



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

Prishtina, on 25 February 2021
Ref.No.:RK 1714/21

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI174/20

Applicant

“DE-KO” L.L.C.

Constitutional review of Notification [KMLC.no.79/2020] of the Office of the Chief State Prosecutor, of 9 July 2020; and Decision [Ac.no.2817/19], of the Court of Appeals in Prishtina, of 16 April 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 “DE-KO” L.L.C., represented by the owner Ndue Komani, from Gjakova (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Notification [KMLC.no.79/2020] of the Office of the Chief State Prosecutor, of 9 July 2020; and Decision [Ac.no.2817/19], of the Court of Appeals in Prishtina (hereinafter: the Court of Appeals), of 16 April 2020.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly have violated the Applicant's rights guaranteed by Article 24[Equality before the Law], Article 31[Right to Fair and Impartial Trial] and Article 46[Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. 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, 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

5. On 12 November 2020, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral, which he had submitted to the Post Office on 9 November 2020.
6. On 17 November 2020, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
7. On 20 November 2020, the Court notified the Applicant about the registration of the Referral and requested from him to clarify before the Court which decisions of the regular courts he is challenging before the Court.
8. On 9 December 2020, the Court received the requested clarifications from the Applicant through the letter of 20 November 2020.
9. On 10 December 2020, the Court notified the Court of Appeals and the Office of the Chief State Prosecutor about the registration of the Referral.
10. On 10 February 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On an unspecified date, Company "M.H." had made a proposal for enforcement to the private enforcement agent against the Applicant, of an invoice in the amount of 23,423.00 euros (hereinafter: the challenged amount) in the name of excavator services that the company "M.H." claimed to have provided to the Applicant.
12. On 12 March 2018, the private enforcement agent G.Gj. through the Writ [P.no.54/18], had assigned the enforcement against the Applicant in the challenged amount.
13. On 21 March 2018, the Applicant submitted an objection to the Basic Court in Gjakova(hereinafter: the Basic Court) against the Writ of enforcement [P.no.54/18], stating, among other things, that the invoice according to which enforcement is requested, does not fulfil the legal elements for enforcement.
14. On 18 May 2018, the Basic Court by Decision [PPP.no.36/18], approved the objection of the Applicant, and annulled the Writ of enforcement[P.no.54/18] of 12 March 2018.
15. On an unspecified date, the Company "M.H." filed an appeal with the Court of Appeals in Prishtina (hereinafter: the Court of Appeals) against the Decision [PPP.no.36/18], of the Basic Court, alleging substantial violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, and erroneous application of the substantive law, by proposing that the Decision of the Basic Court [PPP.no.36/18], be annulled and the case be remanded for reconsideration.
16. On 13 September 2018, the Court of Appeals by Decision[Ac.no.3216/2018], approved as grounded the appeal of the company "M.H." and remanded the case for retrial to the Basic Court.
17. On 27 May 2019, the Basic Court by Decision [PPP.no.146/18], rejected the objection of the Applicant submitted against the Writ of enforcement[P.no.54/18] of 12 March 2018, whereby the enforcement in respect of the challenged amount was assigned.
18. On an unspecified date, the Applicant filed an appeal against the Decision [PPP.no.146/18]of the Basic Court, alleging substantial violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation, and erroneous application of the substantive law by proposing that the Decision of the Basic Court [PPP.no.146/18], be annulled and the case be remanded for reconsideration to the Basic Court again.
19. On 16 April 2020, the Court of Appeals, by Decision [Ac.no.2817/19], rejected the Applicant's appeal as ungrounded, having found that the *"enforcement was allowed on the basis of the original invoices issued by the creditor, which the debtor had regularly received for voluntary fulfilment, and which invoices on the basis of Article 29 paragraph 1 item 1.3 of the [Law on Enforcement Procedure] LEP, have the quality of an authentic document and as such present*

legal basis for awarding enforcement, as determined by the provision of Article 21 of [the LEP]”.

20. On 24 June 2020, the Applicant submitted a proposal before the Office of the Chief State Prosecutor for initiating a request for protection of legality in the Supreme Court against the Decision of the Basic Court [PPP.no.146/18] as well as the Decision of the Court of Appeals [Ac.nr.2817/19].
21. On 9 July 2020, the Office of the Chief State Prosecutor through Notification [KMLC.no.79/2020] informed the Applicant that it had rejected its proposal for initiating a request for protection of legality against the Decision of the Basic Court [PPP.no. 146/ 18] and the Decision of the Court of Appeals [Ac.nr.2817/19], after having considered that the Applicant's allegations *“are not sufficient for filing a request for protection of legality according to Article 247.1, items a) and b) of the Law on Contested Procedure.”*

Applicant's allegations

22. The Applicant alleges before the Court that the Decision [PPP.no.146/18] of the Basic Court, the Decision [Ac.no.2817/19] of the Court of Appeals and the Notification [KMLC.no.79/2020] of the Office of the Chief State Prosecutor, have been issued in violation of its fundamental rights and freedoms guaranteed by Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.
23. The Applicant alleges that the aforementioned Decisions as well as the Notification of the State Prosecutor's Office are *“unlawful, as the same Decisions and the notification were rendered in violation of the provisions of the Law on Enforcement Procedure, contrary to the provisions of the Law on Contested Procedure, which are aptly applied in the enforcement procedure since the debtor's invoice was challenged by the debtor within the deadline provided by law, the creditor had to be instructed to a civil litigation, the creditor's invoice is in contradiction with the provisions of Articles 44 and 45 of the Law on VAT, as the creditor's invoice has not fulfilled the conditions set forth in Articles 44 and 45 of the Law on VAT. Also, the Court of Appeals [...] does not declare itself in respect of the debtor's allegations.”*
24. Finally, the Applicant requests from the Court to declare its Referral admissible; to find violations of Articles 24, 31 and 46 of the Constitution in conjunction with Article 6 of the ECHR; to declare invalid the Decision [Ac.no.2817/19] of the Court of Appeals and remand its case for reconsideration to the Court of Appeals.

Assessment of the admissibility of Referral

25. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.
26. 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”.

27. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides:

“4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.”

28. The Court initially notes that pursuant to paragraph 4 of Article 21 of the Constitution, the Applicant is entitled to submit a constitutional complaint, invoking alleged violations of its fundamental rights and freedoms, valid for individuals as well as for legal persons. (see, the case of the Constitutional Court no. KI41/09, Applicant AAB-RIINVEST University L.L.C., Resolution on Inadmissibility of 3 February 2010, paragraph 14; and KI35/18, Applicant “Bayerische Versicherungsverband”, Judgment of 11 December 2019, paragraph 40).
29. The Court also finds that the Applicant is an authorized party that is challenging an act of a public authority, namely the Notification [KMLC.no.79/2020] of the Office of the Chief State Prosecutor, of 9 July 2020; and Decision [Ac.no.2817/19], of the Court of Appeals in Prishtina, of 16 April 2020.
30. In the following, the Court refers to Article 47 [Individual Requests] of the Law, which provides:

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.”

31. In addition, the Court also examines whether there are fulfilled the admissibility criteria, as provided by Articles 47[Individual Requests] and Rule 39 [Admissibility Criteria], namely paragraphs (1) (b) of the Rules of Procedure. They provide as follows:

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...”

Rule 39 of the Rules of Procedure
[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;

c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant, and [...].”

32. In this context, the Court recalls that as a rule, the 4(four) month deadline starts to run from the “*last decision*” in the process of exhaustion of legal remedies whereby the Applicant's Referral was rejected(see *mutatis mutandis*, ECtHR cases, *Gavrilov v. the Former Yugoslav Republic of Macedonia*, Decision of 1 July 2014, paragraph 25; and *Paul and Audrey Edwards v. the United Kingdom*, Judgment of 14 March 2002).
33. The Court also recalls that the Applicant must exhaust only those legal 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 which are not effective in providing protection of rights for which the Applicant complains (see, *mutatis mutandis*, ECtHR cases, *Gavrilov v. the Former Yugoslav Republic of Macedonia*, cited above, paragraph 25; and, *Fernie v. the United Kingdom*, Judgment of 5 January 2006). In relation to the above criteria, the Court first considers that the request for exhaustion of legal remedies and the criterion for submitting the request within 4 (four) months are closely related (see, *mutatis mutandis*, the case of ECtHR *Jeronovičs v. Latvia*, Judgment of 6 June 2016, paragraph 75).
34. In this respect, the Court will further assess whether in the circumstances of the present case the Notification [KMLC.no.79/2020] of the Office of the Chief State Prosecutor of 9 July 2020 was an effective remedy in relation to the Applicant's allegations for constitutional violation. The answer to this question will be crucial in assessing whether the Applicant's request was submitted within the deadline of four (4) months.
35. In this connection, the Court notes that in the present case, the procedure against the Applicant conducted before the regular courts with respect to the legality of the Writ of enforcement [P.no.54/18] and the issue of enforcement of the disputable invoice was conducted before two judicial instances, the Basic Court

and the Court of Appeals, and had resulted in the issuance of the Decision of the Court of Appeals [Ac.no.2817/19] of 16 April 2020.

36. According to Article 68 (Extra-ordinary legal remedies) of the Law on Enforcement Procedure, it is envisaged that “*no repetition and revision of the procedure is allowed in enforcement procedure*”. Therefore, the Applicant did not have a legal remedy at its disposal, which it “*personally*” could use to challenge the aforementioned Decision of the Court of Appeals before the Supreme Court.
37. However, after receiving the Decision of the Court of Appeals, the Applicant had addressed the Office of the Chief State Prosecutor by proposing to the latter to file a request for protection of legality before the Supreme Court on behalf of the Applicant, against the Decision of the Court of Appeals. In this regard, the Court notes that this request is completely at the discretion of the Office of the Chief State Prosecutor.
38. In this respect, based on the case law of the ECtHR, in accordance with which, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution, the ECHR does not require that the discretionary legal remedies, or legal remedies that are not directly at the disposal of the applicants and which depend on the exercise of discretion by the mediator, as is the case with the request before the Office of the Chief State Prosecutor, must be exhausted before the Applicants address the ECtHR (see, *mutatis mutandis*, the ECtHR case *X and Others v. Latvia*, Decision of 6 June 2008, paragraph 20, and references therein; see also the case of Court KI102/16, Applicant *Shefqet Berisha*, Resolution on Inadmissibility, of 14 December 2016, paragraph 38).
39. More specifically, in relation to similar proposals, such as the proposal made before the State Prosecutor’s Office, requesting from the latter to file a request for protection of legality before the judicial bodies on behalf of the Applicants, the ECtHR had dealt with the case *Lepojić v. Serbia*. In this case, the ECtHR had assessed whether the proposal submitted to the State prosecutor requesting from the latter to submit a request for protection of legality is an effective remedy, by stating that “*[the ECtHR] finds that it was only the public prosecutor who could have filed a [request for protection of legality] on behalf of the applicant and, moreover, that the former had full discretion in respect of whether to do so. While the applicant could have requested such action, he certainly had no right under law to make use of this remedy [request for protection of legality] “personally” [...] An Request for Protection of Legality, was thus ineffective [...]*” (see, the case of ECtHR *Lepojić v. Serbia*, Judgment of 6 November 2007, paragraph 54).
40. Also, by referring to this case-law (in the ECtHR case *Lepojić v. Serbia*), the ECtHR in the case of *Stojanovski v. the Former Yugoslav Republic of Macedonia* did not take into account the notification of the state prosecutor for the purpose of calculating the deadline, when the latter had ascertained that there was insufficient basis to submit a request for protection of legality before the Supreme

Court of Macedonia. The ECtHR in this case had stated that “*the Applicant's request before the Public Prosecutor was not a remedy to be exhausted for purposes [ECHR]. Consequently, the deadline for using that remedy does not stop the six (6) month time-limit from running [for filing an appeal before the ECtHR in relation to the decision of the Court of Appeals]*” and consequently, the ECtHR found that the Applicant's request had been filed out of the prescribed deadline (see, the ECtHR case of *Stojanovski v. the former Yugoslav Republic of Macedonia*, Decision of 16 September 2008). In similar circumstances the ECtHR held the same position in the ECtHR case of *Knapić v. Croatia* (See the ECtHR case of *Knapić v. Croatia*, Decision of 4 June 2009).

41. However, the Court recalls that its case law also recognizes cases in which has been assessed the constitutionality of the notifications of the State Prosecutor whereby the request of the parties for initiating a request for protection of legality in their favour has not been approved. In this regard, the Court refers to its case no. KI42/18, Applicant *Asija Muslija*, Resolution on Inadmissibility, of 22 March 2020, which assessed the Applicant's allegations of constitutional violation of the Notification of the State Prosecutor, having relied also on the case of the ECtHR *Gorou v. Greece* (No. 2), Judgment of 20 March 2009.
42. However, the above case, KI42/18, differs from the present case. In this context, the Court recalls that in the aforementioned case, KI42/18, the Applicant specifically challenged the Notification KMLC no.09/2018 of the State Prosecutor, of 2 March 2018, arguing how this Notification had violated her constitutional rights, which were related, *inter alia*, to the lack of alleged reasoning of the challenged Notification of the State Prosecutor .. Whilst in respect of the Decision AC. no. 3538/2017 of the Court of Appeals of the Republic of Kosovo, of 8 December 2017, which was also challenged in case KI42/18, the main allegation was the failure of the Court of Appeals to confirm the fact that the Applicant had not signed the Mortgage Contract of 2 December 2011. The Applicant's request in the case KI42/18, relating to Decision AC. no. 3538/2017 of the Court of Appeals, was also submitted to the Court within the deadline provided by Law and Rules of Procedure and separately from the Notification of the Office of the Chief Prosecutor.
43. Whereas, in the present case, the Applicant does not present specific allegations relating to the reasons provided by the Notification of the Office of the Chief State Prosecutor and how the Notification of the latter for not submitting a request for protection of legality before the Court Supreme had violated the constitutional rights of the Applicant. The Applicant's allegations in the present Referral relate to the allegations that “*the debtor's invoice was challenged by the debtor within the deadline provided by law, the creditor had to be instructed to a civil litigation, the creditor's invoice is in contradiction with the provisions of Articles 44 and 45 of the Law on VAT, as the creditor's invoice has not fulfilled the conditions set forth in Articles 44 and 45 of the Law on VAT.*”
44. The Court notes that these allegations were examined by the Court of Appeals and not by the State Prosecutor's Office. The latter, in fact, had only decided whether there have been met the legal conditions for such a request to be submitted to the Supreme Court.

45. In this respect, the Court recalls that in the Notification [KMLC.no.79/2020] of 9 July 2020, the Office of the Chief State Prosecutor informed the Applicant that it had rejected its proposal to initiate a request for protection of legality submitted against the Decision [PPP.no.146/18] of the Basic Court and the Decision [Ac.no.2817/19] of the Court of Appeals since it considered that the legal conditions for such a thing were not fulfilled because *“according to the provision of Article 247.1 item a) the request for protection of legality can be submitted only if the violation concerns the territorial jurisdiction, if the court of first instance has issued a verdict without a main hearing, while it was its duty to hold a main hearing, if it has been decided on the claim, for which the dispute is ongoing, or if in contradiction with the law, the public has been excluded from the main hearing. In the present case none of these conditions have been met, whereas as regards the erroneous application of the substantive law, from Article 247.1 item b), you have not presented any provision of the substantive law, the application of which would affect the submission of the request for protection of legality, as an extraordinary legal remedy. We also inform you that pursuant to Article 247.2 the Prosecutor may not initiate a request for protection of legality due to erroneous or incomplete determination of the factual situation.”*
46. Therefore, on the basis of the case law of the ECtHR, the Court recalls that, in the present case, a request for protection of legality through the State Prosecutor, in addition to being at the discretion of the latter, may be initiated only by the State Prosecutor if certain legal conditions are met. Also, the Applicant's allegations relate to the way in which the Basic Court and the Court of Appeals have applied the law when deciding on the legality of the Writ of Enforcement, and the legal status of the disputable invoices. Moreover, the Applicant does not submit specific allegations in respect of the Notification of the Office of the Chief State Prosecutor, but submits to the Court the same allegations which it made against the Decision of the Court of Appeals [Ac.no.2817/19], the allegations, which the Office of the Chief Prosecutor did not have the jurisdiction to address because it has the competence only to submit a request for protection of legality before the Supreme Court and not to assess the legal violations committed by the Court of Appeals. Therefore, in relation to these allegations, in the Applicant's case, after receiving the Decision [Ac.no.2817/19] of the Court of Appeals, of 16 April 2020, there was nothing that prevented the Applicant from addressing the Constitutional Court.
47. Therefore, the Court considers that the *“final decision”*, according to Article 49 of the Law, concerning the procedures related to the disputable invoices for which the Writ of enforcement was issued, is the Decision [Ac.no.2817/19] of the Court of Appeals of 16 April 2020, whereby the Applicant's appeal filed against the Decision of the Basic Court [PPP.no.146/18] was rejected (see, *mutatis mutandis*, the case of the ECtHR *Paul and Audrey Edwards v. the United Kingdom*, Decision of 14 March 2002, see the case of Court KI120/17, Applicant *Hafiz Rizahu*, Resolution on Inadmissibility, 7 December 2017, paragraph 36).
48. In this regard, the Court recalls that the Decision [Ac.no.2817/19] of the Court of Appeals was issued on 16 April 2020. Even though the Applicant did not state the date of receipt of the Judgment, based on the facts of the case, it is clear that the time between the receipt of the Judgment and the date of submission of its

Referral to the Constitutional Court, on 9 November 2020 (the day when the Applicant had submitted its Referral by mail), has passed the time period of 4 (four) months. This is because the Applicant became aware of the Decision of the Court of Appeals at least on 24 June 24, 2020, when he had made the request to the Office of the Chief State Prosecutor.

49. Consequently, the Court concludes that the Applicant's Referral relating to Decision [Ac.no.2817/19] of the Court of Appeals, of 16 April 2020, was submitted after the legal deadline of 4 (four) months.
50. The Court recalls that the purpose of the 4 (four) month legal deadline under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure, is to promote legal certainty by ensuring that cases raising issues under the Constitution are dealt within a reasonable time and that the past decisions are not continually open to challenge (see, *inter alia*, the ECtHR cases: *Franz Hofstiidter v. Austria*, Application no. 25407/94, Decision of 12 September 2000; *Olivier Gaillard v. France*, Application no.47337/99, Decision of 11 July 2000; see also, *inter alia*, the cases of Court KI140/13, Applicant *Ramadan Cakiqi*, Resolution on Inadmissibility, of 17 March 2014, paragraph 24, and KI120/17, Applicant *Hafiz Rizahu*, Resolution on Inadmissibility, of 7 December 2017, paragraph 39).
51. In conclusion, for the reasons elaborated above, the Court finds that the Referral has not been filed within the legal deadline provided for by Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure and, consequently, the Court cannot examine the merits of the case, namely, whether the challenged Decision of the Court of Appeals has violated the Applicant's constitutional rights.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 21.4 and 49 of the Law and in accordance with Rule 39 (1) (c) of the Rules of Procedure, on 10 February 2021, 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

Safet Hoxha

Arta Rama-Hajrizi



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