



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

Prishtina, on 24 May 2021
Ref.No:RK 1783/21

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI15/20

Applicant

Merita Dervishi

**Request for constitutional review of Decision AA. No. 557/2019
of the Court of Appeals in Prishtina – Department for
Administrative Matters, of 05 November 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 Merita Dervishi, from the village Kosterc, Municipality of Skenderaj (hereinafter: the Applicant). The Applicant is represented by Safet Voca, a lawyer from Mitrovica.

Challenged decision

2. The Applicant challenges the constitutionality of Decision AA. No. 557/2019 of the Court of Appeals in Prishtina - Department for Administrative Matters, of 5 November 2019, as well as the constitutionality of Notification KMLA. No. 24/2019, of the Office of the Chief State Prosecutor of 29 December 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decisions, which allegedly violate the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as the rights and freedoms guaranteed by Article 6 (Right to a fair trial), and 13 (Right to an effective remedy) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 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 17 January 2020, the Applicant submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 23 January 2020, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama Hajrizi (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
7. On 10 February 2020, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals.
8. On 12 April 2021, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. At the outset, due to the procedural specificity of this Referral, the Court must recall that on 24 November 2017, the Applicant had already filed a Referral registered by the Court with number KI 140/17, in which she challenged the constitutionality of the Judgment [ARJ. UZVP. No. 55/2017] of the Supreme Court of 30 October 2017 in conjunction with the Judgment [AA. No. 56/2017] of the Court of Appeals of 18 July 2017 and the Judgment [A. No. 781/2015] of

the Basic Court in Prishtina of 23 December 2016 (hereinafter: the Basic Court).

10. The Court notes that the substance of Referral KI140/17 related to a labor dispute against the Municipality of Skenderaj, which the Applicant first initiated before the Independent Oversight Board of the Civil Service of Kosovo (hereinafter: IOBK), which was completed by the decision of IOBK [hr. A 02/107/2015], whereby the Applicant's appeal against the decision of the Municipality of Skenderaj was rejected as filed out of time, pursuant to Article 130 of the Law on Administrative Procedure, as well as Article 4 of the Regulation on Complaints.
11. The second procedure was initiated by the Applicant before the Basic Court in which she challenged the decision of the IOBK [No. A 02/107/2015].
12. In that procedure, first the Basic Court on 23 December 2016, and then the Court of Appeals on 18 July 2017, dismissed the Applicant's appeals as ungrounded. The Applicant submitted a request to the Supreme Court for an extraordinary review of the decisions of the lower instance courts. On 30 October 2017, the Supreme Court rejected that request as ungrounded.
13. The Applicant then claimed before the Constitutional Court that the decisions of the regular courts violated her rights and freedoms guaranteed by Articles 24, 31, 32, 49 and 54 of the Constitution, as well as Article 6 of the ECHR.
14. The Court finds that on 28 May 2019, the Constitutional Court rendered the Resolution on Inadmissibility in the Referral KI 140/17.

Summary of facts in case KI15/20

15. In Referral KI 15/20, the Court finds that on 3 July 2019, the Applicant's lawyer submitted a request to the Basic Court in which he requested a reconsideration of the court proceedings in case A. No. 781/2015, based on Article 55.1 of the Law on Administrative Conflicts, with a reasoning: „that “on 24 June 2019, the claimant learned, namely, she was informed that the acknowledgment of receipt that I signed on 9.3.2015. in my law office in Mitrovica was not sent to the court in question at all, which is in fact decisive evidence in the present case....“.
16. On 5 July 2019, the Basic Court rendered Decision A. No. 781/2015, whereby it rejected the request of the Applicant's lawyer as ungrounded, stating that:

„Article 55, paragraph 1 of the Law on Administrative Conflicts, which stipulates: “The interested party may request reviewing of the decision in effect, when: 1.1 the party is informed about new facts, or if it finds or creates opportunities to use new proves, on which base the conflict shall be solved in more favorable manner for it, if this facts or proofs were raised or used in previous court procedure”, and item 1.2 of this same law stipulates: “the court decision of the representatives or the authorizer of the party, his/her objector, representative or by the objector authorizer, whereas this action presents penal act”, item 1.3 of this article stipulates: ”

the decision is based on issued act decision on penal or civil matter, whereas this judgment has been annulled later by a final court decision”, item 1.4 stipulates: “the document, on which the decision is based is falsified, or if the witness, expert or party during the hearing before the court has given a mendacity declaration and the court decision was based on this declaration”, item 1.5 stipulates that:” the party finds or creates opportunities to use the previous decision issued in the same administrative conflict”, and item 1.6 of this article stipulates: ” the interested person was not allowed to take part in the administrative conflict”, and sub-paragraph 2, Article 55 stipulates that: “Because of the circumstances under sub-paragraph 1.1 and sub-paragraph 1.5 of this paragraph the reviewing shall be allowed only if the party, without her/his blame, was not able to raise these circumstances in the previous procedure”. Article 60, paragraph 2, provides: “The Court shall overrule the request with the decision if the court verifies that the request was submitted by an unauthorized person or the request was not submitted on time, or that the party has not made believable the existence of legal basis for reviewing”.

Based on the provisions mentioned above, namely paragraph 2, Article 55, the court finds that the claimant, namely her authorized representative who participated in the hearings held in this court, had the opportunity to submit the circumstances, namely the facts mentioned in the request for consideration. in the previous proceedings before this court and during the hearings held, then during the filing of the appeal to the Court of Appeals as well as during the filing of the extraordinary legal remedy in the Supreme Court of Kosovo...”

17. Within the legal deadline, the Applicant’s lawyer filed an appeal with the Court of Appeals on the grounds of essential violation of the procedural provisions, erroneous and incomplete determination of factual situation, erroneous application of substantive law, as well as violation of Article 31, paragraph 1 of the Constitution of the Republic of Kosovo, in conjunction with Article 6, paragraph 1 of the ECHR.
18. On 5 November 2019, the Court of Appeals rendered Decision AA No. 557/2019, whereby the appeal of the Applicant's lawyer was rejected as ungrounded, stating that;

“The panel of this court assesses the legal position given in the decision complained of as fair, because the above-mentioned legal requirements have not been fulfilled. Also, the Panel of this court confirmed the decision complained of as fair and based on law, because the decision was rendered in compliance with legal and procedural provisions, complete and correct determination of factual situation, as well as correct application of substantive law.

With regard to violations of the provisions of Article 31, paragraph 1 of the Constitution of the Republic of Kosovo, in conjunction with Article 6, paragraph 1 of the ECHR, that the claimant was not allowed to have her question heard fairly, publicly and within a reasonable time, and in particular she was not provided with equal protection of rights in the

proceedings. The panel of this court did not accept these appealing allegations, because it assessed that they have no influence on the determination of a different factual situation from the one established by the first instance court. Because according to the assessment of this court, the decision of the first instance court appealed of, is clear and comprehensible, as well as it contains sufficient explanations on decisive facts, which are accepted by this court, therefore the claimant's appeal is rejected as ungrounded, and the decision appealed is confirmed as fair and lawful".

19. The Applicant's lawyer submitted a request for protection of legality to the State Prosecutor's Office of Kosovo, requesting that the State Prosecutor files a request for protection of legality with the Supreme Court, against Decision A. No. 781/2015 of the Basic Court in Prishtina - Department for Administrative Matters, of 5 July 2019 and Decision AA. No. 557/2019 of the Court of Appeals of Kosovo - Department for Administrative Matters of 5 November 2019, *"because they violated the provisions of the procedure and that the substantive law was erroneously applied, which violated Article 31, paragraph 1 of the Constitution of the Republic of Kosovo in conjunction with Article 6, paragraph 1 of the ECHR"*.
20. On 29 December 2019, the State Prosecutor's Office rendered notification KMLA. No. 24/2019, in which it stated:

"After reviewing the case file and comprehensive analysis, both of evidence and decisions of the first and second instance court, in terms of the allegations in your proposal to file a request for protection of legality, the State Prosecutor's Office did not find a legal basis for raising a request for protection of legality, whereas Article 25 of the Law on Administrative Conflicts stipulates that against final court decisions, the state prosecutor may submit a request to the Supreme Court for protection of legality, if the law, other provisions or general act have been violated, and the fact is that there are no such violations in this case, nor is there a violation of Article 31, paragraph 1 of the Constitution of the Republic of Kosovo, as well as Article 6, paragraph 1 of the European Convention for the Protection of Fundamental Human Rights and Freedoms, which is the reason for non-filing of the request for protection of legality of the Office of the Chief State Prosecutor".

Relevant law

LAW No. 03/L- 202 ON ADMINISTRATIVE CONFLICTS

Article 55
Reviewing

1. The interested party may request reviewing of the decision in effect, when:

1.1 the party is informed about new facts, or if it finds or creates opportunities to use new proves, on which base the conflict shall be solved

in more favorable manner for it, if this facts or proofs were raised or used in previous court procedure;

1.2 the court decision came as a consequence of judge's penal act, the court employee or the decision has been issued by fraudulence act of the representatives or the authorizer of the party, his/her objector, representative or by the objector authorizer, whereas this action presents penal act;

1.3 the decision is based on issued act decision on penal or civil matter, whereas this judgment has been annulled later by a final court decision;

1.4 the document, on which the decision is based is falsified, or if the witness, expert or party during the hearing before the court has given a mendacity declaration and the court decision was based on this declaration;

1.5 the party finds or creates opportunities to use the previous decision issued in the same administrative conflict; and

1.6 the interested person was not allowed to take part in the administrative conflict.

2. Because of the circumstances under sub-paragraph 1.1 and sub-paragraph 1.5 of this paragraph the reviewing shall be allowed only if the party, without her/his blame, was not able to raise these circumstances in the previous procedure.

Applicant's allegations

21. The Applicant alleges that in the proceedings conducted by the State Prosecutor there have been a violation of Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] of the Constitution, in conjunction with Article 6 (Right to a fair trial), and Article 13 (Right to an effective remedy) of the ECHR, while the decisions of the first and second instance courts violated the provisions of Article 31, paragraph 1 of the Constitution, in conjunction with Article 6, paragraph 1 of the ECHR.
22. In this regard, the Court finds that there are two groups of allegations of the Applicant, and that they relate to i) Decision AA. No. 557/2019 of the Court of Appeals, as well as Decision A. No. 781/2015 of the Basic Court and, ii) Notification KMLA. No. 24/2019 of the State Prosecutor's Office.
23. As to the allegations regarding the decisions of the regular courts, the Applicant alleges "*that the first and second instance courts, by their unlawful decisions, denied the party the right to regular and fair procedure as prescribed by Article 31 of the Constitution and Article 6 of the ECHR, because the enacting clauses of the court decisions are legally unclear and contradictory with itself, because the reasoning does not provide sustainable reasons legally based on the decisive facts that influenced the adoption of these decisions*".

24. As regards the allegations relating to Notification KMLA. No. 24/2019 of the State Prosecutor, the Applicant highlights the fact that the State Prosecutor *“in notification KMLA. No. 24/2019 of 20.12.2019 does not give any legally based reasoning that it did not initiate the issue before the Supreme Court of Kosovo, but summarizes its entire reasoning in a few sentences”*. In addition, the Applicant alleges *“that the State Prosecutor, without initiating a request for protection of legality in the Supreme Court of Kosovo, denied her constitutional right guaranteed by Article 32 of the Constitution of Kosovo, in conjunction with Article 13 of the ECHR”*.
25. The Court also notes that in the Applicant’s Referral there are other allegations concerning the fairness of the decisions in the proceedings already completed. Specifically, *„that the first and second instance courts, by their unlawful decisions, denied the party the right to regular and fair procedure, because the enacting clause of the decision of the first instance court is legally unclear and contradictory with itself”*. There is also a part of the Applicant’s allegations regarding the evidence over the date on the acknowledgment of receipt, which also refers to the proceedings that have already been completed. Having this in mind, the Court states that it will not deal with them in this referral because they have already been analyzed in the Referral KI 140/17.

Admissibility of the Referral

26. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and foreseen by the Rules of Procedure.
27. 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.”*
28. The Court also examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court 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... .”

29. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraphs (2) and (3) (b) of the Rules of Procedure, which establish:

“(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,”

“(3) The Court may also consider a referral inadmissible if any of the following conditions are present:

[...]

(b) the Referral is incompatible ratione materiae with the Constitution;

[...]”.

30. Returning to the present case, the Court finds that the Applicant challenges Decision AA. No. 557/2019 of the Court of Appeals of 5 November 2019, regarding her request for reconsideration of the court proceedings, as well as Notification KMLA. No. 24/2019, of the Office of the Chief State Prosecutor of 29 December 2019, which rejected her request for protection of legality.
31. In this regard, the Court first finds, that on 7 September 2019, the Applicant filed the request with the Basic Court, in which she requested “*reconsideration of the court proceedings in case A. No. 781/2015, based on Article 55.1 of the Law on Administrative Conflicts*”.
32. The Court notes that the legal provision of Article 55 of Law 03/L-202 ON ADMINISTRATIVE Conflicts, provides for the possibility of reviewing the decision, namely that “*The interested party may request reviewing of the decision in effect*”, but only when the requirements set out in the accompanying paragraphs of Article 55 are met.
33. The Court finds that first the Basic Court, and later the Court of Appeals in the appeal proceedings concerning the Applicant’s request for reconsideration of the court proceedings, rendered decisions rejecting the Applicant’s request as ungrounded, citing the legal provision of Article 55 paragraph 2, and concluded that “*Based on the provisions mentioned above, namely paragraph 2, of*

Article 55, the court finds that the claimant, namely her authorized representative who participated in the hearings held in this court, had the opportunity to submit the circumstances, namely the facts mentioned in the request for consideration, in the previous proceedings before this court and during the hearings held, then during the filing of the appeal to the Court of Appeals as well as during the filing of the extraordinary legal remedy in the Supreme Court of Kosovo...”

34. Having this in mind, the Court notes that the regular courts, upon the request for repetition of the court proceeding of the Applicant, decided exclusively on the fulfillment of the procedural requirements for repetition of the court proceeding, and not on the merits of the case.
35. The Court reiterates that in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution “*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*”
36. The Court, having regard to the Applicant’s allegations of a violation of Article 32 of the Constitution, which the Court may consider only in connection with the request for repetition of the court procedure, recalls the case law of the ECtHR and its case-law, according to which Article 31 of the Constitution and Article 6 of the ECHR, do not apply to requests for the reopening or repeating of proceedings: (see: by analogy, the cases of the Constitutional Court KI07/17/15, *Pashk Mirashi*, Resolution on Inadmissibility of 12 June 2017, paragraph 64; KI80/15, 81/15 and 82/15, *Rrahim Hoxha*, Resolution on Inadmissibility of 27 December 2016, paragraph 31; see also ECtHR cases, *inter alia*, *Oberschlick v. Austria*, No. 23727/94, Decision on Inadmissibility of 21 March 1994; *Dowsett v. United Kingdom*, No. 8559/08, Decision on Inadmissibility of 4 January 2011, *Sablon v. Belgium*, No. 36445/97, Judgment of 10 April 2001, paragraph 86).
37. Accordingly, the Court considers that the Applicant's complaint regarding the rejection of the regular courts to reopen the court proceedings as to the merits of the case in which they have already decided is incompatible *ratione materiae* with Article 31 of the Constitution and Article 6 of the ECHR.
38. Furthermore, as regards the Applicant's second allegation that the State Prosecutor's Office violated her rights guaranteed by Articles 31 and 32 of the Constitution in conjunction with Articles 6 and 13 of the ECHR, the Court recalls that it is at the discretion of the State Prosecutor's Office to decide whether in a request for legality there are elements to be adopted or not. In the present case, the Court finds that after analyzing the Applicant’s request “*The State Prosecutor's Office concluded that it did not find that there were legal grounds for raising a request for protection of legality ...*”.
39. Accordingly, the Court finds the Applicant’s allegations that the notification of the State Prosecutor’s Office violated her rights and freedoms guaranteed by Articles 31 and 32 of the Constitution in conjunction with Articles 6 and 13 of the ECHR as ungrounded.

40. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and should be declared inadmissible in accordance with Rule 39 (2) and (3) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 20 of the Law and Rule 39 (2) and (3) (b) of the Rules of Procedure, in the session held on 12 April 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

Selvete Gërxhaliu-Krasniqi

Arta Rama-Hajrizi



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