



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

Prishtina, on 17 October 2019
Ref. no.:RK 1447/19

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI141/18

Applicant

Budimir Ristić

Constitutional Review of Decision AC -1-12-0112-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters, of 26 April 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërzhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci and
Nexhmi Rexhepi, Judge.

Applicant

1. The Referral was submitted by Budimir Ristić from Çaglavica (hereinafter: the Applicant), represented by Visar Vehapi, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges decision AC-1-12-0112-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: Appellate Panel) of 26 April 2018.
3. The challenged decision AC-1-12-0112-A0001 of the Appellate Panel, of 26 April 2018, was served on the Applicant's legal representative on 17 May 2018.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 24 [Equality Before the Law] paragraphs 1 and 2 of Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] and Article 53 [Interpretation of Human Rights Provisions] 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), Article 14 (Prohibition of discrimination) and Article 1 of Protocol 1 (Protection of property) of the European Convention on Human Rights (hereinafter referred to as the ECHR).
5. The Applicant also considers that during the proceedings before the regular courts the Law on Contested Procedure no. 03/L-006 was violated.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the 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

7. On 17 September 2018, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 9 October 2018, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërzhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban.
9. On 12 October 2018, the Court notified the Applicant's legal representative of the registration of the Referral and requested to complete the official Referral Form.
10. On the same day, the Court sent a copy of the Referral to the Appellate Panel.

11. On 2 November 2018, the Applicant's legal representative submitted to the Court the completed Referral Form.
12. On 10 September 2019, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. On 18 December 1964, the Applicant's legal predecessor, now the deceased D. R., entered into a contract on sale Ob.No.2841/64, on the sale of immovable property with PIK "Kosova Export" from Fushë Kosova (hereinafter: PIK).
14. By that contract D.R., sold to PIK, for a certain amount of money the cadastral parcels of land in the total area of 2.62.18 hectares, which were located in the Cadastral Zone of Çagllavica.
15. In 1995, the Municipal Public Prosecutor's Office in Pristina (hereinafter: MPPO) filed a claim with the Municipal Court in Pristina against "MDD Ratar", that was the legal successor of "PIK", for annulment of the contract on sale Ob.No.2841/64 of 18 December 1964.
16. On 8 May 1995, the Municipal Court in Prishtina rendered the Judgment P.no. 438/94, whereby it upheld MPPO's claim, thus declaring the contract on sale Ob.No.2841 /64 of 18 December 1964 null and void.
17. The Court, on the basis of the case file, notes that, upon the contract being declared null and void, the Applicant was restored the ownership over 1.45.49 hectares of land, while the area of 1.15.89 hectares of land could not be restored due to the fact that this part of the land had already been given to some third parties as compensation, thus being transferred into their ownership.
18. Also, the Applicant and the Respondent „MDD Ratar“ failed to reach an agreement on the amount of monetary compensation that would have to be paid to the Applicant as compensation for the part of the land consisting of 1.15.89 hectares that could not be returned to him.
19. On 24 December 2008, the Applicant filed the claim SCC-08-0305 with the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Special Chamber), against „PIK“ and “MDD Ratar”, represented by the Privatization Agency of Kosovo (hereinafter: PKA), requesting the return of 1.15.89 hectares of land.
20. On 12 April 2011, the Applicant filed a submission with the Special Chamber, wherein he proposed that, as compensation for a part of the land not returned to him, another cadastral parcel [No.1394/1], located in the same area, consisting of 1.15.89 ha, and registered in possession list no. 222, Cadastral Zone of Çagllavica, be allocated to him.

21. On 4 September 2012, a hearing was held in the Special Chamber where the parties to the case presented their views.
22. On 25 September 2012, the Specialized Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel) issued the Judgment SCC-08-0305, whereby it rejected the claim for restitution of 1.15.89 hectares as unfounded, the reasoning of the judgment reads:

“There is no legal basis to compensate the claimant for the land that he failed to have returned after the sale contract was declared null and void. Article 104 of the Law on Obligations provides that in case of the nullity of a contract, each contracting party shall retribute to the other that what is received on the ground of such a contract. If one of the parties is unable to retribute the contractual benefits, the law then provides for adequate financial compensation. It is not possible to return the land which is sold to the other party because the respondent sold it. Under these circumstances, the claimant would be entitled to compensation for that part of the land not restituted to him, but it would only be monetary compensation and not compensation in the form of such land. If the claimant would be given such land owned by the defendant, it would entail the privatization of the social property in a manner not provided for by law and is contrary to the law.”

23. On 19 October 2012, the Applicant submitted an appeal to the Appellate Panel against the judgment of the Specialized Panel of 25 September 2012, alleging that the Specialized Panel violated the provisions of the LCP, since the judgment contained significant deficiencies, as well as in the minutes of the hearing of 4 September 2012, was not included his alternative verbal position in the form of a request whereby he accepted monetary compensation as an alternative option, but the Specialized Panel never considered that request because someone manipulated the minutes. The applicant also stated that the minutes had not been served on him pursuant to Article 138, item 3 and Article 139, paragraph 1 of the LCP.
24. On 26 April 2018, the Appellate Panel rendered Decision AC-1-12-0112-A0001, dismissing the Applicant's appeal as unfounded and upholding the judgment of the Specialized Panel.
25. The reasoning of the decision reads:

“The Appellate Panel considers that these appeal claims are unfounded. As stated, it is clear that the claimant sought compensation in rem did not seek any financial compensation. This is confirmed by the minutes, which contain a clear and direct question of the judge for the prosecutor. The appeal claim that he sought alternative compensation is not based on material evidence.

As regards the second claim that it has been the duty of the court, pursuant to Article 139, paragraph 1 of the LCP, and pursuant to Article 138, paragraph 3, to serve the minutes on the parties within 3 days so that

they be able to file their objections, the Appellate Panel considers that this provision is only applicable if the minutes of the hearing are not kept.“

Applicant's allegations

26. The Applicant alleges that the Specialized Panel and the Appellate Panel violated his constitutional rights and freedoms guaranteed by Article 3 [Equality Before the Law], Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 paragraph 1 [Right to Fair and Impartial trial], Article 24, paragraphs 1 and 2 [Equality Before the Law], Article 46 [Protection of Property], Article 53 [Interpretation of Human Rights Provisions] of the Constitution of Kosovo, as well as the rights and freedoms guaranteed by Article 6 (Right to fair trial), Article 14 (Prohibition of discrimination) and Article 1 of Protocol 1 (Protection of Property) of the ECHR.
27. More specifically, the Applicant alleges that it is not disputable that in 2008 he filed a claim for the determination of ownership rights, which he supplemented on 12 April 2011, wherein he requested that in the name of compensation, specifically the parcel no. 1394/1 to have been returned.
28. However, according to the Applicant, it is also not disputable that, during the hearing session of 4 September 2012, he orally presented his position before the Special Chamber in the form of a request in which he stated that he would accept monetary compensation as an alternative form of compensation for the land.
29. The Applicant further states that during the hearing, the minutes were manipulated and that his alternative oral request was never recorded in the final version of the minutes, which led to the Specialized Panel and Appellate Panel ruling exclusively on the claim for confirmation of ownership of 2008-2011, and not on the issue of monetary compensation that he orally requested during the session in 2012. He considers that he is directly discriminated because in similar cases which concern the compensation issues the courts have rendered decisions that are different to the one issued in his case.
30. The Applicant also considers that during the proceedings before the regular courts the Law on Contested Procedure no. 03 / L-006 was violated, namely, the minutes of the hearing of 4 September 2012 were not served on him pursuant to Article 138, paragraph 3 and Article 139, paragraph 1 of the LCP, which consequently resulted in violation of the Law on Contested Procedure.
31. The Applicant requests from the Court to declare his Referral admissible, and find that the courts have violated his guaranteed constitutional rights and freedoms, as well as to annul the judgment of the Specialized Panel and Appellate Panel as invalid, and oblige the Special Chamber of the Supreme Court to render a correct and meritorious judgment in respect of his Referral.

Admissibility of the Referral

32. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure.
33. 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.”

34. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as further specified in the Law. In this respect, the Court first refers to Articles 48 [Accuracy of the Referral], 49 [Deadlines] of the Law, which provide:

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 [...].”

35. As to the fulfillment of these conditions, the Court finds that the Applicant has submitted the Referral in the capacity of an authorized party, challenging the act of a public authority, namely decision AC-1-12-0112-A0001 of the Appellate Panel, after exhaustion of all legal remedies. The Applicant also specified the rights and freedoms he claims to have been violated in accordance with the conditions of Article 48 of the Law and submitted the claim in accordance with the deadline established in Article 49 of the Law.
36. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which provides:

“(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.”

37. In the present case, the Court notes that the Applicant alleged violations of several articles of the Constitution and of ECHR, but the Court also finds that the Applicant relates all the violations to the fact that he has orally presented an alternative standpoint in the form of a request before the Special Chamber, whereby he proposed to be paid monetary compensation in the name of the compensation for the land, but during the session there occurred manipulations of the record and consequently, the courts never decided on that request.
38. The Court finds that essentially all of the Applicant's allegations primarily relate to the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR, and the violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.

Alleged violation of Article 31 of the Constitution in conjunction with Article 6 of ECHR

39. The Court, taking into account the Applicant's allegations, notes that he considers that he has not had a fair trial due to the fact that someone had manipulated the minutes and consequently the regular courts had erroneously established the factual situation and erroneously applied the substantive law, which resulted in courts not having ruled on his alternative oral request, but solely on the claim of 2008/2011. In support of his claim of alleged violation of the right to a fair trial, the Applicant also adds the fact that the minutes of the hearing were not served on him pursuant to Article 138, item 3, and Article 139, paragraph 1 of the LCP, thereby violating the LCP.
40. The Court, taking into account the case file, notes, first of all, that the present case concerns the determination of ownership upon the Applicant's claim, which he initiated in 2008, and specified by a written submission in 2011. Therefore, in the present case, we are dealing with a matter of a civil-legal nature, from which it results that Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR are applicable.
41. The Court, having regard to the Applicant's allegations concerning the erroneous determination of factual situation and erroneous application of substantive law, indicates that, according to the case law of the European Court of Human Rights (hereinafter: ECtHR) and the Constitutional Court, it is not the duty of these courts to review the findings of the regular courts in terms of the facts and the application of substantive law (see ECtHR case, *Pronina v. Russia*, decision on admissibility of 30 June 2005, application no. 65167/01).
42. In fact, the Constitutional Court is not competent to substitute regular courts in considering the facts and the evidence, but rather it is the duty of the regular courts to assess the facts and the evidence they have presented (see ECtHR case, *Thomas v. United Kingdom*, of 10 May 2005, application no. 19354/02). The duty of the Constitutional Court is to examine whether, eventually, any of the constitutional rights (right to fair trial, the right of access to justice, the right to an effective remedy, etc.) have been violated or neglected, and whether the application of the law was, eventually, arbitrary.

43. The Constitutional Court will, therefore, be exclusively involved in examining the manner in which the competent courts have established the facts and how they have applied positive rules of law to the facts thus established when it is evident that in a particular procedure has resulted an arbitrary action of the regular court, both in the fact-finding procedure and in the application of the relevant positive law provisions.
44. However, in the present case, the Court notes that the Applicant on 12 December 2008, has submitted a claim for determination of ownership rights, and that on 12 April 2011, he, by filing a submission, has specified that primary claim, wherein he solely sought the determination of ownership rights over a particular parcel as a form of compensation for his parcel.
45. The Court also notes that, the Specialized Panel taking into account both the primary claim of 2008 as well as the Applicant's specified claim of 2011, issued a judgment finding that the claim could not be realised in the form as sought by the applicant.
46. In this regard, the Court notes that the Specialized Panel rendered its judgment solely related to the possibility of compensation in the form in which the Applicant requested it in the 2008 and 2011 claims, which is compensation *in rem* and not in respect of the oral request in connection with the monetary compensation which according to the claimant, he had orally presented as an alternative option.
47. The Court further notes that the Applicant, in his appeal before the Appellate Panel, made the same allegations as before this Court, claiming that "*the minutes of the hearing were manipulated and that the Specialized Panel's judgment was based on the erroneous determination of the factual situation*".
48. In this regard, the Court notes that the Appellate Panel took into account the Applicant's appeal claims, which also resulted in the fact that it reviewed and analyzed the disputable minutes of the hearing, and found that it is an indisputable fact that on 4 September 2012, a hearing was held in the Special Chamber, and that the President of the Specialized Panel in respect of the issue of the applicant's claim for compensation, has made the *question "whether the applicant wants only land in exchange for land, to which the claimant's (Applicant's) legal representative replied , only land for the land"*.
49. Accordingly, the Appellate Panel rendered a decision concluding that the Applicant's appeal claims in this appeal were unfounded, because on the basis of the minutes it results that the Applicant had requested exclusively that the Specialized Panel decide on the compensation of land by the land and not on the possibility of monetary compensation as a form of alternative option.
50. In this regard, the Court wishes to point out in particular that, according to its opinion, the Specialized Panel and the Appellate Panel have correctly drawn their conclusions, on the ground that the regular courts have no jurisdiction to go beyond the claims and to decide or adjudicate on such matters.

51. Further, the Court cannot fail to notice that the Appellate Panel has also dealt with the Applicant's second appeal claim, which he raises also before this Court, alleging that the minutes of the hearing were not served on him pursuant to the legal provisions of Article 138, paragraph 3 and Article 139, paragraph 1 of the LCP. In this respect the Appellate Panel found that *"pursuant to Article 138, paragraph 2, and pursuant to Article 139, paragraph 1 of the LCP, the minutes are served on the parties within 3 days so that they be able to file their objections, the Appellate Panel considers that this provision is only applicable when the minutes of the hearing have not been kept"*.
52. Based on the foregoing, the Court concludes that it did not find anything that would indicate in the present case an arbitrary or incorrect application of the legal- substantive rules to the detriment of the Applicant. The Court also considers that the Applicant does not provide facts that could justify the claim that there has been a violation of the constitutional rights referred to, which is why there are no elements which *prima facie* indicate a possible violation of constitutional rights under Article 31 of the Constitution in conjunction with Article 6 para.1 of ECHR, and that meritorious examination would be required.

Alleged violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR

53. The Court notes that the Applicant as the main argument of violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR, alleges that the Specialized Panel and the Appellate Panel rendered wrong judgments and decisions, and consequently he failed to obtain compensation for his land, which would be proportionate with the value of his land parcel.
54. When considering whether there has been a violation of Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, the Court must first determine whether the applicant has "property" within the meaning of Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR.
55. In this regard, according to the consistent case law of the ECtHR and of the Constitutional Court, "property" within the meaning of Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR may be either "existing possessions" or "assets", including claims in respect of which an applicant has at least a "legitimate expectation" that they will be realised (see ECtHR judgment, *Jantner v. Slovakia*, 4 March 2003, no. 39050/97).
56. In doing so, the Court points out that "legitimate expectation" must be much more concrete than a "mere" hope, however reasonable the hope may be, it must be based on a legal provision or legal act such as a judicial decision (see ECtHR case, *Kopecký v. Slovakia*, application no. 44912 / 98, of 28 September 2004, paragraphs 48-49 ;).
57. Taking these principles into consideration in the specific case, the Court notes that the Specialized Panel and the Appellate Panel dealt exclusively with the Applicant's claim for determination of property rights.

58. The Court considers that in view of what was stated above the Applicant could not have had a "legitimate expectation" that the Specialized Panel and the Appellate Panel would render decisions on monetary compensation, since he had never submitted such a claim to the aforementioned authorities for deciding on it.
59. Accordingly, since the "legitimate expectation" must be based on a legal provision or a specific legal act, the Court considers that the claimant has not proved to have a "viable claim" which would constitute "property" within the meaning of Article 1 of Protocol 1 of the ECHR.
60. The Court concludes that there is no violation of the right to protection of property under Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR.

Alleged violation of Article 24 of the Constitution in conjunction with Article 14 ECHR

61. The Court notes that the Applicant considers to have been discriminated by the decisions of the Specialized Panel and the Appellate Panel because in "*similar situations which concerned compensation they had rendered decisions that are different to the one rendered in his case*".
62. Therefore, the Court considers that the Applicant complains about the violation of the rights from Article 24 of the Constitution and Article 14 of ECHR, concerning the right to property as per Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.
63. The Court recalls that, according to the case law of the ECtHR, the right to non-discrimination under Article 14 of ECHR is an accessory right. This means that this article does not guarantee a standalone or independent right to non-discrimination, and this Article can be referred to against discrimination only in relation to the "enjoyment of the rights and freedoms guaranteed by the ECHR".
64. Although the finding of a violation of one of the guaranteed rights is not a prerequisite for the application of Article 14 of the ECHR, however, this Article will not be applicable unless the facts of a particular case fall "within the scope" of the guaranteed right (see ECtHR case, *Karlheinz Schmidt v. Germany*, of 18 July 1994, Series A no. 291-B, paragraph 22).
65. In the present case, the Court had already concluded that the Applicant had no "property" within the meaning of Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, consequently his allegations do not fall within the scope of this Article, hence Article 14 of the ECHR cannot be applied.
66. In addition, the Court recalls that the Applicant in his submissions merely haphazardly alleges that he was discriminated "*because the courts in similar cases which concern the compensation issues have rendered decisions that are different to the one issued in his case*" without providing any evidence that could, *prima facie*, make the allegations of a violation of this right possible.

67. On this basis, the Court considers that the allegations of a violation of the right to prohibition of discrimination are set out in Article 24 of the Constitution and Article 14 ECHR in relation to the right to protection of property under Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, are manifestly (*prima facie*) ill-founded, because the facts presented in no way can justify the allegation that there has been a violation of the Constitutionally guaranteed rights.
68. The Court emphasizes that it is the obligation of the Applicant to substantiate his constitutional claims and to submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see the cases of Constitutional Court No. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Sylja*, of December 5, 2013).
69. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and should be declared inadmissible pursuant to Rule 39 (2) 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 49 of the Law and Rule 39 (2) of the Rules of Procedure, on 10 September 2019, unanimously

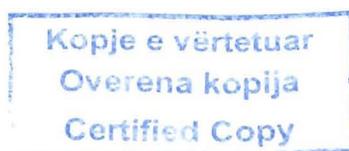
DECIDES

- 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

Safet Hoxha



Arta Rama-Hajrizi