REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 16 April 2024
Ref. no.: MK 2418/24

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CONCURRING OPINION

of Judge

RADOMIR LABAN

in

case no. KI70/23

Applicant

Xhemile Ademi

Constitutional review of Judgment Ac no. 835/19 of the Court of Appeals of Kosovo of 11 November 2022

Expressing from the beginning my respect to the opinion of the majority of judges in this case, who established by majority of votes that the judgment Ac. no. 835/19 of the Court of Appeals of Kosovo of 11 November 2022, is no longer an active controversy, because it was annulled by the decision of the Supreme Court of 7 June 2023, and the issue of her claim was remanded to the Basic Court for retrial. And that as a result, the judgment before this court is no longer in force and as such does not produce any legal effect for the applicant.

However, I as an individual judge, however, have a concurring opinion regarding the conclusion of the majority and I do not agree with the opinion of the majority, although I also consider the case to be inadmissible.

As a judge, I agree with the factual situation as stated and presented in the judgment and I find the same factual situation correct. I as a judge also agree with the way the applicant's

allegations were submitted and presented in the decision on dismissal and I find them correct .

However, I do not agree with the legal analysis and the opinion of the majority that the case is no longer an active dispute. I believe that this legal analysis is in direct contradiction with the practice of the Constitutional Court itself.

I also consider that this analysis and conclusion of the majority is in direct contradiction with the Court's obligation that, in accordance with Article 53 of the Constitution, which obliges the Court that "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*." In emphasizing this, I do not want to refer to an individual case of the ECtHR, but to a practical guide for the admissibility criteria of the ECtHR in which there is not a single case in which the ECtHR declared cases that were not decided on the merits in favor of the applicant as inactive cases, namely without subject matter, on the contrary, the practice of the ECtHR indicates the opposite.

Due to the above, in accordance with Rule 57 of the Rules of Procedure of the Constitutional Court, in order to make it as easy and clear as possible to follow and reason my concurring opinion, I will first (I) State the cases which the court refers to (II) recall the allegations of the applicant (III) reason why I do not agree with the cases referred to by the Court in the decision to dismiss the referral (IV) and then elaborate the admissibility criteria in relation to non-exhaustion and (V) state my conclusion on the subject of the dispute.

I Cases which the Court refers to;

The cases referred to by the Court in the present case are inapplicable and, in my opinion, erroneously interpreted (see ECtHR cases *El Majjaoui & Stichting Touba Mosquee v. the Netherlands*, application no. 25525/03, decision to strike out the application, paragraph 30, *Pisano v. of Italy*, application no. 36732/97, decision to strike out the application, paragraph 42, *Sisojeva and others v. Latvia*, application no. 60654/00, decision to strike out application, paragraph 97). All these cases require two requirements to be met namely (i) first, whether the circumstances that the applicants directly complained of still exist; and, (ii) secondly, whether the effect of a possible violation of the Convention due to those circumstances has also been removed.

I also consider that the cases of the Constitutional Court are fully inapplicable (KI195/18, with the applicant *Afrim Haxha*, decision to reject the referral of 23 July 2019, paragraphs 24-26, cited above, paragraph 30, see also Court case KO98/20, with the applicant *Hajrulla Çeko and 29 other deputies*, constitutional review of decision No. 52/2020, decision to strike out the referral , of 20 November 2020, paragraph 85).

II Applicant's allegations

I recall that the Applicant states that her rights and fundamental freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution have been violated by the challenged judgment.

In her allegations, the Applicant considers that the judgment [C. no. 627/18] of the Basic Court and judgment [Ac. no. 835/19] of the Court of Appeals contain violations of human rights guaranteed by Article 31 of the Constitution, because the Court of Appeals rejected the applicant's appeal as ungrounded and upheld the judgment of the Basic Court, although the same court had previously approved the applicant's appeal and remanded the case for retrial,

emphasizing that the question which was initiated in the lawsuit is not an employment relationship, but the right to acquire the right to maintenance, which does not expire.

The applicant states that the Basic Court did not take into account the remark of the Court of Appeals, and again rejected the applicant's lawsuit as ungrounded, which the applicant considers to be a violation of Article 31 of the Constitution.

III Legal analysis based on the above cases

Returning to the legal analysis required by the above-mentioned cases, I believe that basically the first question that the court would have to answer is (i) whether the circumstances complained of by the applicant still exist?

I consider that the applicant is complaining about the acquisition of the right to maintenance and that the court has not yet decided on the merits.

Another question that the court should answer, in my opinion, is (ii), whether the effect of a possible violation of the Convention due to those circumstances has also been removed?

I consider that it is not because on 7 June 2023, the Supreme Court by decision [Rev. no. 211/2023] approved the applicant's revision as grounded and as a result annulled the judgments of the Basic Court and the Court of Appeals and remanded the case to the Basic Court for retrial. The Supreme Court determined in its decision that due to *„erroneous application of substantive law and violation of procedural rules, the factual situation has not been completely determined, and therefore there are no conditions for modifying the contested judgment, and therefore it approves the revision and completely annuls the first and second instance judgments and remands the case to the first instance court for retrial"*.

From this I conclude that the applicant still has an active dispute before the court that has not been resolved on the merits.

IV Admissibility criteria regarding exhaustion

Furthermore, I conclude that the applicant is an authorized party challenging the act of the public authority, namely judgment Ac. no. 835/19 of the Court of Appeals of Kosovo of 11 November 2022. The applicant also specified what rights and fundamental freedoms she considers having been violated, in accordance with the requirements of Article 48 of the Law and submitted the referral in accordance with the deadlines which are prescribed in Article 49 of the Law.

Below, I refer to Rule 34 (1) (b) of the Rules of Procedure, which stipulates that:

> *"(1) The Court may consider a referral as admissible if:*
>
> *[...]*
>
> *(b) All effective remedies foreseen by law against the challenged act have been exhausted"*

Accordingly, I recall that according to paragraph 1 of Article 47 (Individual Requests) of the Law, every individual has the right to request legal protection from the Constitutional Court if he considers that his rights and freedoms guaranteed by the Constitution are violated by a public authority. According to paragraph 2 of the same article, an individual can submit the aforementioned referral only after exhausting all other legal remedies provided by the law.

As to the present referral regarding the fulfillment of the stated requirements, I emphasize that the applicant is an authorized party, who challenges the act of a public authority, namely, Judgment Ae. no. 835/19 of the Court of Appeals of Kosovo of 11 November 2022. However, I will further assess whether the applicant has fulfilled the requirement of exhaustion of legal remedies prescribed by the Law, as required by paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of rule 34 (Admissibility Criteria) of the Rules of Procedure.

In support of that, I first note that the above-mentioned rule, based on the case law of the European Court of Human Rights (hereinafter: ECtHR) and the Court, allows the latter to declare referrals inadmissible due to non-exhaustion of legal remedies. More specifically, based on Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and point (b) of paragraph (1) of Rule 34 (Admissibility Criteria) of the Rules of Procedure, the Court may declare the referral inadmissible, if during the preliminary assessment it concludes that the submitted referral clearly does not meet the procedural requirements for filing the referral, as prescribed by Article 47 of the Law and point (b) of paragraph (1) of Rule 34 (Admissibility Criteria) of the Rules of Procedure.

In this connection, I state that the conditions for assessing whether the obligations to exhaust all „*effective legal remedies*“ have been fulfilled are well established in the case law of the ECtHR, in accordance with which, according to 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.

I recall that the case law of the ECtHR and of this Court recognizes three categories of cases when a filed referral can be declared inadmissible for consideration due to non-exhaustion of legal remedies, and they are; **i)** „procedural non-exhaustion“, (see ECtHR cases *Civet v. France* [GC], no. 29340/95, judgment of 28 September 1999, paragraph 41; *Pagerie v. France*, no. 24203/16, judgment of 19 April 2023, paragraph 143, *Demopoulos and others v. Turkey* [GC], no. 46113/99, decision of 10 March 2010, paragraphs 69 and 97), **ii)** “substantive non-exhaustion” (see ECtHR case *Haxhia v. Albania*, no. 29861/03, judgment of 8 October 2013, paragraphs 149 and 152; *Castells v. Spain*, no. 11798/85, judgment of 23 April 1992, paragraph 32; *Ahmet Sadik v. Greece* , no. 18877/91, judgment of 15 November 1996, paragraph 33; *Gäfgen v. Germany* [GC], no. 22978/05, judgment of 1 June 2010, paragraphs 142, 144 and 146), and, **iii)** “premature referral”, (see ECtHR cases *Bilsena ŠAHMAN v. Bosnia and Hercegovina*, no. 40110/16, decision of 25 April 2017; *Mirazović v. Bosnia and Hercegovina*, no. 13628/03, decision of 16 May 2006).

In the present case, I note that the applicant is requesting the constitutional review of judgment Ac. no. 835/19 of the Court of Appeals of Kosovo of 11 November 2022, which was annulled by the decision of the Supreme Court of 7 June 2023, and the issue of her claim was remanded to the Basic Court for retrial.

Bearing that in mind, I note that the court proceedings initiated by the applicant are pending before the Basic Court. This qualifies the present referral as a referral of category **iii)** “premature referral”, which is in accordance with the stated ECtHR case law (see specific ECtHR cases *Bilsena ŠAHMAN v. Bosnia and Hercegovina*, no. 40110/16, decision of 25 April 2017; *Mirazović v. Bosnia and Hercegovina*, no. 13628/03, decision of 16 May 2006).

In this respect, I recall that the rule for exhaustion of legal remedies, according to Article 113.7 of the Constitution, Article 47 of the Law and point (b) of paragraph (1) of Rule 34 of the Rules of Procedure, obliges all natural and legal persons who wish to submit their case before the Constitutional Court to first exhaust the effective legal remedies available against the contested decision.

V. Conclusion regarding concurring opinion

Bearing in mind the above, I find that the applicant's referral qualifies as a referral of category **iii)** "premature referral", and accordingly the Court should dismiss the referral in accordance with Article 47 of the Law and point (b) of paragraph (1) of Rule 34 of the Rules of Procedure.

Concurring Opinion is submitted by Judge;

Radomir Laban, Judge

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On 27 March 2024 in Prishtina

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