



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

Prishtina, on 13 September 2019
Ref. no.:RK 1424/19

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RESOLUTION ON INADMISSIBILITY

in

cases No. KI25/19 and KI27/19

Applicant

Hysen Manxholli and Bajram Dajaku

**Constitutional review of Decisions of the Supreme Court of the
Republic of Kosovo, Rev. No. 239/2018, of 3 September 2018 and
Rev. No. 147/2018, of 7 May 2018**

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. Referral KI25/19 was submitted by Hysen Manxholli. Referral KI27/19 was submitted by Bajram Dajaku (hereinafter: the Applicants). The Applicants are from the Municipality of Skenderaj.

Challenged decision

2. The Applicants challenge the decisions of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), as follows: Applicant of Referral KI25/19, Hysen Manxholli, challenges Decision Rev. No. 239/2018 of 3 September 2018, which was served on him on 4 October 2018; whereas Applicant of Referral KI27/19 Bajram Dajaku, challenges Decision Rev. No. 147/2018 of 7 May 2018, which was served on him on 18 October 2018.

Subject matter

3. The subject matter of the referrals is the constitutional review of the challenged decisions, which allegedly violate the Applicants' rights guaranteed by Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and Article 15 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

Legal basis

4. The Referrals are based on paragraph 7 of Article 113 [Jurisdiction and the 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 4 February 2019, the Applicant of Referral KI25/19, by the Post Office of the Republic of Kosovo, submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 8 February 2019, Applicant of Referral KI27/19 submitted his Referral to the Court.
7. On 4 March 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur for cases KI25/19 and KI27/19, and the Review Panel, composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
8. On 4 March 2019, in accordance with paragraph 1 of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referral KI27/19 with Referral KI25/19.
9. On 8 March 2019, the Applicants were notified about the registration of Referrals and the joinder of Referral KI27/19 with Referral KI25/19. On the

same date, the Court also notified the Supreme Court about the registration of Referrals and their joinder.

10. On 23 July 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 1 February and 12 September 2011, the Applicants individually filed a claim with the Basic Court in Mitrovica, Branch in Skenderaj (hereinafter: the Basic Court), against the Government of the Republic of Serbia, for compensation of material and not-material damage that was caused during the war between 1998 and 1999.
12. During the period 23 September 2013 - 28 April 2014, the Basic Court, by individual decisions, dismissed the Applicants' claims and declared itself incompetent to decide.
13. The Applicants filed individual appeals against the decisions of the Basic Court with the Court of Appeals of Kosovo, on the grounds of essential violation of the provisions of the contested procedure. The Applicants requested that the decisions of the Basic Court be annulled and the Applicants' requests be declared admissible.
14. Between 5 November 2015 and 14 May 2018, the Court of Appeals rendered separate decisions, rejected the Applicants' appeals and upheld the decisions of the Basic Court.
15. The Applicants, individually, filed request for revision with the Supreme Court, alleging that there has been essential violation of the provisions of the contested procedure. They requested that their requests for revision be approved, the decisions of the Court of Appeals and of the Basic Court be annulled and their legal matter be referred for reconsideration to the Basic Court. The Applicants alleged that there are other provisions of the Law on Contested Procedure which regulate the issue of jurisdiction in their cases. Among other things, according to them, in the present cases, the provisions of Article 28, 47, 51, 60 and 61 of the Law on Contested Procedure related to the jurisdiction of the courts in disputes with an international element should have been applied.
16. Between 7 May and 3 September 2018, the Supreme Court rendered separate decisions, rejecting, as ungrounded, the requests for revision of each of the Applicants.
17. The main arguments of the Supreme Court in each of these decisions were as follows:

(Rev. No. 239/2018)

"Taking into account the [provisions of the Law on Contested Procedure] LCP as well as the fact that by the claim was sued the Republic of Serbia -

Government of R.S. in Belgrade [...], in the present case it is about the legal-property dispute in the foreign state, the norms of international law apply, for which the domestic court is not competent to decide, therefore, the Supreme Court of Kosovo assesses that the Basic Court and the Court of Appeals have correctly applied the provisions of Article 18.3 and Article 39 par. 1 and 2 of the LCP, when they declared itself incompetent to adjudicate this legal matter and dismissed the claim [of the Applicants], since the court with territorial jurisdiction is the court in the territory of which is the seat of the Assembly of the Republic of Serbia, [and] the seat of the Assembly of the Republic of Serbia as a responding party is not in the territory of the Courts of the Republic of Kosovo.
[...]

(Rev. No. 147/ 2018)

“Taking into account the fact that by the claim as a responding party was involved the Republic of Serbia - the Government of the Republic of Serbia based in Belgrade, therefore under the provision of Article 39 par. 1 and 2 of the LCP, to decide against the Republic of Serbia, of general territorial jurisdiction is the court in which territory is the seat of the Government of Serbia. The Republic of Serbia is a legal person of the public law and the seat of its Assembly is in Belgrade. Consequently, the general territorial jurisdiction is also determined according to the place where the seat of the assembly is located, i.e. in Belgrade.”.
[...]

(Rev. No. 239/2018 and Rev. No. 147/ 2018)

“[...] the claims of the revision regarding the incorrect application of the provisions of Articles 28, 47, 51, 60, 61 of the LCP are ungrounded. Thus, the provision of Article 28 of the LCP, invoked by the Applicant, which determines the jurisdiction of our courts in the disputes with an international (foreign) element, cannot be applied in the present case, as here we do not deal either with foreign natural persons, or with foreign legal persons, but with a foreign state, with which until now the state of Kosovo in the territory of which the damage was caused, has not concluded any international agreements (bilateral etc.) on the jurisdiction of the domestic courts for these types of disputes”.

Applicant's allegations

18. The Applicants' allegations are identical, and therefore, the Court presents them as the same allegations for all Applicants of these joint referrals.
19. The Applicants allege that the decisions of the Supreme Court violated their rights guaranteed by Articles: 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution, Article 6 (Right to a fair trial) of the ECHR and Article 15 of the UDHR.
20. The Applicants allege that the regular courts have “*incorrectly applied the applicable law referred to the territorial jurisdiction of the Basic Court [...], since the court with territorial jurisdiction for the adjudication on legal*

matters, is always the court in the territory of which the crime was committed, moral namely material damage! This valid legal definition and position corresponds to the interest of the injured party, the principle of economy in judicial and administrative proceedings, and in accordance with the international principle - per loci, the resolution of claims based on the place where the crime was committed”.

21. The Applicants, referring to Article 21 of the Constitution, allege that the regular courts *“did not apply international advanced human rights standards. One of the standards is to allow the injured party to initiate the issue of compensation for moral and material damage caused as a result of direct action by the Serbian authorities [...]”.*
22. The Applicants, referring to Article 22 of the Constitution, claim that, while *“human rights guaranteed by international conventions, agreements and instruments are a priority in the event of conflict with the laws and other provisions of public authorities [...]. Filing lawsuits before the local courts is also based on the European Convention for the Protection of Fundamental Rights and Freedoms, Article 6 and Article 15 of the Universal Declaration of Human Rights, under item 15, which provides for the right to a fair trial. [...]”.* The Applicants also allege that *“The obligation to apply Geneva Conventions of 1994 is also foreseen by the International Humanitarian Law of Kosovo”.* According to the Applicants, the regular courts have violated the constitutional provisions because they have not applied the provisions of international conventions as a category of domestic legal order.
23. The Applicants, referring to Article 53 of the Constitution, state that *“even though Kosovo is not a member of the Council of Europe and consequently it is not a signatory party to the Convention, it does not constitute an obstacle to the application of the norms of the Convention”.*
24. 2The Applicants, referring to Article 54 of the Constitution, also state that *“have been denied the right to judicial protection of rights, the right to access to justice at the national level and institutional guarantees for the protection of human rights.* The Applicants refer to some examples from international practice where, according to them, victims of the Second World War were allowed *“to file individual indictments before the national courts for compensation of damage caused by Germany”.* In this regard, they specify that in the cases of Greece and Italy, the individuals were afforded the opportunity to seek compensation for the *“damage caused by Germany during World War II in accordance with international principle ‘per loci’”.*
25. Finally, the Applicants request the Court to annul the decisions of the regular courts and *“to request the Basic Court in Mitrovica - branch in Skenderaj to re-proceed and adjudicate in accordance with applicable law and good court practices the legal matter for compensation of moral and material damage [...]”.*

Admissibility of the Referral

26. The Court first examines whether the Referrals have fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.
27. As an initial note, the Court notes that the subject-matter of these joined referrals, and the allegations raised in those referrals are similar to a number of other referrals on which the Court has already decided (see the decisions of the Constitutional Court in cases: KI73/17, KI78/17 and KI85/17, Resolution on Inadmissibility, of 23 October 2017; cases KI97/17, KI99/17, KI115/17 and KI121/17, Resolution on Inadmissibility of 10 January 2018; cases No. KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, Resolution on Inadmissibility, of 19 February 2019; and recently cases KI177/18, KI182/18 and KI191/18, Resolution of 14 May 2019).
28. As to the admissibility of the referrals of the present cases, the Court first refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provide that:
- “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”.
[...]*
29. 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...”

30. In addition, the Court also refers to the Rules of Procedure, namely paragraph (2) of Rule 39 [Admissibility Criteria], which defines the following:

“(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”.

31. The Court finds that the two Applicants are authorized parties, who challenge an act of a public authority after exhaustion of all legal remedies. The Applicants have also specified the rights and freedoms which have allegedly been violated by the concrete decisions of the regular courts, in accordance with Article 48 of the Law, and have submitted the Referral in accordance with the deadline set out in Article 49 of the Law and 39 (1) (c) of the Rules of Procedure.
32. In addition, the Court should examine whether the admissibility requirement foreseen in Rule 39 (2) of the Rules of Procedure is met. In this regard, the Court recalls that the Applicants allege that the regular courts violated certain rights protected by the Constitution, the ECHR and the UDHR, with particular emphasis on the right to fair and impartial trial and the right to judicial protection of rights.
33. In this respect, the Court notes that the Applicants allege that the regular courts erroneously interpreted the law in force when referring to the territorial jurisdiction of the Basic Court. They further claim that the court in which territory the damage is caused is the competent court to adjudicate their cases.
34. The Court considers that the Applicants' allegations, in substance, relate to the interpretation by the regular courts of the relevant legal provisions that regulate their territorial jurisdiction, namely the competence to deal with the claims of the Applicants.
35. The Court emphasizes its view that correct and complete determination of factual situation, as well as relevant legal interpretations, in principle, fall within the jurisdiction of the regular courts. The role of the Constitutional Court is to ensure that the standards and rights guaranteed by the Constitution are respected and consequently it cannot act as a “fourth instance court” (See *mutatis mutandis*, regarding the “fourth instance” doctrine, the cases of the Constitutional Court, KI86/11, Applicant *Milaim Berisha*, Resolution on Admissibility of 5 April 2012, paragraph 33; as well as joined cases KI73/17, KI78/17 and KI85/17, Applicants *Istref Rexhepi and 28 others*, Resolution on Admissibility, of 27 November 2017, paragraphs 46 and 47).

36. In the present case, the Court notes that the Supreme Court considered the Applicants' allegations regarding the interpretation by the Court of Appeals and the Basic Court of the relevant legal provisions related to the competence to adjudicate in the cases of the Applicants.
37. In reviewing the Applicants' allegations, the Supreme Court reasoned that the Basic Court and the Court of Appeals have correctly applied the provisions of the Law on Contested Procedure when they found that they had no jurisdiction to adjudicate in these court cases. Therefore, the Supreme Court rejected the Applicants' allegations, reasoning that the general territorial jurisdiction is in the court in the territory of which is the seat of the Assembly of the Republic of Serbia which is not in the territory of the Kosovo courts.
38. The Supreme Court further specified that in the case of the Applicants we are dealing with a foreign state, with which until now the state of Kosovo in the territory of which the damage was caused, has not concluded any international agreement regarding the jurisdiction of the domestic courts for these kinds of disputes.
39. The Court considers that the findings of the Basic Court, the Court of Appeals and of the Supreme Court were reached after a detailed examination of all the arguments and interpretations presented by the Applicants. In this way, the Applicants were given the opportunity to present at all stages of the procedure the arguments and legal interpretations they consider relevant to their cases.
40. Therefore, the Court concludes that the proceedings before the regular courts, viewed in their entirety, were fair and that the allegation of arbitrary legal interpretation by the regular courts cannot be substantiated.
41. With regard to the Applicants' allegations as to *their right to judicial protection and access to justice*", the Court emphasizes the case law of the European Court of Human Rights (ECtHR), which it is obliged to refer to in accordance with Article 53 of the Constitution. In this connection, the Court highlights its case law built on the ECtHR case law, where it was noted that there are procedural barriers imposed by the principle of sovereign state immunity - as one of the fundamental principles of international public law - in relation to judicial proceedings that may be conducted against a state in the domestic courts of another state. (See the joined cases of the Constitutional Court, KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, Resolution on Inadmissibility, of 30 January 2019, paragraphs 58 and 59, and recently cases KI177/18, KI182/18 and KI191/18, Resolution of 14 May 2019, paragraph 46, see, *mutatis mutandis*, also the ECtHR cases, *Jones and Others v. United Kingdom*, applications 34356/06 and 40528/06, Judgment of 14 January 2014, *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, application 35763/97 Judgment of 21 November 2001).
42. In addition, in the case *Al-Adsani v. The United Kingdom*, the ECtHR argued as follows: "*The right of access to court may be subject to limitations, unless the essence of the very right is impaired. Such limitations must pursue a*

*legitimate aim and be proportionate. The recognition of sovereign state immunity in civil proceedings follows the legitimate aim of respecting the international law [...]. As far as proportionality is concerned, the Convention should, as far as possible, be interpreted in accordance with other rules of international law, including those relating to the immunity of States. Thus, the measures taken by the state which reflect the general rules of international law on the immunity of States cannot, in principle, be regarded as a disproportionate limitation of the right of access to the court". Such an attitude, as far as concerns the tension between the principle of sovereign immunity of states and the right to access to justice (court), was emphasized by the International Court of Justice (see, for example, *Germany v Italy*; *Greece as an intervening party*, Judgment of 3 February 2012).*

43. In the light of the foregoing arguments, the Court considers that it is important to emphasize the fact that the regular courts of Kosovo, in the Applicants' cases, did not address their right to seek compensation for damage, but only with respect to the territorial jurisdiction of the courts of Kosovo to conduct proceedings against another state.
44. Referring to the Applicants' allegations regarding the application of the Geneva Convention in their court cases, the Court notes that the Applicants have only referred to this Convention, but did not provide further arguments in relation to this allegation (See recent decisions of the Constitutional Court, in the joined cases: KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, paragraph 61, and recently KI177/18, KI182/18 and KI191/18, paragraph 49).
45. The Court emphasizes once more its general view that the mere fact that the Applicants do not agree with the outcome of the decisions of the Supreme Court, or of other regular courts, as well as mentioning of articles of the Constitution or international instruments, are not sufficient to build a reasoned allegation of constitutional violations. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (See case of the Constitutional Court, KI136/14, Resolution on Inadmissibility of 10 February 2015, *Abdullah Bajqinca*, paragraph 33).
46. The Court also reiterates that the presented facts and the Applicants' allegations are almost identical to some of the previous Referrals, where the Court found that they were inadmissible, as manifestly ill-founded on constitutional basis (See decisions of the Constitutional Court, in the joined cases: KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, cited above, KI73/17, KI78/17 and KI85/17, cited above, KI97/17, KI99/17, KI115/17 and KI121/17, cited above, KI96/18, KI97/18, KI98/18, KI99/18, KI100/18, KI101/18, KI102/18, KI103/18, KI104/18, KI105/18, KI106/18, KI107/18, KI116/18, KI117/18, KI119/18 and KI125/18, cited above, KI177/18, KI182/18 and KI191/18).

48. Therefore, the Court concludes that the Applicants' referrals are manifestly ill-founded on constitutional basis and are to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 59 (b) of the Rules of Procedure, on 23 July 2019, unanimously

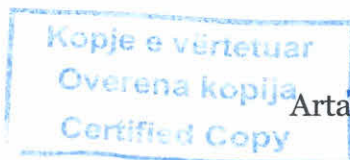
DECIDES

- 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

Bekim Sejdiu



Arta Rama-Hajrizi

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