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

Prishtina, më 8 mars 2021
Nr. ref.:RK1728/21

DECISION TO REJECT THE REFERRAL

in

Case No. KI60/20

Applicant

The Council of Islamic Community

Constitutional review of Decision AC.no.4738/19 of the Court of Appeals of Kosovo, of 23 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 the Council of Islamic Community, having its seat in the Municipality of Gjakova (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision [AC.no.4738 / 19] of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals), of 23 January 2020 in conjunction with Decision [PPP.no.165 / 19] of the Basic Court in Gjakova (hereinafter: the Basic Court), of 5 August 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Decision of the Court of Appeals, which as alleged by the Applicant has violated his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] 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 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 7 April 2020, the Applicant submitted the Referral to the Court by mail.

6. On 19 May 2020, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (presiding), Safet Hoxha and Radomir Laban (members).

7. On 12 June 2020, the Court notified the Applicant about the registration of the Referral and requested from him to submit to the Court the Decision [PPP.no.165 /19] of the Basic Court, of 5 August 2019. On the same day, the Court also notified the Court of Appeals about the registration of the Referral.

8. On 30 June 2020, the Applicant submitted the requested document to the Court.

9. On 7 December 2020, the Court also requested from the Applicant to submit to the Court, within fifteen (15) days, (i) the Decision which as alleged by the Applicant in its Referral should be regarded as *res judicata*; and (ii) all other relevant

documents for dealing with the case at hand. The Applicant did not respond to the Court's request.

10. On 18 February 2021, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court to summarily reject the Referral.

Summary of facts

11. On the basis of the case file, it results that the Applicant had not fulfilled its financial obligations in the amount of 2,938.55 Euros to RWC "Çabrati" J.S.C., having its seat in the Municipality of Gjakova (hereinafter: "Çabrati" J.S.C.). The records of unpaid invoices in the name of waste collection services for the years 2005, 2006, 2007 and a part of 2008, namely until October, reflect the above amount.

12. On 15 December 2008, the "Çabrati" J.S.C., had submitted a proposal for enforcement to the District Commercial Court in Prishtina (hereinafter: the District Court), against the Applicant, due to non-fulfilment of financial obligations stated above.

13. On 12 January 2009, the District Court, through Decision [E.no.516/08] allowed the enforcement. Based on the case file, it is not clear whether this procedure has been concluded.

14. On an unspecified date, the "Çabrati" J.S.C., had filed a claim with the Basic Court against the Applicant in relation to the payment of a debt in the amount of 2,021.70 euros in the name of the waste collection services for the years 2005, 2006, 2007 and a part of 2008.

15. On 5 November 2018, the Basic Court, by Judgment [C.no.332/2018], approved the claim of "Çabrati" J.S.C., obliging the Applicant to pay the aforementioned debt.

16. On an unspecified date, the "Çabrati" J.S.C., had initiated the enforcement through the Private Enforcement Agent G.GJ., according to the enforcement document, respectively the Judgment [C.no. 332/2018] of the Basic Court, of 5 November 2018, which according to the case file, had become enforceable on 25 April 2019.

17. On 8 May 2019, the Private Enforcement Agent, acting upon the Writ [P.no.245 /19], had allowed the enforcement proposed by "Çabrati" J.S.C., against the Applicant.

18. On an unspecified date, the Applicant had filed an objection with the Basic Court against the above-mentioned Writ, alleging essential violations of the provisions of the contested procedure, erroneous determination of the factual situation and erroneous application of the substantive law. The Applicant, in essence, had stated that the proposal for enforcement is in contradiction with the provisions of Law No. 04/L-139 on Enforcement Procedure (hereinafter: the LEP) and also challenged the amount of the debt by claiming its prescription.

19. On 5 August 2019, the Basic Court by Decision [PPP.no.165/19], had rejected the Applicant's objection as ungrounded, stating that (i) on the basis of Article 21 (Legal

basis for awarding enforcement) of the LEP it is provided that the enforcement authority shall assign and and implement the enforcement only on the basis of enforcement document and in the concrete case, the "Çabrati" JSC, had requested the enforcement of the Judgment [C.no.332/2018] of the Basic Court of 5 November 2018, which became final on 22 March 2019 and enforceable on 25 April 2019; and (ii) on the basis of paragraph 1 of Article 71 (Reasons for objection) in conjunction with Article 21 (Legal basis for awarding enforcement) and paragraph 1.1 of Article 22 (Enforcement document) of the LEP, in the circumstances of the present case, the enforcement document has an enforcement title and has the features of enforceability, and the other allegations of the Applicant, submitted through objection, do not fall within the other reasons set out in Article 71 of the LEP.

20. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the above-mentioned Decision of the Basic Court, alleging violations of the provisions of the contested procedure, erroneous determination of the factual situation and erroneous application of the substantive law, by proposing to have the said decision remanded for reconsideration. The Applicant also alleged that the debt claimed to be paid has been prescribed, as it dates back from 2006 and is statute-barred.

21. On 23 January 2020, the Court of Appeals, through Decision [Ac.no.4738/19], rejected the Applicant's appeal as ungrounded and upheld the above-mentioned Decision of the Basic Court. The Court of Appeals, in its reasoning, *inter alia*, stated that the (i) enforcement was allowed based on the enforcement document, namely the Judgment [C.no.332/2018] of the Basic Court, of 5 November 2018, which became final on 22 March 2019 and enforceable on 25 April 2019; and (ii) on the basis of paragraph 1 of Article 361 (Claims determined before court or other relevant authority) of the Law No.04/L-077 on Obligational Relationships (hereinafter: the LOR), *"the claim for enforcement is not statute-barred"*.

Applicant's allegations

22. The Applicant alleges that the Decision [Ac.no.4738/19] of the Court of Appeals, of 23 January 2020, was issued in violation of its fundamental rights and freedoms 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.

23. As regards the alleged violations of the aforementioned Articles of the Constitution and the ECHR, the Applicant states that (i) this case should be regarded as *res judicata* because *"in 2008 the creditor has initiated an enforcement procedure in the District Commercial Court in Prishtina, which is recorded as case(E.no.516/08)"*, and that consequently, *"the enforcement procedure is still open, and the creditor has not had the opportunity to initiate a new enforcement procedure without withdrawing the first, respectively it had to submit a request for transfer of the case to the private enforcement agent"*; (ii) the challenged decision was issued in violation of item n) of paragraph 2 of Article 182 [without title] of the Law No.03/L-006 on Contested Procedure (hereinafter: the LCP); and (iii) in the circumstances of the case, based on the principle *"lex speciali drogat lex generali"*, there should have been applied the Law No.05/ L-043 on Public Debt Forgiveness, on the basis of which there is *"included the forgiveness of debts and*

penalties until 31 December 2008, whilst in the present case the damage was caused on 30.12.2008, hence this damage must be covered by forgiveness in its entirety".

24. Finally, the Applicant requests from the Court to (i) declare its Referral admissible; and (ii) to find that the Decision [AC.no.4738/19] of the Court of Appeals, of 23 January 2020, in conjunction with the Decision [PPP.no.165/19] of the Basic Court, of 5 August 2019, were rendered contrary to Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Assessment of the admissibility of Referral

25. The Court first examines whether there are fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and 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 stipulates:

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

28. In this regard, the Court notes that the Applicant is entitled to file a constitutional complaint, by calling upon alleged violations of its fundamental rights and freedoms, which are valid for individuals as well as for legal persons, to the extent applicable. (See, *inter alia*, the case of Court KI118/18, Applicant, *Eco Construction sh.p.k.*, Resolution on Inadmissibility, of 10 October 2019, paragraph 29 and the references used therein).

29. In addition, the Court also examines whether the Applicant has fulfilled the admissibility criteria as provided by Law. In this respect, the Court first refers to Articles 47(Individual Requests), 48(Accuracy of the Referral) and 49(Deadlines) of the Law, which establish:

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 [...]."

In the context of the above provisions, the Court notes that on the basis of paragraph 7 of Article 113 of the Constitution, paragraph 1 of Article 47 and Article 48 of the Law, in addition to specifying the concrete act of the public authority which is being challenged, the parties are also obliged to accurately clarify and adequately present the facts and allegations for violation of constitutional rights or provisions. In the circumstances of the present case, the Court notes that the Applicant, despite the Court's requests for clarification, has failed to submit to the Court the requested documentation, based on which, its Referral would adequately clarify the factual circumstances of the case before the Court, as well as its allegations concerning the fundamental rights and freedoms which it claims have been violated.

30. In this context, the Court recalls that it had received the Applicant's Referral on 7 April 2020. Taking into account that the Referral was incomplete, pursuant to paragraph 4 of Article 22 (Processing Referrals) of the Law and items (f) and (g) of paragraph (2) of Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure, the Court initially requested from the Applicant to submit to the Court the Decision [PPP.no.165/19] of the Basic Court, of 5 August 2019. The Applicant submitted this decision to the Court. However, taking into account the Applicant's allegations, on 7 December 2020, the Court again addressed the Applicant requesting from him to submit to the Court, within 15 days (i) the Decision for which the Applicant in his Referral alleges that must be regarded as *res judicata*; and (ii) all other documents relevant for dealing with the respective case. The Applicant did not respond to the Court's request.

31. In this respect, the Court refers to paragraph (5) of Rule 35 of the Rules of Procedure, which establishes as follows::

Rule 35
(Withdrawal, Dismissal and Rejection of Referrals)

[...]
"(5) The Court may decide to summarily reject a referral if the referral is incomplete or not clearly stated despite requests by the Court to the party to

supplement or clarify the referral, if the referral is repetitive of a previous referral decided by the Court, or if the referral is frivolous."

[...]

32. The Court notes that the above Rule of the Rules of Procedure enables the Court to summarily reject a Referral if, *inter alia*, the Applicant's Referral is incomplete and not clearly stated, despite the Court's requests to supplement and clarify the respective Referral. The Court addressed the Applicant with a request to supplement and clarify his Referral, without success.

33. The Court reiterates that in the circumstances of the present case, the main allegation of the Applicant is that the Decision [E.nr.516 / 08] of 12 January 2009 of the District Court has become *res judicata*. Based on the case file, it results that this Decision may have allowed the enforcement against the Applicant. However, despite the Court's request, this Decision was not submitted to the Court. Moreover, neither (i) the Judgment [C.no.332/2018] of the Basic Court, of 5 November 2018 nor (ii) the Writ [P.no.245/19] of the Private Enforcement Agent, of 8 May 2019 has been submitted to the Court, decisions which were issued after a decision of the District Court, for which the Applicant claims to be *res judicata*.

34. Upon a request by the Court, the latter was served only with the Decision [AC.no.4738/19] of the Court of Appeals, of 23 January 2020, and the Decision [PPP.nr.165 / 19] of the Basic Court, of 5 August 2019, whilst, despite the Court's request of 7 December 2020, no other relevant documents were submitted to it, including (i) the objection of the Applicant, exercised against the Writ [P.no.245/19] of the Private Enforcement Agent, of 8 May 2019; and (ii) the Applicant's appeal filed against the Decision [PPP.no.165/19] of the Basic Court of 5 August 2019, on the basis of which the Court could also examine the other allegations of the Applicant, which relate to the violation of the provisions of the LCP and the Law on Debt Forgiveness.

35. The Court recalls that the burden of building, clarifying and supplementing the Referral falls on the Applicants, who have a direct interest to have their claims and allegations effectively addressed by the Court. In cases where the Applicants do not respond to the Court's requests for clarification and supplementation of the Referral, the Court summarily rejects these Referrals. (See, *inter alia*, the cases of Court KI90/20, Applicant *Arben Boletini*, Decision to Reject the Referral, of 9 December 2020, paragraph 25; and cases no.KI78/20, KI79/20 and KI80/20, Applicant *Hilmi Aliu and others*, Decision to Reject the Referral, of 7 December 2020, paragraph 33 and the references used therein).

36. In the circumstances where a Referral before the Court is incomplete or not clearly stated despite its requests to the Applicant to supplement or clarify the Referral, the Court finds that the Applicant's Referral does not meet the procedural criteria for further consideration, because it is incomplete and not clearly stated, as defined in paragraph (5) of Rule 35 of the Rules of Procedure.

37. Therefore and finally, the Referral is summarily rejected in accordance with Rule 35 (5) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 22, 47 and 48 of the Law and Rule 35 (5) of the Rules of Procedure, on 18 February 2021, unanimously:

DECIDES

I. TO REJECT the Referral;

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**

Gresa Caka-Nimani

Kopje e vërtetuar
Overena kopija
Certified Copy

Arta Rama-Hajrizi