on 05 October 2020
Ref.No.:RK 1624/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI10/20

Applicant

Regional Water-Supply Company "Hidroregjioni Jugor" J.S.C. – Unit Malësia e Re Prizren

Constitutional review
of Decision Ac. No. 4254/19 of the Court of Appeals of 28 October 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 Regional Water-Supply Company "Hidroregjioni Jugor" J. S. C.- Unit Malësia e Re Prizren, represented by lawyer Ahmet Tahiri from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision [Ac. No. 4254/19] of 28 October 2019 of the Court of Appeals in conjunction with Order [P. No. 1694/2018] of 19 December 2019 of the Private Enforcement Agent.

Subject matter

3. The subject matter of this Referral is the constitutional review of the challenged Decision, which allegedly violates the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 53 [Interpretation of Human Rights Provisions], 54 [Judicial Protection of Rights] and 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: the ECHR).

4. At the same time, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose the interim measure by which it would decide on "*suspension of Decision [Ac. No. 4254/19] of 28 October 2019 of the Court of Appeals, until the final decision by the Court*".

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rules 32 [Filing of Referrals and Replies] and 59 [Types of Decisions] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 16 January 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo.

7. On 17 January 2020, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding) Remzije Istrefi-Peci dhe Nexhmi Rexhepi, members.

8. On 21 January 2020, the Applicant submitted additional documents to the Court.

9. On 29 January 2020, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals.

10. On 21 February 2020, the Court sent a letter to the Applicant requesting it to bring the power of attorney, and the Decisions of the Basic Court and the Court of Appeals, as well as the Order of the Private Enforcement Agent.

11. On 2 March 2020, the Applicant submitted to the Court the requested documents, but they were incomplete.

12. On 23 April 2020, the Court sent again a letter to the Applicant requesting to bring the valid power of attorney to the Constitutional Court as well as the full decisions of the regular courts.

13. On 12 May 2020, the Applicant submitted to the Court the requested power of attorney.

14. On 18 May 2020, the Court sent a letter to the Applicant's representative requesting him to submit the full decisions of the regular courts.

15. On 15 June 2020, the Applicant submitted to the Court the requested decisions as well as some other additional documents.

16. On 23 September 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

17. Kosovo Energy Corporation - District in Prizren (hereinafter: KEK), at the Office of Private Enforcement Agent Rushit Hoxha in Prizren (hereinafter: Private Enforcement Agent) submitted a proposal for enforcement against the Applicant, for the payment of the debt in the amount of 36,937.28 euro, on behalf of the use of supply with electrical energy services.

18. On 19 December 2018, the Private Enforcement Agent by the Order [P. No. 1694/2018] allowed the enforcement proposed by the creditor KEK and ordered the Applicant to pay the debt in the amount of 36,937.28 euro with an annual interest of 8%.

19. The Applicant filed an objection against the Order of the Private Enforcement Agent with the Basic Court in Prizren (hereinafter: the Basic Court), alleging procedural violations and erroneous and incomplete determination of factual situation.

20. On 20 May 2019, the Basic Court by Decision [PPP. No. 63/2019] rejected as ungrounded the objection of the Applicant.

21. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the Decision [PPP. No. 63/2019] of 20 May 2019 of the Basic Court, alleging procedural violations and erroneous determination of the factual situation.

22. On 28 October 2019, the Court of Appeals by the Decision [Ac. No. 4254/2019], rejected as ungrounded the Applicant's appeal and upheld the Decision [PPP. No. 63/2019] of 20 May 2019 of the Basic Court.

Applicant's allegations

23. The Applicant challenges the Decision [Ac. No. 4254/2019] of 28 October 2019 of the Court of Appeals regarding the Order [P. No. 1694/2018] of 19 December 2018 of the Private Enforcement Agent, claiming that the latter were rendered in violation of its fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 53 [Interpretation of Human Rights Provisions], 54 [Judicial Protection of Rights] and 102 [General Principles of the Judicial System] of the Constitution as well as Article 6 [Right to a fair trial] of the ECHR.

24. The Applicant refers to the abovementioned Articles of the Constitution and the ECHR alleging a violation of fundamental rights guaranteed by these Articles, but without elaborating and reasoning at all how and why his rights guaranteed by these Articles of the Constitution and the ECHR have been violated.

25. The Applicant relates the main allegations to violation of Law No. 05/L-043 as well as Law No. 05/L-119 on amending and supplementing Law No. 05/L-043 on Public Debt Forgiveness in Kosovo. He mentions these laws and refers to some of their respective articles.

26. The Applicant alleges that the Decisions of the Basic Court and the Court of Appeals contain essential violations of the provisions of the contested procedure under Article 182 paragraph 2 letter i) of the Law on Contested Procedure (hereinafter: the LCP) as "*by unlawful action, before receiving the challenged decision, the debtor was not given the opportunity to review the case in the court, even though there were legal grounds and facts, taking into account the many years of unresolved disputes between the creditor and the debtor, which also required a procedure for professional and adequate expertise*".

27. The Applicant further alleges that the Private Enforcement Agent by his order as well as the Basic Court and the Court of Appeals by their decisions have decided contrary to Article 182 paragraph 2 letter i) of the LCP because "they *have decided on the claim for which it has been decided, since at the same time the debt has been repaid-forgiven according to the Law on Debt Forgiveness in Kosovo*".

28. Another allegation of the Applicant is that according to him the submissions filed with the court should be forwarded to the opposing party, because as the Applicant states, he was not notified about the response to the objection made by the creditor and thus "*the debtor was also unable to clarify a part of the reasons given in the challenged decision*". In this regard, he alleges that substantial procedural violations were committed by the legal provisions of Article 182 of the LCP.

29. The Applicant further alleges that the order for allowing enforcement was issued on the basis of an extract from the business books, which document according to him "*can in no way represent an enforcement title*". He also alleges that based on the agreement reached between KEK and KEDS, the

distribution and supply with electrical energy is done by the latter, and with this KEDS also collected all debts for spent electrical energy, thus, he emphasizes that "*only KEDS has the license for keeping and issuing the consumer card, namely the extract from the consumer book, and that KEK has had this only until 08.05.2013*".

30. According to the Applicant, the request submitted for enforcement "*is an outdated request as it was submitted many years after the expiration of the time limit within which the enforcement could have been requested* ".

31. Finally, the Applicant requests the Court to approve his Referral and to annul the decisions of the regular courts, including the order of the Private Enforcement Agent and remand the case for retrial. He also requests the Court to impose an interim measure, as according to him, the implementation of the challenged decision may cause irreparable damage.

Admissibility of the Referral

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

33. In this respect, the Court first refers to Articles 21.4 [General Principles] and 113.1 and 113.7 [Jurisdiction and Authorized Parties] of the Constitution which establish:

Article 21

"[...]

4. Fundamental rights and freedoms set forth for in the Constitution are also valid for legal persons, to the extent applicable.
[...]"

Article 113

"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."

34. The Court further refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] 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.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

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".

Article 49
[Deadlines]

"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.[...]

35. In this regard, the Court notes that in accordance with Article 21.4 of the Constitution, the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, applicable both to individuals and to legal persons (see the Constitutional Court, case No. KI41/09, Applicant: *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

36. As to the fulfillment of other requirements, the Court finds that the Applicant is an authorized party; it challenges an act of a public authority, namely Decision [Ac. No. 4254/19] of 28 October 2019 of the Court of Appeals; has specified the fundamental rights and freedoms claimed to have been violated; has exhausted all legal remedies provided by law, as well as, submitted the Referral in accordance with the legal deadlines.

37. In addition to these requirements, the Court also examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Specifically, Rule 39 (2) stipulates that:

"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".

38. The Court notes that, in essence, all of the Applicant's allegations relate primarily to a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR. In this regard, the Applicant complains that in his case

the Courts have made erroneous application of the facts as well as erroneous interpretation of the law.

39. As to these allegations, the Court initially notes that, as a general rule, the allegations of erroneous determination of facts and erroneous interpretation of law, allegedly committed by the regular courts, relate to the scope of legality and as such, are not in the jurisdiction of the Court, and therefore, in principle, the Court cannot review them. (See case of the Court No. KI06/17, Applicant *L. G. and five others*, Resolution on Inadmissibility of 25 October 2016, paragraph 36; case KI122/16, Applicant *Riza Dembogaj*, Judgment of 30 May 2018, paragraph 56; and KI49/19 Applicant *Limak Kosovo International Airport J.S.C.., "Adem Jashari"*, Resolution on Inadmissibility of 10 October 2019, paragraph 47).

40. The Court has consistently reiterated that it is not its task to deal with errors of facts or law allegedly committed by the regular courts (*legality*), unless and in so far as they may have infringed the fundamental rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which has led a regular court to adopt one decision rather than another. If 11 it were otherwise, the Court would be acting as a court of "*fourth instance*", which would be to disregard the limits imposed on its jurisdiction. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See, ECtHR case, *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court: KI70/11, Applicants *Faik Rima, Magbule Rima and Besart Rima*, Resolution on Inadmissibility, of 16 December 2011, paragraph 29; KI06/17, cited above, paragraph 37; KI122/16, cited above, paragraph 57; and KI49/19, cited above, paragraph 48).

41. This stance has been consistently held by the Court, based on the case-law of the ECtHR, which clearly maintains that it is not the role of this Court to review the conclusions of the regular courts in respect of the factual situation and application of the substantive law (see: ECtHR case, *Pronina v. Russia*, Judgment of 30 June 2005, paragraph 24; and cases of the Court KI06/17, cited above, paragraph 38; and KI122/16, cited above, paragraph 58; and KI49/19, cited above, paragraph 49).

42. The Court, however, notes that the case law of the ECtHR and of the Court also provides for the circumstances under which exceptions from this position can be made. The ECtHR reiterated that while it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of legislation, the role of the Court is to verify whether the effects of such interpretation are compatible with the ECHR. (See the ECtHR case, *Miragall Escolano and Others v. Spain*, Judgment of 25 May 2000, paragraphs 33-39).

43. Therefore, even though the role of the Court is limited in terms of assessing the interpretation of law, it must ensure and take measures where it observes that a court has "*applied the law manifestly erroneously*" in a particular case or so as to reach "*arbitrary conclusions*" or "*manifestly unreasoned*" for the Applicant (regarding the basic principles regarding the manifestly erroneous interpretation and application of the law, see, *inter alia*, the case of the Court

KI154/17 and KI05/18, Applicant, *Basri Deva, Afërdita Deva and Limited liability company "Barbas"*, Resolution on Inadmissibility of 28 August 2019, paragraphs 60 - 65 and the references used therein).

44. In this context, the Court notes that in the circumstances of the present case, the essential issue relates to the Applicant's allegation that the debt it was obliged to pay to KEK was forgiven based on the Law on Debt Forgiveness. As mentioned above, the Applicant alleges that the courts have decided on a case that was completed, alluding to debt forgiveness based on the aforementioned Law. On the other hand, the regular courts, having determined that in the circumstances of the Applicant's case the LCP is applicable, have determined that the enforcement document is based on the creditor's accounting books which are a reliable and suitable document for enforcement. The regular courts further stated that the Applicant entered into an agreement for debt reprogramming on 31.08.2017, a fact that was not challenged by the Applicant..

45. Furthermore, the Court notes that the regular courts addressed all of the Applicant's allegations relating to (i) the Applicant's allegation that the business books do not constitute an enforcement title; (ii) the creditor's credit is included in the statute of limitations; and (iii) the claim for calculation of interest of 8%.

46. With regard to the Applicant's allegations, the Basic Court, by its Decision [PPP. No. 63/2019] of 20 May 2019, *inter alia*, stated:

> *"Given that in the present case, we are dealing with the proposal for enforcement of a reliable enforcement document - extract from business books and payments for electricity supply service, while the party in this proposal, has requested in addition to the main debt also the legal interest, as an accessory request and this is referred to in Article 29 par.2 of the LCP, whereas in Article 378 of the LOR, it is stated: In addition to the principal the debtor shall also owe interest if so stipulated by law of if the creditor and the debtor so agree". Since in the present case, the debtor party in his objection, even though stated one of the reasons foreseen in the objection according to Article 71 par.1 item 1, 4 and 6 of the LEP which refers to the quality of an enforcement document, to be as a reliable document, that enforcement creditor is not authorized to request enforcement against the debtor on the basis of enforcement document, and deadline by when, according to the law the enforcement may be requested, has expired, but that these legal reasons for objection are ungrounded and which reasons would hinder the enforcement of the loan-obligation in money in this legal enforcement matter, therefore as a result of this position, it is concluded that the creditor has secured the right to claim in full the obligation in money - the above debt through the court enforcement and based on the reasons mentioned above, this court decided in more detail with the description made as in the enacting clause of this decision".*

47. Addressing the same allegations, the Court of Appeals, by its Decision [Ac. No. 4254/19] of 28 October 2019, *inter alia*, stated:

"The Court of Appeals, based on the state of the case file and evidence, as well as the allegations of the litigating parties raised in the appeal stage, found that the debtor's appealing allegations are ungrounded and not based on law. In fact, this court, assessing the debtor's appealing allegations, found that the latter refer to the quality and validity of the enforcement document on which the creditor based its proposal, the circumstance that the creditor's loan was included in the statute of limitation or not and that also the legality of the calculation of interest at the rate of 8% [...]".

"The Court of Appeals accepts as fair and lawful the legal position of the first instance court, when it found that the objection of the debtor is ungrounded, because its assessment regarding the qualities and appropriateness of the enforcement document, namely that the extracts verified from the books of the creditor's accounting present a reliable and suitable document for enforcement, is fair and lawful.
Also, the assessments regarding the circumstance of the existence of the agreement for debt reprogramming dated 31.08.2017, between the litigants, is evident and this fact has not been challenged by the debtor, therefore in this context the first instance court has given fair and lawful reasons, regarding the allegations as to the time limit for requesting enforcement or even the allegations itself regarding the statute of limitation of the creditor's claims, while regarding the allegations of the conditions and the way of calculating the interest rate, this court considers that the first instance court correctly applied the law in this case, because it is about the debt that was confirmed to exist on 31.08.2017 which was requested to be enforced on 19.12.2018".

48. Consequently and as elaborated above, the Court notes that all the regular courts found that the extracts verified from the creditor's accounting books constitute a reliable and suitable document for enforcement as well as the fact that there was an agreement on the reprogramming of the debt between the Applicant as debtor and KEK as creditor.

49. The Court, as noted above, also notes that the regular courts have addressed the Applicant's allegations regarding the interest rate. According to the regular courts, such circumstances are provided by Article 378 of the Law on Obligational Relationships (LOR) which states "*In addition to the principal the debtor shall also owe interest if so stipulated by law of if the creditor and the debtor so agree*".

50. In this respect, the Court considers that the regular courts have dealt with and reasoned in their entirety the Applicant's allegations and that the proceedings before the courts in the circumstances of the present, case do not in any way result to be unfair or arbitrary..

51. In this respect, in order to avoid misunderstandings on the part of applicants, it should be borne in mind that the "*fairness*'" required by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is not "*substantive*" fairness, but "*procedural*" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and

they are placed on an equal footing before the court (see, in this regard, cases of the Court No. KI42/16 Applicant *Valdet Sutaj*, Resolution on Inadmissibility of 7 November, paragraph 41 and other references therein; and KI49/19, cited above, paragraph 55).

52. The Court also reiterates that Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, do not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provide for the Court to challenge the application of substantive law by the regular courts of a civil dispute, where often one of the parties wins and the other loses. (See cases of the Court KI118/17 Applicant *Sani Kervan and others*, Resolution on Inadmissibility of 17 January 2018, paragraph 36; KI49/19, cited above, paragraph 54; and KI99/19, Applicant *Persa Raičević*, Resolution on Inadmissibility of 19 December 2019, paragraph 48).

53. Therefore in these circumstances, based on the above and taking into account the allegation raised by the Applicant and the facts presented by him, the Court, based also on the standards established in its case law in similar cases and the case law of the ECtHR, finds that the Applicant does not sufficiently prove and substantiate his allegation of violation of the fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

54. Finally, the Court notes that the Applicant alleges a violation of his rights guaranteed by Articles 24, 32, 53, 54 and 102 of the Constitution, but without elaborating and reasoning at all how and why his rights guaranteed by these articles of the Constitution have been violated. Furthermore, the Court notes that the allegation of a violation of Article 102 may be argued by individual Applicants, only in connection with any specific right guaranteed by Chapters II and III of the Constitution. Accordingly, this article cannot individually be applied if the facts of the case do not fall within the ambit of one or more of those provisions of the Constitution regarding *"the enjoyment of human rights and freedoms"* (see, case KI 67/16, Applicant *Lumturije Voca,* Resolution on Inadmissibility of 23 January 2017, paragraph 128; KI172/18, Applicant *Arbër Kryeziu*, owner "Al-Petrol" L.l.c., Resolution on Inadmissibility of 20 January 2020, paragraph 65).

55. In line with its consolidated case law, the Court further notes that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, namely with the decisions of the Supreme Court, the Court of Appeals and the Basic Court, or only the mere mentioning of the Articles of the Constitution, cannot in itself raise an arguable claim of violation of constitutional violations. When such violations of the Constitution are alleged, the Applicants must provide substantiated allegations and convincing arguments (see, *mutatis mutandis,* case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; see also, case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 42).

56. As a result, the Court considers that the Applicant has not substantiated the allegations that the respective proceedings were in any way unfair or arbitrary,

and that the challenged decision violated the rights and freedoms guaranteed by the Constitution and the ECHR.

57. In conclusion, in accordance with Rule 39 (2) of the Rules of Procedure, the Referral is manifestly ill-founded on constitutional basis and, therefore, inadmissible.

Request for interim measure

58. The Court notes that the Applicant requests the Court to impose an interim measure, suspending the Decision [Ac. No. 4254/19] of 28 October 2019 of the Court of Appeals, until the final decision by the Court.

59. In order to approve the interim measure in accordance with Rule 57 (5) of the Rules of Procedure, the Court must find that:

> *"(5) If the party requesting interim measures has not made this necessary showing, the Court shall deny the request for interim measures".*

60. As previously concluded, the Applicant's Referral is manifestly ill-founded on constitutional basis, therefore, the Applicant's request for an interim measure is also to be rejected.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Articles 21.4, 113.1 and 113.7 of the Constitution, and Rules 39 (2), 57 (5) and 59 (2) of the Rules of Procedure, on 23 September 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measure;

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; and

V. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Safet Hoxha

Arta Rama-Hajrizi

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