



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

Prishtina, 21 October 2019
Ref. no.:RK 1456/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI97/19

Applicant

Gëzim Sadrijaj, Gazmend Sadrijaj and Hidajete Sadrijaj

**Constitutional review of Judgment Rev. No. 403/2018,
of the Supreme Court of Kosovo, of 8 January 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 Gëzim Sadrijaj, Gazmend Sadrijaj and Hidajete Sadrijaj from the village Lëbushë, Municipality of Deçani (hereinafter: the Applicants), who are represented by Haxhë Nikqi, a lawyer from Peja.

Challenged decision

2. The Applicants challenge the constitutionality of Judgment Rev. No. 403/2018 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 8 January 2019, which rejected the Applicants' revision against Judgment Ac. No. 1481/2018 of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), of 10 April 2018. The challenged Judgment was served on the Applicants on 19 February 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicants' rights 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 for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

4. The Referral is based on 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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 13 June 2019, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 17 June 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha (members).
7. On 11 July 2019, the Court notified the Applicants' representative about the registration of the Referral and requested that he submits to the Court the power of attorney proving that he represents the Applicants before the Court.
8. On 22 July 2019, the Court received from the Applicant's representative the power of attorney proving that he represents the Applicants before the Court.

9. On 25 July 2019, the Court notified the Supreme Court about the registration of the Referral and requested the Basic Court to submit the acknowledgment of receipt proving the time when the Applicants were served with the challenged Judgment.
10. On 30 July 2019, the Court received the acknowledgment of receipt from the Basic Court.
11. On 8 October 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

12. On an unspecified date A.K., H.K. and N.K. (the claimants), filed a claim with the Municipal Court in Deçan (hereinafter: the Municipal Court), against the Applicants Gëzim Sadrijaj and Gazmend Sadrijaj, as well as against Fate Bobaj (the respondent), for the confirmation of the right of permanent servitude over the cadastral parcel no. 598 from the possession list 00009 CZ-Lebushë (the contested parcel), which was in the name of Fate Bobaj and in the possession of Gëzim Sadrijaj and Gazmend Sadrijaj. The claimants alleged that they had used part of the disputed parcel for passage to their property for 50 years and, consequently, had the right of servitude over the disputed parcel.
13. On an unspecified date, the Applicants filed a counterclaim against the claimants A.K., H.K., and N.K.
14. On 21 October 2011, the Municipal Court in Deçan, by Judgment C. No. 75/10, rejected as ungrounded the claimants' claim and approved the counterclaim of the respondents, to reject the claimants' statement of claim and termination of the right of servitude.
15. The claimants filed appeal against Judgment C. No. 75/10, of the Municipal Court with the District Court in Peja (hereinafter: the District Court).
16. On 16 May 2012, the District Court by Decision AC. No. 42/2012 approved the claimants' appeal as grounded and remanded Judgment [C. No. 75/10] of the Municipal Court for retrial and reconsideration.
17. On 15 April 2013, the Basic Court in Peja, branch in Deçan (hereinafter: the Basic Court), by Judgment C. No. 109/2014, approved the claimants' claim and confirmed their right of servitude for permanent passage over the disputed parcel to use their lands.
18. The respondents (the Applicants) filed appeal with the Court of Appeals against the Judgment of the Basic Court [C. No. 109/2014], on the grounds of essential violation of the provisions of the contested procedure; erroneous and incomplete determination of factual situation; and erroneous application of substantive law.

19. On 28 June 2016, the Court of Appeals, by Judgment AC. No. 3347/2013, rejected the appeal of the respondents and upheld the Judgment of the Basic Court [C. No. 109/2014].
20. The respondents filed a revision with the Supreme Court against the Judgment of the Court of Appeals [AC. No. 3347/2013], on the grounds of violation of the provisions of the contested procedure and erroneous application of the substantive law.
21. On 6 January 2015, the Supreme Court by Decision Rev. No. 337/2014 approved as grounded the revision, quashed Judgment AC. No. 3347/2013, of the Court of Appeals and Judgment C. No. 109/2014 of the Basic Court and remanded the case for retrial. The Supreme Court, *inter alia*, reasoned that the decisions of the Basic Court and the Court of Appeals did not determine all the relevant facts regarding the case, namely that it was not established whether in the three plots of the claimants, over which they seek the servitude of the permanent passage on the contested parcel, was built any residential premise or it is about arable agricultural land. The determination of these facts, according to the Supreme Court, is essential for establishing the right of permanent passage in the disputed parcels.
22. In the retrial proceedings, after the respondent Fate Bobaj died, the claimants modified the claim and the Applicants modified the counterclaim, where Hidajete Sadrijaj (sister of Gëzim Sadrijaj and Gazmend Sadrijaj), instead of Fate Bobaj, on whose behalf the disputed parcel was registered, appeared as a party.
23. On 27 October 2017, the Basic Court, by Judgment C. No. 276/2017, approved again the claimants' claim and upheld their right of servitude, namely the permanent access to the contested parcel. Concerning the request of the Supreme Court to determine the relevant facts for deciding the claim, the Basic Court, after site inspection and obtained the witness statements, came to a conclusion that from the administered evidence it was proved that the servitude of passage was used and is used by the owners of subservient property for more than 50 years, and the claimants were entitled to permanent access to the disputed plot. The Basic Court also reasoned that the determination of these facts consumes the suggestion of the Supreme Court to establish whether any residential premises have been constructed on the subservient plots.
24. The Applicants filed appeal against the Judgment of the Basic Court [C. No. 276/2017], with the Court of Appeals, on the grounds of essential violation of the provisions of the contested procedure; incorrect and incomplete determination of factual situation; and, erroneous application of substantive law.
25. On 10 April, 2018, the Court of Appeals by Judgment AC. No. 1481/2018 rejected the Applicants' appeal and upheld the Judgment of the Basic Court [C. No. 109/2014].
26. The respondents filed revision with the Supreme Court against the Judgment of the Court of Appeals [AC. No. 1481/2018], on the grounds of violation of the

provisions of contested procedure and erroneous application of substantive law, noting that the Basic Court and the Court of Appeals decided contrary to the requirements of the Judgment of the Supreme Court [Rev. No. 337/2014].

27. On 8 January 2019, the Supreme Court by Judgment Rev. No. 403/2018 rejected the Applicants' revision against the Judgment of the Court of Appeals [AC. No. 1481/2018], as ungrounded. The Supreme Court, *inter alia*, reasoned that the lower courts established the legally relevant facts and based on them came to a legal conclusion, which is acceptable also to the Supreme Court, regarding the approval of the claimants' statement of claim as grounded..

Applicant's allegations

28. The Applicants allege that, by the challenged Judgment, the Supreme Court violated their right to fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.
29. The Applicants base their allegation of violation of the right to fair trial on, as they point out, the lack of reasoning of the challenged decision of the Supreme Court, in determining whether the legal requirements for acquisition of the right to permanent servitude are met. They allege that the Supreme Court, in the challenged decision, did not give sufficient reasons why it departed from its position given by Judgment No. 337/2014, where the Supreme Court requested the lower courts to determine the issue of the premises built on the claimants' cadastral plots, because their establishment is essential to determine the right of permanent servitude in the present case.
30. In this regard, the Applicants refer to a number of cases of the Constitutional Court where the Court found a violation of Article 31 of the Constitution due to the lack of reasoning of the court decisions, specifying in particular the cases: KI135/14, KI96/17 and KI139/15. The Applicants emphasize that in the cases mentioned above, the Constitutional Court has "*demonstrated the importance of sufficient and adequate reasoning of judicial decisions - as an important element of the constitutional right to a fair trial, a criterion that the Applicant considers not to have been applied in the present case*".
31. They also complain that the Supreme Court has failed to fulfill its obligation under Article 53 of the Constitution to "*deal with the case of the court in the context of the relevant case law of the [ECtHR]*", referring also to some cases of the ECtHR regarding the reasoning of decisions.
32. The Applicants complain that as a result of the foregoing, the challenged decision also resulted in a violation of the constitutional principle of legal certainty and the prohibition of arbitrariness in decision-making and consequently, the right to a fair trial under Article 31 of the Constitution and Article 6 of the ECHR.
33. Finally, the Applicants request the Court to find that their right to a fair trial has been violated by the Supreme Court and to remand the case for retrial.

Admissibility of the Referral

34. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.
35. 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”.

36. The Court also examines whether the Applicants have fulfilled the admissibility requirements foreseen by 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 [...].”

37. As regards the fulfillment of the abovementioned criteria, the Court finds that the Applicants are authorized parties; have exhausted available legal remedies; have clarified the act of public authority which constitutionality they are challenging and the constitutional rights which they claim to have been violated, and have submitted the Referral on time.

38. In addition, the Court examines whether the Applicants have met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure provides that:

“(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”.

39. The Court recalls that the substance of the Applicants’ allegations is that the regular courts, after their case was remanded for reconsideration by the Supreme Court, did not reason their decisions regarding the determination of facts as requested by the Supreme Court [Judgment No. 337/2014]. In this regard, the Applicants put emphasis on the allegation that the Supreme Court requested the lower courts to establish whether residential plots were built on the claimants’ subservient plots, claiming that the determination of this fact is essential to determining the right of permanent servitude in the present case. As a consequence of the non-reasoning of the decision regarding this allegation, in particular by the Supreme Court, they complain that they have been denied the right to a reasoned decision guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

Regarding the right to a reasoned decision

40. As to the allegation that the decision was not reasoned, the Court recalls that, according to the case law of the European Court of Human Rights (hereinafter: the ECtHR), the right to a fair trial includes the right to a reasoned decision.
41. According to its established case-law, the ECtHR considers that, based on the principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (See *Tatishvili v. Russia*, No. 1509/02, ECtHR Judgment of 22 February 2007, paragraph 58; *Hiro Balani v Spain*, ECtHR, application No. 18064/91, Judgment of 9 December 1994, para. 27; *Higgins and Others v. France*, ECtHR, case No. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42; *Papon v. France*, ECtHR, Case No. 54210/00, Judgment of 7 June 2001).
42. In addition, the ECHR has found that national authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (1) of the ECHR, but that courts must “*indicate with sufficient clarity the grounds on which they based their decision*” (See, *Hadjianastassiou v. Greece*, ECtHR Judgment of 16 December 1992, paragraph 33).
43. According to the case law of the ECtHR, a basic function of a reasoned decision is to demonstrate to the parties that they have been heard. In addition, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice. (See *mutatis mutandis*, *Hirvisaari v. Finland*, no. 49684/99,

paragraph 30, 27 September 2001; see also *Tatishvili v. Russia*, ECtHR, application no. 1509/02, Judgment of 22 February 2007, paragraph 58).

44. In accordance with the case law of the ECtHR, the Constitutional Court of Kosovo emphasized that, although the courts are not obliged to address all the allegations put forward by the Applicants, they should nevertheless address the allegations central to their cases. (See *mutatis mutandis* case *IKK Classic*, Judgment of 9 February 2016, paragraph 53).
45. Therefore, the Court reiterates that the right to obtain a court decision in conformity with the law includes the obligation for the courts to provide reasons for their rulings, at both procedural and substantive level (See *mutatis mutandis* case *IKK Classic*, Judgment of 9 February 2016, paragraph 54).

Application of the aforementioned standards in the case of the Applicants

46. In the present case, the Court notes that initially the Supreme Court [Decision Rev. No. 337/2014] approved as grounded the revision of the Applicants (the respondents) and quashed Judgment AC. No. 3347/2013, of the Court of Appeals and Judgment C. No. 109/2014 of the Basic Court and remanded the case for retrial. The Supreme Court requested the establishment of the relevant facts to confirm the right of permanent servitude of the claimants over the contested parcel, namely whether there were any residential premise or agricultural land in the subservient parcels.
47. The Court notes that after the Supreme Court remanded the case for retrial, the Basic Court took actions to establish the facts of the right of servitude over the disputed parcel, namely on the basis of the site inspection and witness statements. In this regard, the Basic Court, in Judgment C. No. 276/2017, reasoned that:

“The witnesses M.K , R.S, E.K, S.K dhe R.K, stated that the subject road has been divided by a wall and always the claimants and their predecessors, since the time they remember for more than 55 years, have constantly used this road as a permanent road, for passage all the time, by foot or vehicles. Along this route, besides the claimants, also other co-villagers pass through this road at all times, the right which was never challenged by the predecessors of the respondents to the claimants or the owners of other lands that always pass through that road.

[...]

In this circumstance, the [Basic] Court assesses that from the administered evidence it was established that the passage servitude, was used and is used by the owners of the subservient property for more than 50 years.

48. As to the request of the Supreme Court to ascertain whether residential buildings are constructed on the subservient plots, the Basic Court in its Judgment [C. No. 276/2017], established that the claimants had the right of permanent servitude over the disputed parcel for more than 50 years, reasoned that:

“On the other hand, the very fact of defining the part this servitude passes, where this part is separated as a parcel with culture road and the fact that this street serves no one but the claimants but also some other owners of their immovable properties, thus these facts consume the suggestion of the Supreme Court”, to determine if residential buildings are built in the subservient parcels.

49. Whereas, the Supreme Court in Judgment Rev. No. 403/2018 regarding the findings of the Basic Court, upheld by the Court of Appeals, reasoned its decision, stating that:

“The Supreme Court, too, holds that the respondents unjustly challenge the claimants’ right to use the contested road permanently for the purpose of the normal use and normal use of their parcels [...] because there is no establishment of the easement, or the opening of a new road for the purpose of passing it, but it is the claimants’ right to cross an existing road which they have passed for nearly 50 years, necessarily for normal use of their plots [...]

The revision of the respondents states that the judgment of the court of second instance contains essential violation of the provisions of contested procedure that the court of second instance contrary to the established factual situation and the evidence in the case file concludes that the claimants have permanently used the disputed route to access their parcels. These claims of revision of contradiction and ambiguity in the enacting clause and reasoning of the judgment referring to Article 182.2 item n of the LCP do not stand as grounded, since the second and first instance courts in a certain way based on the evidence administered, and especially on the basis of the site examination, geodesy expertise and the testimony of the majority of witnesses, has established that the claimants have used the contested road for approximately 50 years to enter and exit their parcels, which in cadastral evidence is registered as a private road, where it is seen that the only access of the claimants from the main road to their parcels is the use of the contested road [...].

As the Supreme Court ordered that some important facts and circumstances be established in the reconsideration, the first instance court has established those legally relevant facts and based on them has reached a legal conclusion that is acceptable also by the Supreme Court [...].”

50. In these circumstances, the Court considers that the findings of the regular courts, including the Supreme Court, were reached after thorough examination of all the arguments presented by the Applicants. In this way, the regular courts, based on the findings of Decision Rev. No. 337/2014 of the Supreme Court, established the relevant facts and gave their reasoning regarding their positions.
51. Therefore, the Court finds that the challenged Judgment Rev. No. 403/2018 of the Supreme Court is clear and properly addresses the issues raised by the Applicant regarding the establishment of relevant facts to determine the right of permanent servitude over the disputed parcel. The reasoning given by the Supreme Court meets the standards of a reasoned decision elaborated above and therefore did not infringe Article 31 of the Constitution and Article 6 of the ECHR.

52. The Court highlights its principled position that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See, *mutatis mutandis*, case of the ECtHR, *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999 paragraph 28). Therefore, the Constitutional Court cannot act as “a fourth-instance court” (See, *mutatis mutandis*, case of the Constitutional Court KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
53. The Court further notes that the Applicant is not satisfied with the outcome of the proceedings before the regular courts. However, the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim for the violation of the constitutional right to fair and impartial trial. (See, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; and see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 42).
54. In these circumstances, the Court considers that the admissibility requirements have not been met and that the Applicants did not substantiate their allegations that the challenged Judgment violated their constitutional rights and freedoms.
55. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and is 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 in accordance with Rule 39 (2) of the Rules of Procedure, on 8 October 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

