REPUBLIKA E KOSOVËS – РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

BULLETIN OF CASE LAW
2011

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The purpose of the summary of the decisions is to provide a general factual and legal overview of the cases and a brief summary of the decisions of the Constitutional Court. The summary of decisions and judgments in Albanian and English Language have been compiled by the Effective Rule of Law Program, USAID, and as such, they do not replace the decisions of the Constitutional Court nor do they represent the actual form of the decisions /judgments of the Constitutional Court.

BULLETIN OF CASE LAW

2011

OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

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CONSTITUTIONAL COURT

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Foreword for Bulletin of Case Law of the Constitutional Court for 2011

The Constitutional Court of Kosovo was established in 2009 and it is still a young Court. From its inception it has published its decisions on its website, in the Official Gazette. The decisions issued in the years 2009 and 2012 are been published, in a Bulletin of cases that makes the most recent decisions available in one volume. Now we publish the decisions for the year 2011. These include important issues in the protection of human rights and fundamental freedoms and also in relation to Referrals to the Court in cases lodged with the Court by authorised constitutional parties.

Many of these decisions are Resolutions on Inadmissibility where the Court does not make findings of violations of human rights guaranteed under the Constitution. However, many of them involve important decisions where the Court, as the final interpreter of the Constitution and of compliance with laws with the Constitution, has vindicated the rights of citizens where public authorities have acted outside the powers given to them under the Constitution.

It is therefore with great pride that we publish the second Bulletin of case law of the Constitutional Court of Kosovo for the year 2011.

This Bulletin will enable not only Judges, legislators, advocates and other legal practitioners, academics, students and the general public to have an accessible source of the jurisprudence of the Constitutional Court.

The Court commits itself to the highest standards of decision making always bearing in mind the overriding principles of constitutionality that will guarantee for all citizens stability, legal certainty and enforcement of the rule of law, all of these hallmarks of a modern democracy.

Prof. dr. Enver Hasani

President of the Constitutional Court

Teki Bokshi vs. UNMIK Administrative Direction No. 2003/13, as amended and replaced

Case KI 45-2009, decision of 30 November 2010

Keywords: actio popularis, authorized parties, discrimination, equality before the law, human dignity, individual referral, language issues, *locus standi*, right to fair and impartial trial

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that Articles 22.7 and 64.7 of UNMIK Administrative Direction No. 2003/13, as amended and replaced, violate fundamental rights and freedoms guaranteed by Articles 5, 23, 24 and 31 of the Constitution, as well as Articles 6 and 14 of the European Convention on Human Rights, because it provides for the Special Chamber's translation into English of submissions in Kosovo Trust Agency cases, yet requires parties to bear the expense of English translations in other cases, which amounts to discrimination.

The Court held that the Referral was inadmissible pursuant to Articles 53 and 113.7 of the Constitution, Article 47.1 of the Law on the Constitutional Court, and Rule 69 of the Rules of Procedure because the Applicant was not a direct victim of the alleged unconstitutionality, depriving him of standing as an authorized party. The Court noted that the Constitution does not provide for submission of an *actio popularis* by an individual who is not directly affected by an alleged Constitutional violation. For these reasons, the Court decided to reject the Referral as inadmissible.

Pristina, 30 November 2010
Ref. No.: RK 65/10

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 45/09

Applicant

Teki Bokshi

Constitutional Review of UNMIK Administrative Direction No. 2003/13, as amended and replaced.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Teki Bokshi, a lawyer, residing in Gjakova, Kosovo.

Administrative Direction Challenged

2. The Applicant challenges the United Nations Mission in Kosovo (UNMIK) Administrative Direction No. 2003/13, as amended and replaced by UNMIK Administrative Direction No. 2008/6, which entered into force on 11 June 2003.

Subject Matter

3. The Applicant alleges that the operation of Articles 22.7 and 64.7 of UNMIK Administrative Direction No. 2003/13 and Articles 22 (7) and 25 (1) (b) of UNMIK Administrative Direction No. 2006/17, which replaced UNMIK Administrative Direction 2003/13 on 6 December 2006, are in violation of fundamental rights and freedoms protected by the Constitution of the Republic of Kosovo. The Applicant further maintains the Article 6 and Article 14 of the European Convention on Human Rights have been violated. Article 6 of the Conventions refers to the entitlement to the Right to a Fair Trial and Article 14 refers to the Prohibition of Discrimination.

Legal Basis

4. Article 113.1. and 7 of the Constitution of Kosovo (hereinafter: "the Constitution"); Articles 46 and 47 of the Law on the Constitutional Court of the Republic of Kosovo of 16 December 2009, (No. 03/L-121), (hereinafter: "the Law"); and Section 69 and Section 54 of the Rules of

Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

5. On 29 September 2009, the Applicant submitted his Referral to the Court, contesting the constitutionality of the UNMIK Administrative Direction No. 2003/13.

6. On 15 June 2010, the Review Panel, consisting of Judge Robert Carolan (Presiding), Judge Ivan Čukalović and Judge Snezhana Botusharova, considered the Report of Judge Rapporteur Almiro Rodrigues and made a recommendation on inadmissibility to the full Court.

Summary of the facts

7. On 28 September 2009, Mr. Teki Bokshi, a lawyer residing in Gjakova, filed the Referral referred to in paragraph 3 above.

8. The Applicant alleges that Article 22 (7) and 64 (7) of the UNMIK Administrative Direction No. 2003/13, as amended and replaced, are "in contradiction with Articles 5, 23, 24, 31 of the Constitution of the Republic of Kosovo" and "in contradiction to determined policy with Article 6 – the right to a fair trial, and especially by Article 14 on prohibition of discrimination of the European Convention on Human Rights."

9. The Applicant supports his Referral solely by reference to the documents referred to in the Referral made to the Court.

Applicant's allegations

10. The Applicant alleges that Articles 22.7 and 64.7 of UNMIK Administrative Direction No. 2003/13, as amended and replaced, are in violation of fundamental rights and freedoms protected by the Constitution of the Republic of Kosovo (hereinafter: "the Constitution). In particular, the Applicant specifies that Article 5 (Languages), Article 23 (Human Dignity), Article 24 (Equality Before the Law), and Article 31 (Right to Fair and Impartial Trial) are the violated provisions of the Constitution.

11. Article 22.7 of UNMIK Administrative Direction No. 2003/13 was amended and replaced originally by UNMIK Administrative Direction No. 2006/17 and finally by UNMIK Administrative Direction No. 2008/6. The challenged Article of the Administrative Direction is now

Article 25.7, it provides for the language in which cases submitted to the Special Chamber of the Supreme Court of Kosovo must be furnished to the Chamber in the following terms:

25.7 Pleadings and supporting documents may be submitted in Albanian, Serbian or English. However, if submitted in Albanian or Serbian, an English translation of all pleadings and supporting documents shall be provided together with the pleadings. Such translation shall be performed at the party's expense.

12. Article 64.7 of the original UNMIK Administrative Direction is now replaced by Article 67.11 of UNMIK Administrative Direction No 2008/6, it provides for the translation of documents in relation to claims made against the Kosovo Trust Agency in the following terms:

67.11 The Special Chamber shall arrange, where necessary, for the translation into English of the complaint, any subsequent submissions and any supporting documents. Such translations shall be supplied to the complainant(s) and the Agency as soon as they are available, which shall be not later than 7 days before the oral hearing.

13. The Applicant thereby maintains that under the Administrative Direction, in certain claims made against the Kosovo Trust Agency, the Special Chamber shall translate submissions that are made by the Kosovo Trust Agency into English and that this therefore amounts to discrimination.

14. Furthermore, the Applicant alleges that Articles 6 and 14 of the European Convention on Human Rights were violated.

Assessment of the admissibility of the Referral

15. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

16. Article 113.7 of the Constitution specifies that "*Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution.*" The Applicant however, does not demonstrate that he himself is a victim of any violation by a public authority.

17. Furthermore, Article 47.1 of the Law specifies that "[e]very 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." The Applicant yet again, does not demonstrate that the rights and freedoms of *he himself* were or are directly violated by a public authority. As section 69 of the Rules of Procedure clarifies, "[w]hen filing a referral pursuant to Article 113, Paragraph 7 of the Constitution, the authorized party shall convincingly present that he/she has been directly and currently violated by a public authority in his/her rights and freedoms guaranteed by the Constitution."

18. Finally, according to Article 53 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". According to the Strasbourg case-law "[t]he system of individual petition…excludes applications by way of *actio popularis*. Complaints must therefore be brought by or on behalf of persons who claim to be victims of a violation of one or more of the provisions of the Convention. Such persons must be able to show that they were 'directly affected' by the measure complained of" (*see e.g. Judgment in the case İlhan v. Turkey*, No. 22277/93, 27 June 2000, paragraph 52,). Since the referring party, as an individual Applicant, has not demonstrated that he is an authorised party, the Court concludes that the Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.1 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Ruhan Berisha vs. Non-execution of the Judgment of the Municipal Court in Gjilan C. nr. 388/05

Case KI 36-2009, decision of 20 January 2011

Keywords: contract dispute, execution of judgment, exhaustion of legal remedies, individual referral

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, contending without clearly specifying a particular Constitutional provision that his rights were infringed by the Gjilan Municipal Court's failure to execute a judgment that he obtained following a contract dispute. The commercial debtor was liquidated after the judgment became final and executable.

The Court held that the Referral was inadmissible pursuant to Article 113.7 because the Applicant filed to exhaust his legal remedies by appealing to the Special Chamber of the Supreme Court, which had appropriate jurisdiction, emphasizing the presumption that the Kosovo legal system will provide effective legal remedies for Constitutional violations, citing *Selmouni v. France*. The Court added that a party's mere assumption that an appeal would be futile is insufficient to excuse a failure to appeal to a competent authority, citing *Whiteside v. The United Kingdom*. The Court also indicated that the Applicant had failed to specify the rights and freedoms that were allegedly violated and the acts of a public authority that were subject to challenge, citing Article 48 of the Law on the Constitutional Court.

Prishtina, 20 January 2011
Ref. No.: RK 82/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 36/09

Applicant

Ruhan Berisha

Constitutional Review of Non-execution of the Judgment of the Municipal Court in Gjilan C.nr 388/05

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of :

Enver Hasani, President
Kadri Kryeziu, Vice-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge
Iliriana Islami, Judge

Applicant

1. Applicant is Mr. Ruhan Berisha from Gjilan.

Challenged Decision

2. The Applicant complaints on the non-execution of the Judgment of the Municipal Court of Gjilan, dated 20 October 2005.

Subject Matter

3. Subject matter for review in the Constitutional Court is the non-execution of the final Judgment of the Municipal Court of Gjilan C.nr.388/05 dated 20 October 2005, which upholds the claim-suit of Mr. Berisha in its entirety, and obliges the Consortium "Iliria" from Gjilan to repay to the plaintiff the amount as per item II of the Judgment.

Legal Basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: Constitution); Article 20 of the Law *03/L-121* on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and Article 54 (b) of

the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Court

5. The Applicant has submitted a referral in the Constitutional Court on 3 September 2009.

6. On 5 February 2010, the Constitutional Court issued a notification on the registration of the case to the Kosovo Privatization Agency, with the request for a reply in accordance with Article 22.2 of the Law on the Constitutional Court of Kosovo, and never received any reply to the request.

7. On 15 June 2010, after the review of the report of Judge Rapporteur, Iliriana Islami the Review Panel, composed of Judges Robert Carolan, Snezhana Botusharova and Ivan Čukalović, presented its recommendations to the full court to reject the case as inadmissible .

Summary of the facts

8. On 15 February 2002 Mr. Ruhan Berisha, jointer of assets, signed a contract to join for the construction of the Commercial-Residential Building "ILIRI-5/1" with the consortium "Iliria - 5/1", represented by; "Textile Combine INTEGJ and NHIN MORAVA E BINQES" as executors of investments, with the conditions specified in the contract, with the aim of acquiring ownership rights of the flat in Block I, Entry II, first floor, apartment No. 23, with a total surface area of 64,21 m² envisaged to be part of the to-be-built building.

9. The contract was validated in the Municipal Court of Gjilan on 19 February 2002, under the number VR.nr.357/02

10. According to the contract, construction works should be completed 18 months from the day the contract was signed, the latest.

11. After having paid two installments in a timely manner in line with the contract, Mr. Berisha was informed that the building will not be constructed. Discontent with the situation, on 13 May 2005, he filed a lawsuit in the Special Chamber of the Supreme Court of Kosovo, requesting compensation in the amount of 27,611.00 €

12. On 9 June 2005, with the Decision SCC-05-0148, the Special Chamber of the Supreme Court of Kosovo referred the case to the Municipal Court in Gjilan, as the competent court.

13. The Municipal Court in Gjilan, in its Judgment of 20 October 2005, upheld the Claim-suit of the Plaintiff, Mr. Ruhan Berisha, in its entirety, and declared the contract on the jointer of assets for the construction of the commercial-residential building "Iliria 5/1" as null and void, and obliged the Respondent, Consortium Iliria, to pay to the plaintiff the amount of 27.611€ and compensation of litigation expenses in the amount of 151€.

14. On 15 March 2006 the Decision of the Municipal Court became final and executable.

15. The Decision E.nr.249/06 of the Municipal Court in Gjilan rejected the objection of the debtor, Consortium "Iliria", filed against the Decision of the Court to allow the execution.

16. The textile Combine from Gjilan, namely the debtor, was liquidated on 1 December 2006.

17. Ruhan Berisha completed and filed the form in PAK, but received no response.

18. After this, the Plaintiff, Mr. Berisha, no longer addresses the Special Chamber, although the Decision of the Municipal Court involves the Consortium "Iliria", liquidated in 2006.

Applicant's Allegations

19. The Applicant, in his request, doesn't clearly specify which constitutional rights have been violated, and requests the execution of the Judgment of the Municipal Court in Gjilan.

Assessment of the admissibility of the referral

20. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this relation, the Court makes reference to Article 113.7 of the Constitution, which provides that:

"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", and

Article 48 of the Law, which provides that:

"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."

21. Based on the documentation presented for the case, the court finds that following the Judgment taken by the Municipal Court in Gjilan (Judgment C.nr.388/05), the Applicant, aware that his debtor ILIRIA Consortium, respectively its representative, has underwent liquidation did not submit the matter to the Special Chamber of the Supreme Court, which, based on the UNMIK Regulation 2002/13, has jurisdiction to decide, taking into consideration that Mr. Berisha already possessed a Municipal Court Judgment which was not executed, while ILIRIA Consortium, and its respective components, was administered by the Kosovo Trust Agency.

22. The court also points out in this case that the domestic legislation, particularly the abovementioned regulation on the Special Chamber of the Supreme Court, provides for the jurisdiction for settlement of property disputes for claimants who sue companies under the administration of the KTA. Article 9.7 of this regulation expressively stipulates that "The decision in relation to a claim pursuant to Article 4 or settlement of a claim pursuant to Article 4.3 is final and binding for parties and should be executed by the adequate bodies in line with the applicable law.

23. Considering the above, the court holds that the applicant should have submitted the matter to the Special Chamber of the Supreme Court before filing a referral to the Constitutional Court.

24. The court would like to emphasize, that the rationale behind the rule of exhaustion of legal remedies is to offer the respective authorities, including courts, the possibility to prevent or remedy the alleged violation of the Constitution. This rule is based in the presumption that the legal order in Kosovo will ensure effective legal remedy against violations of constitutional rights (see, mutatis mutandis, ECtHR, Selmouni v. France No. 25803/94, Decision of 28 July 1999).

25. The Court also maintains that, a mere presumption in relation to the perspective of the case is insufficient to exclude an applicant from

his/her duty to complain before the national competent authorities (see Whiteside v the United Kingdom, Decision of 7 March 1994, Application No. 20357/92, DR 76, p.80).

26. The applicant did not clarify the referral and failed to justify as far as procedural and substantive aspects are concerned in order to prove that such a constitutional right was violated.

FOR THESE REASONS

The Court, after reviewing all facts and evidences provided, and reviewing the issue of June 15, 2010, concluded that the Applicant HAS NOT exhausted all legal remedies available, and unanimously,

DECIDES

I. TO REJECT the referral as inadmissible;

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Iliriana Islami	Prof. Dr. Enver Hasani

Feti Islami vs. Decision of the Supreme Court of Kosovo Rev. 395/2008 and the decision of District Court in the Municipality of Peja Ac. No. 306/06

Case KI 11-2010, decision of 25 January 2011

Keywords: deadline issue, equality before the law, individual referral, inheritance issue, manifestly ill-founded referral, property ownership dispute, protection of property, right to effective legal remedies, right to property

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 21, 22, 24, 31, 41, 46, 53 and 54 of the Constitution were infringed by a judgment of the Supreme Court, which affirmed the Peja District Court's decision that the Peja Municipal Court had correctly rejected the Applicant's claim for inheritance rights in socially-owned property on the ground that the former owners of the property had been compensated in a legal manner.

The Court held that the Referral was inadmissible because it was submitted after expiration of the 4-month deadline imposed by Article 49 of the Law on the Constitutional Court. Also, the Court held that the Referral was manifestly ill-founded and inadmissible due to a lack of evidence demonstrating that the proceedings below were either not impartial or unfair, citing *Mezotur-Tiszacugi Tarsulat v. Hungary* for the proposition that mere dissatisfaction with an outcome is an insufficient basis for a referral. The Court highlighted that its role was limited to Constitutional disputes, which did not include factual or substantive law controversies, citing *Akdivar v. Turkey*. Finally, the Court held on identical grounds that the Referral was manifestly ill-founded in relation to the implicated European Convention on Human Rights allegations, citing *Mordechai Poznanski et al. v. Germany*.

Pristina, 25 January 2011
Ref. No.: 80/11

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 11/10

Applicant

Feti Islami

Constitutional Review of The decision of the Supreme Court of Kosovo Rev. 395/2008 and The decision of District Court in the Municipality of Peja Ac.No.306/06

THE CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

Composed of:

Enver Hasani,President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The applicant

1. The applicant is Mr. Feti Islami from Peja.

Challenged decisions

2. Challenged decisions are the decision of the Supreme Court of Kosovo rev 395/2008 of 2 June 2009 and the decision of District Court in the Municipality of Peja Ac. No. 306/06 of 25 May 2008.

Subject matter

3. The subject matter of the case submitted with the Constitutional Court of Republic of Kosovo on 26 January 2010 is the review of the constitutionality of the Judgment of the Supreme Court of Kosovo rev, 395/2008, which rejected the revision of plaintiffs: Feti Islami, Zyhdi Islami, Nexhmedin Islami, Belkize Shala, Muhamet Islami, Sehid Islami and Myzafere Dobroshi filed against the Judgment of District Court in Peja Ac.no. 306/06, and of the very Judgment of the District Court in Peja Ac.no.306/06 which had rejected the appeal of the abovementioned

plaintiffs and it had upheld the Judgment of the Municipal Court in Peja C. no 195/05 of 26 May 2006.

Alleged violations of the constitutionally guaranteed rights

4. The Applicant alleges that the challenged decisions of the competent Courts have violated his rights guaranteed by the Constitution of Kosovo, as follows:

    a) Fundamental rights and freedoms, Article 21 paragraphs 1, 2, 3 and 4.
    b) Violations of international agreements and conventions pursuant to Article 22 paragraphs 1, 2, 3, and 4.
    c) Violation of equality before the law, Article 24, paragraphs 1, 2, and 3;
    d) Violation of fair and impartial trial, Article 31, paragraph 1;
    e) Violation by non-transparency and obstruction of the right to access public documents, Article 41, paragraphs 1 and 2;
    f) Violation of the right to protection of property based on Article 46, paragraphs 1 and 3;
    g) Violation in the interpretation of the provisions on human rights, in harmony with court decisions of the European Court, Article 53 and
    h) violation of the right to effective legal remedies, Article 54.

Legal basis

5. Article 113.7 of the Constitution of Republic of Kosovo (hereinafter referred to as: the "Constitution"), Article 47 of the Law No. 03/L-121 on the Constitutional Court of Republic of Kosovo (hereinafter referred to as: the "Law"), and Section 29 of the Rules of Procedure of the Constitutional Court of Republic of Kosovo (hereinafter referred to as: the "Rules of Procedure").

Proceedings before the Court

6. The Applicant submitted his Referral with the Constitutional Court on 26 January 2010.

7. On 25 March 2010, the Constitutional Court notified the Supreme Court of Kosovo regarding the Referral submitted by Mr. Feti Islami. On 26 March 2010, Supreme Court of Kosovo by letter AGJ. No. 147/2010 sent a reply to the Constitutional Court of Republic of Kosovo in its submission regarding the Referral KI 11/10 and on that occasion it reiterated that "the Supreme Court has provided all the facts related to

the case in the reasoning of Judgment Rev. no. 395/08 and it has nothing else to add about this case".

8. On 31 August 2010 the Constitutional Court sent a letter to the Municipal Court in Peja requesting the Judgment AC. No 54/01 of 30 March 2001 which was missing in the case file submitted before the Constitutional Court. The Court received the requested copy of the Judgment on 16 September 2010.

9. On 13 December 2010, after reviewing the report of Judge Rapporteur Altay Suroy, the Review Panel composed of Judges Snezhana Botusharova (Presiding), Robert Carolan and Enver Hasani recommended to the full court to reject the Referral as inadmissible.

Applicant's Complaint

10. The Applicant complaints that the District Court by Judgment Ac.no 306/06 which rejected the lawsuit of the abovementioned plaintiffs and also the Supreme Court of Kosovo by rejecting Revision on this Judgment have violated the right to establish the ownership to property based on inheritance in the town of Peja which in Municipal Cadastral Service is registered as socially-owned property. The Applicant has requested from the Constitutional Court, in compliance with Article 50 of the Law on Constitutional Court of Kosovo, to restore the situation to the conditions prior to the judgments i.e. to allow the repeating of the procedure and to enforce the Judgment of the Municipal Court in Peja C.no. 54/01 of 28 March 2001 which was favorable for the Applicant.

Summary of the facts

11. On 30 March 2001, the Municipal Court in Peja issued Judgment C. no. 54/01 approving the claim filed by plaintiffs Feti Islami, Zyhdi Islami, Nexhmedin Islami, Belkize Shala, Muhamet Islami, Sehid Islami and Myzafere Dobroshi, and acknowledging their right to the immovable property registered in the cadastral plot 2774 with an area of 3007, 3021, 2976, registered in the possession lists 2606 and 313 in Peja CM as follows: to the first two plaintiffs Feti and Nexhmedin Islami, each in the size of 5/20 ideal parts, whereas to the other plaintiffs Belkize, Muhamet, Zuhdi, Sahit and Muzafere, each in the size of 2/20 ideal part.

12. This Judgment took final and executable form on 28 June 2001.

13. The Municipality of Peja, acting as the respondent, had submitted a request to allow for the repetition of proceedings and the Municipal

Court in Peja, on 11 April 2003 UPHELD this proposal and ALLOWED for the repetition of the proceedings, through Decision C. No. 54/01.

14. Acting upon an appeal by the plaintiffs against this decision, District Court in Peja issued Decision Ac. No. 262/03 of 25 May 2004, which QUASHED the Decision of the Municipal Court in Peja C. No. 43/01, which allowed for the repetition of proceedings and returned the case to the same court for Re-Trial.

15. On 14 November 2004, the Municipal Court in Peja, again deciding upon the order of the District Court in the retrial procedure for this case, AGAIN decided to UPHOLD the proposal of the respondent, Municipality of Peja, and allowed a repetition of the proceedings concluded with the final Decision of the Municipal Court in Peja, in which the claim suit of the plaintiffs denoted in paragraph 6 of this decision was upheld, thus acknowledging their right to the immovable property which was the subject of this claim-suit, or the right to a commensurate compensation of 114.000 €.

16. On 26 May 2006, the Municipal Court in Peja, acting upon the claim-suit submitted by plaintiffs Feti Islami, Zyhdi Islami, Nexhmedin Islami, Belkize Shala, Muhamet Islami, Sehid Islami and Myzafere Dobroshi, in accordance with the allowed repeated proceeding, issued JUDGMENT C. No. 195/05, which entirely rejected the claim-suit of the plaintiffs, assessing that the plaintiffs did not provide evidence that would verify their right to the disputed immovable property, whereas the respondent, Municipality of Peja, had provided convincing evidence that the object of this claim-suit is socially-owned property and that its former owners were compensated in a legal manner at the time of its expropriation.

17. On 22 May 2008, the District Court in Peja, through its Judgment Ac. No. 306/06, rejected the appeal presented by the plaintiffs through their authorized representative as unfounded and UPHELD the Judgment of the Municipal Court in Peja, C. no. 195/05 of 26 May 2006.

18. On 2 June 2009, the Supreme Court of Kosovo, through its Judgment Rev no. 395/2008, rejected the revision requested by the plaintiffs against Judgment Ac No. 306/2006 of the District Court in Peja as UNFOUNDED.

19. According to the personal statement of Mr. Feti Islami, he had received a copy of this Judgment on 15 July 2009.

20. Unsatisfied with the progress of the case, Mr. Feti Islami presented a submission at the Office of the Disciplinary Prosecutor against Judge

Ymer Jahëmurtaj and filed a criminal suit against this Judge, registered under PP. no. 1915/09, which was partially rejected, while the party was instructed to file a private claim-suit, if he still considers that there are grounds for criminal prosecution.

21. Mr. Feti Islami had also submitted a request for protection of legality with the State Prosecution, registered under number PCK no. 108/09, and the latter had responded that no procedure for protection of legality can be initiated against the Decisions of the Supreme Court on Revisions.

22. Finally, on 26 January 2010, Mr. Feti Islami filed a referral with the Constitutional Court of the Republic of Kosovo.

Assessment of admissibility

23. In order to be able to adjudicate the Applicants' Referral, the Constitutional Court needs first to examine, whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution.

24. In reference to this, the Court refers to Article 113.7 of the Constitution, which stipulates that:

"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", and,

25. Article 47.2 of the Law on the Constitutional Court of the Republic of Kosovo stipulates that:

"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

26. Article 49 of the Law on the Constitutional Court determines that:

"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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."

27. From the documentation submitted by the Applicant, it may be concluded that Mr. Feti Islami has filed his referral to the Constitutional Court on 26 January 2010, whereas the Judgment of the Supreme Court, as a final decision, was served on him on 15 July 2009, thus he had

submitted the referral to the Constitutional Court 6 months and 11 days from the day of the receipt of the final decision, and referring to the admissibility criteria, it appears that this referral is inadmissible as it was submitted to the Court after the expiration of the legal deadline, foreseen in Article 49 of the Law on the Constitutional Court

28. The Court concludes that even if the referral had been submitted within the foreseen 4 month deadline, it should have again been declared as inadmissible, since it is manifestly ill-founded.

29. In fact, the Constitutional Court of Kosovo enjoys no appeal jurisdiction and may not intervene from the theoretical aspect, if the courts had taken a wrong decision or had erroneously evaluated facts. The role of the Constitutional Court is to ensure compliance with the rights that are guaranteed with the Constitution and other legal instruments and therefore can not act as a "forth instance court" (see, mutatis mutandis Akdivar vs. Turkey, 16 September 1906, R.J.D. 1996-IV, paragraph 65).

30. Furthermore, the Court considers that there is nothing in the referral that would show that the regular courts, during the proceedings in the case, had lacked impartiality or that the proceedings were unfair. The simple fact that the applicants are unsatisfied with the result of the case does not grant them the right to file a substantiated referral on the violation of Article 31 of the Constitution (see mutatis mutandis the ECHR Judgment Appl. No. 5503/02 Mezotur-Tiszazugi Tarsulat vs. Hungary, Judgment of 26 July 2005.

31. Since Article 53 of the Constitution stipulates 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", and Article 22 of the Constitution determines that the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols is directly applicable in the Republic of Kosovo, than similar to the statement of ECHR, which in accordance with Article 35.3 finds a referral inadmissible when it is manifestly ill-founded in relation to the European Convention on Human Rights (see mutatis mutandis Application no. 25101/05 by Mordechai Poznanski and Others against Germany) the Constitutional Court states that the referral is inadmissible as manifestly ill-founded in relation to the Constitution of Kosovo, when deciding on its admissibility (Article 54, paragraph 1, item (b) of the Rules of Procedure of the Constitutional Court).

32. In such circumstances, the Applicant has not met the criteria for the admissibility of the referral.

FOR THESE REASONS

After the review of all presented facts and evidence and after having deliberated on the matter on 13 December 2010, the Court concluded that the Applicant has submitted the Referral after the expiration of the time-limit of four (4) months, foreseen in Article 49 of the Law on the Constitutional Court, and unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

This Decision shall be notified to the parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

Bislim Kosumi vs. Municipal Court of Podujevo

Case KI 34-2010, decision of 25 February 2011

Keywords: deadline issue, execution of judgment, individual referral, protection of property

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his constitutional rights were infringed by three judgments of the Supreme Court, which affirmed decisions of lower courts rejecting the Applicant's property ownership claims. The Applicant argued that the proceedings were terminated, but the judgment was unexecuted.

The Court held that the Referral was incompatible *ratione temporis* with the Constitution and the Law, and therefore inadmissible pursuant to Articles 49, 56 and 58 of the Law because it relates to decisions issued between 1986 and 1988, and should have been submitted before 15 May 2009, which was 4 months after the Law became effective, citing *Shefqet Haxhiu vs. Workers Organisation "Industria e akumulatorëve"* and *Blečić v. Croatia.*

Pristina,25 February 2011
Ref. No.: RK86 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 34/10

Applicant

Bislim Kosumi

vs.

Municipal Court of Podujevo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge.

Applicant

1. The Applicant is Mr. Bislim Kosumi, residing in Podujeva.

Challenged court decisions

2. The Applicant challenges the following decisions:

    a. Decision C.no.186/86 of the Municipal Court of Podujevo, dated 17.04.1986;
    b. Decision Ac.no. 444/1986 of the District Court of Prishtina, dated 11.07.1986;
    c. Decision 05 no. 313-500/87 of the Provicial Secretariat of Economy of Prishtina, dated 08.10.1987;
    d. Decision A.no. 1234/86 of the Supreme Court of Kosovo, dated 13.02.1987;
    e. Decision Gz.no. 350/1987 of the Supreme Court of Kosovo, dated 06.10.1987; and
    f. Decision A.no.1393/1987 of the Supreme Court of Kosovo, dated 15.03.1988.

Subject Matter

3. The Applicant requests “the review of (...) judicial acts and an order-recommendation by this court that based on aforementioned judicial acts my right of ownership is confirmed and that this right is executed by the competent municipal bodies in Podujevo i.e. the cadastral and urban affairs services”. He claims that his right to ownership has been violated.

Legal Basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 22 of Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Section 54(b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

5. On 29 January 2010, the Applicant filed a Referral. However, only on 22 March it was registered by the Secretariat of the Court.

6. On 22 March 2010, the Referral was communicated to the Municipal Court of Podujevo which, on 7 September, replied, stating that the decisions that the Applicant refers to are not in the possession of the Court since the Serbs have taken all documents with them after the war.

7. On 21 January 2011, the Review Panel, consisting of Judges Altay Suroy (Presiding), Kadri Kryeziu and Gjyljeta Mushkolaj, considered the Report of the Judge Rapporteur Almiro Rodrigues and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. On 3 July 1985, the Applicant purchased a commercial photograph shop in Podujeva.

9. On 11 April 1986, the Applicant filed a suit in the Municipal Court of Podujevo, in order to confirm the contract of purchase of a commercial-photography shop. On 17 April 1986, the Municipal Court of Podujeva declared itself incompetent to deal with the case.

10. The Applicant filed the same suit with the District Court of Pristina, which, on 11 July 1986, decided that the Municipal Geodesic Section in Podujeva should carry out the transfer of the ownership title to the Applicant.

11. The Public Defence Attorney, in the capacity of intervening party and representing the interests of the Municipality of Podujeva, requested the District Court of Pristina to review its decision of 11 July 1986. However, on 30 March 1987, the District Court rejected as inadmissible the request of the Public Defence Attorney. A complaint against this decision to the Supreme Court also failed.

Applicants' allegations

12. The Applicant alleges that his right guaranteed by Article 46 of the Constitution [Protection of Property] has been violated by the aforementioned judicial acts.

13. He further alleges that "these acts are not accepted or executed by the Municipal Court and its bodies in Podujevo" and "the proceedings are terminated but the Judgment is not executed".

Assessment of the admissibility of the Referral

14. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

15. All the abovementioned decisions which allegedly violated the right to ownership of the Applicant are dated in between 17.04.1986 and 15.03.1988

16. Thus, the Applicant's referral is related to a matter that has arisen before 15 January 2009, which is the date of the entry into force of the Law on the Constitutional Court.

17. The referral should have been filed before 15 May 2009 [*In accordance with the combined legal provisions of Article 49, 56 and 58 of the Law on Court*]; however, the referral was filed on 29 January 2010.

18. Therefore, it follows that the Referral is out of time and, thus, incompatible "*ratione temporis*" with the provisions of the Constitution and the Law [*See Resolution on Inadmissibility, Case KI 25/09 Shefqet Haxhiu vs. Workers Organisation "Industria e akumulatorëve" of 21 June 2010 and Blecic v. Croatia, Application no. 59532/00, ECHR Judgment of 29 July 2004.].*

19. Accordingly, the Applicants' Referral is rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 49 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Hamide Osaj vs. Judgment of the Supreme Court of Kosovo, Pkl. No. 43/2010

Case KI 55-2010, decision of 3 March 2011

Keywords: criminal matter, equality before the law, exhaustion of legal remedies, individual referral, right to effective legal remedies, right to fair and impartial trial

The Applicant, who was charged with unlawful practice of medicine, filed a Referral pursuant to Article 113.7 of the Constitution, contending that her rights under Articles 24, 31 and 32 of the Constitution, and Article 6 of the European Convention on Human Rights, were infringed because her legal remedies were more restricted than those of her two codefendants since they were charged with more serious offenses, which she argued was unequal and unfair.

The Court held that the Referral was premature and inadmissible pursuant to Article 113.7 because she had not exhausted all legal remedies, as evidenced by the lack of a final judgment from the trial court. The Court stressed that the exhaustion rule presumes that the Kosovo legal system will prevent, or provide an effective remedy to, constitutional violations, citing *Selmouni v. France*, *Azinas v. Cyprus*, *AAB-RIINVEST University L.L.C. vs. Government of Kosovo* and *Mimoza Kusari-Lila vs. The Central*

Pristina, 3 March 2011
Ref. No.: RK 84/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 55/10

Applicant

Hamide Osaj

Constitutional Review of the Judgment of the Supreme Court of Kosovo, Pkl.no. 43/2010, dated 4 June 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mrs. Hamide Osaj, residing in Klina, represented by Gafurr Elshani, a practicing lawyer in Pristina.

Challenged court decision

2. The decision challenged by the Applicant is the Judgment of the Supreme Court of Kosovo (hereinafter: the "Supreme Court"), Pkl.no.43/2010, which was served upon the Applicant on 11 June 2010.

Subject matter

3. The Applicant alleges a violation of Article 6, Equality of Arms, of the European Convention on Human Rights and Additional Protocols (hereinafter: the “ECHR”) and Articles 24 [Equality before the law], 31 [Right to fair and impartial trial] and 32 [Right to legal remedies] of the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”).

Legal basis

4. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Section 54(b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

5. On 1 July 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”).

6. On 25 August 2010, the Referral was communicated to the Supreme Court.

7. On 26 October 2010, a request for additional documents and clarification was submitted to the Applicant which replied on 22 October 2010.

8. On 4 November 2010, a request for additional documents was submitted to the District Court of Pristina, which, so far, has not submitted them.

9. On 13 December 2010, the Review Panel, consisting of Judge Snezhana Botusharova (Presiding) and President Enver Hasani, and Judge Iliriana Islami, considered the Report of the Judge Rapporteur Robert Carolan and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

10. On 22 December 2008, the Public Prosecutor of the District submitted to the District Court of Pristina, which was received by them on 29 September 2008, an indictment against amongst other the Applicant for committing the criminal act of Article 221 [Unlawful Exercise of Medical Activity] of Provisional Criminal Code of Kosovo (hereinafter: the "PCCK").

11. On 25 March 2010, the District Court of Pristina issued Decision KA.no. 767/08, where it did not confirm the indictment against the Applicant because the criminal offence under Article 221.1 of PCCK is punishable with fine or up to one year of imprisonment. Hence, according to Article 461 Provisional Criminal Procedure Code of Kosovo (hereinafter: the "PCPCK") provides that a summary procedure applies for criminal offences for which the principal punishment is a fine or imprisonment of up to three years. Further, according to Article 462.4 of PCPCK there are no proceedings on the confirmation of the indictment in summary proceedings.

12. The Applicant filed a complaint to the District Court of Pristina on 28 April 2010 against the decision KA.no.767/2008 on the grounds of violation of the law, Article 125 and Article 127.1 of PCPCK by not summoning the Applicant. The confirmation of the indictment was held on 2 March 2010, while the Applicant received the summon on 23 April 2010. According to the Applicant, the summon had been received by the neighbor of the Applicant. However, upon the request of the Court to submit evidence in this respect, the Applicant cannot substantiate this fact.

13. The District Court of Pristina rejected the complaint of the Applicant as inadmissible with the reasoning that “the indictment against the Applicant is not confirmed for the criminal offence of unlawful exercise of medical activity as provided for in Article 221.1 PCCK, since the present criminal offence provides for the imposition of fine or punishment of up to three years imprisonment and this offence deals with the summary procedure” (Decision Ka.no. 767/2008 of 13 May 2010).

14. The Applicant requested for protection of legality to the Supreme Court on the grounds of essential violation of the criminal procedure law and erroneous application of the substantive law.

15. The Supreme Court rejected the request for protection of legality as inadmissible since the request does not concern a final decision nor a final trial which preceded such a decision (Decision PkL.no. 43/2010 of 4 June 2010).

Applicant’s allegations

16. The Applicant alleges that the court violated the principle of equality of arms guaranteed by the European Convention on Human Rights, given that court proceedings should be in accordance with the Constitution, applicable law of Kosovo and with international standards.

17. The wrongful interpretation of the PCPCK places the Applicant in an unequal position which is in conflict with the Constitution, under which "all people are equal before the law". Notwithstanding the type of punishment provided for by the law for the criminal offence with which the Applicant is charged, the present criminal offence is related with the criminal offence with which two other defendants are charged with and it can not be separated in any of the phases of the criminal procedure and the confirmation of indictment should be common for all the defendants and the trial should be common to all. In this manner the accused persons will be granted with equal opportunity to defend themselves in all the phases of the criminal procedure.

18. It does not make sense that the defendants who are charged with more serious criminal offences have the chance to prove their innocence and the defendant who is charged with less serious crime has the limited possibility to present their defense.

19. Under the Constitution, in the judicial procedure, "everyone is guaranteed equal protection of the rights in the procedure before the courts, other state bodies and public duty bearers.

20. Further, with regards to the right to legal remedy under the Constitution, "each person has the right to pursue legal remedies against judicial and administrative decisions which affect the rights or interests of that person in the manner prescribed by law".

Assessment of the admissibility of the Referral

21. In order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

22. The Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

23. This Court applied this same reasoning when it issued a Resolution on Inadmissibility on 27 January 2010 on the grounds of non exhaustion of remedies in Case No. KI-41/09, AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, and in its Decision of 23 March 2010 in Case No. KI. 73/09, Mimoza Kusari-Lila vs. The Central Election Commission.

24. Bearing this in mind it is clear from the documentation submitted by the Applicant that the case is still pending before the regular courts. It follows that the Applicant has not exhausted all legal remedies available to him under applicable law as required for him to be able to pursue a claim to the Court. The Court further emphasizes that there is no final decision to be challenged before this Court.

25. It follows that the Applicant has not exhausted all the legal remedies available to him under applicable law.

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

Feti (Hamëz) Gashi vs. Judgment Rev. No. 184/2008 of the Supreme Court

Case KI 74-2009, decision of 3 March 2011

Keywords: deadline issue, individual referral, right to work, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional right to work was infringed by a judgment of the Supreme Court, which upheld his dismissal from his job following a disciplinary action.

The Court held that the Referral was inadmissible because it was submitted almost eleven months after the Applicant's receipt of the Supreme Court's final judgment, which was beyond the 4-month deadline set by Article 49 of the Law on the Constitutional Court.

Pristina, 3 March 2011. god.
Ref. No.: RK 81/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 74/09

Applicant

Feti (Hamëz) Gashi

Constitutional Review of Judgment Rev. No. 184/2008 dated 27 January 2009 of the Supreme Court of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge

Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The applicant is Feti (Hamëz) Gashi residing in Mramur, Hajvali.

Challenged Decision

2. The Applicant challenges Judgement Rev. No. 184/2008 dated 27 January 2009 of the Supreme Court of the Republic of Kosovo.

Subject Matter

3. The Applicant alleges that his right to work protected by the Constitution, has been violated by the Judgement of the Supreme Court of the Republic of Kosovo and Decision of Kosovo Energy Corporation (KEK).

Legal Basis

4. Article 113 (7) of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Law) and Section 54 of the Rules of Procedure of the Constitutional Court (hereinafter referred to as: Rules of Procedure).

Proceedings before the Court

5. On 19 December 2009 the Applicant filed a Referral with the Constitutional Court.

6. In response to the notification of the Referral sent to the Supreme Court and the Legal Office of KEK, the Constitutional Court has not received any substantial comments.

7. On 15 December 2010, after having considered the Report of the Judge Rapporteur Snezhana Botusharova, the Review Panel, composed of Judges Altay Surroy (Presiding), Kadri Kryeziu and Gjyljeta Mushkolaj

made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

8. The Applicant was employed by the Kosovo Energy Corporation (KEK) as an electro installer in Pristina. Disciplinary action was taken by KEK against the Applicant arising from the unauthorized taking of an electrical transformer, the property of KEK.

9. In his defence, the Applicant denied having taken the transformer without permission and argued that the work carried out was outside of the working schedule and with the consent of KEK officials.

10. On 28 April 2006, KEK Disciplinary Commission issued a Decision and found the Applicant had violated his employment duties and consequently terminated his employment contract.

11. The Applicant challenged Decision of KEK Disciplinary Commission to the Municipal Court of Pristina. On 24 November 2006 the Municipal Court issued a Judgment (Cl. Br. 166/2006) and ordered that the Applicant be returned to work.

12. The Judgment of the Municipal Court was appealed by KEK to the District Court of Pristina which through its Judgment AC. nr. 173/2006, dated 06 June 2007 rejected the Appeal of KEK and upheld the Judgement of the Municipal Court.

13. KEK challenged this Judgment to the Supreme Court of Kosovo which through its Judgment, Rev. Nr. 184/2008, dated 27 January 2009, upheld the revision of KEK and quashed the Judgments of the District Court and Municipal Court thereby upholding the dismissal of the Applicant from employment with KEK. The Supreme Court found that the Municipal Court wrongly applied the material law when it found Applicant's suit well founded.

14. Following the Judgement of the Supreme Court, on 11 March 2009 KEK terminated the employment contract of the Applicant because "of the approval of the extraordinary legal remedy – revision of the defendant KEK by the Supreme Court".

Assessment of the admissibility of the Referral

15. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility

requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

16. As to the Applicant's Referral, the Court refers to Article 49 of the Law, which reads as follows:

"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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced.

17. From the submitted documents, it appears that the Referral has not been filed within the time limit pursuant to Article 49 of the Law.

18. The Court notes that final decision, i.e. the judgement of the Supreme Court was taken on 27 January 2009 and was implemented by KEK on 11 March 2009. The Court also notes that the Applicant filed the Referral with the Secretariat of the Constitutional Court on 19 December 2009.

19. The Court, therefore, concludes that the Referral must be rejected as inadmissible, pursuant to Article 49 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Aziz Sefedini vs. Decision No. 03-V-165 of the Assembly of the Republic of Kosovo

Case KI 33-2010, decision of 10 March 2011

Keywords: ambiguous statute, deadline issue, individual referral, language issues, *quorum* (Assembly)

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, contending that the Assembly's appointment of two persons to the Board of the Telecommunications Regulatory Authority violated the *quorum* requirement of Article 80.1 of the Constitution. He also asserted that the Albanian, English and Serbian versions of Article 80 were inconsistent and therefore unconstitutionally ambiguous, as was Rule 31 of the Rules of Procedure of the Assembly, therefore rendering the appointments to the Board invalid.

The Court held that the Referral was inadmissible pursuant to Article 49 of the Law on the Constitutional Court because the Referral had been submitted more than four months after the alleged violation, and because the Applicant failed substantiate a claim that his individual rights and freedoms under the Constitution were violated, citing *Sadik Sheme Bislimi*. The Court also held that the Applicant's contention about the ambiguity of Article 31 was inadmissible because it lacks authority to resolve abstract allegations of Constitutional violations raised as an *actio popularis* by unaffected individuals, citing *Dudgeon v. the United Kingdom*.

Pristina, 10 March 2011
Ref. No.: RK 83/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 33/10

Applicant

Aziz Sefedini

Constitutional Review of the Decision No. 03.V-165 dated 17.09.2009 of the Assembly of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Aziz Sefedini, residing in Pristina.

Challenged decision

2. The decision challenged by the Applicant is Decision No. 03.V-165, taken by the Assembly of the Republic of Kosovo (hereinafter: the "Assembly") on 17 September 2009, which was made public on the web page of the Assembly of the same day.

Subject matter

3. The Applicant requests an assessment of the constitutionality of Decision No. 03.V-165 of the Assembly on the appointment of two members of the Board of the Telecommunications Regulatory Authority (hereinafter: the "TRA"), in the light of Article 80 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

4. Furthermore, the Applicant complains that the Albanian, English and Serbian version of Article 80 of the Constitution are not identical and allow for an ambiguous interpretation regarding the wording "…and voting". In his opinion, the same ambiguity exists regarding Article 31 of the Rules of Procedure of the Assembly.

5. Article 80 (1) of the Constitution provides that: "Laws, decisions and other acts are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution."

Legal basis

6. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

7. On 2 April 2010, the Applicant submitted the referral form to the Court.

8. On 24 August 2010, the Referral was communicated to the Assembly, which, so far, has not submitted any comments.

9. On 21 January 2011, the Review Panel, consisting of Judges Kadri Kryeziu (Presiding), Enver Hasani and Iliriana Islami, considered the Report of the Judge Rapporteur Gjyljeta Mushkolaj and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

10. On 17 September 2009, the Assembly voted, in plenary session, on the appointment of two members of the TRA Board. Out of 68 Assembly Members present, 32 voted in favour, 28 voted against and 8 abstained.

Applicant’s allegations

11. The Applicant alleges that Article 6 (5) of Law (2002/7) on Telecommunications was not respected regarding the term of office of two members of the previous TRA Board.

12. In the Applicant’s opinion, the number of 32 Assembly Members who voted in favour is less than half of the total number of 68 members of the Assembly present at the moment of voting in the plenary session, as required by Article 80 of the Constitution.
13. Hence, the Applicant requests the Court for a constitutional interpretation of Decision No. 03.V-165 of the Assembly, pursuant to Chapter IV, Article 80 of the Constitution.

14. Furthermore, the Applicant complains that the Albanian, English and Serbian version of Article 80 of the Constitution are not identical and allow for an ambiguous interpretation regarding the wording “…and voting”. In his opinion, the Constitution, drafted and adopted in accordance with the Ahtisaari package, does not recognize an ambiguous

interpretation of the text in the official languages of Kosovo. Accordingly, the Constitution prohibits the formalization of violations of the applicable laws and uncertainty and ambiguity in decision-making and during the execution of laws.

15. The Applicant alleges that the same ambiguity exists regarding Article 31 of the Rules of Procedure of the Assembly.

Assessment of the admissibility of the Referral

16. In order for the Referral to be admissible, the Court has first to be assessing whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure of the Court.

17. In this connection, the Court refers to Article 113.7 of the Constitution, providing that "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".

18. It is true that decisions of the Assembly concerning appointments and dismissals of individuals are decisions of public authorities. They concern one or more specific addressees, and must be considered as decisions affecting the individual rights and freedoms of individuals guaranteed by the Constitution. As a consequence, they are subject to constitutional review, i.e. appealable to the Constitutional Court.

19. However, the Applicant has not submitted any evidence, or substantiated his claim that his individual rights and freedoms have been violated by the decision of the Assembly (*see* Constitutional Court, Resolution on Inadmissibility of 18 October 2010, KI 62/09, Sadik Sheme Bislimi).

20. However, even assuming that the Applicant has been the subject of the Assembly decision concerned, the Court notes that Article 49 of the Law provides that the Referral should have been submitted within a period of four (4) month after the final decision in the case.

21. Article 49 stipulates as follows :

"The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."

22. The challenged decision of the Assembly was voted in the Plenary Session of the Assembly on 17 September 2009 and made public on the same day. Consequently, the deadline for the submission of the Referral with the Court expired on 18 January 2010, while the Applicant submitted the Referral on 2 April 2010. Hence, the Referral is out of time, pursuant to the above Article of the Law.

23. In respect to the Applicant's complaint that the different language versions of Article 80 are not identical, the Court reiterates that the Constitution does not provide for an "*actio popularis*", i.e. individuals cannot complain in the abstract about legislation or governmental acts which have not been applied to them personally through a measure of implementation (Dudgeon v. the United Kingdom, no. 7525/76, of 22 October 1981).

24. The Referral must, therefore, be considered as inadmissible.

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

Miftar Sejdiu vs. Non-execution of Judgment A no. 1428/2005 of the Supreme Court

Case KI 46-2009, decision of 10 March 2011

Keywords: deadline issue, disability pension, execution of judgment, human rights, individual referral

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional rights were infringed by the Supreme Court's failure to execute a favorable judgment granting him a disability pension, which was issued in 2006. In 2007, the Ministry of Labor and Social Welfare again denied the pension application despite the judgment, advising the Applicant that he had 30 days within which to appeal the denial to the Supreme Court. Instead, the Applicant appealed directly to the Constitutional Court in 2009.

The Court held that the Referral was inadmissible pursuant to Article 49 of the Law on the Constitutional Court ("Law") and Rule 17.1(b) of the Rules of Procedure because the challenged decision was issued before implementation of the Law and the Referral was not submitted within 4 months of the Law's implementation, citing Articles 56 and 58 of the Law.

Pristina,10 march 2011
Ref. No.:98/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI-46/09

Applicant

Mr. Miftar Sejdiu

versus

Supreme Court of Kosovo - non-execution of Judgment A no. 1428/2005 , dated 13 June 2006

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Unanimously approves the Decision on inadmissibility concerning the Referral.

Applicant

1. The Applicant is Mr. Miftar Sejdiu, from the village of Mirena, municipality of Lipjan.

Challenged decisions

2. The applicant challenges the non-execution of the Judgment of the Supreme Court of Kosovo, dated 13 June 2006.

Subject matter

3. The subject matter raised for review with the Constitutional Court is the non-execution of the Judgment of the Supreme Court of Kosovo, A no. 1428/2005, dated 13 June 2006, approving Mr. Sejdiu's lawsuit as grounded and annulling Resolution no. 5053897, dated 31 May 2006, of the Ministry of Labor and Social Welfare - Appeals Council on Disability Pensions in Prishtina.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law), and Section 54 (b) of the Rules of Procedure of the Constitutional Court (hereinafter referred to as: the Rules of Procedure).

Summary of the proceedings before the Court

5. The Applicant filed the referral with the Constitutional Court on 1 October 2009.

6. On 18 February 2010, the Constitutional Court sent the notification on the registration of the case, Ref. no. DRLSA-226/10, to the Ministry of Labor and Social Welfare requesting their reply pursuant to Article 22.2 of the Law on the Constitutional Court of Kosovo.

7. On 2 April 2010, the Ministry of Labor and Social Welfare sent a written reply to the Constitutional Court explaining the progress of the case.

8. On 16 July 2010, the Review Panel, consisting of Judges Kadri Kryeziu, Enver Hasani and Iliriana Islami, considered the Report of the Judge Rapporteur Gjyljeta Mushkolaj and, on the same day, made its recommendations to the full Court on the inadmissibility of the Referral.

Summary of facts

9. On 1 October 2009, Miftar Sejdiu submitted the Referral with the Constitutional Court, claiming that the non-execution of the Judgment of the Supreme Court of Kosovo, A no. 1428/2005, dated 13 June 2006, violated his human rights. On 2 April 2010, the Ministry of Labor and Social Welfare sent a written reply to the Constitutional Court explaining the progress of the case.

10. On 9 August 2005, Miftar Sejdiu submitted an appeal with the Appeals Council of the Ministry of Labor and Social Welfare challenging the decision of the first instance body of this Ministry, which did not recognize him the right to be the beneficiary of the disability pension. Appeals Council of the Ministry of Labor and Social Welfare, through the Resolution of 31 October 2005 rejected the appeal stressing that Miftar Sejdiu had not provided evidence that he fulfilled the requirements specified in Article 3 of the Law on Disability Pensions in Kosovo. The Resolution contained the legal advice noting that the unsatisfied party can initiate an administrative contest through the lawsuit filed with the Supreme Court of Kosovo within 15 days.
11. Acting pursuant to the legal advice, Miftar Sejdiu filed a lawsuit with the Supreme Court of Kosovo within the prescribed time limit challenging the legality of the resolution of Appeals Council of the Ministry of Labor and Social Welfare, dated 9 August 2005.

12. Through Judgment A. no. 82/2006, dated 5 April 2006, the Supreme Court of Kosovo had:

- accepted the lawsuit as grounded;

- annulled the **Resolution** of Ministry of Labor and Social Welfare no. 5053897, because of the lack of necessary information in the reasoning part of the Resolution, pursuant to Article 209, paragraph 3 of the Law on General Administrative Procedure; and

- obliged the Ministry of Labor and Social Welfare to act pursuant to remarks given in the judgment in the repeated proceedings.

13. Nonetheless, while rendering a decision in the new proceedings, on 31 May 2006, the Ministry of Labor and Social Welfare again issued the Resolution rejecting Miftar Sejdiu's appeal with the same deficient justification that "according to the law, he does not fulfill the requirements to be recognized the right to disability pension". According to the rule, the Resolution also contained the legal advice noting that the unsatisfied party can initiate an administrative dispute through the lawsuit filed with the Supreme Court of Kosovo within 15 days.

14. Miftar Sejdiu again filed a lawsuit with the Supreme Court challenging the legality of the resolution of the Appeals Council of the Ministry of Labor and Social Welfare, dated 31 May.

15. The Supreme Court, as in the first time, through Judgment A no 1428/2005, dated 13 June 2006, approved the lawsuit as grounded underlining that the respondent, respectively the Ministry of Labor and Social Welfare, did not act pursuant to the remarks of the Supreme Court, and based on authorizations under Article 62 of the Law on Administrative Conflicts, obliges the respondent, respectively the Ministry, to act pursuant to remarks underlined in Judgment A no 1428/2005, dated 13 June 2006, in the repeated proceedings.

16. In contradiction to Judgment A no 1428/2005, dated 13 June 2006, the Appeals Council of the Ministry of Labor and Social Welfare, through Judgment no. 5053897, dated 7 September 2007, again rejected Miftar Sejdiu's appeal. Again, pursuant to the applicable legislation, the Resolution contained the legal advice allowing the eventually unsatisfied party a 30-day time limit to initiate an administrative contest through the lawsuit filed with the Supreme Court of Kosovo.

17. Finally, unsatisfied with this situation, the Applicant Miftar Sejdiu does not respect the legal advice to challenge the Resolution of the Ministry of Labor and Social Welfare with the Supreme Court within the 30-day time

limit, but on 1 October 2009, he directly referred to the Constitutional Court of the Republic of Kosovo.

Assessment of the admissibility of the referral

18. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, further specified in the Law on the Constitutional Court and the Rules of Procedure.
19. In connection with this, the Court refers to Article 49 (Deadlines) of the Law, which stipulates:

"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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced".

20. However, the 4 (four) month deadline started to be counted before the Law on the Constitutional Court of the Republic of Kosovo entered into force, it shall start to be counted from the date of entry into force of the Law on the Constitutional Court. (see Article 56 of the Law). The Law entered into force "upon publication in the Official Gazette of the Republic of Kosovo (see Article 58 of the Law). The Law was published in the Official Gazette of the Republic of Kosovo number 46, dated 15 January 2009, page 20.

21. The challenged decision was served on the Applicant on 7 September 2007. Since the Law on the Constitutional Court entered into force on 15 January 2009, the defined legal deadline of 4 (four) months started to be counted from the day of entry into force of the Law, i.e. from 15 January 2009.

22. Consequently, pursuant to Article 17 1 (b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo the deadline of 4 (four) months within which the referral could be submitted, ended on 15 May 2009. As mentioned above, the Referral was submitted on 1 October 2009. As a result, the Referral was not submitted with the Court within the legal time limit defined under Article 49 of the Law.

23. The Referral therefore must be rejected as inadmissible.

FOR THESE REASONS

Pursuant to Article 49 of the Law, and Section 54 (b) of the Rules of Procedure, the Constitutional Court unanimously

DECIDES

I. TO REJECT the referral as inadmissible.

II. This Decision shall be notified to the parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

Abdullah Shkodra vs. Judgment AC No. 70/2010 of the District Court of Gjilan

Case KI 49-2010, decision of 10 March 2011

Keywords: contract dispute, foreclosure on property loan, individual referral, manifestly ill-founded referral, specification of rights violated

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional rights were infringed by a judgment of the Gjilan District Court, which affirmed a lower court's foreclosure order on mortgaged real estate. He argued that the court had failed to recognize his oral agreement with the creditor for a payment adjustment, the failure of the creditor to record all of his payments and the failure of the creditor to give him a payment grace period.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Article 48 of the Law on the Constitutional Court and Rule 36.1(c) of the Rules of Procedure because the Applicant had failed to make a *prima facie* showing that particular Constitutional rights and freedoms had been violated, and to specify the concrete public authority actions related to the violations, citing *Vanek v. Slovak Republic*. The Court emphasized that its discretion is limited to the disposition of Constitutional controversies, such as whether trial proceedings were fair, as opposed to the resolution of factual or substantive law disputes, citing *Garcia Ruiz v. Spain* and *Edwards v. United Kingdom*.

Pristina, 10 march 2011
Ref. No.: RK 95/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 49/10

Applicant

Abdullah Shkodra

Constitutional Review of the Judgment of the District Court of Gjilan, AC.no. 70/2010, dated 15 April 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Abdullah Shkodra, residing in Gjilan.

Challenged decision

2. The decision challenged by the Applicant is the Judgment of the District Court of Gjilan, Ac.no.70/2010 of 15 April 2010.

Subject matter

3. The Applicant claims that, as to the execution of the loan agreement concluded between him and the Creditor, the regular courts have not taken into consideration the fact (1) that he has reached an oral agreement with the Creditor not to pay the loan in full because of his financial problems and (2) that the Creditor has not registered the payments already made by him. The Applicant bases his claim on the fact that the Creditor has not given him a grace period.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”), Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

5. On 28 June 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 26 July 2010, the Applicant informed the Court that he had received a communication of the Municipal Court of Gjilan, dated 20 July 2010, regarding Case E.nr.764/2009, informing him that an expert for the reassessment of the value of his mortgaged real estate had been appointed. The Applicant, however, questions the objectiveness of the expert, since he lives in the same neighbourhood as the Judge in his case. He, therefore, requests the appointment of an expert who will re-asses the value of the mortgaged real estate in a fair and objective manner.

7. On 25 August 2010, the Referral was forwarded to the District Court of Gjilan.

8. On 22 October 2010, additional documents and clarification were requested from the Applicant, which he submitted on 1 November 2010.

9. On 5 November 2010, additional documents were requested from the Municipal Court of Gjilan and the District Court of Gjilan, which, so far, have not been submitted.

10. On 20 January 2011, the Review Panel, consisting of Judges Snezhana Botusharova (Presiding), Ivan Čukalovič and Enver Hasani, considered the Report of the Judge Rapporteur Iliriana Islami and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

11. On 31 March 2004, the Company of the Applicant "Mimoza-Commerce" (hereinafter: the "Applicant") entered into a loan agreement in the amount of 50.000,00 Euro with a commercial bank (hereinafter: the "Creditor") for a twelve months period.

12. On 17 May 2005, the Municipal Court of Gjilan allowed the Creditor to apply the execution clause in the loan agreement, since the Applicant had not honoured that agreement and, on 31 July 2007, appointed an expert to assess the value of the mortgaged real estate of the Applicant.

13. On 16 May 2008, the Municipal Court of Gjilan fixed the market price of the mortgaged real estate of the Applicant based on the evaluation of the expert.

14. The Applicant complained about this market price to the District Court of Gjilan, which by decision of 11 September 2008 rejected the Applicant's complaint as unfounded, stating that the first instance court had correctly applied the substantive and procedural law.

15. On 16 November 2009, the Applicant filed a request for return to the previous situation with the Municipal Court of Gjilan, which, on 15 December 2009, ruled that the Applicant's request could not be granted, since Article 14.2 of the Law on Execution Procedure provides that the return to the previous situation is only permitted in case of (1) non-observance of the time limit for filing an objection and (2) an appeal against the executable decision for compulsory execution, which was not the case in this matter.

16. The Municipal Court further stated that "the debtor filed his request for return to the previous state on 16 November 2009 i.e. during the stage when the session for the execution of conclusions on the first public auction was held according to the creditor's request for execution on 13 November 2009, and, according to the procedural decision rendered on 13 November 2009, since there was no bidder for the purchase of the mortgage, pursuant to the provisions of the Law on Execution Procedure, a decision was reached to have a second public auction".

17. The Applicant complained against the Municipal Court's decision of 15 December 2009 to the District Court of Gjilan, which, on 15 April 2010, rejected the complaint as unfounded, by repeating the findings of the Municipal Court. The District Court further stated that the Applicant had not submitted any evidence that he had entered into an oral agreement with the creditor about the reimbursement of the loan.

18. On 16 July 2010, the Municipal Court of Gjilan appointed the expert for the assessment of the value of the mortgaged real estate.

Applicant's allegations

19. The Applicant alleges that he reached an oral agreement with the Creditor not to have to pay the loan in full because of his financial problems. He further alleges that the Creditor has not registered the payments already made by him.

20. The Applicant refers also to the fact that the Creditor should have given him a grace period.

21. Additionally, the Applicant alleges that the courts and the Creditor did not take into account his interest, when estimating the value of the mortgaged property and the oral agreement he made with the Creditor.

Assessment of the admissibility of the Referral

22. In order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and, as further specified, in the Law and the Rules of Procedure.
23. In this connection, the Court refers to Article 48 of the Law:

    "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."

24. Under the Constitution, the Court is not to act as a court of fourth instance, when considering the decisions taken by ordinary courts. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

25. The Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, mutatis mutandis, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87 adopted on 10 July 1991).

26. In this connection, the Court notes that, the Applicant has not submitted any prima facie evidence indicating what rights and freedoms he claims to have been violated and what concrete act of public authority is subject to challenge, as required by Article 113.7 of the Constitution and Article 48 of the Law (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

27. It follows that the Referral is manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure which provides:

    "The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded."

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law, and Rule 36 (1.c) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Iliriana Islami	Prof. Dr. Enver Hasani

Faik Azemi vs. Decision of the District Court in Pristina Ac Nr 5/2010 and Decision of the Municipal Court in Pristina E. nr. 67/2008

Case KI 28-2010, decision of 10 March 2011

Keywords: execution of judgment, exhaustion of legal remedies, individual referral, specification of rights violated, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional rights were infringed by a decision of the Prishtina District Court, which affirmed the Peja Municipal Court's refusal to execute a favorable judgment in an employment termination matter on the ground that the judgment did not adjudicate the monetary damages to be collected. The District Court advised the Applicant to take additional legal steps to implement the collection process.

The Court held that the Referral was inadmissible pursuant to Article 113.7 because the Applicant did not fulfill the prerequisite exhaustion of all legal remedies by initiating the collection action recommended by the District Court. The Court emphasized that the rationale for the exhaustion rule is to provide an opportunity for the Kosovo legal system to prevent or remedy a constitutional violation, citing *AAB-RIINVEST University L.L.C. vs. Government of Kosovo* and *Selmouni v. France*.

Pristina, 10 March 2011
Ref. No.: RK92/10

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 28/10

Applicant

FAIK AZEMI

Constitutional Review of Decision of the District Court in Pristina Ac Nr 5/2010 dated 4 March 2010

and

Decision of the Municipal Court in Pristina E.nr.67/2008 dated 23 December 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Mr. Faik Azemi from Pristina.

Subject Matter

2. The subject matter of the Referral submitted to the Constitutional Court of is the alleged non-execution of the Judgment of the Municipal Court of Pristina CI.nr 515/2007 dated 29 December 2008, which became final and binding on 18 June 2009.

Alleged violations of Constitutional guarantees

3. The Applicant has not explicitly specified the constitutional rights which have allegedly been violated, but has stated that the provisions of the Law on the Executive Procedure, and the legal principle of *res judicata* have been violated.

Legal Basis

4. Article 113(7) of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo dated 16 December 2008 (hereinafter: the Law), and Article 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Court

5. On 18 January 2010 the Applicant filed a Referral with the Constitutional Court. It was registered on 28 April 2010 after the Applicant submitted the relevant documents.

6. On 16 December 2010, after having considered the Report of the Judge Rapporteur Snezhana Botusharova, the Review Panel, composed of Almiro Rodrigues (Presiding), Gjyljeta Mushkolaj and Kadri Kryeziu made a recommendation to the full Court on the inadmissibility of the Referral.

The Applicant's Complaint

7. The Applicant complains that the Municipal Court in Pristina unjustly refused to execute its Judgment CI .nr 515/2007, despite it being final and "executable".

Summary of the facts

8. On 29 December 2008 the Municipal Court in Pristina issued the Judgment CI nr 515/2007 whereby "approving as grounded the claim-suit of…[the Applicant] and confirming that the respondent, Directorate of Education and Science of the Municipality of Pristina, illegally terminated the employment contract during the period in question, respectively from 1 October 2003 until 31 December 2007,…..and obliging the same respondent to recognize the …[Applicant's] all rights from labour relation…under threat of a forced execution."

9. On 18 June 2009 the above mentioned Judgment became final and binding.
10. On 17 July 2009 the Applicant submitted a written Proposal for the execution of the above mentioned Judgment to the Municipal Court in Pristina as the competent court. His request in particular related to the payment of 11,475 Euro in lieu of the unpaid salaries.

11. On 23 December 2009 the Municipal Court in Pristina issued Decision E.nr. 67/2008 and rejected the Applicant's proposal for execution clarifying, *inter alia* that "the judgment in question does not adjudicate the amounted requested."
12. Unsatisfied with such Decision, the Applicant appealed to the Pristina District Court.

13. On 4 March 2010 the District Court issued Decision Ac .nr 5/2010 and rejected the Applicant's appeal as ungrounded, stating inter alia that "the

creditor [i.e. the Applicant] is entitled to pursue his rights for the challenged period through the contested procedure for personal incomes or salaries."

Assessment of the admissibility of the Referral

14. It should be noted at the outset that the Applicant's complaint is limited to his disagreement with the decision of the District Court that confirmed earlier decision of the Municipal Court of Pristina on rejecting his proposal for the execution of the payment in the amount of 11, 475 Euro.

15. Indeed, the Applicant complaints to the Constitutional Court that the Municipal Court unjustifiably rejects to execute its Judgment CI .nr 515/2007, despite it is according to him that judgment final and executable.

16. The Constitutional Court however notes that execution of the Judgment as requested by the Applicant on 17 July 2009 has never been granted.

17. The Constitutional Court notes that on 4 March 2010 the District Court issued Decision Ac .nr 5/2010 in which was stated *inter alia* that "the creditor [i.e. the Applicant] is entitled to pursue his rights for the challenged period through the contested procedure for personal incomes or salaries."

18. In this respect the Court recalls Article 113 (7) of the Constitution, which provides:

    "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."

19. The Applicant has not submitted any evidence that he has initiated contested proceedings before the competent court in Kosovo as suggested by the Pristina District Court.

20. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, mutatis

mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999).

21. Accordingly the Referral is Inadmissible.

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.4 of the Constitution, Article 20 of the Law on the Constitutional Court and Rule 56 (2) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Teki Bokshi, Avdi Rizvanolli and Qaush Smajlaj vs. UNMIK Administrative Direction No. 2003/13, as amended and replaced

Case KI 29-2009, 32-2009, 47-2009, decision of 17 March 2011

Keywords: actio popularis, authorized parties, human rights, individual referral, *locus standi*

The Applicants, three lawyers, filed a Referral pursuant to Articles 113.1 and 113.7 of the Constitution, and Articles 6 and 14 of the European Convention on Human Rights, asserting that two conflicting provisions of an UNMIK Administrative Direction were discriminatory and violated Articles 5, 23, 24 and 31 of the Constitution because parties in some cases were required to bear the expense of translating documents into English and in other cases the translations were prepared by the Special Chamber.

The Court held that the Referral was inadmissible pursuant to Articles 53 and 113.7 of the Constitution, Article 47.1 of the Law on the Constitutional Court and Rule 69 of the Rules of Procedure because none of the Applicants had demonstrated that he was an authorized party to a Referral based on a violation of his individual Constitutional rights or freedoms. The Court emphasized that a complaint of a Constitutional violation brought as an *actio popularis* by someone who was not directly affected is inadmissible, citing *Ilhan v. Turkey*.

Pristina, 17 March 2011
Ref. No.: RK 99/11

RESOLUTION ON INADMISSIBILITY

In Cases

KI 29/09, KI 32/09 and KI 47/09

Applicants

Teki Bokshi, Avdi Rizvanolli and Qaush Smajlaj

Constitutional Review of UNMIK Administrative Direction No. 2003/13, as amended and replaced

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. The Applicants are Mr. Teki Bokshi, Mr. Avdi Rizvanolli, lawyers from Gjakova and Mr. Qaush Smajlaj from Dujak villige who is represented by Mr. Teki Bokshi, a lawyer from Gjakova.

Administrative Direction Challenged

2. The Applicants challenge the United Nations Mission in Kosovo (UNMIK) Administrative Direction No. 2003/13, as amended and replaced by UNMIK Administrative Direction No. 2008/6, which entered into force on 11 June 2003.

Subject Matter

3. The Applicants allege that the operation of Articles 22.7 and 64.7 of UNMIK Administrative Direction No. 2003/13 and Articles 22 (7) and 25 (1) (b) of UNMIK Administrative Direction No. 2006/17, which replaced UNMIK Administrative Direction 2003/13 on 6 December 2006, are in violation of fundamental rights and freedoms protected by the Constitution of the Republic of Kosovo. The Applicants further maintain the Article 6 and Article 14 of the European Convention on Human Rights have been violated. Article 6 of the Conventions refers to the entitlement to the Right to a Fair Trial and Article 14 refers to the Prohibition of Discrimination.

Legal Basis

4. Article 113.1. and 7 of the Constitution of Kosovo (hereinafter: “the Constitution”); Articles 46 and 47 of the Law on the Constitutional Court

of the Republic of Kosovo of 16 December 2009, (No. 03/L-121), (hereinafter: "the Law"); and Section 69 and Section 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

5. Between April and October 2010 the Applicants submitted their Referrals to the Court, contesting the constitutionality of the UNMIK Administrative Direction No. 2003/13.

6. On 17 March 2010 the President issued decision Nr. Ur. 47-09-bk/10 to join Referrals KI 19/10, KI 29/09, KI 32/09 and KI 47/09.

7. On 17 December 2010, after having considered the Report of the Judge Rapporteur Kadri Kryeziu, the Review Panel, composed of Almiro Rodrigues (Presiding), Gjyljeta Mushkolaj and Iliriana Islami made a recommendation to the full Court with regard to the admissibility of the Referrals Nos. KI 29/09, KI 32/09 and KI 47/09 only.

8. On the same date the Court decided that Referral KI 19/10 would be decided separately.

Summary of the facts

9. The Applicants allege that Article 22 (7) and 64 (7) of the UNMIK Administrative Direction No. 2003/13, as amended and replaced, are "in contradiction with Articles 5, 23, 24, 31 of the Constitution of the Republic of Kosovo" and "in contradiction to determined policy with Article 6 – the right to a fair trial, and especially by Article 14 on prohibition of discrimination of the European Convention on Human Rights."

10. The Applicants support their Referrals solely by reference to the documents referred to in the Referral made to the Court.

Applicants' allegations

11. The Applicants allege that Articles 22.7 and 64.7 of UNMIK Administrative Direction No. 2003/13, as amended and replaced, are in violation of fundamental rights and freedoms protected by the Constitution of the Republic of Kosovo (hereinafter: "the Constitution). In particular, the Applicants specify that Article 5 (Languages), Article 23 (Human Dignity), Article 24 (Equality Before the Law), and Article 31

(Right to Fair and Impartial Trial) are the violated provisions of the Constitution.

12. Article 22.7 of UNMIK Administrative Direction No. 2003/13 was amended and replaced originally by UNMIK Administrative Direction No. 2006/17 and finally by UNMIK Administrative Direction No. 2008/6.

13. The challenged Article of the Administrative Direction is now Article 25.7; it provides for the language in which cases submitted to the Special Chamber of the Supreme Court of Kosovo must be furnished to the Chamber in the following terms:

25.7 Pleadings and supporting documents may be submitted in Albanian, Serbian or English. However, if submitted in Albanian or Serbian, an English translation of all pleadings and supporting documents shall be provided together with the pleadings. Such translation shall be performed at the party's expense.

14. Article 64.7 of the original UNMIK Administrative Direction is now replaced by Article 67.11 of UNMIK Administrative Direction No 2008/6; it provides for the translation of documents in relation to claims made against the Kosovo Trust Agency in the following terms:

67.11 The Special Chamber shall arrange, where necessary, for the translation into English of the complaint, any subsequent submissions and any supporting documents. Such translations shall be supplied to the complainant(s) and the Agency as soon as they are available, which shall be not later than 7 days before the oral hearing.

15. The Applicants thereby maintain that under the Administrative Direction, in certain claims made against the Kosovo Trust Agency, the Special Chamber shall translate submissions that are made by the Kosovo Trust Agency into English and that this therefore amounts to discrimination.

16. Furthermore, the Applicants allege that Articles 6 and 14 of the European Convention on Human Rights are violated.

Preliminary Assessment of the admissibility of the Referral

17. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

18. Article 113.7 of the Constitution specifies that "*Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution*." The Applicants however, do not demonstrate that they themselves are a victim of any violation by a public authority.

19. Furthermore, Article 47.1 of the Law specifies that "every individual is entitled to request from the Constitutional Court legal protection when he/she considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority."

20. The Applicants yet again, does not demonstrate that the rights and freedoms were or are directly violated by a public authority. As section 69 of the Rules of Procedure clarifies, "when filing a referral pursuant to Article 113, Paragraph 7 of the Constitution, the authorized party shall convincingly present that he/she has been directly and currently violated by a public authority in his/her rights and freedoms guaranteed by the Constitution."

21. Finally, according to Article 53 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".

22. According to the Strasbourg case-law the system of individual petition…excludes applications by way of *actio popularis*. Complaints must therefore be brought by or on behalf of persons who claim to be victims of a violation of one or more of the provisions of the Convention. Such persons must be able to show that they were 'directly affected' by the measure complained of" (*see e.g. Judgment in the case İlhan v. Turkey*, No. 22277/93, 27 June 2000, paragraph 52,).

23. Since the referring parties, as individual Applicants, have not demonstrated that they are an authorised party, the Referrals must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Mr. Sc. Kadri Kryeziu	Prof. Dr. Enver Hasani

Imer Ibriqaj vs. Decision no. 03V-115 of the Assembly of the Republic of Kosovo

Case KI 34-2009, decision of 18 March 2011

Keywords: exhaustion of legal remedies, freedom of election and participation, hiring dispute, individual referral, interim measures, manifestly ill-founded referral, Ombudsperson, right to fair and impartial trial

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 31 and 45 of the Constitution were infringed by the Assembly's rejection of his application for the position of Ombudsperson and requesting interim measures. The Applicant originated an administrative proceeding in the Supreme Court in 2009, which was still pending when the Referral was submitted.

The Court held that the Referral was premature and inadmissible pursuant to Article 113.7 and Article 47.2 of the Law on the Constitutional Court because of the pendency of the Applicant's case in the Supreme Court, reflecting that the prerequisite of exhausting all legal remedies had not been met. The Court also held that the Applicant had failed to make a *prima facie* case that his right to a fair and public hearing under Article 31 and Article 6.1 of the European Convention on Human Rights had been violated, citing *Vanek v. Slovak Republic*. Finally, the Court denied the request for interim measures after finding that the Applicant failed to establish a *prima facie* case that he would otherwise face any risk or irreparable damage.

Pristina, 18 March 2011
Ref. No.: RK100/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 34/09

Applicant

Imer Ibriqaj

Constitutional Review of Decision no. 03V-115 of the Assembly of the Republic of Kosovo dated 4 June 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Imer Ibriqaj from Komoran, Gllogovc Municipality.

The Challenged Decision

2. The Applicant challenges Decion no. 03V-115 of the Assembly of the Republic of Kosovo dated 4 June 2009.

Subject Matter

3. The Applicant complaints that the rejction of his application for the position of the Ombudsperson was unjust, thus violating his right guaranteed by Articles 31 and 45 of the Constitution of the Republic of Kosovo (hereafter referred to as: the Constitution).

4. The Applicant also requests the Court to decide on his request for Interim Measure.

Legal basis

5. Article 113 (7) of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"); Article 20 and 27 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law"); and Section 53 and 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 27 July 2009 the Applicant filed a referral at the Constitutional Court challenging decision no. 03V-115 of the Assembly of the Republic of Kosovo dated 4 June 2009 on the appointment of the Ombudperson, and submitted to the Court a request for Interim Measures.

7. On 18 March 2010 the President of the Court appointed Judge Robert Carolan as the Judge Rapporteur and the Review Panel composing of Judge Snezhana Botusharova, Judge Gjyljeta Mushkolaj and Judge Almiro Rodrigues.

8. On 27 May 2010, the Constitutional Court has notified the Assembly of Kosovo regarding the applicant's referral. On 3 June 2010 and on 6 June 2010 the Court received the responses from the Opposing party.

9. On 17 December 2010, after having considered the Report of the Judge Rapporteur Robert Carolan, the Review Panel, composed of Almiro Rodrigues, Snezhana Botusharova and Gjyljeta Mushkolaj made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

10. On 13 March 2010, the Applicant had submitted his application to the Assembly of the Republic of Kosovo following its annocuncment for the vacancy of the Ombudsperson.

11. On 18 May 2010, the Selection Panel presented its report to the Assembly of Kosovo, recommending three (3) potential candidates for the position of the Ombudsperson. In addition to the report the Selection Panel has also enclosed a list containing the points of the twenty three (23) candidates that were interviewed.

12. The Applicant Mr. Imer Ibriqaj was not amongst the twenty three (23) candidates who were invited for an interview.

13. On 4 June 2010, an Assembly meeting was held for the purpose of the selection of the Ombudsperson. On the same day the President of the Assembly issued Decision no. 03V-115, appointing Mr. Sami Kurteshi as the Ombudsperson of the Republic of Kosovo.

14. The Applicant, with regards to the selection process, has made a complaint to the Assembly of Kosovo and to the International Civilian Office.

15. On 29 July 2009 the Applicant initiated the Administrative proceedings before the Supreme Court. The case is still pending at the Supreme Court.

The Applicant's allegations

16. The Applicant alleges that his application was rejected by the Assembly of Kosovo and the appointment of the current Ombudsperson was done in an unlawful matter and thus claims that there has been a violation of Article 45 of the Constitution [Freedom of Election and Participation].

17. In addition, The Applicant also alleges that his cases at the Supreme Court that initiated on 29 July 2009 is being lengthened intentionally and thus claims that there has been a violation of Article 31 of the Constitution [The Right to a Fair Trail].

18. Furthermore, the Applicant requests a monetary compensation of 550.000 Euors for material and immaterial damages.

Opposing Party's comment

19. The Assembly of the Republic Kosovo replied on the 3 June 2010, stating that Mr. Ibriqaj was eliminated in the first stage "due to non fulfillment of the formal conditions".

20. Furthermore, on 6 June 2010, the legal representative of the Assembly of Kosovo, the Ministry of Justice submitted an additional letter asserting that the selection process was in accordance with the law, also enclosing the case file regarding the process for the selection of the Ombudsperson.

Assessment of the request for Interim Measures

21. According to Article 27 of the Law on the Constitutional Court, the facts provided by the Applicant, the Court finds that the Applicant has failed to establish that there exists a prima facie case for the Court to decide on his request for Interim Measure.

22. The Court concludes that the request for Interim Measure is unsubstantiated, the Applicant not having submitted any convincing arguments that he might face any risk or irreparable damage, if his request for Interim Measure would not be granted.

Assessment of the admissibility of the Referral

23. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine, whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution.

24. In this relation, the Court refers to Article 113.7 of the Constitution, which states that:

"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";

and to Article 47.2 of the Law, stipulating that:

"The individual may submit the referral in question only after he/she has exhausted all legal remedies provided by the law."

25. The Applicant has filed the referral at the Constitutional Court while his case is still pending at the Supreme Court.

26. In these circumstances, the Applicant's complaint is premature and thus cannot be considered to have fulfilled the requirements under Article 113.7 of the Constitution.

27. Moreover, the Applicant had not submitted any prima facie evidence that his right to a fair and public hearing within a reasonable time guaranteed by Article 31 of the Constitution in conjunction with Article 6 (1) of the European Convention on Human Rights has been violated since his case is pending before Supreme Court from 29 July 2009 (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

28. Accordingly, the Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 49 of the Law on the Constitutional Court, and Rule 56(2) of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT the Request for Interim Measure.

II. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

Gafur Podvorica vs. Ministry of Labor and Social Welfare

Case KI 44-2010, decision of 18 March 2011

Keywords: authorized parties, individual referral, *locus standi*, specification of rights violated

The Applicant, the Director of the Institute for Social Policy (ISP), filed a Referral pursuant to Article 113.7 of the Constitution, asserting that a decision of the Ministry of Labor and Social Welfare (MLSW) dissolving the Institute for Social Policy's status as a special unit of the MLSW pursuant to a recommendation from the Functional Review and Institutional Design of Ministries (FRIDOM) initiative violated unspecified provisions of the Constitution.

The Court held that the Referral was inadmissible pursuant to Article 131.1 of the Constitution and Article 46 of the Law on the Constitutional Court on the ground that the Applicant was not an authorized party, either as a citizen or as ISP Director, highlighting that he lacked *locus standi* since he had failed to demonstrate that any of the rights and freedoms guaranteed to him as an individual had been violated, citing Article 34 of the EU Convention for Protection of Human Rights, *Municipal Section of Antilly v. France, Lindsay v. the United Kingdom*, *Agrotexim et al. v. Greece, Ukraine,* and *Loyka*.

Pristina, 18 march 2011
Ref. No.:88 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 44/10

Applicant

Gafur Podvorica

vs

Ministry of Labor and Social Welfare

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Ivan Čukalović, Judge
Snezhana Botusharova, Judge
Gjylieta Mushkolaj, Judge and
lliriana Islami, Judge

Applicant

1. The Applicant is Mr. Gafur Podvorica from Prishtina, residing at "Halil Orana" llam III. No. 4, in Prishtina and Director of the Department of the Institute for Social Policy.

Opposing party

2. The opposing party is the Ministry of Labor and Social Welfare (MLSW) in Prishtina.

Subject matter

3. The subject matter is the assessment of the constitutionality of the Decision of the MLSW [*Decision of the MLSW, No. 89, dated 23.04.2010]*, which as of 01.05.2010 dissolves the Department of the Institute for Social Policy as a special organizational structure within the Ministry of Labour and Social Welfare

Alleged violations of constitutionally guaranteed rights

4. The Applicant did not explicitly specify what rights guaranteed by the Constitution have been violated

Legal Basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2009 (hereinafter referred to as the Law), and Article 29 of the Rules of

Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Rules).

Proceedings before the Court

6. On 23 June 2010, the Applicant submitted the Referral to the Court.

7. On 26 August 2010, the Court sent a copy of the Referral to the Ministry and requested a response. On 8 October 2010, the Court received the Ministry's reply.

8. On 14 December 2010, the Review Panel consisting of Judges Robert Carolan (Presiding), Snezhana Botusharova and Gjylijeta Mushkolaj considered the report of the Judge Rapporteur Almiro Rodrigues and made a recommendation to the Court on the inadmissibility of the Referral.

Applicant's allegations

9. On 23.06.2010, the Applicant filed a referral with the Constitutional Court of the Republic of Kosovo complaining that the Minister of Labor and Social Welfare in Prishtina has unlawfully decided to suppress the Institute of Social Policy (hereinafter referred to as ISP) [*Article 4, paragraph 1 of the Law No. 02/L provides for the existence and functions the Institute of Social Policy*] and, by undertaking this action, the Ministry has committed a constitutional violation.

Comments of the opposing party

10. On 26 August 2010, the notification on the registration of the case and the request to reply has been sent to the opposing party. On 08.10.2010, the MLSW sent its reply justifying the challenged Decision with FRIDOM (Functional Review and Institutional Design of Ministries) recommendation on the functional revision in the MLSW

Summary of the facts

11. On 23 April 2010, the Ministry of Labor and Social Welfare decided [*Decision No. 89/10, item I (one), dated 23.04.2010]* that:

"The Department of the Institute of Social Policy, as a special organizational structure that functions and operates within the Ministry of Labor and Social Welfare shall be suppressed as of 01.05.2010."

12. That decision was issued pursuant to FRIDOM recommendations for the functional revision in the MLSW [*See the functional revision report in MLSW and Recommendation III.5: to merge the ISP into the Department for Social and Family Policies, page 15].*

13. As soon as the report was made public, more precisely on 11.11.09, the director of the Institute of Social Policy of the MLSW sent a memo to the MLSW Committee reviewing the FRIDOM Report, contesting the Report as being unreasonable, inconsistent with the scope of Department of Institute for Social Policy and in contradiction with the applicable law which regulated the status and the scope of the Department of Institute for Social Policy.

14. On 13.05.2010, the Office of the Prime Minister for Legal Support Services sent [*Through the document with Ref. No. 122/2010]* to the ISP director a legal opinion concluding that the "Institute shall have the status of a Department", "the status of this Institute can be changed through the amendment of the Law No.02/L-17 on Social and Family Services" and "the Ministry of Labour and Social Welfare can (...) propose a regular procedure for a draft law amending the Law No.02/L-17 on Social and Family Services"

15. On 19.05.2010, the ISP Director sent [*Registered under No. 01/104/10]* to the Minister of the MLSW the legal opinion of the Office of the Prime Minister, requesting from the Minister to review the decision for the suppression of the ISP.

16. On 14.06.2010, the Permanent Secretary of the MLSW requested [*Through the document No. 159/4/10]* the ISP Director, "to undertake all actions for the implementation of this decision" and informing that "negligence or deliberate actions related to the non-implementation of the aforementioned decision will not be tolerated, and for that reason measures in conformity with the applicable provisions shall be initiated".

17. Finally, on 23.06.2010, the Applicant addressed to the Constitutional Court, requesting the assessment of the constitutionality of the challenged act.

Assessment of admissibility

18. The Court needs to preliminarily assess if the Applicant has met the admissibility conditions set forth by the Constitution.

    In reference to this, Article 113.1 of the Constitution stipulates that *"The Constitutional Court decides only on matters referred to the court in a*

legal manner ***by authorized parties"*** and Article 113.7 of the Constitution stipulates that *"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."*

19. On the other side, Article 46 of the Law on the Constitutional Court stipulates that

"The Constitutional Court receives and processes a referral submitted in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that *all legal requirements have been met".*

20. The submitted documents do not show that the Applicant is an "an authorized party", either as a citizen or as a Director of the Institute for Social Policy.

21. In fact, firstly the Applicant does not show that "his individual rights and freedoms, guaranteed by the Constitution, have been violated by public authorities" This is a basic condition to refer a case to the Constitutional Court, pursuant to Article 113.7 of the Constitution of the Republic of Kosovo. The Applicant lacks active legitimacy or locus standi to refer this case to the Constitutional Court. Therefore, the Court shall declare the referral inadmissible [*See mutatis mutandis Convention (Municipal Section of Antilly v. France (dec.), no. 45129/98, ECHR 1999-VIII)].*

22. Secondly, the Applicant does not directly specify either any constitutional provision that could have been violated by the decision he is challenging without being able to prove "the status of the victim of the public authority's act" as it is foreseen in article 34 of the EU Convention for Protection of Human Rights [*See mutatis mutandis Lindsay v. the United Kingdom, no. 31699/96, Commission decision of 17 January 1997, 23 E.H.R.R. Agrotexim and Others v. Greece, judgment of 24 October 1995, Series A no. 330-A, pp. 22-26, §§ 59-72; Terem Ltd, Chechetkin and Olius v. Ukraine, no. 70297/01, § 28, 18 October 2005; Veselá and Loyka v. Slovakia (dec.), no. 54811/00, 13 December 2005)]*

23. Accordingly, the Applicants' Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution of the Republic of Kosovo, Article 20 of the Law on the Constitutional Court and Rule 56 (2) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the referral as inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

The Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Azem Ademi vs. The Ministry of Justice

Case KI 62-2010, decision of 18 March 2011

Keywords: equality before the law, extradition, freedom of movement, individual referral, manifestly ill-founded referral, restitution

The Applicant, a Kosovar citizen, filed a Referral pursuant to Article 113.7 of the Constitution, asserting that the Ministry of Justice (MOJ) violated his rights under Articles 24 and 35 of the Constitution when extraditing him from a country in the European Union. The Applicant requested that he be afforded rights belonging to citizens of the EU country, that the MOJ compensate him for the monthly salary that he would have earned if he had remained in the EU country during the 8 years following his extradition, that he be granted citizenship in the EU country (which would enable him to continue his education) and that he be returned to his job there.

The Court held that the Referral was manifestly unfounded and inadmissible pursuant to Rule 36 of the Rules of Procedure because the Applicant had failed to make a *prima facie* showing that his Constitutional rights had been violated and because he did not substantiate the basis for fulfillment of his other requests, citing *Vanek v. Slovak Republic*.

Pristina, 18 March 2011
Ref. No.: RK 110/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 62/10

Applicant

Azem Ademi

vs.

The Ministry of Justice

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Azem Ademi, a citizen of the Republic of Kosovo.

Subject Matter

2. The Applicant alleges that Ministry of Justice has violated his rights guaranteed by Article 24 (Equality before the Law) and Article 35 (Freedom of Movement) of the Constitution of the Republic of Kosovo.

Legal Basis

3. Article 113.7 of the Constitution of the Republic of Kosovo; Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rule 36 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

4. On 12 July 2010 the Applicant filed a Referral with the Secretariat of the Constitutional Court.

5. On 15 July 2010 the Applicant informed the Court that the ongoing procedure at the Ombudsperson Institution has terminated.

6. On 22 February 2011 after having considered the Report of the Judge Rapporteur, Snezhana Botusharova, the Review Panel, composed of Almiro Rodrigues (Presiding), Gjyljeta Mushkolaj and Kadri Kryeziu made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts and complaints

7. The Applicant is unsatisfied with his status having returned to Kosovo from a country of the European Union where he lived from 1994 to 2002.

8. Therefore he approached the Ministry of Justice and submitted a number of written requests in 2008, 2009 and 2010, entitled, inter alia, "Competencies of the Ministry to Decide on Extradition". According to the Applicant the Ministry should decide upon his (voluntary) extradition from a country of European Union (EU) and grant him certain rights that belong to the citizens of that country.

9. Since the Ministry of Justice has not approved his requests, the Applicant requests the Constitutional Court to order the Ministry of Justice to pay to him monetary compensation for monthly salaries he would have earned during the eight years if he had stayed and worked in that EU country.

10. The Applicant also considers that he should be returned to his workplace in that country and that he should also be granted citizenship of that country. He maintains that he would then be able to continue his studies.

11. The Applicant states that is also expecting the licensing of a patent from the sale of which, according to him, he can earn a large amount of money.

Assessment of the Admissibility of the Referral

12. In order to be able to adjudicate the Applicants' Referral the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.
13. In this respect the Court recalls that according to Rule 36(1)(c) "the Court may only deal with Referrals if the Referral is not manifestly ill-founded."

14. Rule 36 (2) of the Rules of Procedure further prescribes that;

"*The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:*
a) the Referral is not prima facie justified, or
b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or
c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

d) when the Applicant does not sufficiently substantiate his claim;"

15. The Applicant has not submitted any prima facie evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

16. The Court finds the Applicant's claims for, inter alia, the monetary compensation for unearned monthly salaries for the period of 8 years, for his return to his earlier workplace in an EU country, for his right to a foreign EU citizenship and for the right to continue his studies in an EU country entirely unsubstantiated. It appears therefore that the Applicant's Referral is not prima facie justified.

17. Indeed the facts as presented by the Applicant do not in any way justify the allegations that his rights have been violated by the actions of the Ministry of Justice of the Republic of Kosovo.

18. Accordingly, the Referral must be rejected as manifestly-ill-founded.

FOR THESE REASONS:

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure,

DECIDES

I. Unanimously to Reject the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Art. 20(4) of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

NLB Bank Pristina sh.a. vs. Judgment Mle-Rev. no. 19/2009 of the Supreme Court

Case KI 40-2010, decision of 21 March 2011

Keywords: contract dispute, execution of judgment, individual referral, interim measures, manifestly ill-founded referral, unjust enrichment

Applicant NLB Bank Pristina filed a Referral pursuant to Article 113.7 of the Constitution, asserting that its rights under Article 54 of the Constitution were infringed by a judgment of the Supreme Court, which affirmed a decision of the Prishtina Commercial District Court rejecting the Applicant's claim against the execution of an unjust enrichment judgment obtained by a debtor, and requesting interim measures. The Applicant argued that the debtor's claim for unjust enrichment suit had no legal basis, that the disputed credit agreement was executed voluntarily and lawfully, that the debtor violated the agreement, and that the affirmed Commercial District Court decision contradicted an earlier, controlling decision.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Rule 36.1(c) of the Rules of Procedure because the Applicant complained about factual and substantive law determinations by the Supreme Court and lower court, whereas this Court is limited to resolving Constitutional disputes, citing *Sevdail Avdyli* and *Garcia Ruiz v. Spain*, such as whether the Applicant was afforded a fair trial, citing *Edwards v. United Kingdom*. The Court found that the Applicant had failed to meet its burden of making a *prima facie* showing that the contested Supreme Court decision was arbitrary or unfair, citing *Shub v. Lithuania* and *Vanek v. Slovak Republic*. Similarly, the Court denied the request for interim measures pursuant to Article 27 of the Law on the Constitutional Court because the Applicant failed to establish the potential for irreparable damage or a public interest in approval of the measures.

Pristina, 21 March 2011
Ref. No.: RK 103/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 40/10

Applicant

NLB Bank Pristina sh.a.

Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo, Mle-Rev.no. 19/2009, dated 16 March 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is NLB Bank Pristina sh.a. represented by Mr. Albert Lumezi as President of the Managing Board.

Challenged decision

2. The decision challenged by the Applicant is the Judgment of the Supreme Court of the Republic of Kosovo (hereinafter: the “Supreme Court”), Mle-Rev.no. 19/2009, of 16 March 2010.

Subject matter

3. The Applicant claims violation of Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to decide on his request for interim measures against the execution of the Judgment of the Commercial District Court of Pristina, E.no. 382/09, of 18 November 2009 until the

final decision of the Court. The Applicant alleges that irreparable damage will be caused, since the Applicant would be unable to return the money concerned taking into consideration that the Applicant entered into a loan agreement with a third party (hereinafter: the "Debtor") and the debtor has a responsibility to pay the amount of 269.686,04 Euros.

Legal basis

5. Article 113.7 of the Constitution, Articles 22 and 27 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 2 June 2010, the Applicant submitted the Referral to the Court.

7. On 24 August 2010, the Referral was forwarded to the Commercial District Court of Pristina and to the Supreme Court.

8. On 22 February 2011, the Review Panel consisting of Altay Suroy (Presiding), Almiro Rodrigues and Gjyljeta Mushkolaj considered the report of the Judge Rapporteur Ivan Čukalovič and made a recommendation to the Court..

Summary of the facts

9. On 22 October 2001, the Applicant entered into a loan agreement with the Debtor. The loan was paid to the debtor immediately after signature of the Contract.

10. On 30 September 2002, the Applicant filed a claim with the Municipal Court of Lipjan after the debtor failed to respect the credit agreement. On the same date, the Municipal Court of Lipjan declared itself not competent in the matter. The competent Court is the Commercial District Court of Pristina.

11. On 18 December 2002, the Commercial District Court of Pristina approved the claim of the Applicant and ordered the debtor to pay its debts to the Applicant. On 14 December 2004, this Judgment became final.

12. On 13 January 2004, the debtor filed a claim, for unjust enrichment by the Applicant, with the Municipal Court of Lipjan. The Municipal Court

declared itself not competent in the matter, but indicated that the competent Court was the Commercial District Court of Pristina.

13. On 23 December 2004, the Commercial District Court of Pristina approved the claim of the debtor and ordered the Applicant to reimburse the debtor the unjust enrichment. The Applicant filed a complaint to the Supreme Court against this judgment.

14. On 30 November 2005, the Supreme Court granted the complaint of the Applicant and returned the case to the Commercial District Court of Pristina for retrial.

15. On 14 June 2007, the Commercial District Court of Pristina ruled that the claim of the debtor was founded and obliged the Applicant to pay the debtor the unjust enrichment. The Applicant complained to the Supreme Court, which on 17 September 2009 ruled that the complaint of the Applicant was unfounded and upheld the Judgment of the Commercial District Court of Pristina.

16. On 26 October 2009, the Applicant submitted a request for protection of legality to the Public Prosecutor against the judgment of the Commercial District Court of Pristina of 14 June 2007. Further, on 5 November 2009, the Applicant also filed a claim with the Supreme Court, requesting the revision of the judgment of the Commercial District Court of Pristina of 14 June 2007 and the Supreme Court's Judgment of 17 September 2009.

17. On 26 October 2009, the debtor requested the Commercial District Court of Pristina to execute its Judgment. On 28 October 2009, the Court allowed the execution of its judgment. On 17 November 2009, the Applicant filed an objection against the execution decision of the Commercial District Court in Prishtina of 28 October 2009. On 19 November 2009, the Commercial District Court of Pristina rejected the Applicant's objection as unfounded and upheld the execution decision.

18. On 1 December 2009, the Applicant filed a complaint with the Supreme Court against the execution decision, which so far has not decided in the matter.

19. On 18 December 2009, the Commercial District Court of Pristina issued a judgment ordering the Applicant to comply with the execution decision. The Applicant requested the Commercial District Court to postpone the execution decision, whereupon it postponed the execution until the request for protection of legality of the Public Prosecutor was decided upon (Commercial District Court of Pristina, E.no. 382/2009 of 24 December 2009). No further information has been submitted.

20. On 16 March 2010, the Supreme Court ruled that the claim of the Applicant on 26 October 2009 for protection of legality and revision was unfounded.

Applicants' allegations

21. The Applicant alleges a breach of Article 54 of the Constitution in that the claim of unjust enrichment filed against it by the debtor has no legal basis, because it was approved by the Commercial District Court of Pristina on 23 December 2004, in contradiction of the final Judgment of the Commercial District Court Pristina, II. C.no. 206/2002. Accordingly, the final judgment should have been observed, otherwise the constitutional principle of guaranteed legal rights of any legal entity, be that a natural or legal person, would be violated.

22. In his opinion, the issue is that the credit agreement has been violated, because it was signed with the full and free will of the contractual parties without any legal flaw. Hence, the credit agreement had to be respected.
23. Further, the Applicant complains that the Commercial District Court of Pristina had decided on the execution despite the fact that the Supreme Court had not decided upon the complaint of the Applicant against the Decision E.no. 382/2009 of 19 November 2009.

24. Hence, the Applicant requests the Constitutional Court to annul all decisions taken in the civil and executive procedures, so that the judgment of the Commercial District Court of 18 December 2002 (which became final on 14 December 2004) remains in force.

Assessment of the request for interim measures

25. In the light of the submissions of the Applicant, the Court finds that the Applicant has failed to establish that there exists a prima facie case as required by Article 27 of the Law. The Applicant has not submitted any convincing arguments that he might sustain irreparable damage, if his request for interim measures would not be granted or that there exist a public interest to grant interim measure.

26. The Court, therefore, concludes that the request for interim measures has not been substantiated and must therefore be rejected.

Assessment of the admissibility of the Referral

27. As to the Applicant's allegation that his right guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution has been violated, the

Court observes that, in order to be able to adjudicate the Applicants' complaint, it is necessary to first examine whether it has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

28. The Applicant can complain only, if the regular courts have committed errors of fact or law, unless and in so far as they may have infringed rights and freedoms protected by the Constitution.

29. In this connection, the Court maintains that it is not a court of fourth instance, when considering the decisions taken by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, Resolution on Inadmissibility in Case No. KI 13/09, Sevdail Avdyli, of 17 June 2010 and mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

30. The Constitutional Court can only consider, whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, mutatis mutandis, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87 adopted on 10 July 1991).

31. In this respect, it is noted that the Applicant not only has not built a case on a violation, but also has not submitted any evidence showing that the Judgment of the Supreme Court was unfair or tainted by arbitrariness, when it rejected the Applicant’s claim as ungrounded (see, mutatis mutandis, Shub v. Lithuania, ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009 and Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

32. It follows that the Referral is manifestly ill-founded, pursuant to Rule 36 (1.c) of the Rules of Procedure which provides: “The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded.”

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (2) of the Rules of Procedure, unanimously, on 22 February 2011,

DECIDES

I. TO REJECT the Referral as Inadmissible;

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Alil Memetoviq vs. Judgment of the District of Prishtina, P. nr. 49/2006 and Judgment Pkl. Nr/8/09 of the Supreme Court

Case KI 50-2010, decision of 21 March 2011

Keywords: criminal matter, individual referral, manifestly ill-founded referral, right to fair and impartial trial, sentencing, specification of rights violated

The Applicant, a prison inmate serving a 30-year sentence following convictions for aggravated murder and weapons offenses, filed a Referral pursuant to Article 113.7 of the Constitution, asserting that unspecified Constitutional rights were infringed by a judgment of the Supreme Court affirming his convictions in the Prishtina District Court. The Applicant argued that the court decisions were based upon erroneous factual determinations, including a failure to perform a scene reconstruction, and that the sentence imposed was too harsh.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Articles 102 and 113.1 of the Constitution, and Articles 47 and 48 of the Law on the Constitutional Court, because the Applicant failed to establish a *prima facie* showing that the proceedings in his case were unfair or not impartial. The Court noted its limited discretion to resolve constitutional disputes, and inability to revisit judicial determinations of fact and applications of substantive law, provided that the process was fair and impartial, citing *Akdivar v. Turkey*. The Court emphasized that the Applicant's dissatisfaction with the outcome of his case was an insufficient basis for a Constitutional challenge, citing *Mezotur-Tiszacugi Tarsulat v. Hungary*.

Prishtina, 21 March 2011
Ref. No.:RK 114 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 50/10

Applicant

Alil Memedoviq

Constitutional Review of the Judgment of the District Court of Prishtina, P.nr.49/2006, dated 30.08.2006, and Judgment of the Supreme Court of Kosovo, Pkl. nr/8/09, dated 19.04.2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge,

Applicant

1. The applicant is Mr. Alil Memedoviq from the village of Sfirca, currently serving his prison sentence at Dubrava Prison.

Challenged decisions

2. Challenged decisions are:
   Judgment of the District Court of Prishtina, P.nr.49/2006, dated 30.08.2006, and
   Judgment of the Supreme Court of Kosovo, Pkl.nr/8/09, dated 19.04.2010.

Subject matter

3. The subject matter of the case submitted with the Constitutional Court of the Republic of Kosovo on 29 June 2010 is the constitutional review of the Judgment of the District Court of Prishtina, P.nr.49/2006, dated 30.08.2006, declaring Mr. Alil Memedoviq guilty and pronouncing him a 30 year prison sentence for the criminal offences he was declared guilty, and of the Judgment of the Supreme Court of Kosovo, Pkl.nr/8/09, dated 19.04.2010, refusing his request for the protection of legality against the final Judgment of the District Court.

Alleged violations of constitutionally guaranteed rights

4. Even though pursuant to Article 48 of the Law on the Constitutional Court in his referral, the applicant should accurately clarify what rights and freedoms he claims to have been violated, Mr. Memedoviq did not clarify in his referral what rights he claims to have been violated, even though from his referral submitted with the Court it can be assumed that the applicant claims that "his right to a fair and impartial trial", guaranteed by Article 31 of the Constitution of the Republic of Kosovo, has been violated.

Legal basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2009 (hereinafter referred to as: the Law), and Section 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules).

Proceedings before the Court

6. The Applicant filed the Referral with the Constitutional Court on 29 June 2010.

7. On 26 August 2010, the Constitutional Court notified the Supreme Court regarding the Referral submitted with the Constitutional Court and the Court has not received any reply within the legal time limit.

8. On 14 December, after having considered the Report of the Judge Rapporteur, Kadri Kryeziu, the Review Panel, composed of Judges Altay Suroy (Presiding), Gjyljeta Mushkolaj and Iliriana Islami, members of the Panel, on the same date, recommended to the full Court to reject the case as inadmissible.

Applicant's complaint

9. The applicant complains that the District Court of Prishtina had issued an unfair judgment by incorrectly determining the factual situation of his case, especially by not doing site reconstruction, and that the sentence pronounced to him for the criminal offence he claims not to have committed is too severe. He also emphasizes that Supreme Court judgments regarding his and his defense attorney's complaints are unjust and based on incomplete and erroneous determination of the factual situation, even though he provides the same reasoning in these

complaints for site non-reconstruction and for the reconciliation with the family of the victims of the incident he had caused.

Summary of the facts

10. On 30 August 2006, the District Court of Prishtina, acting as a first instance court, issued Judgment P.nr 49/2006, declaring Mr. Alil Memedoviq, from the village of Sfirca – Medvegja municipality, now residing in Prishtina, guilty of the criminal offence of aggravated murder under Article 147, para. 1, item 11 of PCCK, and of the criminal offence of "unauthorized ownership, control, possession or use of weapons" under Article 328, para. 2 of PCCK, and pronounced him an imprisonment of 29 (twenty-nine) years for the first offence and an imprisonment of one year and six months for the second offence, including the time spent in pretrial detention.

11. On 25 April 2007, the Supreme Court of Kosovo, acting pursuant to the complaint of Mr. Memedoviq's legal representative, issued Judgment Ap.nr7/2007, amending the Judgment of the District Court of Prishtina, P.nr 49/2006, again declaring him guilty of criminal offences of aggravated murder and attempted murder under Article 146, respectively Article 147, para. 1, item 11 as read with Article 20 of PCCK, pronouncing him a long-term imprisonment of 29 (twenty-nine) years including the time spent in pretrial detention, from 23 October 2005 onwards.

12. On 4 June 2008, the Supreme Court of Kosovo, acting as a third instance court, pursuant to the complaint of the accused Alil Memedoviq and of his defense lawyer, issued Judgment Api.nr.4/2007, refusing as ungrounded complaints of the accused and of his defense lawyer and confirming the Judgment of the Supreme Court, Ap.nr.7/2007, dated 25 April 2007.

13. On 10 April 2010, the Supreme Court of Kosovo, through Judgment Pkl.nr.8/09, refused the request for the protection of legality of the accused Mr. Alil Memedoviq, submitted against the final Judgment of the District Court of Prishtina, p.nr.49/2006, dated 30.08.2006, and the Judgment of the Supreme Court of Kosovo in Prishtina, Api.nr.4/2007, dated 04.06.2008.

14. Finally, unsatisfied with all mentioned judgments, on 26 June 2010, Mr. Memedoviq filed a referral with the Constitutional Court of the Republic of Kosovo.

Assessment of the admissibility of the referral

15. In order to be able to adjudicate on Applicant's Referral, the Court preliminarily refers to Article 113.1 of the Constitution, which stipulates that:

    "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties," and Article 47, respectively 48, of the Law on the Constitutional Court of the Republic of Kosovo, 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.

    *Article 48 - **Accuracy of the Referral***
    In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims so have been violated and what concrete act of public authority is subject to challenge.

16. In connection to this, the Constitutional Court also stresses that Article 102 of the Constitution provides that:

    1. Judicial power in the Republic of Kosovo is exercised by the courts
    2. Courts shall adjudicate based on the Constitution and the law.

17. In fact, the correct and complete determination of the factual situation is a full jurisdiction of regular courts and site inspection or reconstruction of the event outside the main trial is a discretional right of the Court if the Court deems this necessary (see Article 366, para 2 of the Provisional Criminal Procedure Code of Kosovo), so, from applicant's claims related to this issue, the Constitutional Court does not see that regular courts have acted in incompliance with the Constitution.

18. With that said, the Court finds that the District Court, through Judgment P.nr.49/2006, dated 30.08.2006, and the Supreme Court, through judgments issued based on complaints submitted by the accused and his defense lawyer, mentioned in items 8, 9, and 10 of this Report, have concluded the fact that Mr. Alil Memedoviq has committed the criminal offences he is accused of and pronounced him the prison sentence as described in the enacting clause of the judgments. The Constitutional Court did not find any element of the violation of Article 31 of the Constitution (Right to Fair and Impartial Trial), or Article 6 of the

European Convention for the Protection of Human Rights (Right to Fair and Impartial Trial) in Applicant's complaints.

19. On this occasion, the Constitutional Court of Kosovo reiterates it does not enjoy appellate jurisdiction. The task of the Constitutional Court is to ensure compatibility with the rights guaranteed by the Constitution and other legal instruments and, therefore, it cannot act as "a fourth instance court", (see *mutatis mutandis,* i.a., Akdivar vs. Turkey, 16 September 1996, R.J.D, 1996-IV, para. 65).

20. From facts submitted with the referral, it appears that the applicant has not met the legal obligation regarding the accuracy of the referral, because he did not accurately specify what rights guaranteed by the Constitution have been violated by acts of public authorities. Moreover, the Court considers that there is nothing in the Referral which indicates that courts hearing the case lacked impartiality or that proceedings were otherwise unfair. The mere fact that applicants are dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of Article 31 of the Constitution (see *mutatis mutandis* Judgment ECHR Appl. No. 5503/02, Mezotur-Tiszazugi Tarsulat vs. Hungary, Judgment of 26 July 2005).

21. In these circumstances, the referral is manifestly ungrounded since the applicant has not met the requirements for the admissibility of the referral

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Kadri Kryeziu	Prof. dr. Enver Hasani

Zejni Selimi vs. Decision of the Judgment A. Nr. 727/2009 of the Supreme Court

Case KI 65-2009, decision of 21 March 2011

Keywords: administrative dispute, individual referral, pensions, right to fair and impartial trial, right to pension, specification of rights violated

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that her Constitutional rights were infringed by a judgment of the Supreme Court, which affirmed a decision of the Kosovo Pension Administration (KPA) rejecting on medical grounds her application for a continuation of a disability pension.

The Court held that the Referral was inadmissible pursuant to Article 113.7 because the Applicant had failed to make a *prima facie* showing of a Constitutional violation. Indicating that the Referral reflected the Applicant's dissatisfaction with the Supreme Court's factual findings and application of substantive law, the Court emphasized that its discretion is limited to resolution of Constitutional controversies, not factual or other legal disputes, citing *Garcia Ruiz v. Spain*, including ensuring a fair trial, citing *Edwards v. United Kingdom*. The Court found that there was no indication from the Applicant's submission that the Supreme Court proceedings had been unfair or tainted by arbitrariness, citing *Vanek v. Slovak Republic*.

Pristina, 21 march 2011
Ref. No.: RK91/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 65/09

Applicant

Zejni Selimi

requesting

Constitutional review of the Decision of the Judgment of the Supreme Court of Kosovo, A. Nr. 727/2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Unanimously approves the following Decision on the inadmissibility of the case.

INTRODUCTION

Applicant

1. The Applicant is Ms. Zejni Selimi, from Prishtina.

Challenged decision

2. Judgment of the Supreme Court of Kosovo, A. Nr. 727/2009, dated 22 October 2009.

Subject matter

3. On 24 November 2009, Ms. Zejni Selimi, from Prishtina, submitted a Referral to the Constitutional Court of Kosovo. The Applicant, requests an assessment of the constitutionality of Judgment of the Supreme Court of Kosovo A.Nr. 727/2009, dated 22 October 2009, which is in relation to her right on disability pension.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

5. The referral was submitted to the Constitutional Court on 24 November 2009.

6. On 17 December 2010 after having considered the Report of the Judge Rapporteur Snezhana Botusharova, the Review Panel, composed of judges, Kadri Kryeziu (Presiding), and Gjyljeta Mushkolaj and liriana Islami, members, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

7. On 24 November 2009, the Applicant filed a referral with the Constitutional Court of Kosovo, registered by no. KI - 65/09. Although she fails to concretely state the constitutional rights which have been allegedly violated, it may be concluded that she has challenged the Judgment of the Supreme Court of Kosovo, ref. no. A. no. 727/2009, which rejects the claim of the Applicant as ungrounded, in relation to the right to pension.

8. From case files, it may be ascertained that in compliance with Regulation No. 2003/23, the Department of the Kosovo Pension Administration, Ministry of Labour and Social Welfare, on 22 February 2006 rendered a Decision thereby recognizing the Applicant's right to disability pension, retroactively since 1 January 2004, at the amount of forty Euros (40 €). Also, the Decision states that three (3) years from the date of acquiring the right to pension, the Applicant shall be invited to this Ministry for revision.

9. On 2 April 2009, The Department of Kosovo Pension Administration, Ministry of Labour and Social Welfare, based on the assessment of the Medical Commission, which concluded that the Applicant does not have full abilities, and disability is present and permanent, it rendered a Decision thereby rejecting the application of Mrs. Selimi for Disability Pension.

10. On 22 October 2009, the Supreme Court of Kosovo issued a Judgment, thereby rejecting the claim of the Applicant.

11. In this Judgment, the Supreme Court maintains that Medical Commissions established by the Ministry of Labour and Social Welfare, in compliance with Article 3.2 of the Law on Pensions of Disabled Persons (LPDP), consisting of specialist physicians of respective fields,

after examining the medical documentation and direct examination, found that the Applicant does not have any full and permanent disability. Therefore, it concluded that the Ministry of Labour and Social Welfare had fairly and fully ascertained the factual situation and had applied material law when finding that the Applicant ,Mrs. Selimi, does not meet criteria set forth by Article 3 of the LPDP to acquire the right to pension for disabled persons.

Assessment of the admissibility of the Referral

12. Article 113.7 of the Constitution of the Republic of Kosovo provides the following:

"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".

12.1 From the documentation submitted, it may be found that the Applicant has exhausted all legal remedies provided by law.

13. Paragraph 1 of Article 49 of the Law on the Constitutional Court provides the following:

"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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced".

13.1 The most recent decision related to this case is the decision of 22 October 2009. The Applicant filed her referral before the Constitutional Court on 24 November 2009, which means that she filed the referral before this Court in compliance with the deadline set forth by Article 49.

14. Even though, the Applicant has exhausted all legal remedies in order to realize her alleged right on disability pension foreseen by law, she has not provided any evidence - relevant fact to support that the "administrative or judicial authorities have made any violation of her rights guaranteed with the Constitution", (see Vanek v. Slovak Republic, ECtHR Decision on Admissibility of the case No. 53363/99 dated 31 May 2005).

15. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and

substantive law (see, mutatis mutandis, García Ruiz v. Spain, no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-I).

16. The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see among others authorities, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No 13071/87 adopted on 10 July 1991).

17. However, having examined the documents submitted by the Applicants, the Constitutional Court does not find any indication that the proceedings before Supreme Court were in any way unfair or tainted by arbitrariness (see mutatis mutandis Application No. 53363/99, Vanek v. Slovak Republic, ECHR Decision of 31 May 2005).

THEREFORE

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law, and Rule 56 (2) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr . Snezhana Botusharova	Prof. Dr. Enver Hasani

AGEF Gmbh through duly authorized representatives vs. Decision of the Municipal Assembly of Prishtina No. 353-1297

Case KI 72-2010, decision of 21 March 2011

Keywords: contract dispute, exhaustion of legal remedies, individual referral, interim measures

The Applicant, an NGO, filed a Referral pursuant to Articles 113.7 and 116.2 of the Constitution, asserting that its rights to effective legal remedies under Articles 22.3 and 32 of the Constitution, and Article 1 of Protocol 1.1 of the European Convention on Human Rights, were infringed by the Prishtina Municipal Assembly's annulment of a long-standing contract for use of a building, which was allegedly politically motivated. The Applicant requested suspension of the decision as an interim measure.

The Court held that the Referral was premature and inadmissible pursuant to Article 113.7 because a lawsuit filed by the Applicant was still pending in the Municipal Court, reflecting that the exhaustion of all legal remedies prerequisite was not fulfilled. The Court emphasized that the rationale of the exhaustion requirement was a presumption that the Kosovo legal system would prevent or remedy constitutional violations, citing *Selmouni v. France*. It also noted that the Applicant's dissatisfaction with the outcome below was an insufficient basis for an appeal, citing *Whiteside v. the United Kingdom*. Similarly, pursuant to Article 116.2 of the Constitution, Article 27 of the Law on the Constitutional Court, and Rule 51.2 of the Rules of Procedure, the Court denied the request for interim measures because the Applicant fail to demonstrate the potential for irreparable damage or how the public interest would be served by the measures.

Pristina, 21 March 2011
Ref. No.: RK101/11

RESOLUTION ON INADMISSIBILITY

Case No. KI 72/10

Applicant

AGEF Gmbh through duly authorized representatives

Constitutional Review of the Decision of the Municipal Assembly of Prishtina No. 353-1297, dated 29 June 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is the NGO AGEF Gmbh, registered on 12 June 2000 to operate in Kosovo, registration no. 5300232-3, which submitted the referral through its duly authorized representatives, Mrs. Iliriana Osmani Serreci and Mr. Virtyt Ibrahimaga from Prishtina.

Challenged decision

2. The challenged decision is the Decision on the annulment of the Decision granting temporary use of the building of the municipal archive to the German Academy (school) for Adults (AGEF) 01. No. 353-1774, dated 24 September 2002. Challenged decisions are: Decision of the Supreme Court of Kosovo rev. 395/2008, dated 2 June 2009, and the Decision of the District Court in the municipality of Peja, Ac. No. 306/06, dated 25 May 2008.

Subject matter

3. The subject matter of the case submitted with the Constitutional Court of the Republic of Kosovo on 30 July 2010 is the assessment of the Decision of the Municipal Assembly of Prishtina, 01 No. 353-1297, dated 29 June 2010, anulling the Decision granting temporary use of the building of the municipal archive to the German Academy (school) for Adults (AGEF)

01. No. 353-1774, dated 24 September 2002, requesting the Constitutional Court to impose interim measures cancelling the execution of the Decision of Prishtina MA, **01 No. 353-1297, dated 29 June 2010.**

Alledged violations of the rights guaranteed by the Constitution

4. The applicant claims that the Decision of the Municipal Assembly of Prishtina has violated his constitutional right to effective legal remedies (Article 32 of the Constitution) and Article 22.3 of the Constitution as read with Article 1 of the Protocol 1 (1) of the European Convention on Human (every or legal person is entitled to the peaceful enjoyment of his possessions).

Legal basis

5. Article 113 (7) and 116.2 of the Constitution, Articles 48 and 49 of the Law on the Constitutional Court of the Republic Kosovo, of 16 December 2008 (No. 03/L-121), (hereinafter referred to as: the Law), and Article 54 (b) and Article 69 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Proceedings before the Court

6. The applicant filed the referral with the Constitutional Court on 30 July 2010.

7. On 2 August 2010, the Constitutional Court notified the I.O.T. Bar Office, which represents the applicant, that the Constitutional Court has received their referral and registered it with number 72/10.

8. On 2 August 2010, the Constitutional Court notified the municipality of Prishtina as an opposing party, regarding the registered referral and asked the municipality for possible comments regarding the referral.

9. On 1 October 2010, the Constitutional Court sent a request to the Municipal Court of Prishtina for access to the case file C. no. 1679/2010, since it was aware that this case had the same subject matter as the case before the Constitutional Court of Kosovo.

10. On 10 August 2010 and on 15 September 2010, the municipality of Prishtina sent its comments regarding the case defending its decision as based on law.

11. On 14 December 2010, after having considered the Report of the Judge Rapporteur Ivan Čukalović, the Review Panel, composed of judges Robert Carolan (presiding) and Snezhana Botusharova and Altay Suroy, members, recommended the full Court to reject the Referral as inadmissible.

Applicant's complaint

12. The Applicant complains that the Municipal Assembly of Prishtina with Decision 01 No. 353-1297, dated 29 June 2010, unconstitutionally and unlawfully annulled its Decision 01. No. 353-1774, dated 24 September 2002, and thus unilaterally terminated the Contract on the use of the building and the plot, drafted on 3 October 2002, according to which AGEF, as a contracting party, has been using the building, which is the subject matter of the contract, for 10 years, in conformity with conditions set forth in the contract.

Summarry of the facts

13. On 24 September 2002, the Municipal Assembly of Prishtina issued Decision 01. No. 353-1774, granting temporary use of the building of the municipal archive to the German Academy (school) for Adults (AGEF). Item III (three) of this Decision underlines that conditions of granting temporary use of the building shall be determined by a special contract, which is to be concluded between the municipality and AGEF.

14. On 3 October 2010, the Municipal Assembly of Prishtina, represented by the President of the Assembly, Mr. Salih Gashi, in the capacity of the owner, and the NGO AGEF, represented by dr. Karin Lutze, in the capacity of the user, concluded the contract regaring the use of the building of the municipal archive in Prishtina, at Andrea Gropa Street, cadastral plot 5941/5942, municipality of Prishtina.

15. Article 3 (three) of the Contract provides that the owner shall lend the building, which is the subject matter of this contract, to the user for a period of 10 (ten) years.

16. At the meeting held on 24 June 2010, the Municipal Assembly of Prishtina issued the decision, registered in the protocol with number 01 No. 353-1297, anulling the Decision granting temporary use of the building of the municipal archive to the German Academy (school) for Adults (AGEF) 01. No. 353-1774, dated 24 September 2002, with a remark on item VI (six) of the Decision that this decision enters into force from the day of approval in the Municipal Assembly, whereas in conformity with item III of this decision, AGEF should vacate the

building it has been using within 30 days from the issuance of this decision.

17. On 7 July 2010, Prishtina MA, throught its Department of Finance and Property, officialy notified AGEF about its decision.

18. On 22 July 2010, AGEF Gmbh, through its duly authorized representative, the lawyer Avdi Ahmetaj, from Prishtina, submitted a REFERRAL with the Municipal Court of Prishtina for the imposition of INTERIM MEASURES cancelling the execution of the Decision of the Prishtina MA, 01 No. 353-1297, dated 29 June 2010.

19. Municipal Court of Prishtina, deciding pursuant to AGEF referral, dated 4 August 2010, issued Judgment C. no. 1679/10, imposing temporary security measures and prohibits Prishtina MA to execute Decision 01 No. 353-1297, dated 29 June 2010, obliging at the same time the proposer (AGEF) to file a lawsuit within 30 days from the day of the approval of temporary security measures, against the objectors of security measures for the issue, which is the subject matter of the referral, for the imposition of temporary security measures.

20. On 1 October 2010, the Constitutional Court directly submitted the Referral, Ref. no. 1442/10 DRLSA, to the Municipal Court of Prishtina for access to the case file C. 1679/2010, which relates to the case being reviewed at the Constitutional Court, and it immediately received from the Municipal Court the copy of the lawsuit C.no.1679, from which it can be clerarly seen that AGEF, through its representative, the lawyer Selim Nikçi, in the capacity of the plaintiff, filed a lawsuit agaisnt the municipality of Prishtina for the confirmation of the existence of the contract, dispute value €3.500.00.

Assessment of admissibility of the referral on interim measures and the meritum

Interim measures

21. In order to be able to adjudicate the applicant's referral, the Court needs to preleminariy assess if the applicant has fulfilled admissibility requirements laid down in the Constitution.

22. In this connection, the Court refers to Article 116.2 of the Constitution, which provides:

While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the

Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages.

And Article 27 of the Law on the Constitutional Court, which provides:

The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.

The Court also bears in mind Article 51, paragraph 2 of the Rules of Procedure of the Constitutional Court, which provides:

The request shall specify the reasons for requesting interim measures, the possible consequences if it is not granted, and the measures requested.

23. From the abovementioned norms, it appears that the essential condition for the imposition of interim measures is the **irreparable (uncompensated)** damage that could be caused to the applicant and the protection of the **public interest**. It is also the obligation of the applicant to argumentatively justify his referral for the imposition of interim measures.

24. Considering allegations in AGEF Referral, the Court holds that the applicant did not submit evidence that would make the imposition of interim measures necessary. The applicant did not emphasize what irreparable damage would be caused to him if interim measures were not imposed and the reason why that damage could not be avoided, even through court's final decision. The applicant did not stress either how **public interest** was damaged by Prishtina MA decision and how this interest could be protected through court's possible interim measure.

25. Even if the applicant had sufficiently indicated the existence of the danger for irreparable damage caused to him by the application of the Prishtina MA decision, this danger was avoided through the determination of INTERIM SECURITY MEASURES of the Municipal Court in Prishtina through Resolution C. no. 1679, dated 4 August 2010, and this measure is still in force, so that the Constitutional Court cannot determine interim measures for the case according to which interim measures have already been determined.

26. From the abovementioned reasons, the Court unanimously decides to reject the referral for interim measures.

Assessment of essential aspects of the referral

27. By reviewing all arguments submitted by the parties to the case, the Court comes to the conclusion that the referral submitted with the Constitutional Court by AGEF's authorized representatives ***is premature*** and that it has not been submitted pursuant to Articles 113.1 and 113.7 of the Constitution of the Republic of Kosovo, because:

28. In the referral on the assessment of the constitutionality of Prishtina MA Decision, submitted with the Constitutional Court, authorized representatives of the NGO AGEF Gmbh claimed that the Decision of the Municipal Assembly of Prishtina 01 No. 353-1297, dated 29 June 2010, is a political act, it does not have the quality of the administrative act and as such it does not provide the possibility of using **legal remedies** to challenge it before competent authorities, even though this right is a judicial constitutional category, provided by Article 32 of the Constitution.

29. If the Court recognized applicant's allegations and took the stand that Prishtina MA Decision does not have the quality of the administrative act, but that it is a political decision, in that case, the Court should declare as political the Decision of the Municipal Assembly of Prishtina 01 No. 352-1774, dated 24 September 2002, through which the building, which is the subject matter of the dispute, was given to AGEF for temporary use, and which provided the obligation of reaching of the contract on the use of the building, and which determines rights and obligations of contracting parties.

30. Article 1, paragraph 4 of the Law on Administrative Procedure (No. 02/L-28), provides:

The provisions of this Law shall not apply to the following forms of activities of the public administration bodies:

a) administrative acts of regulatory character;

b) administrative acts pertaining the internal organization of the public administration bodies:

c) administrative acts issued by the public administration bodies within private transactions, to which the public administration is a party.

Considering what was said above, it appears that the challenged decision of Prishtina MA does not fall in any of the mentioned categories, it was therefore issued in the administrative procedure and it can be challenged through the administrative procedure.

31. So even assuming that the administrative contest could not have been initiated, the Court considers that Article 82, paragraph 1 of the Law on Local Self-Government (Law 03/L-040) provides the possibility of challenging Municipal Assembly decisions within the competent Ministry of Local Self-Government.

32. NGO AGEF filed a lawsuit through its lawyer, Mr. Selim Nikçi, with the Municipal Court in Prishtina for the confirmation of the existence of the contract it previously concluded with Prishtina MA and which is the consequence of Prishtina MA Decision 01 No. 353-1774, dated 24 September 2002, and this procedure is ongoing.

33. Referring to Article 113.7 of the Constitution, which provides:

"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."

Based on above, the Court concludes that it cannot consider a referral before all legal remedies at disposal have been exhausted, and it is clear that this did not happen in the actual case.

34. Moreover, the Court wishes to emphasise that the rationale of the rule for the exhaustion of legal remedies is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. This rule is based on the assumption that the legal order of Kosovo will provide effective legal remedies for the protection of the violation of constitutional rights (see, *mutatis mutandis*, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).

35. The Court also emphasizes simply that any doubt regarding the perspective of the issue is not sufficient to exclude one complainant from his/her obligation to appeal to local competent authorities (see Whiteside vs. the United Kingdom, Decision of 7 March 1994, App. No. 20357/92, DR 76, p. 80).
36. Consequently, the applicant has not met the requirements for the admissibility of the Referral, so

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution of the Republic of Kosovo, Article 49 of the Law on the Constitutional Court and Rule 56 (2) of the Rules of Procedure, on 14 December 2010 unanimously,

DECIDES

I. TO REJECT the referral as inadmissible;

This Decision shall be notified to the parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Ismet Hebibi vs. Judgment Rev. 1 no. 165/2004 of the Supreme Court

Case KI 101-2010, decision of 22 March 2011

Keywords: inadmissible *ratione temporis*, individual referral, restitution, right to compensation for unpaid salaries, right to work, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional rights to work for compensation were infringed by a 2004 judgment of the Supreme Court, which arbitrarily reversed a lower court judgment reinstating him to a job from which he had been terminated and awarding him back wages.

The Court held that the Referral was incompatible *ratione temporis* with the Constitution and inadmissible pursuant to Article 113.7, Article 56 of the Law on the Constitutional Court and Rule 36 of the Rules of Procedure because it relates to events that happened prior to the implementation of the Constitution, citing *Jasiúnienè v. Lithuania*.

Pristina, 22 March 2011
Ref. No.: RK 106/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 101/10

Applicant

Ismet Hebibi

Constitutional Review of the Judgment of the Supreme Court of Kosovo Rev.l.no.165/2004, dated 9 November 2004

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President

Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Ismet Hebibi residing in Junik.

Challenged Decision

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo Rev.l.no.165/2004, dated 9 November 2004.

Subject Matter

3. The Applicant deems that his right to work and the right to compensation as provided by law have been violated.

4. The Applicant requests from the Constitutional Court to remand his case for retrial, alleging that the Ministry of Health, CFM "Adem Ukëhaxhaj" and CFM "Dr. Ali Hoxha" in Junik violated his rights and did not act in a legal way.

Legal Basis

5. Article 113.7 of the Constitution of the Republic of Kosovo; Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rule 36 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

6. On 11 October 2010 the Applicant filed a Referral with the Secretariat of the Constitutional Court.

7. On 19 January 2011, the Constitutional Court notified the Supreme Court that the Applicant challenges the Judgment that the Supreme Court adopted.

8. The Constitutional Court has not received a reply from the Supreme Court.

9. On 21 February 2011 after having considered the Report of the Judge Rapporteur Altay Suroy, the Review Panel, composed of judges, Almiro Rodrigues (Presiding), Gjyljeta Mushkolaj and Iliriana Islami, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

10. The Applicant was employed at the Medical Center in Deçan with the duties of Doctor of General Practice. On 17 September 1992 with the decision no.126 of the Medical Center in Deçan terminated the labour relation with the Applicant.

11. On 12 February 2001 the Municipal Court of Deçan Judgment C.l.no.18/2000, quashed the Decision no.126 dated 17 September 1992 of the Medical Center in Deçan and compelled the respondent (i.e. Medical Center in Deçan) to reinstate the Applicant in to labour relation. The respondent was also obliged to compensate the court proceedings expenses in the amount of 60 Deutsche Marks.

12. On 9 July 2001 the District Court of Peja Judgment Ac.nr.65/2001 Rejected the appeal of the Medical Center "Adem Ukëhaxhaj" and confirmed the the Municipal Court of Deçan Judgment C..no.18/2000, dated 12 February 2001.

13. On 28 December 2001 the Applicant filled a revision to the Supreme Court of Kosovo requesting the quashing the Judgment of the District Court in Peja and adjudicating the compensation of his income for the period from 1 November 1991 until 31 September 2001.

14. On date 9 November 2004 the Supreme Court of Kosovo rendered Judgment Rev.l.no.165/2004 in the Applicant's case and rejected as ungrounded the District Court of Peja Judgment Ac.nr.108/2003, dated 13 July 2004 , and rejected the Applicant's revision.

15. On date 14 February 2005 the Applicant submitted to the Ombudsperson Institution of Kosovo a request for compensation of personal incomes.

Applicant's allegation

16. The Applicant complains that he was legally harmed, prosecuted and manipulated by an arbitrary justice. He claims that he was entitled to

return to work and to have the compensation of personal income form the Ministry of Health and the Center for Family Medicine “Adem Ukëhaxhaj” in Deçan and also from the Center for Family Medicine “Dr. Ali Hoxha” in Junik.

Assessment of the Admissibility of the Referral

17. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

18. As to the Applicant's Referral, the Court notes that the Applicant complains of the Judgment Rev.no.165/2004 of the Supreme Court which is dated 9 November 2004. This means that the Referral relates to events prior to 15 June 2008 that is the date of the entry into force of the Constitution of the Republic of Kosovo.

19. It follows that the Applicant’s referral is incompatible "*ratione temporis*" with the provisions of the Constitution (see *mutatis mutandis* Jasiùnienė v. Lithuania, Application no. 41510/98, ECHR Judgments of 6 March and 6 June 2003) and it does not fall under the jurisdiction of the Constitutional Court as provided by Article 56 of the Law on the Constitutional Court.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT this Referral as Inadmissible;

The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

Agim Stubilla vs. Judgment PKL no. 69/2010 of the Supreme Court, Judgment P. no. 129/2009 of the Municipal Court of Lipjan, and Kosovo Police Decision P. no. 122/VDP/2010

Case KI 84-2010, decision of 23 March 2011

Keywords: competency of lawyer, criminal matter, deadline issue, exhaustion of legal remedies, identity non-disclosure, individual referral, manifestly ill-founded referral, police misconduct claim, protection of legality, termination of employment, waiver

The Applicant, a police officer convicted of an on-duty theft, filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his right to work and exercise his profession under Article 49 of the Constitution was infringed by a judgment of the Supreme Court, which rejected his appeal of the Lipjan Municipal Court conviction for lack of specificity, and challenging a Kosovo Police decision terminating his employment. The Applicant contended that police and other prisoners physically abused him during his detention, that his conviction was politically motivated, the evidence was fabricated and insufficient to support his conviction and that his lawyer failed to follow his instructions to appeal the conviction.

As for the Supreme Court complaint, the Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Article 113.7 because he had failed make a *prima facie* showing that particular Constitutional rights and freedoms were violated and because he had waived his appellate rights. The Court held that the Kosovo Police complaint was inadmissible because the Applicant failed to exhaust all of his legal remedies before submitting the Referral, noting that his complaint to the Ministry of Internal Affairs was pending. Finally, the Court held that the Referral was inadmissible in general since it had not been submitted within the mandatory 4-month deadline, which ran from the date of the Municipal Court decision.

Pristina, 23 March 2011
Ref. Nr.:RK93/11:

RESOLUTION ON INADMISSILITY

in

Case No. KI 84/10

Applicant

Agim Stublla

CONSTITUTIONAL REVIEW
of
Judgment of the Supreme Court of the Republic of Kosovo, PKL.no.69/2010 dated 6 August 2010,

Judgment of the Municipal Court of Lipjan, P.no.129/2009, dated 23 February 2010,

and
Decision of Kosovo Police P.no.122/VDP/2010, dated 19 November 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharove, Judge
Ivan Čukalovič, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Agim Stublla residing in Podujevo.

Challenged court decision

2. The decision challenged by the Applicant is the Judgment of the Supreme Court of the Republic of Kosovo (Judgment PKL.No.69/2010, dated 6 August 2010), (hereinafter: "Supreme Court"), which rejected as ungrounded the Applicant's request for protection of legality, filed against the Judgment of the Municipal Court of Lipjan (Judgment P.no.129/2009, dated 23 February 2010) and Decision of Kosovo Police (Decision P.no.122/VDP/2010, dated 19 November 2010).

Subject matter

3. The Applicant alleges a violation of Article 49 [Right to Work and Exercise of Profession] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

4. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the court

5. On 13 September 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 9 of November 2010, the registration of the Referral was communicated to the Applicant, who, in accordance with Article 48 of the Law, was asked to clarify the alleged violation of his constitutional rights and freedoms. Although the time limit for doing so expired on 23 November 2010, the Applicant has not submitted any comments to address this issue.

7. The Applicant has requested not to disclose his identity, but did not substantiate this request.

8. On the same date of 9 November 2010, the Referral was communicated to the Supreme Court.

9. On 23 February 2011, the Review Panel consisting of Judges Robert Carolan (Presiding), Snezhana Botusharova and Gjyljeta Mushkolaj considered the report of Judge Rapporteur Almiro Rodrigues and made a recommendation to the Court on inadmissibility.

Summary of the facts

10. On 7 March 2009, the Applicant, working as a police officer at the airport of Prishtina, found a celullar phone on the table where he was drinking coffee.

11. The Applicant claims that he handed in the phone at the lost and found section. The Applicant also claims that he had requested for a receipt that he handed in the phone at the lost and found section, but he was not delivered such a receipt.

12. Some time later, the Applicant was arrested and detained for 15 days.

13. On 9 March 2009, the Municipal Public Prosecutor at the Municipal Court in Lipjan accused the Applicant of having commited theft under Article 252 (1) of the Provisional Criminal Code of Kosovo. Whoever takes the movable property of another person with the intent to unlawfully appropriate it for himself, herself or for another person shall be punished by a fine or by imprisonment of up to three years.

14. On 4 February 2010, the Applicant's lawyer requested the Municipal Court in Lipjan to postpone the hearing of 3 February 2010, because the Applicant was mentally not stable enough to participate in the session.

15. On 23 February 2010, the Municipal Court found that the Applicant was guilty, because he had deliberately tried by illegal means to appropriate the abovementioned celullar phone in order to enrich himself.

16. The Applicant was sentenced to three (3) months of imprisonment which he did not need to serve, if, in the time-frame of one (1) year, he would not commit another criminal act.

17. The Applicant alleges that his lawyer failed to file an appeal with the District Court against the Judgment of the Municipal Court.

18. Meanwhile, the Applicant filed a request with the Supreme Court which he called "a request for exceptional legal protection". Even though such a remedy does not exist as such, the Supreme Court considered it to be a "request for protection of legality".

19. The Supreme Court (Judgment PKL.No.69/2010, dated 6 August 2010) rejected the request as ungrounded, because the request did not contain any allegation on a breach of the law and did not state the legal provisions, which had allegedly been violated.

20. The General Police Directorate issued a decision (Decision P.no.122/VDP/2010, dated 19 November 2010), whereby it terminated the Applicant's labour relationship with the Kosovo Police for disciplinary reasons, one of them being the theft of a celullar phone at the Prishtina Airport on 7 March 2009.

21. On 10 December 2010, the Medical Service of the Kosovo Police issued a notification on the mental state of the Applicant, stating that the Applicant had a low threshhold of tolerance.

22. The Applicant submitted a complaint to the Ministry of Internal Affairs, opposing the the General Police Directorate decision.

Applicant's allegations

23. The Applicant claims that, while in detention, he was beaten by the police and prisoners.

24. He further complains that the Judgment of the Municipal Court in Lipjan is politically motivated and not based on evidence, but, instead, founded on lies and orchestrated by the current government.

25. Furthermore, he claims that he was also threatened by the said Court.

26. The Applicant further alleges that he has not used any regular legal remedy against the judgment of first instance, dated 23 February 2010, because his lawyer deliberately failed to file an appeal with the second instance court, even though he was authorized by the Applicant to do so.

Assessment of the admissibility of the Referral

27. As to the Applicant's allegation that his right guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution has been violated, the Court observes that, in order to be able to adjudicate the Applicants' complaint, the Court needs first to examine wether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

28. Regarding the complaint against the decision of the General Police Directorate (Decision P.no.122/VDP/2010, dated 19 November 2010), by which the Applicant's labour relationship with the Kosovo Police was terminated, the Applicant submitted a complaint to the Ministry of Internal Affairs, opposing the said decision. However, no other legal remedies provided by law were used by the Applicant.

29. Thus, as to this complaint, the Applicant has not exhausted all legal remedies available to him under applicable law.

30. In the complaint against the Supreme Court judgment, the Applicant did not specify what rights guaranteed by the Constitution have been

violated, how and why they were violated, nor he presented any pertinent and relevant evidence.

31. Some documents were submitted by the Applicant. However, they do not show that *"his individual rights and freedoms, guaranteed by the Constitution, have been violated by public authorities"*.

32. In addition, the Applicant has not made use of any regular legal remedy against the judgment of the Municipal Court in Lipjan, dated 23 February 2010. Thus, he waived the right to further complaint.

33. Furthermore, the Referral should have been filed with the Constitutional Court within a period of four (4) months, starting from 23 February 2010, the date of the judgment of the Municipal Court. However, the Applicant filed the Referral with the Constitutional Court on 13 September 2010, meaning almost seven (7) months later.

34. Therefore, the Referral is ill-grounded and must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, by MAJORITY VOTE, on 23 February 2011,

DECIDES

I. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasan

Sabri Hamiti and other Deputies vs. Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo

Case KO 29-2011, decision of 30 March 2011

Keywords: dissolution of Assembly, duties of Deputies, election of the President, elections, *quorum* (Assembly), referral by 10 or more Deputies

The Applicants, a group of 34 Assembly Deputies, filed a Referral pursuant to Article 113.5 of the Constitution contesting the Assembly's decision to elect Behgjet Pacolli as President of Kosovo on its third ballot, alleging that the election proceedings violated Article 86 of the Constitution in three respects: the decision lacked the two-thirds *quorum* required for a Presidential election under Article 86.4; there was only one candidate for the position, whereas Article 86.5 requires at least two candidates; and, there was an impermissible interruption during the election proceedings.

In his response, Mr. Pacolli contended that the Assembly *quorum* requirement of Article 69.3 of the Constitution merely requires the presence of more than one-half of the Deputies, which was fulfilled at the beginning of the disputed session, adding that the departure of Deputies from the session were effectively votes against him, so the *quorum* existed. Mr. Pacolli argued that Article 86.3 does not require the Assembly to nominate more than one Presidential candidate, asserting that the two-thirds vote and dissolution provisions of Articles 86.5 and 86.6 apply only in a situation where more than two candidates are nominated for the post. Mr. Pacolli also argued that the Assembly President is the final interpreter of the Assembly's Rules pursuant to Article 17.1 of the Assembly's Rules of Procedure, and that he approved the request for a break in the election proceedings.

The Court held that the Referral was admissible because the Applicants, members of a group comprised of 10 or more Assembly Deputies, were authorized parties and had met the 8-day deadline pursuant to Article 113.5, and had complied with the requirements of Article 42 of the Law of the Constitutional Court by identifying its members, providing necessary signatures, identifying the challenged decision, specifying the Constitutional provisions allegedly violated, and providing supporting evidence.

First, the Court held that Article 86 is breached when Assembly Deputies only nominate one candidate for President, emphasizing that the intent of the drafters of the Constitution to embrace a more democratic system in which more than one candidate is a prerequisite to a Presidential election. The Court noted the absence of language allowing a Presidential election

with only one candidate, citing the Constitutions of Albania and Hungary as examples. The Court concluded that the election in this case was invalid. Second, the Court concluded that the election was also invalid because of a lack of the 100% *quorum* mandated by Article 86, which obliged all 120 Assembly Deputies to vote (with the exception of those who had been properly excused by the President of the Assembly) in a Presidential election. In that regard, the Court emphasized that Deputies have a duty to participate in Assembly proceedings. Finally, the Court noted that Article 86 and the Rules of Procedure for the Assembly were silent on whether a break in Presidential election proceedings is allowed, highlighting that its duty is only to review allegations of Constitutional violations and concluding that a break in the proceedings did not encompass a constitutional issue under Article 86. The Court concluded that the Applicants had not submitted evidence of a Constitutional violation.

For the reasons stated, the Court issued a Judgment declaring that the Referral was admissible and, by seven votes in favor and two votes opposed, that the Assembly decision concerning the election of the President violated Article 86 and that it was, therefore, invalid.

Pristina, 30 March 2011
Ref. No.: AGJ 107/11

JUDGMENT

in

Case No. KO 29/11

Applicants

Sabri Hamiti and other Deputies

Constitutional Review of the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge

Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. The Applicants are 25 (twenty-five) Deputies from the Democratic League of Kosovo ("LDK") and 9 (nine) Deputies from the Alliance for Future of Kosovo ("AAK") (see Appendix A), represented by Mr. Sc. Vjosa Osmani.

Challenged decision

2. The decision challenged by the Applicants is the Decision of the Assembly of the Republic of Kosovo (hereinafter: the "Assembly"), No. 04-V-04, concerning the election of the President of the Republic of Kosovo, Mr. Behgjet Pacolli, held at the extraordinary session of the Assembly of 22 February 2011.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the Constitutionality of the decision of the Assembly, by which, Mr. Behgjet Pacolli, was elected the President of the Republic of Kosovo.

4. The Applicants contest the constitutionality of the procedure for the election of the President of the Republic of Kosovo as applied in the extraordinary session of the Assembly held on 22 February 2011, alleging a violation of Article 86 [Election of the President] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

5. The Applicants, in particular, claim that Article 86, paragraphs (4), (5), and (6) of the Constitution has been violated in view of the lack of the necessary quorum during the vote, lack of any opposing candidate and the interruption of voting during the election procedure.

Legal basis

6. Article 113.5 of the Constitution, Article 42 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56 (1) of the Rules of Procedure of the

Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

7. On 1 March 2011, the Applicants submitted the Referral to the Court.

8. On 2 March 2011, pursuant to Rules 8 and 33 of the Rules of Procedure, the President, by Order No.GJR. 29/11 of 2 March 2011, appointed Judge Iliriana Islami as Judge Rapporteur. On the same date, pursuant to Rule 9 the Rules of Procedure, the Deputy-President of the Court, by Order No.KSH. 29/11, appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Ivan Čukalovič and Enver Hasani.

9. On 3 March 2011, the Referral was communicated to the President of the Assembly, requesting his response. On the same date, pursuant to the Rules of Procedure, the Referral was communicated also to the President of the Republic of Kosovo and the International Civilian Office, as interested parties to the case.

10. On 8 March 2011, the Court requested the Applicants to submit additional documents, pursuant to Rule 35 (2) of the Rules of Procedure.

11. On 10 March 2011, the President of the Republic of Kosovo, Mr. Behgjet Pacolli, submitted his reply to the Applicants Referral.

12. On 11 March 2011, the President of the Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi, submitted only the Decision on the election of the President, the Minutes and the Transcript from the election of the President and the Government held on the extra ordinary session on 22 February 2011.

13. On 17 March 2011, the Review Panel deliberated on the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

14. On 28 March 2011, the Court deliberated and voted on the case.

Summary of the facts

15. On 21 February 2011, the President of the Assembly summoned the Deputies for an extraordinary session to be held on 22 February 2011. On the agenda for the extraordinary session appeared, amongst other issues, the election of the President of the Republic of Kosovo.

16. The only proposed candidate running for the office of President of the Republic of Kosovo was Mr. Behgjet Pacolli.

17. During the voting, the following Opposition Parties did not participate: LDK, AAK, and Vetëvendosja. As a result, only 67 (sixty seven) Deputies were present.

18. After the first voting round, the President of the Assembly declared that 67 (sixty seven) Deputies were present and that, out of those 67 (sixty seven), 54 (fifty-four) deputies had voted in favour.

19. The Assembly then held a second round, whereafter the President of the Assembly declared that out of the 67 (sixty-seven) Deputies present, 58 (fifty-eight) voted in favour.

20. Thereafter, the President of the Assembly announced a third round of voting. However, the Democratic Party of Kosovo (PDK) requested a break, which was initially refused by the President of the Assembly.

21. After the break, the third round of voting was held, whereafter the President of the Assembly declared that, out of the 65 (sixty-five) Deputies, 62 (sixty-two) voted in favour. However, the Commission, which chaired the election procedure, declared that out of 67 voting ballots in the ballot box, 62 were in favor, 4 against, and one invalid.

22. After the third round of voting, the President of the Assembly, Mr. Jakup Krasniqi, conclude that Mr. Behgjet Pacolli was elected President of the Republic of Kosovo.

Applicants' arguments

i. Lack of quorum in order to enable the election of the President

23. The Applicants claim that, according to Article 86(4) of the Constitution providing: "The President of the Republic of Kosovo shall be elected by a two thirds (2/3) majority [of the votes] of all deputies of the Assembly", the two thirds (2/3) majority of 120 (one hundred and twenty) deputies is 80 deputies, which is the required quorum needed to hold an election of the President. However, during the Extraordinary Session of the Assembly, in the first voting round, only 67 deputies were present, meaning that the necessary quorum was never reached in order to initiate the voting procedure for the President. Despite this, the voting took place without a quorum.

24. According to the Applicants, the lack of quorum was evident even in the second voting round, where only 67 (sixty seven) deputies were declared present.
25. In the third voting round, only 65 (sixty-five) deputies were declared present and the President of the Assembly, concluded that Mr. Pacolli, receiving 62 votes, was elected as the President of the Republic of Kosovo.

26. In the Applicants' opinion, in all, throughout the voting procedure for the election of the President, the necessary quorum of two thirds was not achieved or complied with, which is in breach of Article 86.4 of the Constitution.

27. Furthermore, the Applicants claim that the procedure is contrary to how the President of the Republic of Kosovo has previously been elected.

28. They, further, argue that Article 51 of the Rules of Procedure of the Assembly clearly specifies that: "The Assembly has a quorum, when there are more than half of the Deputies present in the Assembly" and that "Decisions of the Assembly sessions are valid only if when these were taken, when more than half of the Deputies in the Assembly were present." Furthermore, the Rules of Procedure of the Assembly provide that "Laws, decisions and other acts of the Assembly are considered to be adopted, if the majority of the Deputies are present and voting." However, the Rules also provide that "An exception is made in cases, when the Constitution of the Republic of Kosovo provides otherwise." In the view of the Applicants, it is clear that, regarding the necessary quorum in the case of the election of the President of Kosovo, the Constitution foresees otherwise, by requiring 2/3 of all the deputies of the Assembly.

29. The Applicants further hold that the Rules of Procedure of the Assembly, where the decision-taking with 2/3 is provided, are the ratification of international agreements, the dismissal of the Ombudsperson, the extension of a state of emergency for more than 150 days, the adoption of the Rules of Procedure of the Assembly, etc. The Applicants claim that, when the Assembly had to decide on any of the above mentioned issues, the vote should not have taken place, until a confirmed quorum of 2/3 of all deputies was present. As an example, the Applicants stated that, in the session of the Assembly of 6 September 2010, after the President of the Assembly confirmed that 72 deputies were present, he continued with the agenda of the day, which, in item 4, included the ratification of the Agreement between the Government of Kosovo and the World Bank. According to Article 18.1 (3) of the Constitution, ratification of international agreements must be made with 2/3 of all the deputies of

the Assembly. By respecting this procedure, in the session of 6 September 2010, the President of the Assembly, after stating that there was no quorum, postponed it for the next available plenary session. Similarly, in a session in 2009, the Assembly proceeded with the ratification of an Agreement on the acquisition of a loan between the Republic of Kosovo and the International Bank for Reconstruction and Development (IBRD), as well as the Memorandum of the Treasury Mission of the World Bank, only after 81 deputies were declared present in the Assembly, i.e. more than 2/3 needed for the ratification of such an agreement. Also, in the plenary session of 13 and 17 May 2010, item 7 of the Agenda of the day, was the review of a proposal of the Government of Kosovo to amend the Agreement with the International Monetary Fund (IMF). Before reviewing this issue, the President of the Assembly declared that the voting for such a procedure cannot start without the quorum of 2/3 of all the deputies of the Assembly.

30. The Applicants further argue that the election of the President of the Republic of Kosovo in 2008 was based on the Constitutional Framework for Provisional Self-Government in Kosovo, which foresaw an identical procedure (with regard to the number of votes required) for the election of the President. Article 9.2.8 of this Framework stipulates that ”The Assembly elects the President of Kosovo with a majority of 2/3 of the votes of all the deputies of the Assembly. If after 2 rounds of voting, a majority of two thirds cannot be achieved, in the subsequent round, a majority of votes of all deputies is required”. Even in that case, the voting was held after the confirmation that a quorum of two thirds of all the deputies was present. In fact, there were 119 deputies present, and after this number was confirmed, the President/Chairperson stated that “all the conditions/criteria have been met in order to proceed with the order of the day”, which included the election of the President. The Applicants, by using the principle of analogy, claim that the requirement of a quorum of 2/3 would have to be valid for the election of the President, according to the Constitution.

31. The Applicants hold that it is evident, that the previous practices of the Assembly confirm that, even if it is not mentioned expressly, before voting begins, a quorum of 2/3 is needed, by virtue of the Rules of Procedure of the Assembly and the Constitution. This is supported by the parliamentarian practice of the Assembly. Therefore, by not respecting this procedure, Article 86 of the Constitution has been violated and any decision taken in such a procedure is unconstitutional.

ii. Lack of any opposing candidate during the voting procedure for the President

32. In this respect, the Applicants claim that the election of the President of the Republic of Kosovo must take place after the nomination of more than one candidate, pursuant to Article 86.5 providing: "if none of the candidates receives the majority of 2/3 in the first 2 ballots, a third ballot takes place between the 2 candidates who received the highest number of votes in the second ballot and the candidate who receives the majority of [the votes of] all deputies of the Assembly shall be elected as President of the Republic of Kosovo". Furthermore, Article 86.6 of the Constitution provides: "If none of the candidates is elected as President of the Republic of Kosovo, the Assembly shall dissolve…".

33. The Applicants further claim that Article 86 of the Constitution provides that the candidacy of, at least, two (2) candidates is required, because in both quotations, the number of the candidates is mentioned in plural. However, during the voting procedure on 22 February 2011, there was only one candidate running for the office of the President, which is unconstitutional, pursuant to Article 86.5 and Article 86.6 of the Constitution.

34. Finally, the Applicants allege that, at the previous two elections of the President of Kosovo there were always two candidates running for President. In fact, the Constitutional Framework did not provide for an opposing candidate, and it is clear, that the aim of the drafters of the Constitution was, when including the requirement in the Constitution of the Republic of Kosovo, not to have only one candidate in the case of the election of the President, but to have an opposing candidate as well. Thus, according to the Applicants, the aim of the drafters of the Constitution was to change this procedural part of electing the President, by aiming at a more democratic stance by adding competition.

iii. Interruption of voting contrary to the Rules of Procedure of the Assembly of the Republic of Kosovo

35. As to the interruption of the voting, when a break was asked, the Applicants claim that it was in violation of the Rules of Procedure of the Assembly of Kosovo and of the Constitution, based on the conclusion of the President of the Assembly, as the final interpreter of the Rules of Procedure of the Assembly. Since the Rules of Procedure do not specify, if in the beginning of the voting phase for the election of the President, interruptions or breaks can be allowed in the middle of the voting procedure, it is clear that the President of the Assembly, pursuant to Article 17(1) of the Rules of Procedure, gives the final interpretation of the Rules of Procedure during the plenary sessions. This is exactly, what Mr. Jakup Krasniqi did in the session of 22 February 2011, when he

stated that the interruption of the voting was in violation of the Rules of Procedure.

36. The Applicants further hold that, in the middle of the second and third ballot regarding the election of the President, PDK requested a break, which was initially refused by President Jakup Krasniqi, but even after allowing a break, it was pointed out by him, that it was a violation of the Rules of Procedure of the Assembly and a violation of the Constitution.

37. In their submission, after a pause of almost one hour, during the third ballot, Mr. Behgjet Pacolli was elected President of the Republic of Kosovo, despite the earlier warning by the President of the Assembly Mr. Jakup Krasniqi that such a break was unconstitutional and contrary to the Rules of Procedure of the Assembly. After the break was over, the President of the Assembly stated once more that the interruption in the middle of the voting procedure is contrary to the Rules of Procedure and will have as a consequence that pressure is put on the deputies.

38. The Applicants conclude that, based on the conclusion of the President of the Assembly as the final interpreter of the Rules of Procedure of the Assembly, the interruption of the election procedure violated those Rules.

Response from the President of the Assembly of the Republic of Kosovo

39. The President of Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi, did not submit any comments as to the Referral of the Applicants but submitted to the Court the Decision on the election of the President of the Republic of Kosovo, Mr. Behgjet Pacolli, the Minutes and the Transcript on the election of the President and the Government of Kosovo held on 22 February 2011.

40. The President of the Assembly opened the extra ordinary session on 22 February 2011 with 81 deputies present, according to the Minutes and the Transcript, where two issues were on the agenda: 1) the election of the President of the Republic of Kosovo, and 2) the election of the Government of the Republic of Kosovo.

41. Thereafter, the temporary Commission for verification of the quorum and mandates submitted a Report for verification of the conditions of the candidate nominated for President, Mr. Behjget Pacolli, where it concluded that he fulfilled the conditions provided by the Constitution and the Law No. 03/L-094 on the President of the Republic of Kosovo.

42. After this report was presented by the Commission, the President of the Assembly noted that 93 deputies were present.

43. Before the first round of voting began LDK, AAK, and Vetëvendosja left the session and did not participate. As a result, only 67 (sixty seven) Deputies were present.

44. After the first voting round, the President of the Assembly declared that 67 (sixty seven) Deputies were present and that, out of those 67 (sixty seven), 54 (fifty-four) deputies had voted in favour, 11 (eleven) voted against and 2 (two) votes were invalid.

45. The Assembly then held a second round, whereafter the President of the Assembly declared that out of the 67 (sixty-seven) Deputies present, 58 (fifty-eight) voted in favour, 7 (seven) voted against and two votes were invalid.

46. Thereafter, the President of the Assembly announced a third round of voting, which was held after the break with 65 (sixty-five) deputies present. The President of the Assembly declared that, out of the 65 (sixty-five) Deputies, 62 (sixty-two) voted in favour, 4 (four) voted against and 1 (one) vote was invalid. However, the Commission, which chaired the election procedure, declared that out of 67 voting ballots in the ballot box, 62 were in favor, 4 against, and one invalid.

47. After the third round of voting, the President of the Assembly, Mr. Jakup Krasniqi, concluded that Mr. Behgjet Pacolli was elected President of the Republic of Kosovo.

Response from the President of the Republic of Kosovo

48. The President of the Republic of Kosovo, Mr. Behgjet Pacolli (hereinafter: the "Interested Party"), claims that he was nominated as candidate for the post of the President of the Republic of Kosovo in compliance with Article 86.3 of the Constitution. The Interested Party claims that, in compliance with Article 86.1 and Article 86.5 of the Constitution, in the third ballot, 62 deputies voted in favour for the election of Mr. Behgjet Pacolli as President of the Republic of Kosovo.

49. As to the lack of quorum, the Interested Party argues that, according to Article 69 [Schedule of Sessions and Quorum] of the Constitution and, more specifically Article 69.3 of the Constitution, provides that the Assembly has its quorum when more than one (1/2) half of the Deputies is present. At the beginning of the extraordinary session, there were 117 deputies present, according to the Interested Party. The fact that LDK,

AAK and Vetëvendosja left the session should be considered as a vote against the candidate Mr. Behgjet Pacolli for the post of the President of the Republic of Kosovo and the deputies present and voting in favour of Mr. Behgjet Pacolli have to be considered as fulfilling the procedural requirements of Article 86 of the Constitution and that the will of the Assembly was expressed in the two first ballots.

50. Further, the Interested Party argues that there were 67 deputies present in the session when the first ballot started, i.e. the Assembly had a quorum in compliance with Article 69.3 of the Constitution and Article 51.1 and Article 51.3 of the Rules of Procedure of the Assembly. The presence of 67 deputies was also confirmed by the President of the Assembly. Furthermore, neither Article 86 of the Constitution nor the Rules of Procedure of the Assembly provide that two thirds (2/3) of the deputies is needed to begin the voting.

51. Moreover, the Interested Party argues that the Constitution does not literally provide an obligation for the deputies to be present. However, in the spirit of the Constitution and dignified representation of their electorate they have an obligation (at least an ethical obligation) to be present in the session. Therefore, in order to avoid blockage for the election of the President in the Assembly, the drafters of the Constitution and especially Article 86 of the Constitution has foreseen three rounds and in the third round Mr. Behgjet Pacolli was elected President.

52. As to the number of candidates, the Interested Party argues that Article 86.3 of the Constitution does not expressly require and does not obligate the deputies to nominate more than one candidate for the President.

53. Furthermore, the Interested Party claims that Article 86 of the Constitution has to be read and interpreted in its entirety and Article 86.5 and Article 86.6 of the Constitution only refer to “the special situation” when there is more than one candidate for the post of President.

54. As to the break, the Interested Party argues that neither the Constitution nor the Rules of Procedure of the Assembly prohibits the right of a group of parliamentarians to request for a break.

55. Furthermore, the Interested Party claims that pursuant to Article 17.1 of the Rules of Procedure of the Assembly, the final interpreter of the Rules of Procedure of the Assembly is the President of the Assembly. Therefore, the President of the Assembly as the final interpreter of the Rules of Procedure of the Assembly approved the request for a break.

Therefore, the break was in compliance with the Rules of Procedure of the Assembly and the Constitution.

56. The Interested Party also remarked, *inter alia,* that "an additional amendment to the Constitution in compliance with universal principles of law is required".

Assessment of the admissibility of the Referral

57. As to the Applicants' allegation that Article 86 [Election of the President] of the Constitution has been violated, the Court observes that, in order to be able to adjudicate the Applicants' complaint, it is necessary to first examine whether they have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

58. The Court needs first to determine whether the Applicants can be considered as an authorized party, pursuant to Article 113.5 of the Constitution, stating that: "Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed". In the present Referral, thirty four (34) deputies from the LDK and the AAK contested the constitutionality of the decision, adopted by the Assembly, to elect Mr. Behgjet Pacolli as President of the Republic of Kosovo. Therefore, the Applicants are an authorized party, entitled to refer this case to the Court, by virtue of Article 113.5 of the Constitution.

59. Furthermore, as to the further requirement of Article 113.5 of the Constitution that the Applicants must have submitted the Referral "within eight (8) days from the date of adoption" of any decisions by the Assembly, the Court determines that the Assembly adopted its decision on 22 February 2011, whereas the Applicants submitted the Referral to the Court on 1 March 2011. The Applicants, therefore, have met the necessary deadline for filing a referral to the Court, provided by Article 113.5 of the Constitution.

60. The Court also finds that the Applicants have fulfilled Article 42 of the Law, stipulating that:

"In a referral made, pursuant to Article 113, Paragraph 5 of the Constitution, the following information shall, inter alia, be submitted:
1.1 names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;

1.2. provisions of the Constitution or other act or legislation relevant to this referral; and
1.3. presentation of evidence that supports the contest."

61. Since the Applicants are an authorized party, have met the necessary deadline to file a referral with the Court and accurately described the alleged violation of the Constitution, including the challenged decision of the Assembly, the Court concludes that the Applicants have complied with all admissibility requirements.

Legal assessment of the Referral

62. Since the Applicants have fulfilled the procedural requirements for admissibility, the Court now needs to examine the merits of the Applicants' complaints.

As to the Procedure for the election of the President of the Republic of Kosovo

1. As to the number of candidates

63. The Applicants complain that the procedure for the election of the President of the Republic of Kosovo with only one candidate is in violation of Article 86.5 and Article 86.6 of the Constitution.

64. In this respect, the Court refers to Article 86.3 of the Constitution which provides: *"Every eligible citizen of the Republic of Kosovo may be nominated as a candidate for President of the Republic of Kosovo, provided he/she presents the signatures of at least thirty (30) deputies of the Assembly of Kosovo. Deputies of the Assembly can only sign for one candidate for the President of the Republic."*

65. As to the present case, the Court notes that Mr. Behgjet Pacolli as a candidate for President of the Republic of Kosovo presented the signatures of 64 deputies. It is evident that the group of Parliamentarian that left and did not participate at the extraordinary session held on 22 February 2011 did not avail of the Constitutional opportunity to nominate another candidate for the President of the Republic of Kosovo.

66. Article 86.5 of the Constitution provides: *"If a two thirds (2/3) majority is not reached by any candidate in the first two ballots, a third ballot takes place between the two candidates who received the highest number of votes in the second ballot, and the candidate who receives the majority of the votes of all deputies of the Assembly shall be elected as President of the Republic of Kosovo"*.

67. Article 86.6 of the Constitution provides: *"If none of the candidates is elected as President of the Republic of Kosovo in the third ballot, the Assembly shall dissolve and new elections shall take place within forty five (45) days"*.

68. The Court is of the opinion that the wording of Article 86 [Election of the President] of the Constitution must be examined in its entirety. The interpretation of the Article can only be that there must be more than one candidate for the election of the President of the Republic of Kosovo in order for the election procedure to be put in motion. In particular, its paragraph 5, is explicit in stipulating that, if a two thirds (2/3) majority is not reached by any candidate in the first ballot, a third ballot takes place between the "*two candidates who received the highest number of votes in the second ballot*". Furthermore, Article 86.6 of the Constitution also speaks of more than one candidate: "If none of the ***candidates*** is elected". Article 27(4) and (5) of the Rules of Procedure of the Assembly contain similar provisions.

69. In this connection, the Court refers to the Constitutional Framework for Provisional Self-Government in Kosovo, providing in its Chapter 9.2.8: *"The President of Kosovo shall be elected by the Assembly by secret ballot. A nomination for the post of President of Kosovo shall require the support of the party having the largest number of seats in the Assembly or of at least 25 members. The Assembly shall elect the President of Kosovo by a two-thirds majority of the members of the Assembly. If after two ballots a two-thirds majority is not obtained, in the following ballots a majority of the votes of all members of the Assembly shall be required for election."*

70. The Court notes that, under the Constitutional Framework, the first election of the President of Kosovo was held in 2002, where only one candidate ran for the office of the President of Kosovo, i.e. Ibrahim Rugova from LDK. In the 2004 presidential election, there were two candidates running for President, Ibrahim Rugova from LDK and Ramë Buja from PDK. Further, in the 2006 election there was only one candidate running for President, Fatmir Sejdiu from LDK. However, in the 2008 election, still held under the Constitutional Framework, two candidates ran for President, Fatmir Sejdiu from LDK, and Naim Maloku from AAK. In the last presidential election of 22 February 2011, held under Article 86 of the Constitution of the Republic of Kosovo, there was only one candidate running for the office of President of the Republic of Kosovo.

71. The Court further notes that the Constitutional Framework was silent as to the number of candidates for the election of the President of Kosovo. However, unlike the Constitutional Framework, Article 86 of the Constitution of the Republic of Kosovo mentions, in an unambiguous way, that there must be more than one candidate in the first and second ballot as well as in the third ballot. It is evident that the drafters of the Constitution have chosen the wording of Article 86 of the Constitution in order to divert from the system provided by the Constitutional Framework by embracing a more democratic system where more than one candidate is needed before the procedure for the election of the President of the Republic of Kosovo can be set in motion. The election procedure has been crafted to ensure that, out of more than one candidate nominated for the election as President, the one, who obtained most of the votes, would be chosen as the representative of the people of Kosovo. If it had been the intention of the drafters of the Constitution to provide for an alternative election procedure, with only one candidate nominated, the Constitution would have expressly provided for such a procedure.

72. In this respect, the Court refers, as an example, to the Constitution of Albania, which, in its Article 87.5, expressly allows for a single candidate to run for the office of President:

"When there is more than one candidate and none of them has received the required majority, within 7 days, a fourth voting takes place between the two candidates who have received the greatest number of votes."

73. The Constitution of Hungary, on the contrary, provides for a similar system laid down in the Constitution of the Republic of Kosovo, its Article 29 B providing:
"…..

(2) The Parliament shall elect the President of the Republic by secret ballot. Voting may be repeated should this prove necessary. The candidate who receives a majority of two-thirds of the votes of the Members of Parliament in the first round of voting is elected President of the Republic.

(3) Should no candidate receive such a majority in the first round of voting, the voting process must be repeated, in accordance with Par. (1). A majority of two-thirds of the votes of the Members of Parliament shall also be required to be elected in the second round of voting.

(4) Should no candidate win the required majority in the second round of voting, a third round of voting shall be held. In the third round of voting only those two candidates who received the largest numbers of votes in the second round may stand for election. The candidate receiving a majority of the votes - regardless of the number of votes cast - in the third round of voting is elected President of the Republic.
……..".

74. In fact, this presidential election procedure stems from the transition period after the Cold War, when the former Communist countries chose to have their presidents elected by their assemblies through a similar procedure as still provided in the Constitutions of Hungary and Kosovo. In the meantime, most of the former Communist countries amended the presidential election procedure and opted for direct elections by popular vote. This solution was motivated by the necessity to express and reflect the will of the people and through direct vote to elect a President who is the Head of the State and represents the unity of the people.

75. As to the presidential election procedure laid down in Article 86 of the Kosovo Constitution, the Court, therefore, emphasizes, that if deputies present only one candidate for the election as President of Kosovo, the formal requirements for putting in motion that election procedure are not met. In such a situation, any procedure which was followed to have the single candidate elected as President of the Republic of Kosovo, was, thus, in breach of Article 86 of the Constitution.

76. The Court notes that, at the extraordinary session of the Assembly of 22 February 2011, deputies presented Mr. Behgjet Pacolli as the only candidate for the election as President of the Republic of Kosovo. At the same session, the election procedure conducted by the President of the Assembly lead to the single candidate being elected as President of Kosovo, although, in the Court's opinion, it was inconsistent with the formal requirements of Article 86 of the Constitution.

77. In these circumstances, the Court concludes that the procedure for the election of Mr. Behgjet Pacolli as President of the Republic of Kosovo, carried out at the extraordinary session of the Assembly on 22 February 2011, was in breach of Article 86 of the Constitution and, therefore, unconstitutional.

2. As to the Vote by the Assembly

78. The Court first emphasizes that, since it just concluded that the election procedure with one candidate running for the office of President of Kosovo was unconstitutional, it would not be necessary to go into

allegations of additional breaches of the Constitution regarding the election procedure as carried out on 22 February 2011. However, even assuming that the Constitution would allow for one candidate to run for the office of President of Kosovo, the participation of less than the number of Deputies required by Article 86 of the Constitution, rendered the voting procedure also invalid.

79. In this respect, the Court refers to Article 70 [Mandate of Deputies] of the Constitution, stipulating that the "Deputies of the Assembly are representatives of the people [...]". Furthermore, as to their obligation as deputies, Article 74 [Exercise of Function] of the Constitution provides that "the deputies of the Assembly of Kosovo shall exercise their function in the best interest of the Republic of Kosovo and pursuant to the Constitution, Laws and Rules of Procedure of the Assembly."

80. Moreover, Law No. 03/L-111 on Rights and Responsibilities of the Deputy (hereinafter: the "Law on Deputies") and Articles 3 and 21 of the Rules of Procedure of the Assembly, adopted on 29 April 2010 further emphasize that the Deputies of the Assembly are representatives of the people and shall have an equal right and obligation to participate fully in the proceedings of the Assembly and carry out their task as representatives of the people of Kosovo in accordance with the Constitution, the Law and the Rules of Procedure of the Assembly. That is to say, by receiving the vote of the citizens, deputies have an obligation towards them, inter alia, as stipulated by Article 40 [Obligations] of the Law on Deputies, by being obliged to participate in the Plenary Sessions and in meetings of the assisting bodies of the Assembly in which they are a member. If the deputy cannot participate in the Assembly Sessions or in the meetings of the assisting authorities of the Assembly in which he/she is a member, he/she must inform in time the President of the Assembly respectively the President, Vice President of that assisting body, by submitting the reasons for his/her absence, as required by Article 40.3 of the Law on Deputies.

81. Their obligation as deputies is further reflected in the oath that the Assembly Members must take before the Assembly after the verification of their mandates, pursuant to Article 10 of the Rules of Procedure of the Assembly, providing:

"I, Member of the Assembly of the Republic of Kosovo, swear that honestly and with devotion, shall carry out my duty and represent the people with dignity, shall work in the interest of Kosovo and all its citizens, shall be committed to protection and respect of the constitutionality and lawfulness, for protection of the territorial and institutional integrity of Kosovo, for guaranteeing human rights and

freedoms, in accordance with the domestic laws and European standards. I swear".

82. Furthermore, the Court emphasizes that, pursuant to Article 27 of the Rules of Procedure of the Assembly, the members of the Assembly shall comply with the Code of Conduct that is annexed to those Rules. The Code of Conduct clearly provides that the Members of the Assembly have a duty to uphold the law and to act on all occasions in accordance with the public trust placed in them.

83. In these circumstances, all 120 deputies of the Assembly should feel obliged, by virtue of the Constitution, the Law on Deputies, the Rules of Procedure of the Assembly and the Code of Conduct, to participate in the plenary sessions of the Assembly and to adhere to the procedures laid down therein, but most of all an obligation vis-à-vis the people of Kosovo that elected them.

84. The election of the President of Kosovo who, pursuant to Article 83 [Status of the President], is the Head of State and represents the unity of the people of the Republic of Kosovo, is of such importance, that all deputies, as the representatives of the people of Kosovo, should consider it their constitutional duty, unless excused by the President of the Assembly, to participate in the procedure for the election of the President as laid down in Article 86 [Election of the President] of the Constitution.

85. In this respect, the Court notes that, as to the number of votes required for the election of the President of the Republic of Kosovo, Article 86.4 of the Constitution provides that the President of the Republic of Kosovo shall be elected by a two thirds (2/3) of the "**votes of all deputies**" (in the original Albanian version "me dy të tretat (2/3) e votave të të gjithë deputetëve") of the Assembly, meaning that all 120 deputies should vote, minus those properly excused by the President of the Assembly, and that the candidate obtaining 80 or more votes of the votes of all deputies (in the first or second round) will be elected. Only if a 2/3 majority is not reached, a third round takes place. Article 27 of the Law on Deputies and Article 27(4) of the Rules of Procedure of the Assembly, contains identical wording: "two thirds (2/3) of the **votes of all deputies** of the Assembly".

86. It appears from the Minutes of the extraordinary session of the Assembly of 22 February 2011, that, before the voting started, initially 81 Deputies were present. However, when the voting started, only 67 deputies were still present and participated in the voting, while the other deputies had left the Assembly Hall. The requirement of Article 86, that all deputies

had to vote, was, therefore, not met. All the more, a second round of voting took place in similar circumstances, while in the third round, Mr. Behgjet Pacolli, the only candidate nominated, was elected as President of Kosovo with 62 votes out of 67 votes.

87. The Court concludes that, since only 67 deputies participated in the procedure for the election of the President of Kosovo held at the extraordinary session of the Assembly on 22 February 2011, Article 86 of the Constitution was violated.

3. As to the break held during the election procedure of the President of the Republic of Kosovo

88. As to the Applicants' claim that the break allowed by the President of the Assembly before the third round was in violation of Article 27 of the Rules of Procedure of Assembly, the Court notes that Article 86 of the Constitution as well as Article 27 of the Rules of Procedure are silent on this issue.

89. Furthermore, the Court emphasizes its duty is only to review alleged breaches of the Constitution. The Applicants' complaint that a break was held before the third round of voting does not, in the Court's view, constitute a constitutional issue which could be raised under Article 86 [Election of the President] of the Constitution. However, if the Assembly had decided beforehand that no break was allowed, or if the President of the Assembly, as the ultimate interpreter of the Rules of Procedure of the Assembly, had informed the deputies that during the voting no break would be allowed in order to avoid that pressure on deputies might be exercised, then the break before the third round would have been in violation of that decision.

90. Therefore, as to the Applicants' complaint that there is a violation of Article 86 [Election of the President] of the Constitution when a break was allowed before the third round, the Court concludes that the Applicants have not submitted evidence, why a violation of that Article should have occurred.

FOR THESE REASONS,

THE COURT, in its session held on 28 March 2011,

I. DECLARES, unanimously, that the Referral is ADMISSIBLE.

II. DECLARES, by seven votes in favour and two votes against, that the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011, is unconstitutional – and shall no longer be in force from the date of its publication pursuant to Article 116.3 of the Constitution - since it is contrary to the requirements of Article 86 of the Constitution of the Republic of Kosovo and the democratic principles enshrined therein.

III. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law.

IV. This Judgment shall have immediate effect.

Judge Rapporteur	**President of the Constitutional Court**
Iliriana Islami	Prof. Dr. Enver Hasani

Appendix A

LDK

1. Sabri Hamiti
2. Ismet Beqiri
3. Teuta Sahatqija
4. Arben Gashi
5. Lutfi Haziri
6. Skender Hyseni
7. Salih Morina
8. Eqrem Kryeziu
9. Anton Quni
10. Imri Ahmeti
11. Vjosa Osmani
12. Hashim Deshishku
13. Ali Sadriu
14. Sadri Ferati
15. Sali Asllanaj
16. Naser Osmani
17. Armend Zemaj
18. Bahri Thaçi
19. Afërdita Berisha-Shaqiri
20. Hykmete Bajrami
21. Vjollca Krasniqi
22. Lirije Kajtazi
23. Haki Demolli
24. Nazane Breca
25. Lutfi Zharku

AAK

1. Ardian Gjini
2. Daut Haradinaj
3. Ahmet Isufi
4. Time Kadriaj
5. Burim Ramadani
6. Bali Muharremaj
7. Kymete Bajraktari
8. Teuta Haxhiu
9. Xhevdet Neziraj

Presidentiali and other Deputies of the Assembly of Kosovo vs. Decision of the Assembly of the Republic of Kosovo No. 04-V-04 concerning the election of the president of the Republic of Kosovo (Dissenting Opinion of Judges Robert Carolan and Almiro Rodrigues)

Case KO 29-2011 MM, decision of 30 March 2011

Keywords: authority of Constitutional Court to order vote by Assembly, dissenting opinion, dissolution of Assembly, duties of Deputies, election of the President, quorum (Assembly), referral by 10 or more deputies

Judges Robert Carolan and Almiro Rodrigues dissented from the Court's Judgment in this Presidential election matter, addressing three main issues: (1) the *quorum*, (2) the number of candidates and (3) the consequences of the judgment.

First, the dissent distinguished between "*quorum*" and "voting," and the respect in which the rules applicable to each may differ. Citing Article 69.3 of the Constitution and the Assembly's Rules of Procedure, the dissent asserted that the legislature meets the *quorum* requirement when more than 50% of all Assembly Deputies are present. The dissent noted that once established the *quorum* is maintained during the life of the session, citing Robert's Rules of Order, regardless of the number of votes necessary to issue a decision, citing Articles 20, 68, 69, 76, 90, 91 and 131 of the Constitution as examples. The dissent contended that according to the Constitution and the Assembly's Rules of Procedure a successful Presidential candidate must receive a two-thirds vote (80 Deputies) on the first or second ballots, or a one-half vote (61 Deputies) on the third ballot. Here, the dissent argued, the only candidate received 62 votes on the third ballot, more than the minimum votes necessary for election. The dissent emphasized that the drafters of the Constitution clearly understood the difference between a *quorum* and voting because it allowed a different number of votes on a third Presidential ballot, but never changed the *quorum* requirement. The dissent admonished that a Constitutional interpretation that requires a two-thirds *quorum* would allow a small minority of Assembly members (i.e., 41 members) to prevent a majority of Deputies from accomplishing the Assembly's business, which would be inconsistent with the intentions of the drafters of the Constitution and render Article 86.4 meaningless.

Second, the dissent contended that the Judgment's conclusion that an unopposed candidate could not be elected was based upon a misreading of Article 86.5 of the Constitution, adding that the drafters would have specifically prohibited an election involving only one candidate if that was their intention. The dissent emphasized that Article 86.5 refers to "any"

candidate, the plain meaning of which is "one or more," asserting that a two-thirds vote is more appropriate for a run-off between two or more candidates, whereas a majority vote on a third ballot is appropriate for endorsement of a single candidate, although it is also suitable for a two candidate race. According to the dissent, requiring two or more Presidential candidates could prevent the election of a candidate supported by the majority of Deputies, creating a sham of the electoral process, and undermining political stability. The dissent argued that the Court did not have the authority to order the Assembly to nominate more than one candidate.

Third, the dissent noted that the Court could not change the results of the election, emphasizing that Article 86.6 required dissolution of the Assembly and a new election in view of the majority's holding that the disputed election violated the Constitution. Finally, the dissent argued that the Court did not have authority to order the Assembly to nominate at least two Presidential candidates or to take a fourth vote.

For the reasons stated, the dissent asserted that the Judgment was erroneous.

Pristina, 30 March 2011
Ref. No.: OM 108/11

Case No. KO 29/11

Applicants
Sabri Hamiti and other Deputies of the Assembly of Kosovo

Constitutional Review of the Decision of the Assembly of the Republic of Kosovo
No. 04-V-04
Concerning the election of the president of the Republic of Kosovo
Dated 22 February 2011

30 March 2011

Dissenting Opinion of Judges
Robert Carolan and Almiro Rodrigues

We respectfully dissent from both the Judgment and the Conclusions of the Majority of the Court in this Referral.

THE FACTS

The Applicants and the Respondent agree as to the facts that follow.

1. On 22 February 2011, the Assembly of Kosovo commenced voting for the election of the President of the Republic of Kosovo.

2. The only candidate nominated was Mr. Behgjet Pacolli.

3. When the first ballot was cast, there were 67 Deputies present in the Assembly. Mr. Pacolli received 54 votes.

4. When the second ballot was cast, there were 67 Deputies present. Mr. Pacolli received 58 votes.

5. Before the third ballot was cast there was a break of less than one hour.

6. When the third ballot was cast, there were at least 65 Deputies present. Mr. Pacolli then received 62 votes.

We will consider three main issues: (1) the quorum, (2) number of candidates and (3) consequences of the Court's Judgment.

(1) QUORUM

The Majority, at least implicitly, erroneously concludes that the definition of a "quorum" for purposes of electing a President is the same as the minimal number of votes that a successful candidate for President must receive to be elected and that this minimal number of voters must be present when opening the session.
A quorum is different than voting. A quorum is "the minimum number of members of a deliberative assembly necessary to conduct business".[1] Voting[2] by the members of legislative body is part of the business of that legislative body. The rules applicable to each can be, and often are, different. Pursuant to **Paragraph 3 of Article 69 of the Constitution,** "The Assembly of Kosovo has its quorum when more than one half (1/2) of all Assembly deputies are present". That provision is the only one mentioning a quorum. The Rules of Procedure of the Assembly also establish the same quorum for the Assembly, which is more than one-half of all deputies (61

1 Robert's Rules of Order Newly Revised, Tenth Edition (2000), p. 20
2 A voting system contains rules for valid voting, and how votes are counted and aggregated to yield a final result ("Voting system" From Wikipedia)

deputies). That quorum is kept unchanged during the session[3], regardless of the business of the Assembly even though the minimum number of votes to take a decision may change.[4]
Therefore, pursuant to both the Constitution and the Rules of Procedure of the Assembly, a successful candidate for President, on either the first or the second ballot cast by members of the Assembly, must receive the votes of two-thirds (80 deputies) of the votes of all deputies.
On the third ballot to be elected as President, the successful candidate must receive the vote of more than one-half (61 deputies) of all the deputies.
In this case, on 22 February 2011 there was a quorum of the Assembly because between 67 and 65 deputies were present.
The only candidate nominated did not receive the required two-thirds votes (80 deputies' vote) that he needed to be elected President on either the first or second ballot. However, on the third ballot, the only candidate nominated received 62 votes, more than the minimum number of votes (61) required by both the Constitution and the Rules of Procedure.
The drafters of the Constitution clearly understood the difference between a quorum and voting by allowing the Assembly on the third ballot to elect a President with a different number of minimum votes but never changing the number of members that had to be present to have a quorum.
A rule that would require a quorum of 2/3s would allow a small minority of the members (41 deputies) to prevent the majority of parliamentarians from doing the business and will of the majority by simply refusing to meet and do the work they took an oath of office to do. It would prevent the majority from discharging the duties they were duly elected to do. It effectively would allow the minority to thwart the democratic will of the majority. It would also prevent the Assembly from acting pursuant to **Paragraph 4 of Article 86 of the Constitution** and elect a President on a simple majority vote of the deputies of the Assembly. Such an interpretation would make **Paragraph 4 of Article 86** meaningless. The drafters of the Constitution specifically designed the Constitution in such a way so as to prevent the minority from thwarting the will of the majority. .

(2) NUMBER OF CANDIDATES

The Majority erroneously concludes that the Assembly cannot elect a President of the Republic unless there is more than one candidate.
A successful candidate must be nominated by at least 30 deputies of the Assembly. Therefore, a maximum of four and a minimum of one candidate might exist. However, the Majority erroneously concludes that the Assembly

3 . "A Session of an assembly is a meeting which, though it may last for days, is virtually one meeting (...) The intermediate adjournments from day to day, or the recesses taken during the day, do not destroy the continuity of the meetings, which in reality constitute one session". (Robert's Rules of Order, Art. XI. Miscellaneous, 63. Session)
4 See Articles 20, 68, 69, 76, 90, 91 and 131 of the Constitution

of Kosovo cannot elect a President of Kosovo unless at least 60 deputies nominate two different candidates for President even in a situation where they may all support just one candidate.

As the Majority implicitly concedes, under its interpretation of the Constitution the first President of Kosovo, his Excellency, the late Ibrahim Rugova, could not have been elected President of the Republic by acclamation in 2002 even if that was the will of the entire Assembly. Certainly the drafters of the Constitution never intended such a result.

In fact, the Majority clearly misreads **paragraph 5 of Article 86 of the Constitution** by inferring that it requires that there be at least two candidates. If two candidates were required, the drafters of **paragraph 5 of Article 86** could have and would have stated that there shall be more than one candidate. Indeed, in the following paragraph of the **Constitution, paragraph 6**, the very same drafters of the Constitution specifically used the word "shall" when they stated what would happen if none of the candidates was elected in the third ballot. Furthermore, the expression "any" under paragraph 5 of Article 86 of the Constitution, in accordance with all dictionaries, means "one or more".

Thus, "any candidate" means "one or more candidate". In addition, the combination of a two thirds (2/3) majority for the two first ballots and the majority for the third ballot also mean that one or more candidates may exist, as the two thirds (2/3) majority is more appropriate for a running off when more than one candidate and majority for only one candidate.

The fact that the drafters of the Constitution chose not to use the same language anywhere in the Constitution with respect to how many candidates must be nominated in order for the Assembly to elect a President but specifically used the term "shall" with respect to the consequences of the Assembly not electing a President by the third ballot clearly means that the drafters never intended that there had to be more than one candidate for President before the Assembly could elect a President.

There is no requirement that there must be more than one candidate for President before the Assembly can elect a President. The only requirement in the Constitution in this regard is that if there are two candidates when the third ballot is cast, the winning candidate must receive a majority of the votes of the deputies (61).

If the Constitution were to be interpreted as requiring at least two or more candidates, it could prevent the election of a candidate that the majority of the elected deputies of the Assembly supported. If such a requirement existed it could easily be met by simply having 30 other deputies sign a document supporting the other candidate but then voting for the popular candidate.

This interpretation would create a sham and mockery of the election system for the highest elected office in Kosovo. The drafters of the Constitution could not have intended such an illogical result. The Constitutional Court

does not have the authority to order the Assembly to nominate more than one candidate.
In sum, the foregoing is in accordance with a systematic and teleological interpretation which allows the conclusion that the main purpose of the Constitution is guaranteeing the regular functioning of the political institutions and ensuring the political stability.
Furthermore, we cannot say that, being the President the head of the State and guarantor of the unity of the people[5], the President must necessarily be elected by two thirds (2/3) of the votes of all deputies, as, even when there is more than one candidate, the President can be elected only by majority of the votes.

(3) CONSEQUENCES OF THE COURT'S JUDGMENT

The Majority concludes, and it is undisputed, that, on 22 February 2011, the Assembly had three rounds of balloting for the Office of President of the Republic. At the conclusion of the third round of balloting the President of the Assembly declared that Mr. Behgjet Pacolli had been elected President. This Court cannot change the facts or re-write what happened on February 22. Three ballots were cast for the Office of President of the Republic. The President of the Assembly then declared Mr. Behgjet Pacolli the elected President of the Republic of Kosovo.
If that election process violated the Constitution, paragraph 6 of the Constitution is very clear with respect to what the Constitutional remedy is:
"If none of the candidates is elected as President of the Republic of Kosovo in the third ballot, the Assembly shall dissolve and new elections shall take place within forty five (45) days". (emphasis added.)
The Constitutional Court does not have the authority to order the Assembly to nominate at least two candidates for the office of President or to order the Assembly to re-vote for a fourth time.
However, at the outset, when the Court determines that there was a violation of the Constitution in the election procedure of the Assembly, the Constitution then mandates that the Assembly shall dissolve and new national elections of the Assembly shall take place within forty five days.
By declaring that the election process on 22 February 2011 violated the Constitution, this Court declared that the Assembly had not elected a President after the third round of balloting. The Constitution then mandates the dissolution of the Assembly and new national elections within 45 days.
The Court's erroneous decision of today, which cannot be without consequences, forces that result. The Court by simply declaring the election process on 22 February 2011 violated the Constitution implicitly acknowledges that it does not have the authority to order the Assembly to re-

5 Article 83 [Status of the President] of the Constitution states that "The President is the head of state and represents the unity of the people of the Republic of Kosovo".

vote. Since the Court also does not have the power to declare the election unconstitutional without a remedy, the decision of the Majority forces the dissolution of the Assembly and new national elections.

Respectfully submitted,

Robert Carolan Almiro Rodrigues

Judges of the Constitutional Court of the Republic of Kosovo

Kosovo Privatization Agency (PAK) vs. Decision ASC-09-089 of the Special Chamber of the Supreme Court

Case KI 25-2010, decision of 31 March 2011

Keywords: equality before the law, individual referral, international agreements and instruments, judicial protection of rights, Kosovo Privatization Agency (PAK), legal effect of decisions, referral submitted by a legal entity, remand, right to fair and impartial trial, separation of powers, sovereignty

The Applicant, the Kosovo Privatization Agency (PAK), filed a Referral pursuant to Article 113.7 of the Constitution, asserting that its rights under Articles 3.2, 31.1, 31.2, 54, 102.2, 102.3. 102.4, 112.2, 116.3, 143, and 145.2 of the Constitution, as well as Article 13 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), were infringed by a ruling made by an Appellate Panel of the Special Chamber of the Supreme Court ("Special Chamber") because it relied upon a legal opinion from UNMIK when giving the Kosovo Trust Agency (KTA), an agency created by UNMIK, priority over PAK, which the Assembly designated as KTA's successor, effectively countermanding the legislation. The Applicant also challenged the composition of the Special Chamber panel because none of its members was a Kosovo judge. The Applicant argued that it was therefore deprived of a fair and impartial public hearing by an independent and impartial tribunal.

The Court held that the Referral was admissible, finding that the Applicant was an authorized party pursuant to Article 113.7 since the Law on PAK granted it a "full juridical personality," the Referral complied with the 4-month deadline set by Article 49 of the Law on the Constitutional Court ("Law"), that it met the remedies exhaustion prerequisite of Article 47.2 of the Law, and it accurately specified the violated rights and freedoms, along with the related actions by public authorities, pursuant to Article 48 of the Law.

On the Referral's merits, the Court found that the Special Chamber had failed to give the Applicant an opportunity to respond to UNMIK's submission and that it had incorporated UNMIK's language into its decision. The Court held that the Special Chamber had not acted impartially, which violated the Applicant's right to a fair and impartial trial under Article 31 of the Constitution and Article 6 of the ECHR. It also held that the Special Chamber violated the Applicant's right to a fair trial under Article 31 and ECHR Article 6, as well as Article 16.3 of the Constitution, when rejecting the Applicant's assertion of legal entity status because Kosovo was a sovereign state, citing *Advisory Opinion of the International Court of Justice* (22 July

2010). The Court also held that the Special Chamber, was part of Kosovo's judiciary and had a constitutional obligation to apply laws adopted by the Kosovo Assembly, citing Article 102.3 and Article 1.1 of the Comprehensive Proposal for the Kosovo Status Settlement. Citing Article 145 of the Constitution, the Court noted that laws existing on the date of the Constitution's implementation continued in force until repealed, superseded or amended in accordance with the Constitution, which included UNMIK Regulations and Administrative Decisions issued by the Special Representative of the Secretary General (SRSG). The Court therefore held that the Law on PAK had repealed the UNMIK Regulation that created KTA, and replaced it with PAK, which received full legal standing, citing Article 31 of the Law on PAK. The Court emphasized that EULEX judges are bound to follow Kosovo law, citing the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo. In its final analysis, the Court held that the Special Chamber violated Article 102 of the Constitution when failing to acknowledge PAK's replacement of KTA, as well as PAK's status as a legal entity, pursuant to the Law on PAK.

Finding no violation of Articles 31.2 and 54 of the Constitution, the Court overruled the Applicant's objection to the Panel's composition and Court that the participation of Kosovar judges in Appellate Panel decision is not mandatory. Rather, Section 14 of Administrative Direction No. 2008/6 merely specifies that a *quorum* of three judges is a prerequisite to disposition of a case, and is silent regarding the nationality of the judges.

For the reasons stated, the Court issued a judgment reversing the decision of the Special Chamber pursuant to Articles 31 and 32 of the Constitution, and Article 6.1 of the ECHR, remanding the case to the Special Chamber for reconsideration in conformity with the judgment pursuant to Rule 74.1 of the Rules of Procedure, and requiring the Special Chamber to submit information to the Court describing the measures taken to enforce its judgment.

Pristina, 31 March 2011
Ref. No.: AGJ 109/11

JUDGMENT

in

Case No. KI 25/10

Applicant

Kosovo Privatization Agency

Constitutional Review of the Decision of the Special Chamber of the Supreme Court of Kosovo, ASC-09-089, dated 4 February 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is the Kosovo Privatization Agency (hereinafter: "PAK"), represented by the Director of the Legal Department of PAK.

Challenged court decision

2. The challenged court decision is the decision of the Special Chamber of the Supreme Court of Kosovo (hereinafter: the "Special Chamber"), ASC-09-089 of 4 February 2010, which was served on the Applicant on 10 February 2010.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the constitutionality of the decision of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo (hereinafter: "Appellate Panel"), by which it rejected the Applicant's request to amend the decision of the Trial Panel of the Special Chamber that a

republication of the new list of employees eligible to share in the privatization proceeds was unnecessary.

4. The Applicant complains that:

- PAK is entitled to petition this referral pursuant to Article 113.7 of the Constitution;
- Decisions and Judgments by the Appellate Panel of the Special Chamber are subject to constitutional review by the Constitutional Court;
- The Appellate Panel violated the PAK's right to a trial by an independent court, when it requested a clarification FROM THE Special Representative of the Secretary General of UNMIK (hereinafter: the "SRSG");
- The Appellate Panel violated the PAK's right to an impartial trial requesting a clarification from the SRSG, being fully aware that UNMIK had a clear and considerable interest in the respective matter;
- The Appellate Panel violated the PAK's right to a fair trial based on the principle of equality before the law and equal access to the court by not providing PAK the opportunity to reply to this clarification;
- The Appellate Panel violated the PAK's right to the settlement of the case based on the Constitution and the law, when it rejected to recognize the Law on PAK as a law;
- The Appellate Panel does not have the competence to render a decision that, in fact, invalidates the status of law of the Law on PAK;
- The Appellate Panel violated the Constitution, the Comprehensive Proposal for the Kosovo Status Settlement, and the Regulation on the Special Chamber, when it rendered the decision signed by four EULEX judges;
- The UNMIK letters to Kosovo courts constitute an unacceptable attempt by UNMIK to interfere with the judiciary's business;
- EULEX judges, who signed and rendered the Decision of the Appellate Panel, should not participate in the review of that Decision, if such review is ordered by the Constitutional Court;
- Section 2 of UNMIK Regulation No. 1999/24 is inconsistent with Article 145 of the Constitution.

5. The Applicant claims, in particular, that the decision of the Appellate Panel violated: Articles 3.2 [Equality before the Law]; 31.1 and 2 [Right to Fair and Impartial Trial]; 54 [Judicial protection of Rights]; 102.2 to 4 [General principles of the Judicial System]; 112.2 [General Principals]; 116.3 [Legal Effect of Decisions]; 143 [Comprehensive Proposal for the Kosovo Status Settlement]; 145.2 [Continuity of International

Agreements and Applicable Legislation] of the Constitution and as well as Article 13 [Right to an Effective Remedy] of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: the "ECHR").

6. The Applicant asks the Court to consider whether the decision of the Appellate Panel complies with these provisions of the Constitution.

Legal basis

7. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

8. On 23 April 2010, the Applicant submitted the Referral to the Court.

9. On 3 June 2010, the Referral was communicated to the Special Chamber, which submitted its comments to the Court on 8 July 2010. The Special Chamber stated that "the grounds for the decisions taken are exclusively laid out in their legal reasoning".

10. On 28 June 2010, the President, by Order No.GJR. 25/10, appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur. On the same date, the President, by Order No.KSH. 25/10, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Kadri Kryeziu.

11. On 2 February 2011, the Court submitted a request to the Applicant for clarification and additional documents, which replied on 8 February 2011.

12. On 18 February 2011, the Court submitted a request to the Applicant for further clarification, which so far has not submitted any comments.

13. On 3 March 2011, the Court communicated the Referral to the Special Representative of the Secretary General, which did not submit any comments.

14. On 30 March 2011, the Court deliberated and voted on the case.

Summary of the facts

15. On 21 May 2008, the Assembly of the Republic of Kosovo (hereinafter: the "Assembly") passed Law No. 03/L-067 on the Privatization Agency of Kosovo (hereinafter: the "Law on PAK"). Article 1 of the Law on PAK states that "[t]he Agency is established as an independent public body ...." and "....is established as the successor of the Kosovo Trust Agency (hereinafter: the "KTA") regulated by UNMIK Regulation 2002/12 'On the establishment of the Kosovo Trust Agency,' (hereinafter: "UNMIK Regulation 2002/12"), as amended, and all assets and liabilities of the latter shall be assets and liabilities of the Agency." Furthermore, Article 31 of the Law on PAK stipulates, in its paragraph 1, that the Law on PAK "shall supersede any provisions in the Applicable Law which are inconsistent herewith.", while its paragraph 2 states that "UNMIK Regulation 2002/12, as amended, will cease to have legal effect after the Law on PAK enters into force".

16. On 22 June 2009, the Director of UNMIK's Office of Legal Affairs (hereinafter: OLA) sent a letter to the President of the Municipal Court of Istog, stating that, having in mind the fact that UNMIK would be responsible for the administration and supervision of Socially-Owned Enterprises (hereinafter: "SOE") and their property by the Kosovo Trust Agency, OLA needed copies of all orders and decisions rendered since June 2008 by the relevant Kosovo courts dealing with SOE's and their assets.

17. On 16 October 2009, the Trial Panel of the Special Chamber issued a decision in case no. SCEL-09-0003, declaring the list of employees eligible to share in the privatization proceeds null and void. The Trial Panel further stayed the proceedings in this case and instructed the Appellant/Respondent [PAK] to publish a new list according to the law.

18. On 26 October 2009, the Presiding Judge of the Appellate Panel of the Special Chamber requested the SRSG to provide clarification of Section 5.2 (determines the category of persons and bodies that may be brought before the Special Chamber) of UNMIK Regulation 2008/4, amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, as amended, (hereinafter: "UNMIK Regulation 2008/4"), in view of a Law approved by the Assembly on the Establishment of PAK, the applicable law in Kosovo and the jurisdiction of the Special Chamber.

19. The clarification requested by the Special Chamber from the SRSG concerns the question whether PAK can be treated as an "Agency", pursuant to the provisions of UNMIK Regulation 2008/4.

20. On 12 November 2009, the SRSG forwarded a Clarification of Section 5.2 of Regulation 2008/4 to the Special Chamber, which stated that "UNMIK Regulation 2002/12, which established the KTA, remained in force and was applicable in Kosovo based on United Nations Security Council (hereinafter: the "UNSC resolution 1244") UNSC resolution 1244 (1999), as it can only be repealed or amended by UNMIK through another Regulation, which has not happened.

21. In the SRSG's opinion, the Law [on PAK]…without being promulgated by an UNMIK Regulation and purporting to have entered into force on 15 June 2008, could, therefore, not abolish or repeal UNMIK Regulation 2002/12, nor extinguish the legal existence of the KTA as an independent Agency with full juridical personality. The PAK "can at best be considered to act as an agent of the KTA operating without KTA/UNMIK's approval and authority." The SRSG further held that "This present clarification is sufficient confirmation that UNMIK has not in the past, nor will during the continuation of UNSC Resolution 1244 implicitly approve any attempts by PAK to assume succession or authority from KTA" and that "any disregard for the PAK legislation would prevent the Special Chamber from including the PAK in its proceedings." However, according to the SRSG, "while PAK cannot be treated to possess juridical personality, PAK can still be considered as another person necessary for the full and complete adjudication of the case in accordance with the provision of section 5 of UNMIK Regulation No. 2008/4, as amended." Indeed, according to SRSG, the Special Chamber could consider the PAK as an unregistered general partnership of several natural persons under the applicable law, acting with a common interest. The SRSG concluded, that "it is obvious that a number of natural persons conduct the affairs of PAK, thereby cooperating in the conduct PAK's activities" and that "In the absences of a proper legal basis established in accordance with UNSC resolution 1244(1999) for the establishment of the PAK, the qualification of the PAK".

22. On 20 November 2009, PAK filed an appeal against the decision of the Special Chamber of 16 October 2009, by which it had declared the list of employees, submitted by PAK, null and void.

23. By letter of 8 January 2010, the Director of UNMIK OLA informed the President of the Municipal Court of Suha Reka that despite the fact that KTA had not been functional since July 2008, the KTA continued to exist as a legal person and that UNMIK was the representative of the KTA for

KTA related matters before the Special Chamber, including those cases that were referred from the Special Chamber to the local courts, with the right to appeal to the Special Chamber. The letter further stated that any correspondence for legal matters in which the KTA was involved should be addressed to UNMIK OLA and that no decision or judgment in which KTA is summoned as a party might be of final form, until such decision or judgment was submitted to KTA, which was represented by UNMIK OLA.

24. On 4 February 2010, the Appellate Panel of the Special Chamber (composed of three international EULEX judges) rejected the appeal of PAK of 20 November 2009, as ungrounded. With regard to the legal status of PAK and the applicability of the Law on PAK, the Panel stated that "As the KTA as the Agency which, in conformity with the applicable law In Kosovo, should be the one dealing with the Privatization of SOE's and the distribution of the 20 % to the eligible workers does not act in this field of its responsibilities anymore, and as the Appellant has taken over those responsibilities on the basis of the (not directly applicable) Law on PAK, the Special Chamber accepts the activities of PAK as an obvious matter of fact to enable the workers involved in the privatization process to have effective access to court in the meaning of Article 6 of the ECHR". The Panel continued that "This does not and cannot mean that the Special Chamber accepts the PAK-Law as applicable law in Kosovo, but to ensure a secure and rightful privatization process this PAK "Law" has to be treated as valid and binding internal rules of organization within the privatization process. The Panel concluded that "The PAK, factually acting as successor of the KTA on the field of privatization, thus has to at least in this context-follow the rules laid down in the PAK-Law."

Applicant's allegations

25. The Applicant alleges that the Appellate Panel of the Special Chamber has violated the entitlement of PAK to a fair and impartial trial by an independent court, when, by letter of 26 October 2009, its President, acting as President of the Appellate Panel of the Special Chamber, asked the SRSG to provide "a clarification on Section 5.2 of UNMIK Regulation 2008/4 of 5 February 2008, amending UNMIK Regulation No. 2002/13 on a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, as amended, in view of a Law adopted by the Assembly of Kosovo on the Establishment of the Privatization Agency of Kosovo, the applicable law in Kosovo, and the jurisdiction of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters".

26. In this respect, the Applicant refers, in particular, to the case law of the ECtHR, determining that an independent court is a court which at minimum is independent from the executive and the parties. In Campbell and Fell v United Kingdom (dated 28 June 1984, Series A no. 84, § 78), ECtHR determined some factors that must be taken into account in order to assess the independence of any given court:

"In determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case (see, inter alia, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 24, para. 55), the Court has had regard to the manner of appointment of its members and the duration of their term of office (ibid., pp. 24-25, para. 57), the existence of guarantees against outside pressures (see the Piersack judgment of 1 October 1982, Series A no. 53, p. 13, para. 27) and the question whether the body presents an appearance of independence (see the Delcourt judgment of 17 January 1970, Series A no. 11, p. 17, para. 31)."

27. The Applicant further makes reference to the ECtHR judgment, Beaumartin vs France, dated 24 November 1994, Series A no. 296-B, in which, the Conseil d'Etat of France was bound by law to interpret a case before it in accordance with an international agreement issued by the Ministry of Foreign Affairs. ECtHR stated that this is inconsistent with the judiciary's independence and that the international agreement has denied the court its full jurisdiction and concluded that, therefore, it was a violation of Article 6 of the Convention.

28. Further reference is made by the Applicant to ECtHR judgment, Sovtransavto Holding v. Ukraine, dated 25 July 2002, in which ECtHR concluded that there was a violation of Article 6 of the Convention, when the President of Ukraine sent two letters to the respective courts, calling upon them to "protect the interests of Ukraine nationals" in a matter between a Russian Company and an Ukrainian Company; the respective courts rendered contradictory and unusual decisions.

29. The Applicant also referred to ECtHR judgment, Zielinski, Pradal, Gonzalez and others v. France, dated 28 October 1999, §§ 57-57, Reports 1999-VII, concerning legislative intervention in the judicial decision-making process through the adoption of legislation, which in fact predetermined the outcome of the lawsuit in question in order to protect the state's interest. ECtHR stated that "The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on

compelling grounds of general interest – with the administration of justice designed to influence the judicial determination of a dispute."

30. In view of the above ECHR case-law, a request of the kind that the Special Chamber has made to the SRSG of UNMIK, would, in the Applicant's opinion, be entirely contrary to accepted norms of the contemporary judicial practice in Europe.

31. Furthermore, the Applicant alleges that the Request of the Special Chamber for Clarification violated its right to an independent judicial process in an independent court, since the SRSG is the Head of UNMIK and the main executive authority in Kosovo, based on UNSC Resolution 1244, as can be read also in the letter that was submitted by UNMIK to the Special Chamber. Moreover, the letter was sent to UNMIK which also can be considered as a party in the case before the Special Chamber, since the case concerned the issue, whether PAK is a competent authority to be a party before the Special Chamber or the Legal Department of UNMIK representing KTA. In addition to this, the Applicant emphasizes that, in issuing the Clarification, the SRSG has provided a clarification of a legal act – the Regulation on the Special Chamber – which was entirely drafted by UNMIK and promulgated by the SRSG. Therefore, as far as this legal act is concerned, UNMIK and the SRSG should be considered as legislators and the Clarification should be considered as an additional contended legal act, through which the SRSG "clarifies" a matter that derives from a previous UNMIK Regulation (in this case, the Regulation on the Special Chamber).

32. The Special Chamber did not offer PAK an opportunity to reply to the letter of UNMIK, but instead reached a Decision (ASC-09-0089), dated 4 February 2010, that repeated the basic legal conclusions provided by the Clarification. All this clearly confirms the Special Chamber's subjective partiality in favour of UNMIK vis-à-vis PAK. In this connection, the Applicant refers to the case Vermeulen v. Belgium, in which ECtHR decided that the fact that it was impossible for the petitioner to reply to the Procureur General before the hearing's conclusion constituted a violation of the petitioner's rights. "That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision." Consequently, ECtHR held that this fact itself constituted a violation of Article 6(1) of the Convention.

33. The Applicant further alleges, that, based on Articles 102.3, 112.1 and 116.3 of the Constitution, the Appellate Panel of the Special Chamber is not the competent body to take a decision that invalidates the Law on

PAK. Furthermore, according to Chapter VIII [Constitutional Court] of the Constitution, the Court is the only judicial body that can declare a law in the Republic of Kosovo invalid. The decision of the Appellate Panel explicitly rejects the acceptance of the Law on PAK as a law, by referring to the Law on PAK as "binding internal rules of organization within the privatization process." In this respect, the Decision attempts to invalidate the status of law of the PAK Law, which is completely outside the authority of the Special Chamber.

34. In the Applicant's view, when four (4) EULEX Judges took a decision as members of the Appellate Panel, the Special Chamber violated Articles 143 and 145.2 of the Constitution, Articles 3.2 and 3.3 of Annex VII [Property and Archives] of the Comprehensive Proposal for the Kosovo Status Settlement (hereinafter: "the Comprehensive Proposal"), and Section 3.3 of the Rules of Procedures of the Special Chamber. Article 3.3 of Annex VII of the Comprehensive Proposal (which is effective on the basis of Article 143 of the Constitution) explicitly prescribes that the Appellate Panel of the Special Chamber shall have three international judges. No provision of the Comprehensive Proposal provides the authority to appoint four international judges to the Appellate Panel.

35. In addition, the Applicant alleges that Section 3.3 of the Regulation on the Special Chamber provides that the Appellate Panel shall be composed of the President of the Special Chamber, two international judges and two judges who are habitual residents of Kosovo. No provision of the Regulation on the Special Chamber provides the authority to assign four international judges in the Appellate Panel. Article 143 of the Constitution provides that the Comprehensive Proposal shall take precedence over the Regulation of the Special Chamber. Therefore, if the Comprehensive Proposal in a clear and certain way prescribes that the Appellate Panel will have three international judges, then the Regulation on the Special Chamber must be interpreted in conformity with the Comprehensive Proposal, and cannot be interpreted as to allow the appointment of four international judges in the Appellate Panel.

36. On 23 April 2010, the Applicant filed a referral to the Constitutional Court, asking the Court to quash the decision to the Special Chamber, thereby asking the Special Chamber to review its decision on a fair and impartial basis and in compliance with the Constitution.

37. Furthermore, the Applicant requests that, should the Court decide to quash the previous decision of the Special Chamber, as specified by articles 31.2, 53, 102.2, 102.4 of the Constitution and Article 6 of the

ECHR, EULEX Judges who decided on the respective case should not participate in the review of that decision.

Assessment of the admissibility of the Referral

38. In order to be able to adjudicate the Referral of the Applicant, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution, the Law and the Rules of Procedure.

39. The Court needs to determine first whether the Applicant is an authorized party, possessing juridical personality within the meaning of Article 21.4 of the Constitution, stating that "Fundamental Rights and Freedoms set forth in the Constitution are also valid for legal persons to the extent applicable." In this respect, reference is made to Article 1 of the Law on PAK, providing: "The Agency shall possess full juridical personality." Therefore, the Applicant is an authorized party, entitled to refer this case to the Court under Article 113.7 of the Constitution.

40. Furthermore, as to the requirements that the applicant must have submitted the Referral within 4 months after the final court decision in the case was taken, the Court determines that the Appellate Panel of the Special Chamber took Decision ASC-09-089 on 4 February 2010, whereas the Applicant received the Decision on 10 February 2010. The Applicant submitted the Referral to the Court on 23 April 2010. The Applicant, therefore, has met the necessary deadline for filing a referral to the Court, provided by Article 49 of the Law.

41. The Court also determines that the Applicant did exhaust all the legal remedies. The Appellate Panel of the Special Chamber is considered "as a last instance court to adjudicate privatization related matters," according to the Special Chamber, through a letter sent to the Court on 8 July 2010. As a result, the Applicant exhausted all the legal remedies that Article 47.2 of the Law states.

42. Furthermore, the Court determines that the Applicant has fulfilled Article 48 of the Law: "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."

43. Since the Applicant is an authorized party, has met the necessary deadlines to file a referral with the Court, has exhausted all the legal remedies, and accurately clarified the allegedly violated rights and freedoms, including the decision subject to challenge, the Court

determines that the Applicant has complied with all requirements of admissibility.

Legal assessment of the Referral

44. While the Applicant has fulfilled the procedural requirements for admissibility, the Court needs to examine the merits of the Applicant's complaint.

1. As to the Applicant's legal status

45. The Applicant alleges that the Appellate Panel of the Special Chamber has violated the right of PAK to a fair and impartial public hearing by an independent and impartial tribunal by requesting UNMIK to provide a Clarification as to the interpretation of the applicable law and, in particular, of Section 5.2 of UNMIK Regulation 2008/4 (amending Regulation 2002/13 on the Establishment of a Special Chamber of the Supreme Court), providing an exhaustive list of parties eligible as claimants in the proceedings before the Special Chamber. In the Applicant's opinion, such a request is contrary to Articles 31.2 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 102(2) and (4) [General Principles of the Judicial System] of the Constitution.

46. The Court notes that, according to the Clarification which the SRSG provided on 12 November 2009 to the President of the Appellate Panel of the Special Chamber, the "UNMIK's general stance vis-à-vis the PAK is known and has been brought to the Special Chamber's attention in various cases before it…Even if PAK's own legal understanding could be considered, accepting the Kosovo Assembly's legislation as a purported legal basis for the establishment of PAK, proves unsuccessful. The PAK legislation violates the very legal basis from which it purports to receive legitimacy: Annex Vii, Article 2.1 of the Ahtisaari proposal". The Clarification further mentions that "the PAK has not been established on the basis of applicable law in Kosovo in accordance with UNSC resolution 1244(1999) and thus cannot be treated in law as the legal successor of the KTA… " and that "PAK cannot be accorded the status of a legal person" as well as "…the discretion of the Special Chamber to call the PAK in its capacity as a non-legal person…".
47. As to the question whether the Appellate Panel took the UNMIK Clarification into account in its Decision ASC-09-089, as alleged by the Applicant, the Court notes that the interpretation provided by the UNMIK Clarification is clearly reflected in, or in the Panel's Decision, for instance, where it points out that it "accepts the activities of the PAK as an obvious matter of fact" and "…Law on PAK.., pursuant to which the

PAK as factual entity has been established…". The Appellate Panel, furthermore, maintains that "this does not and cannot mean, that the Special Chamber accepts the PAK-Law as applicable law in Kosovo, but, to ensure a secure and rightful privatization process, this PAK-Law has to be treated as valid and binding internal rules of organization within the privatization process".

48. The Court is, therefore, of the view that the Special Chamber of the Supreme Court, by requesting a Clarification from the UNMIK SRSG, which was not communicated to the Applicant in order to allow it to express its opinion about it, but was indeed used by the Special Chamber in the wording of Decision ASC-09-089, cannot be considered as an impartial tribunal, to which the Applicant was entitled, pursuant to Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to Fair Trial) ECHR.

49. It follows that the Special Chamber has acted in breach of these Articles.

50. In its Decision ASC-09-089, the Appellate Chamber, as mentioned above, also considered the legal status of PAK, and, ultimately, adjudicated that PAK was only a factual entity, despite the fact that, pursuant to Article 5 [Establishment and Legal Status of the Privatization Agency of Kosovo] of Law 03/L-067, PAK "is established as an independent public body, ….shall possess full juridical personality …[and] is established as the successor of the Kosovo Trust Agency regulated by UNMIK Regulation 2002/12 "On the establishment of the Kosovo Trust Agency", as amended".

51. In this respect, the Court maintains that, one of the aspects of fair trial is that a party must be entitled to effectively participate in the court proceedings, meaning that, in the present case, the Applicant should have been a party to the proceedings "in its own name", as "the Privatization Agency of Kosovo ", in accordance with Law 03/L-067 and not, as determined by the Special Chamber in its Decision ASC-09-0089, "…as factual entity..".

52. The Court considers that, by not recognizing the Applicant's legal status as a party to the proceedings before it, as laid down in Article 5 of Law 03/L-067, the Special Chamber has violated the principle of fair trial as guaranteed by Article 31 of the Constitution and Article 6 ECHR.

53. In these circumstances, the Court can only draw the conclusion that the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo does not recognize and apply the laws lawfully adopted by the Assembly. In fact, the Special Chamber simply continues to ignore the existence of

Kosovo as an independent State and its legislation emanating from its Assembly.

54. In this connection, the Court refers to the Advisory Opinion of the International Court of Justice of 22 July 2010, according to which the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council Resolution 1244(1999) or the Constitutional Framework. In the Court's view, the establishment of the Republic of Kosovo as an independent and sovereign state, based on the declaration of independence and whose statehood was recognized, so far, by 75 countries, is, therefore, not contrary to Security Council Resolution 1244(1999) as well as international law, the principles of which the Republic of Kosovo has to abide by, as laid down in Article 16(3) of the Constitution, providing that "The Republic of Kosovo shall respect international law."

55. Article 7 [Values] of the Constitution which entered into force on 16 June 2009 provides some of those principles, reading as follows: "The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, social justice, pluralism, separation of powers, and a market economy."

56. As part of the Rule of Law principle, Article 102 [General Principles of the Judicial System], paragraph 3, of the Constitution stipulates that "Courts shall adjudicate based on the Constitution and the law", meaning that the Special Chamber of the Supreme Court, as part of the Kosovo judiciary, is under the constitutional obligation to apply laws adopted by the Kosovo Assembly.

57. Moreover, the Comprehensive Proposal for the Kosovo Status Settlement, the provisions of which shall take precedence over all legal provisions in Kosovo, provides, in its Annex IV [Justice System], Article 1.1, clearly provides that "The Supreme Court shall ensure the uniform application of the law by deciding on appeals brought in accordance with the law". The Special Chamber, as part of the Supreme Court, is, therefore, obliged to abide by this provision.

58. Finally, Article 145 [Continuity of International Agreements and Applicable Law] stipulates, that "Legislation applicable on the date of the entry into force of the Constitution shall continue to apply to the extent it is in conformity with this Constitution until repealed, superseded or amended in accordance with this Constitution". As the final interpreter of the Constitution, the Court holds that the legislation applicable on the date of the entry into force of this Constitution

includes UNMIK Regulations and Administrative Decisions issued by the SRSG before 15 June 2008. In accordance with Article 145, such Regulations and Administrative Instructions as well as other legislation will only continue to apply to the extent they are in conformity with the Constitution until repealed, superseded or amended in accordance with the Constitution.

59. It follows that UNMIK Regulation 2002/12, as amended, which was repealed by Article 31 [Applicable Law] of Law No. 03/L-067 on the Privatization Agency of Kosovo of 21 May 2008, reading: "UNMIK Regulation 2002/12, as amended, will cease to have legal effect on the date the present law enters into force" is no longer applicable. Therefore, relevant UNMIK Regulations and Administrative Instructions only continue to be applicable as long as they are in conformity with Law No, 03/L-067.

60. In these circumstances, the Court holds, that the Special Chamber of the Supreme Court, in its Decision ASC-09-089, clearly did not "ensure the uniform application of the law", as envisaged by the Comprehensive Proposal, nor did it act in conformity with its duties under the above Article 102 of the Constitution, since it did not apply Law 03/L-067. Instead, it considered Law No.03/L-067 not as a Law, duly adopted by the Assembly of Kosovo, but as valid and binding internal rules of organization for PAK, which it characterized as a factual entity, instead of an independent public body possessing full legal standing, as laid down in Law No. 03/L-067.

61. The finding that the Special Chamber does not ensure the uniform application of the law is, furthermore, illustrated by the fact that the very basis of the legal status of the EULEX Judges on the Special Chamber is regulated by Law No. 03/L-053 on the Jurisdiction, Case Selection and Case allocation of EULEX Judges and Prosecutors in Kosovo, duly adopted by the Assembly of Kosovo on 13 March 2008 and, as the Court notes, effectively applied by EULEX KOSOVO as an Assembly law. This Law, in its Article 1 [Objective], regulates the integration and jurisdiction of the EULEX judges and prosecutors in the judicial and prosecutorial system of the Republic of Kosovo. The Court considers it, therefore, inconceivable that EULEX judges - integrated in the Special Chamber of the Supreme Court of Kosovo in accordance with Law 03/L-053 – refuse to apply laws duly adopted by the Assembly of the Republic of Kosovo.

62. It follows that, by not applying Law 03/L-067 on PAK, duly adopted by the Assembly of Kosovo, the Special Chamber has acted in breach of Article 102 of the Constitution.

2. As to the Applicant's complaint regarding the composition of the Appellate Panel

63. Furthermore, the Applicant complained that Articles 31.2 and 54 of the Constitution as well as the Comprehensive Proposal, and the Rules of Procedures of the Special Chamber were violated, since the Appellate Chamber, which dealt with the case in question, was composed of four (4) EULEX judges.

64. It appears from the Decision of the Appellate Panel, that three (3) and not four (4) EULEX Judges participated in the proceedings before the Appellate Panel. However, the Applicant has apparently taken the EULEX Registrar for a EULEX Judge.

65. Furthermore, it needs to be determined, whether, as the Applicant also complained, the absence of two (2) Kosovar Judges in the Appellate Panel, as specified in Article 3.3[6] of Section VII of the Comprehensive Proposal, constitutes a violation of Articles 31.2 and 54 of the Constitution.

66. In this respect, the Court notes that the participation of the Kosovar judges in the Appellate Panel decisions is apparently not a necessary condition for the functioning of the Panel.

67. According to Section 14 of Administrative Direction No. 2008/6, inter alia, providing rules on the composition of the Appellate Panel of the Special Chamber of the Supreme Court, a quorum of three judges is required to decide on a case brought before it. However, the Directive is silent on the question whether the quorum of judges should contain a particular number of EULEX and Kosovar judges. It follows, that the presence of three (3) EULEX judges in the Appellate Panel did not violate any Article of the Constitution or the Comprehensive Proposal.

68. Therefore, as to the Applicant's complaint about the absence of the Kosovar Judges from the Appellate Panel, when it took Decision ASC-09-089, the Court does not find a violation of Articles 31.2 and 54 of the Constitution, as invoked by the Applicant.

[6] "There shall be an appeals panel within the Special Chamber for reviewing Special Chamber decisions. The Appeals Panel shall be composed of three (3) additional international judges and two Kosovar judges."

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law on the Constitutional Court, and Rule 56 (1) of the Rules of Procedure, decides unanimously, at its session held on 30 March 2011, to

I. DECLARE the Referral admissible;

II. DECLARE invalid the Judgment ASC-09-089 of the Special Chamber of the Supreme Court of 4 February 2010, which violates Article 31 and 102 of the Constitution and Article 6(1) ECHR;

III. REMAND the Judgment ASC-09-089 of the Special Chamber of the Supreme Court of 4 February 2010 to the Special Chamber of the Supreme Court for reconsideration in conformity with the Judgment of the Court, pursuant to Rule 74 (1) of the Rules of Procedure.

IV. Pursuant to Rule 63 (5) of the Rules of Procedure, the Special Chamber of the Supreme Court shall submit information to the Constitutional Court about the measures taken to enforce this Judgment of the Constitutional Court.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

Sabri Hamiti and other Deputies vs. Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo

Case KO 29-2011, decision of 1 April 2011

Keywords: clarification of judgment, dissolution of Assembly, duties of Deputies, election of the President, quorum (Assembly)

The President of the Assembly, the President of the Republic of Kosovo, and the Prime Minister submitted requests for clarification to the Court regarding its earlier Judgment invalidating the Presidential election.

The Court responded to three questions submitted by the Assembly President. First, the Court clarified that the Judgment invalidated the Presidential election held on 22 February 2011, effective on 30 March 2011. Second, the Court clarified that the Judgment did not require the holding of early national elections. Third, the Court clarified that Kosovo had an Acting President as of 30 March 2011, avoiding an institutional vacuum.

In addition, the Court responded to a single question from the President of Kosovo, clarifying again that the country had an Acting President, effective 30 March 2011, which avoided an institutional vacuum.

Finally, the Court responded to three questions posed by the Prime Minister on behalf of the Government. First, the Court directed the Prime Minister to the Judgment for clarification concerning its holdings on the issues of whether Article 86 of the Constitution requires a *quorum* of 80 or 120 Deputies for voting on the first and second ballots in a Presidential election, the *quorum* necessary for a third vote and whether the presence of a Deputy who abstains from voting is counted against the *quorum*. Second, the Court clarified that Kosovo had an Acting President as of 30 March 2011, avoiding an institutional vacuum. Third, the Court declined to respond to the Prime Minister's question about whether it is possible to proceed directly to a third ballot when a large number of Deputies refuse to participate in a Presidential election, on the ground that the Court did not have authority to answer hypothetical questions. The Court related that the Prime Minister's submission was framed as a Referral under Article 93.10 of the Constitution, noting that it did not treat the request as a new Referral, because it was clearly a request for clarification. The Court added that the Government would be entitled to file a new Referral pursuant to Article 93.10 upon a showing of new facts and circumstances.

Pristina, 1 April 2011
Ref. No.: SQ 111/11

CLARIFICATION

of

JUDGMENT

in

Case No. KO 29/11

Sabri Hamiti and other Deputies

Constitutional Review of the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011.

Requested Clarifications of the Majority's Decision, dated 30 March 2011.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Altay Suroy, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Subject matter

1. Request for clarification of the President of Assembly, Mr. Jakup Krasniqi, the Presidency of the Republic of Kosovo, signed by Mr. Behgjet Pacolli and of the Government of the Republic of Kosovo, signed by the Prime Minister, Mr. Hashim Thaci.

Legal basis

2. Article 113.5 of the Constitution, Article 42 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rules 56 (1) and 61 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

3. On 1 April 2011, the Court held a session to assess and decide on the above requests.

Facts

4. On 31 March 2011, the Constitutional Court of the Republic of Kosovo received a request for clarification from the President of the Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi, containing three questions in respect of the Judgment of this Court in case KO 29/11, adopted by majority vote on 30 March 2011, reading as follows:

   ".....
   1. In practice, what does it mean that the Judgment does not have retroactive effect?
   2. As a consequence of this Judgment, should the country go for early elections?
   3. Currently, does the Country have a President, respectively an Acting President?
   ....."

5. On the same day, the Court received a letter from the Presidency of the Republic of Kosovo, signed by Mr. Behgjet Pacolli, requesting an answer to the question raised in respect of the same Judgment, reading as follows:

   "Does my removal from office create an institutional vacuum of the highest state institution, taking into consideration that no one has requested to assume the duty of Acting President until new election?"

6. Furthermore, on 1 April 2011, the Court received a letter containing three questions from the Government of the Republic of Kosovo, signed by Prime Minister Hashim Thaci, raised in respect of the same Judgment, reading as follows:

"The Government of the Republic of Kosovo in its meeting dates March 31, 2011, decided that it presents questions that follow to the CC in line with Art. 93 paragraph 10 of the Constitution of the Republic of Kosovo which says that "Government may refer constitutional questions to the Constitutional Court.

...

1. During the first two ballots for President, under Article 86(4), the President is elected by a two-thirds majority of all deputies of the Assembly. Thus, 80 votes are required for election. Does Article 86 require at least 80 deputies to be present during the voting, or must all 120 deputies be present during the voting? In other words, does Article 86 require a quorum of 80 or 120 deputies to begin voting in the first two ballots for President? If a President is not elected during the first two ballots, what is the quorum required for the third ballot which only requires majority vote to elect? If a deputy is present and does not cast a vote, does the deputy's presence count towards the necessary quorum?

2. May the Acting President of Kosovo exercise power for a six month period beginning on 29 March 2011 or does the six month period of limitation of power date back to an earlier date in view of the fact that the President of the Assembly served as Acting President following the resignation on 27 September 2010 of President Sejdiu?

3. On 22 February 2011, more than forty deputies in the Assembly refused to participate during the first two ballots for President. One party has publicly announced that its deputies will refuse to participate and other parties may do the same, despite the Constitutional Court's clear indication in Case No. KO 29/11 that Deputies should participate in the election as it is their Constitutional duty to do so. When the election is called and fewer than 80 Deputies are present to vote, despite being duly notified of the election, is it permissible under Article 86 to declare that the first and second ballot would fail to elect a President in that 40 or more Deputies chose not to be present and proceed immediately to the third ballot in Article 86(5) and elect the President of Kosovo by a majority of all Deputies, at least 61 votes?

...."

Legal limits of assessing the Requests

7. The Court notes that the questions raised by the three above mentioned institutions are of similar nature, except in relation to the request of the Government which was made under Article 93 of the Constitution. Even though, the Court will answer separately to each of them.

8. The answers to the requested questions are given by the Court taking into account the legal basis abovementioned, together with the exceptional importance of the case, the pertinence and relevance of the requests and the limits of the subject matter of the petitum which is on the basis of the judgment taken in the case.

9. Therefore, bearing in mind that the Court is bound by the limits of its judgment and is not legally authorized to go beyond those limits, the questions are clarified as follows hereafter.

Answers to the requests

I. As to the questions contained in the letter of the President of the Assembly

10. As to the first question whether the Judgment of this Court has retroactive effect, the answer is that the Judgment of the Court enters into force with immediate effect on 30 March 2011 and that the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011, is no longer in force as of 31 March 2011, being the date of publication of the Judgment in the Official Gazette.

11. As to the second question whether the Judgment of this Court forces the dissolution of the Assembly and the holding of new elections, the answer is no.

12. As to the third question whether Kosovo has a President, respectively an Acting President, the answer is that Kosovo has an Acting President as of 31 March 2011. Thus, there is no institutional vacuum since the date of the publication of the Judgment.

II. As to the question contained in the letter of Mr. Behgjet Pacolli

13. As to the issues raised by Mr. Pacolli in his letter of 31 March 2011, reference is made to the answer provided in paragraph 12, that Kosovo has an Acting President as of 31 March 2011. Thus, there is no institutional vacuum since the date of the publication of the Judgment.

III. As to the questions contained in the letter of the Prime Minister of the Government of the Republic of Kosovo

14. As to the first question, the Court refers to its findings in the Judgment regarding this issue.

15. As to the second question whether Kosovo has an Acting President, the answer is that Kosovo has an Acting President as of 31 March 2011. Thus, there is no institutional vacuum since the date of the publication of the Judgment.

16. As to the third question, the Court recalls that the purpose of this Clarification is to clarify the Judgment and does not have the authority to go outside the subject matter of the Referral. Therefore, hypothetical situations as mentioned in the letter of the Prime Minister fall outside the ambit of the subject matter and may be the basis for a new case.

17. As to the request under Article 93 of the Constitution, the Court notes that Article 93 [Competencies of the Government] establishes that *"The Government has the following competencies:*

    (...)

    (10) may refer Constitutional questions to the Constitutional Court".

18. The Court notes that the Government made the request under that provision. However, the Court considers that this request is not a new referral, as its content clearly has to do with clarification of the Judgment delivered in the case No. KO 29/11.

19. Therefore, the Court recalls that only with new facts and circumstances, the Government is entitled to avail itself of that constitutional provision to file a new referral with the Court.

FOR THESE REASONS,

THE COURT, in its session held on 1 April 2011, decides, by majority, to clarify the requested questions as above

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Iliriana Islami	Prof. Dr. Enver Hasani

N.T.SH Meteorit vs. Decision No. 2407/2006 of the Supreme Court

Case KI 55-2009, decision of 6 April 2011

Keywords: individual referral, right to fair and impartial trial, tax evasion

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional right to a fair and impartial trial under Article 31 of the Constitution was infringed by a judgment of the Supreme Court, which affirmed a decision of the Independent Review Board (IRB) rejecting the Applicant's defense against a tax assessment imposed by the Tax Administration of Kosovo (TAK).

The Court held that the Referral was admissible because: the Applicant is a party authorized to file a Referral pursuant to Article 113.7; he met the prerequisite of exhausting all legal remedies pursuant to Article 113.7 and Article 47.2 of the Law on the Constitutional Court; he filed the Referral within the legal deadline; he specified the rights and freedoms that were violated, as well as the related actions by public authorities; and, he submitted information and documents supporting his contentions.

On the merits of the Referral, the Court held that there was no violation of either the Applicant's right to a fair hearing and or to his right to a fair and impartial trial under either Article 31 or Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court noted that its authority is limited to disposing of allegations of Constitutional violations, adding that it is bound by the decision of the Supreme Court unless a fundamental right has been infringed. It found that the IRB's ruling was based upon the Board's assessment of the Applicant's credibility and the evidence presented, which the Supreme Court confirmed. The Court also noted that its obligation is to resolve allegations of Constitutional violations by determining whether the proceedings, taken as a whole, were fair and compliant with specific Constitutional safeguards. It added that an Applicant's mere dissatisfaction with the outcome of his case is an insufficient basis for an Article 31 violation, citing *Demë Kurbogaj and Besnik Kurbogaj*, *The Case of X (17 June 2010)*, and *Mezoture Tiszazugi Tarsulat v. Hungary*. The Court held that there was no support for a claim that the Supreme Court assessed the Applicant's evidence in an unfair or inaccurate matter.

For the reasons stated, the Court issued a Judgment overruling the Applicant's objection to the Supreme Court's decision and reflecting its holding that there was no violation of the Applicant's right to a fair and impartial trial.

Pristina, 6 April 2011
Ref. No.: 89/11

JUDGMENT

in

Case No. KI 55/09

Applicant

N.T.SH Meteorit

Constitutional review of the Decision No. 2407/2006 of the Supreme Court of Kosovo, dated 30 September 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge,
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is NTSH Meteorit with offices at Prizren, through its owner Tahir Hoxha of Prizren, represented by Sahit Bibaj, Lawyer also of Prizren.

The Challenged Decision

2. Decision of the Supreme Court of Kosovo, No. 2407/2006, dated 30 September 2009.

Legal Basis

3. The Referral is based on Article 113.7 and of the Constitution, Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Rule 57 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Procedure before the Constitutional Court

4. The Applicant filed a referral to the Constitutional Court that seeks to invalidate and annul Supreme Court of Kosovo decision A.Nr.2407/2006, dated 30 December 2009, as a violation of its constitutional right to a fair and impartial trial as detailed in Article 31 of the Constitution of the Republic of Kosovo due to the Supreme Court's failure to annul the Independent Review Board ("IRB") decision A.Nr. 439/2006 dated 24 August 2006 regarding the tax liabilities of the Applicant.

5. The President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and appointed a Review Panel comprising Judges Altay Suroy, presiding, Kadri Kryeziu and Gjyljeta Mushkolaj. The Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral. The full Court deliberated and voted in a private session on the Referral on 13 December 2010.

Summary of the Facts

6. From 1 September 2003 until 8 October 2003, officials of the Tax Administration of Kosovo ("TAK") performed an examination of the accounts and tax affairs and returns of the Applicant regarding tax declarations and tax payments made for the period of 2000/2003. In the its report, issued 8 May 2003, TAK found the Applicant had not properly declare its turnover of goods for tax purposes, and accordingly assessed the corresponding taxes, penalties, and interest. Specifically, based on irregularities in Applicant's accounting records concerning the purchase entries, sale entries, and declared income tax for certain inventory, TAK utilized the inventory's expiration period of sixty (60) days to calculate the appropriate turnover for the time periods in question. The report contained detailed charts of the accounting methods used in TAK's tax assessment based on the physical quantity of the Applicant's stock of goods and reported turnover.

7. The Applicant originally filed an appeal against the TAK findings to the Appeals Department of the Tax Administration. After reviewing the Applicant's information and comparing it with the facts provided by the Tax Administration the Department of Appeals rendered its decision Nr.426 on 9 January 2004 and rejected the Appeal.

8. The Applicant then appealed the Department of Appeals' Decision to the Independent Review Board (IRB). The IRB reviewed the case and pursuant to the Regulation on Tax Administration and Procedures RB rendered a decision Nr.62/2004 on 14 April 2004 rejecting Meteorit's appeal as unfounded. In its Decision the IRB *inter alia* stated:

   N.T.Sh Meteorit during the development of business was not abiding by the regulations and procedures of taxes and instructions of tax inspectors. The documentation presented in the hearing, which was the key element of the control … show[ed] the taxpayer had understated its income.

   The calculation of additional tax income was determined by the difference of the declared tax compared to the real turnover based on the records of the taxpayer, preliminary interview, declarations of taxpayers for the contested period, activities of the inspectors with the indirect site inspection of the business, and information from third parties. The data presented in the hearing was analyzed and compared with the data obtained by the Peja Brewery. It is determined that the tax inspector has acted correctly and has applied the [correct] method of supply analysis and declared sales in relation to the chronology of the date of use.

   The purchase and sales books were not kept in accordance with the Regulation.

9. Applicant then filed an appeal to the Supreme Court seeking to nullify the Decisions of the Department of Appeals and the IRB. In the Appeal it was claimed that the TAK's accounting methods utilizing the expiration period for beer of sixty (60) days for purposes of turnover without evidence of the stock's actual sale unfairly burdened the Applicant with twice the tax liabilities. The Applicant submitted a letter from N.P "Brewery" Peja detailing that that if Peja Beer was stored in optimal conditions, it may be served past its expiration date of sixty (60) days. However, that letter did not detail how long past the expiration date the beer could be maintained and served.

10. The Supreme Court issued decision A.Nr.233/2004 on 17 May 2006 in favor of the Applicant "to approve the lawsuit" and "annul the decision of

the Independent Review Board" dated 14 April 2004. The verdict stated the IRB "did not abide by the rules of procedure on taxes and instructions of tax inspectors" due to its failure to reference specific rules and regulations that Applicant failed to adhere to in his records. In addition, the Supreme Court held the IRB failed to provide sufficient reasons concerning the "legal basis of the tax obligation, type, amount, and time of settlement of tax obligation, which data are relevant for the fair adjudication of the present administrative affair." The Supreme Court ordered a retrial of the matter to address the deficiencies in the record.

11. The IRB held a further hearing, pursuant to the Supreme Court decision, on 28 July 2006. After hearing the merits of the matter, the IRB issued its retrial decision A.Nr.439/2006, dated 24 August 2006, rejecting the Appeal. In its decision, the IRB analyzed the evidence presented by the Applicant, the written appeal, evidence presented at the hearing, and "cross-examined the evidence presented by both parties." The IRB made a determination that the Applicant "did not present the real turnover and understated the declarations in the category of prejudiced tax for the . . . [control] period." All evidence presented by the parties in the hearing were analysed and compared with the information obtained by Peja Brewery. This analysis resulted in the determination that the tax inspector had acted properly in its "analysis method of supply and declared sales" in regards to the expiration dates of the goods in question for the control report. In addition, the IRB held the Applicant's purchase and sales books were not held in accordance with regulation, resulting in a 125 EUR fine on 2 June 2004, and the calculated tax reassessment and penalties were valid.

12. The Applicant then appealed the second IRB Decision A.Nr.439/2006 to the Supreme Court. The Applicant in its Appeal stated that the both parties to the Appeal rendered additional explanations regarding the facts. The Applicant maintained that it had fulfilled all obligations far arose from the regulation and other legal provisions as proved by the documentation and evidence included in the case files. The Applicant continued to maintain that the tax assessment was not correct.

13. The Supreme Court in its decision A.Nr.2407/2006 of 30 September 2009 rejected this further Appeal as unfounded. The Supreme held the IRB "followed the [required legal] format provided under Article 206 of the Law on General Administrative Procedure ("LGAP"), the introduction of the [IRB] decision was drafted in accordance with Article 207 para 1 of LGAP, and the reasoning complied in accordance with Article 209 para 2 of LGAP". The Supreme Court held that the IRB's retrial reviewed the evidence presented by Applicant, the TAK

representative, evidence presented at the hearing, and case file, when the IRB approved the conclusion of the initial IRB decision Nr.62/2004 of 14 April 2004. In addition, the Supreme Court held the IRB observed the rules of procedure, factual situation, and presented evidence, when "determin[ing] undoubtedly plaintiff made tax violations" for which he was assessed a fine and interest. It was from this final Decision of the Supreme Court that the Applicant filed a referral to the Constitutional on 19 October 2009.

Admissibility

14. In order to be able to adjudicate the Applicant's Referral the Constitutional Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution. In this regard, the Court refers to Article 113.7 of the Constitution, which provides:

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;

and to Article 47.2 of the Law, stipulating that:

The individual may submit the referral in question only after he/she has exhausted all legal remedies provided by the law.

15. It is apparent that the Applicant is an authorized party; it exhausted all legal remedies provided by law before having filed its Referral, within the legal deadline. Also the Applicant clarifies what rights and freedoms have been violated, indicating what concrete act of a public authority is subject to challenge; and he justifies the referral, attaching the necessary supporting information and documents. Therefore, the Court concludes that the case is admissible.

Merits

Right to a Fair Trial

16. The right to a fair and impartial trial is one of the hallmarks of a country based on the rule of law. That right is enshrined in the Constitution and in the European Convention on Human Rights and Fundamental Freedoms (the Convention). Article 31 of the Constitution of Kosovo provides for the right to a fair and impartial trial in the following terms:

Article 31 [Right to Fair and Impartial Trial]

1. *Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.*
2. *Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.*
3. *Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.*
4. *Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence.*
5. *Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.*
6. *Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice.*
7. *Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.*

17. Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms which was incorporated into the Law of Kosovo pursuant to the provisions of Article 22 of the Constitution of Kosovo provides as follows:

    In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

18. The Constitutional Court, when assessing the constitutionality of the decision of the Independent Review Board and of the Supreme Court, is only permitted to review whether there was a violation of the Applicant's constitutional rights. Therefore, the Constitutional Court can only

intervene in the case of a violation of a specific fundamental right protected by the constitutional law. As long as no fundamental right has been infringed, the Constitutional Court is bound by the decision of the Supreme Court.

19. The Applicant in this case was given an oral hearing by the Independent Review Board at which the representatives of the Tax Administration were heard, the evidence was presented and cross examination was allowed. Following this the Independent Review Board found that the Applicant did not present the real turnover and that he understated the declarations for the relevant tax period. In essence the Applicant was not believed in relation to the evidence that he presented. The Board was within its authority to make that finding.

20. The Supreme Court in its second Decision considered the second Decision of the Independent Review Board and the arguments of the Applicant's representatives. It noted that the Independent Review Board had made a finding after the hearing that undoubtedly the Applicant had violated the taxation provisions. That Court was satisfied that that the format of the Decision was correct and that the requirement of the Taxation Laws and the reasoning were complied with.

21. It is not the task of the Constitutional Court to assess the legality and accurateness of decisions made by competent judicial institutions, unless there is clear evidence that such decisions have been rendered in an obviously unfair and inaccurate manner.

22. The Court's task with regard to alleged violations of constitutional rights is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by the Constitution. The Constitutional Court is, therefore, not a fourth instance of appeal, and has no jurisdiction to reopen court proceedings or to substitute decisions of regular courts with its own findings. As stated by this court in its Decisions in the case of Demë Kurbogaj and Besnik Kurbogaj of 19 May 2010, Case No KI 07/09 and in the case of X of 17 June 2010, Case No. KI 06/09 "The mere fact that the Applicant/s is/are dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of Article 31 of the Constitution (see mutatis mutandis Judgment ECHR Appl. No. 5503/02, Mezotur Tiszazugi Tarsulat v. Hungary, Judgment of 26 July 2005.)"

23. There is no evidence in the instant case that the Supreme Court has assessed the evidence provided by the Applicant in an unfair or an inaccurate manner. The Applicant has failed to prove that the Supreme

Court has violated Article 6 of the European Convention on Human Rights and Article 31 of the Constitution.

24. Taking into account the reasoning as set out above and the findings of the Independent Review Board and the Supreme Court the Constitutional Court therefore finds that there was no violation of a right to a fair hearing and no violation of the Applicant's right to a fair trial as provided for in Article 6.1 of the Convention.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law on the Constitutional Court, and Rule 56 (1) of the Rules of Procedure, by majority**,**

DECIDES

I. TO DECLARE the Referral admissible

II. That there has been no violation of the right to a fair and impartial trail as guaranteed by Article 31 of the Constitution of Kosovo in conjunction with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Law.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

N.T.SH Meteorit vs. Decision No. 2407/2006 of the Supreme Court, (Dissenting Opinion of Judges Almiro Rodrigues and Gjyljeta Mushkolaj)

Case KI 55-2009, dissenting opinion of 6 April 2011

Keywords: dissenting opinion, format of appellate court decision, format of trial court decision, individual referral, right to fair and impartial trial, tax evasion

Judges Almiro Rodrigues and Gjyljeta Mushkolaj dissented from the Court's Judgment in this tax matter, which affirmed the Supreme Court's decision rejecting the Applicant's claim that he had not received a fair trial. First, the dissent asserted that the Supreme Court's holding was unfair because it failed to issue a reasoned written decision. The dissent noted that the Applicant complained to the Supreme Court that the IRB's second decision did not follow the Supreme Court's instructions. The dissent asserted that the IRB decision was conclusory and formulaic, lacking factual and legal analysis, and did not provide a reasoned disposition of the Applicant's claim. Second, the dissent contended that the IRB, like a court, must provide a fair trial. The dissent asserted that the right to a fair trial encompasses a fundamental right to judicial protection, including rights to present arguments and evidence, a reasoned court decision, and equality of arms. The dissent recognized that a reasoned decision did not require a detailed answer to every challenge, although a response to a fundamental argument is necessary, citing *Hiro Balani v. Spain*. The dissent argued that neither the IRB nor the Supreme Court resolved the Applicant's fundamental arguments in a reasoned decision, leaving the Applicant to guess whether the issues were or intentionally omitted. In sum, the dissent argued that the decisions by the IRB and the Supreme Court were defective for three reasons: they did not reconcile the arguments and evidence presented by the Applicant; they violated the rights to equality of arms and an adversarial process; and, they was insufficiently supported. Accordingly, the dissent contended, violations of Article 31 and ECHR Article 6 occurred, and the Court should have reversed the Supreme Court's judgment and remanded the case to the Supreme Court for further proceedings.

Pristina, 6 April 2011
Ref. No.: 115

DISSENTING OPINION

in

Case No. KI 55/09

Applicant

N.T.SH Meteorit

Constitutional Review of the Decision of the Supreme Court of Kosovo, No. 2407/2006, dated 30 September 2009

Judges

Almiro Rodrigues
and
Gjyljeta Mushkolaj

We welcome the judgment of the majority of the Constitutional Court, but respectfully dissent on that "there was no violation of a right to a fair hearing and no violation of the Applicant's right to a fair trial as provided for in Article 6.1 of the Convention".[7].

1. In fact, the Judgment concluded that "there is no evidence in the instant case that the Supreme Court has assessed the evidence provided by the Applicant in an unfair or an inaccurate manner. The Applicant has failed to prove that the Supreme Court has violated Article 6 of the European Convention on Human Rights and Article 31 of the Constitution."[8]

2. With all respect, it is our view that there was a violation of a right to a fair hearing (a) and a violation of the Applicant's right to a fair trial (b) and a different conclusion should have been reached (c).

(a) Violation of a right to a fair hearing

3. In our view, there was a violation of fairness, as the argument made by the Applicant was neither heard nor a reasoned decision on it was delivered to him. The right to be heard is not strictly linked to an oral hearing, but mainly to an answer of the court to an argument of the Applicant, including in written. The Applicant made the argument as follows.

4. The Applicant claimed, on one side, about "the method of determination of additional turnover and obligations that arise hitherto, alleging that

[7] Paragraph 24 of the Judgment
[8] Paragraph 23 of the Judgment

the arguments that are convincing have not been taken into account"[9] nor the supporting evidence.

5. The Applicant further alleged that "the assessment of the control inspectors was not correct because according to the figures in the case files more goods were declared that they were available in stock"[10].

6. On the other side, the Applicant alleges that the Supreme Court of Kosovo[11] concluded, in its first Judgment, that "the factual situation was not determined and that there was contradiction between the evidence and disputed decision regarding the respective tax obligation of the plaintiff".

7. Furthermore, the Applicant claims that the Independent Review Board did not follow the instruction of the Supreme Court on "how the decision making authority should act for rendering a lawful decision, examination of evidence, and decisive facts"[12].

8. It is up to the Supreme Court, to rectify the errors of the lower courts. Complying with that obligation, the Supreme Court, in answering that argument of the Applicant, identified in its first Judgment a violation on that ***"the factual situation was not determined and that there was contradiction between the evidence and disputed decision regarding the respective tax obligation of the plaintiff"***. Therefore, the Supreme Court remanded the case to the Independent Review Board instructing how it should act for rendering "a lawful decision, examination of evidence, and decisive facts".

9. Meanwhile, the Applicant claims that the second Judgment of the Supreme Court[13] "is in contradiction with the verdict of the same court A.Nr.233/04" and "the case files indicate that the right of the claimant to fair and impartial trial provided under Article 31 of the Constitution of Republic of Kosovo" was violated.

10. The main question to be discussed is whether the second decision of the Independent Review Board correctly determined ***"the factual situation"*** and eliminated the ***"contradiction between the evidence and disputed decision*** regarding the respective tax obligation of the plaintiff".

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[9] See Appeals to the Supreme Court against the decisions Nr.426 of 09.01.2004 and Nr.62/2004 of 14.04.2004
[10] See Appeals to the Supreme Court against the decision A.Nr.439/06 of 24.08.2006
[11] Judgment A.Nr.233/04 of 17.05.2006
[12] See Appeals to the Supreme Court against the decision A.Nr.439/06 of 24.08.2006
[13] A.Nr.2407/2006 30 December 2009

11. In our view, such a determination and elimination were not done by the Independent Review Board. Therefore, either the first Judgment of the Supreme Court was correct on pointing out these shortcomings or not. If yes, it should have maintained the same view in relation to the second decision of the Independent Review Board. We consider that the second decision[14] did not fulfill the shortcomings, as we will further explain.

12. As a matter of fact, a comparison of both the two decision of the Independent Review Board[15] shows the following:

    i) The very same clause "The purchase and sales books were not kept in accordance with the Regulation" appears in both decisions (62/2004, the first, and 439/2006, the second);
    ii) Also the very same clause "The tax inspector has acted correctly and has applied the method of supply analysis and declared sales in relation to the chronology of the date of use" appears in both decisions (62/2004, the first, and 439/2006, the second);
    iii) The clause "Based on Section 7 and 2 of the Regulation 2000/20 and Section 9.1 and 9.4 of Regulation 1/2000 and Section 8 and 27 of Regulation 2001/11 and Section 10 of Regulation 2002/4, during tax reassessment we concluded that the decision of Tax Administration is valid and penalties that were calculated for the taxpayer are also valid" only appears in the second decision (439/2006). Apparently this is the only modification made by the Independent Review Board in order to comply with the instruction of the Supreme Court.

    We note that that all of these sentences/clauses are conclusive and without any factual and legal analysis.

13. Furthermore, the second Decision of the Supreme Court[16] contains the following statement: "following the analysis of the evidence presented by the owner of the taxpayer and analysis of the written appeal and following the hearing of the representative of the Tax Administration and evidence presented at the hearing, cross-examined the evidence presented by both parties, in which it determined the following factual situation".

14. However, neither facts were established nor legal analysis was made before having concluded as it was mentioned under paragraph 12 i) and ii) above. On the other side, the clause mentioned under paragraph 12 iii) is only a mere legal reference to certain legal provisions completely empty of

[14] Decision A.Nr.439/2006 dated of 24.08.2006
[15] Nr.62/2004 dated of 14/04/2004 and A.Nr.439/2006 dated of 24.08.2006
[16] A.Nr.2407/2006 30 December 2009

practical legal meaning, as without any link to an established factual situation. It is only a stereotypical formula.

15. Apparently, the Majority was satisfied that the abovementioned clause under paragraph 12 iii) was enough to fill in the shortcomings pointed out in the first Judgment of the Supreme Court, in as much as it mentioned the applicable legal provisions and regulations.

16. However, the statement/clause under paragraph 12 iii), without specifying what facts were established and what relationship with the mentioned legal provisions, is nothing more than an empty and unexpressive formula. On the other side, the argument made and the evidence presented by the Applicant has to do with the heart of the case. Therefore, the argument of the Applicant should have been explicitly taken, analyzed and concluded.

(b) Violation of the Applicant's right to a fair trial

17. The Applicant has the *right to obtain a court ruling in conformity with the law*. This right includes *the obligation for courts to provide reasons* for their rulings with reasonable grounds at both procedural and material level. The right to have reasons for court decisions requires explanations with *plausible and legally well constructed reasons* for the decision taken in each individual case, which should include both the *legal criteria and factual elements* in support of the decision.

18. The decisions, which are under consideration in the case, were mainly delivered by the Independent Review Board. Even though the Independent Review Board is not a tribunal, the term "court"[17] is to be understood in its broadest sense, in conformity with the ECtHR jurisprudence. Thus all bodies, including Independent Review Board, required to settle administrative disputes are to be regarded as courts. Consequently, the right to a fair trial should also be guaranteed in proceedings before these bodies.

19. In addition, the Law No.2004/48 on Tax Administration and Procedures[18], which establishes the Independent Review Board[19], firmly acknowledges the right to a fair trial as guaranteed by the ECHR and the Constitution.

[17] The term "Tribunal" used by Article 6 (1) of the European Convention or the term 'Courts" used by Article 31 (1) of the Constitution.
[18] Regulation No. 2005/17 9 April 2005 on the Promulgation of the Law on Tax Administration and Procedures adopted by the Assembly of Kosovo
[19] Article 57.1 of the Law No.2004/48 prescribes that "The Independent Review Board established under UNMIK Administrative Direction No. 2000/7 shall continue as the Independent Review Board under this law."

20. On the other hand, Section 3 of the UNMIK Administrative Direction No. 2000/7[20] requires the Board to "conduct a hearing and review the relevant testimony, documents and other evidence presented by the taxpayer and the Tax Administration" (Section 3.1.), as well as stipulates that "the Board shall discuss the case as a panel and shall notify the parties of its decision, **together with written reasons for the decision**, within 30 days of the conclusion of the hearing" (Section 3.2.).

21. As said above, the Applicant alleges a violation of his right to fair trial by the Independent Review Board and Supreme Court when his right to be heard was not respected and the decision was not reasoned.

22. In addition, the right to a fair hearing, as embodied in constitutional texts and Article 6 of the European Convention on Human Rights and Article 31 of the Constitution of Republic of Kosovo, is of fundamental nature to safeguard fundamental rights.

23. However, the right of access to court is not an absolute right. In its case-law, the ECtHR has further held that any limitation will only be compatible with Article 6 if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved[21]. Therefore, any limitation must be subject to the principles of necessity and proportionality, meaning only if necessary and until it is necessary.

24. The fundamental right to a fair trial is derived from the fundamental right to judicial protection[22]. More than other fundamental rights, the right to a fair trial demands that judges be careful as they are always in danger of violating it. All judges sitting in higher courts also have to check that this principle has been correctly applied at the lower levels. In fact, the right to a fair trial is a general reference to a complex of other rights: namely, the right to present arguments and evidence, the right to a reasoned decision and the adversarial principle and equality of arms.

25. Article 31 of the Constitution and Article 6 of the Convention require that the domestic courts give reasons for its judgment. Courts are not obliged to give detailed answers to every argument or question[23]. However, if a submission is fundamental to the outcome of the case, the court must then specifically and expressly deal with it in its judgment.

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[20] UNMIK Administrative Direction No 2000/7 of 12 April 2000.
[21] Ashingdane v the United Kingdom, 28 May 1985, pa 57
[22] Article 54 of the Constitution
[23] Van de Hurk v Netherlands, 19 April 1994, pa. 61

26. In *Hiro Balani v. Spain*[24] the applicant had made a submission to the court which required a specific and express reply. The court failed to give that reply making it impossible to ascertain whether they had simply neglected to deal with the issue or intended to dismiss it and if so what were the reasons for dismissing it. This was found by the ECtHR to be a violation of Article 6 (1).

27. In our view, it is indisputable that it is fundamental to the outcome of that case the argument on "the method of determination of additional turnover and obligations that arise hitherto, alleging that the arguments that are convincing have not been taken into account" nor the supporting evidence. It is also fundamental for the outcome of the case that "The assessment of the control inspectors was not correct because according to the figures in the case files more goods were declared than they were available in stock".

28. In addition, no specific and express reply to the argument made and evidence presented by the Applicant was provided by either the second decision of the Independent Review Board or by the second Judgment of the Supreme Court. Then, it was impossible for the Applicant to "ascertain whether they had simply neglected to deal with the issue or intended to dismiss it and if so what were the reasons for dismissing it".

29. In principle, the Referral against a regular court is admissible if an Applicant was denied the possibility of being heard before the court due to an incorrect procedure on the part of the regular courts in the course of the proceedings.

30. The right to a fair hearing is a right that concerns constitutional judges[25] not only because they are called upon to review compliance with this constitutional principle by the regular courts, but also insofar as they themselves have a duty to apply the right to a fair hearing.

31. We assume that the more opportunity the parties have to present their arguments on an equal footing, respecting the equality of arms and adversarial principles, the more chance for the decision itself is being fair. In other words, in endeavoring to establish whether a trial has been fair, we should no longer consider the substance of the decision itself but the way in which the decision was reached.

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[24] ' Hiro Balani v. Spain, 9 December 1994

[25] The European Court, in the case Kraska v Switzerland, 19 April 1993, pa 26, has stated that Article 6 applies to proceedings before a constitutional court if the outcome of these proceedings is directly decisive for a civil right or obligation.

32. The right to obtain a court decision in conformity with the law includes the obligation for the courts to provide reasons for their rulings with reasonable grounds at both procedural and substantive level. Providing reasons requires explanations with plausible and legally constructed reasons for the decision taken in each individual case, which should include both the legal criteria and factual elements in support of the decision.

33. The statement of reasons should not, in any case, be too long, but it must enable the person for whom the decision is intended, and the public in general, to follow the reasoning that led the court to make a particular decision. The right of appeal, moreover, can only be effective if the facts are well established and the reasons for the decision are sufficiently spelt out.

34. Thus, the justification of the decision must state the relationship between the merit findings and reflections when considering evidence on the one hand, and the legal conclusions of the court on the other. A judgment of a court will violate the constitutional principle of a ban on arbitrariness in decision making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them.

35. Therefore, we consider there to be a violation of the right to a fair trial where arbitrariness or unreasonableness is found in a decision of a regular court. Consequently, the judgment of the Supreme Court where it did not check the factual allegation on a reasonable basis should be declared invalid. A fortiori, the judgment may be considered to be overturned in the case of arbitrariness, namely following absence or unreasonable evaluation of essential evidence.

(c) Conclusion that should have been reached

36. Before the foregoing reasons, we consider that the challenged decisions violated the right to a fair trial in the sense that:

    i. they did not take into account the fundamental and essential arguments made, and pertinent and essential evidence presented, by the Applicant, as they did not weigh their relevancy for the case and they did not take position concerning the relevant statements;
    ii. they violated the equality of arms and adversarial principles, as they have not considered equally all the arguments of both parties and
    iii. they are without sufficient reasons.

37. In sum, there is evidence in the instant case that the Supreme Court, in its second and final Judgment, was not consistent and fair when assessing the initial argument and evidence provided by the Applicant and, thus, there has been a violation of the Applicant's right to a fair trial, as provided for in Article 31 of the Constitution and Article 6 of the Convention quoted above and, accordingly, we respectfully dissent.

38. Consequently, in accordance with Rule 74 of the Rules of Procedure, the Judgment of the Supreme Court should have been declared invalid and the case remanded to the Supreme Court for reconsideration.

Judge

Almiro Rodrigues

Judge

Gjyljeta Mushkolaj

R.D. vs. Judgment of the Supreme Court of Kosovo Rev. No. 295/2007

Case KI 29-2010, decision of 19 April 2011

Keywords: individual referral, manifestly ill-founded referral, property ownership dispute

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional right to property was infringed by a judgment of the Supreme Court, which affirmed adverse lower court decisions concerning his right of ownership in particular real property, arguing that the courts violated the Laws on Contested Procedure and Civil Procedure when making their rules.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Rule 36.1(c) because the Applicant failed to make a *prima facie* showing that a Constitutional violation had occurred, citing *Vanek v. Slovak Republic*. The Court emphasized that its discretion is limited to disposition of Constitutional controversies such as whether the Applicant received a fair trial, and that it cannot resolve factual and substantive law disputes, citing *Garcia Ruiz v. Spain* and *Edwards v. United Kingdom*. It held that there was no evidence that the proceedings below were in any way unfair or arbitrary, citing *Vanek*.

Pristina, 19 April 2011
Ref. No.: RK112/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 29/10

Applicant

R.D.

Constitutional Review of the Judgment of the Supreme Court of Kosovo Rev. No. 295/2007

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. R. D. residing in Vitia. In the proceedings before the Constitutional Court, he is represented by Mr. Mustafë Musa, a lawyer from Gjilan.

Challenged decision

2. The applicant challenges the Judgement of the Supreme Court of Kosovo Rev. No. 295/2007, of 29 March 2010.

Subject matter

3. The Applicant, requests an assessment of the constitutionality of Judgment of the Supreme Court of Kosovo Rev. No. 295/2007 dated 29 March 2010 related to his property rights regarding parcel no. 2072 in Rajac, Municipality of Vitia.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo; Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rule 36 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

5. On 29 April 2010, the Applicant filed a Referral with the Secretariat of the Constitutional Court.

6. On 23 August 2010, the Constitutional Court notified the Supreme Court that the Applicant challenges the Judgment that the Supreme Court adopted.

7. The Constitutional Court has not received a reply from the Supreme Court.

8. On 21 January 2011 after having considered the Report of the Judge Rapporteur Robert Carolan, the Review Panel, composed of judges, Altay Suroy (Presiding), Snezhana Botusharova and Enver Hasani, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

9. On 16 October 2006 the Municipal Court of Viti through it's Judgement C.nr. 60/2006 recognized the Applicant's ownership on cadastral parcel no. 2072, in Rajac, Municipality of Vitia.

10. On 2 May 2007, Shaip Rexhepi has requested to reopen procedure for case C. No. 60/05,

11. On 4 June 2007, the Municipal Court of Viti, , approved the Mr. Shaip Rexhepi's request for reopening procedure, and annulled a part of the Judgment C. No. 60/05 thus recognizing Mr. Shaip Rexhepi's ownership right regarding parcel no. 2073/3.

12. On 27 August 2007, the District Court of Gjilan, Judgement Ac. No. 274/07 dismissed the Applicant's appeal as ungrounded stating that the first instance court has not committed any essential violation of the provisions on the Law on Contested Procedure. The District Court has also stated that the material law has been applied fully and fairly.

13. On 29 March 2010, the Applicant requested revision from the Supreme Court of Kosovo against the Judgment of the District Court of Gjilan seeking the annulment of the Judgements of the lower instances.

14. On 20 March 2010, the Supreme Court of Kosovo through it's Judgement Rev.nr. 295/2007, rejected the Applicant's request for revision as ungrounded.. The Supreme Court stated that material law was fairly applied in rejecting the applicants claim as ungrounded as the court of the first instance found that the Applicant has not purchased the disputable part of the land. Therefore the Supreme Court found that the legal findings and the reasoning of the lower instance courts are fair according to which the claim of the Applicant requesting the recognition of the ownership right is ungrounded.

Applicant's allegations

15. The Applicant alleges that there have been essential violations of the Law on Contested Procedure, namely Article 354, paragraph 1 and 2, item 14, in relation to Article 40, paragraph 3, Article 133 and 148, and furthermore Article 421, paragraph 1, Article 423, paragraph 1, sub-paragraph 1, and Article 427, paragraph 5, of the Law on Civil Procedure.

Assessment of the admissibility of the Referral

16. In order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

17. In this respect the Court recalls that according to Rule 36(1)(c)"the Court may only deal with Referrals if the Referral is not manifestly ill-founded.

18. Rule 36 of the Rules of Procedure further prescribes that;

    The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:
    a) the Referral is not prima facie justified, or
    b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or
    c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or
    d) when the Applicant does not sufficiently substantiate his claim;

19. The Applicant has not submitted any prima facie evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

20. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, García Ruiz v. Spain, no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-I).

21. The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant

had a fair trial (see among others authorities, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No 13071/87 adopted on 10 July 1991).

22. However, having examined the documents submitted by the Applicants, the Constitutional Court does not find any indication that the proceedings before Supreme Court were in any way unfair or arbitrary (see mutatis mutandis Application No. 53363/99, Vanek v. Slovak Republic, ECHR Decision of 31 May 2005.

23. Accordingly, the Referral must be rejected as manifestly-ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure,

DECIDES

I. TO REJECT this Referral as Inadmissible.

The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

Zvezdana Dimitrijević vs. Decision SCEL-09-0001 of the Special Chamber of the Supreme Court

Case KI 10-2010, decision of 20 April 2011

Keywords: exhaustion of legal remedies, individual referral, privatization issue, right to work and exercise profession

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that her right to work and exercise her profession under Article 49 were infringed by a decision of the Special Chamber of the Supreme Court concerning her claim to a 20% share of the proceeds of the privatization of a company where she worked for 17 years. Despite the fact that she was not listed as an employee when the privatization notification was made, she argued that she was nonetheless eligible for a share pursuant to UNMIK Regulation 2003/13's exception in cases involving discrimination. Her appeal to the Special Chamber was still pending when the Referral was submitted.

The Court held that the Referral was premature and inadmissible pursuant to Articles 113.1 and 113.7 of the Constitution because the Applicant's appeal to the Supreme Court was still pending, reflecting that she had failed to comply with the prerequisite of exhaustion of all legal remedies.

Pristina, 20 April 2011
Ref. No.: RK97/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 10/10

Applicant

Zvezdana Dimitrijević

Constitutional Review of the Decision of the Special Chamber of the Supreme Court of Kosovo, SCEL-09-0001, dated 8 January 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Mrs. Zvezdana Dimitrijević from Kosovska Gračanica.

Subject Matter

2. The Applicant alleges the Decision SCEL-09-0001 C-631, dated 8 January 2010, of the Special Chamber of the Supreme Court of Kosovo violated Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo.

Proceedings before the Court

3. On 29 January 2010, the Applicant submitted a Referral to the Constitutional Court.

4. On 19 August 2010, the Constitutional Court, informed the Special Chamber of the Supreme Court of Kosovo of the filing of the Referral and requested if they had any comments deemed interesting to be reviewed by the Court regarding the issue.

5. On 25 August 2010, the Special Chamber of the Supreme Court of Kosovo replied saying that 31 public hearings have been held, and in one of them, respectively on 21 April 2010, Mrs. Zvezdana Dimitrijević personally attended, participated and was heard too.

6. Furthermore, the Special Chamber of the Supreme Court of Kosovo informed that a decision in case SCEL-09-0001 has not been delivered yet and the proceedings are still pending.

7. On 21 January 2011, after having considered the Report of the Judge Rapporteur Almiro Rodrigues, the Review Panel, composed of judges Altay Suroy (Presiding) Ivan Čukalović, Gjyljeta Mushkolaj, members made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

8. On 10 January 2007, the Applicant submitted a request to the Kosovo Trust Agency in Pristina, dated 9 May 2003, claiming that she should be in the list of employees eligible for the 20% of proceeds of the privatization of the Socially Owned Enterprise (hereinafter referred as: the "SOE Ramiz Sadiku").

9. Subsequently, on 7 September 2006 she submitted an urgency note to the Kosovo Trust Agency on the same content.

10. On 4 March 2009, the PAK published in the "Koha Ditore" newspaper a list of employees eligible for the 20% of proceeds of the privatization of the "SOE Ramiz Sadiku". The applicant's name is not in the list.

11. On 23 March 2009, the Applicant submitted an appeal to the Special Chamber of the Supreme Court of Kosovo against PAK.

12. On 5 May 2009, the PAK submitted an answer to the applicant's claim to the Special Chamber, where it states that, at the time of privatization, respectively on 27 June 2006, the Applicant was not registered as an employee of the "SOE Ramiz Sadiku", due to the fact that the Applicant worked in this SOE from 1972 until 1999, and that she submitted her case within the final deadline set out by the PAK (31 August 2007).

13. The Special Chamber informed the Court that a hearing on this case was held on 21 April 2010 and the Applicant's case is still pending.

The Applicant's allegations

14. The Applicant claims that her name should be included in the list of employees' eligible for the 20% of the proceeds of the "SOE Ramiz Sadiku", in accordance with on the Transformation of the Right of Use to Socially-Owned Immovable Property. Section 10.4 of the UNMIK Regulation 2003/13 reads as follows:

i. "For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatization and is established to have

been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6"

15. The Applicant also claims that she was on the payroll for more than 17 years, she believes that her rights have been violated and that proportionally to the years and months worked in the "SOE Ramiz Sadiku" she is entitled for an appropriate monetary compensation.

Assessment of the Admissibility of the Referral

16. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, as well as the Law and the Rules of Procedure.

17. These requirements are namely that the Applicant may refer the matter to the Court in a legal manner (Article 113.1 of the Constitution) and after having exhausted all legal remedies provided by law (Article 113.7 of the Constitution).

18. As to the pertinent case, in accordance with the information received from the Special Chamber on 15 September 2010, a case is still pending at the Special Chamber and thus the Referral is premature as the Applicant has not exhausted all legal remedies provided by the law yet.

19. Therefore, the Court concludes that the Referral is inadmissible, pursuant to Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Magbule Asllani vs. Supreme Court Judgment Rev. I. no. 482/2008

Case KI 85-2010, decision of 6 May 2011

Keywords: deadline issue, individual referral, right to work, termination of employment

The Applicant, a court employee, filed a Referral pursuant to Article 113.7 of the Constitution, which contended that her right to work under Article 49 of the Constitution was infringed by a judgment of the Supreme Court, which reversed lower court decisions upholding her claim that her employment termination was baseless.

The Court held that the Referral was inadmissible pursuant to Article 49 of the Law on the Constitutional Court and Rule 36.1(b) of the Rules of Procedure because it was submitted 10 months after the contested decision, which is beyond the mandatory 4-month deadline.

Pristina, 6 May 2011
Ref. No.: 116 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 85/10

Applicant

Magbule Asllani

Constitutional Review of the Supreme Court Judgment Rev. I.no. 482/2008 dated 18 December 2008

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President

Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Magbule Asllani, residing in Pristina Kosovo, represented by Xhevat Bici, a lawyer from Pristina.

Challenged court decision

2. The challenged court decision is the Judgment of the Supreme Court Rev.I. no 482/2008 of 18 December 2008, which was served on the Applicant on 29 November 2009.

Subject matter

3. The Applicant alleges that her right to work as guaranteed by Article 49 of the Constitution has been violated.

4. In particular the Applicant requests the Constitutional Court to "Uphold the suit of the...[Applicant] and quash the Supreme Court Judgment Rev.I. no 482/2008 of 18 December 2008 as unlawful and verify the District Court in Pristina Judgment Ac.nr. 80/2008 dated 17 June 2008 and Municipal Court in Pristina Judgment."

Legal basis

5. Article 113.7 of the Constitution, Articles 20 and 22 and 49 of the Law on the Constitutional Court and Rule 36 (1) (b) of the Rules of Procedure of the Constitutional Curt of the Republic Court of the Republic of Kosovo.

Proceedings before the Court

6. On 15 September 2010 the Applicant submitted the Referral to the Court.

7. On 12 April 2011 after having considered the Report of the Judge Rapporteur, Altay Suroy, the Review Panel, composed of Judge Ivan Čukalović (Presiding), Judge Enver Hasani and Judge Iliriana Islami

made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts and allegations as presented by the Applicant

8. According to the Applicant the Supreme Court Judgment is unlawful and unfair, since she has been working for her entire life and now at age of 63 her employment contract has not been extended.

9. The Applicant alleges that her employment contract was discontinued for no reason, although she worked for decades for the same court. Moreover, other employees were hired instead of her.

10. The Applicant claim that it is her "principle right" to obtain an extension of the employment contract for two additional years due to her age, because she has no chance of employment due to her age, and she was careful and accurate at her workplace, and she never obtained any remark by her supervisors and was one of the most hard working and careful employees.
11. The Applicant also alleges that the way in which her case was dealt is unjust and inhumane in violation of Articles 49 of the Constitution.

12. In support of her Application the Applicant submitted the Municipal Court Judgment of 15 November 2007 according to which her claim suit was upheld as grounded and decisions of the Appeal's Commission of the Independent Judicial Council Secretary of Kosovo KA 41/2007 of 22 March 2007 and of IOBK no 1258/07 of 5 June 2007 were annulled.

13. The abovementioned judgment of the Municipal Court was confirmed by the Judgment if the District Court of Prisitina issued on 17 June 2008.

14. However, on 18 December 2008 the Supreme Court of Kosovo upheld the revision of the Judicial Council of Kosovo and changed (i.e. annulled) the judgments of the Municipal and District Courts. In the reasoning if its judgment the Supreme Court stated that the material right was applied wrongfully by the lower instance courts (i.e. the Municipal Court in Pristina and District Court in Pristina) in the Applicant's case.

15. The Applicant alleges in her Referral that the above mentioned Supreme Court Judgment was served on her on 29 November 2009

Assessment of the admissibility of the Referral

16. In order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

17. As to the Applicant's referral, the Court refers to Article 49 of the Law which insofar relevant reads as follows:

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…."

18. The Court notes that the challenged judgment of the Supreme Court of Kosovo Rev. I.no. 482/2008 of 18 December 2008 was served on the Applicant on 29 November 2009. The Court also notes that the Applicant submitted the Referral to the Court on 15 September 2010.

19. The Applicant is out of time prescribed by Article 49 of the Law and Rule 36 (1) (b) of the Rules of Procedure.

FOR THESE REASONS:

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure,

DECIDES

I. TO REJECT the Referral Inadmissible.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Art. 20(4) of the Law on the Constitutional Court.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

The Independent Union of Workers of IMK Steel Factory in Ferizaj vs. Decision C. No. 340/2001 of the Municipal Court of Ferizaj

Case KI 08-2009, decision of 12 May 2011

Keywords: clarification of judgment, individual/group referral, right to an effective remedy, right to compensation for unpaid salaries, right to fair and impartial trial, right to work and exercise profession

The Privatization Agency of Kosovo (PAK) requested that the Court clarify two issues arising from the Judgment issued in this case on 17 December 2010. First, PAK asked the Court to specify the case that it had deemed as *res judicata*. The Court identified the case, a decision rendered by the Ferizaj Municipal Court in 2002, emphasizing that the Judgment had specified the case in several places. Second, PAK requested clarification for guidance on its concrete obligations pursuant to the judgment. The Court responded that the Judgment had not invalidated the Law on Business Organizations or any other laws, adding that the case arose from a failure to enforce the Municipal Court's final decision for 9 years and that despite Municipal Court's decision PAK's predecessor, the Kosovo Trust Agency (KTA), privatized the IMK Steel Factory in violation of Article 31 of the Constitution, as well as Articles 6 and 13 of the European Convention on Human Rights and Fundamental Freedoms.

The Court reiterated its earlier holding that the Municipal Court's binding decision must be executed. The Court emphasized that PAK is solely and completely responsible for the decision's implementation through satisfaction of valid claims from creditors from the proceeds of the sale of Socially Owned Enterprises pursuant to the Law on PAK. Finally, the Court noted that it is not the final authority for determining the legality of a statute and admonished the parties in the case to seek independent legal advice regarding the legal responsibilities of the Government and PAK.

.Pristina, 12 May 2011
Ref. No.: 104/11

CLARIFICATION

of

JUDGMENT

in

Case No. KI 08/09

The Independent Union of Workers of IMK Steel Factory in Ferizaj,
represented by Mr. Ali Azem, President of the Union.

Constitutional Review of the Decision of the Municipal Court of Ferizaj, Decision C No. 340/2001, dated 11 January 2002

Requested Clarification of the Judgment, dated 17 December 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Subject Matter

1. Request for clarification submitted by the Privatization Agency of Kosovo.

Legal basis

2. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the "Law") and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Constitutional Court

3. On 31 March 2011, the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") held a session to assess and decide on the above request.

Facts

4. On 18 January 2011, the Constitutional Court of the Republic of Kosovo received a request for clarification from the Privatization Agency of Kosovo (hereinafter: "PAK"), containing two questions in respect of the Judgment of this Court in case KI-08/09 adopted on 17 December 2010, reading as follows:

   "...
   1. *Firstly, PAK requests clarification regarding the first part of item III of the enacting clause, as to which decision is qualified as final and binding – res judicata, specifying the number of the case and the date of issuance of the decision, which is the subject matter of this enacting clause.*

   2. *Secondly, in the function of the implementation of this Judgment, PAK requests the clarification of what are the concrete obligations of PAK for the implementation of item III of the enacting clause, especially considering legal provisions of Regulation No. 2005/48 on the Reorganization and Liquidation of Enterprises under the Administrative Authority of PAK, as the legal successor of Kosovo Trust Agency.*

   ..."

Legal limits of assessing the Request

5. The answers to the above questions are given by the Court taking into account the legal basis abovementioned, together with the legitimacy, the pertinence and relevance of the request and the limits of the subject matter of the petitum which is at the basis of the judgment taken in the case.

6. Therefore, bearing in mind that the Court is bound by the limits of its judgment and is not legally authorized to go beyond those limits, the questions are clarified as follows hereafter.

Answer to the request

7. As to the first question which decision is qualified as final and binding – res judicata – which is the subject matter of clause III, the answer is that the decision concerned is referred to in the Judgment several times. Notwithstanding this, the decision concerned is: Decision of the Municipal Court of Ferizaj, C. No. 340/2001, dated 11 January 2002.

8. As to the second question which relates to the concrete obligations of PAK to implement clause III with respect to Regulation No. 2005/48 on the Reorganization and Liquidation of Enterprises under the Administrative Authority of PAK, the answer is that the Judgment does not invalidate Law No. 02/L-123 on Business Organizations or any other Laws.

9. The case concerns the Municipal Court's *res judicata* decision that has still not been enforced after 9 years, whereas despite the *res judicata* decision, the Kosovo Trust Agency (KTA) privatized the debtor IMK. By failing for such a long period of time to enforce the judgment of 11 January 2002, the appropriate authorities have deprived the provisions of Article 31 of the Constitution and Articles 6 and 13 of the ECHR of all useful effect, as stipulated by the Judgment. Consequently, the Court held that the final and binding decision of the Municipal Court of Ferizaj must be executed.

10. Furthermore, according to the Law on PAK, it appears that PAK is the authority administering Socially Owned Enterprises and that PAK shall satisfy valid claims of Creditors relating to Socially Owned Enterprises from those monetary proceeds that have been derived from the administration, sale, transfer or liquidation of such Enterprises and/or such assets. Since these monetary proceeds are held in trust for the benefit of the relevant Creditors by PAK, PAK may be solely and completely responsible for implementing the Decision of the Municipal Court of Ferizaj, C.No. 340/2001, date 11 January 2002, depending on whether and how its predecessor, KTA, responded in the last nine years with respect to the judgment of the municipal court and following the applicable law.

11. On behalf of the Court which is responsible for interpreting the Constitution, but which is not the final authority for determining the legality of a statute, the Court cautions the responsible parties in case KI-08/09 to seek their own legal advise concerning the Government's and PAK's legal responsibility.

FOR THESE REASONS

THE COURT, on 12 May 2011, decides, unanimously, to clarify the requested questions as above.

This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

Vahide Badivuku vs. Notification No. 01/118-713 of the Kosovo Judicial Council on the reappointment of judges and prosecutors

Case KI 114-2010, decision of 18 May 2011

Keywords: deadline issue, exhaustion of legal remedies, individual referral, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that her right to legal remedies under Article 32 of the Constitution was infringed by a decision of the Kosovo Judicial Council (KJC) to terminate her employment as a prosecutor without notice of the reasons for termination or an opportunity for an appeal, arguing that she was entitled to complete the 3-year term of her appointment. The Applicant argued that the treatment of her termination should have been consistent with the procedures for judges under Article 104 of the Constitution.

The Court held that the Applicant had failed to exhaust all legal remedies before submitting the Referral, which was therefore inadmissible pursuant to Article 113.7 because of the Applicant's failure to appeal the KJC's notification within the 15-day deadline imposed by Administrative Direction No. 2008/02. The Court emphasized that the rationale of the exhaustion rule involved an assumption that the Kosovo legal system would provide an effective remedy for constitutional violations, citing *AAB-RIINVEST University L.L.C. vs. the Government of Kosovo* and *Selmouni v. France*.

Prishtina, 18 May 2011
Ref. No.: RK119 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 114/10

Applicant

Vahide Badivuku

Constitutional Review of the Notification of the Kosovo Judicial Council on the reappointment of judges and prosecutors, No. 01/118-713, dated 27 October 2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The applicant is Mrs. Vahide Badivuku, residing in Vushtrri.

Challenged decision

2. The Applicant challenges the Notification of the Kosovo Judicial Council, No. 01/118-713, dated 27 October 2010, for her dismissal from the post of the prosecutor at the Municipal Public Prosecutor's Office of Mitrovica.

Subject matter

3. The Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 12 November 2010 claiming that her rights guaranteed by Article 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") have been violated.

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 16 December 2009, (No. 03/L-121) (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 12 November 2010, the Applicant submitted a Referral with the Court.

6. On 16 December 2010, the President, by Order No. GJR. 114/10, appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same date the President, by Order, No. KSH. 114/10, appointed the Review Panel consisting of Judges Snezhana Botusharova (Presiding), Enver Hasani and Almiro Rodrigues.

7. On 28 December 2010, the Referral was communicated to the Kosovo Judicial Council. So far, no reply has been received.

8. On 18 May 2011, the Review Panel, consisting of Judges Snezhana Botusharova (Presiding), Enver Hasani and Almiro Rodrigues considered the Report of the Judge Rapporteur Kadri Kryeziu and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

9. On 25 July 2008, by Decree of the President of Kosovo, No. DP-008/2008, the Applicant was appointed to the post of the prosecutor at the Municipal Public Prosecutor's Office in Mitrovica, pursuant to Article 109, paragraph 5, of the Constitution, for a three year mandate.

10. On 29 October 2010, the Applicant received a notification from the Kosovo Judicial Council, No. 01/118-713, dated 27 October 2010, informing her that her mandate as a prosecutor with the Municipal Court of Mitrovica ceases on 27 October 2010.

11. The notification of the Kosovo Judicial Council refers to the results of the reappointment process of judges and prosecutors during the third phase, based on Article 2.11, Article 2.16 and 14.2 of Administrative Direction No. 2008/02 Implementing UNMIK Regulation No. 2006/25 on a Regulatory Framework for the Justice System in Kosovo (hereinafter: the AD 2008/02) and Article 150 of the Constitution.

Applicant's allegations

12. The Applicant claims to have received a notification from the Kosovo Judicial Council, No. 01/118-713, on 29 October 2010, informing her that her function as a prosecutor at the Municipal Public Prosecutor's Office in Mitrovica ceases on 27 October 2010. The Applicant also points out

that the KJC notification contains no reasons as to why she is dismissed from her position of prosecutor.

13. The Applicant claims that her appointment as a prosecutor at the Municipal Public Prosecutor's Office in Mitrovica for a period of three year has been done in accordance with Article 109.5 of the Constitution and that her mandate and that it should have continued until the end of her mandate, on 25 July 2011, pursuant to the Decree of the President of Kosovo, No. DP-008/2008, dated 25 July 2008.

14. The Applicant claims that the KJC's decision was not based on any legal provision relating to the dismissal of a judge or prosecutor, but only on a simple notification, contrary to Article 104 [Appointment and Removal Judges] of the Constitution.

15. The Applicant alleges that she has been denied the right to appeal under paragraph 5 of the same Article of the Constitution, stipulating that a judge has the right to directly appeal a decision of dismissal to the Supreme Court of the Republic of Kosovo.

16. The Applicant also claims that her three (3) year mandate should be respected pursuant to Article 150, paragraph 4, of the Constitution, which stipulates:

150.4 "All successful candidates who have been appointed or reappointed as judges and prosecutors by the President of Kosovo on the proposal of the Kosovo Judicial Council as part of the Appointment Process shall continue to serve in their posts until the natural expiration of their appointment, or until such time as they are dismissed in accordance with law."

17. In her opinion, even Article 2.16 of Administrative Direction No. 2008/02 Implementing UNMIK Regulation No. 2006/25 on a Regulatory Framework for the Justice System in Kosovo provides that serving judges and prosecutors who have not been reappointed, whether they have applied for reappointment or not, shall terminate their employment on the day of the entry into function of judges or prosecutors appointed to the posts which the non-reappointed judges or prosecutors have been encumbering

18. The Applicant claims, that her three year mandate as a prosecutor has not been respected by the KJC, dismissing her from her position as prosecutor on the basis of a notification, which does not contain any legal reason. Hence, the Applicant claims that her fundamental rights and freedoms have been violated by KJC's unlawful and irregular action.

Assessment of admissibility of the Referral

19. The Applicant complains that the KJC, through Notification No. 01/118-713, dated 27 October 2010, terminated her position as a prosecutor, although her mandate, pursuant to the Decree of the President of Kosovo, No. DP-008/2008, had not ended yet.

20. However, in order for a Referral to be admissible, the Applicant must first show that he/she has fulfilled all admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

21. As to the present Referral, the Constitutional Court notes that, on 29 October 2010, the Kosovo Judicial Council notified the Applicant, through its Notification No. 01/118-713, that her mandate as a prosecutor ceased on 27 October 2010.

22. The Kosovo Judicial Council apparently based the issuance of this Notification on Article 150 of the Constitution and on Articles 2.11, 2.16, and 14.2 of Administrative Direction No. 2008/02, without mentioning other reasons for the dismissal of the Applicant. The Applicant never appealed against this Notification.

23. In this respect, the Court emphasizes that it can only decide on the admissibility of a Referral, if the Applicant shows that he/she has exhausted all effective remedies available under applicable law.

24. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see *mutatis mutandis*, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).

25. In the present case, the Court finds that the Applicant has not submitted any *prima facie* evidence and facts showing that she has exhausted all effective remedies under Kosovo law, in order for the Court to proceed with her allegation about the constitutionality of Notification No. 01/118-713 of 27 October 2010, pursuant to Section 6 [Request for reconsideration] of AD No. 2008/02 providing that:

"A candidate who fails to meet eligibility requirements and is not selected for judicial or public prosecutorial office under this Appointment Process may, within fifteen (15) days from the notification of such decision by the IJPC, file a request to the Independent Judicial and Prosecutorial Commission Review Panel ("the IJPC Review Panel") for reconsideration of the decision."

26. It follows that the Referral is inadmissible pursuant to Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, on 3 June 2011, unanimously,

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Mr.Sc.Kadri Kryeziu	Prof. Dr. Enver Hasani

Bojana Denić vs. Decision of the Election Complaints and Appeals Panel, A. No. 263/2010

Case KI 22-2011, decision of 19 May 2011

Keywords: administrative dispute, ballot counting, competency of lawyer, election and participation rights, equality before the law, exhaustion of legal remedies, finality of election results, freedom of election and participation, human rights, individual referral

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution contending that a Decision of the Election Complaints and Appeals Panel (ECAP), which rejected a request to place her name on the list of Parteš Municipal Assembly Members, violated her rights under Articles 3.2, 21.3 and 45.1 of the Constitution, as well as rights guaranteed by the Law on General Elections. The Court determined that the Applicant received 15 votes and a ranking of 3 in the Unified Serbian political party, while the opponent who was appointed by the Central Election Commission received the same number of votes, but was ranked as 9 in the same party. The Applicant's complaint to the Central Election Commission (CEC) was rejected on the ground that the decision was final, after which she filed an administrative appeal in the Supreme Court. The Supreme Court dismissed the appeal on the ground that she had not exhausted her right to appeal to ECAP, which then denied her appeal on the ground that election results are final when certified by the Central Election Commission.

The Court held that the Referral was inadmissible pursuant to Article 113.7 and Article 47.2 of the Law on the Constitutional Court because the Applicant had failed to exhaust all legal remedies by appealing the ECAP decision to the Supreme Court.

Prishtina, 19 May 2011
Ref. No.:RK 124/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 22/11

Applicant

Bojana Denić

Constitutional review of the Decision of the Election Complaints and Appeals Panel, A. No. 263/2010 dated 12 November 2010

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge,
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge.

The Applicant

1. The applicant is Ms. Bojana Denić from Parteš, represented by lawyer Bejtush A. Isufi from Prishtina.

Challenged Decision

2. The Applicant challenges the Decision of the Election Complaints and Appeals Panel, A. No. 263/2010 dated 12 November 2010, by which a complaint against a decision of the Central Election Commission was rejected, registered as 757/10, and in regard to mandates of the political party Unified Serbian List.

Subject Matter

3. The Applicant challenges the Decision of the Election Complaints and Appeals Panel A. No. 263/2010 claiming that Article 3.2, Article 21.3 and Article 45.1 of the Constitution of the Republic of Kosovo and Article 111 of the Law No. 03/L-073 on General Elections in the Republic of Kosovo have been violated.

Legal Basis

4. Article 113.7 and Article 21.4 of the Constitution, Article 20, Article 22.7 and Article 22.8 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo dated 15 Januara 2009 (hereinafter referred to as: the "Law") and Rule 56(2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the "Rules of Procedure").

Proceedings before the Constitutional Court

5. The Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the "Court") on 21 February 2011.

6. On 24 March 2011, the Constitutional Court informed Mr. Bejtush A. Isufi that the procedure has been initiated and that No. 22-11 was assigned to the case.

7. On the same date, the Constitutional Court informed the Election Complaints and Appeals Panel and the Central Election Commission that No. 22-11 was assigned to the case and that a procedure regarding review of the constitutionality of their decisions has been initiated.

8. On 19 May 2011, after having considered the Report of the Judge Kadri Kryeziu the Review Panel composed of Judges: Robert Carolan (presiding), Altay Suroy and Ivan Čukalović, recommended to the full Court to reject the Referral as inadmissible.

Summary of Facts

9. Complainant Bojana Denić, as a candidate of the Unified Serbian List for a seat in the Parteš Municipal Assembly, won 15 votes and was ranked 3 in this political party.

10. Jasmina Vasić from the same political party, the Unified Serbian List, won the same number of votes as Bojana Denić, however on the list she was ranked as 9.

11. The Central Election Commission in Prishtina, in its Announcement, dated 16 July 2010, Protocol Number 757-10 and signed by the President of the Central Election Commission appointed Jasmina Vasić for a Municipal Assembly Member and rejected the request of Bojana Denić for confirmation and verification of her mandate as Parteš Municipal Assembly Member.

12. Unsatisfied with this decision Bojana Denić filed an appeal to the Central Election Commission, which rejected this appeal with justification that allegedly this Decision is final and that the unsatisfied party has the right of initiating an administrative dispute at the Supreme Court in Prishtina.

13. Dissatisfied with the Decision of the Central Election Commission, Bojana Denić complained to the Supreme Court of Kosovo with a request to annul the Decision of the Central Election Commission. However, the Supreme Court rejected this complaint with justification that they should first address the Election Complaints and Appeals Panel.

14. Following the recommendation of the Supreme Court, on 15 November 2010 Bojana Denić filed a complaint to the Election Complaints and Appeals Panel, in which she requests amendment of the Decision number 757-10 of the Central Election Commission and to confirm her as Parteš Municipal Assembly Member.

15. But, Election Complaints and Appeals Panel rejected the complaint as inadmissible with explanation that: "Elections results are final and binding when they are certified by the Central Election Commission".

Applicant's Allegations

16. The Applicant alleges that Decision of Election Complaints and Appeals Panel by which a request to place Bojana Denić in the list of Parteš Municipal Assembly Members was rejected and that it violated her rights guaranteed by Article 3.2, Article 21.3 and Article 45.1 of the Constitution of the Republic of Kosovo.

17. Further, she claims that this decision violated her rights prescribed in Article 111 of the Law No. 03/L-073 on General Elections in the Republic of Kosovo.

Law on Elections in Kosovo

18. Law in regard to organizing elections in the Republic of Kosovo is governed by Law No. 03/L-073 on General Elections in the Republic of Kosovo, Law No. 03/L-256 on Amending and Supplementing the Law No. 03/L-073 on General Elections in the Republic of Kosovo and Law No. 03/L-072 on Local Elections in the Republic of Kosovo.

19. According to the Law No. 03/L-073 on General Elections in the Republic of Kosovo and the Law No. 03L-072 on Local Elections in the Republic of Kosovo, Article 26 of the Law on Local Elections provides the following:

"Chapter XVI (The counting of ballots and announcement of election results), and any provision relating to the subject matter thereof, of the Law on General Elections in the Republic of Kosovo shall mutatis mutandis apply to local elections unless otherwise provided by this Law."

20. Article 101 of the Law on General Elections sets out general provisions for counting the ballots and announcement of election results, and gives authorization to the CEC to make rules in accordance with this. This Article provides for the following:

"101.1 The procedures of counting of the ballots shall be governed by the following objectives: accuracy, transparency, efficiency, capability for recount and repeat elections, and protection of the secrecy of the vote.
101.2 Regular ballots cast at Polling Stations within Kosovo will be counted at those Polling Stations immediately after the close of voting.
101.3 The counting procedures shall be in accordance with the CEC rules."

21. The CEC has adopted rules which set out many election aspects. First of them was the rule No. 01/2008 on Registration and Operation of the Political Parties which entered into force on 29 June 2009. The latest was the election rule No. 15/2010 in regard to Early and Extraordinary Elections which entered into force on 2 March 2010.

22. The most important rule that is related to this case is the Election rule No. 09/2009 on Polling and Counting Inside Polling Stations on Municipal Election Commission Level, which entered into force on 25 June 2009. These rules are pertinent to the counting of ballots and counting and reconciliation of conditional ballots. ECAC decides on complaints in regard to the voting process. The Applicant filed a complaint to the ECAC and her complaint was rejected by the ECAC.

23. Article 106.1 of the Law No. 03/L-256 on Amending and Supplementing the Law No. 03/L-073 on General Elections sets forth the following:

"The CEC shall certify the final election results after the completion of all polling station and counting centre procedures and when all outstanding complaints related to voting and counting have been adjudicated by the ECAP and any appeals of ECAP's decisions on them have been determined by the Supreme Court of Kosovo."

24. Article 118.4 of the Law No. 03/L-256 on Amending and Supplementing the Law No. 03/L-073 on General Elections stipulates:

"An appeal may be made from a decision of the ECAP, as ECAP may reconsider any of its decisions upon the presentation by an interested party. An appeal to the Supreme Court of Kosovo may be made within twenty four (24) hours of the decision by ECAP, if the fine involved is higher than five thousand Euro (€5,000) or if the matter affects a fundamental right. The Supreme Court shall decide within seventy two (72) hours after the appeal is filed."

25. Article 118.5 of the Law No. 03/L-256 on Amending and Supplementing the Law No. 03/L-073 on General Elections prescribes:

"The ECAP decision is binding upon the CEC to implement, unless an appeal allowed by this law is timely filed and the Supreme Court determines otherwise."

Preliminary Assessment of Admissibility

26. In order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure of the Constitutional Court.

27. The Court notes that the Applicant filed the Referral under Article 113.7 of the Constitution which provides for the following:

"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 wishes to emphasize that the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see, mutatis mutandis, ECHR, Selmouni v. France, No. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the rule for exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, No. 56679/00, decision of 28 April 2004).

29. Having this in mind, it is obvious from the submissions that the Applicant has not presented evidence to the Court that she has exhausted all legal remedies provided by law in her attempt to have her request

approved by the court. Therefore, she didn't exhaust all remedies provided by law (complaint to the Supreme Court of Kosovo following the decision of the ECAC) in order to submit a Referral to the Constitutional Court in accordance with Article 113.7 of the Constitution.

30. Taking into consideration that the Applicant was represented by a lawyer during the entire proceedings, the Court assumes that the Applicant should have known all legal remedies which were at her disposal.

31. After having considered all presented facts and evidence, and after deliberating on the matter on 19 May 2011, the Court concludes that the Applicant has not exhausted all legal remedies available to her.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 56.2 of the Rules of Procedure, on 30 May 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Mr. sc. Kadri Kryeziu	Prof. Dr. Enver Hasani

Tomë Krasniqi vs. Section 2.1 of the United Nations Mission in Kosovo (UNMIK) Administrative Direction No. 2003/12 and Article 20.1 of the Law on Radio Televison of Kosovo, Law No. 02/L-47

Case KI 11-2009, decision of 30 May 2011

Keywords: contract dispute, elderly, individual referral, interim measures, mootness, striking of referral

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional rights were infringed by the imposition of a monthly fee on him to be collected by the Kosovo Energy Corporation (KEK) for services from Radio Television of Kosovo (RTK) under a scheme mandated by UNMIK Administrative Direction No. 2000/12. The Applicant argued that the arrangement violated the Law of Obligations and was an unenforceable contract because he and other consumers were coerced into paying for services, and that the failure of the courts to enforce his rights violated the Constitution and the European Convention on Human Rights. In part, RTK responded that the Applicant failed to request an exemption pursuant to the Law on RTK and that the arrangement was authorized by the Assembly in the public interest. In part, KEK responded that its actions were undertaken in compliance with the Law on RTK, adding that its obligation to collect fees would expire on 30 November 2009 and would not be renewed. In part, the Assembly advised the Court that it anticipated enactment of an amendment to the Law on RTK that would exempt indigent persons, and that it was partially financing RTK through other sources.

The Court noted that as of the date of its decision no fees were being charged to or collected directly from individuals or households for RTK services, which included the Applicant. Accordingly, the Court found that the Applicant was not the victim of a Constitutional violation committed by a public authority, which is a prerequisite to sustaining an interim measure, citing *Biriuk v. Lithuania* and *Dudgeon v. the United Kingdom*, and to maintaining a claim before the Court pursuant to Article 113.7. The Court held that the Applicant's claim was therefore moot, struck the Referral pursuant to Rules 32 and 37 of the Rules of Procedure, and declined to make any further order on interim measures or to continue its examination of the Referral.

Pristina, 30 May 2011
Ref. No.: VHL112/11

DECISION TO STRIKE OUT THE REFERRAL

in

Case No. KI 11/09

Applicant

Tomë Krasniqi

Constitutional review of Section 2.1 of the United Nations Mission in Kosovo (UNMIK) Administrative Direction No.2003/12 and Article 20.1 of the Law on Radio Television of Kosovo, Law No. 02/L-47

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Tomë Krasniqi of Pristina, Kosovo.

Subject Matter

2. The Applicant alleges that the imposition on him of a monthly fee of €3.5 collected by the Kosovo Energy Corporation (hereinafter KEK) for services from Radio Television of Kosovo (hereinafter RTK) is unconstitutional. He maintains that his circumstances, as a pensioner on a very limited income, makes the imposition of the fee an overly excessive burden on him and breaches his fundamental rights as guaranteed by the Constitution. The Applicant also maintains that imposing a fee on him through the terms of a contract between KEK and

consumers of electricity breaches his fundamental rights as guaranteed by the Constitution.

3. The Applicant maintains that the scheme devised under UNMIK Administrative Instruction in conjunction with a contract entered into between KEK and RTK violated his constitutional rights. This scheme and the form of the contract are dealt with in the Judgment below.

Legal Basis

4. Articles 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Articles 20 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Rules 32 (4) and 56 of the Rules of Procedure of the Constitutional Court (hereinafter referred to as: the Rules).

Proceedings before the Court

5. On the 16 of March 2009, the Applicant filed a Referral with the Constitutional Court concerning the constitutionality of the operation of Article 2.1 of UNMIK Administrative Instruction No. 2003/12, concerning the implementation of UNMIK Regulation No.2001/13 on the establishment of RTK.

6. The President appointed Judge Iliriana Islami as Judge Rapporteur and a Review Panel comprising of Judges Snezhana Botusharova, presiding, Enver Hasani and Ivan Čukalović.

7. Subsequently, on 2 September 2009, the Applicant requested interim measures prohibiting the implementation of the fee pending the final determination on the merits of the original Referral.

8. A hearing was held by the Court on 6 October 2009 at which the Applicant and representatives of RTK and KEK attended and participated.

9. Pursuant to Article 116(2) of the Constitution, Article 27 of the Law and Section 52 in conjunction with Section 59 of the Rules, which were in operation at that time, the Court issued a Decision dated 16 October 2009 granting an interim measure on further application of the provisions of Article 20.1 of the Law on RTK pending the decision on the merits of the Referral. The Court recommended to the Assembly of Kosovo that it reviews the nature of Article 20.1 of the Law on RTK and the practices based on its provisions.

10. On 14 June 2010, the Court renewed the said interim measure until 1 January 2011 and requested the Assembly of Kosovo to inform the Court in a timely manner on progress in relation to compliance with the Court's previous recommendation.

11. The Court deliberated further on the matter on 17 May 2011.

Facts

12. On 2 March 2006, the Applicant wrote to KEK requesting that his personal rights not be violated on the basis of his personal circumstances and the infringement of his integrity and personality as a pensioner to have to pay €3.5 per month for RTK.

13. Because the Division of Distribution, Sales Section of KEK did not reply to his written request the Applicant filed a complaint on 13 April 2006 with the Consumer Protection Department (hereinafter CDP) of the Energy Regulatory Office (hereinafter ERO) arising the inaction of the administration of KEK.

14. On 27 April 2006, the CPD of the ERO rejected his complaint. On 28 April 2006, not being satisfied with that decision, the Applicant filed a request to review the decision of the CPD with the Board of ERO.

15. On 27 May 2006, the Board of ERO rejected the complaint against the decision of CPD, indicating that the Applicant could pursue a legal remedy against this decision in the Municipal Court of Pristina.

16. On 07 June 2006, the Applicant initiated proceedings before the Municipal Court of Pristina seeking, among other things, to have the payment of € 3.5 "declared invalid".

17. On 22 January 2007, because more than six months had passed from the day the case was filed, the Applicant asked the Court "to convoke a court session for this matter".

18. On 12 June 2007, he requested "an urgent convocation of court session". The Applicant stated that "the Court continued to remain silent what practically and realistically impeded the realization of Applicant's right to an effective legal remedy". The Constitutional Court has not been made aware of any decision made by the Municipal Court in the matter.

Responses of Radio Television of Kosovo

19. On 07 September 2009, RTK replied to the referral stating, in general, that the payment, in accordance with article 20 of the Law of RTK, was an appropriate financial provision for RTK enacted by the Assembly of Kosovo.

20. RTK made the points that follow.

- The Assembly of Kosovo adopted the Law No.02/L-47 on Radio and Television of Kosovo which entered into force on January 20, 2006.

- According to this Law, the Assembly of Kosovo is the establishing authority of the public institution RTK.

- RTK offers a public service in the field of radio and television, with one television channel and two radio channels, through its services. its programmes are transmitted via satellite for the diaspora and for Kosovo minority communities in other countries.

- The Assembly of Kosovo is the only institution authorised to determine the amount due to be paid by citizens for RTK services. This was done through Article 20.1 of the Law. All natural and legal persons in the territory of Kosovo are obliged to pay for the public transmitting of RTK services.

- The Contract for Services No. 2532/08, date 1 December 2008, between KEK and RTK, was due to expire on December 1, 2009, and serves as the basis for the collection of € 3.5 by KEK on behalf of the RTK.

- RTK in its response considered that its operation as the public broadcaster is lawfully based. RTK regards the Law as the legal basis for its operation in Kosovo society.

21. At the public hearing on 6 October 2009, RTK made the additional points that follow.

- Since the Law on RTK entered into force the earlier UNMIK Administrative Instruction No. 2003/12 and UNMIK Regulation 2003/13 do not apply.

- The Applicant did not specify in his Referral what provisions of the Constitutions were alleged to have been violated or what was the concrete act of a public authority challenged by him.

- The Law on RTK defines the status of RTK as the body which offers public service in the field of radio and television and that it was the Assembly of Kosovo that established RTK and that the Assembly is responsible for guaranteeing the autonomy and the editorial and financial independence of RTK.

- That RTK was subject to monitoring by the Independent Media commission and that advertising by it was for regulated and limited amounts of time.

- That RTK was not a "state broadcaster" but that its mission was to provide public broadcasting to serve the needs and interests of the public and to be funded through the public.

- That following recommendations of the Council of Europe on public broadcasting that funding should be secure and transparent to ensure editorial independence and institutional autonomy.

- That paragraph 20.9 of the Law of RTK provided that *"Households included on the Ministry of Labour and Social Welfare Social Assistance Scheme roster, and any other categories of Kosovo residents so defined in law, shall be exempt from payment of the fee."* Therefore, that the Applicant did not make use of the remedies guaranteed to him by the Law on RTK.

- That the references in the Referral to the Law on Obligations are not relevant as the Law passed by the Assembly gives the basis for the contract between RTK and KEK.

- That the legal provisions authorisation of the collection of the monthly fee of €3.5 did not cause any risk or irreparable damage endangering the public interest, on the contrary, it provided for the long-term funding of public broadcasting in Kosovo.

Response of Kosovo Energy Corporation

22. The other interested party, KEK, did not respond in writing to the Constitutional Court's request but appeared at the public hearing on 6 October 2009 and it made the points that follow.

- The collection of fees by KEK on behalf of RTK was entered into by virtue of a contract between them, which was lawfully authorised, and that KEK complied with the contract because of its legal obligations to do so.

- The contract for the collection of the monthly fee was due to expire by 30 November 2009.

- In many regions which were not covered by the RTK signal KEK proceeded with the collection of the fee despite objections and non-payment of the electricity bills. That debts amounting to approximately € 400 million were outstanding.

- Some religious authorities, based on rules of religion, did not pay for electricity and that this was one of several objections that KEK faced in the field in regard to collection of electricity charges.

- KEK was not interested in acting as the collecting agent for RTK beyond the 30 November 2009, the date of the expiry of the contractual arrangement between them and RTK.

- No sums were received from the Kosovo budget for providing the service of collecting the monthly fee.

Events since the granting of Interim Measures

23. On 16 October 2009, the Court grated Interim Measures at the request of the Applicant on 16 October 2009 in the following terms:

I. *It is GRANTED an interim measure on further application of the provisions of Art. 20.1 of the Law on RTK, pending the decision on merits of the Referral KI11/09*

II. *It is RECOMENDED to the Assembly of the Republic of Kosovo that it reviews until December 2009 the nature of Art. 20.1 of the Law on RTK and practices based on those provisions.*

III. *Following December 1, 2009 and thereafter, the Court decides the merits of the Referral*

IV. *This decision is to be notified to the applicant, the opposing parties, the Assembly of the Republic of Kosovo, and shall be duly published.*

V. *This decision is in power from this moment on.*

24. On 30 November 2009, the contractual arrangement entered into between KEK and RTK for the collection of the monthly fee terminated and has not been renewed since.

25. Following the service of the Decision on Interim Measures, the Court considered the matter further on 14 June 2010 and issued an extension to the Interim Measure.

26. The Assembly of Kosovo was served with the Decision on Interim Measures immediately it was made. In response to the recommendation of the Court to review Art. 20.1 of the Law on RTK and the practices based on those provisions, the Assembly wrote to the Court by letter, dated 29 April 2009.

27. In its letter of 29 April 2009 to the Court the Assembly pointed out that certain steps had previously been taken by the Assembly dealing with the Law on RTK, prior to the Referral being made by the Applicant to the Court. The Assembly pointed out that, on 16 September 2008 the Committee on Public Administration, Local Government and Media recommended to the Assembly Presidency to approve the initiative on amendments to the Law on RTK. On 29 September 2009, the Assembly Presidency approved the recommendation of the Committee. On 27 January 2009 the Committee held a public hearing. Subsequently the Committee held a two–day workshop at which representatives of many interested institutions participated.

28. A working group held its first meeting on 8 September 2009 and involved experts assisting in drafting proposed amendments to the Law. Further amendments were considered by the working group held at a meeting on 7 April 2010. RTK addressed proposals for its future financing to the Committee on 20 April 2010.

29. It is for the Assembly of Kosovo to devise a scheme that is transparent, fair, sustainable, that contains effective and appropriate safeguards for the exemption of indigent persons and that ensures that the laudable aims of the provision of an adequately funded public broadcasting service.

30. Importantly, the Assembly of Kosovo, in a plenary session held on 28 January 2010 approved a Decision No. 03’237 for the provisional financing of RTK for the period from 1 January 2010 to 30 June 2010.

31. Since then the Annual Report of RTK for 2010 states that in the year 2010 €10,464,000 of its total revenue of €12,305,162 were derived from the Kosovo State Budget. The greater part of the rest of its income

derived from advertising. This compares to a figure of €7,080,276 received from public subscriptions out of total revenues of €9,785,042 in 2009. In 2009 no revenue was received from the Kosovo State Budget.

32. The Court notes that, at present, no fees are charged or collected directly from individual or households for the provision of the services of RTK.

Allegations of the Applicant

33. The Applicant alleges that Administrative Direction No. 2000/12 infringes the Constitution of the Republic of Kosovo by the setting up, from 1 March 2003, of a contractual arrangement whereby the RTK monthly fee of € 3.5 was imposed and collected through monthly electricity invoices.

34. Administrative Direction No. 2003/12 was promulgated by the Special Representative of the General Secretary of the United Nations on the 03 June 2003. Articles 2.1 and 4.1 of the Direction provide as follows:

Section 2
Collection and Remittance of the Fee

2.1 Every household, business or other establishment in Kosovo shall be legally obliged to pay the fee. For purposes of the present Administrative Direction, a household shall be considered a cohabitating family group that manages its economic affairs as a single entity. Evidence of such management shall include a single bill for electricity or telephone services.

Section 4
Establishing the Level of the Fee

4.1 The level of the fee shall be set initially at three and one-half (3.5) euro (€) per month, and shall be effective as of the effective date of the present Administrative Direction. The fee shall remain in effect until and unless a new level is established by the Assembly, pursuant to section 4.2 below. The fee shall be exempt of all taxes and charges.

35. The Applicant maintains that the KEK arrangement, by which the consumer becomes bound to make payments against their will and without their permission and without having signed a contract to do so, constitutes a violation of the jus cogens in relation to articles 26 and 28 of the Law of Obligations.

36. According to the Applicant, based on Articles 103 and 51 of the Law of Obligations, contractual obligations may be enforced only if they are lawfully imposed. He maintains that the contract is completely non-

enforceable on the basis that a consumer becomes a contractually obligated party without his consent, by becoming an "unauthorised" contracting party

37. The Applicant considers that the consumer is an "unauthorised" party to the collection arrangement and is deceived. KEK, without the consumer's consent, authority, agreement or signature, has taken measures without taking into consideration proper lawful authority. He says that the implementation of the contract in favour of RTK was done by force and that, according to the Applicant, KEK acts related to the contract are not valid for the purposes of enforcing it. The contract can only be made valid for the benefit of RTK by the free will of the two contracting parties.

38. The Applicant maintains that, the making of a decision to enforce Article 2.1 of Administrative Direction No. 2003/12 regarding the prepayment of the monthly fee of € 3.5 imposed on every consumer who has a contract with KEK is not in compliance with the Constitution of Kosovo.

39. The Applicant maintains that the failure to vindicate his rights through judicial means amounts to a violation of his personal rights, particularly those rights contemplated by Articles 6, 13, 22 and 32 of the Constitution of the Republic of Kosovo all these rights being guaranteed by the European Convention on Human Rights (hereinafter referred to as ECHR).

Victim Status

40. Before an individual Applicant can be successful in a claim to the Constitutional Court based on Article 113.7 of the Constitution it is necessary that he or she is able to establish that they hold the status of a victim of a violation of a public authority. This concept was expressed by this Court in the following terms when it issued the decision to grant interim measures on 16 October 2009, *"In line with this, the case law of the European Court of Human Rights says that the party may ask for such a measure and be granted as such if "... the party bring prima facie evidence of such a practice and of his being a victim of it" (Cf. Biriuk v. Lithuania, No. 23373/0325, §27, 25 February 2009, mutatis mutandis, Cf. Dudgeon v. the United Kingdom, 22 October 1981, §§ 40-41, Series A No. 45)."*

41. Whatever status was held by the Applicant at the time of the making of the Referral or at the time of the granting of the interim measures events have moved on since then which indicate that the Applicant's position has changed significantly. The current position is that neither the Applicant nor any household in the Republic of Kosovo is charged with

the monthly license fee for the provision of RTK services. In light of this the Court must consider whether there is merit in pursuing the matter further and whether the Applicant has the status or standing to justify his status as a victim any further.

42. The Court has the power and the duty to address this question particularly in view of the Court's own Rules of Procedure.

43. Rule 32 (4) of the Rules of Procedure of the Constitutional Court states that the Court may dismiss a Referral when it determines that a claim is moot or when it does not otherwise present a case or a controversy. The Rule, to the extent relevant, provides as follows:

Rule 32

Withdrawal of Referrals and Replies

...(4) The Court may dismiss a referral when the Court determines a claim to be moot or does not otherwise present a case or controversy.

(5) The Secretariat shall inform all parties in writing of any withdrawal, of any decision by the Court to decide the referral despite the withdrawal, and of any decision to dismiss the referral before final decision.

44. The Constitutional Court of Kosovo is not alone in having such a Rule. The Rule reflects universal practice in legal jurisdictions around the world. Indeed the European Convention on Human Rights provides, to the extent relevant, the following:

Article 37. Striking out applications

1 The Court may <u>at any stage of the proceedings</u> decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

a. the applicant does not intend to pursue his application; or
b. the matter has been resolved; or
c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2 The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

45. Courts should not, as a general rule, make decisions on cases where the issue is no longer a live one. This is a generally accepted principle of behaviour of courts and it analogous to the principle of judicial restraint. The Assembly, following the recommendation of the Court in the original Decision on Interim Measures wrote to the Court informing of the steps being taken by the Assembly to address the question of the funding of the public broadcasting service in Kosovo.

46. The concept of mootness is well recognised legal concept. It can arise where a case in an abstract or hypothetical issue, presents itself for decision by a Court. There are good grounds for a Court not dealing with hypothetical situations. Without a real, immediate or concrete issue to be decided upon the Court might stray into making decisions that will bind itself and the public without there being good cause to do so. Any decision that the Court would now make in relation to this Referral will have no practical effect, particularly in view of the events that have transpired since the granting of the Interim Measures on 16 October 2009. Furthermore, the scarce resources of the Court should be utilised to deal with issues and Referrals that are pending and that affect the parties directly and not those where the issue is now hypothetical or academic.

47. The last effective date for the operation of the KEK – RTK contract for collecting the monthly fee was the 30 November 2009. After that point in time there was no mechanism in place that obliged KEK to collect that fee and the reality is that today electricity bills in Kosovo are issued without the fee. At the time of the granting of the interim measures there was not a sufficient degree of certainty surrounding the issue and it was felt that it was necessary to protect the interests of the Applicant by the granting of the interim measures in the manner described above. There is therefore now no further necessity to grant furthe, interim or permanent measures.

48. Taking into account the events that have occurred and all the other matters referred to above, the Court concludes that the Applicant now has no case or controversy pending in relation to the collection of the RTK monthly fee. He no longer has the status of a victim in relation to the scheme for the collection of the monthly fee. The issue is effectively moot. On that basis it is not appropriate to make any further order on interim measures or to continue to examine the Referral.

FOR THESE REASONS:

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law, and Rule 32(4) of the Rules of Procedure, unanimously

DECIDES

I. TO STRIKE OUT the Referral pursuant to Rule 32.4 of the Rules of Procedure of the Constitutional Court of Kosovo.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Iliriana Islami	Prof. Dr. Enver Hasani

Shkurte Krasniqi vs. Judgment A. no. 771/2010 of the Supreme Court

Case KI 124-2010, decision of 13 June 2011

Keywords: administrative dispute, disability pension, exhaustion of legal remedies, health and social protection, individual referral, manifestly ill-founded referral, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that her constitutional rights under Article 51.2 were infringed by a judgment of the Supreme Court, which affirmed the Department of Pension Administration rejection of her request for an extension of her disability pension. The Applicant argued that a medical finding made by the University Clinical Center of Kosovo (UCCK) after the Supreme Court decision supported her request for extension.

The Court held that the Referral was inadmissible because its role is limited to resolving allegations of Constitutional violations, and that it cannot otherwise overturn legal and factual findings of the Supreme Court, citing *Avdyli* and *Garcia Ruiz v. Spain*. The Court also held that the Applicant had not submitted *prima facie* evidence of a Constitutional violation, noting that its examination of the record did not find that the Supreme Court had been unfair or arbitrary, citing *Edwards v. United Kingdom* and *Shub v. Lithuania*. The Court also found that the Applicant had not demonstrated that a new request based on the recent UCCK report would not be successful, which would relieve her of the exhaustion of all legal remedies prerequisite to a Referral submission.

Pristina, 13 June 2011
Ref. No.: RK120/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 124/10

Applicant

Shkurte Krasniqi

Constitutional Review of the Judgment of the Supreme Court of Kosovo, A.no. 771/2010, dated 27 October 2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mrs. Shkurte Krasniqi, residing in Pristina.

Challenged court decision

2. The decision challenged by the Applicant is the Judgment of the Supreme Court of the Republic of Kosovo (hereinafter: the "Supreme Court"), A.no.771/2010, of 27 October 2010, which was served upon the Applicant on 1 November 2010.

Subject matter

3. The Applicant claims that she was deprived of the right to obtain an extension of her invalidity pension, although she fulfills the necessary requirements.

4. In this respect, the Applicant alleges a violation of Article 51.2 [Health Care and Social Protection] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

5. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 16 December 2009, (No. 03/L-121), (hereinafter: "the Law") and Rule 56 (2) of the Rules of

Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

6. On 10 December 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

7. On 14 December 2010, the President, by Order No.GJR. 124/10, appointed Judge Almiro Rodrigues as Judge Rapporteur. On the same date, the President, by Order No.KSH. 124/10, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalović.

8. On 27 January 2011, the Referral was forwarded to the Supreme Court.

9. On 2 March 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

10. In 1982, the Applicant was employed as a full time nurse at the University Clinical Center of Kosovo (hereinafter: UCCK). Meanwhile, the Applicant got TBC in a kidney and received surgical interventions in 1983, 1985 and 1989.

11. On 22 March 1990, the then Pension and Invalidity Insurance of Kosovo recognized the Applicant's right to part time employment due to her health condition (Decision no.7021296025).

12. On 5 July 2007, the Human Resources Department of UCCK, at the Applicant's request of 5 March 2007, gave its consent to terminate the employment relationship with her, starting from 1 March 2007, after she had suffered a heart attack at work on 18 August 2004 (Decision No.175).

13. On 20 September 2007, the Department of Pension Administration of Kosovo of the Ministry of Labour and Social Welfare approved the Applicant's request for a disability pension, starting from 5 January 2007 (Decision no.5087134).

14. On 6 May 2008, the Applicant underwent heart surgery.

15. On 19 April 2010, the Medical Review Commission assessed that

permanent limited ability did not exist in the Applicant's case. Based on this conclusion, on 26 April 2010, the Department of Pension Administration of Kosovo of the Ministry of Labour and Social Welfare concluded that the Applicant did not meet the criteria under Article 3 of Law no. 2003/23 on Pension of Disabled Persons in Kosovo. Therefore, the Applicant's request for a disability pension was rejected (Decision no. 5087134).

16. On 21 May 2010, the Applicant filed a complaint against the decision of the Department of Pension Administration of Kosovo of the Ministry of Labour and Social Welfare to the Appeals Commission before the Department of Pension Administration of Kosovo.

17. On 23 June 2010, the Appeals Commission of the Department of Pension Administration of the Ministry of Labour and Social Welfare rejected the appeal of the Applicant and found her claim ungrounded (Decision no. 5087134).

18. On 19 August 2010, the Applicant filed a complaint to the Supreme Court.

19. On 27 October 2010, the Supreme Court rejected the Applicant's claim as ungrounded, reasoning that the Applicant's submissions did not lead to another conclusion or verdict than the one of the lower instance bodies (Judgment A.no.771/2010).

20. On 25 November 2010, after the final Judgment of the Supreme Court was given, the UCCK issued a medical report, stating that, based on objective criteria and a clinical examination, the Applicant was unable to work.

Applicant's allegations

21. The Applicant claims that, on 19 April 2007, the Medical Review Commission made an unfair assessment of her health condition, because the submitted documents clearly show that, due to her health condition, certified by medical reports, she is unable to work.

22. The Applicant further claims that Article 51 [Health and Social Protection] of the Constitution has been violated, because, according to the numerous medical reports she fulfills the conditions for receiving a disability pension according to Article 3 of Law No.2003/23 on Disability Pension.

23. Furthermore, the Applicant deems that her right to medical and social assistance, provided by Article 13 [The right to social and medical assistance] of the European Social Charter in conjunction with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution has been violated**.**

Assessment of the admissibility of the Referral

24. As to the Applicant's allegation that her right guaranteed by Article 51.2 [Health Care and Social Protection] of the Constitution has been violated, the Court observes that, in order to be able to adjudicate the Applicants' complaint, it is necessary to first examine whether she has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

25. The Applicant can complain only if the regular courts have committed errors of fact or law, unless and in so far as they may have infringed rights and freedoms protected by the Constitution.

26. In this connection, the Constitutional Court is not a court of fourth instance, when considering the decisions taken by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, Resolution on Inadmissibility in Case No. KI 13/09, Sevdail Avdyli, of 17 June 2010 and, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

27. The Constitutional Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, for instance, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87 adopted on 10 July 1991).

28. In this respect, it is noted that the Applicant not only has not build a case on a violation but also has not submitted any relevant evidence showing that the Judgment of the Supreme Court was unfair or tainted by arbitrariness, when it rejected the Applicant's claim as ungrounded (see mutatis mutandis, Shub v. Lituania, ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

29. Furthermore, it appears from the Applicant's submissions, that, on 25 November 2010, the UCCK issued a new medical report, stating that, based on the latest clinical examination the Applicant was unable to

work. This new medical evidence should, therefore, be considered as new fact, giving rise to a new case.

30. As pointed out in the Judgment of the Supreme Court, the Medical Commission is legally authorized to ascertain the ability or disability of a Plaintiff. The Medical Commission is, therefore, in the Court's opinion, the authorized body to decide upon the Applicant's request for the recognition of her physical disability based on the new medical report of 25 November 2010.

31. It appears, that, she has not submitted a request to the Medical Commission to review this new medical report of 25 November 2010 and that she has not substantiated how and why such new application would not be effective and, therefore, it would not need to be exhausted.

32. In all, it follows that the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Rule 56 (2) of the Rules of Procedure, on 2 March 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Iliaz Shuleta vs. Judgment CI. No. 307/2006 of the Municipal Court in Prishtina

Case KI 30-2011, decision of 17 June 2011

Keywords: disability pension, exhaustion of legal remedies, individual referral, invalidity pension, occurrence predates enactment of Constitution, pensions, protection of property, reemployment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution challenging the Prishtina Municipal Court's rejection in 2007 of his lawsuit seeking reinstatement to his job with the Kosovo Energy Corporation notwithstanding the previous approval of his application for an early invalidity pension on the ground that he had since recovered from his disability and was fit to work. The Court noted that the Applicant did not specify the constitutional right(s) that had allegedly been violated as required by Article 48 of the Law on the Constitutional Court.
The Court held that the Referral was inadmissible *ratione temporis* pursuant to Rule 36.3(h) of the Rules of Procedure because the events at issue occurred before the Constitution was implemented, citing *Blečić vs. Croatia* and *Jasiúnienè vs. Lithuania*. The Court also held that the Referral was inadmissible pursuant to Article 113.7 because of the Applicant's failure to exhaust all legal remedies since there was no evidence that the Applicant had appealed the Municipal Court's decision to a higher court.

Prishtina, 17 June 2011
No. ref.:RK122/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 30/11

Applicant

Iliaz Shuleta

Constitutional review of Judgment CI. No. 307/2006, dated 12 February 2007, of the Municipal Court in Prishtina

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge
lIiriana Islami, Judge

Applicant

1. The applicant is Mr. Iljaz Shuleta, from Prishtina, residing at 18/a Mbreti Bardhyl [King Bardhyl] Street, Prishtina, duly represented by Mr. Maliq Lushaku.

Challenged decision

2. The challenged decision is Judgment CI. No. 307/2006, dated 12 February 2007, of the Municipal Court in Prishtina.

Subject matter

3. The subject matter of the case that was submitted with the Constitutional Court of the Republic of Kosovo on 1 March 2011 is the constitutional review of Judgment CI. No. 307/2006, dated 12 February 2007, of the Municipal Court in Prishtina, rejecting plaintiff's, Mr. Iljaz Shuleta's, lawsuit for his reinstatement to his post with the Kosovo Energy Corporation, from where he had gone to early invalidity pension at his personal request.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as the "Constitution"), Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter referred to as the "Law"), and Rule 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the "Rules of Procedure").

Proceedings before the Court

5. On 1 March 2011, Mrt. Iljaz Shuleta submitted a Referral with the Constitutional Court challenging Judgment CI. No. 307/2006, dated 12 February 2007, of the Municipal Court in Prishtina, rejecting his lawsuit for his reinstatement to his post with the Kosovo Energy Corporation, from where he had gone to early invalidity pension at his personal request.

6. On 2 March 2011, the President appointed Judge Kadri Kryeziu as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Enver Hasani and Gjyljeta Mushkolaj, members.

7. The Constitutional Court has not received any comment from parties involved in the issue concerning the Referral.

8. On 19 May 2011, following the report of the Judge Rapporteur, Kadri Kryeziu, the Review Panel, composed of Judges Robert Carolan (Presiding), Enver Hasani and Gjyljeta Mushkolaj, members, recommended to the full Court on the inadmissibility of the Referral.

Summary of the facts

9. Even though the Applicant has not attached necessary documents to the Referral, from the copy of Judgment CI. No. 307/2006, dated 12 February 2007, of the Municipal Court in Prishtina, it can be concluded that Mr. Shuleta was in continuous employment relationship with KEK for over 20 years.

10. On 23 September 2003, always according to data obtained from the said judgment, he submitted a written request to his employer for invalidity pension because of his worsened health condition.

11. On 23 October 2003, KEK approved Mr. Shuleta's request through Decision No. 171/132, and recognized his right to temporary invalidity pension according to "B" category starting from 1 January 2003 through 1 December 2008.
12. On 21 April 2006, Mr. Shuleta addressed KEK through a request for his reinstatement to his former post justifying his request with the fact that he has already recovered and rehabilitated and that he is fit to work.

13. Since his request was not approved, the Applicant filed a claim with the Municipal Court in Prishtina, where the case was registered under number CI. No. 307/06.

14. Meanwhile, the Applicant, Mr. Shuleta, informed KTA and KEK through notification letters on the initiation of this procedure.

15. On 12 February 2007, the Municipal Court in Prishtina issued Judgment CI. No. 307/2006 rejecting Mr. Iljaz Shuleta's claim as ungrounded.

16. Mr. Shuleta had written in the official application form of the Referral filed with the Constitutional Court the he had received the judgment of the Municipal Court on 10 April 2007.

17. From the documents submitted by the Applicant, it appears that this judgment has not been appealed and that there is no other judgment of a higher court instance.

18. Finally, unsatisfied with the said Judgment of the Municipal Court, Mr. Iljaz Shuleta through his legal representative [the sentence is not complete in the original]

Applicant's allegations

19. The Applicant has not clarified what constitutionally guaranteed right he claims to have been violated by the decision he is challenging before the Court, even though he is obliged by Article 48 of the Law on the Constitutional Court to clarify it.

20. He claimed that Judgment CI. No. 307/2006, dated 12 February 2007, of the Municipal Court in Prishtina, rejecting his claim submitted with the Court for his reinstatement to his post with KEK, was illegal.

Assessment of the admissibility of the Referral

21. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution.

22. In this relation, the Court refers to Article 113.7 of the Constitution, which states that:

    "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."
    The Court also takes into account:

    Article 46 of the Law on the Constitutional Court of the Republic of Kosovo, which refers to individual Referrals, stipulating that:

"The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met."

23. By analyzing the documents of the case submitted by the Applicant, it appears that the last Judgment of the Municipal Court in Prishtina was issued on 12 February 2007 and according to his personal allegations, he received that Judgment on 10 April 2007.

24. Always considering time limits, the Court notices that the Applicant has requested the constitutional review of the act of the public authority (Judgment of the Municipal Court in Prishtina, of 12 February 2007, received by the party on 10 April 2007) which relates to a period prior to the entry into force of the Constitution of the Republic of Kosovo (15 June 2008), so, the Constitutional Court cannot assess the constitutionality of the juridical acts which have allegedly violated any constitutionally guaranteed right, since those rights have neither been determined nor guaranteed by the Constitution since the Constitution itself did not exist, therefore, I conclude that the referral is inadmissible ratione temporis in relation to the Constitution (see Blečić vs. Croatia, Application No. 59532/00, ECHR Judgment of 29 July 2004), whereby the ECHR had declared that Application as inadmissible because the provisions of the European Convention on Human Rights do not oblige the contracting parties on any act that has been issued or a juridical situation that has seized existing prior to the entry into force of the Convention.

25. The European Court used such reasoning when it declared Jasiúnienè v. Lithuania as inadmissible (see mutatis mutandis Jasiúnienè v. Lithuania, Application No. 41510/98, ECHR Judgments of 6 March and 6 June 2003).

26. Even if the Referral related to an issue dating after the entry into force of the Constitution, it would nonetheless not fulfill admissibility requirements set forth by Article 113.7 of the Constitution since its Applicant had not exhausted all legal remedies available to him before addressing the Constitutional Court because he had provided only Judgment CI. No. 307/2006, dated 12 February 2007, of the Municipal Court in Prishtina, as material evidence and he had not provided evidence on the use of other legal remedies of appeal.

27. Under these circumstances, the Applicant has not fulfilled admissibility requirements, and:

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution of the Republic of Kosovo, article 49 of the Law on the Constitutional Court, and Rule 36.3(h) of the Rules of Procedure, in the session held on 15 May 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible because the Referral is incompatible ratione temporis with the Constitution.

II. This Decision shall be notified to the parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Mr.sc.Kadri Kryeziu	Prof. Dr. Enver Hasani

Arben Komani vs. Decision of the Directorate of Education of the Municipal Assembly of Gjakova No. 4

Case KI 128-2010, decision of 20 June 2011

Keywords: administrative dispute, discipline and conduct of teachers, exhaustion of legal remedies, individual referral

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his minor son's rights under Articles 3 and 22 of the Constitution, Article 3 of the Convention on the Rights of the Child, and Articles 2 and 7 of the Universal Declaration of Human Rights were infringed by the slow pace of the Supreme Court's review of a decision of the Gjakova Municipal Assembly's Directorate of Education, which related to the discipline of a teacher for mistreatment of his son.

In view of the pendency of the Supreme Court matter, the Court held that the Referral was premature and inadmissible pursuant to Article 113.7 and Article 47.2 of the Law on the Constitutional Court because the Applicant had not exhausted all legal remedies. The Court noted that the standard for assessing the reasonableness of the length of proceedings depends upon the complexity of the case, the conduct of the applicant and the relevant authorities, and the applicant's stake in the situation, citing *Frydlender v. France*. It emphasized, however, that the rationale for the exhaustion rule is to afford an opportunity for preventing or resolving a Constitutional violation by reliance on the Kosovo legal system, citing *AAB-RIINVEST University L.L.C. vs. the Government of Kosovo* and *Selmouni v. France*.

Pristina, 20 June 2011
Ref. No.: RK118/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 128/10

Applicant

Arben Komani

Constitutional Review of the Decision of the Directorate of Education of the Municipal Assembly of Gjakova No. 4, dated 29 January 2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Arben Komani, father of the minor David Komani, from Gjakova.

Challenged decision

2. The Applicant challenges the Decision of the Directorate of Education of the Municipal Assembly of Gjakova No. 4, of 29 January 2010, which was served on the Applicant on 6 February 2010.

Subject matter

3. The Applicant claims that the Supreme Court and Administrative bodies, by remaining silent and not treating his case as a matter of priority, is in violation of:
    a. Article 3 of the Convention on the Rights of the Child in conjunction with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution");
    b. Article 31 [Right to Fair and Impartial Trial] of the Constitution;
    c. Articles 2 and 7 of the Universal Declaration of Human Rights in conjunction with Article 22 of the Constitution.

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: “the Law”) and Rule 56 (2) of the Rules of

Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 16 December 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 27 January 2011, the Court communicated the Referral to the Supreme Court and the Directorate of Education of the Municipal Assembly of Gjakova.

7. On 14 February 2011, the President, by Order No. GJR. 128/10, appointed Judge Ivan Čukalovič as Judge Rapporteur. On the same date, the President, by Order No. KSH. 128/10, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Gjyljeta Mushkolaj.

8. On 18 May 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

9. On 26 December 2009, the Applicant filed a complaint with the Head Inspector of Education of the Ministry of Education, Science and Technology (hereinafter: "MEST") against his son's teacher, complaining that the teacher had inflicted stress upon his son in school.

10. On 12 January 2010, the Department of Inspection of MEST in Gjakova performed an inspection at the school.

11. On 13 January 2010, the Applicant requested the Head Inspector of Education of MEST that his complaint of 26 December 2009 be dealt urgently, since the teacher of his son had caused his son to suffer from anxiety and feelings of uneasiness.

12. On 19 January 2010, the Cabinet of the Permanent Secretary of MEST issued a recommendation to establish a commission to review the complaint and take appropriate measures against the teacher as well as to report back to the Section of Inspectors in Gjakova for the actions that had been taken.

13. On 29 January 2010, the Disciplinary Commission established by the Directorate of Education in Gjakova issued its decision (No. 04). The Applicant was instructed to bring his complaint before the board of the school, where the teacher was employed, and the Director of the school was requested to look into the complaint made by the Applicant and to take a decision on the merits of the complaint. The Applicant was told, that, if he was not satisfied with the outcome, that he could bring a case before the Head Inspector of Education of MEST. Moreover, the decision could be contested before the Appeal's Commission.

14. On 8 February 2010, the Applicant complained to the Municipal Department of Education against the decision of the Disciplinary Commission of 29 January 2010.

15. On 27 March 2010, the Disciplinary Commission found that the teacher had acted unprofessionally and imposed on her the disciplinary measure of a written reprimand. The Applicant was entitled to complain about the decision to the Municipal Department of Education, which he, apparently. never did.
16. On 8 April 2010, the Applicant filed a complaint with the Supreme Court complaining about administrative silence and violation of legal provisions.

17. On 16 September 2010, the Applicant filed a request with the Supreme Court to urgently decide his case.

Applicant's allegations

18. The Applicant alleges a breach of Article 3 of the Convention on the Rights of the Child in conjunction with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, Article 31 [Right to Fair and Impartial Trial] of the Constitution and Articles 2 and 7 of the Universal Declaration of Human Rights in conjunction with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution by being silent and for the non-qualification of the matter as a priority.

19. According to the Applicant, in all proceedings before the administrative organs, he had met with administrative silence, legal provisions had been violated, and unjustified delegation of competencies had taken place in order to postpone the case and escape the responsibilities concerned, while the competent authorities refused to take punitive measures against the violators of the law and caused an unreasonable postponement of the proceedings in general, by not taking a final decision and disregarding our interests as parents, and as well as

attempting to hinder the process, to the detriment of his son, by not replying to the complaints.

Assessment of the admissibility of the Referral

20. The Applicant alleges a breach of Article 3 of the Convention on the Rights of the Child in conjunction with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, Article 31 [Right to Fair and Impartial Trial] of the Constitution and Articles 2 and 7 of the Universal Declaration of Human Rights in conjunction with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution by being silent and for the non-qualification of the matter as a priority.

21. As to the Applicant's allegation that the Supreme Court and the Administrative bodies had been slow in dealing with his case, the Court refers to the relevant case-law of the European Court for Human Rights, providing that "the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute" (see, among many other authorities, Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII).

22. However, in order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure, in particular, whether he has exhausted all legal remedies available under the applicable law.

23. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, judgment of 28 July 1999).

24. In the present case, the Court notes that the Applicant's claim, which he is presently making before this Court concerning the excessive length of proceedings, has not been decided yet in final instance by the Supreme Court.

25. It follows, that the Referral is inadmissible pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.2 of the Law, and Rule 56 (2) of the Rules of Procedure, on 20 June 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Gjokë Dedaj vs. Judgment SCC-04-0104 of the Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters

Case KI 115-2010, decision of 21 June 2011

Keywords: deadline issue, individual referral, property ownership dispute

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional rights were infringed by proceedings in the Special Chamber of the Supreme Court because the Chamber allegedly failed to give him an opportunity for a hearing, failed to recognize his purchase of the disputed commercial property in dispute, issued a deficient judgment and failed to give him a right to appeal.

Noting the chronology, the Court held that the Referral was inadmissible pursuant to Articles 49 and 56 of the Law on the Constitutional Court ("Law") because it was not submitted within four months of implementation of the Law. Regardless of the application of Article 50 of the Law, which extended the deadline to one year for special situations in which the Applicant was unable to submit a Referral, the Court held that the Referral was not submitted before the extended deadline, rendering it inadmissible for that reason.

Pristina, 21 June 2011
Ref. No.: RK123 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 115/10

Applicant

Gjokë Dedaj

Constitutional Review of the Judgment of the Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters, SCC-04-0104, dated 23 October 2007

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Gjokë Dedaj residing in Peja and represented by Mr. Zef Prenaj, a practicing lawyer in Pristina.

Challenged court decision

2. The Applicant challenges the Judgment of the Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters (hereinafter: the "Special Chamber"), SCC-04-0104, of 23 October 2007, which was served on the Applicant on 14 July 2008.

Subject Matter

3. The Applicant requests an assessment of the constitutionality of the Judgment of the Special Chamber, allegedly, to having "committed serious violations of contested procedure, by not inviting parties to the proceeding, by rendering a deficient judgment [...]" and "not given a right to appeal".

4. The Applicant, assuming that the Referral is out of time pursuant to Article 49 and 56 of the Law on the Constitutional Court, further requested the Referral to be returned to the previous situation pursuant to Article 50 of the Law on the Constitutional Court.

Legal Basis

5. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121) (hereinafter: the "Law") and Rule 56 (2) of the Rules of

Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 18 November 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

7. On 22 November 2010, the President, by Order No.GJR. 115/10, appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur. On the same date, the President, by Order No.KSH. 115/10, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Almiro Rodrigues.

8. On 21 January 2011, the Referral was forwarded to the Special Chamber.

9. On 28 January 2011, the Court requested the Applicant to submit a power of attorney, which he did on 3 February 2011.

10. On 23 May 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

11. On 12 August 1993, based on a Public auction opened by the Socially Owned Enterprise "Plant Protection Station" (hereinafter: the "SOE") in Peja, the Applicant bought a commercial premise at the "Rexhep ALibajrami" Street n.n., for the total amount of 40.500 Deutsche Mark (hereinafter: "DM").

12. On 6 July 1994, the Department for Legal and Property Affairs of the Ministry of Finance of the Republic of Serbia rendered a Decision (011 no: 464-08-03056/94) on the request of the SOE to obtain the Department's consent for the transfer of the commercial premise to the buyer (Applicant), pursuant to Article 3.1 of the Law on special conditions of transfer of immoveable property (Official Journal of SR Serbia, No. 30/89 and 42/89) and Article 202 of the Law on General Administrative Procedure. The request was rejected, because if granted it would have an impact on the national population structure or resettlement of members of a certain nationality or ethnicity, and such a transfer would cause unrest, or insecurity or inequality between members of different nations or nationalities pursuant to Article 3 of the Law on special conditions of transfer of immoveable property.

13. On 29 July 2001, the Applicant submitted a request to the Kosovo Trust Agency (hereinafter: the "KTA") to acknowledge the ownership right over the commercial premise.

14. On 13 August 2003, the Applicant initiated the procedure before the Municipal Court of Peja for the certification of the commercial premise.

15. On 31 March 2004, the Municipal Court of Peja transferred the case to the Special Chamber, as competent court under UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency (hereinafter: "UNMIK Regulation 2002/12") and UNMIK Regulation 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (hereinafter: "UNMIK Regulation 2002/13"), for further adjudication (C. No. 359/03).

16. On 12 July 2004, the Applicant filed a claim with the Special Chamber seeking confirmation of ownership of the commercial premise and registration of it. The KTA was also notified of the initiation of the procedure.

17. On 23 October 2007, the Special Chamber: 1) rejected the claim as ungrounded, 2) declared the sale purchase contract null and void, 3) ordered the Applicant to hand the commercial premise to the SOE, 4) and instructed the SOE to reimburse the Applicant (SCC-04-0104).

18. The Special Chamber reasoned that the transfer of the commercial premise was made following appropriate tender procedures of which the Applicant was the winner and that it had been done in conformity with the provisions of the Law on special conditions of transfer of immoveable property. The Special Chamber further stated that, the Applicant had submitted evidence that he paid, at least, 30.000 Deutsche Mark (hereinafter: "DM") out of 40.500 DM in August 1993. So, the commercial premise should have been transferred to the Applicant. However, this did not happen, because the Department for Legal and Property Affairs of the Ministry of Finance of the Republic of Serbia decided, that such sale was in contradiction with the provisions of the Law on Limitations of Real Estate Transactions, which is no longer applicable, because it is discriminatory legislation, pursuant to UNMIK Regulation 1999/24 on the Law Applicable in Kosovo (hereinafter: UNMIK Regulation 1999/24). Consequently, the commercial premise was sold by the SOE to a third person and a compromise agreement was entered with the Applicant to substitute the ownership of the commercial premise with the ownership of an alternative commercial premise. This was confirmed by the Director of the SOE; however, no original or certified copy of such agreement had been submitted. The Special

Chamber ruled therefore that the transfer had not been done in accordance with the Law on the Transfer Property.

Applicants' allegations

19. The Applicant alleges that the Special Chamber has committed serious violations of the Law on Contested Procedure, "by not inviting the parties to the proceedings, by rendering a deficient judgment and by not recognizing the purchase of" the commercial "premise". However, the Special Chamber did confirm the amount paid for the commercial premise instead of recognizing the ownership to the commercial premise.

20. Furthermore, the Applicant complains that he was not given a right to appeal.

Assessment of the admissibility of the Referral

21. The Applicant requests the Court to assess the constitutionality of the judgment of the Special Chamber of 23 October 2007, whereby it had committed serious violations of the Law on Contested Procedure, by not inviting the parties to the proceedings, by rendering a deficient judgment and by not recognizing the purchase of the commercial premise.

22. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, as further specified in the Law and the Rules of Procedure.

23. As one of the requirements, the Applicant must establish that he has submitted the Referral within a period of 4 months after the final court decision taken in his case, as stipulated by Article 49 of the Law. However, it appears from the Applicant's submissions that the final court decision regarding his case, was the judgment of the Special Chamber of 23 October 2007, served upon him on 14 July 2008, whereas he submitted his Referral to the Constitutional Court only on 18 November 2010, that is more than 4 months after the entry into force of the Law (see Article 56 of the Law). It follows that the Referral is out of time pursuant to Article 49 of the Law, as it should have been filed with the Court on 15 May 2009.

24. Moreover, pursuant to Article 50 of the Law, providing that:

"If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such

a request, is obliged to return it to previous situation. The claimant should submit the request for returning to previous situation within 15 days from the removal of obstacle and should justify such a request. The return to the previous situation is not permitted if one year or more have passed from the day the deadline set in this Law has expired."

the Court notes that the final decision was served upon the Applicant on 14 July 2008 and pursuant to Article 50 of the Law, the Referral should have been filed by the Applicant on 14 July 2009, i.e. one year after the final decision had been served upon the Applicant. Since the Referral was filed on 18 November 2010, the Referral is out of time.

25. In these circumstances, the Referral has to be rejected as out of time pursuant to Article 49 in conjunction with Article 56 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Articles 49 and 56 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, on 21 June 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

Democratic Party of Kosovo Ashkalia vs. Judgment of the Supreme Court of Kosovo A.A. No. 66/2011

Case KI 33-2011, decision of 7 August 2011

Keywords: elections, individual referral, manifestly ill-founded referral, minority representation, Parliamentary seat dispute

The Applicant, the Democratic Party of the Kosovo Ashkalia (DPKA), filed a Referral pursuant to Article 113.7 of the Constitution challenged the Supreme Court's decision to affirm a Election Complaint and Appeals Panel's determination allowing the Ashkalia Party for Integration (API) to obtain an additional parliamentary seat that arguably belonged to DPKA, contending that it violated Article 64.2 of the Constitution of the Republic of Kosovo and Article 111 of the Law on General Elections in Kosovo.

The Court held that the Referral was inadmissible as manifestly ill-founded pursuant to Rule 36.2(b) because the Applicant had failed to prove that the Supreme Court had violated any rights or freedoms guaranteed by the Constitution. The Court determined that DPKA and API represent the same minority community of Ashkalia, which received two Assembly seats in accord with the process prescribed by Article 64.2 of the Constitution.

Date: 9 June 2011
Ref:125/11

DRAFT RESOLUTION ON INADMISSIBILITY
in

Case No. KI 33/11

Applicant

Democratic Party of Kosovo Ashkalia

Constitutional Review of the Judgment of the Supreme Court of Kosovo A.A. No. 66/2011 of 5 February 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is the Democratic Party of the Kosovo Ashkalia, registered at the address: Mother Theresa in Fushë Kosova municipality represented by Mr. Naser Emini from Ferizaj, Secretary General of the Political entity Democratic Party of Kosovo Ashkalia.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo A.A. No. 66/2011 of 5 February 2011 rejecting the appeal on the resolution of the Elections Complaints and Appeals Panel A. No. 112/2011 of 2 February 2011 by which the request of the Political entity of the Democratic Party of the Kosovo Ashkalia (hereafter: DPKA) to gain another parliamentary seat, was rejected as unfounded.

Subject matter

3. The Applicant challenges the Judgment of the Supreme Court of Kosovo A.A. No. 66/2011 claiming that this decision violates Article 64 Paragraph 2 of the Constitution of the Republic of Kosovo. Considering that this political entity DPKA should have won another additional parliamentary seat, which according to the Constitution belongs to them, but has been given to another political entity, respectively the Ashkalia Party for Integration (hereafter: API).

Legal basis

4. Articles 113.7 and 21.4 of the Constitution, Article 20, Article 22.7 and Article 22.8 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereafter: the "Law") and Rule 56 (b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereafter: "Rules of Procedure").

Proceedings before the Court

5. On 3 March 2011 the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereafter: the "Court").

6. On 23 March 2011 the Constitutional Court notified the Elections Complaints and Appeals Panel (hereafter: "ECAP") and the Supreme Court of Kosovo that proceedings on reviewing the constitutionality of their decisions have been initiated**.**

7. On 31 March 2011 the Supreme Court of Kosovo in their reply to the Constitutional Court of Kosovo stated that they have nothing to add and that their opinion on the subject matter is exposed on the Judgment of the Supreme Court of Kosovo.

8. On 6 April 2011 replying to our notification, the ECAP in its response indicated the reasons why they rejected the request of the DPKA, submitted additional documentation and recommended to reject the request of the DPKA as unfounded.

9. On 9 June 2011 after reviewing the report of Judge Altay Surroy, the Review Panel composed of Judges Robert Carolan (Presiding), Prof. Dr. Enver Hasani and Gjyljeta Mushkolaj, recommended to the full Court the inadmissibility of the Referral.

Summary of facts

10. On 30 January 2011 the Central Electoral Committee (hereafter: CEC) announced the results of the general elections, according to which the mandates guaranteed by the Constitution of Kosovo for minority of Roma, Ashkalia and Egyptians guaranteed 4 (four) seats and that:

    - Democratic Party of Kosovo Ashkalia votes 2871 mandate 1
    - New Democratic Initiative of Kosovo votes 1690 mandate 1
    - Party of the United Kosovo Roma votes 690 mandate 1
    - Ashkali Party of Integration votes 1386 mandate 1

11. On 31 January 2011 the DPKA filed an appeal against the decision of the CEC to the ECAP, considering that this decision of the CEC damaged the DPKA, emphasizing that this violates the Constitution of the Republic of Kosovo and the Article 111 of the Law on General Elections in Kosovo.
12. Deciding on the appeal of the DPKA filed against the announced election results by the CEC, at the meeting held on 2 February 2011 the ECAP

issued the Resolution A No. 112/2011 and rejected the appeal of the DPKA as unfounded.

13. On 3 February 2011 the DPKA filed a complaint, to the Supreme Court of Kosovo on the resolution of the ECAP, whereby the Supreme Court of Kosovo on the session held on 5 February 2011 ruled the Judgment A.A. No. 66/2011 rejecting the appeal as unfounded.

14. On the 3 March 2011, after exhausting all legal remedies, the DPKA submitted a request for constitutional review of the above-mentioned judgments and resolutions to the Constitutional Court.

Applicant's Allegations

15. The Applicant claims that the Judgment of the Supreme Court of Kosovo A.A. Br. 66/2011 of 5 February 2011, by which was rejected the appeal against the resolution of the Elections Complaints and Appeals A.br. 112/2011 of 2 February 2011 and by which, the request of the Political entity DPKA to gain another parliamentary seat has been rejected as ungrounded, violates the Constitution of the Republic of Kosovo and the Law No.003/L-073 on general elections in the Republic of Kosovo.

16. DPKA claims that as a party of a non-majority community it was damaged by these decisions and that the additional seat belonging to them was given to the political entity of API.

Law on elections in Kosovo

17. The Constitution of the Republic of Kosovo in Article 64 paragraph 2 scope 2 which determines the composition of the Assembly of the Republic of Kosovo, provides the following:

(2) *Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the other Communities shall have the total number of seats won through the open election, with a minimum number of seats in the Assembly guaranteed as follows**: the Roma community, one (1) seat; the Ashkali community, one (1) seat; the Egyptian community, one (1) seat; and one (1) additional seat will be awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes**; …*"

18. The Law in regard to organizing elections in the Republic of Kosovo is governed by Law No. 03/L-073 on General Elections in the Republic of

Kosovo, Law No. 03/L-256 on Amending and Supplementing the Law No. 03/L-073 on General Elections.

19. According to the Law 03/L-073 Law on general elections in the Republic of Kosovo Article 111 determines the distribution of seats and the way to calculate the seats belonging to some political entities in the Assembly of Kosovo, providing the following:

„111.2 (b) the total number of valid votes received by each Political Entity in the Assembly elections shall be divided by 1, 3, 5, 7, 9, 11, 13, 15, et seq. until the number of divisors used is equal to the number of seats:…"

20. The Law No. 03/L-256 on amending and supplementing of the Law No. 03/L-073 on general elections by Article 106 paragraph 1 provides the following;

"*The CEC shall certify the final election results after the completion of all polling station and counting centre procedures and when all outstanding complaints related to voting and counting have been adjudicated by the ECAP and any appeals of ECAP's decisions on them have been determined by the Supreme Court of Kosovo*."

Preliminary assessment of the admissibility

21. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure of Constitutional Court.

22. On 3 March 2011 the Applicant submitted his Referral to the Constitutional Court, while the last Decision regarding this case was ruled by the Supreme Court of Kosovo on 5 February 2011. Therefore, the Court concludes that the Referral was submitted pursuant to Article 49 of the Law.

23. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, resolution on inadmissibility in Case KI.13/09 Sevdail Avdyli of 17 June 2010).

24. On the presented case the Applicant did not provide any proof that the Judgment of the Supreme Court has violated rights and freedoms

guaranteed by the Constitution in Chapter II, Chapter III and Chapter IV (Article 21-82 of the Constitution) also there was no proof that the Supreme Court of Kosovo arbitrarily decided when the Referral was rejected as unfounded (see *mutatis mutandis,* Vanek v. Slovak Republic, Decision of ECHR on Admissibility of the application No. 53363/99 of 31 May 2005).

25. In the present case, the Constitution of the Republic of Kosovo in Article 64 paragraph 2 scope 2 provides that:„ One additional seat will be awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes…" and not to the political entity with the highest overall votes.

26. Having in mind that the political entity of the DPKA and API represent the same non-majority community of Ashkalia, and that this non-majority community of Ashkalia won two seats as prescribed by the Constitution, therefore, the Constitutional Court finds that the Referral is manifestly unfounded in accordance to the Rule 36 (1c) of the Rules of Procedure which provides: "The Court shall reject a Referral as being manifestly ill-founded when: c) the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution".

FOR THESE REASONS

The Constitutional Court of Kosovo pursuant Article 113.7 of the Constitution, Article 20 of the Law, and Rule 36 (2b) and Rule 56(2) of the Rules of Procedure, on the session held on 9 June 2011, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

Shefki Gjergji vs. Judgment of the Supreme Court of Kosovo A No. 274/2010

Case KI 41-2011, decision of 8 July 2011

Keywords: administrative dispute, deadline issue, disability pension, individual referral, pensions, right to pension

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution contending that the Supreme Court violated Article 49 of the Constitution when upholding a decision of the Pension Administration Department in the Ministry of Labor and Social Welfare of Kosovo rejecting his application for a disability pension.

The Court held that the Referral was inadmissible pursuant to Rule 36.1(b) of the Rules of Procedure because the Applicant had failed to submit the Referral within four months of his receipt of the Supreme Court decision, a mandatory deadline set by Article 49 of the Law on the Constitutional Court.

Pristina, 10 June 2011
Ref. :126/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 41/11

Applicant

Shefki Gjergji

**Constitutional review of the Judgment of the Supreme Court of Kosovo
A No. 274/2010 of 22 September 2010**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The applicant is Shefki Gjergji from Obranqa village, Podujevo municipality.

Challenged decision

2. The applicant challenges the Judgment of the Supreme Court of Kosovo 274/2010 dated 22 September 2010, by which was rejected his complaint on the decision of the Ministry of Labor and Social Welfare of Kosovo - Pension Administration Department No. 50040570 dated 20 November 2009.

Subject matter

3. The applicant challenges the Judgment of the Supreme Court of Kosovo 274/2010 dated 22 September 2010 as being, allegedly, in violation of Article 49 of the Constitution of the Republic of Kosovo.

Legal basis

4. Articles 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008. (hereafter: the „Law“) and Rule 56 Paragraph 2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereafter: „Rules of Procedure“).

Proceedings before the Court

5. On 21 March 2011 the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereafter: the „Court“).

6. On 23 March 2011, the Constitutional Court communicated the Referral to the Supreme Court of Kosovo.

7. On 10 May 2011, the Constitutional Court of Kosovo received proof that the Judgment of Supreme Court was served to the applicant on 2 October 2011.

8. On 10 June 2011, after having considered the Report of the Judge Altay Suroy the Review Panel composed of Judges: Almiro Rodrigues (presiding), Gjyljeta Mushkolaj and Snezhana Botusharova, recommended to the full Court to reject the Referral as inadmissible.

Summary of the facts

9. The applicant requested from the Ministry of Labor and Social Welfare of Kosovo - Pension Administration Department as the organ of first instance, to acknowledge his pension right as a person with limited abilities. However, this first instance organ rejected his request on 19 October 2009, pursuant to the Article 3 of the Law 2003/23 on Disability pensions in Kosovo.

10. The first instance organ based its opinion on conclusion of the medical commission dated 15 October 2009, that the applicant didn't fulfill the requirements specified in the law on Disability pensions in Kosovo.

11. Furthermore, in the second instance proceedings before the Board of Appeals of the Pension Administration Department – Ministry of Labor and Social Welfare, the respondent provided the conclusion No. 5004057 of the second instance medical commission on the limited abilities of the actual organ (*body organ*), dated 8 December 2009, which concurs with the conclusion and opinion of the first commission, therefore, based on this, the complaint of the applicant was rejected as ill-founded and challenged decision has been confirmed.

12. Taking into account that the medical commissions, authorized by law, concluded that the Applicant has no limited abilities and that the law on disability pension in Kosovo was appropriately applied, the Supreme Court of Kosovo assessed that there was no law violation, therefore by Judgement A. No. 247/2010 of 22 September rejected the Applicant's complaint as ill-founded.

Applicant's Allegations

13. The applicant claims that the Judgment of the Supreme Court of Kosovo 274/2010 of 22 September 2010, by rejecting his complaint on the decision of the Ministry of Labor and Social Welfare of Kosovo - Pension Administration Department No. 50040570 dated 20 November 2009,

violated his rights guaranteed with Article 49 of the Constitution of the Republic of Kosovo.

Assessment of the admissibility of the Referral

14. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

15. In this connection, the Court refers to Article 49 of the Law, stipulating that:

„ 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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force.“

16. From the submitted documents, it appears that the Referral has not been filed within the time limit pursuant to Article 49 of the Law.

17. The final decision of the Supreme Court of Kosovo A. No 247/ 10 was taken on 22 September 2010, served upon the applicant on 2 October 2010 (proof: return receipt of Supreme Court of Kosovo), whereas he submitted his Referral to the Constitutional Court only on 21 March 2011. It follows that the Referral is out of time pursuant to Article 49 of the Law.

18. The Court after considering all the facts and evidence on the subject matter, and after having deliberated on the matter, found that the Referral was submitted after the time limit of 4 months, from the day when the latter decision was served to the applicant.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law on the Constitutional Court, and Rules 36(1b) and 56 (2) of the Rules of Procedure, in its session of 10 June 2011 unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

Gani Geci and other deputies vs. Assembly Decision of 14 October 2010 regarding the Draft Strategy and the Decision of the Government on the Privatization of Kosovo Post & Telecommunications

Case KO 107-2010, decision of 17 August 2011

Keywords: authorized parties, individual/group referral, mootness, *quorum* (Assembly), referral by 10 or more Assembly Deputies

The Applicants, 12 Assembly Deputies, filed a Referral pursuant to Article 113.4 of the Constitution contending that the Assembly President put a draft strategy and decision to a vote without having the necessary *quorum* of Deputies, thereby violating Articles 51(1), (2) and (3) of the Rules of Procedure of the Assembly, which requires a *quorum* of more than 50% of the Deputies. In reply, the Assembly President advised that the vote did not produce a signed decision and that the drafts were not adopted due to a complaint about a lack of quorum, indicating that the issues would be submitted to the Assembly for consideration at a later time.

The Court found that the Referral had become moot because the Assembly President had invalidated the questioned decision due to a lack of *quorum* and issued a Decision to Strike Out the Referral pursuant to Rule 32.4 of the Rules of Procedure.

Pristina, 17 August 2011
Ref. No.: RK133 /11

DECISION TO STRIKE OUT THE REFERRAL

in

Case No. KO 107/10

Applicant

Gani Geci and other deputies

Constitutional Review of the Assembly Decision of 14 October 2010 regarding the Draft Strategy and the Decision of the Government on the Privatization of Kosovo Post & Telecommunication

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicants are 12 Deputies (whose names appear in the Annex to the Resolution), represented by one of them, Mr. Gani Geci.

Challenged decision

2. The decision challenged by the Applicants is the Assembly Decision of 14 October 2010 on the Draft Strategy and Decision of the Government of Kosovo on the Privatization of Kosovo Post & Telecommunication (hereinafter: the "Draft Strategy PTK").

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the constitutionality of the Assembly Decision of 14 October 2010 by which the Draft Strategy and Decision of the Government on the Privatization of PTK was adopted.

4. The Applicants contest the constitutionality of the Assembly Decision of 14 October 2010, alleging a violation of Article 51 paragraphs (1), (2) and (3) of the Rules of Procedure of the Assembly of the Republic of Kosovo (hereinafter: the "Rules of Procedure of the Assembly").

5. The Applicants claim, in particular, that Article 51, paragraphs (1), (2), and (3) of the Rules of Procedure of the Assembly has been violated because of the lack of the necessary quorum during the vote.

Legal basis

6. Article 113.5 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 42 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121) (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

7. On 22 October 2010, the Applicants submitted the Referral to the Court.

8. On 16 December 2010, the President, by Order No.GJR. 107/10, appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur. On the same date, the President, by Order No.KSH. 107/10, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu.

9. On 19 January 2011, the Referral was communicated to the President of the Assembly of the Republic of Kosovo (hereinafter: the "Assembly").

10. On 3 May 2011, the Court requested additional documents from the Assembly, which submitted them on 5 May 2011.

11. On 6 July 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

12. On 12 October 2010, the President of the Assembly called for a plenary session of the Deputies to be held on 14 October 2010. On the session's agenda appeared, amongst other issues, the adoption by the Assembly of the Draft Strategy and Decision of the Government on the privatization of PTK.

13. On 14 October 2010, the Assembly held its Plenary Session and voted on the Draft Strategy PTK. After the voting, the President of the Assembly declared that fifty(50) Deputies had been present and that, out of those fifty (50), forty seven (47) deputies had voted in favour, two (2) against with one (1) abstention.

14. After the voting, the President of the Assembly, Mr. Jakup Krasniqi, concluded that the Draft Strategy and the Decision of the Government of Kosovo on the Privatization of PTK had been approved.

Applicants' arguments

15. The Applicants argue that the Speaker of the Assembly, Mr. Jakup Krasniqi, had put the decision on the privatization of PTK to the vote without having the necessary quorum of Deputies, as required by Article 51(1), (2) and (3) of the Rules of Procedure of the Assembly, i.e. more than half of all Deputies.

Response from the President of the Assembly of the Republic of Kosovo

16. On 5 May 2011, the President of Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi, submitted his comments on the Referral of the Applicants.

17. He replied that there was no signed decision on the approval of the Draft Strategy and the Decision of the Government of Kosovo on the Privatization of PTK.

18. He further submitted that, on 28 October 2010, he had taken the decision (Decision No. 03-V-448) not to adopt the Draft Strategy and Decision, since the Deputies had complained about the lack of quorum, and that these texts would be submitted for revision at a later stage.

Assessment of the admissibility of the Referral

19. The Applicants allege that Article 51 [Quorum and Voting in the sessions of the Assembly] of the Rules of Procedure of the Assembly has been violated, when, on 14 October 2010, the Assembly adopted in plenary session the Draft Strategy PTK.

20. In this respect, the Court observes that, in order to be able to adjudicate the Applicants' complaint, it is necessary to first examine whether they have fulfilled all admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

21. As to the present complaint, the Court needs first to determine, whether the Applicants can be considered to have fulfilled the requirements of Article 113.5 of the Constitution, stating that: "Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or

decision adopted by the Assembly as regards its substance and the procedure followed".

22. The Court notes that the present Referral was submitted by twelve (12) deputies contesting the constitutionality of the Assembly Decision on the Draft Strategy and the Decision of the Government of Kosovo regarding the Privatization of PTK.

23. Moreover, as to the requirement of Article 113.5 of the Constitution that the Applicants must have submitted the Referral "within eight (8) days from the date of adoption" of any law or decision by the Assembly, the Court notes that, by letter of 11 May 2011, the President of the Assembly informed the Court that, by Decision No. 03-V-448 of 28 October 2010, he had decided that, because of a lack of the necessary quorum at the plenary session of the Assembly on 14 October 2010 , the decision of the Assembly to adopt the Draft Strategy and the Decision of the Government of Kosovo regarding the Privatization of PTK had to be considered as never having been taken.

24. In these circumstances, the Court concludes that the Assembly Decision of 14 October 2010, which the Applicants wished to challenge before this Court, has been invalidated by the Assembly President and, therefore, no longer exists.

25. In this respect, the Court refers to Rule 32 (4) of the Rules of Procedure of the Constitutional Court which, to the extent relevant, provides as follows:

"The Court may dismiss a referral when the Court determines a claim to be moot or does not otherwise present a case or controversy."

26. The Court concludes that the Referral became moot upon the notification submitted to the Court on 5 May 2011 by the President of Assembly of the Republic of Kosovo, Mr. Jakup Krasniqi, providing that there was no signed decision on the approval of the Draft Strategy and the Decision of the Government of Kosovo on the Privatization of PTK.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.5 of the Constitution and Rule 32(4) and Rule 56 (2) of the Rules of Procedure, on 06 July 2011,

DECIDES

I. TO STRIKE OUT the Referral pursuant to Rule 32(4) of the Rules of Procedure of the Constitutional Court of Kosovo;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

Annex A

1. Gani Geci
2. Lulzim Zeneli
3. Naser Rugova
4. Driton Tali
5. Besa Gaxherri
6. Ismajl Kurteshi
7. Brahim Selmanaj
8. Sinavere Rysha
9. Mark Krasniqi
10. Drita Maliqi
11. Zafir Berisha
12. Naim Rrustemi

Bosnian Union of Kosovo vs. Resolution A-U. No 4152010 of the Supreme Court

Case KI 35-2011, decision of 17 August 2011

Keywords: deadline issue, exhaustion of legal remedies, individual/group referral, service of process

The Applicant, the Bosnian Union of Kosovo (BUK), filed a Referral pursuant to Article 113.7 of the Constitution contending that its right to complain was infringed by the Supreme Court's decision rejecting the Applicant's appeal of a determination by the Electoral Complaints and Appeals Commission (ECAP) that upheld the imposition of a fine on the BUK by the Political Party Registration Office (PPRO). The Supreme Court ruled that BUK's appeal was inadmissible by law because the fine imposed was below the 5000 EUR threshold in such matters. In reply, ECAP submitted clarifying and supporting documentation regarding its decision, as well as evidence that the same criteria had been applied to other political parties.

The Court held that the Referral was inadmissible because the Applicant had failed to complain before the 4-month deadline set by Article 113.7 of the Constitution and Article 49 of the Law on the Constitutional Court, which is made applicable to legal entities by Article 21.4 (granting legal entities the same rights as individuals) of the Constitution.

Prishtina, 17 August 2011
Ref.No.:RK130/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI-35/11

Applicant

Bosnian Union of Kosovo

Constitutional Review of the Resolution of the Supreme Court of Kosovo A-U.No. 415/2010 of 27 May 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge
Ilirian Islami, Judge

Applicant

1. Political entity Bosnian Union of Kosovo from Reçan - Prizren Municipality, represented by the President of this Political entity Mr. Sagdati Raman from Reçan.

Challenged decision

2. The challenged decision is the Resolution of the Supreme Court of Kosovo A-U.No.415/2010, rejecting the complaint of BUK against the decision of Electoral Complaints and Appeals Commission ABr.87/2010 of 28 February 2010 (hereafter: ECAC) by which was adopted the complaint of Political Party Registration Office (hereafter: PPRO) of the Central Election Committee (hereafter: CEC) by which the Bosnian Union of Kosovo has been fined the sum of 1500 EUR.

Subject matter

3. The Applicant challenges the Decision of the Supreme Court of Kosovo of 27 May 2010, without pointing out concrete Articles of the Constitution of the Republic of Kosovo, but, simply stating that the Decision of the ECAC A No. 87/2010 is confusing and ambiguous. The Applicant also complains that it was not given the possibility to explain the complaint of PPRO because they were not served with the complaint. The Applicant also alleges that the right to complain is their violated Constitutional right.

Legal basis

4. Articles 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereafter: „Law“) and Rule 56 (b) of the

Rules of Procedures of the Constitutional Court of the Republic of Kosovo (hereafter: „Rules of Procedure“).

Proceedings before the Court

5. The Applicant of the Referral on the 8 March 2011 submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereafter: „Court“).

6. On 23 March 2011 the Constitutional Court notified Mr. Raman Sagdati on initiated proceedings and the case got registered as No. 35-11.

7. On the same day the Constitutional Court notified the ECAC as well as the CEC that the case number is No. 35-11 and that there were initiated proceedings on assessment of the constitutionality of their decisions.

8. On 18 April 2011, the President by Order No.GJR.KI35/11 appointed Judge Robert Carolan as Judge Rapporteur.

9. On the same day, the President by Order No.KSH.KI35/11 appointed the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Iliriana Islami.

10. On 06. April 2011 the Electoral Complaints and Appeals Commission submitted it’s reply notifying the Constitutional Court with additional documentation clarifying their previous decisions and submitted additional documentation supporting their decision, together with their evidence that the same criteria were applied to other political entities.

Summary of the facts

11. On 25 May 2010 the ECAC received a complaint No.358 from the PPRO at the CEC which stated that the political entity BUK did not submit the report on financial condition of the PPRO offices as other 27 political entities, which is required according to Article 40 paragraph 5 and Article 119 paragraph 2 of the Law on general elections in the Republic of Kosovo, and pursuant Article 6 paragraph 6 of Election Policies No.12/2009. These regulations provide that every registered political entity is obliged to provide the financial report for the first round of elections by 31 December 2009 and for the second round by 7 January 2010.

12. Such a complaint of the PPRO at the CEC, the ECAC forwarded to the BUK on 15 February 2010 in order to have the possibility to reply on the alleged complaints of 18 February 2010.

13. The plaintiff BUK, claims that they did not receive any copy of the complaint forwarded by the ECAC and therefore it was impossible to answer to that.

14. Deciding on such a complaint of the PPRO at the CEC, the ECAC in the meeting held on 23 February 2010, ruling the decision A No. 87/2010 by which the political subject BUK was fined in the sum of 1500 EUR, with the reasoning that there has been violation of Article 40 paragraph 1 of the Law on General Elections.

15. Unsatisfied with such a decision, on 29 April 2010 BUK, in Prizren, filed an appeal to the Supreme Court of Kosovo to annull the decision on the fine, requesting that the decision of the ECAC A.br.87/2010 of the 23 February 2010 be revoked and to remand the case for another review and to reject the complaint of the PPRO as ungrounded.

16. Deciding on the appeal of BUK, the Supreme Court of Kosovo in the meeting held on 27 May 2010 rejected the appeal of BUK as inadmissible referring to the Article 118 paragraph 4 of the Law on general elections by which the party has the possibility to complain to the Supreme Court only if the fine is higher that 5000 EUR.

17. ECCA with amendments and supplements of the Law No.03/L-256 on general elections has changed it's title into Electoral Panel for Complaints and Applications (hereafter: EPCA), Since BUK did not pay the imposed fine, on 28 February 2011 EPCA sent to BUK a warning on payment of the fine previously imposed.

Allegations of the opposite side

18. On 6 April 2011 the EPCA explained that by correspondence No. A87/R1-2010 of 15 February 2010 forwarded to the PPOR at the CEC that Office gave the opportunity to the BUK to articulate on complaint's allegations regarding the financial report submitted by the PPRO against their entity.

19. The EPCA claims that on 18 February 2010 the Secretariat of the EPCA did not receive any reply from the BUK.

20. In the same reply the EPCA alleges that mentioning the UPS was just a technical failure during the translation of the text from Albanian into Serbian language.

Applicant's allegations

21. The Applicant of the Referral claims that the decision of the Electoral Panel for Complaints and Applications which adopted the complaint of the PPOR and fined the political entity of BUK, is contrary to the Constitution without stating specific Articles of the Constitution, which were allegedly violated.

22. BUK claims that decision of the EPCA is ambiguous and confusing mentioning the UPS in the clarification of this decision, and that they have never received the complaint of the PPRO, therefore they could not reply to it.

Assessment of the Admissibility of the Referral

23. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

24. The Court notes that the Applicant has filed his Referral pursuant Article 113.7 of the Constitution, which provides:

    "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."

25. The Court first considers that, pursuant to Article 21.4 of the Constitution, which provides that: "fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable", the Applicant is entitled to submit a constitutional complaint, invoking fundamental rights which are valid for individuals as well a for legal persons as the Applicant. This means that the Applicant is equally under the obligation respect the deadlines as provided by law, as Article 113.7 stipulates for individuals.

26. Article 49 of the Law , which determines the deadlines on filing individual requests in accordance to the Article 113(7) of the Constitution and Article 47 of the Law:

    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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced."

27. Referral of the Applicant has been submitted to the Constitutional Court on 8 March 2011, while the last Decision regarding this case has been ruled by the Supreme Court of Kosovo on 27 May 2010 which was served to the Applicant on 30 June 2010 (see the case file, proof return receipt). From this, the Court concludes that the request was filed beyond the deadline, therefore is not in accordance with provisions of the Constitution and the Law.

28. Even if the Court would apply the time limit in relation to the resolution of the EPCA A.No.87-2010 of 23 February 2010, the Referral would have been filed beyond the deadline. Therefore, it is not in accordance to the provisions of the Constitution and the Law.

29. The Court after considering all the facts and evidence on the subject matter, and after having deliberated on the matter, found that the Referral was submitted after the time limit of 4 months, from the day when the latter decision was served to the applicant.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law on the Constitutional Court, and Rules 36(1b) and 56 (2) of the Rules of Procedure, in its session of 07 July 2011 unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

Agron Vula vs. Decision of the Municipality of Gjakova not to Implement the Decision of the Independent Oversight Board, dated 25 February 2008

Case KI 57-2009, decision of 17 August 2011

Keywords: exhaustion of legal remedies, individual referral, suspension from employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution contending that Gjakova Municipality's failure to implement a decision of the Independent Oversight Board (IOB) requiring a review of the case and adoption of a merited decision violated his rights under Articles 21.1 and 49.1 of the Constitution. In reply, the Municipality argued that the Referral was not ripe for decision because its appeal of the Gjakova Municipal Court's award of unpaid salary was still pending in the Peja District Court.

The Court held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution and Article 47 of the Law on the Constitutional Court because the municipality's appeal was still pending in the District Court, reflecting that all legal remedies had yet to be exhausted. The Court's ruling indicated that the exhaustion rule is based on an assumption that the Kosovo legal system will provide an effective remedy for a constitutional violation.

Prishtina, 17 August 2011
Ref. No.: RK128/11

RESOLUTION ON INADMISSIBILITY
In

Case No. KI57-09

Applicant

Agron Vula

Constitutional Review Decision of the Municipality of Gjakova not to implement the Decision of the Independent Oversight Board, dated 25 February 2008

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Agron Vula, residing in Gjakova, who was originally unrepresented but who is now represented by Mr Taki Bokshi, a Lawyer, also from Gjakova.

Challenged Decision

2. Decision of the Municipality of Gjakova (hereinafter: the Municipality) not to implement the Decision of the Independent Oversight Board, dated 25 February 2008, served on the Respondent on 17 March 2008.

Subject Matter

3. On 21 October 2009 the Applicant filed a Referral with the Secretariat of the Constitutional Court (hereinafter: the "Court"), maintaining that the Decision of the Independent Oversight Board, dated 25 February 2009, had not been implemented by the Applicant's employer, the Municipality. The Decision of the Independent Oversight Board ordered the Municipality to review the case and adopt a merited decision.

Proceedings before the Constitutional Court

4. On 21 October 2009 the Applicant filed a Referral with the Secretariat of the Constitutional Court. He was then unrepresented. The Applicant is now represented by Teki Bokshi, a Lawyer, from Gjakova. The Applicant complains that the Decision of the of the Independent Oversight Board, dated 25 February 2008 was not implemented and that his rights under Article 49.1 of the Constitution of Kosovo, Article 6 of the European Convention on Human Rights and Fundamental Freedoms and Article

23 of the Universal Declaration on Human Rights, in conjunction with Article 21.1.1 of the Constitution of Kosovo were violated.

5. The President of the Constitutional Court appointed Judge Snezhana Botusharova as Judge Rapporteur and he appointed a Review Panel comprising Judge Ivan Cukalovic, presiding, and Judges Enver Hasani and Iliriana Islami.

6. By letter dated 21 January 2010 addressed to the Applicant's legal representative the Constitutional Court requested clarification of certain documents submitted with the original Application.

7. By a subsequent letter dated 1 September 2010 the Court send the Referral to the Municipality of Gjakova inviting the Municipality to provide its reply to the Referral together with justification and necessary supporting information and documents.

8. The Municipality replied on 30 September 2010 and stated that there was litigation pending in the case and that therefore the case before the Constitutional Court was inadmissible.

9. The Applicant's legal representative was copied with the response of the Municipality on 4 October 2010 and he wrote to the Court on 26 October 2010, *inter alia*, stating that a Decision had issued from the District Court of Peja C. no. 121/09, dated 7 April 2009. The response did not fully address the issue of the current proceedings arising from the suspension of the Applicant which were still pending before the District Court in Peja.

10. The Court deliberated on the matter on 14 December 2010.

Summary of the facts

11. The Applicant was employed under a temporary contract of employment with Gjakova Municipality as the Chief of the Fire Protection and Prevention. He was temporarily suspended from duties from 20 August 2003 "until the completion of the procedure for the verification of responsibilities or disciplinary irresponsibility". He was to be paid half of his personal monthly incomes during the temporary suspension.

12. His appeal against this suspension was ultimately heard by the Independent Oversight Board on 28 February 2008. The Decision of the Independent Oversight Board ordered the Municipality to review the case and adopt a merited decision. That Decision was not implemented. Instead, the Municipality maintains that there is litigation pending in

relation to the matter and it furnished to the Court a Judgment of the Municipal Court in Gjakova awarding the Applicant unpaid salary. The Municipality maintains that they appealed this Judgment to the District Court in Peja which has not yet decided the case.

13. The Appeal of the Municipality to the District Court in Peja has been furnished to the Constitutional Court; these proceedings are still pending.

Assessment on Admissibility

14. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

15. Article 113.7 of the Constitution states:

"Individual persons 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."

16. The Court wishes to emphasize again that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution, invoked by the Applicant before those instances. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004).

17. This Court applied the same reasoning when it issued Resolution on Inadmissibility in the case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case KI 41/09 of 27 January 2010, and in the Resolution on Inadmissibility in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. KI 73/09 of 23 March 2010.

18. As there are proceedings pending relevant to the issue of the implementation of the Decision of the Independent Oversight Board and

while those proceedings are pending it is premature for the Constitutional Court to deal with this case. It follows that the Applicant has not exhausted all legal remedies available to him under applicable law as required by Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 47 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously, in its session of 14 December 2010

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Bajram Santuri vs. Judgment of the Municipal Court in Prizren C. no. 368/2000, Judgment of the Supreme Court of Kosovo, Rev. 46/2005 (C. nr. 99/07), Swedish court decisions, and Judgments No. 8329/06 and 9095/07 of the European Court of Human Rights

Case KI 63-2009, decision of 17 August 2011

Keywords: exhaustion of legal remedies, family issue, individual referral, inheritance issue, personal jurisdiction (*ratione personae*), property ownership dispute, right to fair and impartial trial, right to marriage and family

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, contending first that the Prizren Municipal Court and the Supreme Court violated rights guaranteed by Articles 31 and 37 when rejecting his property inheritance claims against an aunt and uncle. The Applicant argued that the Municipal Court decision was unjust because the Presiding Judge was allegedly related to other parties, and that the Supreme Court's decision was unfair because the Court was unaware of relevant facts. Aspects of the property dispute were still pending in the Prizren District Court when the Referral was filed. Second, the Applicant contended that Swedish courts and the European Court of Human Rights (ECtHR) were biased against him when disposing of some family law matters.

The Court held that the Referral was inadmissible for three reasons: (1) the property inheritance matter is incompatible *ratione temporis* with the Constitution and the Law because it involves events occurring prior to when the Constitution was implemented, citing *Jasiúnienè vs. Lithuania* and *"Adler Com" Sh.p.k. vs. Decision of Gjakova*; (2) the Applicant failed to exhaust all legal remedies provided by law with respect to the property issue because the matter is apparently pending in a lower court, citing *AAB-RIINVEST University L.L.C. vs. Kosovo* and *Selmouni v. France*; and, (3) the family law matter is inadmissible *ratione personae* because it involves matters beyond the jurisdiction of the Court.

Prishtina, 17 August 2011
Ref. No.: RK132/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 63/09

Applicant

Bajram Santuri

Constitutional Review of Judgment of the Municipal Court in Prizren C. no. 368/2000 of 8 May 2003, Judgment of the Supreme Court of Kosovo, Rev. 46/2005 (C.nr.99/07) of 28 December 2006 as well as Swedish court decisions and Judgments No. 8329/06 and 9095/07 of the European Court of Human Rights

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Bajram Santuri from Prizren.

Challenged decisions

2. The applicant challenges Judgment of the Municipal Court in Prizren C. no. 368/2000 of 8 May 2003 and Judgment of the Supreme Court of Kosovo, Rev. 46/2005 of 28 December 2006.

3. He also complains about Decisions of the European Court of Human Rights (hereinafter: ECtHR), Nos. 8329/06 and 9095/07 of 26

September 2006 and 18 September 2007, respectively, in separate cases against Sweden.

Subject Matters

4. The Referral deals with two issues:

(1) Property issue

5. The Applicant alleges that the above decisions of the Kosovo courts concerning the property issue violate his rights guaranteed by Article 31 [Right to a Fair and Impartial Trial] and 37 [Right to marriage and Family] of the Constitution.

(2) Family right issue

6. The Applicant requests the Court to review the decisions of the ECtHR, by which his Applications Nos.8329/06 and 9095/07 were rejected on 26 September 2006 and 18 September 2007, respectively.

Legal basis

7. Article 113 (7) of the Constitution, Articles 20 and 22 (7) and (8) of the Law (No. 03/L – 121) on the Constitutional Court of the Republic of Kosovo, dated 15 January 2009 (hereinafter: the Law), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Constitutional Court

8. On 15 December 2009, the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

9. On 6 July 2010, the Referral was communicated by the Court to the Municipal Court in Prizren, which replied on 20 July 2010.

10. By Decision of the President (No. GJR. 63-09/10, of 23 December 2009), Judge Gjyljeta Mushkolaj was appointed Judge Rapporteur. On the same date, the President appointed, by Decision no. KSH. 63-09/10, a Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Snezhana Botusharova.

11. On 29 March 2011, additional information regarding the status of the case was requested from the Municipal Court in Prizren, which replied on 1 April 2011.

Background of the property issue

12. The Applicant's grandfather died in 1953 and left behind, from his first marriage, the Applicant's grandmother and father and, from his second marriage, a second wife and five children.

13. The Applicant complains that the property of his grandfather was transferred into the name of the second wife and shared with her five children, thereby excluding the Applicant's father. The Applicant does not mention, whether his grandmother got a share of the inheritance.

Summary of facts as to the property issue:

14. By Decision of the District Court in Prizren C. no. 50/55 of 25 November 1955, as lawful heirs of the Applicant's grandfather were declared: the grandfather's second wife, the Applicant's father and the five children of the grandfather's second wife (the grandfather's first wife is not mentioned at all in the said decision). The property concerned consisted of a house and yard at the address Petar Stambolic Street, no. 77; a parcel with a shop at the address Boris Kidric Street no. 65 in Prizren; and a parcel of 2 hectares in Llëka. According to the Court's decision all heirs were entitled to one seventh (1/7) of the entire property of the late grandfather.

15. By court settlement R. no. 279-56 of 14 May 1956 concluded before the District Court in Prizren between the Applicant's father on the one hand and the six other heirs on the other hand, it was decided that the Applicant's father would take the shop at Boris Kidric Street no. 65 in Prizren, while the others would take the house in joint ownership and the 2 hectares of land. But the six other heirs were ordered to pay the Applicant's father the amount of 34.000 Dinars until 1 November 1956. However, before the payment of the money became due, the Applicant's father died in June 1956. According to the Applicant, the six other heirs never paid the amount concerned.

16. By decision of the District Court in Prizren O – No. 123/56 of 24 October 1956 the Applicant's mother, who had a second minor son (the Applicant's brother) was declared the only heir. The Applicant's late father owned a parcel and shop at the address Boris Kidric Street nr. 65, in Prizren, with a value of 70.000 Dinars at that time. At the District Court in Prizren, the Applicant's mother stated, on her behalf and on

behalf of her minor children, that she accepted the inheritance, and, pursuant to the law, also recognized the inheritance rights of her minor children.

17. On 1 June 1964, the Applicant's step grandmother, uncle and aunt sold the immoveable property in "Lleka" (which transaction was validated by the Municipal Court in Prizren) to KBI Progres "Lavërtaria" from Prizren. On 24 March 1966, KBI Progres "Lavërtaria" sold the property to a third party from the village Hoqë e Qytetit. The contract concerned was validated by the Municipal Court in Prizren, leg.no. 382/66 on the same day.

18. Upon the request of the Public Prosecutor, the Municipal Court in Prizren, by Judgment of p. no. 348/95 of 4 June 1998, annulled the sales contract, validated by the same Court by Decision leg. No. 920/64, of 1 June 1964 and signed between the Applicant's step grandmother, uncle and aunt and KBI "Progres", was annulled on the ground that the parties at the time were forced by municipal and committee activists to agree to the contract.

19. On 8 May 2003, the Municipal Court in Prizren, by Judgment C.no.368/00, approved the claim suit of the uncle and aunt of the Applicant and annulled the sales contract entered into between the KBI "Progres" and the third party from the village Hoqë e Qytetit, validated by the Municipal Court in Prizren, leg.no.382/66 of 24 March 1966. The Court also ordered KBI "Progres" and the third party to accept the judgment and transfer the ownership and possession rights to the Applicant's uncle and aunt, for half a share each, in the cadastral parcel no. 9437 in "Llëka" as indicated in the list of possessions no. 7275 KK in Prizren.

20. On 1 June 2004, the Municipal Court in Prizren, by Decision E. no. 14/2000, suspended the execution procedure, initiated by the Applicant in order to have the court settlement No 279-56 of 14 May 1956 concluded between the Applicant's father and the six other heirs of the Applicant's late grandfather executed, due to prescription. The Court ruled that the Applicant had filed the request for the execution of the court settlement of 14 May 1956 out of time, because more than ten(10) years had passed from the date of signature of the settlement; therefore, pursuant to Article 379(1) of the Law on Obligations, the Applicant's execution request had been prescribed.

21. The District Court in Prizren, by Decision Ac. no. 354/05 of 17 October 2005, rejected as ungrounded the Applicant's appeal against the decision of the Municipal Court, E. no. 14/2000 of 1 June 2004. The District

Court concluded that the first instance court had decided correctly, when it suspended the execution procedure, because the Applicant had requested the execution of court settlement R. no. 279-56 of 14 May 1956 out of time.

22. Thereupon, the Applicant filed a request for revision with the Supreme Court, which on 15 August 2006, rejected the Applicant's revision request as being inadmissible, reasoning, that the Municipal Court in Prizren, by Decision E.nr 14/2000 dated 1 June 2004 had suspended the execution procedure initiated by the Applicant against the debtors, due to prescription and that the District Court, by Decision Ac.nr. 354/2005 of 17 October 2005 had rejected his appeal as unfounded, thereby upholding the decision of the Municipal Court of 1 June 2004.

23. On 28 December 2006, the Supreme Court of Kosovo, by Decision Rev. no. 46/2005, in the legal matter concerning the Applicant's step grandmother, uncle and aunt on the one side and KBI Progres "Lavërtaria" and the third party from the village "Hoqa e Qytetit on the other side, upheld the request for revision and the request of the Kosovo Public Prosecutor for protection of legality, thereby quashing the lower courts' decisions and referred the case back to the Municipal Court of Prizren for further adjudication under a new file number C 99/07.

24. On 27 February 2008, the Applicant proposed to the Municipal Court in Prizren to allow him to intervene in the proceedings of his uncle and aunt against KBI Progres "Lavërtaria" and the third party from the village "Hoqa e Qytetit.

25. The Municipal Court in Prizren, by Decision Agj. no. 17/2009 of 16 December 2009, approved as grounded the request of the Applicant in the capacity of plaintiff and intervener to have the judge, against whom the Applicant had filed a complaint, removed from case C. no. 99/07.

26. In reply to a request for information submitted by the Constitutional Court in Case KI 63/09, the President of the Municipal Court of Prizren stated that the request of the Applicant to take part in the proceedings in the capacity of intervener in Case C. no. 99/07, following the statements of the litigating parties, was approved, as registered in the process report of 7 July 2010.

27. So far, in Case C. no. 99/07, the President of the Municipal Court has scheduled 7 sessions, but some of them had to be postponed, because not all procedural preconditions had been met. The next session was scheduled for 16 September 2010, since the authorized representatives of the litigating parties had agreed to have more time for review and

preparation, since this was a voluminous matter developing since the 50-ies of the last century. However, on 16 September 2010, the Municipal Court decided to suspend the proceedings in this matter, following the death of the fourth respondent, the Applicant's aunt.

28. On the basis of an appeal, submitted by the Applicant on 16 December 2010 against the suspension of proceedings, the case file was sent to the District Court of Prizren to be proceeded further. So far, no information has been submitted by the Applicant about any possible outcome of these court proceedings.

Applicant's allegations as to the property issue

29. The Applicant claims that, by Judgment of the Municipal Court in Prizren C. no. 368/2000 of 8 May 2003 and Judgment of the Supreme Court, Rev.46/2005 (C. No. 99/07) of 28 December 2006, his rights guaranteed by Articles 31 [Right to a Fair and Impartial Trial] of the Constitution have been violated.

30. The Applicant claims that the Municipal Court's Decision of 8 May 2003 has inflicted an injustice upon him, because he had not been a party to these proceedings, because the Presiding Judge was suspected of having family relations with the other parties in the procedure.

31. The Applicant claims that, by Judgment of the Supreme Court of Kosovo Rev. 46/2005 (C. Nr. 99/07), of 28 December 2006, he suffered a further injustice, because he could not join the proceeding, and thereby was prevented from enjoying an assumed right to shares, the Supreme Court not being fully aware of all the facts.

32. The Applicant further alleges that his rights as a child have been violated since 1956, because during that time his father shared the inherited property with his family members and, when his father died in 1956, he had not been able to realize his share, because he was a minor. According to the Applicant, the family members of his father have used and abused the situation by taking the share of the Applicant's father (their late brother).

33. The Applicant alleges that his father's share was not realized, because he died on 13 June 1956, whereas the share should have been realized on 1 November 1956, as indicated in the court settlement of 14 May 1956, concluded between the Applicant's father and his family members, despite the fact that the District Court in Prizren, by Decision O-nr. 123-56 of 24 October 1956, had ruled that his mother and he and his brother as minors were the only heirs of his late father's property.

Summary of facts as to the family issue:

On 16 February 2006, the social security services in Sweden decided to prohibit contacts between the Applicant and his wife and daughter, which decision was upheld by the second instance court, by Decision no. 554-06 of 13 March 2006.

34. Dissatisfied with the court decision, the Applicant filed an application, in two instances, with the ECtHR in Strasbourg, against the Swedish Government. The first application was filed on 27 March 2006 and the second one on 15 January 2007.

35. On 26 September 2006, a committee of three judges of the ECtHR, pursuant to Article 27 of the Convention, decided that Application No. 8329/06 was inadmissible, on the grounds that it had not found any violation of rights and freedoms guaranteed by the Convention or by its Protocols.

36. The second application was dealt with a committee of 3 judges of the ECtHR on 18 September 2007, pursuant to Article 27 of the Convention, which decided that Application No. 9095/07 was also inadmissible, on the ground that the current complaint was in essence the same as the previous one (Application No. 8329/06) and did not contain any new facts.

37. The Applicant filed claims in regular courts and before the Higher Court of Sweden against three persons: the curator of the Lundt University Hospital, Neonatal Section of Women Department (Claim no. B1044-06 dated 2 May 2006), an employee of a kindergarten in Alvesta (claim no. B 155-06 of 10 October 2006) and another employee of the kindergarten in Alvesta (claim no. B 155-06 of the same day). In all three cases, the Applicant's claims were rejected by the above-mentioned courts.

Applicant's allegations as to the family issue:

38. The Applicant claims that the decisions of the ECtHR in Applications No. 8329/06 of 26 September 2006 and No. 9095/07 of 18 September 2007,were biased and unjust to him and his family, because, as the Applicant claims, decisions at hand were reached by ECtHR committees consisting of Swedish and Yugoslav judges, who protected their own interests against the Applicant's claim, which criticizes the Swedish state and the former Yugoslavia.

39. The Applicant further claims that the decisions of the regular courts in Sweden, overturning his claim against the Curator of the Lundt University Hospital and the two employees of the kindergarten in Alvesta, were a result of racism and xenophobia of the Swedish people and Sweden against foreigners. As evidence, the Applicant refers to a Book in Swedish called "Social Vanvard", and a number of CDs, records and pictures.

40. The Applicant claims that, for racist reasons and for material benefit, Swedish authorities have separated him from his first wife and his second wife and their baby, finding that the Applicant was allegedly in a mentally unstable condition to maintain his family.

Preliminary assessment of admissibility

(1) As to the property issue

41. The Applicant complains that, by Judgment of the Municipal Court in Prizren C. no. 368/2000 of 8 May 2003 and Judgment of the Supreme Court, Rev.46/2005 (C. No. 99/07) of 28 December 2006, his rights guaranteed by Articles 31 [Right to a Fair and Impartial Trial] of the Constitution have been violated.

42. As to the Applicant's claim, the Court observes that, in order to be able to adjudicate the Applicants' complaint, it needs first to be examined whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

43. In this respect, the Court notes that, apart from the fact that the Applicant was clearly not a party to these proceedings, the relevant court decisions he is complaining about, are dated 8 May 2003 (Municipal Court decision) and 28 December 2006 (Supreme Court decision), respectively. This means that his complaints regarding these court proceedings relate to events prior to 15 June 2008, that is the date of the entry into force of the Constitution. The Court has, therefore, no jurisdiction to deal with these complaints.

44. It follows that this part of the Referral is incompatible "ratione temporis" with the provisions of the Constitution and the Law (see, mutatis mutandis, Jasioniene v. Lithuania, Application No. 415101/98, ECHR Judgments of 6 March and 9 June 2003; and, Case No. KI 61/09, "Adler Com" Sh.p.k., Constitutional Review of the Decision of Municipality of Gjakova, Judgment of the Constitutional Court of 16 December 2010).
45. The Court further notes that, by decision of 7 July 2010, the Municipal Court in Prizren, to which the case, in which the Applicant had not been

a party, had been transferred by the Supreme Court by decision of 28 December 2006 under a new case number C. No. 99/07, approved the Applicant's request to join the proceedings in the capacity of intervener. However, when the Municipal Court suspended the proceedings by decision of 16 September 2010, the Applicant filed an appeal against the suspension decision with the District Court. The Applicant has not submitted any information about any possible outcome of these court proceedings.

46. In these circumstances, the Court refers to Article 113.7 of the Constitution and Article 47.2 of the Law, providing that the Applicant can only submit a Referral to the Court, after having exhausted all legal remedies provided by law. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see, inter alia, Resolution on Inadmissibility KI41-09 AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, mutatis mutandis, ECHR, Selmouni v. France, No. 25803/94, decision of 28 July 1999).

47. It follows that this part of the Referral is inadmissible.

(2) As to the family issue

48. As to the Applicant's allegation that his right guaranteed by Article 31 [Right to a Fair and Impartial Trial], and Article 37 [Right to Marriage and Family] of the Constitution have been violated, the Court emphasizes once more, that in order to be able to adjudicate the Applicants' complaint, it first needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

49. In this respect, the Court notes, that the events which occurred in Sweden as well as the decisions of the ECtHR, of which the Applicant complains, are not due to the public authorities in Kosovo, as required by Article 113.7 of the Constitution and 47(1) of the Law and, thus, fall outside the jurisdiction of the Court.

50. It follows that this part of the Referral must be rejected as being inadmissible "ratione personae".

FOR THESE REASONS

The Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56(2) of the Rules of Procedure, the Constitutional Court, unanimously, in its session held on 6 July 2011,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20(4) of the Law on the Constitutional Court; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

Shpresa Loxha-Pllana vs. Decision C. no. 644/06 of the Municipal Court of Peja

Case KI 87-2010, decision of 17 August 2011

Keywords: deadline issue, expropriation, individual referral, property ownership dispute, restitution of land

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution complaining of non-implementation of the law, without specifying which law and/or which court had failed to act, seeking restitution of previously nationalized land. The Peja Municipal Court issued a final decision regarding the case on 1 July 2008 and the Applicant submitted a Referral on 20 September 2010.

The Court held that the Referral was inadmissible pursuant to Article 113.7 and Article 49 of the Law on the Constitutional Court because the Applicant failed to meet the mandatory 4-month submission deadline.

Pristina, 17 August 2011
Ref. No.: RK135 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 87/10

Applicant

Shpresa Loxha-Pllana

Constitutional Review of the Decision of the Municipal Court of Peja, C.no. 644/06, dated 1 July 2008.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Robert Carolan, Judge
Altay Suroy, Judge

Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Shpresa Loxha-Pllana, residing in Mitrovica, represented by Sami Sharaxhiu, a practicing lawyer in Peja.

Challenged court decision

2. The decision challenged by the Applicant is the Judgment of the Municipal Court of Peja of 1 July 2008, which was served upon the Applicant on the same day.

Subject matter

3. The Referral of the Applicant concerns the non-implementation of the law, without specifying which law, and/or which court, such as the Municipal Court of Peja and/or the Special Chamber of the Supreme Court of Kosovo.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: "the Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

5. On 20 September 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 9 November 2010, the Referral was forwarded to the Municipal Court of Peja.

7. On 14 December 2010, the President, by Order No.GJR. 87/10, appointed Judge Robert Carolan as Judge Rapporteur. On the same date, the President, by Order No.KSH. 87/10, appointed the Review Panel

composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalovič.

8. On 16 May 2011, the Review Panel, consisting of Judges Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalovič considered the Report of the Judge Rapporteur Robert Carolan and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

9. On 13 July 1929, the first instance Court in Peja (No. 169) issued a decision that recognized that the legal ownership of the land in Peja belonged to the grandfather of the Applicant based on the Tapia (land registry).

10. This property was in the 1930's nationalized by the government.

11. On 18 March 1936, the Commercial Court of Dubrovnik (Judgment POSL. BR.U25/35/8) recognized the ownership right to the nationalized land of the grandfather of the Applicant and ordered the authorities to restitute the confiscated land to its lawful owner, i.e. the Applicant's grandfather. However, this judgment was never enforced and was not executed by the authorities.

12. On 3 March 1946, the Applicants grandfather was subject to nationalization of 48,65,36 Ha of land in Peja by the Decision of District Agrarian Court for Kosovo in Pristina (No. 591).

13. On 11 April 1946, the District Agrarian Court of Kosovo in Pristina (No. 1182) returned a piece of the legal title to the land to the Applicant's grandfather.

14. The heirs of the late grandfather of the Applicant filed in 1985 a claim with the Executive Council of the Autonomous Socialist Province of Kosovo (KSAK) – Secretariat for finance and economy – against the decision of the District Agrarian Court. They requested the reopening of the procedure since new facts had been brought to their attention.

15. On 3 April 1985, the Provincial Directorate for Property and Judicial Matters in Pristina rejected the request to reopen the procedure concluded by decision of the District Agrarian Court on the ground that it was time-barred (no. 03-466-993/84). This decision was appealed to the Supreme Court of Kosovo.

16. On 14 November 1985, the Supreme Court rejected the claim as ungrounded, the request for reopening the procedure being time barred (A-no. 745/85).

17. On 19 February 1999, the Applicant filed a request with the Commission for restitution of land to previous landowners of the Municipal Assembly of Peja for the restitution of the land taken from the Applicant's predecessors. No response or decision in this matter is present in the case file.

18. On 8 December 2005, the Applicant submitted a request for restitution of the nationalized property, which at the moment is used by the Biotechnical Institute of Peja, to the Kosovo Trust Agency (hereinafter: the "KTA").

19. On 4 October 2006, the Applicant filed a claim with the Special Chamber of the Supreme Court requesting the annulment of the decision to nationalize the land. On 31 January 2007, the Special Chamber transferred the case to the Municipal Court of Peja to decide this matter and indicated that, if the Applicant would appeal against the decision of the Municipal Court, it should be done before the Special Chamber.

20. On 30 August 2006, the Applicant filed a claim with the Municipal Court of Peja to annul the decision to nationalize the land. On 1 July 2008, during the main hearing it was decided to terminate the procedure upon the proposal of the representative of the Applicant since it was necessary to decide first, in preliminary proceedings, whether to transform KTA into a new agency, as stated in its letter to the Applicant, dated 4 June 2008, or to reach a solution after the establishment of the state of Kosovo. The respondent's representative had no objection to the proposal for termination, since the procedure could be re-initiated as per request of one of the litigating parties.

Applicant's allegations

21. The Applicant alleges that the Municipal Court and the Special Chamber of the Supreme Court has not applied the law.

Preliminary assessment of the admissibility of the Referral

22. As to the Applicants Referral concerning the non-implementation of the law, without specifying which law, and/or which court, such as the Municipal Court of Peja and/or the Special Chamber of the Supreme Court of Kosovo, the Court observes that, in order to be able to adjudicate the Applicant's Referral, it is necessary to first examine

whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

23. As one of the requirements, the Applicant must establish that she has submitted the Referral within a period of 4 months, as stipulated by Article 49 of the Law. However, it appears from the Applicant's submissions that the final court decision regarding her case was the Decision of the Municipal Court of Peja, C.no. 644/06, dated 1 July 2008, served upon her on 1 July 2008, whereas she submitted her Referral to the Constitutional Court only on 20 September 2010, that is more than 4 months after the entry into force of the Law (see Article 56 of the Law). To be admissible, the referral should have been filed before 15 May 2009 in accordance with the combined legal provisions of Article 49 and 56 of the Law.

24. It follows that the Referral is out of time pursuant to Article 49 of the Law.

25. With regard to the issue of property restitution, the Constitutional Court refers to its previous case KI 14/09 Heirs of Ymer Loxha and Sehit Loxha vs. Decision No. PKL.Nr.21/07 of the Supreme Court of the Republic of Kosovo, dated 17 December 2008 of 15 October 2010.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 49 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, unanimously, on 16 May 2011

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

Mr. Denic D. Mladen and Mr. Vitkovic-Denic D. Milorad vs. Decision Cml.-Gzz. Br. 36/2007 of the Supreme Court

Case KI 18-2010, decision of 17 August 2011

Keywords: continuing violation, exhaustion of legal remedies, individual referral, interim measures

The Applicants filed a Referral pursuant to Article 113.7 contending that the Supreme Court's grant of the Public Prosecutor's Request for Protection of Legality, thereby annulling the Prishtina Municipal Court's favorable disposition of their property dispute, after the decision had become *res judicata* violated Articles 22.1, 22.2, 22.5, 31.1 and 46 of the Constitution. They requested the Court to quash the Supreme Court's decision, restore the Municipal Court's restitution order, and grant various interim measures to protect their property rights. The Applicants argued that the Public Prosecutor did not have the right to submit a Request for Protection of Legality; the Request was filed in the wrong court since the Special Chamber had exclusive jurisdiction over the appeal, and the appeal was time-barred by the Rules of the Special Chamber.

The Court denied the request for interim measures because the Applicants did not demonstrate a potential for irreparable damage. It held that the Referral was inadmissible *ratione temporis* because it dealt with issues occurring prior to implementation of the Constitution. The Court reasoned that even if the alleged violations were continuing in nature and therefore within its temporal jurisdiction, the Referral was nonetheless inadmissible because the Applicants had failed to exhaust all available legal remedies in light of the pendency of the Municipal Court matter, citing *Selmouni v. France*, *Azinas v. Cyprus*, *AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo* and *Mimoza Kusari-Lila vs. The Central Election Commission*.

Pristina, 17 August 2011
Ref. No.: RK 134/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 18/10

Applicants

Mr. Denic D. Mladen and Mr. Vitkovic-Denic D. Milorad

Constitutional Review of the Decision of the Supreme Court of Kosovo, Cml.-Gzz. br. 36/2007, dated 13 December 2007

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. The Applicants are Mr. Denic D. Mladen and Mr. Vitkovic-Denic D. Milorad, residing in Kraljevo, Serbia, represented by Mr. Vitkovic M. Branislav, a practicing lawyer in Kraljevo, Serbia.

Challenged decision

2. The challenged decision is Decision Cml.-Gzz. br. 36/2007 of the Supreme Court of Kosovo, dated 13 December 2007, which was served upon the Applicants on 21 January 2008.

Subject Matter

3. The Applicants allege that the decision of the Supreme Court is in violation of Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to a Fair and Impartial Trial], Article 32 [Right to Legal Remedies], and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: "the Constitution").

Legal Basis

4. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: "the Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

5. The Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 24 February 2010.

6. On 15 March 2010, the President of the Constitutional Court, by Order No.GJR. 18/10, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Constitutional Court, by Order No.KSH. 18/10, appointed the Review Panel consisting of Judges Kadri Kryeziu (Presiding), Iliriana Islami and Gjyljeta Mushkolaj.

7. On 12 April 2011, the Review Panel, consisting of Kadri Kryeziu (Presiding), Iliriana Islami and Gjyljeta Mushkolaj considered the Report of the Judge Rapporteur Snezhana Botusharova and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

8. The Applicants are the exclusive legal heirs of Mr. Danic Dragoljub, their late father, who was the owner of k.p. 1536/1, a plot of land in Jagnjilo, KZ Pristina. On 20 July 1946, 3 December 1947 and 20 August 1953, multiple sections were expropriated without compensation.

9. Ownership of the land was officially transferred by a contract between the owner (Danic V. Dragoljub) and the General Agricultural Cooperative "Gomje Dobrevo." This contract was signed on 12 June 1961 and certified by the District Court in Pristina on 30 October 1962. The contract terms provided Mr. Dragoljub with 100,000 dinars (2,533.84 Euro in today's currency) as compensation for the land.

10. On 29 January 1964, "Gomje Dobrevo" was attached to the Industrial Agricultural Cooperative "Kosovo-Export" from Kosovo Polja. As a result, "Kosovo-Export" gained ownership of the land.

11. On 21 February 1997, the Municipal Court of Pristina issued Judgment P.br. 395/96, which transferred the right of ownership of the land to Mitrovic Pane Marko. At a later stage, Judgment P.br. 395/96 was

discovered to be a forged document, as confirmed by the District Public Prosecutor in Pristina by ruling PP.br. 415-1/2005. Nonetheless, before the Judgment was known to be fake, the Office of Cadastre and Geodesy in the Municipality of Pristina used that faked Judgment as the basis for transferring the ownership of the land to Marko on 20 August 1998 (br. 208/03).

12. On 7 March 1997, the Applicants filed a law suit with the Municipal Court of Pristina (P.br. 236/97), requesting restitution of the land of their predecessor. These proceedings remained suspended during the war.

13. On 19 March 2004, Marko sold the land to two buyers.

14. On 4 December 2006, the Applicants re-filed the law suit with the Special Chamber of the Supreme Court for Kosovo Trust Agency Related Matters. By decision SCC-06-0498 of 31 January 2007, the Special Chamber granted authority to the Municipal Court of Pristina to act as the court of first instance, but also mandated that any appeals should be filed with the Special Chamber.

15. On 16 April 2007, the Municipal Court of Pristina ruled, by Decision P.Gr. 236/97, that the 12 June 1961 contract transferring the disputed land to "Gomje Dobrevo" had been concluded under coercive conditions, thus rendering the contract null and void and that Marko's right to ownership had been dissolved by the fact that the court decision, which he had used to obtain ownership of the land, had been forged.

16. Therefore, the Court held that the last legitimate owner of the land was the predecessor of the Applicants and returned the right of ownership to the Applicants. The Court also held that the Applicants were under the obligation to reimburse the compensation received by their predecessor (2,533.84 Euro) to Kosovo Export.

17. According to the Municipal Court, this decision would become final (*res judicata*) 15 days after receipt of the decision. The Applicants received their copy of the Municipal Court's decision on 20 April 2007. Therefore, according to the directive of the Municipal Court, the decision should be regarded as final as of 5 May 2007, whereas, according to the UNMIK Rules, the decision should be regarded as final as of 20 June 2007. In their Referral, the Applicants calculate the time period for the decision having become "*res judicata*" by using the UNMIK Rules.

18. On 6 July 2007, after the decision of the Municipal Court had become "*res judicata*" according to the Rules of both the Municipal Court and

UNMIK, the Public Prosecutor submitted a Request for the Protection of Legality against the Judgment of the Municipal Court P.br. 236/97 with the Supreme Court. The Applicants were not a party to these proceedings.

19. On 13 December 2007, the Supreme Court issued Decision Cml-Gzz br. 36/2007, which annulled Judgment P.br. 236/97 of the Municipal Court and returned the law suit for retrial to the Court of first instance.

20. The hearing in that case has apparently not yet taken place.

Applicant's Allegations

21. The Applicants claim that the Public Prosecutor did not have the right to submit a Request for Protection of Legality.
22. The Applicants further claim that the Public Prosecutor did not file the appeal in the correct court and assert that only the Special Chamber of the Supreme Court had competence to hear the appeal, as indicated in Decision SCC-06-0498 of the Special Chamber.

23. The Applicants also claim that the Public Prosecutor's appeal was not filed within the time limit prescribed by the Rules of the Special Chamber.

24. For the above reasons, the Applicants allege that the decision of the Supreme Court, Cml.-Gzz. br. 36/2007, of 13 December 2007 violates Articles 22(1) [Universal Declaration on Human Rights], 22(2) [European Convention for the Protection of Human Rights] and 22(5) [Convention on Elimination of All Forms of Racial Discrimination] of the Constitution, respectively.

25. The Applicants also claim that the Supreme Court decision violates Article 31 [Right to Fair and Impartial Trial], paragraph 1 of the Constitution, which provides: *"Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public power."*

26. The Applicants further claim that the Supreme Court decision violates Article 32 [Right to Legal remedies] of the Constitution, which states: "Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law."

27. Finally, the Applicants assert that the Supreme Court decision violates Article 46 [Protection of Property], paragraph 1 of the Constitution, providing: "The right to own property is guaranteed."

28. The Applicants request the Constitutional Court to quash the Decision of the Supreme Court Cml.-Gzz. br. 36/2007 of 13 December 2007 and to restore the decision of the Court of first instance, P.br. 236/97 of 16 April 2006.

29. The Applicants also seek interim measures that prohibit the Municipal Cadastre Office (Pristina) to administer any property ownership changes regarding the disputed land, prohibiting the Department of Urban Planning from issuing building permits on the land, and preventing the construction of any civil works thereon.

Assessment of the request for Interim Measure

30. The Applicants have requested the Court to impose interim measures on the Municipal Cadastre Office.

31. However, the Court considers that the submissions of the Applicants do not contain sufficient evidence or reasons, which might justify the imposition of interim measures. In particular, the Applicants have not shown, as required by Article 27 of the Law, that they will suffer irreparable damage, if interim measures are not granted. Moreover, it has not been established that the imposition of interim measures would be in the public interest.

32. Therefore, the requirements for the imposition of interim measures are not satisfied and the Applicants' request must be rejected.

Assessment of the admissibility of the Referral

33. As to the Applicants' complaint that they have been deprived of their property by Decision Cml.-Gzz br. 36/2007 of the Supreme Court dated 13 December 2007, the Court notes that, in order to adjudicate the Applicants' Referral, it must first be examined whether the Applicants have fulfilled the admissibility requirements laid down by the Constitution, the Law and the Rules of Procedure.

34. From their submissions it appears that the Applicants were served with the decision of the Supreme Court on 21 January 2008, that is to say, before the entry into force of the Constitution, and that they submitted their Referral to the Court on 24 February 2010.

35. The Court must, thus, first establish, whether the matters raised in the Referral "fall under its jurisdiction". In this respect, the Court considers that the public authorities of the Republic of Kosovo can only be required to answer to facts and acts which occurred subsequent to the entry into force of the Constitution on 15 June 2008. Accordingly, the Court cannot deal with a Referral relating to events that occurred before the entry into force of the Constitution.

36. As to the present Referral, the Court notes that it deals with issues, which happened before 15 June 2008 and, thus, fall outside the Court's jurisdiction. The Court would, therefore, have to reject the Referral as incompatible *ratione temporis*.

37. Even assuming that there might be a continuing situation in the present case, if the violation of the Constitution was caused by an act committed prior to the entry into force of the Constitution and the consequences of that original act still exist, granting the Court jurisdiction to examine the complaint, the Referral is inadmissible.

38. At the proceedings on 13 December 2007, where the Applicants were not present, the Supreme Court allowed the State Prosecutor's Request for Protection of Legality, annulled the Judgment of the Municipal Court of 16 April 2006 and returned the case to the Municipal Court for retrial. So far, the Applicants have not submitted any evidence showing that the Municipal Court has already scheduled a hearing and has taken a decision on the matter, let alone that they have raised the same complaints, at least implicitly or in substance, before the Municipal Court as they have done before this Court.

39. In this connection, reference is made to Article 113.7 of the Constitution and 47(2) of the Law, according to which individuals, who submit a referral to the Court, must show that they have exhausted all legal remedies available under the applicable law.

40. The Court emphasizes that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. This rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no 56679/00, decision of 28 April 2004).

41. This Court applied the same reasoning, when it issued Resolution on Inadmissibility in the case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case KI 41/09 of 27 January 2010, and in the Resolution on Inadmissibility in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. 73/09 of 23 March 2010.

42. As to the present case, it is clear from the Applicants' submissions, that, so far, they have not raised or pursued the alleged violations in the pending proceedings before the Municipal Court or before any higher instance courts, if their claim before these regular courts would not be successful, then the Applicants' can bring a new Referral before this Court.

43. It follows, that the Applicants have not exhausted all legal remedies available under applicable law, as required by Article 113.7 of the Constitution and Article 47(2) of the Law.

FOR THESE REASONS

The Court decides, pursuant to Article 20 of the Law on the Constitutional Court, and Rule 56(2) of the Rules of Procedure, decides, in its session held on 12 April 2011, unanimously,

DECIDES

I. TO REJECT the Request for Interim Measures;

II. TO REJECT the Referral as inadmissible;

III. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Arta Hyseni vs. Decision A No. 1030/2009 of the Supreme Court of Kosovo

Case KI 21-2010, decision of 17 August 2011

Keywords: ballot counting, burden of proof, equality before the law, freedom of election and participation, individual referral, international agreements and instruments, manifestly ill-founded referral

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution challenging the Supreme Court's decision to reject her complaint against the refusal of the Election Complaints and Appeals Panel (ECAP) to certify her election to the Podujeva Municipal Assembly, arguing that the rejection violated Articles 3, 24 and 45 of the Constitution. She argued that ECAP rejected her first appeal without examining the facts and deemed her second appeal as inadmissible despite factual support, and that the Supreme Court unjustly held that neither the inconsistency between preliminary and final election results nor the Applicant's expectation was a legitimate basis for reversing the CEC's decision.

The Court found that the CEC and the ECAP were given authority to ensure certainty in the electoral process, indicating that the Constitutional Court will annul an electoral certification only after an Applicant has met a high burden of proof that a very serious violation of Constitutional guarantees of individual rights and freedoms has occurred. Crediting the determinations by ECAP and the Supreme Court, the Court held pursuant to Rules 36.1(c) and 36.2(d) that the Referral was inadmissible because the Applicant had failed to sufficiently substantiate her claim.

Prishtina, July 2011
Ref. No.: RK/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 21/10

Applicant

Arta Hyseni

vs.

The Decision of the Supreme Court of Kosovo, dated 12 February 2010, A No. 1030/2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Adopts the following Resolution:

Applicant

1. The Applicant is Ms. Arta Hyseni from Llapashtica e Poshtme, Pudujeva.

Challenged Decision

2. The Decision of the Supreme Court of Kosovo, dated 12 February 2010, A No. 1030/2009

Legal basis

3. Article 113 of the Constitution of the Republic of Kosovo (hereinafter: 'the Constitution'); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter 'the Law'), and Section 56(2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter 'the Rules of Procedure').

Subject matter

4. On 30 March 2010 the Applicant filed a Referral with the Constitutional Court of Kosovo. The Applicant challenged the decision of the Supreme

Court of Kosovo, dated 12 February 2010, A No. 1030/2009 which rejected her complaint against the Election Commission on Appeals and Complaints (ECAC) arising from her dissatisfaction with the failure to declare her elected to the Municipal Assembly of Podujeva following the Local Elections held on 15 November 2009.

5. In particular, the Applicant alleges that the following provisions of the Constitution were violated were violated: Articles 3 and 24 [EQUALITY BEFORE THE LAW], and Article 45 [FREEDOM OF ELECTION AND PARTICIPATION].

Summary of proceedings before the Constitutional Court

6. The Applicant filed a Referral with the Constitutional Court on 30 March 2010. The President of the Court appointed Prof. Dr. Ivan Cukalovic as Judge Rapporteur and Review Panel composed of Enver Hasani (presiding) and Judges Kadri Kryeziu, and Iliriana Islami.

Summary of the Facts

7. The Applicant was a candidate in the Local Elections held in Kosovo on 15 November 2009 for the Municipal Assembly of Podujeva. The Applicant maintains that the preliminary results issued by the Central Elections Commission (CEC) showed that she obtained 179 votes and was therefore entitled to be elected as a member of the Municipal Assembly for Pudujeva. However, when the final results were certified by the CEC on 14 December 2009 she was shown as having obtained 187 votes whereas another candidate had received 192 votes. This meant that she was not elected to the Municipal Assembly.

8. She states that she suffered damage arising from the Local Election because of either intentional manipulation or due to a mathematical miscount of the votes. The Applicant originally appealed the result to the Election Complaints and Appeals Commission (ECAC) on 17 December 2009.

9. The ECAC rejected her complaint through its decision 495/2009, dated 22 December 2009. She maintains that the ECAC did not review the factual situation of the votes at all. The ECAC in that decision stated that because the Central Elections Commission (CEC) had certified the results of the Local Elections on 14 December 2009 that the results were binding. The ECAC therefore rejected the complaint as unfounded.

10. On 29 December 2009, dissatisfied with this result, the Applicant purported to make a further complaint to the ECAC. This time she states

that she submitted all the evidence of the complaint and she included tabulated clarification of the vote count of the election.

11. By its decision A. no.529/2009 the ECAC concluded that the appeal of the Applicant related to an adjudicated matter and concluded that the second complaint was inadmissible.

12. The Applicant appealed this decision to the Supreme Court of Kosovo. The Supreme Court rejected her appeal on 12 February 2010. In its Judgment the Supreme Court stated that the alleged inconsistency of final results with preliminary results or the expectation of the complainant did not present a reason for complaining against the CEC.

Assessment of the Admissibility of the Referral

13. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, further specified in the Law on the Constitutional Court and the Rules of Procedure.

14. In its Resolution on Inadmissibility issued in the Referral of Mimosa Kusari-Lila, In a previous case of Ms. Mimoza Kusari, KI- 73/09, published on 18 March 2010, the Constitutional Court referred to the importance of elections in a democratic society. The Constitutional Court referred to that Resolution and repeated its observations in another Judgment of the Court in the case of Kimete Bikliqi vs. The Central Election Commission, Case No. KI. 09/10, dated 14 December 2010. Some quotations from the former Decision are worth emphasising again.

20. Article 45 of the Constitution of Kosovo provides:

Article 45 [Freedom of Election and Participation]

1. *Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.*

2. *The vote is personal, equal, free and secret.*
3. *State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.*

21. According to Article 22 of the Constitution of Kosovo the European Convention for the Protection of Human Rights and Fundamental

Freedoms and its Protocols are directly applicable in the Republic of Kosovo. They form part of its domestic law. Article 3 of the First Protocol provides for the right to free elections. It provides that free elections shall be held "…at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people…"

22. Article 123.2 of the Constitution of the Republic of Kosovo provides that "Local self-government is exercised by representative bodies elected through general, equal, free, direct and secret ballot elections." The Assembly of Kosovo has provided a mechanism for the holding of General and Local Elections by the enactment of the Law on General Elections, Law No. 03/L-073, in the Republic of Kosovo and the Law on Local Elections in the Republic of Kosovo, Law No. 03/L-040.

23. The natures of the rights to vote in elections and to stand for elections are differentiated by the case law of the European Court of Human Rights (ECtHR). The Court has pointed out that the right to vote is an active right and the right to stand for election is a passive right. The Applicant maintains that her right to be elected has been violated. There is a difference, however, between the right to be elected and the right to stand for election. The jurisprudence of the ECtHR points to the considerable leeway that States have in devising electoral systems and they allow a wide margin of appreciation as to how elections are conducted and how results are certified. In the case of United Communist Party of Turkey v Turkey the Court stated that "…[States] have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see Sadak and Others (no. 2) v. Turkey, nos. 25144/94 et al., § 31, ECHR 2002-IV).

24. The ECtHR has consistently expressed the importance of free elections and of democracy in its Judgments. In the same Judgment the Court expressed its view in the following terms "Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it." The ECtHR in the same Judgment quoted, with approval, The Code of Good Practice was adopted by the European Commission for Democracy through Law (Venice Commission) at its 51st (Guidelines) and 52nd (Report) sessions on 5-6 July and 18-19 October 2002 (Opinion no. 190/2002, CDL-AD (2002) 23 rev.). There the Venice Commission stated:

The five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals.

25. The Venice Commission points out that the organisation of elections should be overseen by an impartial body in charge of applying electoral law and that there be an effective system of appeal. Under the law in Kosovo these two functions are performed by the CEC and the ECAC, respectively, subject to such court appeals as may be permitted by law. These are the bodies that decide on all matters relating to the running of elections, certification of results and who adjudicate on complaints and permitted appeals concerning the electoral process, as established by law and the electoral rules. They are permanent independent bodies.

26. The rationale for the CEC and the ECAC having such authority lies in the proposition that there must be certainty in the electoral process. The necessity of certainty in the electoral process requires the annulling of elections only for the most serious violations and a high burden of proof lies with whoever alleged such violations.

27. The role of the Constitutional Court in the electoral process is recognized by the Law on General Elections where it is provided in Article 106.1 that the CEC shall certify election results after complaints have been adjudicated upon by the ECAC and by the Constitutional Court. This Court has no other role in these electoral processes and it cannot revisit or overturn the decisions of the CEC or the ECAC, subject to the important provision that the Court will do so if there has been a violation of the individual rights and freedoms guaranteed by the Constitution."

15. When the Constitutional Court examines the events that led to the bringing of the Referral it notes the fact that the Applicant had a Decision from the ECAC in relation to her dissatisfaction with the results of the Local Election for the Municipality of Podujeva. She attempted to lodge a further Appeal to the ECAC and it decided that her appeal had already been dealt with. She appealed this second Decision of the ECAC to the Supreme Court who decided that her appeal to them was not founded.

16. Rule 36.1 and 2 of the Rules provide:

Rule 36

Admissibility Criteria

1. The Court may only deal with Referrals if:

a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted, or

b) the Referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or

c) the Referral is not manifestly ill-founded.

2. The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: a) the Referral is not prima facie justified, or

b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

d) when the Applicant does not sufficiently substantiate his claim;

17. This Court recalls that it cannot revisit or overturn the Decisions of the CEC or the ECAC unless there has been a violation of individual rights and freedoms guaranteed by the Constitution. In this regard the onus is on the Applicant to establish that the violation has occurred. Bearing in mind, again, the wide margin of appreciation that is granted to Kosovo in how it conducts its elections the Constitutional Court is not satisfied that the Applicant in the particular circumstances of this Referral has substantiated her claim and therefore the Court must reject the Referral as being manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT this Referral as Inadmissible;

II. The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Amrush Rexhepi vs. Judgment Rev. No. 256/08 of the Supreme Court

Case KI 12-2011, decision of 17 August 2011

Keywords: Comasation Commission, compensation of property right, individual referral, lost profits, manifestly ill-founded referral, right to property, violation of individual rights and freedoms

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution contending that the Supreme Court violated an unspecified right to property guaranteed under the Constitution and international conventions when it affirmed lower court rejections of a lost profits compensation claim against the Municipality of Gllogoc based an alleged inability to use farmland due to an error in the Comasation Commission's land allocation process. The Gllogoc Municipal Court denied relief on the ground that the Applicant had failed to insist upon possession and use of the contested land, and finding his claim against the municipality for damages was unfounded, which was affirmed by the Prishtina District Court and the Supreme Court.

The Court held that the Referral was inadmissible as manifestly ill-founded under Rule 36.2(b) of the Rules of Procedure because of an absence of *prima facie* evidence that either the Supreme Court's decision had violated any of the Applicant's fundamental rights and freedoms, or the Supreme Court's decision was arbitrary, citing ECtHR, *Vanek vs. The Republic of Slovakia*, and noting that the Applicant had been compensated for the expropriated property.

Prishtina, 17 August 2011
Ref.No.:RK131/11

RESOLUTION ON INADMISSIBILITY

for

Referral No. KI 12/11

The Applicant

Amrush Rexhepi

Constitutional review of the Judgment of the Supreme Court of Kosovo, Rev. No. 256/08, dated 15. November 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Mr. Amrush Rexhepi from the village of Zabel i Epërm, Municipality of Gllogoc.

Challenged Decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo, Rev. No. 256/08, dated 15. November 2010, by which revision of the Judgment of the District Court of Prishtina, Ac. No. 512/2006 dated 25. February 2008 was rejected.

Subject Matter

3. The Applicant challenges the Judgment of the Supreme Court of Kosovo Rev. No. 256/08 dated 15 November 2010, without naming particular articles of the Constitution, but he stresses that the right to property is guaranteed by the Constitution of Kosovo and international Conventions everywhere around the world and that court decisions caused injustice to him.

Legal Basis

4. Article 113.7 and Article 21.4 of the Constitution; Article 20, Article 22.7 and Article 22.8 of the Law (No. 03/L-121) on the Constitutional Court of the Republic of Kosovo dated 16 December 2008 (hereinafter referred to as: the "Law") and Rule 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the "Rules of Procedure").

Proceedings at the Constitutional Court

5. The Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the "Court") on 2 February 2011.

6. On 23 March 2011 the Constitutional Court informed Mr. Amrush Rexhepi, the Supreme Court of Kosovo, the District Court of Prishtina and the Municipal Court of Gllogoc that proceedings for constitutional review have been initiated at this Court.

7. On 2 march 2011, the President, by Order No. GJR. 12/11, appointed Judge Ivan Čukalović as Judge Rapporteur.

8. On the same date, the President, by Order No. KSH. 12/11, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Prof. Dr. Gjyljeta Mushkolaj and Prof. Dr. Iliriana Islami.

9. On 31 March 2011 the Supreme Court of Kosovo, in its answer to the Constitutional Court of Kosovo stated that they do not have anything new to add and that their opinion on the subject matter is presented in the Judgment of the Supreme Court of Kosovo.

10. On 8 April 2011 the District Court of Prishtina, in its answer to the Constitutional Court of Kosovo, delivered as additional documents copies of all 3 judgments rendered by the aforementioned courts.

Summary of Facts

11. On 8 May 1987 the Comasation Commission [interpreters note: comasation - redistribution of land/land management] of the Gllogoc Municipality by Resolution 01. No. 461-29 executed land distribution in the Cadastral Municipality of "Zabel i Epërm".

12. The Applicant entered into the comasation process with the land area of 2.39.35 ha, which the Comasation Commission evaluated at 13,900.89 points.

13. Considering the fact that reduction in the amount of 0.025 was valid for all participants in the comasation (to ensure roads and irrigation channels). The Applicant received land at the cadastral chart 427, plot of land No. 35, type plough land class III and IV with the area of 0.75.20 ha and cadastral chart 427, plot of land No. 42, type plough land class IV, V and VI with the area of 1.12.26 ha, which in total is 1.87.46 ha, and which after converting it into points summed up to 13,623.08.

14. From this statement of facts it can be established that the area allocated to the Applicant is smaller compared to the area with which the Applicant entered in the comasation process, because the value of the land with which he entered into the comasation process is lower than the value of the land he received during the comasation process, while the value of the points is approximately the same compared to the points he had when he entered the comasation process.

15. Paragraph II of the holding of the Resolution of the Comasation Commission of the Gllogoc Municipality, 01. No. 461-29 dated 8 May 1987, states that handover of the land was executed with Minutes No. 461-29 dated 17 November 1986 and after this decision would become final, the handover of the land was to be considered permanent.

16. The Applicant didn't file an appeal with the Directorate for judicial property relations of the Province on this Resolution.

17. The Applicant claims that the Resolution of the Comasation Commission of the Gllogoc Municipality, 01. No. 461-29 dated 8 May 1987, was not entirely executed in the field and that he is using only 1.54.95 ha.

18. Due to such factual situation and following Applicant's request to determine the exact factual situation, the court rendered a decision to carry out a site inspection.

19. Namely, after conducting control of the site on 11 August 2004 and following the written opinion and conclusion of the geodesy expert, Mr. Xhafer Rama, dated 18 July 2005 with changes and clarifications dated 18 October 2005, the following was concluded:

    a) That Amrush Rexhepi took the possession and is using the land that was allocated to him as per the Decision on comasation at the cadastral chart 427, plot No. 35 with the area of 0.78.28 ha.

    b) That Amrush Rexhepi did not take the possession and is not using the land that was allocated to him as per the Decision on comasation at the cadastral chart 427, plot No. 42; and that this plot is in the possession of Nexhat Avdullahu with an area of 0.12.19 ha, Banush Avdullahu with an area of 0.28.13 ha, Shefqet Avdullahu with an area of 0.60.95 ha and Sami Avdullahu with an area of 0.08.50 ha, which according to the expert's opinion are holding these plots without any legal rights to posses.

    c) The expert determined that Amrush Rexhepi took the possession and is using the land from the cadastral chart 425, plot No. 30 with an

area of 0.58.97 ha; cadastral chart 424, plot No. 31/1 with an area of 0.29.70 ha; cadastral chart 423, plot No. 15 with an area of 0.75.10 ha, and that update was not executed as per Resolution of the Comasation Commission of the Gllogoc Municipality.

d) Finally, the geodesy expert's opinion is that according to the sketches, the area which was allocated to Amrush Rexhepi is smaller for 0.20.51 ha from the one he is using now, but the area that was allocated to him by the resolution, compared to the area with which he entered into comasation, is the same when considering it with value points.

20. Based on such opinion of the expert, Amrush Rexhepi filed a claim suit by which he requested compensation from the Municipality of Gllogoc for lost profits due to the inability to use the land with the area of 0.20.51 for sowing crops during the years 2001, 2002, 2003, 2004, 2005 and 2006 in total amount of 1,133.34 Euros, with 3.5% interest since 2001.

21. At the main hearing on 9 March 2006 the Municipal Court of Gllogoc, through Judgment C. No. 09/04, rejected the claim suit of Mr. Amrush Rexhepi as ungrounded, by which he claimed compensation from the Municipality of Gllogoc for lost profits due to the inability to use the land with the area of 0.20.51 ha.

22. In the reasoning of the Judgment, the Municipal Court of Gllogoc stated that it accepted the expert's opinion in its entirety, which was harmonized with other material evidence in the case file, stressing that with Resolution of the Comasation Commission of the Gllogoc Municipality, 01. No. 461-29 dated 8 May 1987, Mr. Amrush Rexhepi was allocated land from the cadastral chart 427, plot No's 35 and 42 and that Amrush Rexhepi was obliged to insist to be given into possession and use the plots which were allocated to him by the Comasation Commission and not to take possession of other plots.

23. The Municipal Court of Gllogoc concluded that in the present case the Municipality of Gllogoc did not cause damage to Mr. Amrush Rexhepi in any way, as he claimed in the claim suit, and therefore the claim was rejected as ungrounded.

24. Unsatisfied with such decision, Mr. Amrush Rexhepi filed an appeal with the District Court of Prishtina.

25. The District Court of Prishtina through Judgment Ac. No. 512/2006, dated 25 February 2008, rejects the appeal as unfounded and confirmed

the Judgment of the Municipal Court of Gllogoc C. No. 09/04, dated 9 March 2006.

26. Mr. Amrush Rexhepi filed a request for Revision of the Judgment of the District Court of Prishtina Ac. No. 512/2006, dated 25 February 2008, to the Supreme Court of Kosovo.

27. The Supreme Court of Kosovo by Judgment Rev. No. 256/2008 dated 15 November 2010 rejected the request for revision of the Judgment of the District Court of Prishtina Ac. No. 512/2006, dated 25 February 2008, as unfounded.

Applicant's allegations

28. The Applicant claims that Judgments of court authorities in Kosovo, through which the claim suit of Mr. Amrush Rexhepi was rejected as ungrounded, in which he requested compensation from the Municipality of Gllogoc for lost profits due to the inability to use the land with the area of 0.20.51 for sowing crops during the years 2001, 2002, 2003, 2004, 2005 and 2006, caused injustice to him, although he did not name concrete articles of the Constitution.

29. Therefore, requests from the Constitutional Court to correct this injustice, for the Municipality of Gllogoc to correct this deficiency and transfer to him other land that remained unallocated after the comasation.

Preliminary assessment of admissibility of the Referral

30. In order for the Referral to be admissible, the Court first needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, Law and the Rules of Procedure of the Constitutional Court

31. The Applicant's Referral was filed with the Constitutional Court on 7 February 2011, whilst the last Decision on this case was delivered by the Supreme Court of Kosovo on 15 November 2010. Therefore, the Court concludes that the Referral is filed pursuant to Article 49 of the Law.

32. Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts (see, Resolution on Inadmissibility, Case KI 13/09, Sevdail Avdyli, dated 17 June 2010).

33. In the present case, the Applicant has not shown any prima facie evidence that the Judgment of the Supreme Court violated his rights and freedoms guaranteed in Chapter II of the Constitution (Fundamental Rights and Freedoms, Articles 21 – 56 of the Constitution) or that the Supreme Court rendered an arbitrary decision when rejecting the applicants claim as unfounded (see, Vanek vs. The Republic of Slovakia, ECtHR Decision on admissibility of the Application No. 53363/99 dated 31 May 2005).

34. In the present case, considering that regular courts established that the Applicant received compensation for the expropriated property, even in a higher number of value points, with a condition that he insisted on using plots of land that were assigned to him by the Comasation Commission and not other plots, the Constitutional Court considers that actions of public authorities have not violated any of his rights guaranteed by the Constitution.

35. From this, it results that the Referral is manifestly ill-founded pursuant to Rule 36.2(b) of the Rules of Procedure, which in its pertinent part reads: "The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: when the presented facts do not in any way justify the allegation of a violation of the constitutional rights,..".

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 36.2(b) of the Rules of Procedure, at the session held on 7 July 2011, unanimously

DECIDED

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Eduard Thaqi (also known as Sokol Thaqi) vs. Decision No. 398-SHPK-2002 of the Kosovo Police

Case KI 100-2010, decision of 8 September 2011

Keywords: administrative dispute, inadmissible *ratione temporis*, individual referral, reemployment, right to work and exercise profession, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution challenging a Kosovo Police decision terminating his employment on the ground that it violated his right to work under Article 49 of the Constitution. The Applicant argued that he was entitled to reinstatement because he provided proof to the employer that he had fulfilled an educational requirement. The Applicant requested the Court to reinstate him as a Kosovo Police Officer, award compensatory damages, and protect his identify from disclosure.

The Court held that the Referral was inadmissible *ratione temporis* pursuant to Rule 36.3(h) of the Rules of Procedure because the alleged Constitutional violation occurred prior to the Constitution's implementation, citing *Blečič v. Croatia* for the proposition that temporal jurisdiction involves considerations of the factual subject matter of the complaint and the scope of the Constitutional right involved.

Prishtina, 8 September 2011
Ref . No.: 136/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 100/10

Applicant

Eduard Thaqi (also known as Sokol Thaqi)

Constitutional Review of the Decision of the Kosovo Police, no.398-SHPK-2002 dated 22 October 2002

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Ivan Čukalović, Judge
Snezhana Botusharova, Judge
Gjylieta Mushkolaj, Judge and
lliriana Islami, Judge

Applicant

1. The Applicant is Mr. Eduard Thaqi (formerly known as Sokol Thaqi) residing in Kishnicë.

Opposing party

2. The opposing party is the Kosovo Police

Subject matter

3. The Applicant challenges the Kosovo Police Decision 398-SHPK-2002, dated of 22 October 2002, whereby he was expelled from work.

4. Moreover, the Applicant alleges a violation of Article 49 [Right to work and exercise profession] of the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”).

5. Furthermore, the Applicant requested his identity not to be disclosed in the decision of the Constitutional Court.

Legal basis

6. Article 113.7 of the Constitution, Article 49, 56 and 58 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 36 1 (b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

7. On 8 October 2010, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

8. On 17 November 2010, the Referral was communicated to the Kosovo Police, which replied on 6 December 2010.

9. On 7 December 2010, the President appointed Judge Almiro Rodrigues as Judge Rapporteur. On the same date, the President appointed the Review Panel composed of Judges Ivan Čukalović (Presiding), Kadri Kryeziu and Enver Hasani.

10. On 6 January 2011, the Court requested additional documents, which the Applicant submitted on 18 January 2011.

11. On 25 March 2011, the Referral was communicated to the MEST, which replied on 28 March 2011.

12. On 20 May 2011, the Review Panel considered the report of Judge Rapporteur Almiro Rodrigues and made a recommendation to the court on inadmissibility.

Summary of the facts

13. The Applicant joined Kosovo Police on 19 February 2000, where he served in different positions, one of them being in the capacity of Investigator within the Unit for Missing Persons.

14. On 22 October 2002, the Applicant was expelled from work for the reason that, *inter alia*, his employment record contained inaccurate information. The Kosovo Police decision stated the following:

    "Sokol Thaqi you were insincere and your application in Kosovo Police Service contains inaccurate information/documents. You have failed to meet minimal conditions for employment in Kosovo Police Service."
    "Based on the evidence against you, Sokol Thaqi KPS # 0566, you are expelled from Kosovo Police Service due to violation of Principles and Procedures of the Kosovo Police Service."

15. On 3 December 2002, the Applicant had an interview with the Kosovo Police Appeals Board, whereby he was, allegedly, promised to be reinstated as Kosovo Police officer on the condition that he provides a valid secondary school diploma. Thereupon, the Applicant enrolled in

the secondary school in Obiliq and obtained a secondary school diploma, which he submitted to the Kosovo Police.

16. On 28 August 2004, after having obtained the secondary school diploma, the Applicant requested to be rehired by the Kosovo Police.

17. The Kosovo Police went to the Ministry of Education, Science and Technology (MEST), in order to have the diploma submitted by the Applicant verified.

18. The Applicant states that the Kosovo Police was informed by MEST that the validity of Applicant's diploma was contentious.

19. On 25 November 2004 and onwards, the Applicant initiated some administrative and judicial proceedings in order to clarify the validity of the diploma.

20. Finally, on 2 May 2006, the MEST validated the certificates and diplomas of all the students who had passed the respective exams of the relevant school year, including the Applicant.

Applicant's allegations

21. The Applicant claims that, even though he finished and obtained a valid school diploma, he was still not rehired as Kosovo Police officer, in spite of the fact that he was promised to be rehired once he has provided the said qualifications.

22. The Applicant also claims that he had a successful interview with the Kosovo Police and was only waiting to resume his work as an officer of the Kosovo Police

23. In addition, the Applicant alleges that he was encouraged by the Kosovo Police to apply for newly available positions in the Force, which, according to the Applicant is impossible, because the Kosovo Police is not recruiting new cadets anymore.

24. As to the request on his identity not to be disclosed, the Applicant was well aware that a decision could be taken only based on arguments presented by him. No reasons were given to support that request.

25. From the submitted documents it appears that the Applicant asks the Court to:

    a) reinstate him as Kosovo Police officer;

b) award him with just compensation for the damages incurred during the period he remained unemployed.

Assessment of the admissibility of the Referral

26. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

27. As to the Applicant's Referral, the Court refers to Rule 36 (3) (h) which reads as follows:

"A Referral may also be deemed inadmissible in any of the following cases:

(h) the Referral is incompatible ratione temporis with the Constitution."

28. In order to establish the Court's temporal jurisdiction it is essential to identify, in each specific case, the exact time of alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of constitutional right alleged to have been violated (see, *mutatis mutandis, European Court of Human Rights Chamber Judgment in case of Blečič v. Croatia, Application no.59532/0, dated 8 March 2006, para.82).*

29. The Court notes that the Applicant complains that his right to work guaranteed by the Constitution of the Republic of Kosovo has been violated. In that respect the Applicant challenges decision no.398-SHPK-2002 of the Kosovo Police which is dated 22 October 2002.

30. This means that the alleged interference with Applicant's right guaranteed by the Constitution occurred prior to 15 June 2008 that is the date of the entry into force of the Constitution and from which date the Court has temporal jurisdiction.

31. It follows that the Applicant's referral is incompatible *"ratione temporis"* with the provisions of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution of the Republic of Kosovo and Section 36 (3) (h) of the Rules Procedure, on 20 May 2011, unanimously

DECIDES

I. TO REJECT the referral as inadmissible.

II. TO REJECT the request on his identity not to be disclosed as ungrounded.

III. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

IV. The Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

The Government of the Republic of Kosovo concerning the immunities of Deputies of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo

Case KO 98-2011, decision of 20 September 2011

Keywords: authorized parties, immunity of Assembly Deputies, immunity of Members of Government, immunity of the President, referral by the Prime Minister (Government), separation of powers

The Applicant filed a Referral pursuant to Articles 93.10 and 113.3.1 of the Constitution, requesting an interpretation of the immunities afforded the President of Kosovo, Assembly Deputies and Members of Government, specifying Articles 89, 75.2 and 98 of the Constitution, respectively.

The Court held that the Referral was admissible, concluding that the Prime Minister was an authorized party pursuant to Article 113.3.1 because each question raised an issue related to the abilities of the President, Assembly Deputies and Members of Government to perform their Constitutional functions independently, noting that Chapter III of the Law on the Constitutional Court provides no deadline for Referrals submitted under Article 93.10.

On the merits, the Court held that Articles 75.1, 89 and 98 of the Constitution afford the President, Assembly Deputies and Members of Government functional immunity for actions taken or decision made within the scope of their responsibilities, encompassing opinions expressed, votes cast or decisions made, which is of unlimited duration. The Court clarified that the expression "[w]hile performing his/her duties" refers to performing the work of the Assembly during its plenary and committee meetings.

As for Assembly Deputy immunities, the Court emphasized the importance of separation of powers and the Assembly's independence, citing *Syngelidis v. Greece*. The Assembly President, the Assembly, three Assembly Deputies, and the Parliamentary Group of Vitëvendosja provided various responses and/or comments regarding the issue of immunity, which the Court took into account. The Court relied upon the plain language of Articles 29, 70, 72 and 75 of the Constitution when resolving the question of a Deputy's immunities, noting also that a Deputy, like any other person under the jurisdiction of Kosovo courts, enjoys the protections of Articles 22, 24.1, 29, 30, 31 and 54 of the Constitution, as well as Articles 5 and 6 of the European Convention on Human Rights. It held that a Deputy is not immune from criminal prosecution for actions taken or decision made *outside* the scope of his/her responsibilities, regardless of whether the criminal acts occurred

prior to election or during service as a Deputy. It held that a Deputy could not be dismissed from the Assembly, except for reasons outlined in Article 70 of the Constitution. The Court held that with the Assembly's approval an Assembly Deputy could be arrested or detained while performing his/her duties at plenary meetings of the Assembly and/or of its committees. It also held that an Assembly Deputy could be arrested or detained without the Assembly's approval when there are no plenary meetings of the Assembly or meetings of its committees. The Court held that a Deputy could be arrested or detained without approval of the Assembly when caught committing a serious offence that is punishable by five or more years of imprisonment. It also held that a Deputy could be arrested or detained when his/her mandate ends arising from a conviction of a crime and a sentence of one or more years of imprisonment by a final court decision. The Court held that an authorized prosecutor has the right to request the Assembly for waiver of a Deputy's immunity. The Court held that an authorized prosecutor could arrest or detain a Deputy without the Assembly's consent provided that it occurs when there is no plenary meeting of the Assembly or of its committees.

As for the President's immunities, the Court relied upon the plain language of Articles 89, 90 and 91 of the Constitution and the Law on the President, Law No. 03/L-094 when holding that the President is not immune from prosecution for actions taken and decision made *outside* the scope of his/her responsibility, and that a serious crime prosecution may be initiated against the President. It also held that the President is not immune from civil lawsuit for actions taken and decision made *outside* the scope of his/her responsibilities. The Court held that the Assembly could dismiss the President in accordance with Article 91 of the Constitution. However, the Court held that the President could not be subjected to arrest or detention during his/her term of office due to the nature of the functions of the President, which require constant availability.

Regarding Members of Government, the Court relied upon Articles 97 and 98 of the Constitution when holding that they do not have any special immunity for actions taken and decisions made *outside* the scope of their responsibility.

The Court held that the Judgment was effective immediately.

Prishtina, 20 September 2011
Ref. No.: AGJ138/11

JUDGMENT

in

Case No. KO-98/11

Applicant

The Government of the Republic of Kosovo

**Concerning the immunities of
Deputies of the Assembly of the Republic of Kosovo,**

**the President of the Republic of Kosovo and
Members of the Government of the Republic of Kosovo**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Vice-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Referral

1. The Referral was lodged by the Prime Minister of Kosovo, Mr Hashim Thaqi, on behalf of the Government of the Republic of Kosovo (the Government).

2. On 20 July 2011, the Constitutional Court of the Republic of Kosovo (the Constitutional Court) received the Referral containing three separate issues from the Government. The questions submitted to the Court related to the immunities of different state bodies of Kosovo, namely - the deputies of the Assembly, the President, and the members of the Government.

3. The Government considered that there was a necessity to interpret and clarify the questions of immunities of the deputies of the Assembly, the President and members of the Government because "this issue has a direct impact on the democratic functioning of the institutions of the Republic of Kosovo, pursuant to the Constitution of the Republic of Kosovo."

4. The Government stated that it based the Referral on Article 93 (10) and Article 113 (3) (1) of the Constitution.

Proceedings before the Court

5. On 20 July 2011 the Applicant filed the Referral with the Court.

6. On the same date, the President of the Constitutional Court appointed Judge Snezhana Botusharova as the Judge Rapporteur and appointed a Review Panel composed of Judges Robert Carolan (Presiding) and Enver Hasani and Iliriana Islami.

7. On 22 July 2011 the President of the Court notified the President of the Assembly, the President of the Republic of Kosovo and the Prime Minister of the lodging of the Referral and asked them to respond to and comment on the questions raised within 45 days.

8. In addition, in its letter to the President of the Assembly, and in a further one of 26 July 2011 complementing the first letter, in which it was noted that it would be useful to receive deputies' replies and remarks on issues raised in the Referral., the President of the Court asked the President of the Assembly to furnish papers and files, and in particular:

    - The *travaux preparatoires* of the Constitution to the extent that they relate to the several immunities under Articles 75, 89 and 98 of the Constitution;

    - A full copy of the files of the Assembly in relation to the Articles dealing with the immunities of the deputies under the Law on Rights and Responsibilities of Deputies, Law No. 03/L-111, and in particular, copies of all preparatory work of the Assembly, minutes of all meetings and all correspondence concerning the said Articles;

    - A full copy of the files of the Assembly in relation to the Articles dealing with the immunities of the deputies under the Rules of Procedure of the Assembly of Kosovo, adopted on 29 April 2010, and in particular, copies of all preparatory work of the Assembly, minutes

of all meetings and all correspondence concerning the said Articles; and,

- A full copy of the files of the Assembly in relation to the Articles dealing with the immunities of the President of the Republic of Kosovo under the Law No. 03/L-094 on the President of The Republic Of Kosovo, and in particular, copies of all preparatory work of the Assembly, minutes of all meetings and all correspondence concerning the said Articles.

9. On 21 August 2011 Mr. Nait Hasani, a deputy of the Assembly, submitted a reply to the Court giving his view of the questions.

10. On 23 August 2011 Dr. Jakup Krasniqi, President of the Assembly of Kosovo, replying to the President of the Court's letter of 26 July 2011, wrote to the Court and enclosed a letter sent by the Assembly to Mr Xavier De Marnhac, Head of the EULEX Mission in Kosovo, on the issue and he also furnished the Legal Opinion prepared by the Legal Office of the Assembly of Kosovo.

11. On 8 September 2011 a further letter was sent to the President of the Assembly reminding him to furnish the files, papers and other documentation requested on 22 July 2011. The President of the Assembly responded on 9 September 2011 to this reminder, which was received on 12 September 2011. The response had attached the dossiers on the Law on Rights and Responsibilities of the Deputy and on the Rules of Procedure of the Assembly of Kosovo, approved on 29 April 2010.

12. On 9 September 2011 a response and comments were received from Mr Visar Ymeri on behalf of the Parliamentary Group of Vetevendosje.

13. On 12 September 2011 the Constitutional Court received a reply from Ms. Alma Lama, a deputy of the Assembly.

14. On 13 September 2011 the Court received a response, dated 12 September 2011, from Mr Fatmir Limaj, a deputy of the Assembly.

15. On 13 September 2011 a further response, dated 13 September 2011, was received from Dr. Jakup Krasniqi, President of the Assembly,

16. Responses were not received from other deputies of the Assembly, the President of the Republic of Kosovo or from members of the Government.

17. The Review Panel considered the Report prepared by the Judge Rapporteur, Judge Snezhana Botusharova and made a recommendation to the full Court.

18. On 20 September 2011 the Court at its full session decided to give priority to the Referral in view of the nature of the constitutional questions that were raised by the Government and it deliberated and voted on the Referral, .

Responses and comments

A Response of Mr. Nait Hasani, deputy of the Assembly

19. Mr. Nait Hasani stated that he had the immunities guaranteed to him by the Rules of Procedure of the Assembly of Kosovo and the Constitution. He stated that the immunities were clearly defined and that the immunity of a deputy could be waived by the Assembly on the request of a competent body in charge of criminal prosecution.

B Response and comments of the Assembly

20. The response of the Assembly to the Constitutional Court, dated 13 September 2011, sent by Dr. Jakup Krasniqi President of the Assembly, contained his letter dated 15 July 2011 to Mr. Xavier De Marnhac, Head of the EULEX Mission in Kosovo. It stated that there was no incompatibility between the Law on Rights and Responsibilities of the Deputy and the Constitution and there was no need to address the Constitutional Court in the matter. He pointed out that it was completely within the discretion of the Government to refer a question to the Constitutional Court and it did not require a resolution of the Assembly to do that. The letter stated that the Assembly could take procedural action concerning the immunity of a deputy only when a request was made by the General Prosecutor (Albanian: Prokurori i Përgjithshëm i Kosovës, Serbian: Glavni javni tužilac Kosova, Unofficial English translation: Attorney General) based on Article 9 (3) of the Law on Rights and Responsibilities of the Deputy.

21. The Legal Opinion of the Legal Office of the Assembly of Kosovo identified certain constitutional and statutory provisions and maintained that the wording in them was identical. There was, therefore, no incompatibility issue which would require interpretation from the Constitutional Court. Further, the opinion stated that the constitutional provisions did not provide for the possibility of the Assembly to request a resolution from the Government to commence proceedings in the Constitutional Court.

22. Finally, the opinion stated that according to the Constitution and Article 9 of the Law on Rights and Responsibilities of the Deputy, Law No. 03/L-111, criminal prosecution shall not be prevented, suspended or delayed in any way when a suspect is a deputy of the Assembly. It further stated that the judiciary may follow its course by continuing an investigation and a trial. Following final conviction and sentencing to one or more years of imprisonment a deputy's mandate ends prematurely and this can lead to arrest and imprisonment.

C Response and comments of the Parliamentary Group of Vetevendosje

23. Mr. Ymeri in his response on behalf of the Parliamentary Group of Vetevendosje stated that the issues of the immunities of the deputies were clearly regulated by the constitutional and legal provisions in force. His opinion was that the immunity meant that a deputy could not be subject to criminal prosecution, civil lawsuit for the free expression of thoughts regardless of form, and from voting or not voting for any decision taken in the Assembly. The constitutional provisions did not prevent criminal prosecution by competent authorities for all other actions taken outside of the scope of their responsibilities as deputies.

24. They considered that the immunity cannot serve as a shield to those deputies who have committed criminal acts of organized crime, corruption and other acts that seriously damage the property and health of citizens. The purpose of the immunity was to prevent arbitrary power over the deputy, to free the deputy from possible political constraints and, above all, to guarantee necessary political space to the deputy to perform his/her duties in representing citizens' interests and will, without being subject to political-legal pressure during this representation.

25. They considered that the separation of powers should guarantee sufficient autonomy to enable the performance of institutional functions. The immunity of deputies was essential for the autonomy of the Assembly and therefore it was essential for the constitutional order and that the immunity was linked to his/her mandate and was for the whole time that he/she served in that political post.

26. They considered that the immunity was reduced in cases where he/she was suspected or prosecuted. They pointed out the law in relation to prosecution, under Article 9 of the Law on the Rights and Responsibilities of the Deputy, which dealt with arrest without the consent of the Assembly, for persons caught while committing (in

flagrante) a severe criminal act punishable with five or more years of imprisonment.

27. They pointed out provisions of Articles 281 and 210 of the Criminal Procedure Code of Kosovo that allowed the arrest of a person pursuant to a court order and by the police or other person when caught committing a criminal offence even without a court order.

28. They pointed out that Article 22(3) of the Rules of Procedure of the Assembly provided for the deputy to enjoy immunity from measures of detention, arrest and prosecution until the Assembly takes a decision on waiving his/her immunity. However, this could be considered to be in contradiction to Article 75(2) of the Constitution because the immunity does not prevent criminal prosecutions for actions taken outside the scope of the responsibilities of the deputy.

29. Finally, they stated that, regardless of the severity of a criminal offence, the immunity of a deputy could be waived after full observance of procedures after the vote of a majority of the deputies of the Assembly.

D Response and comments of Ms. Alma Lama, a deputy of the Assembly

30. Ms Lama stated that Article 75 provided immunity to the deputies of the Assembly, while paragraph 2 of the same Article prevented arrest and detention of the deputy while he/she was performing his/her duties without the consent of the majority of all deputies of the Assembly. She stated that she had no unclarity about the issues.

E Response and comments of Mr. Fatmir Limaj, a deputy of the Assembly

31. Mr Limaj stated that he had a number of central issues, namely, whether there was any provision regarding immunity in the Constitution of Kosovo, whether there was any provision regarding immunity in the ordinary law of Kosovo, whether there was authority for the Government to have recourse to the Constitutional Court directly and whether any such Referral was time barred.

32. Firstly, he quoted Article 75 of the Constitution and concluded that this Article provided that there was a provision regarding immunity.

33. Secondly, he referred to Article 9 of the Law on Rights and Responsibilities of the Deputy, Law no. 03/L-111, and, pointing out the

similarity between it and the constitutional provisions, he concluded that there was provision regarding immunity in the ordinary law of Kosovo.

34. Thirdly, he emphasised Article 113 (2) of the Constitution which gives the Government, *inter alia*, power to refer questions concerning the compatibility with the Constitution of laws, decrees of the President or Prime Minister, and of regulations of the Government. He pointed out that no question of compatibility had been identified by the Government and that therefore no Referral was possible under Article 113.

35. He was of the opinion that the Constitution did not permit referral to the Constitutional Court for advisory opinions on question pertaining to the scope or application of the law and that therefore any such Referral was *ultra vires* the Constitution. He was of the view that a Referral under Article 93 (10) of the Constitution was subject to the provisions of Article 113 of the Constitution and that the Government had no special access to the Court outside Article 113 of the Constitution.

36. Fourthly, he pointed out that the provisions of Article 29 and 30 of the Law on the Constitutional Court, Law No. 03/L-121, provided that Referrals made under Article 113 (2) of the Constitution had to be filed within six months from the date upon which the contested Law enters into force. As the Law on the Rights and Responsibilities of the Deputy had entered into force on 4 June 2010 any challenge to that Law had to be filed by 3 December 2010.

37. In addition, Mr. Limaj observed that in balancing the administration of justice the Constitution determined that deputies would not be above the law but that they should not be subjected to politically motivated prosecutions simply because they were elected officials. He also pointed out that a criminal prosecution was not stayed by dint of a suspect being a deputy of the Assembly and that an investigation and trial could be conducted.

F Further response and comments of the President of the Assembly, Dr. Jakup Krasniqi

38. The further response and comments from Dr. Jakup Krasniqi, the President of the Assembly, dated 13 September 2011, closely reflected those arguments of Mr Limaj described above.

Subject matter

39. The subject matter of the Referral concerns immunity. The questions put to the Constitutional Court were in the terms that follow.

A Immunity of the Deputies of the Assembly

1 *The Government of the Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 75 (1) (Immunity) of the Constitution of Kosovo, which stipulates: 1. Deputies of the Assembly shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly." The Constitutional Court is asked to clarify if the deputies of the Assembly of the Republic of Kosovo shall be immune from prosecution, civil lawsuit, dismissal and arrest or detention for their actions and decisions taken outside the scope of their responsibilities as deputies?*

2 *The Government of the Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 75 (2) (Immunity) of the Constitution of Kosovo, which stipulates: "2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly." The Constitutional Court is also asked to clarify the meaning of "while performing her/his duties as a member of the Assembly", mentioned in Article 75.2. Does this performance include only those duties of deputies taken in carrying out their mandate as deputies of the Assembly?*

3 *The Government of the Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 75 of the Constitution of Kosovo, which stipulates: The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly." How should Article 75 be applied in cases when there is suspicion of crimes committed prior to the start of the mandate of a deputy of the Assembly or for crimes committed during the mandate, but which are outside of the scope of their responsibilities?*

B Immunity of the President of the Republic

The Government of Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 89 (Immunity) of the Constitution of Kosovo, which stipulates: "The

President of the Republic of Kosovo shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of responsibilities of the President of the Republic of Kosovo." The Constitutional Court is asked to clarify if the President shall be immune from prosecution, civil lawsuit, dismissal and arrest or detention for actions or decisions taken outside the scope of responsibilities of the President of the Republic of Kosovo?

C Immunity of the members of the Government

The Government of the Republic of Kosovo refers for interpretation to the Constitutional Court the applicability and effect of Article 98 (Immunity) of the Constitution of Kosovo, which stipulates: "Members of the Government shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as members of the Government". The Constitutional Court is asked to clarify if the members of the Government of the Republic of Kosovo shall be immune from prosecution, civil lawsuit, dismissal and arrest or detention for actions and decisions taken outside the scope of their responsibilities as members of the Government?

Assessment of the Admissibility of the Referral

40. The Government bases its Referral to the Constitutional Court under Article 93 (10) and Article 113 (3) (1) of the Constitution. According to Article 93 (10) the Government may refer Constitutional questions to the Constitutional Court. If the questions are constitutional questions then the Government will be an authorised party and the Referral will be admissible. The Court will look at the questions closely to see if the Referral contains constitutional questions.

41. According to the Constitution, the sovereignty of the Republic of Kosovo that stems from the people and that belongs to the people is exercised, inter alia, through elected representatives. (See Art.2 of the Constitution) The Constitution gives a special status with immunity, as prescribed in Article 75, to the deputies of the Assembly. This is a necessary tool which permits the legislative power, the Assembly, to be independent, separate from and equal to the other powers of the State.

42. The institution of the President also is granted with immunity according to Article 89 of the Constitution. This special status and privilege stems from the President expressing the unity of the nation and of being head of State. This state body, the President of the Republic needs the special status, privilege and immunity in order to perform his functions with

independence, dignity and efficiency and at the same time not to be interfered with by the other powers - legislative, executive and judicial.

43. The Government as the bearer of the executive branch also needs to be independent with strictly defined functions and to be separate from the legislative and judicial branches. Thus, the Constitution grants immunity to the members of the Government to ensure their independence, efficiency and to protect them from interferences from the other branches.

44. The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of the separation of powers and the checks and balances among them. The separation of powers is one of the bases that guarantees the democratic functioning of a State. The essence of the independence and effective functioning of these branches is the immunity provided to the persons embodying these powers.

45. As the Prime Minister states, the immunity questions raised affect the democratic functioning of the state.

46. The questions are of a constitutional nature as they are linked to the form of governance of the State. They concern the mechanisms of the exercise of the division of power in the Republic of Kosovo.

47. Under the Constitution, those that implement power and exercise duties in the State have immunities and special status in order to ensure their independence so that they can do their work effectively, to ensure that other powers are stopped from interfering with their work and to prevent abuse.

48. The Deputies must be free to perform their functions and not be liable for their actions, decisions, votes and opinions expressed while they are acting as deputies of the Assembly. That freedom, guaranteed by immunity, is to enable them to perform their representative mandate and to give expression to the popular will and to the sovereignty of the people. Without this freedom there is a danger that the Assembly would not be able to operate properly. They are immune for their actions and decisions within the scope of their responsibilities as deputies. It is important to note that this privilege attaches to the deputy, not for his or her own convenience, but for the benefit of the people who have elected him or her. This is a reflection of the wording of the immunity which is expressed to be for actions *"within the scope of their responsibilities as Deputies of the Assembly"*.

49. For a Referral to be declared admissible the Constitution requires that the matter be referred to the Court in a legal manner by an authorised party, according to Article 113 (1) of the Constitution. The Court finds that the questions of the Applicant are raised in a legal manner. The Constitutional Court, as the final authority for the interpretation of the Constitution, considers that these questions relating to immunity are of a constitutional nature. Therefore, the Government, has raised constitutional questions and it is an authorised party.

50. The questions raised are constitutional questions as contemplated by Article 93 (10) of the Constitution, It is therefore not necessary to consider the Referral in the context of Article 113 (3) (1) of the Constitution. Furthermore, whereas there are time restrictions provided for in Chapter III, Special Procedures, of the Law on the Constitutional Court for bringing Referrals under Article 113 of the Constitution, there are no time restrictions in the bringing of such Referrals under Article 93 (10).

Merits

51. The Court will interpret and clarify the constitutional questions submitted by the Government in the following order: A - Immunity of the Deputies of the Assembly, B - Immunity of the President of the Republic and C - Immunity of the Members of the Government.

A Concerning the Immunity of the Deputies of the Assembly

General Principles

52. When addressing the constitutional questions raised by the Government - the immunity of the deputies of the Assembly of Kosovo - the Court shall look at the Constitution in its entirety and not just at Article 75. It provides:

"1. Deputies of the Assembly shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly.

2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly."

53. According to constitutional theory and practice different legal systems recognize and implement two categories of, or sides to, the concept of parliamentary immunity.

54. The first category is non-liability in judicial proceedings of any nature over the opinions expressed, votes cast or decisions taken in their work as deputies and other actions taken while performing their duties. This type of immunity extends after their mandate comes to the end and it is of unlimited duration. They will never be liable to answer to anyone or any court for such actions or decisions. This is clearly provided for by the Constitution of Kosovo. This is functional immunity.

55. The second category of parliamentary immunity relates to inviolability for acts outside the scope of responsibilities of the deputies of the Assembly. It has two aspects:

Criminal Prosecution

a) The first aspect relates to the criminal prosecution of deputies with the consent of the Assembly. However, this is not provided for in the Constitution of Kosovo. The Constitution permits criminal prosecution without the consent of the Assembly for actions taken outside the scope of their responsibilities. (See Article 75 (1), second sentence)

Arrest and Detention

b) The second aspect refers to freedom from arrest and detention. Deprivation of liberty is permitted with or without a decision of the Assembly. The Constitutional Court will elaborate on these two aspects further in the Judgment.

Applicability of these General Principles in the Republic of Kosovo

56. The Government poses the question whether the deputies of the Assembly of the Republic of Kosovo are immune from prosecution, civil lawsuit, dismissal and arrest or detention for their actions and decisions taken outside the scope of their responsibilities as deputies. The Court notes that the Government asks:

a) whether deputies are immune from prosecution for actions and decisions taken outside the scope of their responsibilities;

b) whether deputies are immune from civil lawsuits for actions and decisions taken outside the scope of their responsibilities;

c) whether deputies are immune from dismissal for actions and decisions taken outside the scope of their responsibilities; and,

d) whether deputies are immune from arrest and detention for actions and decisions taken outside the scope of their responsibilities.

57. As far as acting within the scope of the responsibilities of deputies is concerned it should be stressed that the deputies of the Assembly of the Republic of Kosovo have functional immunity. This means that they shall be immune from prosecution, civil lawsuit, and dismissal for their actions and decisions. (See Article 75 (1), first sentence)

58. Article 75 (1) of the Constitution provides that the deputies of the Assembly of Kosovo have functional immunity in respect of opinions expressed, or votes cast, or actions or decisions taken within the scope of their responsibilities as deputies. Indeed, due to the characteristics and importance of rights and duties of deputies they have a privileged position taken within the scope of their responsibility. Because of the special status as elected representatives performing their constitutional mandate they are given immunity to provide to them greater freedom, security and independence from the executive and the judiciary, but only to the extent of their actions and decisions taken within the scope of their responsibility.

59. The Constitution clearly defines the scope of the responsibility of the deputies. Those are the actions taken and decisions made in order to perform the competencies of the Assembly of Kosovo prescribed in Article 65 of the Constitution. Consequently, the Deputies are immune for any action taken or decision made that is related to:

(1) adoption of laws, resolutions and other general acts;
(2) decision to amend the Constitution by two thirds (2/3) of all its deputies including two thirds (2/3) of all deputies holding seats reserved and guaranteed for representatives of communities that are not in the majority in Kosovo;
(3) announcement of referenda in accordance with the law;
(4) ratification of international treaties;
(5) approval of the budget of the Republic of Kosovo;
(6) election and dismissal the President and Deputy Presidents of the Assembly;
(7) election and dismissal the President of the Republic of Kosovo in accordance with this Constitution;
(8) election the Government and expresses no confidence in it;

(9) overseeing the work of the Government and other public institutions that report to the Assembly in accordance with the Constitution and the law;
(10) election of members of the Kosovo Judicial Council and the Kosovo Prosecutorial Council in accordance with this Constitution;
(11) proposing the judges for the Constitutional Court;
(12) overseeing foreign and security policies;
(13) giving consent to the President's decree announcing a State of Emergency;
(14) decision in regard to general interest issues as set forth by law.

60. In doing so the Deputies are obliged to exercise their function in the best interests of the Republic of Kosovo and pursuant to the Constitution, the Laws and the Rules of Procedure (see Article 74 of the Constitution).

61. Consequently, in order to ensure the separation of powers and independent functioning of the Assembly free from interfering of executive or judicial power into the legislative domain, deputies of the Assembly of Kosovo enjoy functional immunity and they are non-liable for the actions taken and decisions made within the scope of their responsibilities.

62. In a number of cases the European Court of Human Rights addressed the applicability of non-liability of members of parliaments in the Contracting States vis-à-vis the European Convention on Human Rights and Fundamental Freedoms and the Protocols thereto.

63. For example, in the case of Syngelidis v. Greece (Application no. 24895/07) of 11 February 2010 the European Court on Human Rights emphasised:

"41…The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court.

42. The Court observes in this connection that when a State affords immunity to its members of parliament, the protection of fundamental rights may be affected. That does not mean, however, that parliamentary immunity can be regarded in principle as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1 (see Kart v. Turkey, cited above, § 80). Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise

be regarded as inherent, an example being those limitations generally accepted by the Contracting States as part of the doctrine of parliamentary immunity (see A. v. the United Kingdom, cited above, § 83, and, mutatis mutandis, Al-Adsani v. the United Kingdom [GC], no. 35763/97, § 56, ECHR 2001-XI). The Court has already acknowledged that it is a long-standing practice for States generally to confer varying degrees of immunity on parliamentarians, with the aim of allowing free speech for representatives of the people and preventing partisan complaints from interfering with parliamentary functions (see A. v. the United Kingdom, cited above, §§ 75-77; Cordova, cited above, § 55, and De Jorio v. Italy, no. 73936/01, § 49, 3 June 2004). That being so, the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued (see A. v. the United Kingdom, cited above, § 88).

43. It would be equally incompatible with the purpose and object of the Convention, however, if the Contracting States, by adopting one of the systems of parliamentary immunity commonly used, were thereby absolved from all responsibility under the Convention in relation to parliamentary activity. It should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see Aït-Mouhoub v. France, 28 October 1998, § 52, Reports 1998-VIII). It would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1, if a State could, without restraint or control by the Court, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons (see Fayed v. the United Kingdom, 21 September 1994, § 65, Series A no. 294-B).

44. Thus, where parliamentary immunity hinders the exercise of the right of access to justice, in determining whether or not a particular measure was proportionate the Court examines whether the impugned acts were connected with the exercise of parliamentary functions in their strict sense (see Cordova (no. 1), cited above, § 62, and De Jorio, cited above, § 53). The Court reiterates here that the lack of any clear connection with parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed. This is particularly so where the restrictions on the right of access stem from the resolution of a political body (see Kart v. Turkey, cited above, § 83, and Tsalkitzis v. Greece, no. 11801/04, § 49, 16 November 2006). Moreover, the

broader an immunity, the more compelling must be its justification (see A. v. the United Kingdom, cited above, § 78).”

Responses to the four parts of the first question of the Government in relation to the immunity of deputies

64. The Court recalls that the Government questioned whether the deputies of the Assembly are immune from prosecution, civil law suit, dismissal and arrest or detention for their actions and decisions taken outside the scope of their responsibilities. The Court will respond to each of the questions.

a) **Immunity from prosecution for actions and decisions outside the scope of the responsibility of the deputies.**

65. The second sentence of Article 75 (1), of the Constitution provides a caveat to the overall immunity that is granted to the deputies, “*The immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside of the scope of their responsibilities as deputies of the Assembly.*” There is a clear distinction made by the Constitution between what the deputy does as a representative of the people and what he or she does in their private capacity. There is no blanket immunity granted by the Constitution for all prosecutions.

66. The deputies are, in their capacity as private citizens, subject to the same treatment under the Criminal Code and the Criminal Procedure Code of the Republic of Kosovo as all other citizens. This conclusion stems from the second sentence of Article 75 (1) of the Constitution which provides that the immunity shall not prevent the criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities as deputies of the Assembly.

67. It is further reinforced when one considers Article 70(6) of the Constitution that prescribes that the mandate of the deputy comes to the end when a deputy is convicted and sentenced to one or more years of imprisonment by a final court decision of committing a crime.

68. The Constitution does not allow any limitation or interference by the legislature with the criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities.

69. Since the Constitution does not grant inviolability with regard to criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities, they are not inviolable either

with regard to prosecution for criminal acts allegedly committed prior to the beginning of their mandate as deputies or during the course of their mandate.

70. Article 22(3) of the Rules of Procedure of the Assembly provides that *"A member of the assembly shall enjoy immunity from ... prosecution until the Assembly takes a decision on waiving his/her immunity."* The Constitutional Court notes that this provision, concerning prosecution, is null and void as there is no such immunity against criminal prosecution for the deputies in the Constitution. The Court reiterates once again that immunity to prevent the criminal prosecution of deputies for acts taken outside the scope of their responsibility does not exist. No decision of the Assembly is necessary for such a prosecution.

71. The only circumstance when a decision of the Assembly waiving immunity is required is for the arrest or detention of a deputy when he/she is performing his/her duties as a deputy. This is the constitutional position.

b) Immunity from civil lawsuits for actions and decisions outside the scope of their responsibilities.

72. There is no constitutional obstacle for the filing of such civil lawsuits. It stems from the explicit language related to the functional immunity. In such a situation it is evident that the respective provisions of the applicable laws will be enforced.

c) Immunity from dismissal for actions and decisions outside the scope of their responsibility.

73. The interpretation of dismissal in this context means removal of the deputy as a member of the Assembly. Article 70 of the Constitution regulates the scope, duration and the possibly of the mandate of the deputy to come to an end or to become invalid. These provisions do not give arguments to conclude that a deputy can be dismissed for actions outside the scope of his responsibilities. It could be read in conjunction with this question that, when a deputy is convicted to one or more years of imprisonment by a final court decision of committing a crime, his/her mandate ends.

d) Immunity from arrest and detention for actions and decisions outside the scope of their responsibility

74. Immunity from arrest and detention must also be read in conjunction with the second question of the Government and the Court will answer them jointly.

75. The Government requested the interpretation of the words "while performing her/his duties as a member of the Assembly" set out in Article 75 (2) of the Constitution.

76. The Constitution guarantees equality before the law and everyone enjoys the right to equal legal protection. Thus, the Constitution provides for justice to be rendered and not to be delayed. This applies to deputies in their capacity as private citizens. They can be criminally prosecuted and are liable for acts outside the scope of their responsibilities for actions prior to and during their mandate.

77. It goes without saying that deputies, as it is with any other person under the jurisdiction of the courts in the Republic of Kosovo, are entitled protection of their fundamental rights and freedoms guaranteed under the Constitution and the law. These include the rights set out in paragraph 1 of Article 24 [Equality Before the Law], Article 29 [Right to Liberty and Security] in conjunction with Article 5 of The European Convention on Human Rights and Fundamental Freedoms, Article 30 [Rights of the Accused] and Article 31 [Right to Fair and Impartial Trial] both in conjunction with Article 6 of the ECHR and Article 54 [Judicial Protection of Rights]. Deputies, as is the case with all citizens, are also entitled to fair pre-trial and trial procedures that are guaranteed under the Constitution and the law. The Court also notes that Article 19 of the Constitution, concerning the applicability of legally binding norms of international law, can be taken into consideration.

78. In such circumstances, as it is prescribed in Article 29 of the Constitution, a measure of "deprivation of liberty", which includes a measure of "arrest or otherwise detention" may by issued against a deputy in cases foreseen by law and after a decision of a competent court in the situations listed in Article 29 of the Constitution.

79. The Court recalls that Article 29 (1) [Right to Liberty and Security], reads as follows:

1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:
(1) pursuant to a sentence of imprisonment for committing a criminal act;

(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;
(3) for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order;
(4) for the purpose of medical supervision of a person who because of disease represents a danger to society;
(5) for illegal entry into the Republic of Kosovo or pursuant to a lawful order of expulsion or extradition."

80. The Court also notes that Article 29 (2) of the Constitution provides that where arrest or detention occurs without a court order the person detained shall be brought within forty-eight (48) hours before a judge who shall decide on her/his detention not later than forty-eight (48) hours from the moment the detained person is brought before the court.

81. The overseeing of the personal liberty guaranteed under the Constitution is entrusted to all law enforcement bodies, prosecutorial authorities and the Courts, according to applicable law.

82. Article 5 of the ECHR deals with the right to liberty, which provides that an individual may be subject to lawful arrest or detention only under clearly defined circumstances. These include such issues as imprisonment following sentence and arrest on suspicion of the commission of a crime. In particular, Article 5 provides for the right to prompt access to a Court or appropriate judicial proceedings to determine the legality of the arrest or detention and to a trial within a reasonable period or release pending such a trial.

83. The provisions of Article 5 of the ECHR are directly applicable in Kosovo by virtue of Article 22 of the Constitution and have priority over national laws in the case of conflict. Article 54 of the Constitution gives effect to the Convention by providing that everyone, including deputies of the Assembly, shall have the right of judicial protection and the right to an effective legal remedy arising from a breach of any such right or fundamental freedom.

84. The same general provisions and safeguard concerning arrest and detention and fair trial are applicable not only in criminal investigation and trials but also to civil lawsuits.

Constitutional and legal provisions related to arrest and detention of deputies of the Assembly of Kosovo

85. Arrest and detention of a deputy is contemplated by the terms of the Constitution and under the Law on Rights and Responsibilities of the Deputy. The following provisions allow this :

Constitution

i. The first is when the assembly waives the immunity from arrest or other detention of a deputy while performing his or her duties, pursuant to Article 72 (2) which reads:

2. A member of the Assembly shall not be arrested or otherwise detained while performing her/his duties as a member of the Assembly without the consent of the majority of all deputies of the Assembly."

Constitution

ii. While a deputy is not performing duties. This stems from Article 75 (2) of the Constitution.

Law on Rights and Responsibilities of the Deputy

iii. Article 9 (9) of the Law on the Rights and Responsibilities of the Deputy specifically provides that if a deputy is caught while committing a serious offence (in flagrante) punishable with five years imprisonment or more then arrest may occur. Article 9 (2) and (9), of that Law provide:

2. The deputy of the Assembly can not be arrested or stopped [detained] *while he/she is performing his/her duties as deputy of the Assembly, without consent of the majority of all deputies of the Assembly.*
...

9. With exception from paragraph 3 [this should refer to paragraph 2] *of this Article, the measure of imprisonment can be undertaken towards a deputy without any prior consent from the Assembly in case when he or she is caught while committing (in flagranti* [flagrante]*) a severe criminal act that is condemnable with five (5) or more years of imprisonment.*

Constitution

iv. When a mandate ends because of final conviction and sentence to one of more years of imprisonment arrest may proceed without reference to any other person or body as there is no longer constitutional protection.

86. In the first circumstance providing for arrest or other detention of a deputy the Constitution clearly defines circumstances that must be available so that an arrest or detention of a deputy can happen. The Constitutional term “while performing his/her duties” requires an interpretation from the Court not just because of the questions asked but because it is important in answering the questions raised in relation to the functioning of the Assembly.

87. Article 66 of the Constitution , uses the term “mandate” to describe the duration of the Assembly. It states that the four years commences with the constitutive session held after the announcement of the election results and ends with the dissolution of the Assembly.

88. The Constitution also uses the term “mandate” in relation to the deputies of the Assembly whereby as representatives of the people they are not bound by any obligatory mandate. Each deputy has an individual mandate which commences on the date of the certification of the results of the election. While the mandate of the Assembly commences on the constitutive session of the newly elected Assembly the mandate of each deputy may commence earlier. The mandate for a deputy ends at the occurrence of any of the circumstances set out in Article 70 (3) of the Constitution. The mandate of the deputy embodies his/her representative function.

89. The organisation of the work of the Assembly is done in two annual sessions. They commence on the third Monday in January and the second Monday of September and ending at a time decided by the Assembly.

90. Article 40 of the Law on Rights and Responsibilities of the Deputy provides that deputies are obliged to participate in the Plenary “Sessions” and in meetings of the assisting bodies of the Assembly in which he is a member

91. Article 39 of the Rules of Procedure of the Assembly provides that the Assembly performs at plenary session and committees. It is when the deputies are at these meetings and committees that they are performing their duties. Thereby they fulfil, exercise and give completion to the competencies of the Assembly as set out in Article 65. The actions and decisions including their discussions, speeches, votes all take place at these plenary and committee meetings and they have functional immunity to undertake this work. The functional immunity protects that work. That is the purpose of the immunity and they cannot ever be liable for what they do at these meetings.

92. The Assembly functions only when it is convened. It is the President of the Assembly who decides on the dates of meetings. Outside of the convening of the Assembly or its committees the deputies of the Assembly can not be said to be performing the work necessary to give effect to the Assembly. (See Article 39 of the Rules of Procedure of the Assembly)

93. Different legal systems and constitutions in Europe have different definitions of a mandate and the duration concerning both the scope and the timing of this immunity of the deputy. This includes the entire mandate of the parliament or the sessions of the parliament or the meetings of the houses of the parliament.

94. The period of performing the duties of a deputy is his/her work in the Assembly during its plenary and committee meetings.

95. Article 75 (2) stipulates that while a deputy is performing his/her duties, in order to be arrested or detained a decision to waive the immunity is required by a majority of all of the deputies of the Assembly. The purpose of this requirement is to ensure that the work of the Assembly must not be hindered. While the deputy is performing his/her duties it is for the benefit of the Assembly and the conduct of its work. A decision of the Assembly is required to remove the deputy because his/her physical presence is necessary at the meeting of the Assembly and its committees. During the work of the Assembly the deputy is there in his capacity as a representative of the people and as a constituent member of the Assembly. It is only the Assembly itself which can decide that arrest and detention of a deputy can occur while he/she is performing the work of the Assembly.

96. The Court reiterates that outside the scope of his/her responsibilities a deputy is to be treated as any other citizen. A deputy is liable for his/her private acts and behaviour as are all citizens. Therefore, while not performing his/her duties he/she may be arrested or detained without a decision of the Assembly according to the regular law. This could happen following the provisions of the regular law that is applicable for the Republic of Kosovo as it is for any other citizen. The applicable law and who has the authority to order arrest will be elaborated further.

97. The situation of permitting arrest and detention while caught committing a serious crime (in flagrante) punishable by five or more years imprisonment is a standard that is recognised in the constitutional order of all countries, be it in their Constitutions or in their organic law. The public must have confidence that their interests are protected in these circumstances. The public administration of justice cannot be

stalled merely because there is an apprehension that at some stage of a criminal process a deputy might plead that he/she had immunity from prosecution. This would undermine confidence in the administration of justice. This Law on Rights and Responsibilities of the Deputy in Article 9 (9) recognises this exception. The case for arrest in such circumstances speaks for itself.

98. The mandate of the deputy is provided for in the Constitution. However, the Constitution provides for when the mandate can end prematurely. In relation to the situation when there is a final court decision for the sentencing of a deputy for a term of one or more year of imprisonment, the deputy is stripped of his/her mandate and therefore the mandate ends and he/she no longer can enjoy the privilege and immunity attaching to the mandate. Then, the sentence of imprisonment can be served and his/her arrest can follow in execution of the sentence of the Court.

Authority to request waiver of immunity

99. When there is a prosecution in process, the prosecutorial body or the court considers that the waiving of immunity is required for the conduct of the prosecution then a request for the waiving of immunity must be considered by the Assembly. There is a constitutional obligation for the Assembly to consider requests for waiving immunity, in cases where it is necessary. A lacuna in the law or the failure of the Assembly to pass Laws necessary to give effect to the proper functioning of the judicial power of the state can not be used as an excuse to fail to give effect to the positive obligation to consider the waiver.

100. Therefore Article 9 (3) of the Law on the Rights and Responsibilities of the Deputies provides that a request may only be made by the General Prosecutor (Albanian: Prokurori i Përgjithshëm i Kosovës, Serbian: Glavni javni tužilac Kosova, Unofficial English translation: Attorney General). Clearly there are other situations where arrest may be necessary, in the opinion of the police, the Public Prosecutor, the State Prosecutor or the Special Eulex Prosecutors. In the case of a private prosecution the Court dealing the matter, must sent the request to waive the immunity to the Assembly.

101. The failure of the Law on Rights and Responsibilities of the Deputy to state that any or all of these to request the waiver of the immunity is not a bar to such a request being received. If such a request is made by a competent body then the Assembly is obliged to consider it. It is entirely a matter within the prerogative of the Assembly to approve the request or not - but they must consider it.

102. In that respect, it is important to recall that according to Article 109 of the Constitution the *"State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law."*

103. The Court also notes that on 30 September 2010, the Assembly adopted the "*Law No.03/L –225 on State Prosecutor*", which will enter into force on 1 January 2013. From that date on the following will cease to be applicable: "*1.1. The Law on the Public Prosecution Office of the Autonomous Province of Kosovo, 1.2. UNMIK Reg. 1999/05, on the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor. 1.3. Any other law to the extent that it is inconsistent with the provisions of this law."*

104. Further, upon the entry into force of that law any reference in any law, regulation, directive, rule or other legal act to "Prosecution Services" or "Public Prosecutor" shall be construed to mean the "State Prosecutor". However, nothing in that law is construed or applied to alter, restrict, expand or otherwise change the authorities, jurisdiction, powers, or duties granted the Special Prosecution Office as provided in the Law on Special Prosecution Office of the Republic of Kosovo, No. 2008/03-L052.

105. It appears therefore that at present the legal acts that regulate the competences and organisation of the Prosecutors are *The Law on the Public Prosecution Office of the Autonomous Province of Kosovo* and *UNMIK Reg. 1999/05, on the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor*. In addition to this, there is also the *Law on the Special Prosecution Office of the Republic of Kosovo*.

106. The Court also notes that pursuant to the 2008 Law on the Special Prosecution Office of the Republic of Kosovo, the Special Prosecution Office is established as a permanent and specialized prosecutorial office operating within the Office of the State Prosecutor of Kosovo. The Law envisaged that for duration of EULEX Mission in Kosovo, the Special Prosecution Office will be composed of five EULEX prosecutors in addition to those prescribed by the Law.

107. On 13 March 2008 the Assembly of the Republic adopted the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

108. The Law on the Public Prosecutor (Official Gazette of Autonomous Socialist Province of Kosovo, KSAK, no. 32/76, 52/77, 49 (79, 44/82, 44/84 and 18/87) is still in force and it provides:

Pursuant to Article 1, the Public Prosecutor is an independent state body who prosecutes the perpetrators of criminal deeds and other deeds condemned by law, takes measures in accordance with the law in protecting the interests of the social communities, exercise the legal remedies for protecting the constitutionality and legality and performs other duties in accordance with the law.

109. The Constitutional Court consequently notes that the prosecution of persons charged with committing criminal acts as described by Article 109 of the Constitution is performed by operation of different legal acts.

110. The bodies that have the right to request the Assembly to waive immunity of a deputy, while he/she is performing his/her duties, are also authorised to arrest or detain without the waiver of the Assembly while the deputy is not performing his/her duties.

Procedure for waiving the immunity for detention and arrest

111. This procedure is not specifically provided for in the Constitution but it is not necessary. The procedure set out in Article 23 of the Rules of the Assembly is to be used in cases or request for waiving immunity of a deputy concerning arrest or detention. This is not applicable for non existent immunity from prosecution according to the Constitution. The Court reiterates that Article 22 (3) of the Rules of Procedure which speaks of immunity from prosecution is null and void when it purports to grant such immunity. The procedure is further elaborated in Article 23 of the Rules of Procedure. This is compliant with the constitutional provisions only in so far as it pertains to a waiver concerning arrest or detention.

112. It is to be noted that the Rules of Procedure of the Assembly introduce a special procedure related to a situation when a deputy of the Assembly is arrested or detained by a competent body without a waiver, i.e. a decision of the Assembly. When there is arrest or detention without a waiver it may be for the conduct of a criminal prosecution which was for a crime outside the scope of the responsibility and outside a time when the deputy was performing his/her duties. In such circumstances the Assembly cannot overrule a judicial decision ordering arrest and detention. Any power that the Assembly purports to give to itself to do so is null and void and inconsistent with the Constitution. A deputy, of course, has all the remedies for the protection of his/her rights as stated

earlier in this Report, and has full recourse to the courts of the Republic of Kosovo for the vindication of those rights according to the Constitution and the law.

113. Comparative studies indicate that it is the predominant position that, when a deputy is arrested committing a serious crime, the arresting authorities inform the ruling body of the Assembly that the arrest has occurred. Article 24 (1) of the Rules of Procedure stipulates that the competent prosecuting authority shall immediately inform the President of the Assembly of the arrest or detention. This ensures the proper functioning of the Assembly.

Response to the third question of the Government in relation to immunity of deputies

114. The Government seeks interpretation of Art 75 of the Constitution in cases where there is suspicion of crimes committed prior to the start of the mandate of the deputy or for crimes committed during the mandate but outside the scope of his/her responsibility. As previously stated in paragraph 65 above, the Constitution does not grant immunity with regard to criminal prosecution of deputies of the Assembly for actions taken outside the scope of their responsibilities. They are liable to prosecution for crimes allegedly committed prior to the beginning of their mandate as deputies. They are also liable for prosecution during the course of their mandate for crimes outside the scope of their responsibilities.

B Concerning the Immunity of the President of the Republic of Kosovo

115. In the Referral of the Government concerning the immunity of the President there are two questions asked.

i) Interpretation of the applicability and effect of Article 89 of the Constitution.

ii) The Government asks for clarification if the President shall be immune from prosecution, civil lawsuit, dismissal and arrest or detention for actions or decisions taken outside the scope of responsibilities of the President of the Republic of Kosovo.

116. The Court notes that the Government asks for clarification as to:

a) whether the President is immune from prosecution for actions and decisions taken outside the scope of the President's responsibilities;

b) whether the President is immune from civil lawsuits for actions and decisions taken outside the scope of his/her responsibilities;

c) whether the President is immune from dismissal for actions and decisions taken outside the scope of his/her responsibilities; and,

d) whether the President is immune from arrest and detention for actions and taken decisions outside the scope of his/her responsibilities

117. Article 89 [Immunity] says:

The President of the Republic of Kosovo shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of responsibilities of the President of the Republic of Kosovo.

118. This is a functional immunity and the characteristics of functional immunity have already been discussed in the section dealing with the immunity of the deputies and they apply equally to the President of the Republic. The President of the Republic is the head of State and he/she represents the unity of the people of the Republic of Kosovo. The head of State acts both internally and externally as an important figure above all others in the State and ranking equally with the heads of other states in the world for representative purposes. The immunities granted to the President are functional immunities to ensure that the President will be unimpaired in carrying out the State duties entrusted to that institution under the Constitution.

119. The status of President of the Republic is regulated also by the Law on the President, Law No. 03/L-094. The privileges and immunity granted to the President in the Constitution and the Law befit the role of head of State. Therefore the functional immunity granted to the President immunes him/her for actions and decisions within the scope of his/her responsibilities and that immunity covers non-liability for actions within the scope of his/her responsibility and particularly there can be no prosecution, civil lawsuits and dismissal.

120. Article 8 of the Law on the President also provides that this functional immunity shall be valid after the end of the mandate.

121. As far as the second question is concerned each of the parts merits a separate answer.

a) **Immunity from prosecution for actions and decisions outside the scope of the responsibilities of the President.**

122. The Constitution in Article 91 (1) refers to the dismissal of the President if he/she has been convicted of a serious crime. If conviction for a serious crime is a reason for dismissal it is evident that the President has to be convicted and this must inevitably follow a criminal investigation and trial. Therefore the President is not immune from prosecution for actions and decisions outside the scope of his/her responsibility.

b) Immunity from civil lawsuits for actions and decisions outside the scope of his/her responsibility.

123. The interpretation of this part of the question is the same as that for the immunity of the deputies. There is no constitutional obstacle for the filing of civil lawsuits for actions and decisions outside the scope of his/her responsibilitie. It stems from the explicit language related to the functional immunity. In such a situation it is evident that the respective provisions of the applicable laws will be enforced.

c) Immunity from dismissal for actions and decisions outside the scope of his/her responsibility.

124. There is a particular provision in the Constitution dealing with the dismissal of the President contained in Article 91 of the Constitution. It provides:

Article 91 [Dismissal of the President]

1. The President of the Republic of Kosovo may be dismissed by the Assembly if he/she hasbeen convicted of a serious crime or if she/he is unable to exercise the responsibilities of office due to serious illness or if the Constitutional Court has determined that he/she has committed a serious violation of the Constitution.

2. The procedure for dismissal of the President of the Republic of Kosovo may be initiatedby one third (1/3) of the deputies of the Assembly who shall sign a petition explaining thereasons for dismissal. If the petition alleges serious illness, the Assembly shall consult the medical consultants team on the status of the President's health. If the petition alleges serious violation of the Constitution, the petition shall be

immediately submitted to the Constitutional Court, which shall decide the matter within seven (7) days from the receipt of the petition.

3. If the President of the Republic of Kosovo has been convicted of a serious crime or if the Assembly in compliance with this article determines that the President is unable to exercise her/his responsibilities due to serious illness, or if the Constitutional Court has determined that he/she has seriously violated the Constitution, the Assembly may dismiss the President by two thirds (2/3) vote of all its deputies.

The provision does not make explicit distinction for the dismissal of the President for actions or decisions within or outside the scope of his/her responsibility. The President may be dismissed after conviction for a serious crime, as previously dealt with above. The President may also be dismissed if she/he is unable to exercise the responsibilities of his/her office due to serious illness or if the Constitutional Court has determined that he/she has committed a serious violation of the Constitution. The decision for dismissal is taken by the Assembly following the procedures in Article 91 (2) and (3) of the Constitution.

d) immunity from arrest and detention for actions and decisions outside the scope of her/her responsibilities.

125. The President exercises unique functions that reside in his/her capacity alone. The Constitution requires the President to be available at all times to perform these functions. They are indivisible from the Presidency and therefore the President cannot be hindered in the exercise of these functions by arrest and detention. The President must be permanently available to execute the functions of the institutions and with matters of state.

126. When Article 90 refers to the temporary absence of the President there is no indication there that arrest or detention is contemplated. It is absurd to suggest that a temporary absence of the President could be linked to his voluntarily transferring of his duties for a certain period of time allied to an arrest or detention.

127. The arrest and detention of such a person is repugnant to those ideals of the President representing the unity of the people and by embodying the statehood as head of State. The proper remedy is the impeachment of the President pursuant to the Constitution.

128. When a President is dismissed only then may arrest or detention occur, because he/she is no longer President but is now a private citizen to whom the regular laws apply.

C Concerning the Immunity of the Members of the Government of Kosovo

129. In the Referral of the Government concerning the immunity of the members of the Government there are two questions asked.

i) Interpretation of the applicability and effect of Article 98 of the Constitution.

ii) Clarification on immunity of the members of the Government from prosecution, civil lawsuit, dismissal and arrest or detention for actions taken or decisions made outside the scope of their responsibilities.

130. The Court notes that the Government asks for clarification as to:

a) whether members of the Government are immune from prosecution for actions and decisions taken outside the scope of their responsibilities;

b) whether members of the Government are immune from civil lawsuits for actions and decisions taken outside the scope of their responsibilities;

c) whether the members of the Government are immune from dismissal for actions and decisions taken outside the scope of their responsibilities; and,

d) whether the members of the Government are immune from arrest and detention for actions and decisions taken outside the scope of their responsibilities

131. Article 98 of the Constitution deals with the immunity of the members of the Government and it provides:

Article 98 [Immunity]

Members of the Government shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as members of the Government.

132. As is the case for the Deputies of the Assembly and for the President there is a functional immunity for the members of the Government. Again, this immunity is for actions and decisions taken within the scope of their responsibilities, referred to in Article 97 of the Constitution. They have immunity from prosecution, civil lawsuit and dismissal within the scope of this functional immunity.

133. In contrast to the position regarding deputies of the Assembly and the President, members of the Government are accountable to the Assembly. They are accountably jointly with the Prime Minister and Deputy Prime Minister(s) for the decisions made by the Government and individually accountable for decision made in their fields of responsibility. This political accountability is completely different from their functional immunity. They are elected by the Assembly and therefore are accountable to it.

134. For members of the Government there are no special protections given for actions outside that scope. As far as members of the Government are concerned if they are charged with offences they are no different from other citizens of the Republic of Kosovo.

135. As far as the four parts of the second question of the Government are concerned members of the Government do not have any protection for actions taken and decisions made outside the scope of their responsibilities. In such circumstances, they have no immunity and they are liable for prosecution, civil lawsuits and arrest or detention as for any other private citizen. Dismissal and appointment of the members of the Government follows the specific procedures set out in Articles 95 and 96 of the Constitution.

FOR THESE REASONS
THE COURT UNANIMOUSLY DECIDES AS FOLLOWS:

1. The Referral is admissible;

2. In accordance with Article 75(1), Article 89 and Article 98 of the Constitution, the deputies of the Assembly, the President of the Republic and the members of the Government enjoy functional immunity for actions taken or decisions made within the scope of their respective responsibility. Accordingly, deputies of the Assembly, the President of the Republic and the members of the Government are non-liable in judicial proceedings of any nature over the opinions

expressed, votes cast or decisions taken within the scope of their responsibility. This type of immunity is of unlimited duration.

A. Concerning the immunity of the deputies of the Assembly

3. Acting outside the scope of their responsibilities:

1. Deputies are not immune from criminal prosecution for actions taken or decisions made outside the scope of their responsibilities. This is applicable both with regard to prosecution for criminal acts allegedly committed prior to the beginning of their mandate and during the course of their mandate as deputies;

2. Deputies are not immune from civil lawsuit for actions taken and decisions made outside the scope of their responsibilities;

3. Deputies of the Assembly cannot be dismissed other then for reasons set out in Article 70 of the Constitution.

IV. Arrest or other detention of a deputy.

1. A deputy may be arrested or detained while performing his/ her duties, that is, at plenary meetings of the Assembly and/or of its committees, following a decision of the Assembly.

2. A deputy may be arrested or detained while not performing his/her duties, that is, when there are no plenary meetings of the Assembly or meetings of its committees without a decision of the Assembly.

3. A deputy may be arrested or detained when caught committing (*in flagrante*) a serious offence that is punishable with five (5) or more years of imprisonment without a decision of the Assembly.
4. A deputy may be arrested or detained when his/her mandate ends arising from a conviction and sentence to one or more years of imprisonment by a final court decision of committing a crime.

V. "While performing his/her duties" means the work of the Assembly during its plenary and committee meetings.

VI. Any prosecutorial body/institution that is performing the prosecution of persons charged with committing criminal acts as described by Article 109 of the Constitution and that acts within the jurisdiction prescribed by the applicable law for the Republic of Kosovo have the right to request the Assembly to waive the immunity of a deputy.

This body/institution is authorised to arrest or detain without a decision of the Assembly while the deputy is not performing his/her duties that is, when there is no plenary meeting of the Assembly or of its committees.

B. Concerning the immunity of the President of the Republic

VII. Acting outside the scope of his/her respective responsibility:

1. The President is not immune from prosecution for actions taken and decisions made outside the scope of his/her responsibility. A prosecution may be initiated and performed against a President for a serious crime.

2. The President is not immune from civil lawsuit for actions taken and decisions made outside the scope of their responsibilities.

3. The President may be dismissed by the Assembly in accordance with Article 91 of the Constitution.

4. The President cannot be subject to arrest or detention during his/her term of office because of the nature of the functions of the President which require his/her permanent availability to perform them.

C. *Concerning the immunity of the members of the Government*

VII. The members of the Government do not have any special protection for their actions taken and decisions made outside the scope of their responsibility.

D. Concerning the legal effects of this Judgment

VIII. This Judgment shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

IX. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Arjeta Halimi vs. Alleged non-execution of Judgment of the District Court in Gjilan CN Nr. 24/09

Case KI 36-2011, decision of 30 September 2011

Keywords: discipline and conduct of students, discrimination, equality before the law, execution of judgment, exhaustion of legal remedies, freedom of belief, conscience and religion, freedom of thought, conscience and religion, headscarf, human rights, individual referral, international agreements and instruments, jurisdiction and authorized parties, religion, right to education, secular state

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution seeking enforcement of a Gjilan District Court judgment requiring the Municipal Education and Culture Directorate (MDE) to afford her all rights as a secondary school student despite her use of a headscarf, alleging that non-execution of the judgment violated Articles 22, 24, 38 and 47 of the Constitution. In reply, MDE denied that it had violated the Applicant's right to an education, adding that she withdrew from school voluntarily, highlighting that a secondary education was optional under the Law on Primary and Secondary Education. MDE emphasized that its Regulations require identical school uniforms, admonishing that policy deviations would hamper the educational process. Finally, MDE argued that the Constitution mandates that Kosovo remain a secular state in relation to religious beliefs.

The Court held that the Referral's execution claim was inadmissible pursuant to Article 113.7 and Article 47 of the Law on the Constitutional Court because the Applicant did not seek execution of the judgment in a lower court, reflecting a failure to exhaust all legal remedies. It also held that the Referral was manifestly ill-founded pursuant to Rules 36.2(a) and 36.2(c) because the Applicant had not been expelled or otherwise prevented from obtaining an education, citing *Dogru v. France*.

Prishtina, 9 September 2011
Ref. No.: RK137/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 36/11

Applicant

Arjeta HALIMI

Constitutional Review of alleged non execution of Judgment of the District Court in Gjilan CN.nr.24/09 of 17 November 2009 and alleged violation of the Applicant's human rights

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Arjeta Halimi residing in the Village of Drobesh, Municipality of Vitia. She is now aged 19 years. The Applicant is represented before the Constitutional Court ("the Court") by the Centre for Legal Assistance and Regional Development ("CLARD"), with headquarters in Pristina.

Subject Matter

2. The Applicant requests an assessment of the constitutionality of the non-execution of District Court Judgment in Gjilan CN.nr. 24/09 of 17 November 2009 in which her claim was approved and the Respondent, the Municipal Education Directorate of Vitia was obliged "to grant to the claimant [i.e. the Applicant] all rights deriving from the status of a fulltime student at 'Kuvandi i Lezhes' Gymnasium in Vitia." By her referral the Applicant wants to ensure the above cited judgment issued by the District Court in Gjilan is executed by the Municipal Education Department in Vitia. The Applicant alleges that non-execution of the District Court Judgment in Gjilan CN.nr. 24/09 of 17 November 2009 deprives her of the right to education that is guaranteed by all national and international acts.

3. The Applicant alleges that following Articles of the Constitution have been violated: Article 24 (Equality before Law), Article 38 (Freedom of Belief, Conscience and Religion) and Article 47 (Right to Education).

4. The Applicant also argues that in accordance with Article 22 of the Constitution (Direct Applicability of International Agreements and Instruments) the following internationally recognized human rights have been violated: Article 2 of Protocol No 1 (Right to Education) to the European Convention on Human Rights as well as Article 9 (Freedom of Thought, Conscience and Religion) in conjunction with Article 14 (Prohibition of Discrimination) of the same Convention.

5. The Applicant further considers that there has been violation of Article 18 of International Covenant on Civil and Political Rights as well as Articles 2 and 26 of the Universal Declaration of Human Rights. Finally, as regard to the international instruments the Applicant also refers to Articles 14 and 28 of the UN Convention on the Rights of the Child.

6. The Applicant also alleges that in her case Articles 2, 4 and 9 of the Kosovo Antidiscrimination Law 2004/3 ???? as well as Article 12 of the Law on Administrative Conflict (03/L-202) have been violated.

Legal Basis

7. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Articles 20 and 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Law) and Rule 36 of the Rules of Procedure of the Constitutional Court (hereinafter referred to as: Rules of Procedure).

Proceedings before the Court

8. On 10 March 2011 the Applicant filed a Referral with the Court.

9. On 21 March 2011 the President of the Court appointed Judge Iliriana Islami as Judge Rapporteur and a Review Panel composed of Judges Snezhana Botusharova (Presiding), Prof. Dr. Ivan Čukalović and Prof. Dr. Enver Hasani.

10. On 28 April 2011 the Court notified the Municipal Directorate of Education and Culture (“MDE”) in the Municipality of Vitia of the Referral and invited MDE to submit a reply to the Referral pursuant to Article 22.2 of the Law.

11. On the same date the Court notified the District Court of Gjilan and the Ministry of Education, Science and Technology (MEST) of the making of the Referral.

12. On 4 May 2011 the District Court of Gjilan submitted a reply to the referral.

13. On 16 May 2011 MDE submitted a reply to the referral.

14. MEST did not submit a reply.

15. On 28 June 2011 the Court requested the Municipal Court in Vitia to be informed whether the Applicant has submitted a proposal for the execution of the final judgment CN. No. 24/09 rendered by the District Court.

16. On 5 July 2011 the Municipal Court in Vitia submitted their reply.

17. After having considered the Report of the Judge Rapporteur, the Review Panel, made a recommendation to the full Court on the inadmissibility of the Referral.

18. The full Court deliberated and voted on the Referral on 8 July 2011 and on 23 September 2011.

The facts of the case

19. Prior to 15 January 2009, the Applicant attended the secondary public school "Kuvendi i Lezhes" in the Municipality of Vitia.

20. The Applicant began wearing a headscarf to school during the first semester of 10th grade.

21. The Applicant alleges she was informed verbally by school management she would not be allowed to attend school any more unless she removed her headscarf. She alleges that the school notified the MDE who allegedly indicated to the school that wearing the headscarf in school is a violation of sub legal act relating to the school uniform.

22. The Applicant also alleges that certain officials within MDE exercised pressure on her requesting her to sign a statement indicating that she would agree to remove the headscarf.

23. The Applicant further alleges that since she refused to sign the above mentioned statement she was asked not to return to school any more.

24. According to the Applicant from 15 January 2009 she did not attend the secondary public school "Kuvendi i Lezhes" in Vitia.

25. The Applicant's parents, acting as her "legal representatives" as she was a juvenile, retained counsel from CLARD on 6 April 2009.

26. On 15 April 2009 the Applicant requested that the MDE in Vitia to provide her with official notification regarding her status of the Applicant and the grounds for her dismissal from school.

27. On 28 April 2009 the MDE replied in writing to the Applicant as follows:

" I. Please be informed that the management of the Secondary School "Kuvendi i Lezhes" in Vitia has not denied and prevented the right to education for Arjeta Halimi, student in the Xth grade in this school. The school management has given a verbal warning to this student regarding wearing the veil on head and suggested to this student not to wear this veil in school otherwise she will be denied access to school.

II. This student withdrew from the teaching process without any request or submission and she did not request any communication or request from the school management or the MED, but the MED was requested to enable her right to exams for the last grade of the school year; therefore, her right to education was not violated in any way.

III. According to the Law on Primary and Secondary Education, the Secondary Education is not mandatory but optional, and Section 22, item d of Regulation No.01-013/86 on Conduct and Discipline provides for that student should wear the same uniform and this student has breached this Regulation and the school rules. This school has students of different beliefs and religions and if suchclothing is allowed, the education process in our school would be hampered.

The Constitution of the Republic of Kosovo also defines Kosovo as a secular state in terms of religious beliefs."

28. On 6 May 2009 the Applicant filed an appeal to the Education Inspection Department in Gjilan alleging violations of, inter aliai, the Constitution and applicable law. The Applicant requested that the MDE of Vitia be obliged to permit her to attend "Kuvendi i Lezhes", and that sanctions be imposed on certain persons within the MDE of Vitia for violation of Anti-Discrimination Law.

29. On 28 August 2009 the Regional Education Inspection in Gjilan replied to the appeal stating that the Applicant's allegations with regard to the violation of law in her case were ungrounded and based on a wrong interpretation of the law.

30. On 18 September 2009 the Applicant filed a lawsuit concerning administrative conflict in the Supreme Court of Kosovo. The Applicant requested the Supreme Court to act and to view the substance of the Applicant's assertions and establish the legality and compliance in actions carried out by the Municipality of Vitia. The Applicant requested the Supreme Court to cancel all actions of the Municipality which violated her rights.

31. On 19 October 2009, the Supreme Court of Kosovo declared that it did not have jurisdiction in terms of the subject matter to adjudicate the Applicant's case. The Court referred to Article 9 of then applicable Law on Administrative Conflicts.

32. According to the ruling of the Supreme Court the Applicant's case related to protection due to an unlawful action. Therefore, the Supreme Court decided to forward all case files to the District Court in Gjilan as the Court which had the appropriate jurisdiction pursuant to then applicable Law on Regular Courts.

33. On 17 November 2009, the District Court of Gjilan issued Judgment Cn.nr.24/09 granting the Applicant's claim and obligating the Municipal Education Department of Vitia to "to grant to the claimant [i.e. the Applicant] all rights deriving from the status of a fulltime student at 'Kuvandi i Lezhes' Gymnasium in Vitia."

34. The District Court found that ". . . the respondent [Municipality of Vitia] through an unlawful action based on a verbal reasoning dismissed the claimant [the Applicant] from school because she was wearing a headscarf in her head. Respondent's claims that the issue of wearing the uniform is regulated in a precise manner . . . are inconsistent."

35. On 23 November 2009, Applicant informed the MDE in Vitia of the District Court of Gjilan's judgment Cn.nr.24/09 and requested that the judgment be complied with.

36. On 25 January 2010, the Applicant wrote to the District Court of Gjilan informing the Court that Cn.Nr.24/09 had not yet been implemented by the MDE of Vitia and requesting that the Court take measures within its jurisdiction to implement the judgment.

37. To date the Applicant has not asked the Municipal Court in Vitia to execute the judgment of the District Court of Gjilan Cn.Nr. 24/09 of 17 November 2009.

Comments of the Opposing and/or Interested Parties

38. The District Court of Gjilan in their reply submitted to the Constitutional Court on 4 May 2011, stated that it was no longer competence to act in the matter since it had decided on the issue and the competent court for the execution of the Judgment was the Municipal Court in Vitia.

39. The MDE in their reply to the Constitutional Court of 16 May 2011 objected to the substance of the Applicant's complaint and stated that the Applicant's claims do not stand and her complaint addressed to the Constitutional Court was ungrounded and without argument.

40. The Municipal Court in Vitia in their reply of 5 July 2011 confirmed that the Applicant has never submitted a proposal for the execution of the final judgment CN. No. 24/09 rendered by the District Court.

Arguments presented by Parties

41. The Applicant states she has been denied her right to continue her education. According to her, notwithstanding that in Kosovo her education rights are recognized, for two years she has not been allowed to attend school. As stated earlier the Applicant alleges that following Articles of the Constitution have been violated: Article 24 (Equality before Law), Article 38 (Freedom of Belief, Conscience and Religion) and Article 47 (Right to Education).

42. In that respect the Applicant specified that "the abovementioned articles have been violated since [she] was denied the right to continue [her] education in accordance with [her] abilities, because the public institution denied [her] the right to attend the teaching process while wearing an Islamic headscarf, even though this act is called by the Constitution - discrimination on grounds of religion."

43. Finally the Applicant argues that the MDE in Vitia failed to implement the judgment of the District Court in Gjilan, which judgment is mandatory, and consequently the denial of her right to continue education was still persisting. She argues that there is no other legal remedy she can pursue in order to ensure enforcement of the District Court Judgment.

44. The District Court essentially objects to the admissibility of the Referral, alleging that the Applicant has to exhaust available remedy, i.e. to request the execution of the judgment in the Municipal Court in Vitia.

45. MDA argues that the Applicant's Referral submitted to the Constitutional Court is ungrounded and without arguments. By this argument, MDE essentially alleges that the Applicant's referral is manifestly-ill-founded.

46. In support of their arguments, MDA in their reply to the Constitutional Court stated as follows: "We would like to inform you that nobody from the school management or MDE has banned and denied her right to education, but they have been issued verbal warnings by Management of "Kuvendi i Lezhes" Secondary school that they are prohibited to wear the black scarf at school. Following this warning, the abovementioned student left school - and school management issued no disciplinary measure against her and hoped that this former student would continue her classes."

47. MDE further states that "the school management and MDE only implemented the Regulation on Conduct and Discipline of the Municipal Assembly of Vitia NO.01-013/866, Article 22, para 9, which stipulates that the students' uniform shall be the same, as well as Administrative Instruction of MEST No 7/2009, Article 4, para 13, which stipulates that the wearing of religious uniforms is prohibited at school."

48. MDE in their written submission again emphasizes that "MDE has in no way denied this former student her right to education….it is pressure against the school in order to impair the education process and her purpose was to impose to MDE and the school such a wearing, since the students of different religions, Muslim and Catholics, attend classes of this school,…and that the wearing of the black scarf at school is in contradiction to applicable norms and it would open the possibility of wearing various uniforms and clothing from students of different religions, and it would be a huge risk in damaging the inter- religious relations in our municipality."

Relevant legal background

49. A number of legal provisions have been quoted by the Parties in their written submissions.

50. The Court notes that Section 6 of the 2002 Law on Primary and Secondary Education in Kosovo specifies that 0rganisation of education programme in Kosovo shall consist of pre-primary, primary and

secondary education. As such the following educational levels have been organized:

(a) Level 0: Pre-primary Education (normally ages 3 to 6);
(b) Level 1: Primary Education (first stage of basic education) for 5 years (normally ages 6 to 12);
(c)Level 2: Lower Secondary education (second stage of basic education) for 4 years (normally ages 12 to 15); and
(d) Level 3: Upper Secondary education for 3 years or 4 years depending on the curriculum settled by MEST (normally ages 15 to 19).

51. Section 8 of the same Law prescribes that "access to Level 3 (upper secondary education) shall be open to pupils on a voluntary basis".

52. Furthermore the MEST Code of Good Conduct and Diciplinary Measures for Students of Secondary Higher Schools, in Article 3 prescribes obligations of the student, inter alia, "to keep the school uniform during learning process and professional practice, if the school is determined that the student to have uniform."

53. Article 6 of the same Code describes disciplinary educational measures such as:

1. *verbal warning;*
2. *written warning;*
3. *temporary suspension from competition, excursions, visits, walks;*
4. *temporary suspension until 3 days;*
5. *temporary suspension until 1 month;*
6. *suspension for more than 1 (one) month.*

54. It is further prescribed that an oral warning is to be given to a student who has committed a minor violation of school rules.

55. Finally, Article 4 of the MEST Administrative instruction No 7/2009, insofar relevant reads, as follows

"*Pupils are prohibited from:*
...
13. wearing religious uniforms."

Assessment of the Admissibility of the Referral

56. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

57. In this connection, the Court refers to Article 113 (7) of the Constitution, which provides:

"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";

58. The admissible requirements are further elaborated in the Law (see e.g. Article 47[2] of the Law), and the Rules of Procedure.

59. Article 36 of the Rules of Procedure , insofar as it is relevant, reads as follows:

"*Rule 36*

Admissibility Criteria

1. The Court may only deal with Referrals if:
a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted, or
b) the Referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or
c) the Referral is not manifestly ill-founded.
2. The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:
a) the Referral is not prima facie *justified, or*
b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or
c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or
d) when the Applicant does not sufficiently substantiate his claim";

Admissibility criteria with regard to the non-execution of the District Court Judgment:

60. The Constitutional Court notes that the Applicant in her referral stated there is no other legal remedy she can pursue in order to ensure the execution of the District Court Judgment.

61. The District Court on the other hand refers to the the admissibility requirements of the Referral, alleging that the Applicant has to exhaust available remedy, i.e. to request execution of its judgment from the Municipal Court in Vitia.

62. The Constitutional Court recalls that the Municipal Court in Vitia confirmed that the Applicant has never submitted a proposal for the execution of the final judgment CN. No. 24/09 rendered by the District Court

63. With regard to requirement of exhaustion of remedies the Court refers to its case -law (see. e.g. Judgment of the Court in case No 06/10 Valon Bislimi against Ministry of Internal Affairs, Kosovo Judicial Council And Ministry of Justice) as follows:

"50.The Constitutional Court recalls that a similar admissibility criterion is prescribed by Article 35 of the European Convention on Human Rights (the "Convention").

51. According to the well established jurisprudence of the European Court on Human Rights, the Applicants are only required to exhaust domestic remedies that are available and effective. Furthermore, this rule must be applied with some degree of flexibility and without excessive formalism. The European Court on Human Rights further recognized that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is the essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the country concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants …

64. The Constitutional Court notes that at the time of the alleged violation, the 1977 Law on Administrative Disputes (Official Gazette No 4/77 SFRJ) was applicable. Chapter VI of that Law entitled "Special Provisions" defined this remedy and its enforcement.

65. The Constitutional Court also notes that at the moment when the Applicant submitted the referral and when the Court communicated the Referral to the other parties in the proceedings the Law on Administrative Dispute was not any more applicable. Indeed, on 16 September 2010 the Assembly of Republic of Kosovo approved a new Law on Administrative Conflicts.

66. The Court further notes that executive procedure is prescribed by the Law on Executive Procedure from 2008. This Law prescribes the rules for executive court proceedings unless otherwise prescribed.

67. According to the Applicant's allegation and the documents in the case file it is clear that the Applicant has never submitted a request to the Municipal Court of Vitina for enforcement of the judgment of the District Court of 17 November 2009.

68. Therefore the Court finds that the Applicant has not exhausted "all effective remedies that are available under the law" contrary to the Rule 36 1(a) of the Rules of Procedure.

Admissible criteria with regard to the Applicant's other complaints:

69. The Court recalls that the Applicant complains that she has been denied of her right to continue her education. According to her notwithstanding that in Kosovo her education rights are recognized, for two years she is not allowed to attend the teaching process. As it was stated earlier the Applicant alleges that following Articles of the Constitution have been violated: Article 24 (Equality before Law), Article 38 (Freedom of Belief, Conscience and Religion) and Article 47 (Right to Education). In that respect the Applicant specified that "the abovementioned articles have been violated since [she] was denied the right to continue [her] education in accordance with [her] abilities, because the public institution denied [her] the right to attend the teaching process while wearing an Islamic headscarf, even though this act is called by Constitution discrimination on grounds of religion."

70. The Court notes, and this is undisputed between parties, that the Applicant has never received any decision from the school she was attending (nor MDE) that she was banned from the school or suspended from continuing her education.

71. Moreover, the Applicant's petition was confirmed by the District Court Judgment of 17 November 2009.

72. Consequently, the Court is not convinced with the Applicant's argument that she has not been permitted to attend the school "Kuvendi i Lezhes". The Court notes that the Applicant stopped attending her school on 15 January 2009 based on a "verbal warning." Only three months after that, on 15 April 2009, she approached a relevant state body, MDE. Seven months later the Applicant received a Judgment that she complains has not been executed.

73. According to the Applicant's allegation and the documents in the case file, it seems that the Applicant has never tried to attend school after 15 January 2009.

74. The Court therefore notes that the Applicant "does not sufficiently substantiate her claim" contrary to Rule 36.1(d) of its Rules of Procedure.

75. For the same reasons that Court is of the view that that Applicant did not prima facie justify her referral (see above quoted Rule 36 [2]a). Indeed the facts of the case that are presented by the Applicant to the Constitutional Court "do not in any way justify the allegation of a violation of constitutional rights" contrary to Rule 36.2 (b) and (c) of the Rules.

76. In this respect, the Court is obliged, pursuant to Article 53 of the Constitution, to interpret human rights and fundamental freedoms consistent with the court decisions of the European Court on Human Rights (ECtHR). The Constitutional Court recalls the Judgment of the ECtHR, in the case of Dogru v. France (Application no 27058/05) of 4 December 2008 as follows:

"61. *The Court reiterates that while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. It does not, however, protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in a manner governed by a religious belief (see Leyla Sahin, cited above, §§ 105 and 212).*

62. The Court notes next that in a democratic society, in which several religions coexist within one and the same population, it may be

necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (see Leyla Sahin, cited above, § 106). It has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs and that it requires the State to ensure mutual tolerance between opposing groups (see Leyla Sahin, cited above, § 107). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals which are justified in order to maintain and promote the ideals and values of a democratic society.

63. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, in respect of which the approaches taken in Europe are diverse. Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (see Leyla Sahin, cited above, §§ 108-09).

64. The Court also reiterates that the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety (see Leyla Sahin, cited above, § 111, and Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 92, ECHR 2003-II). Accordingly, compelling a motorcyclist, who was a practising Sikh wearing a turban, to wear a helmet was a safety measure and any resulting interference with the exercise of his freedom of religion was justified on grounds of the protection of health (see X v. the United Kingdom, no. 7992/77, Commission decision of 12 July 1978, Decisions and Reports (DR) 14, p. 234). Likewise, security checks enforced at airports (see Phull v. France (dec.), no. 35753/03, ECHR 2005-I, 11 January 2005) or at the entrance to consulates (see El Morsli v. France (dec.), no. 15585/06, 4 March 2008, ECHR 2008-...) and consisting in ordering the removal of a turban or a veil in order to submit to such checks do not constitute disproportionate interferences with the exercise of the right to religious freedom. Nor does the

regulation of student dress or the refusal to provide administrative services, such as issuing a diploma, constitute a disproportionate interference where the individual concerned fails to comply with the rules (in the case in point requiring a student wearing the Islamic headscarf to appear with her head uncovered on a passport photo), regard being had to the requirements of the secular university system (see Karaduman v. Turkey, 16278/90, Commission decision of 3 May 1993, DR 74, p. 93). In the case of Dahlab (cited above), the Court held that prohibiting a teacher from wearing her headscarf while teaching a class of young children was "necessary in a democratic society", having regard, among other things, to the fact that secularism, which presupposes denominational neutrality in schools, is a principle laid down in the Constitution of the canton of Geneva. The Court stressed the "powerful external symbol" represented by wearing the headscarf and also considered the proselytising effect that it might have seeing that it appeared to be imposed on women by a religious precept which was hard to square with the principle of gender equality.

65. In the cases of Leyla Sahin and Köse and Others in particular, the Court examined complaints similar to the one in the present case and concluded that there had been no appearance of a violation of Article 9 having regard, among other things, to the principle of secularism.

66. In the case of Leyla Sahin*, after analysing the Turkish context, the Court found that the Republic had been founded on the principle that the State should be secular, which had acquired constitutional value; that the constitutional system attached prime importance to the protection of women's rights; that the majority of the population of the country were Muslims; and that for those who favoured secularism the Islamic headscarf had become the symbol of a political Islam exercising a growing influence. It thus held that secularism was undoubtedly one of the fundamental principles of the State which were in harmony with the rule of law and respect for human rights and democracy. The Court thus noted that secularism in Turkey was the guarantor of democratic values and the principle that freedom of religion is inviolable and the principle that citizens are equal, that it also served to protect the individual not only against arbitrary interference by the State but also from external pressure from extremist movements and that freedom to manifest one's religion could be restricted in order to defend those values. It concluded that this notion of secularism was consistent with the values underpinning the Convention. Upholding that system could be considered necessary to protect the democratic system in Turkey (see* Leyla Sahin*, cited above, § 114).*

67. In the case of Köse and Others *(cited above), the Court also considered that the principles of secularism and neutrality at school and respect for the principle of pluralism were clear and entirely legitimate grounds justifying refusing pupils wearing the headscarf admission to classes when they refused – despite the relevant rules – to remove the Islamic headscarf while on the school premises.*

68. Applying those principles and the relevant case-law to the present case, the Court observes that the domestic authorities justified the ban on wearing the headscarf during physical education classes on grounds of compliance with the school rules on health, safety and assiduity which were applicable to all pupils without distinction. The courts also observed that, by refusing to remove her headscarf, the applicant had overstepped the limits on the right to express and manifest religious beliefs on the school premises.

69. The Court also observes, more generally, that the purpose of that restriction on manifesting a religious conviction was to adhere to the requirements of secularism in state schools, as interpreted by the Conseil d'Etat *in its opinion of 27 November 1989 and its subsequent case-law and by the various ministerial circulars issued on the subject.*

70. The Court next notes that it transpires from these various sources that the wearing of religious signs was not inherently incompatible with the principle of secularism in schools, but became so according to the conditions in which they were worn and the consequences that the wearing of a sign might have.

71. In that connection the Court refers to its earlier judgments in which it held that it was for the national authorities, in the exercise of their margin of appreciation, to take great care to ensure that, in keeping with the principle of respect for pluralism and the freedom of others, the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion (see Köse and Others, cited above). In the Court's view, that concern does indeed appear to have been answered by the French secular model.

72. The Court also notes that in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools. The Court reiterates that an attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to

*manifest one's religion and will not enjoy the protection of Article 9 of the Convention (*see Refah Partisi (Prosperity Party) and Others*, cited above, § 93). Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention."*

77. The Court recalls that Article 8 of the Constitution defines the Republic of Kosovo as a secular state. It reads as follows:

"The Republic of Kosovo is a secular state and is neutral in matters religious belief."

78. Accordingly, based on the all above reasons the Applicant's referral should be declared as inadmissible pursuant to Rule 36 of the Rules of Procedure

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law and Rule 36 of the Rules of Procedure, by majority

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Asst. Prof. Dr. Iliriana Islami	Prof. Dr. Enver Hasani

Binak Thaqi vs. District Court Judgment P. no. 610/07, Supreme Court Judgment Ap. No. 267/08, Supreme Court Judgment Pn. No. 311/10 and Supreme Court Judgment Pn. No. 572/10

Case KI 106-2010, decision of 4 October 2011

Keywords: criminal matter, equality before the law, exhaustion of legal remedies, individual referral, language issues, manifestly ill-founded referral, right to effective legal remedies, right to fair and impartial trial, rights of the accused, specification of rights violated

The Applicant, convicted of murder and firearms violations, filed a Referral pursuant to Article 113.7 of the Constitution challenging decisions of the Peja District Court and the Supreme Court, contending that his rights under Articles 5, 24.2, 30.1, 31.1.4, and 32 of the Constitution were violated because an autopsy report admitted at his trial was in English, depriving the Applicant of an ability to attack the report or use it in cross-examination. The District Court twice rejected a request for a re-trial, and the Supreme Court rejected two appeals of those decisions as ungrounded.

The Court held that the Referral was inadmissible because the Applicant both failed to exhaust all legal remedies pursuant to Article 113.7 and, per Article 48 of the Law on the Constitutional Court, to specify the rights and freedoms that were violated. Specifically, the Applicant failed to clarify how an Albanian version of the autopsy report would have created reasonable doubt, noting that the Applicant's admissions considerably lessened the report's significance. The Court also noted that the Applicant failed to object at trial either to the use of an English-version autopsy report or the alleged inability to cross examine witnesses regarding the report, and that the Applicant failed to raise those issues in his Supreme Court appeal.

Pristina, July 2011
Ref. No.:RK/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 106/10

Applicant

Binak Thaqi

Constitutional Review of the: District Court Judgment P.no. 610/07, Supreme Court Judgment Ap.no. 267/08, Supreme Court Judgment Pn.no. 311/10 and Supreme Court Judgment Pn.no. 572/10

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Binak Thaqi of Gjakova represented by his lawyer Mustafe Kastrati of Peja.

Challenged Decisions

2. The Applicant challenges the decisions of the District Court in Peja (P.no. 610/07. Three judgments were issued under this decision number on the following dates: 21 November 2007, 8 April 2010 and 1 September 2010) and the decisions of the Supreme Court (Ap. no. 267/08 of 25 September 2008, Pn.no. 311/10 of 12 July 2010 and Pn.no. 572/10 of 5 October 2010).

Subject Matter

3. The matter concerns the conviction of the Applicant in the District Court of Peja on 21 November 2007 for murder and unauthorized ownership, control, possession or use of weapons.

Legal Basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as

the Law) and Section 56.2 of the Rules of Procedure of the Constitutional Court (hereinafter referred to as the Rules).

Proceedings before the Court

5. On 21 October 2010 the Applicant filed a Referral with the Secretariat of the Constitutional Court.

6. By order of the President of the Constitutional Court Deputy -President Kadri Kryeziu was appointed as Judge Rapporteur. The President of the Constitutional Court appointed a Review Panel composed of Judges Almiro Rodrigues (presiding), Ivan Čukalović and Iliriana Islami.

7. On 14 June 2011 the Review Panel considered the report of the Judge Rapporteur and deliberated on the matter and made a recommendation to the full Court.

Summary of the Facts

8. The Applicant was convicted of murder under Article 146 of the Provisional Criminal Code of Kosovo and unauthorized ownership, control, possession or use of weapons under Article 328 (2) of the Provisional Criminal Code of Kosovo in the District Court in Peja on 21 November 2007. The evidence relied on which led to his conviction was extensively set out in the Decision of the District Court.

9. The Applicant, who was then represented by his defense counsel Enver Nimani, lodged an Appeal dated 21 April 2008 to the Supreme Court of Kosovo against the conviction on a substantial number of grounds. These grounds included that the Court misinterpreted numerous instances of fact and came to numerous erroneous conclusions. That Appeal also alleged that self-defense was not properly considered by the District Court. The Appeal contained the statement that *"the death of the late [... deceased...], as a result of bullets fired from the pistol of Binak Thaci, by his hands, is indisputable ..."*

10. The Appeal also referred to the sentences of imprisonment for both counts, stating that the sentences were too harsh.

11. On 25 September 2008 the Supreme Court of Kosovo rejected that Appeal as ungrounded and upheld the judgment of the District Court. The Supreme Court also rejected the Appeal against the severity of the sentences.

12. On 14 August 2009 the Applicant, then represented by lawyer Mustafe Kastrati, lodged a Motion with the District Court in Peja seeking to re-open the procedure. The grounds included, but were not confined to, the fact that there was an incomplete autopsy report on the causes of death and that the autopsy report was in English only. The District Court, by Decision dated 8 April 2010, rejected the request to reopen the criminal procedure and stated that the matter was *res judicata*.

13. On Appeal from this Decision of the District Court the Supreme Court, by Decision of 12 July 2010, rejected the appeal as ungrounded.

14. The Applicant then filed a request for protection of legality to the District Court, arising from alleged violations of the Criminal Code, the Constitution of the Republic of Kosovo, the Charter of Human Rights [sic] and requested that the procedure be reopened. The District Court rejected this request as inadmissible on 1 September 2010.

15. The Applicant appealed this Decision to the Supreme Court on 6 September 2010. The Supreme Court rejected the Appeal on 5 October 2010 as ungrounded.

Allegations of the Applicant

16. The Referral alleges that the following rights guaranteed by the Constitution have been violated: Article 5 [Languages], Article 24.2 [Equality Before the Law], Article 30.1 [Rights of the Accused], Article 31.1.4 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies].

17. The substance of the Referral hinges on the allegation that the autopsy report on the deceased was in English and not in Albanian and that the Applicant and his lawyer therefore had no opportunity to question it or to cross examine witnesses in relation to it.

Assessment of the Admissibility of the Referral

18. The admissibility requirements are laid down in the Constitution and further specified in the Law and the Rules of Procedure.

19. Article 113. 1 and 113.7 of the Constitution establish the general legal frame required for admissibility. Article 113.1 provides:

    1. *The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*

Article 113.7 provides:

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.*

20. Furthermore, Article 48 of the Law states:

"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."

21. Finally, Rule 36 of the Rules of Procedure states:

"1. The Court may only deal with Referrals if:
c) the Referral is not manifestly ill-founded.

2. The Court may reject a Referral as being manifestly ill-founded when it is satisfied that:

a) the Referral is not prima facie justified, or

b) when the presented facts do not in any way justify the allegation of the violation of constitutional rights, or

c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

d) when the Applicant does not sufficiently substantiate the claim;"

22. Article 35.1 of the European Convention on Human Rights and Fundamental Freedoms provides that the European Court of Human Rights may only deal with a matter when all domestic remedies have been exhausted.

23. The Constitutional Court of Kosovo applied the reasoning of exhaustion of remedies in Case No. KI41/09, AAB-RIINVEST University L.L.C. vs. Government of the Republic of Kosovo, and in Case No. KI. 73/09, Mimoza Kusari Lila vs. the Central Election Commission.

24. In these cases, the Court emphasized that the rationale for the exhaustion rule is to afford the authorities concerned, including the regular courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that

the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803194, decision of 28 July 1999).

25. The European Court of Human Rights elaborated on the importance of this concept, in so far as it relates to raising alleged violations when exhausting domestic legal remedies prior to submitting an application to the Court, in Selmouni v. France (no. 25803194, decision of 28 July 1999), discussing the purpose of Article 35 [Admissibility Criteria] and the assumption of effective domestic legal remedies, stating:

". . . Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law (see the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, § 34)."

26. The Constitutional Court of Kosovo applied this reasoning in KI 07-09 (Deme and Besnik Kurbogaj vs. Supreme Court Judgment Pkl.nr. 61/07 and Supreme Court Judgment No. Ap.nr. 510/07) to find inadmissible the Applicants' allegations of a violation of the right to fair trial due to the police and prosecution threatening witnesses, stating:

". . . neither in the attached decision of the District Court of Peja nor in the decisions of the Supreme Court any reference to the event can be found. On the other side, there is nowhere mentioning of any objection made in the hearing to the alleged violation eventually occurred and, if any, what was the remedy.

Therefore, the referral does not attach the necessary supporting information and documents to prove the allegation. Apparently the applicant didn't actually object to the violation and therefore waived the right of invoking now such a violation if any."

27. As stated in the facts above the whole of the Referral is now focused on the fact that the autopsy report was in English and that the Applicant did not have an opportunity to understand its contents or to cross examine in relation to it. However, the Applicant does not indicate what evidence in the autopsy report would have been of relevant probative value in casting doubt on the original verdict and conviction for murder and unauthorized use of a weapon. Furthermore the arguments of the Applicant at this stage as to the importance of what might be in the autopsy report are lessened considerably by the admissions of the

Applicant that " the death of the late [... deceased...], as a result of bullets fired from the pistol of Binak Thaci, by his hands, is indisputable ...".

28. The Constitutional Court of Kosovo does not have an appellate jurisdiction and cannot intervene on theory that such courts have made a wrong decision or erroneously assessed the facts. The role of the Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and can, therefore, not act as a "fourth instance "court (see, mutatis mutandis, i.a., Akdivar v. Turkey, 16 September 1996, R.J.D, 1996-IV, para. 65).

29. In addition, the Court notes there is no evidence in the Referral to suggest the Applicant objected to the English language autopsy report, its lack of availability in Albanian, or his lost opportunity to question the report or cross examine witnesses in relation to it during the initial trial at the District Court in Peja. These issues are also not raised in the Applicant's appeal to the Supreme Court dated 21 April 2008.

30. On the basis of the above reasoning, the Referral is manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of Law, and Rule 56 (2) of the Rules of Procedure, by majority

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Kadri Kryeziu	Prof. Dr. Enver Hasani

Vehbi Halili vs. Supreme Court Judgment Rev. no. 5/2004

Case KI 69-2010, decision of 4 October 2011

Keywords: discrimination in employment, inadmissible *ratione temporis*, individual referral, right to work, right to work and exercise profession

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution asserting that his Constitutional right to work [Article 49] was infringed by the Supreme Court when it affirmed a 2003 decision of the Mitrovica District Court rejecting a claim that he was dismissed in 1990 from his position as Assembly Committee Clerk on account of his Albanian origin and reversing the Vucitrn Municipal Court's order reinstating him to his former position or to another workplace suitable to his professional background.

The Court held pursuant to Rule 36.3(h) of the Rules of Procedure that the Referral was inadmissible as being incompatible *ratione temporis* with the Constitution, citing *Blečić v. Croatia* for the proposition that temporal jurisdiction involves considerations of the factual subject matter of the complaint and the scope of the Constitutional right involved.

Pristina, 2011
Ref. No.: RK 13/11

RESOLUTION ON INADMISSIBILITY
in

Case No. KI 69/10

Applicant

Vehbi HALILI

Constitutional Review of the Supreme Court Judgment Rev. no. 5/2004 dated 10 February 2004

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge

Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Vehbi Halili, residing in Vucitrn, Kosovo.

Challenged court decision

2. The challenged court decision is the Judgment of the Supreme Court of Kosovo, Rev. no 5/2004 of 10 February 2004, which was served on the Applicant on 5 March 2004.

Subject matter

3. The Applicant alleges that his right to work guaranteed by the Constitution of the Republic of Kosovo, which right is also guaranteed by international Conventions that are directly applicable by operation of Article 22 of the Constitution has been violated.

4. The Applicant requests the Constitutional Court to enforce constitutionality and legality in his case, enabling him to realise his basic right to work, will all rights and duties of the job he had enjoyed before his dismissal.

Legal basis

5. Article 113.7 of the Constitution of the Republic of Kosovo; Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rule 36 (3) (h) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

6. On 30 July 2010 the Applicant submitted the Referral to the Court.

7. On 23 November 2010, the President, by Order No.GJR. 69/10, appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President, by Order No.KSH. 69/10, appointed the Review Panel

composed of Judge Robert Carolan (Presiding), Judge Snezhana Botusharova and Judge Almiro Rodrigues.

8. On 20 May 2011, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts and allegations as presented by the Applicant

9. The Applicant was employed at the Municipal Assembly in Vucitrn in the position of Assembly Committee Clerk in the course of 1998.

10. In 1990 he was expelled from his workplace as a result of imposed management in the Municipality of Vucitrn. This was done only because of his Albanian ethnic origin.

11. Following his dismissal the Applicant initiated proceedings before the Municipal Court of Vucitrn in March 2000. By its judgment K No. 13/2000 of 16 October 2000, the Municipal Court in Vucitrn, granted the Applicant's claim suit and ordered the Municipality of Vucitrn to restore the Applicant to the workplace of Assembly Committee Clerk, or another workplace suitable to his professional background.

12. Unsatisfied with this outcome, the Municipality of Vucitrn submitted an appeal before the District Court of Kosovo on 16 October 2000.

13. On 13 November 2003 the District Court of Kosovo, by its judgment AC. No 32/2001 amended entirely the above mentioned judgment of the Municipal Court in Vucitrn and rejected as ungrounded the Applicant's claim suit.

14. Subsequently, the Applicant submitted a revision to the Supreme Court of Kosovo.

15. On 19 February 2004, the Supreme Court of Kosovo issued the Judgment Rev. no 5/2004 that was according to the Applicant served on him on 5 March 2004.

Assessment of the admissibility of the Referral

16. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

17. As to the Applicant's Referral, the Court refers to Rule 36 (3) (h) which reads as follows:
"A Referral may also be deemed inadmissible in any of the following cases:

(h) the Referral is incompatible ratione temporis with the Constitution."

18. In order to establish the Court's temporal jurisdiction it is essential to identify, in each specific case, the exact time of alleged interference. In doing so the Court must take into account both the facts of which the Applicant complains and the scope of the Constitution right alleged to have been violated (see*, mutatis mutandis, European Court of Human Rights Grand Chamber Judgment in the case of Blečić v. Croatia, Application no.59532/0, dated 8 March 2006, para. 82.).*

19. The Court notes that the Applicant complains that his right to work guaranteed by the Constitution of the Republic of Kosovo has been violated. In that respect the Applicant challenges Judgment Rev.no.5/2004 of the Supreme Court which is dated 10 February 2004 and which was served on the Applicant on 5 March 2004.

20. This means that the alleged interference with Applicant's right guaranteed by the Constitution occurred prior to 15 June 2008 that is the date of the entry into force of the Constitution and from which date the Court has temporal jurisdiction.

21. It follows that the Applicant's referral is incompatible "*ratione temporis*" with the provisions of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution of the Republic of Kosovo and Section 36 (3)(h) of the Rules of Procedure, on 20 May 2011, unanimously,

DECIDES

I. TO REJECT the referral as inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. The Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

Lon Paluca vs. Judgment Rev. no. 286/2007 of the Supreme Court

Case KI 116-2010, decision of 12 October 2011

Keywords: compensation of property right, expropriation, individual referral, international agreements and instruments, property ownership dispute, protection of property, right to fair and impartial trial

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 22, 46.1 and 46.3 of the Constitution, as well as Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, were infringed by a judgment of the Supreme Court, which affirmed a decision of the lower courts rejecting the Applicant's claim for compensation for expropriated property.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Article 48 of the Law on the Constitutional Court because the Applicant failed to specify what Constitutional rights and freedoms were violated, or the public authority actions related to the alleged violations, noting the absence of a *prima facie* showing of a Constitutional violation, citing *Vanek v. Slovak Republic.* The Court emphasized that its discretion was limited to disposing of Constitutional controversies, such as whether the Applicant received a fair trial, as opposed to the resolution of factual or substantive law disputes, citing *Garcia Ruiz v. Spain* and *Edwards v. United Kingdom*, noting that the Applicant had not challenged the fairness of the proceedings in the lower courts.

Pristina, 12.October 2011
Ref. No.: RK 141 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 116/10

Applicant

Lon Paluca

Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev. no. 286/2007, dated 6 May 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Lon Paluca, residing in Prizren and represented by Mr. Sahit Bibaj, a practicing lawyer from Pristina.

Subject Matter

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo (hereinafter: the "Supreme Court"), Rev.no. 286/2007, dated of 6 May 2010 and served on the Applicant on 15 November 2010, and by which his right to be compensated for property expropriation was allegedly violated.

3. The Applicant requests an assessment of the constitutionality of the Judgment of the Supreme Court, as being in violation of Article 46.1 and 46.3 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and Article 1 [Protection of Property] of Protocol 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the "ECHR") in conjunction with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution.

Legal Basis

4. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 18 November 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 22 November 2010, the President appointed Judge Almiro Rodrigues as Judge Rapporteur. On the same date, the President appointed the Review Panel composed of Judges Ivan Čukalovič (Presiding), Kadri Kryeziu and Gjyljeta Mushkolaj.

7. On 28 January 2011, the Referral was forwarded to the Supreme Court.

8. On 27 April 2011, the Court requested additional documents by the Municipality of Klina, showing whether the Applicant had received another premise to exercise his business activity.

9. On 27 April 2011, the Court requested additional documents by the Applicant, showing whether the Applicant had received another premise to exercise his business activity.

10. On 3 May 2011, the Municipality of Klina submitted its reply/documents, showing that the Applicant was not against the expropriation and that he did not want compensation but a premise so he could continue to exercise his business activity. Furthermore, the Applicant had only a temporary permit to exercise his business activity in the premise that was expropriated.

11. On 6 May 2011, the Applicant submitted the requested additional documents showing that the Applicant has never received compensation in respect to the expropriated property. However, the Applicant has not replied to the question whether he received another premise or not to exercise his business activity.

12. On 23 May 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

13. On 14 January 1975, the Applicant bought immovable property in the area of 0.03.20 hectares. The Applicant confirmed the sale contract at the court, paid the transaction price and gained possession and use of the immovable property.

14. On 18 January 1977, the Municipal Assembly of Klina, the Directorate of Economy, Municipal Affairs, and Legal-Property Affairs expropriated the Applicant's immovable property in favour of the self-governing community for housing interest and for the construction need of a socially-owned building in that immovable property (Decision No. 04-465-15/2). According to this decision, the Applicant had approved the expropriation but required compensation with a similar premise so he could continue with his business. In this respect, the Applicant initiated a judicial procedure before the Municipal Court to receive compensation for the expropriated property. However, there was no final court decision. After 1999, the Applicant made attempts to secure the case file and to continue the procedures, but was unsuccessful because the Municipal Court verbally informed the Applicant that his case was not with them and this was later confirmed in writing (Confirmation A.GJ. 276/2010 of 22 October 2010).

15. On 17 April 2001, the Applicant filed a suit for compensation with the Municipal Court in Klina.

16. On 16 October 2003, the Municipal Court of Klina upheld the Applicant's claim and instructed the opposing party, in relation to the expropriated property, to grant the Applicant permanent use of a premise of the same dimensions as the expropriated property, or that the Applicant is compensated in monetary value (C.no. 54/2001).

17. The Municipality of Klina appealed this judgment to the District Court of Peja.

18. On 8 May 2007, the District Court of Peja quashed the judgment of the Municipal Court rejecting the claim of the Applicant as ungrounded and concluded that the Applicant did not file a claim for compensation until 2001 and, therefore, the Applicant's claim for compensation was prescribed (Ac.no. 233/04).

19. On 9 July 2007, the Applicant filed a revision with the Supreme Court.

20. On 6 May 2010, the Applicant's claim for revision was rejected as ungrounded. The Supreme Court upheld the decision of the District Court (Rev.No. 286//2007) and further stated that the opposing party lacked passive legitimacy, because it was not the legal successor of those bodies that expropriated the property. The opposing party were recently-established bodies on the basis of UNMIK Regulation 2000/45 on Self-Government of Municipalities in Kosovo (hereinafter: UNMIK

Regulation 2000/45) which provides that they will not undertake the obligations of the former Municipality of Klina.

Applicants' allegations

21. The Applicant alleges that his rights guaranteed by Article 46.1 and 46.3 [Protection of Property] of Constitution have been violated because he was never compensated for the expropriated property. The Applicant further alleges that the right guaranteed by Article 1 [Protection of Property] of Protocol 1 of ECHR , which is directly applicable as provided by Article 22 of the Constitution, has been violated.

Admissibility of the Referral

22. The Applicant complains that the Supreme Court has violated Article 46.1 and 46.3 [Protection of Property] of the Constitution, and Article 1 [Protection of Property] of Protocol 1 of ECHR, in conjunction with Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution.

23. However, in order to be able to adjudicate the Applicant's Referral, the Court examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, as further specified in the Law and the Rules of Procedure.

24. In this connection, the Court refers to Article 48 of the Law:

"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."

25. Under the Constitution, it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (constitutionality). Thus, the Court is not to act as a court of fourth instance, when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

26. In fact, the Applicant does not substantiate any appearance of a violation of his rights, namely the right to a fair trial, guaranteed by the Constitution.

27. Therefore, the Constitutional Court can only consider whether the proceedings, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, mutatis mutandis, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87 adopted on 10 July 1991). However, the Applicant has not made any allegation on the fairness of the proceedings conducted by the Supreme Court.

28. In conclusion, the Applicant has neither built a case on a violation of his right to a fair trial by the regular courts nor has he submitted any prima facie evidence on such a violation (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005). Moreover, the Applicant has not accurately clarified, as required by Article 48 of the Law, what rights and freedoms he claims to have been violated by the Judgment of the Supreme Court.

29. It follows that the Referral is manifestly ill-grounded pursuant to Rule 36 1. (c) of the Rules of Procedure which provides that *"The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded."*

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 48 of the Law on the Constitutional Court, and Rule 36 (1.c) and Rule 56 (2) of the Rules of Procedure, on ... 2011, ...

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Shejh Ali Shehu vs. Judgment Rev. 995/99 of the Supreme Court of the Republic of Serbia

Case KI 52-2009, decision of 14 October 2011

Keywords: competence to enter into contractual relations, exhaustion of legal remedies, inadmissible *ratione temporis*, individual referral, inheritance issue, language issues, protection of property, right to property, specification of rights violated, undue influence on a party to a contract

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution contending that the Supreme Court of Serbia violated his Constitutional rights in 2000 when affirming a 1998 decision by the Peja District Court upholding in the Djakova Municipal Court's 1997 annulment of a contract involving donation of land by his mother to him. The Gjakova Cadastral Office annulled his registration of the property in July 2009 on deception grounds, and the Applicant's appeal to the Kosovo Cadastral Agency (KCA), was pending. The Referral did not allege a violation of a specific Constitutional right; the Court itself specified Article 46.

First, the Court held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court because all legal remedies had not been exhausted in view of the pendency of the KCA appeal, citing *Selmouni v. France* for the proposition that the exhaustion rule assumes that the Kosovo legal system will provide effective legal remedies for constitutional rights violations. Second, the Court held that even if legal remedies had been exhausted, the Referral was inadmissible because the alleged violation happened prior to the implementation of the Constitution and an institution of the Republic of Kosovo did not perform the challenged acts, citing *Blečić v. Croatia*.

Prishtina, 14 October 2011
Ref.No.:RK 127/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 52/09

Applicant

Shejh Ali Shehu

Constitutional review of the Judgment of the Supreme Court of the Republic of Serbia, Rev. 995 /99, of 2 February 2000

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Shejh Ali Shehu, from Gjakova, who is duly represented by Mr. Besnik Haxhijanuzi, a lawyer from Gjakova, residing at Mother Theresa St, no number.

Challenged Decision

2. The challenged decision is the Judgment of the Supreme Court of the Republic of Serbia, Rev. 995/99, of 2 February 2000.

Subject Matter

3. The subject matter of the case submitted for review with the Constitutional Court of the Republic of Kosovo on 14 October 2009 is the assessment of the constitutionality of the Judgment of the Supreme Court of the Republic of Serbia, Rev. 995/99, of 2 February 2000, whilst the party has not provided any general specification as to which constitutionally guaranteed rights have allegedly been violated with the challenged Judgment

Alleged violations of constitutionally guaranteed rights

4. Even though Article 48 of the Law on the Constitutional Court of the Republic of Kosovo stipulates that: “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", the applicant did nod base his referral on the provisions of the Law and Constitution, although it can be assumed that the Applicant complains about a violation of the right to property based on Article 46 of the Constitution, although he did not attach any evidence to support his claims.

Legal basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2009 (hereinafter referred to as: the Law), and Section 29 of the Rules of Procedure).

Proceedings before the Court

6. On 14 October 2010, the Applicant filed his Referral with the Constitutional Court.

7. On 21 October 2010, the Constitutional Court notified the Applicant on the registration of his Referral with the Secretariat of the Court.

8. On 13 December 2010, after having considered the Report of the Judge Rapporteur, Kadri Kryeziu, the Review Panel, composed of Judges Almiro Rodiges (Presiding), Iliriana Islami and Gjyljeta Mushkolaj, members, on the same date, recommended to the full Court to reject the Referral as inadmissible.

Applicant's Complaint

9. The Applicant requests the Constitutional Court to assess the constitutionality of the Judgment of the Supreme Court of the Republic of Serbia, Rev. 995/99, of 2 February 2000, and declare it as incompatible with the Constitution and applicable laws in the Republic of Kosovo, and as a legal act that does not produce any legal effects, assuming that it is exactly because of the operation of this Judgment that he has been seriously damaged in the issue of enjoying the property he had gained earlier, according to him, in a legal manner.

Summary of the facts

10. Applicant's mother is Nazife Shehu (now deceased). His father is Shejh Muharrem Shehu (also deceased now). When Muharrem Shehu passed away, Nazife inherited all his property (Decision T. nr. 52/70, of 16.03.19979), whereas their heirs had agreed they would divide the property in equal shares after her death.

11. Pursuant to the donation contract (Ov. br. 237/96, of 1 March 1996), Nazife donated a part of the property to her son, Ali Shehu (now, the Applicant). However, when the other son of Nazife, Aziz Shehu, who was also her caretaker, explained to her what contract she had concluded, "she was terrified, objected it and requested an urgent procedure" for the annulment of the contract.

12. Aziz Shehu, as stated above, was the caretaker of Mrs. Nazife, and, through her authorization, he filed a lawsuit against Ali Shehu with the Municipal Court in Djakova for the annulment of the donation contract, and this Court, through Judgment (P. br. 279/97) of 9 July 1997: (1) annulled the donation contract, and (2) ordered plaintiff's procedural expenses to be paid.

The contract was annulled for three main reasons:

a) Insanity: According to the applicable law at that time, parties to a contract should have "ability to act" in order to enter into contractual relations (Article 56, para 1, Law on Torts and Obligations of SFRY). Mrs. Nazife suffered from chronicle arteriosclerotic insanity. When she signed the contract, she was not capable of understanding what she was doing. So, the contract should be annulled;

b) Language: The contract was drafted in Serbian, and Mrs. Nazife "could hardly speak her own mother tongue", and had little or no knowledge of Serbian; and

c) Manipulation: Mr. Ali took advantage of his mother's visit to his house to instruct her (under pressure) to sign the contract.

13. On 7 October 1998, the District Court in Peja issued Judgment Gz. br. 480/98 rejecting Mr. Ali's appeal as ungrounded and confirming the Judgment of the Municipal Court.

14. On 11 November 1998, the Applicant filed a request for revision with the Supreme Court of Serbia in Belgrade.

15. On 2 February 2000, the Supreme Court of Serbia issued Judgment Rev. 995/99 rejecting Mr. Ali's revision as ungrounded. It found there was no violation of the Law on Contested Procedure (SFRY), and that the lower Court had correctly applied respective laws.

16. Nine years later and after the death of his mother, Mr. Ali Shehu submitted a request with the Municipal Cadastral Office in Gjakova in order to register his property. On 19 May 2009, the Municipal Cadastral Office recognized his right to register the real estate (Nr. 436/09).

17. On 28 July 2009, the Municipal Cadastral Office in Gjakova annulled Decision 436/09, of 19 May 2009. This Office found that evidence from previous legal proceedings showed that Ali Shehu had deliberately deceived the Municipal Cadastral authority, and it reinstated the previous situation.

18. On 24 August 2009, Ali Shehu filed an appeal with Kosovo Cadastral Agency requesting from the Agency to declare the Decision of the Municipal Cadastral Office in Gjakova as unlawful and to leave Decision 436/09 in force, which would allow him to register the property. The decision was pending since the date of the submission of the request.

Assessment of the admissibility

19. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements, laid down in the Constitution.

20. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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".

21. Article 47.2 of the Law on the Constitutional Court of the Republic of Kosovo provides:

"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".

22. Article 48 of the Law on the Constitutional Court provides:

"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".

23. In the capacity of the interested party, Mr. Aziz Muharrem Shehu addressed the Constitutional Court with a request to obtain a copy of the Referral submitted with this Court by Mr. Shejh Ali Shehu saying that: "There is an ongoing property dispute at the Municipal Court in Gjakova pursuant to the lawsuit of the plaintiff Sheh Ali Shehu, from Gjakova, against his brothers and relatives, Afijete Shehu and others, registered under C. nr. 314/01. Mr. Aziz Shehu has also notified the Constitutional Court that Mr. Sheh Ali Shehu's representative, the lawyer Besnik Haxhiujonuzi, has requested from the Municipal Court to stop the procedure for the revision of this heritage until the Constitutional Court reaches a decision on his client's request for the assessment of the constitutionality of the Judgment of the Republic of Serbia, Rev. nr. 995/99, of 2 February 2000, registered at the Constitutional Court under number KI 52/09, whose resolution he considers a preliminary issue.

24. Based on what was said above, the Court considers that this issue is still ongoing with the Municipal Court in Gjakova, and, since there is no final decision and legal remedies have not been exhausted in order to challenge the eventual decision unsatisfactory for the parties to the dispute, the admissibility requirements set forth under Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court of the Republic of Kosovo concerning the exhaustion requirement have not been met.

25. The Court wishes to emphasize that the rationale of the rule for the exhaustion of legal remedies is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. This rule is based on the assumption that the legal order of the Republic of Kosovo will provide effective legal remedies for the protection of the violation of constitutional rights (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, Decision of 28 July 1999).

26. The Court also emphasizes that even if the Referral were submitted after the exhaustion of legal remedies available, the Referral would nonetheless be inadmissible since its Applicant requests the assessment of the constitutionality of an act of a public authority that has not been issued by the Institutions of the Republic of Kosovo and it was done prior to the entry into force of the Constitution of the Republic of Kosovo. In this regard, always taking into account time limits, the Court notices that the assessment of the constitutionality of acts of public authorities dating

prior to the entry into force of the Constitution of the Republic of Kosovo (15 June 2008) is not possible.

27. Considering the fact that pursuant to general provisions of the international law (non-retroactivity of agreements-treaties), provisions of the European Convention on Human Rights do not oblige contracting parties regarding any act that has been issued or a legal situation that ceased existing prior to the entry into force of the convention (see, mutatis mutandis, Blečić v. Croatia, Application no. 59532/00, ECHR Judgment of 29 July 2004), the Constitutional Court cannot assess the constitutionality of legal acts that have allegedly violated a constitutionally guaranteed right because at that time they were neither specified nor guaranteed by the Constitution since the Constitution itself did not exist.

28. The Applicant has not clarified the Referral, has not reasoned it in the procedural and substantial aspect to prove that a constitutional right has been violated and under these circumstances, the Referral is manifestly ill-founded.

FOR THESE REASONS

The Court, after having considered all submitted facts and evidence, and after having considered this issue on 13 December 2010, concluded that the Applicant has filed his Referral prior to the exhaustion of legal remedies available and he has not clarified and reasoned his Referral, and unanimously

DECIDED

I. TO REJECT the Referral as inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

Mr. Selim Berisha vs. Judgment A. No. 85/2011 of the Supreme Court

Case KI 67-2011, decision of 19 October 2011

Keywords: administrative dispute, individual referral, manifestly ill-founded referral, specification of rights violated

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution asserting that his right to a disability pension was infringed by a judgment of the Supreme Court affirming the denial of the pension based upon an erroneous assessment of his disability status. The Applicant argued that medical documentation supported his application. The Supreme Court decided that the Ministry of Labor and Social Welfare (MLSW) had authority to make the determination, concluding that its assessment was correct.

The Court declined to resolve the factual dispute, noting that its only role was to ensure compliance with Constitutional guarantees, citing *Akdivar v. Turkey*. The Court held that the Referral was inadmissible as manifestly ill-founded pursuant to Rules 36.2(b) and 36.2(c) of the Rules of Procedure because the Applicant had not substantiated any Constitutional violation, and had failed to specify which Constitutional rights were violated by public authorities per Article [48] of the Law on the Constitutional Court, or to make a *prima facie* showing that a lower court or the MLSW had been biased, or that the proceedings were otherwise unfair, noting that an Applicant's mere dissatisfaction with an outcome is not a sufficient basis for a referral, citing *Mezotur-Tiszacugi Tarsulat vs. Hungary*.

Prishtina, 19 October 2011
Ref. No.: RK 143 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 67/11

Applicant

Mr. Selim Berisha

Constitutional Review of the Judgment of the Supreme Court of Kosovo
A. No. 85 /2011, of 31 March 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The applicant is Mr. Selim Berisha, from Prishtina, residing in Prishtina at "Shkodra" St. 21.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo A. No. 85/2011, dated 31. 03. 2011, by which was rejected the request for review of legality of Resolution with case file no. 5097046, of Appeals Council of the Ministry of Labor and Social Welfare (hereinafter referred to as "MLSW") regarding the right on disability pension.

Subject matter

3. The subject matter of the case submitted with the Constitutional Court of the Republic of Kosovo on 24 May 2011 is the constitutional review of the Judgment of the Supreme Court of Kosovo A. No. 85/2011 dated 31.03. 2011, which the Applicant, according to his claim, received on 08.04.2011.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as the "Constitution"), Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2009, which entered into force on 15 January 2010 (hereinafter referred to as the "Law"), and Section 29 of the Rules of Procedure of the

Constitutional Court of the Republic of Kosovo (hereinafter referred to as the "Rules of Procedure").

Proceedings before the Court

5. On 24 May 2011, z. Selim Berisha submitted Referral with the Constitutional Court of Kosovo by which requested Constitutional Review of the Judgment of Supreme Court of Kosovo A. No. 85/2011, dated 31.03.2011.

6. On 24 June 2011, the Constitutional Court notified the applicant and the Supreme Court on the registration of the case also seeking written reply by the parties.

7. On 21 July 2011, the Applicant sent a written response to the Constitutional Court, by attaching also the decisions of the MLSW regarding refusal of his request.

8. On 17 August 2011, the President appointed Judge Robert Carolan as Judge Rapporteur and appointed a Review Panel composed of Judges Snezhana Botusharova, (Presiding), Mr. Sc. Kadri Kryeziu and Dr. Gjyljeta Mushkolaj, members of the Panel.

9. On 5 October 2011, after having considered the report of the Judge Rapporteur Robert Carolan, the Review panel composed by Judge Snezhana Botusharova (Presiding), Mr. Sc. Kadri Kryeziu and Dr. Gjyljeta Mushkolaj, members of the panel unanimously recommended to the full Court to reject the Referral as inadmissible.

Summary of the facts

10. On 2 June 2010, Mr.Selim Berisha submitted a request with the Ministry of Labor and Social Welfare- Department of Pension Administration of Kosovo, requesting the recognition of his right to disability pension.

11. On 6 September 2010, the Department of Pension Administration of Kosovo had issued a decision rejecting Mr.Berisha's request, reasoning that the Medical Committee has concluded that he does not have "**full and permanent disability**". Mr. Selim Berisha received this decision on 6 October 2010.

12. On 7 October 2010, Mr. Berisha filed an appeal against this decision with the Appeals Council on Disability Pensions, within MLSW, because of erroneous confirmation of the medical situation of the Applicant for disability pension.

13. On 25 November 2010, the Appeals Council on Disability Pensions issued a Resolution, with dossier number 597046, rejecting Mr. Selim Berisha's appeal as ungrounded, confirming that the decision of the first instance was based on law and just. Mr. Berisha received this resolution on 10 January 2011.

14. On 26 January 2011, Mr. Selim Berisha filed a lawsuit with the Supreme Court of Kosovo requesting the assessment of the legality of the Resolution of the Appeals Council of MLSW, qualifying that resolution as ungrounded, because according to him, he has presented sufficient medical documentation proving his permanent disability.

15. On 31 April 2011, the Supreme Court of Kosovo issued Judgment A.No. 85/2011 rejecting the lawsuit and assessing that Committees of MLSW are authorized by law to assess the full and permanent disability of persons claiming such a right, and that, in the actual case, these Committees have assessed that Mr. Berisha does not have such a disability, thus the Supreme Court concludes that administrative authorities have correctly applied legal provisions while deciding on this case and that all conditions exist to reject the lawsuit. Mr. Berisha received this judgment on 08.04.2011.

16. On 24 May 2011, finally dissatisfied with all decisions of administrative and judicial authorities, Mr. Selim Berisha submitted a referral with the Constitutional Court of the Republic of Kosovo.

Applicant's Allegations

17. The Applicant stressed that the Medical Committee of the Ministry of Labor and Social Welfare (hereinafter referred to as "MLSW") have unlegally rejected his "right for disability pension", although he has fulfilled conditions for such a pension, whereas the Supreme Court of Kosovo, rejecting his lawsuit related to this issue, committed exactly the same, because, according to the Applicant, he has permanent work disability and he substantiated it with medical documentation.

18. The Applicant has not determined exactly which right guaranteed by the Constitution has been violated, but stressed that he was denied the "**right for disability pension**."

Assessment of the admissibility of the referral

19. In order to be able to adjudicate the Applicant's referral, the Court needs first to examine whether the Applicant has fulfilled all the Admissibility requirements laid down in the Constitution.

20. In this relation, the Court refers to Article 113.7 of the Constitution, which stipulates:

    "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."***

21. Court also takes into account:

    Rule 36 of the Rules of Procedure of the Constitutional Court, which stipulates:

    "(1) The Court may only deal with Referrals if:
    d) the Referral is not manifestly ill-founded.

22. In fact, referring to the alleged violation of the right to pension, the Court concludes that the Constitution of Kosovo refers to the right to pension only in Articles 105 and 109, while referring to the process of the mandate and reappointment of judges and prosecutors , fro whom the constitutional wording "**until the retirement age by law**" is used.

23. Article 51 of the Constitution **[Health and Social Protection],** paragraph 2, clearly stipulates: "Basic social insurance related to unemployment, disease, disability and old age shall be regulated by law".

24. From the legal definition of Article 51 of the Constitution, it appears that social insurance for "disability, unemployment and old age" shall be regulated by LAW. In the actual case, the disability pension issue is regulated by Law No. 2003/23 ON DISABILITY PENSIONS IN KOSOVO, approved by the Assembly of Kosovo on 6 November 2003.

25. The procedures of applying and fulfilling the conditions to enjoy this right are provided by this Law, like the right to appeal decision when parties are not satisfied with those decisions regarding their request.

26. Administrative Committees of MLSW had acted exactly conformity with the provisions of this Law and the Supreme Court had concluded that these decisions were lawful.

1. The Constitutional Court is not a Court of facts. The Constitutional Court wishes to emphasize that the determination of that factual situation, correct and complete, is a full jurisdiction of regular court and, in this case, of administrative authorities as well, and its role is solely to ensure

compliance with the rights guaranteed by the Constitution and other legal instruments and can, therefore, not act as a "fourth instance court" (see mutatis mutandis, i.e., Akdivar v. Turkey, 16 September 1996, R. J. D, 1996 –IV, para. 65).

28. From the facts submitted with the Referral, it appears that its Applicant has not met the legal obligation regarding the accuracy of the referral, because he did not accurately specify what rights guaranteed by the Constitution have been violated by acts of public authorities. Moreover, the Court considers that there is nothing in the Referral which indicates that the court, and in this case the Committees of MLSW examining the case, lacked impartiality or that the proceedings were otherwise unfair. The mere fact that Applicants are dissatisfied with the outcome of the case can not serve to them as a reason to raise and arguable claim of a breach of Article 31 of if Constitution (see mutatis mutandis Judgment ECHR Appl. No. 5503/02, Mezotur- Tiszazugi Tarsulat vs. Hungary, judgment of 27 July 2005).

2. In these circumstances, the Applicant has not "sufficiently substantiated his claim", so,

FOR THESE REASONS

Pursuant to Article 113.7 of the Constitution of the Republic of Kosovo, Article 49 of the Law on the Constitutional Court, and Rule 36 para. 2, items (b) and (c) of the Rules of Procedure, the Constitutional Court in the session of 5 October 2011, unanimously

DECIDED

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with the Article 20 (4) of the Law on the Constitutional Court;

III. This decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

L. H. vs. Decision of the Municipal Court of Peja/Pec C. no. 271/10

Case KI 19-2011, decision of 19 October 2011

Keywords: equality before the law, exhaustion of legal remedies, family issue, identity non-disclosure, individual referral, parental rights

The Applicant filed a Referral pursuant to 113.7 of the Constitution contending that the Peja Municipal Court's dismissal on jurisdiction grounds of her request to amend a child custody order violated her right to equal protection under Article 24.1 of the Constitution, arguing that the original order was burdensome and affected her employment relations.

The Court held that the Referral was inadmissible due to a failure to exhaust all legal remedies due to the Applicant's failure to appeal the decision within the 15-day deadline. The Court noted that exhaustion is required by Article 113.7 and Rule 36.1(a) of the Rules of Procedure in order to permit the Kosovo legal system to prevent and correct Constitutional violations, citing *Selmouni v. France*, *Hamide Osaj vs. the Supreme Court*, and *Muhamet Bucaliu vs. the Public Prosecutor*. The Court also noted that the Municipal Court had merely approved an agreement on custody and visitation *reached by the parties*, indicating that either party may seek a modification upon a showing of changed circumstances.

Pristina, 19 October 2011
Ref. No.: RK 142/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 19/11

Applicant

L. H.

Constitutional Review of the Decision of the Municipal Court of Peja/Pec C. no. 271/10 dated 07.10.2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is L. H. Applicant requested that Court should take into consideration protection of her identity.

Challenged Decision

2. The Challenged decision of the public authority is the Municipal Court`s Decision CI. no. 271/10 in Peja/Peć, dated 07.10.2010 whereby alleged violations of constitutional guarantees occurred.

Subject matter

3. Basic matter of the Referral with the Constitutional Court of Kosovo, date 18 February 2011, is the assessment of Constitutionality of the Decision of Municipal Court in Peja CL.no.271/10, dated 07.10.2010, whereby the version in Serbian was issued on 07.10.2010, but the Applicant did not specify when she received it and then the version in Albanian language that she admitted receiving on 30 May 2011.

Alleged violations of rights guaranteed by constitution

4. The Applicant on this request alleges that by the Decision of the Municipal Court of Peja/Peć, issued in the Serbian language, whereby it declared to be incompetent to decide on her claim, her rights guaranteed by the Constitution of the Republic of Kosovo have been violated, respectively article 24.1 (equity before the law)

Legal Basis

5. Article 113.7 The Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), article 47 of the Law No. 03/L-121 for the Constitutional Court of the Republic of Kosovo, dt. 16 December

2009, entered into force on 15 January 2010 (below referred to as the Law) and article 29 of the Rules of Procedures of the Constitutional Court of the Republic of Kosovo (below referred to as the Rules of Procedures).

The Referral of the Applicant

6. The Applicant claims that the Municipal Court in Peja/Peć, by declaring to be incompetent to decide on her claim to amend the Decision of the District Court of Peja/Peć. no 367/09 regarding the right to parent custody rights over her daughter, which has, based on the conditions set in the Decision, and by wrongly advising her for the Competent organ to decide on this legal issue, put her in unequal position with her former husband, who is allegedly abusing her rights as set by the above mentioned Decision, therefore committed violation of guaranteed right by the Constitution, respectively Article 24 of the Constitution.

Procedure in the Constitutional Court

7. On 18 February 2011 the Constitutional Court has received the claim of the applicant and registered it with no. KI 19/11

8. On March 02, 2011 with the Decision GJ.R 19/11 the President of the Court assigned the Judge Robert Carolan as the reporting judge.

9. On the same day, the President of the Court, with the Decision KSH 19/11, assigned the Review Panel composed of Judge Ivan Cukalovic (presiding judge) and Judges Kadri Kryeziu and Gjylieta Mushkolaj, as member of the Panel.

10. The Constitutional Court informed the Municipal Court and the District Court in Peja/Peć as well as the Applicant for the registration of the case on 04 May 2011.

11. The Constitutional Court, on 20 June 2011 received additional documents from the Applicant.

12. The Constitutional Court, on 19 August 2011, received a page long response from the Municipal Court in Peja/Peć regarding the date of delivering the Decision C. no 271/10 of this Court to the Applicant.

Summary of the facts

13. The District Court in Peja/Peć, on 24 November 2009 issued the Decision Cno.367/09 whereby it has RESOLVED (divorced) the

marriage (with CONSENT) between K. M. from village Llabjan, Municipality of Peja/Peć and L. M. from Drenas/Gllogovac.

14. According to this Decision, the child E. M., is trusted to the father Mr. K. M. for custody, education and care.

15. As pursuant to this Decision, the Court DECIDED on the contacts of Mrs. L. H. (the mother) and her daughter E., on every second and fourth Friday of the month to stay with her till Sunday at 17.00 hrs. Mrs. L. H., as set in this Decision, was obliged to return the minor – daughter E. – to her father in the same place where she took her. The Court reached this Decision after the parties had previously agreed on 24.09.2009, agreement that was signed by Mr. Rexhep Kacaniku, the legal attorney of K. M. and L. H.

16. According to the above mentioned Decision, the Applicant, L. H., also has the right during winter holidays to be with the daughter E. for 8 days and during summer holidays for 15 (fifteen) days.

17. On 11 December 2009, taking note of the fact that Mr. K. M., her former husband, is not complying with the Decision of the District Court of Peja/Peć C no.367/09, with regard to the contacts between the mother and the child, Mrs. L. H. submitted a proposal to the Municipal Court in Peja/Peć for the Enforcement of the Permit to contact and care about her daughter according to the conditions set by the Decision of the District Court in Peja, which resolved her marriage to her former husband, Mr. K. M.

18. The Municipal Court in Peja/Peć, on 12. March 2010 held the session on the enforcement of the Decision E.no 593/09 (which lacks in case files) whereby the Debitor Mr. K. M. declared that he will voluntarily execute the Decision and that the debitor, Mrs. L. H., could immediately go to the social work center in Peja, where they daughter E. was staying, and that he had done the same two weeks before. In this case the municipal court has fully ENFORCED the execution of the Decision based on the executive title.

19. Mrs. L. H., Peja/Peć, on 7 May 2010 filed a CLAIM to CHANGE the Decision C.no.367/07 which resolved her marriage with her former husband and decided on “Custody, Care and education of their daughter and the forms of contacts between the mother and her daughter” because she was unhappy with the existing situation, considering herself as the damaged party and unequal because she had always to go to Social Work Center in Peja to pick her daughter up, and not having her ex-husband to

have to bring the daughter to Drenas/Gllogovac, emphasizing the fact that this is both costly and time consuming to her as an employee.

20. The Municipal Court in Peja/Peć, with the DECISION P.br 271/10 drafted and sent to the Applicant in Serbian DECLARED itself incompetent to decide on this legal case, thus advised the party to address the mater to the Social Center Institution in Peja/Peć, who according to the Court, is competent to deliberate in this contest.

21. In its legal advice, it wrote that the unsatisfied party may appeal the decision in 15 days from the day of reception at the District Court in Peja/Peć. Mrs. L. H. did not file any complaint from this decision in the Serbian language within the 15 days allowed. In the Constitutional Court's Form she declared that she had not done so, because she did not understand Serbian language.

22. The Social Work Center in Peja/Peć, on 5 November 2010, by the way of the Report of the Social Worker no. 1085.07.2009 responded to the Municipal Court in Peja/Peć, that based on the applicable law (Kosovo Law on Family no. 2004/32)) articles 139-145, and in compliance to the Circular of the Department for Social Welfare no. 1020, date 25 May 2010, social work centers are not competent to issue decisions regarding 'child custody, child contacts with one of the parents or alimentation matters ", because these are legally clearly defined matters.

23. The Constitutional Court, on 20 June 2011, received all the additional documents from Mrs. L. H., which was a handwritten paper where she explained about her claim filed with the Court on 18 February 2011. In that statement she admitted that she received the Decision P.br 271/10 dated 07 October 2010 by the Municipal Court in Peja/Pec and that it was also in the Albanian Language. She did not state when she received that decision in the Albanian language.

24. On 19 August 2011, the Constitutional Court received an additional document as a response from the Municipal Court in Peja/Peć, which confirmed that on 30 May 2011 Mrs. L. H. received the Decision C.271/10 of the Municipal Court or Peja/Peć translated into Albanian Language. She did not file a complaint against this decision in its Albanian version within 15 days of receipt on 30 May 2011.

Assessment on the admissibility of the Referral

25. To be able to judge on the Referral of the Applicant, the Court should preliminary assess if the Applicant meet the admissibility conditions

defined by the Constitution, Law on Constitutional Court and its Rules of Procedures.

26. Article 113.7 of the Constitution, which states that:

"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."

27. The Court also takes account of:

Rule 36 of the Rules of Procedures in the Constitutional Court which states:

"(1) The Court may only deal with Referrals if:

a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted,

28. It is not absolutely clear when the Applicant received in the decision of the Municipal Court of Peja in the Albanian language. Whether the Applicant received the decision, no. P.br.271/10, of the Municipal Court in Peja, in Albanian on 07. October 2010, or on 30 May 2011, as she admits, it is clear that she did not submit a complaint within 15 days allowed by law even after she received the decision on 30 May 2011, as she admits.

29. Therefore, the Court considers that the criteria of `exhausting all legal remedies as foresees is absolutely necessary as fundamental requirement to submit a claim in the Constitutional Court of Kosovo, and apart from being a legal condition foreseen by the Constitution and the Law on Constitutional Court, it is also set as fundamental condition with the rule 36 par. Point (a) of the Rules of Procedures of Constitutional Court.

30. The Court reiterates that the reason for exhausting of all legal remedies lies in providing the authorities, including here the Courts too, with the possibility to prevent, and correct the alleged violation of Constitution. This rule is based on the assumption that the Kosovo law order shall ensure efficient legal remedies for the violation of constitutional rights (see, mutatis mutandis, GJEDNJ, Selmouni v. France no. 25803/94, Decision of 28 July 1999

31. The Court applied similar reasoning during previous deliberations such as in the cases : KI 55/10 Hamide Osaj`s request for the Assessment of Constitutionality of the Decision of Kosovo Supreme Court, Pkl. no.

43/2010, date 4 June 2010 ; Case no. KI 20/10 Muhamet Bucaliu against the Judgment of The State Prosecutor KMLC.no. 09/10 of 24 February 2010(decision of the Constitutional Court date 15 October 2010)

32. Regarding the allegations of the party that with the Decision C.no.367/09, date 24.11.2009 of the District Court in Peja, the Article 24 of Constitution (equity before the law) is violated, and that Mrs. L. H. is treated unequal, the Court is aware that this decision was reached upon full and mutual agreement of the parties and that the parents custody, care and education of their child was decided on their previous agreement reached voluntarily, and also signed by both parties in the agreement. The Municipal Court in Peja/Peć merely approved the agreement of the parties involved, and, thereby, made it the legitimate judgment of the Municipal Court.

33. The Court also acknowledges that the Applicant can renew her request to change the terms and conditions of the custody arrangement she has with her daughter's father at any time while her daughter is still a minor and upon a showing of a change in circumstances with respect to the child and/or the parents. Nothing prevents her or the child's father from renewing her Claim for the change of this Decision as pursuant to Article 145, point 1 and 2 of the Law on Family (law.no.2004/32).

34. Because disclosure of the identity of the Applicant in this case would also result in the disclosure of the identity of the Applicant's minor child, who because of her young and tender years, needs to have her identity protected while she is growing and developing her own identity and because she is truly an innocent party in these proceedings, it is in the public interest not to disclose the identity of the Applicant as requested by the Applicant.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 13.7 of the Constitution of the Republic of Kosovo and Section 36.1 (a) of the Rules of Procedure on 5 October 2011, unanimously,

DECIDES

I. TO REJECT the referral as inadmissible;

II. To grant the request of the Applicant to preserve the confidential nature of her identity in this Referral;

III. The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and,

IV. The Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

The Ombudsperson of the Republic of Kosovo vs. Articles 14(1) 6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111

Case KO 119-2010, decision of 20 October 2011

Keywords: extension of interim measures, interim measures, referrals by Ombudsperson

On 20 December 2010, the Court allowed interim measures for a period no longer than three months in duration, beginning on 22 December 2010, immediately suspending the implementation of Articles 14(1) 6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010, for that time period. Here, the Court decided to extend the time limit on the duration of the previously imposed interim measures to 31 December 2011, and to retain jurisdiction over the matter. The Court's decision was based upon its consideration of three factors: (1) the fact that the Assembly of Kosovo was suspended during the period when the original order on interim measures was issued, (2) the time constraints that were encountered by the Assembly in submitting a Response to the Referral, and (3) the necessity for consideration of the responses of the Assembly, the Central Bank and the Ministry of Finance that have been received by the Court.

Pristina, 20 october 2011
Ref. No.:URDH,VMP 144/11

ORDER EXTENDING INTERIM MEASURES

In

Case No. KO 119-10

The Ombudsperson of the Republic of Kosovo

Constitutional Review of Articles 14 (1) 6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

Introduction

1. On 20 December 2010 the Constitutional Court granted interim measures in relation to the above Referral. In its Judgment the Court, *inter alia*, decided:

    I. TO GRANT interim measures for a duration of no longer than three (3) months from 22 December 2010, and
    II. TO IMMMEDIATLY SUSPEND the implementation of Articles 14 (1) 6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010, for the same duration.

Correspondence from the Assembly of Kosovo

2. Following the service of the Decision to grant the interim measures on the Assembly the President of the Assembly wrote to the Constitutional Court by letter dated 24 January 2011 informing it that due to the fact that the Assembly had been suspended it was not possible to reply to the Referral at that time.

3. The letter from the President of the Assembly also acknowledged that the Assembly was aware of the granting of the interim measure for the period of three (3) months. The Court therefore on 21 March 2011 extended the interim measure until 22 June 2011.

4. The Assembly subsequently responded to the Referral on 16 May 2011. In this regard the Court has received, in particular, the response of the Committee for Legislation of the Assembly dated 11 may 2011.

5. By letter dated 22 July 2011 signed by the Governor, Gani Gërguri, the Central Bank of Kosovo notified the Constitutional Court that there was

no correspondence between Central Bank and the Assembly of Kosovo concerning the Law on Rights and Responsibilities of the Deputies.

6. On 27 July 2011 the Ministry of Finance, in its letter signed by Minister Mr. Bedri Hamza, notified the Constitutional Court, *inter alia,* that the Ministry of Finance had received a request from the Assembly of the Republic of Kosovo on 24 December 2010 to prepare the financial statement concerning the implementation of the Law on Rights and Responsibilities of the Deputies.

7. On 4 August 2011 the Constitutional Court received further documentation from the Assembly of Kosovo containing material concerning the Law on Rights and Responsibilities of the Deputies.

8. The responses received from the Central Bank and the Ministry of Finance were forwarded to the Assembly of the Republic of Kosovo on 6 September 2011 for their information. No further response was requested nor has a response been received.

9. The Court bears in mind the following;

   i. the fact that the Assembly of Kosovo was suspended during the period when the making of the original order was made,
   ii. the time constraints that were encountered by the Assembly in submitting a Response to the Referral, and
   iii. the necessity to consider the response of the Assembly, the Central Bank and the Ministry of Finance which have been received.

DECISION

The Court, having deliberated on the matter on 23 September 2011 therefore unanimously

DECIDES

I. To extend the time limit imposed by the Court in its original Decision of 22 December 2010 by a further period until 31 December 2011, and

II. To remain seized of the matter

This Decision shall be notified to the Assembly of Kosovo and to the Applicant and shall be published in the Official Gazette of the Republic of Kosovo.

This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Judge Robert Carolan	Prof. Dr. Enver Hasani

LDK-AAK-LDD, Prizren MA

Case KO 43-2010, decision of 25 October 2011

Keywords: authorized parties, human rights, *locus standi*, majority representation, referral submitted by a legal entity, self-government

The Applicants, Prizren Municipal Assembly Deputies from three political parties (LDK, AAK and LDD), filed a Referral and three Supplemental Referrals pursuant to Article 113.7, contending that the Prizren Mayor had repeatedly violated Articles 123.1 (Right to Self-Government) and 124.6 (requiring municipalities to obey the Constitution and laws, and to apply court decisions) of the Constitution on occasions enumerated in the Referrals. The Applicants requested penalization of the Minister of Local Government Administration (MLGA) and the Prime Minister of Kosovo for failure to restrain the Mayor from taking arbitrary actions, and an order requiring the MLGA to initiate the Mayor's discharge.

The Court held that the Referral was inadmissible because groups of Municipal Assembly Deputies were not "authorized parties" within the meaning of Article 113.1 of the Constitution and therefore lacked *locus standi*, citing *Municipal Section of Antilly v. France.* It also noted that the Applicants have the ability to file claims to remedy constitutional violations perpetrated on them as individuals.

Prishtina, on 25 October 2011
No. ref.:145/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KO 43/10

Applicant

LDK-AAK-LDD, Prizren MA

Constitutional review of the legal acts issued by the Mayor of Prizren

CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge
lIiriana Islami, Judge

By majority of votes approves the Resolution on Inadmissibility regarding this Referral.

Applicants

1. The Applicants are groups of Prizren Municipal Assembly members from LDK, AAK and LDD, duly represented by Mr. Ridvan Hoxha, chairperson of the LDK group in Prizren MA.

Challenged Acts

2. The challenged acts before the Constitutional Court are:

   - Decision on the appointment of two Deputy Mayors, Mr. Arsim Shpejti and Mr. Ruzhdi Rexha, from the majority community;
   - Decision on the appointment of primary and secondary school directors in Prizren;
   - Vacancy announcement published in daily newspapers, dated 9 February 2010; and
   - Resolution of 1 March 2010 terminating the employment relationship of Mr. Isa Osmankaj-Procurement Manager at Prizren Municipality. All of them were issued by the Mayor of Prizren.

Subject Matter

3. The subject matter of the Referral filed with the Constitutional Court of the Republic of Kosovo on 18 June 2010, supplemented with additional Referrals of 19 august 2010 and 1 September 2010, is the constitutional review of acts of the Mayor of Prizren, Mr. Ramadan Muja, on the appointment of two Deputy Mayors from the majority community in Prizren, of the decision on the appointment of primary and secondary school directors in Prizren, of resolutions terminating the employment

relationship of civil servants in the municipality, as well as for the obstruction of the work of the Municipal Assembly, by disregarding applicable laws and the Constitution of the Republic.

4. The applicant claims that the Mayor of Prizren has committed the following violations of the Constitution of the Republic:

   Article 123 *1. The right to local self-government is guaranteed and is regulated by law.*
   Article 124 *6. Municipalities are bound to respect the Constitution and laws and to apply court decisions.*

Legal Basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2009 (hereinafter referred to as: the Law), and Article 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the proceedings before the Court

6. The Applicant submitted the Referral with the Constitutional Court on 18 June 2010, supplemented with additional referrals of 19 August 2010 and 1 September 2010.

7. The Ministry of Local Government Administration (hereinafter referred to as: MLGA) was notified of the Referral on 3 August 2010, which replied to the Constitutional Court on 27 August 2010. MLGA stressed in its letter that it had reviewed and replied to the complaints submitted by the groups of deputies of political entities represented in the Municipal Assembly of Prizren, and by the clarification note I02-138, of 24 February 2010, it had explained to all mayors of the Republic of Kosovo the legal way of increasing the number of municipal directorates, because the MLGA monitors had noticed that in some municipalities the Law on Local Self-Government and municipal statutes had not been respected., Through Act I. no. 02-312, of 23 April 2010, signed by the Minister of MLGA, Mr. Sadri Ferati, the MLGA requested from Mr. Ramadan Muja, Mayor of Prizren, to review the decision on the appointment of Deputy Mayors. A copy of this act was sent to Mr. Nijazi Kryeziu, Chairperson of the Municipal Assembly in Prizren, whereas regarding the request for MLGA to clarify the regularity of the voting in "the vote of confidence for the Chairperson of the Municipal Assembly", MLGA had clarified that in the meeting of the Municipal Assembly, held

on 19 May 2010, 40 out of 41 Municipal Assembly members took part in the Assembly meeting and that the proposal for the vote of confidence (discharge) of the Chairperson of the Municipal Assembly received 20 votes, while 21 votes were required. The Ministry of Local Government also attached the correspondence between MLGA and the Applicant to the letter sent to the Court.

8. On 14 September 2010, the Constitutional Court of Kosovo received a reply from the Mayor of Prizren regarding the Referral of the group of Prizren Municipal Assembly members, whereby the Mayor challenged the referral both in terms of its admissibility and grounds. Mayor Muja has stressed he cannot be a party to the proceedings, because pursuant to the Law on Self-Government, the municipality has the status of the legal person and it is the municipality that "can sue and be sued" and not the Mayor. Furthermore, Mr. Muja has disputed also the legitimacy of the applicants stating that their individual rights and freedoms have not been violated, as provided in Article 113.7 of the Constitution of Kosovo, and stressed that the parties had not respected the legal time limit of 4 months for submitting a Referral with the Constitutional Court.

9. On 22 February, after reviewing the report of Judge Rapporteur Kadri Kryeziu, the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Kadri Kryeziu, members of the Panel, on the same day presented its recommendations to the full Court to reject the Referral as inadmissible.

Applicant's Complaint

10. The Applicants have stated that Mr. Ramadan Muja, in the capacity of the Mayor of Prizren, performing his official duties has committed continuous violations of the Constitution of Kosovo and of the Law on Local Self-Government, from the very beginning of his term of the office. These violations, alleged by the Applicants, are described as follows:

    - The Mayor of Prizren has obstructed the work of the Municipal Assembly acting in contradiction with the Statute of Prizren Municipality, failing "to ensure the implementation of the Law on Self-Government and other legal provisions that are in the responsibility of municipalities";
    - He has violated Article 60.1 of the Law on Self-Government by appointing one Deputy Mayor more from the majority community;
    - He has made arbitrary and unlawful decisions for the establishment of the municipal executive, respectively directorates, without having this issue regulated with a special regulation;

- He has violated applicable legal provisions on the appointment of the school directors;
- He has made a political decision to discharge the Head of the Procurement Office without prior procedure as provided by the Law on Civil Service of Kosovo;
- Together with the Chairperson of (the Municipal Assembly), Mr. Nijazi Kryeziu, they have made it impossible for the Municipal Assembly to function, and that the Assembly, since its first constitutive meeting, held on 15 February 2010, has held only two extraordinary meetings requested by the opposition of the Municipal Assembly; and
- He has committed other violations of the applicable legislation in Kosovo.

Summary of the facts

11. Through the request of 18 June 2010, the Applicant requested the Constitutional Court "to undertake punitive legal measures against the Minister of MLGA and the Prime Minister of Kosovo, because of inaction and silence over arbitrary actions of Mr. Ramadan Muja, Mayor of Prizren". At the same time, the Applicant requested from the Constitutional Court to order the Ministry of Local Government Administration to initiate the procedure to discharge the Mayor of Prizren claiming that Mr. Ramadan Muja, Mayor of Prizren, has violated the Constitution of Kosovo.

12. Representatives of political parties LDK, AAK and LDD, Municipal Assembly members, sent a copy of the Referral with the same data to the International Civilian Representative in Prishtina.

13. The Applicant has also stated that the group of members of LDK, AAK and LDD in Prizren Municipal Assembly because of abovementioned violations has initiated the procedure to discharge the Mayor pursuant to Article 64, paragraphs 1, 2 and 3 of the Law on Local Self-Government, and pursuant to Article 36 of the Statute of the Municipality of Prizren, but that their initiative was ignored by the MLGA and the Government of Kosovo.

14. The Applicant has also attached to the Referral the allegations for the violation of the applicable legislation by the Mayor of Prizren during his two-year governance, but also during his previous term on the office in the period 2007 – 2009, together with the supporting documentation, claiming that MLGA and Government of Kosovo have been regularly informed.

15. On 28 July 2010, the Constitutional Court received an additional Referral from the Applicant, presenting additional allegations concerning the violations of the Constitution and the applicable legislation in the Republic of Kosovo by the Mayor of Prizren, and he requests from the Constitutional Court to force MLGA and the Prime Minister to initiate the procedure to discharge the Mayor of Prizren based on the Law on Local Self-Government. The additional allegations are the following:

    - The Mayor of Prizren "in an unconstitutional and illegal manner has signed and forwarded for approval to the Assembly of Kosovo the revised budget for the Municipality of Prizren, without having it go through the procedure provided by the applicable legislation;
    - The Mayor of Prizren, together with the Chairperson of the Municipal Assembly, who according to the Applicant has lost the vote of confidence on 19 May 2010, has unlawfully organized the session of the Municipal Assembly of Prizren.

16. On 19 August 2010, the Constitutional Court received the second additional Referral from the same Applicant. By the second Referral, the Applicant informed the Court that the Mayor of Prizren had organized a press conference confirming the holding of the session of the Municipal Assembly of Prizren, which the Applicant claims to have been illegal. The Applicant attached to the Referral copies of articles from two dailies on Mayor's press conference.

17. On 1 September 2010, the Constitutional Court received the third additional Referral from the same Applicant which is registered under the same number. By the third additional Referral, the Applicant alleges that the Mayor committed three other violations of the applicable legislation, such as:

    - The Mayor of Prizren, together with the Chairperson of the Municipal Assembly of Prizren, organized the second session of the Municipal Assembly on 30 August 2010, in violation of Article 50 of the Law on Local Self-Government. The Municipal Assembly has not held regular sessions for six months and, as such, it is inexistent;
    - Due to not holding regular sessions, the status of Prizren Municipal Assembly members, according to Article 36 (e) of Law on Local Self-Government; and
    - The Mayor of Prizren has committed a legal violation by dismissing the civil servant without respecting the legal procedure. To support this allegation, the Applicant attached as evidence Decision No. 1709

of the Independent Oversight Board of Kosovo, dated 27 March 2010, confirming the legal violation.

Assessment of the admissibility

18. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure. The fulfillment of the requirements in a cumulative manner is essential for referring an issue with the Constitutional Court in a legal manner, and in this regard the Court refers to Article 113.1 of the Constitution which reads:

"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".

19. The authorized parties to refer matters to the Constitutional Court are set forth in Article 113, paragraphs 2-9 of the Constitution of Republic of Kosovo, and in fact none of the paragraphs provides the right of the deputies (members) of any municipal assembly of Kosovo as a group to file a Referral with the Constitutional Court.

20. In fact, the Constitution of Kosovo with regard to the right to refer matters to the Constitutional Court, refers to the legal definition "deputy" only in paragraph 5 and 6 of Article 113, and in that case the right to refer a matter to the Constitutional Court is attributed to the "deputies of the Assembly of Kosovo", and precisely 10 or more deputies of the Assembly of Kosovo have the right to request the assessment of the compatibility of laws and decisions of the Assembly of Kosovo with the Constitution, and at least 30 deputies, of the Assembly of Kosovo, may request an interpretation by the Court whether the President of the Republic has violated the Constitution of the country, but not the deputies (members) of municipal assemblies.

21. In this relation, the Court refers to Article 113.7 of the Constitution, which states that "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." So, members of municipal assemblies who claim that public authorities, including the municipality, have violated their individual rights or freedoms guaranteed by the Constitution have the right to sue the public authority.

22. In such a case, the parties should prove that they are "an authorized party" and that the Municipal Assembly member – the applicant has

been subject to "violations by public authorities of their individual rights and freedoms guaranteed by the Constitution". The Applicant should prove before the Court "the status of the victim caused by a public authority" as it is provided under Article 34 of the European Convention for the Protection of Human Rights (see mutatis mutandis Lindsay v. the United Kingdom, no. 31699/96, Commission decision of 17 January 1997, 23 E.H.R.R. Agrotexim and Others v. Greece, judgment of 24 October 1995, Series A no. 330-A, pp. 22-26, §§ 59-72; Terem Ltd, Chechetkin and Olius v. Ukraine, no. 70297/01, § 28, 18 October 2005; Veselá and Loyka v. Slovakia (dec.), no. 54811/00, 13 December 2005).

23. Therefore, the Court clearly concludes that the Applicants lack active legitimacy to refer this matter to the Constitutional Court, respectively they lack locus standi, and consequently the Court should declare the Referral as inadmissible (see mutatis mutandis Convention (Municipal Section of Antilly v. France (dec.), no. 45129/98, ECHR 1999-VIII).

24. Under these circumstances, the Referral is inadmissible and the Applicant has not met the criteria for the admissibility of the Referral,

FOR THESE REASONS, IT

DECIDES

I. TO REJECT Referral as inadmissible.

II. This Decision shall be delivered to the Parties and it shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on Constitutional Court.

III. The Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

Zef Prenaj vs. Administrative Instruction No. 11/2010 on Basic Pension Payments issued by the Ministry of Labor and Social Welfare

Case KI 40-2011, decision of 1 November 2011

Keywords: actio popularis, authorized parties, fundamental rights and freedoms, human rights, individual referral, pensions

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that Administrative Instruction No. 11/2010 on Basic Pension Payments was unconstitutional because it withholds pension entitlements from eligible citizens.

The Court held that the Referral was inadmissible pursuant to Articles 113.1 and 113.7 of the Constitution on the ground that the Applicant was not an authorized party to a Constitutional challenge of the Instruction because there was no evidence that he was a direct victim of the alleged violation.

Pristina, 01 novembar 2011
Ref. No.:RK146/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 40/11

Applicant

Zef Prenaj

Constitutional Review of The Administrative Instruction No. 11/2010, on Basic Pension Payments issued by the Ministry of Labor and Social Welfare in October 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President

Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Zef Prenaj, a retired lawyer from Pristina.

Challenged Decision

2. The Applicant challenges the Administrative Instruction No. 11/2010, issued by the Ministry of Labor and Social Welfare (hereinafter: "MLSW") in October 2010, on registration, suspension, reactivation, re-application and termination of basic pension payments after the death of pensioners (hereafter: the Administrative Instruction).

Legal Basis

3. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 20, 22(7) and 22(8) of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereafter: the "Law") and Rule 56(2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter : the "Rules").

Proceedings before the Court

4. On 22 March 2011, the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereafter: the "Court").

5. On 8 April 2010, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Ivan Čukalović (presiding), Enver Hasani and Iliriana Islami.

6. On 24 March 2011, the Court requested the Applicant to provide additional information regarding his representation of all Kosovo pensioners and the exhaustion of other legal remedies, if any.

Description of the facts of the case

7. On 10 May 2007, the Applicant retired, when he met the requirements of 40 years of service and 65 years of age, as provided by the applicable law.

8. On 28 January 2011, when the Applicant went to the Raiffeisen Bank to receive his pension, he noticed that his pension had not been paid into his account as usual.

9. In fact, the Applicant found out that he had been paid 2.120 Euro for the period of 38 months, while the Pension Administration Department of MLSW should have paid him 3.040 euro, a difference of 820 Euro.

10. Thereupon, the Applicant complained to the Pension Administration Department, requesting that the 820 Euro with accrued interest be paid into his account.

11. On 11 February 2011, the Pension Administration Department replied, stating that all procedures regarding pension payments had been followed, in accordance with the Administrative Instruction.

Legal arguments presented by the Applicant

12. The Applicant argues that, "pursuant to Article 113.7 of the Constitution of the Republic of Kosovo and Articles 46, 47, 48 and 49 of the Law on the Constitutional Court", there is a "……violation of the constitution and human rights of all Kosovo pensioners".

13. The Applicant concludes that "The Constitutional Court should closely analyze this (…) Administrative Direction 11/2010 and declare it null and void and unconstitutional, so that all Kosovo pensioners are paid back the pensions they have been denied so far".

14. The Applicant further concludes that the "Administrative Direction No. 11/2010 is unconstitutional and unlawful, inhuman and in violation of the basic rights of pensioners and humanity in general".

15. In addition, the Applicant submits that the Constitutional Court "……should act in line with our [his] request so that all the Kosovo pensioners are paid back their pensions that have been suspended without any legal basis…."

Assessment of the admissibility of the Referral

16. The admissibility requirements are laid down in the Constitution and further specified in the Law and the Rules of Procedure.

17. Articles 113.1 and 113.7 of the Constitution establish the general legal framework required for the admissibility of individual referrals. They provide :

"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."

18. In the present case, the Applicant requests "....the constitutional review of Instruction No. 11/2010....", submitting that "The Constitutional Court should closely analyze this (...) Administrative Direction 11/2010 and declare it null and void and unconstitutional."

19. Such a request on suspending the Administrative Instruction in favor of all Kosovo pensioners suggests that the Applicant is challenging in abstract the said Administrative Instruction. If that is the intention of the Applicant, as an individual, he cannot be considered as an authorized party.

20. In fact, the Applicant refers to Article 113.7 of the Constitution as a legal basis to submit his Referral. However, he has not provided any evidence proving that he was a direct victim of the issuance of the Administrative Instruction.

21. Only the entities that are explicitly stated in Article 113..2 to 113.6 of the Constitution are authorized parties to refer to the Court matters of abstract constitutional review.

22. In addition, the Kosovo constitutional legal system does not provide for an "*actio popularis*", which is a modality of an individual complaint, allowing individuals, who seek to defend the public interest and the constitutional order, to refer violations to the constitutional court without being a victim of such violations themselves.

23. Therefore, the Court considers that the Applicant is not an authorized party to challenge the constitutionality in abstract of the Administrative Instruction and, thus, his Referral should be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.1 and 113.7 of the Constitution, Articles 46, 47 and 48 of the Law and Rule 36(1) (a) and (3)(c) of the Rules of Procedure, at the session held on 23 September 2011, unanimously

DECIDED

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20(4) of the Law; and,

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Applicant X vs. Judgment of Supreme Court of Kosovo rejecting an Appeal on a Decision of Ministry of Labor and Social Welfare, Department of Social Welfare

Case KI 52-2011, decision of 1 November 2011

Keywords: administrative dispute, disability (social assistance), family issue, identity non-disclosure, individual referral, manifestly ill-founded referral, right to social assistance, specification of rights violated

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his/her rights under Articles 22, 102 and 51.2 of the Constitution were infringed by a judgment of the Supreme Court, which affirmed a decision of the Ministry of Labor and Social Welfare rejecting the Applicant's application for assistance for lack of medical support.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Article 113.7 of the Constitution, Article 48 of the Law on the Constitutional Courts and Rule 36.2(b) because the Applicant failed to provide *prima facie* evidence of a Constitutional violation, citing *Vanek v. Republic of Slovakia*. The Court granted the Applicant's request for non-disclosure of identity due to the nature of the subject matter.

Prishtina, 01.november 2011
Ref. No.:148/11

RESOLUTION ON INADMISSIBLITY

in

Case Nr. KI 52/11

Applicant **X**

Constitutional review of a Judgment of Supreme Court of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge

Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The applicant is a resident of Republic of Kosovo, who requested protection of identity.

Challenged Decision

2. The challenged decision is a Judgment of Supreme Court of Kosovo by which it was rejected the Appeal on a Decision of Ministry of Labor and Social Welfare (hereinafter referred as to the "MLSW") – Department of Social Welfare (hereinafter referred as to the DSW).

Subject matter

3. The Applicant alleges that the Judgment of Supreme Court of Kosovo has violated the right to social protection provided by the Constitution of Republic of Kosovo.

Legal basis

4. Articles 113.7 and 21.4 of Constitution, Articles 20, 22.7 and 22.8 of Law Nr. 03/L-121 on Constitutional Court of Republic of Kosovo of 16 December 2008 (hereinafter referred as to the "Law"), and Rule 56 Paragraph 2 of Rules of procedure of Constitutional Court of Republic of Kosovo (hereinafter referred to as the "Rules of Procedure").

Proceedings before the Court

5. On 15 April 2011, the Applicant filed the Referral with the Constitutional Court of Republic of Kosovo.

6. On 10 May 2011, the Constitutional Court notified the Supreme Court of Kosovo that it has been initiated the proceeding of constitutional review of Kosovo Supreme Court Judgment.

7. On 23 September 2011, after considering the report of Judge Ivan Čukalović, the Review Panel composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Dr. Iliriana Islami made a

recommendation to the full Court on inadmissibility of the Referral and on granting the protection of identity of the Applicant.

Protection of identity of the Applicant

8. The Court noted the reasons of the request of the Applicant for protection of identity, which due to its very nature are not disclosed. The Court considered the request grounded and thus granted the protection of the identity. For that reason, the different elements of fact which could lead to the identity of the Applicant will be omitted in the decision.

Summary of the facts

9. The Applicant claims that suffers from incurable disease and that his/her child also inherited the disease. Since the Applicant was not able to provide for medications, he/she submitted a request for recognition of the right to material support to the Centre for Social Welfare in Z for support to families of children with special needs.

10. The Centre for Social Welfare in Z decided to reject as unfounded the request for recognition of the right to material support for families that take care of children with permanent disability for the child Y, based on the opinion of the first instance medical commission.

11. The Applicant filed an Appeal on this Decision with MLSW - DSW Appeal Board in Prishtina, as a second instance body.

12. In reviewing the appeal, the Appeals Commission in Prishtina, as a second instance body, decided to reject the appeal and confirmed the Decision of Centre for Social Welfare in Z. This Decision was made based on the opinion of second instance medical commission, where it is stated that there is no permanent disability.

13. The Applicant filed an appeal with the Supreme Court of Kosovo against the Decision of Appeals Commission in Prishtina.

14. The Supreme Court of Kosovo rejected the appeal as unfounded, stating that from the case file it appeared that the medical opinions by both the first and second instance medical commission concluded that the right to material support to child Y cannot be recognized because there is no permanent disability.

Applicant's allegations

15. The Applicant alleges that the Judgment of Supreme Court of Kosovo violated the right to social protection. The Applicant alleges that Article

51 Paragraph 2 of Constitution which provides the right to health and social protection has been violated.

16. The Applicant further alleges that there was violation of Article 102, paragraph 3 of Constitution, which obliges the Courts to adjudicate based on Constitution and the law, stating that Supreme Court has not applied correctly Articles 6, 10, 11 and 13 of Law on Material Support to Families of Children with Permanent Disability.

17. Finally, the Applicant alleges that there is violation of Article 22 of the Constitution that provides direct application of international agreements and instruments, precisely Article 13 of European Social Charter from 1996.

Assessment of admissibility of Referral

18. The Applicant states that Article 51 Paragraph 2 (Right to social and health care) , Article 102 Paragraph 3 (General Principles of Judicial System), and Article 22 (Direct application of international agreements and instruments) of Constitution of Kosovo are the basis of his Referral.

19. Article 48. Of Law on Constitutional Court of republic of Kosovo envisages:

"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."

20. Under the Constitution, the Constitutional Court is not a court of appeal when it reviews decisions taken by lower courts. The role of lower courts is to interpret and apply the pertinent rules of both procedural and substantive law (see *mutatis mutandis*, García Ruiz vs. Spain [GC], No. 30544/96, Paragraph 28., European Court for Human Rights [ECHR] 1999-I).

21. The Applicant did not provide any *prima facie* evidence indicating a violation of his constitutional rights (see Vanek vs. Republic of Slovakia, Decision ECHR on admissibility of request, No. 53363/99 of 31 May 2005). The Applicant does not state in what manner Articles 22, 51 and 102 support his Referral, as prescribed by Article 113.7 of Constitution and Article 48 of the Law.
22. The Applicant alleges that his rights were violated by erroneous establishment of facts and erroneous application of Law by lower courts, without clearly stating in what way these decisions violated his constitutional rights.

23. In this case, the Applicant was provided with many opportunities to present his case and to challenge the interpretation of law which he/she deems to be incorrect, both before the Ministry of Labor and Social Welfare and before the Supreme Court. After reviewing the proceedings in its entirety, the Constitutional Court did not find that relevant proceedings were in any fashion incorrect or arbitrary (see *mutatis mutandis*, Shub vs. Lithuania, Decision of ECHR on admissibility of request, No. 17064/06 of 30 June 2009).

24. Finally, admissibility requirements have not been met in this Referral. The applicant has failed to substantiate the allegation that the challenged decision violated his/her constitutional rights and freedoms.

25. Therefore, it results that that the Referral is manifestly ill-founded pursuant to Rule 36 (2b) of the Rules of Procedure which provides that: "The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights."

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56 paragraph 2 and Rule 36 (2b) of the Rules of Procedure, in the session held on 23 September 2011, unanimously:

DECIDED

I. TO REJECT the Referral as Inadmissible:

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and,

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Sylë Shlivova vs. Resolution of the Supreme Court of Kosovo, Rev. No. 82/2002

Case KI 58-2011, decision of 1 November 2011

Keywords: hiring dispute, inadmissible *ratione temporis*, individual referral, right to work, termination of employment

The Applicant filed a referral pursuant to Article 113.7 of the Constitution, contending that his right to work was infringed by the Supreme Court of Kosovo in 2002 when it affirmed lower court decisions rejecting on missed-deadline grounds his challenge of the Jashnica Municipality's failure in 2000 to hire him for an assistant's position at the Municipal Office in Jashnica village in favor of a less-qualified candidate, despite an assurance of reinstatement that he received in 1999 as a remedy to his earlier dismissal by Serbian authorities.

The Court held that the Referral was inadmissible as incompatible *ratione temporis* with the Constitution pursuant to Rule 36.3(h) of the Rules of Procedure because the events happened prior to when the Constitution became effective.

Prishtina, 01. November 2011
Ref. No.: RK 147/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI-58/11

Applicant

Sylë Shlivova

Constitutional Review of the Resolution of the Supreme Court of Kosovo
Rev. No. 82/2002 of 21 August 2002

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President

Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge
Ilirian Islami, Judge

Applicant

1. The Applicant is Sylë Shlivova from Jashanica village, Klina Municipality.

Challenged decision

2. The challenged decision is the Resolution of the Supreme Court of Kosovo Rev. No 82/2002 of 21 August 2002 rejecting the revision of the Resolution of the Municipal Court in Peja Ac. No. 54/2002 of 8 April 2002.

Subject Matter

3. The Applicant challenges the Resolution of the Supreme Court of Kosovo Rev. No. 82/2002 of 21 August 2002 considering that his right to work, as stipulated by the Constitution of the Republic of Kosovo, has been violated.

Legal Basis

4. Article 113.7 and Article 21.4 of the Constitution, Article 20, Article 22.7 and Article 22.8 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56.2 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 28 April 2011 the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 22 June 2011 the Constitutional Court notified the Supreme Court of Kosovo that proceedings on reviewing the constitutionality of the

Resolution of the Supreme Court Rev. Br. 82/2002 of 21 August 2002 have been initiated.

7. On 04 October 2011, after having considered the Report of the Judge Snezhana Botusharova the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Prof. Dr. Enver Hasani, recommended to the full Court to reject the Referral as inadmissible.

Summary of the facts

8. The Applicant has been employed at the Municipal Office in Jashanica village from 1968 until 1998, when he was allegedly "*…forcibly dismissed by Serbian authorities*" .

9. The applicant was reinstated back to his workplace as assistant at the Municipal Office in Jashanica by resolution No.153/99, of 1 October 1999, of Klina Municipal Council, Kosovo Interim Government, "*…for a limited period of time, until the next vacancy opening".*

10. On 5 October 2000, there was a vacancy opening for all administration employees to which the Applicant applied for the assistant's position at the Municipal Office in Jashanica village; however another person was hired for the position the Applicant had applied.

11. Unsatisfied with the decision of the vacancy committee, the Applicant filed a law-suit to the Municipal Court of Klina requesting the annulment of the vacancy opening alleging, in its pertinent part, that he was interviewed by the competent Committee*, "… but the person who got hired did not meet the requirements."*

12. On 7 December 2001, at the hearing in the Municipal Court of Klina, representatives of Klina Municipality stated that "the law-suit against them was ungrounded, that the vacancy has been announced by the UNMIK Administration and not by the Municipality of Klina." Furthermore, they stated that according to the UNMIK Regulation *2000/47, " UNMIK bodies have immunity, that the office in Jashanica village doesn't exist since it was affiliated to the office in Klina Municipality, and finally that all the deadlines, within which a court protection could've been sought, have expired.*"

13. After reviewing all the facts, the Municipal Court of Klina by Resolution C. No. 89/2001, of 1 December 2001, rejected the law-suit as out of time, since all the preclusive deadlines provided by the laws and UNMIK Regulations applicable at that time in the Republic of Kosovo, had expired.

14. The Applicant filed an appeal against the resolution of the Municipal Court of Klina, to the District Court in Peja, which by Resolution Ac. No. 54/2002 of 8 April 2002 rejected the appeal and upheld the resolution of the Municipal Court of Klina C. No. 89/2001 of 7 December 2001.

15. The Applicant filed a request for revision with the Supreme Court of Kosovo against the resolution of the District Court in Peja Ac. No. 54/2002 of 8 April 2002, which got rejected by Resolution Rev.No.82/2002 of 21 August 2002.

Applicant's allegations

16. The Applicant alleges that the resolution of the Supreme Court of Kosovo Rev. No. 82/2002 of 21 August 2002 violated his right to work, stipulated by the Constitution. He did not point out any specific Article of the Constitution, but requested to return to work.

Assessment on the admissibility of the Referral

17. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure of Constitutional Court.

18. In the present case, considering that the challenged Resolution of the Supreme Court of Kosovo Rev. Br. 82/2002 was issued on 21 August 2002, it appears that the Referral concerns events before 15 June 2008, the date when the Constitution of the Republic of Kosovo entered into force. Based on that, it is obvious that the Referral has not been filed within the time limit, and is incompatible, *"ratione temporis",* with the provisions of the Constitution and the Law (see *mutatis mutandis Jasiūnienė against Lithuania, App. No. 41510/98, Judgments of the ECHR of 6 March and 6 June 2003).*

19. It follows that the Referral is inadmissible pursuant to Rule 36.3 (h) of the Rules of Procedure which provides that "Referral may also be deemed inadmissible in any of the following cases: h) the Referral is incompatible, "*ratione temporis",* with the Constitution."

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 20 of the Law, and Rule 36.3 (h) of the Rules of Procedure, in its session of 04 October 2011 unanimously

DECIDED

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Elmi Dragusha vs. Judgment Rev. No. 185/2008 of the Supreme Court

Case KI 72-2011, decision of 1 November 2011

Keywords: hiring dispute, individual referral, manifestly ill-founded referral

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his constitutional rights were infringed by a judgment of the Supreme Court, which affirmed decisions of the lower courts rejecting the Applicant's complaint regarding a hiring decision made by the Obiliq Centre for Social Welfare. The applicant argued that the judgment of the Supreme Court violated Article 31 of the Constitution because it failed to resolve material differences between evidence submitted by the parties.

The Court held that the Referral was manifestly ill-founded and therefore inadmissible pursuant to Article 48 of the Law on the Constitutional Court and Rule 36.2(b) of the Rules of Procedure because it failed to produce *prima facie* evidence substantiating a constitutional violation, citing *Vanek v. Slovak Republic.*

Prishtina, 01 november 2011
Ref. No.: RK101/11

RESOLUTION ON INADMISSIBILITY
in

Case No. 72/11

Applicant

Elmi Dragusha

Constitutional review of the Judgment of the Supreme Court of Kosovo
Rev. No. 185/2008 dated 6 January 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President

Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge
Ilirian Islami, Judge.

The Applicant

1. The Applicant is Elmi Dragusha from the village of Prugovc, Municipality of Obiliq.

Challenged Decision

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo, Rev. No. 185/2008, dated 6 January 2011 and served on him on 8 March 2011.

3. In fact, the Applicant claims that "the Supreme Court did not determine the rights according to which should see the contradictions between the material evidences of both parties".

Legal Basis

4. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 of the Law No. 03/L-121 on the Constitutional Court of Kosovo, dated 16 December 2008 (hereinafter, the "Law") and Rule 56.2 of the Rules of Procedure.

Proceedings before the Court

5. On 23 May 2011, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, referred to as the "Court"). On 24 May 2011, the Applicant was notified to complete the Referral and, on 2 June 2011, he completed and clarified the Referral.

6. Meanwhile, in completing the Referral, the Applicant, without giving any justification, requested his identity not to be disclosed.

7. On 24 June 2011, the Court informed the Applicant and the involved courts that a procedure has been initiated for review of constitutionality in the case KI 72/11.

8. On 05 October 2011, after having considered the Report of the Judge Almiro Rodrigues, the Review Panel, composed of Judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalović, recommended to the full Court to reject the Referral as inadmissible.

Summary of the Facts

9. On 11 February 2002, the Centre for Social Welfare in Prishtina (hereinafter "CSW in Prishtina") announced in the "Koha Ditore" newspaper a job vacancy for the post of Social Services Officer in the Centre for Social Welfare in Obiliq (hereinafter "CSW in Obiliq"), requiring that the candidates should have superior university education.

10. Among other 9 candidates, the Applicant applied for the post. However, after the selection and recruitment proceedings, the Applicant was not hired.

11. The Applicant filed an appeal to the Municipal Court of Prishtina against the Obiliq CSW decision. On 23 January 2003, the Municipal Court of Prishtina rejected the Applicant's appeal as unfounded.

12. The Applicant filed an appeal to the District Court of Prishtina against the Judgment of the Municipal Court of Prishtina. On 20 May 2005, the District Court of Prishtina annulled the Judgment of the Municipal Court of Prishtina, due to erroneous application of the law and remanded the case for retrial.

13. On 27 February 2007, at retrial, the Municipal Court of Prishtina, again, rejected as unfounded the appeal of the Applicant.

14. The Applicant filed an appeal with the District Court of Prishtina against the second Judgment of the Municipal Court of Prishtina. On 19 November 2007, the District Court of Prishtina rejected as unfounded the Applicant's appeal and upheld the second Judgment of the Municipal Court of Prishtina Cl. No. 192/2005, dated 27 February 200.

15. The Applicant filed with the Supreme Court of Kosovo a request for revision against the Judgment of the District Court of Prishtina. On 6 January 2011, the Supreme Court of Kosovo rejected as unfounded the Applicant's request for revision and upheld the Judgment of the District Court of Prishtina.

16. In the reasoning of the Judgment of the Supreme Court of Kosovo, Rev. No. 185/2008 dated 6 January 2011, the Supreme Court states the following:

"... the minutes on assessment of candidates' capabilities nr.18, dated 15.03.2002, it is established that candidate (...), who has completed the Faculty of Law and who was assessed with 43 points, was admitted. The claimant has completed the Faculty of Philosophy and Sociology and was assessed with 21 point."

"... inferior instance courts' have fairly applied the substantive law when they rejected the claimant's claim, because the decision on admission of the candidate is legal, because the admitted candidate is a Graduated Lawyer and he meet the terms foreseen by the competition..."

Legal arguments presented by the Applicant

17. The Applicant alleges that "the SLC of Obiliq (...) has announced a competition for job position the Official for Social Services for which position it is required to have a respective university qualification and not, as the courts are considering, that it is required a superior university qualification".

18. He further alleges that "from the interpretation that [he] did to the competition it results that duty of the candidate with respective university qualification is to do social analysis, but it is hired the graduated that according to qualification does legal analysis/justifications, what it does not correspond with the duties announced in the competition. In the competition it is required that the candidate should solve social cases, lawyer does not perform these tasks".

19. Therefore, the Applicant considers that the selected person, being a lawyer, "does not fulfill the conditions and his selection was made in violation of the law".

20. In the end, the Applicant concludes that the Judgment of the Supreme Court violated the right to a fair trial, as prescribed in Article 31 of the Constitution.

21. The Applicant also concludes that Article 6.1 of the European Convention on Human Rights was violated (hereinafter the "ECHR"). Article 6.1 of ECHR states:

"In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time [...]"

22. The Applicant further refers to Article 13 of the ECHR, establishing:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"

23. Therefore, the Applicant requests from the Constitutional Court *"to approve the claim and annul the Supreme Court judgement Revision nr. 185/2008 and District Court judgment Ac. Nr. 588/2007, and case to be returned to the Supreme Court or Municipal Court for retrial".*

Assessment of the Admissibility of the Referral

24. The Applicant claims Article 31 (Right to a Fair and Impartial Trial) of the Constitution and Articles 6 (Right to a Fair Trial) and 13 (Right to an Effective Remedy) of the ECHR are the basis for his referral.

25. Admissibility requirements are laid down in the Constitution and further specified in the Law on the Constitutional Court and the Rules of Procedure.

26. Article 48 of the Law on the Constitutional Court of the Republic of Kosovo states:

"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."

27. Under the Constitution, the Constitutional Court is not a court of appeal, when considering decisions rendered by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECtHR] 1999-I).

28. The Applicant has neither substantiated an allegation nor has he submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECtHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005). The Applicant does not specify why and how Article 31 of the Constitution or Articles 6 and 13 of the ECHR support his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.

29. The Applicant claims that his rights were violated by the lower courts' erroneous finding of fact and application of law, without specific reference to how these decisions infringed on his constitutional rights.

30. In the present case, the Applicant was afforded ample opportunities to present his case and to contest the interpretation of the law which he considered incorrect, before the Municipal, District and Supreme Court. The Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no_17064/06 of 30 June 2009).

31. In conclusion, the Referral is manifestly ill-founded, pursuant to Rule 36.2(b) of the Rules of Procedure which stipulates that "*The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:... b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights".*

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 36.2(b) of the Rules of Procedure, at the session held on 5 October 2011, unanimously

DECIDED

I. **TO REJECT** the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Zora Palič and Paško Palič vs. Judgment Rev. No. 218/2006 of the Supreme Court and Judgment P. no. 177/2002 of the Municipal Court of Lipjan

Case KI 86-2010, decision of 18 October 2010

Keywords: individual referral, right to work and exercise profession, termination of employment

The Applicants filed a Referral pursuant to Article 113.7 of the Constitution, contending that their rights to work under Article 49 of the Constitution were infringed when the Supreme Court affirmed the Prishtina District Court's upholding of the Lipjan Municipal Court's rejection of their claims that UNMIK terminated their employment as teachers without just cause. The Respondent argued in the Municipal Court that the Applicants voluntarily terminated their employment and it was necessary to replace them to maintain the continuity of the educational program.

The Court held that the Referral was inadmissible pursuant to Article 49 of the Law on the Constitutional Court because they had failed to submit the Referral within 4 months of the final judgment in the case.

Pristina, 01 November 2011
Ref. No.: RK 155 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 86/10

Applicants

Zora Palić
Paško Palić

Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev.no. 218/2006, dated 15 May 2008, and Judgment of the Municipal Court of Lipjan, P.no. 177/2002, dated 9 January 2003

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. The Applicants are Ms. Zora Palić and Mr. Paško Palić, residing in Lipjan.

Challenged court decisions

2. The decisions challenged by the Applicants are:

a. Judgment of the Supreme Court of Kosovo (hereinafter: the "Supreme Court"), Rev.no.218/2006, which was served upon the Applicant on 16 December 2008; and
b. Judgment of the Municipal Court of Lipjan, P.no. 177/2002, which was served upon the Applicant on 3 June 2003.

Subject matter

3. The Applicants allege a violation of Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”).

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the “Law”) and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

5. On 15 September 2010, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”).

6. On 9 November 2010, the Referral was forwarded to the Municipal Court of Lipjan.

7. On 7 December 2010, the President, by Order No.GJR. 86/10, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President, by Order No. KSH. 86/10, appointed the Review Panel composed of Judges Almiro Rodrigues, Kadri Kryeziu and Gjyljeta Mushkolaj.

8. On 2 March 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

9. The Applicants requested the Municipal Court of Lipjan to be reinstated in their positions at the elementary school in Janjevë. On 9 January 2003, the Municipal Court rejected the claim of the Applicants as unfounded (Judgment P.no. 177/2002).

10. Before the Municipal Court, the Applicants asserted that:

    a. they were permanently employed for 32 and 30 years, respectively;
    b. they were prevented, without any ground, to continue their employment by UNMIK;
    c. they received income on 31 December 1999 and that they were employed until 31 August 2000;
    d. they have orally and in written asked the school to continue with their work; and
    e. no disciplinary procedure was initiated against them and no decision on employment termination was delivered to the Applicants.

11. The responding party responded before the Municipal Court that:

    a. the Applicants had not been at work from 1 September 2000 until 29 September 2001;
    b. the school was forced to recruit new staff to the positions that were held by the Applicants in order to provide normal teaching for the students, who had previously been taught by the Applicants; and
    c. UNMIK Administration, Department of Education, was authorized to decide on recruitment and dismissal of the school staff.

12. The Municipal Court asserted that:

a. the Coordinator for Local Communities in Lipjan/Lipljan had notified the Applicants of their positions being occupied by new staff, since they had voluntarily left their jobs;
b. the Applicants have not filed an objection with the competent body of the school in relation to the alleged violation of their rights under the labour law; and
c. pursuant to Article 83.2 of the Law on Basic Rights from Labour Relations it is provided that the protection of rights before competent court cannot be sought, unless protection of rights had previously been sought before the competent bodies of the organization.

13. The Applicants complained to the District Court in Pristina, which rejected their complaint and upheld the Judgment of the Municipal Court of Lipjan, holding that the application of the material and procedural law was correct (Judgment Gzh.no. 394/2003 of 14 July 2005).

14. The Applicants then complained to the Supreme Court claiming that:

a. the lower courts did not review whether there was any legal basis for the termination of the employment;
b. there was no evidence that the Applicants had voluntarily left their work;
c. the lower courts had not taken into consideration all the evidence that the Applicants had presented; and
d. the judgment of the lower courts were not reasoned.

15. The Supreme Court rejected the complaint as unfounded (Judgment Rev.no. 218/2006 of 15 May 2008), holding that the factual situation and the material and procedural law had been correctly applied by the lower courts.

Applicant's allegations

16. The Applicants alleges that their employment contract had been illegally and unconstitutionally terminated without any decision.

17. Furthermore, the Applicants allege that the Constitution guarantees basic rights for the citizens, like the right to employment, as is the issue in their case.
18. Additionally, the Applicants state that they are citizens of Kosovo and are entitled to employment, because they are employed for over 30 years according to the employment contract, and thus, it is illogical that their employment should be terminated without any written decision made by the school.

Assessment of the admissibility of the Referral

19. As to the Applicant's allegation that their right guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution has been violated, the Court observes that, in order to be able to adjudicate the Applicants' complaint, it is necessary to first examine whether they have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

20. As one of the requirements, the Applicants must establish that they have submitted the Referral within a period of 4 months after the final court decision taken in their case, as stipulated by Article 49 of the Law. However, it appears from the Applicant's submissions that the final court decision regarding their case, was the judgment of the Supreme Court of 15 May 2008, served upon them on 16 December 2008, whereas they submitted their Referral to the Constitutional Court only on 15 September 2010, that is more than 4 months after the entry into force of the Law (see Article 56 of the Law).

20. It follows that the Referral is out of time pursuant to Article 49 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Rule 56 (2) of the Rules of Procedure, on 2 March 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Private Enterprise Gradevinar vs. Judgment Ae - Pž No. 21/2008 of the Supreme Court

Case KI 1-2011, decision of 1 November 2011

Keywords: compensation (war damage), individual referral, international agreements and instruments, manifestly ill-founded referral, specification of rights violated

The Applicant filed a Referral pursuant to Articles 21.4 and 113.7 of the Constitution, asserting that his unspecified constitutional rights were infringed by a judgment of the Supreme Court, which affirmed a lower court decision rejecting on immunity grounds the Applicant's claim for compensation related to property damage sustained during and just after war activities in 1999.

The Court held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution, Article 48 of the Law on the Constitutional Court and Rule 36.2(b) of the Rules of Procedure because the Applicant failed to specify the Constitutional rights and freedoms encompassed by his claim or to submit *prima facie* evidence of a Constitutional violation, citing *Vanek v. Slovak Republic*. The Court noted that KFOR and UNMIK forces have immunity from civil liability. The Court emphasized that its discretion was limited to disposing of Constitutional controversies, such as whether the Applicant received a fair trial, as opposed to the resolution of factual or substantive law disputes, citing *Garcia Ruiz v. Spain*. The Court found that the lower court proceedings were neither unfair nor arbitrary, citing *Shub v. Lithuania*.

Prishtina, 01 November 2011
Ref. No.: RK149/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 01/11

Applicant

Private Enterprise Građevinar

Constitutional review of the Judgment of the Supreme Court of Kosovo
Ae - Pž No. 21/2008 dated 15 July 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The applicant is a Private Enterprise "Građevinar" from Kraljevo, represented by lawyer Miro Delević from Mitrovica.

Challenged Decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo Ae - Pž No. 21/2008 dated 15 July 2010 rejecting as ungrounded the appeal on the Judgment of the Commercial District Court of Prishtina IV P-No. 11/2005 dated 11 July 2007, regarding the Applicant's claim for compensation for the damage sustained due to destruction of property during and immediately after the war activities in 1999.

Subject Matter

3. The Applicant challenges the Judgment of the Supreme Court of Kosovo Ae - Pž No. 21/2008 dated 15 July 2010 without specifying a particular article of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"). The Applicant claims that the violation of the rights consisted in the fact*: "That at any time and under any circumstances, the Law has to be in place and has to exist, and that the existence of the Law provides the protection to both natural and legal persons at all times, and it establishes the issue of liability".*

Legal Basis

4. The Referral is filed based on Articles 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 of the Law No. 03/L-121 on the Constitutional

Court of the Republic of Kosovo, dated 16 December 2008 (hereinafter: the "Law") and Rule 56.2 of the Rules of Procedure.

Proceedings before the Constitutional Court

5. The Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 5 January 2011.

6. On 23 March 2011 the Constitutional Court informed Mr. Miro Delević, the Supreme Court of Kosovo and the Commercial District Court of Prishtina that a procedure has been initiated for review of constitutionality in case KI 01/11.

7. On 28 March 2011, in its response to the Constitutional Court of Kosovo, the Commercial District Court of Prishtina stressed that they have nothing new to add and that their opinion on the subject matter is given in the Judgment of the Commercial District Court of Prishtina.

8. On 29 March 2011, in its response to the Constitutional Court of Kosovo, the Supreme Court of Kosovo stressed that they have nothing new to add and that their opinion on the subject matter is given in the Judgment of the Supreme Court of Kosovo.

9. On 5 April 2011 the Constitutional Court asked from the lawyer, Mr. Miro Delević, to submit evidence on the date of receipt of the Judgment of the Supreme Court of Kosovo Ae - Pž No. 21/2008 dated 15 July 2010.

10. On 26 April 2001, in its written response, the lawyer, Mr. Miro Delević informed the Constitutional Court of Kosovo that the delivery receipt note for the Judgment is with the Supreme Court of Kosovo.

11. On 28 June 2011 the Commercial District Court of Prishtina delivered the receipt note by fax, which shows that the lawyer, Mr. Miro Delević, received the Judgment of the Supreme Court on 2 September 2010.

12. On 4 October 2011 after having considered the report of the judge Rapporteur Altay Suroy, the Review Panel composed by judges: Snezhana Botusharova (Presiding), Ivan Cukalovic and Iliriana Islami made a recommendation the full Court on the Inadmissibility of the referral.

Summary of Facts

13. Private Enterprise "Građevinar", from the village of Ratina, Municipality of Kraljevo, and which during 1999 operated in the territory of the

Municipality of Obiliq, has filed a claim suit to the Commercial District Court of Prishtina, in which it asked from the Municipality of Prishtina, as the first respondent, Provisional Institutions of Kosovo as the second respondent, and the Government of Kosovo, as the third respondent, compensation for the Private Enterprise "Građevinar" for the damage sustained during the second part of 1999.

14. Namely, Private Enterprise "Građevinar" during the second part of 1999 sustained damage, which the Applicant estimated at 255,000.00 Euros, and the issue is about the destroyed property which was under possession of the Private Enterprise "Građevinar" and which was consisted of: facilities, orchards, crops, lost profit due to inability to cultivate the land, and movable items that were present in the mentioned facilities.

15. In its claim suit to the Commercial District Court of Prishtina the Applicant referred that the responsibility of the respondents is based upon Article 180 of the Law on Contracts and Torts, the European Convention on Human Rights and Freedoms and the Protocol to the Convention which regulates the right for the undisturbed use and protection of property.

16. On 11 July 2007 the Commercial District Court of Prishtina by Judgment IV. P. No. 11/2005 rejected the claim suit as **unfounded** in the part regarding responsibilities of the Municipality, the first respondent, stating that: "*The Article 180 of the Law of Obligations does not provide for liability of a municipality where the case involves destruction of property due to war or military actions, as the bodies of a Municipality are certainly not capable of preventing a war, i.e. aggression against an entire country, the way it happened in Kosovo in year 1999".*

17. In the same Judgment and in regard to the Provisional Institutions of Kosovo, as the second respondent, and the Government of Kosovo, as the third respondent, the Commercial District Court of Prishtina **rejected** the claim suit with the following reasoning: "*According to the UNMIK Regulation No. 2000/47 dated 18 august 2000, UNMIK staff enjoys immunity;"* and that the Government of Kosovo, as the third respondent, *"....cannot be a party in court proceedings because pursuant to Article 77 of the Code of Civil Procedure, it does not have the status of physical person."*

18. On 2 January 2008, the Private Enterprise "Građevinar", through its representative Mr. Miro Delević, lodged an appeal to the Supreme Court of Kosovo, about which, he, in its pertinent part, states: *Tthat the damage was caused after 9 June 1999, after seizing of war activities*

and that there was an erroneous application of the substantive law in regard to the passive legitimacy of the second and third respondent".

19. On 15 July 2010 the Supreme Court of Kosovo, by Judgment Ae - Pž No. 21/2008 rejected the appeal of the lawyer Mr. Miro Delević as **unfounded** and **confirmed** the Judgment of the Commercial District Court of Prishtina **IV**. P. No. 11/2005 dated 11 July 2007.

Applicant's Allegations

20. The Applicant alleges that the Judgment of the Supreme Court of Kosovo Ae - Pž No. 21/2008 dated 15 July 2010 rejecting the claim suit of the Private Enterprise "Građevinar" for compensation of the damage sustained due to destruction of property of the Private Enterprise "Građevinar" during 1999 violates Enterprise's rights guaranteed by the Constitution of the Republic of Kosovo, without specifying any particular articles of the Constitution that were violated.

21. The Applicant considers that the: *"....violation of the Law is in the fact that, at any time and under any circumstances, the Law has to be in place and has to exist, and that the existence of the Law provides the protection to both natural and legal persons at all times, and it establishes the issue of liability".*

22. The Applicant further considers that the Judgments of the District and Supreme Court advocate legal vacuum in the dispute in regard to passive legitimacy of KFOR, UNMIK and the Government of Kosovo.

Relevant provisions of the Law and the Constitution in regard to property disputes

23. Article 180.1 of the Law on Contracts and Torts prescribes the following:

"A State whose agencies, in conformity to existing regulations, were bound to prevent injury or loss, shall be liable for loss due to death, bodily injury or damaging or destroying property of an individual due to acts of violence or terror, as well as in the course of street demonstrations and public events."

Relevant provisions of the Law and the Constitution in regard to responsibilities of Government bodies

24. UNMIK Regulation No. 1999/1 dated 25 July 1999, which sets out the authority of the Interim Administration in Kosovo in Articles 1.1 and 7 provides for the following:

"1.1 All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.

7.1 The present regulation shall be deemed to have entered into force as of 10 June 1999, the date of adoption by the United Nations Security Council of Resolution 1244 (1999)."

Relevant provisions of the Law and the Constitution in regard to immunity

25. Article 146 of the Constitution of the Republic of Kosovo **[International Civilian Representative]** stipulates the following:

Notwithstanding any provision of this Constitution:

1. The International Civilian Representative and other international organizations and actors mandated under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 have the mandate and powers set forth under the said Comprehensive Proposal, including the legal capacity and privileges and immunities set forth therein.

26. UNMIK Regulation No. 2000/47 dated 18 August 2000 on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo, in Articles 2.1 and 3.1 sets forth the following:

"2.1 KFOR, its property, funds and assets shall be immune from any legal process.

3.1 UNMIK, its property, funds and assets shall be immune from any legal process."

Preliminary Assessment of Admissibility

27. Admissibility requirements are laid down in the Constitution and further specified in the Law on the Constitutional Court and the Rules of Procedure.

28. The request by the applicant is in accordance with the period prescribed by the Constitution, the Law or the Rules of Procedures, the way of calculating the period is stipulated in the Rule 27 paragraph 3 and 6 of the Rules of Procedures which provides the following:

3. When a period is expressed in months, the period shall end at the close of the same day of the month as the day during which the event or action from which the period to be calculated occurred or when appropriate the first day of the following month.

6. When a time period would otherwise end on a Saturday, Sunday or official holiday, the period shall be extended until the end of the first following working day.

29. Article 48 of the Law on Constitutional Court of the Republic of Kosovo stipulates:

"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."

30. Under the Constitution, the Constitutional Court is not a court of appeal, when considering decisions rendered by lower courts. It is the role of the lower courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECtHR] 1999-I).

31. The Applicant did not submit any *prima facie* evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECtHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005). The Applicant does not specify which Articles of the Constitution support his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.

32. The Applicant claims that its rights were violated by the lower courts' erroneous finding of fact and application of law, the Applicant claims that lower courts advocate *"legal vacuum"*.

33. From the above cited legal provisions in Articles 1.1 and 7.1 of the UNMIK Regulation 1999/1 dated 25 July 1999 it is clear that this legal vacuum does not exist because the Regulation sets retroactive effect as of 10 June 1999 and sets UNMIK Administration as the sole responsible authority. Whilst, UNMIK Regulation No. 2000/47 on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo, in Articles 2.1 and 3.1 prescribes immunity from any legal processes for KFOR and UNMIK, and their property, funds and assets.

34. In the present case the Applicant had multiple opportunities to build its case and challenge the interpretation of the law, which it considers is

inaccurate, at the Commercial District Court and the Supreme Court. Having examined the proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no_17064/06 of 30 June 2009).

35. In conclusion, the Admissibility requirements are not met by this Referral. The Applicant has failed to state and support with evidence the constitutional rights and freedoms that were allegedly violated by the challenged decision.

36. It follows that the Referral is manifestly ill-founded pursuant to Rule 36.2(b) of the Rules of Procedure which stipulates: *"The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights;"*

FOR THESE REASONS

The Constitutional Court of Kosovo pursuant to article 113, 7 of the Constitution, Article 20 of the Law, and the Rule 56 par. 2 and Rule 36(b) of the Rules of Procedure, in its session held on 4 October 2011 unanimously:

DECIDE

I. **To REJECT** the Referral as inadmissible**;**

II. This decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance wit the Article 20 paragraph 4 of the Law of the Constitutional Court; and,

III. This decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof.Dr.Enver Hasani

Ilmi Rakovica vs. Judgments of the District Court in Prishtin P. nr. 529/06, and Supreme Court of Kosovo Pp. nr. 200/07, and District Court in Prishtina P. nr. 465/07

Case KI 113-2010, decision of 3 November 2011

Keywords: criminal matter, human dignity, individual referral, innocence claim, murder, police misconduct claim, right to fair and impartial trial

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Article 23 of the Constitution were infringed by judgments of the Supreme Court, which increased the sentence imposed by the Prishtina District Court on an aggravated murder of a police officer conviction, and the Prishtina District Court, which convicted him of aggravated attempted murder of a second police officer, because he was innocent of the offenses. The Applicant also complained that he was physically abused by police officers during the search of his apartment. He contended that he did not appeal the District Court aggravated attempted murder conviction because he feared that the Supreme Court might increase his sentence again.

The Court presumed that the Applicant intended to complain about the lack of a fair and impartial trial under Article 31 of the Constitution and Article 6 of the European Convention on Human Rights and Fundamental Freedoms. It held that the Referral was inadmissible because the Referral was not submitted within the 4-month deadline mandated by Article 49 of the Law on the Constitution. The Court also held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court because the Applicant failed to exhaust all of his legal remedies, as reflected by the absence of an appeal of the District Court aggravated murder conviction. The Court noted that the Applicant's prediction about the outcome of the appeal did not release him from the exhaustion rule, citing *Whiteside v. the United Kingdom*. It also emphasized the rationale of the rule, which is based on an assumption that the Kosovo legal system will provide an effective remedy for constitutional violations, citing *Selmouni v. France*, *Azinas v. Cyprus*, *AAB-RIINVEST University L.L.C. v. Government of Kosovo*, and *Mimoza Kusari Lila vs. The Central Election Commission*.

Pristine, 03.November 2011
Ref. No.: RK161/11

RESOLUTION ON INADMISSIBILITY

In

Case No. KI113/10

Applicant

Ilmi Rakovica

Constitutional Review of Judgments of the District Court in Prishtina P.nr.529/06 dated 15 March 2007,

and

Supreme Court of Kosovo Pp.nr. 200/07 dated 5 July 2007,

and

District Court in Prishtina P.nr.465/07 dated 12 December 2008.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Ilmi Rakovica having an address in Prishtina.

Challenged Decision

2. Judgments of the District Court in Prishtina P.nr.529/06 dated 15 March 2007, Supreme Court of Kosovo Pp.nr. 200/07 dated 5 July 2007, District Court in Prishtina P.nr.465/07 dated 12 December 2008.

Subject Matter

3. The Applicant deems that his fundamental human rights granted in Article 23 [Human Dignity] of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution) have been violated.

4. The Applicant requests the Constitutional Court (hereinafter: Court) to remand his case for retrial to the first instance court, alleging that the Judgments have ruled in his determent and violated his Fundamental Human Rights guaranteed by the Constitution and the Convention on Fundamental Human Rights.

Legal Basis

5. Art. 113.7 of the Constitution; Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

6. On 5 October 2010 the Applicant filed a Referral with the Secretariat of the Constitutional Court.

7. By order of the President of the Constitutional Court Judge Iliriana Islami was appointed as Judge Rapporteur and he appointed a Review Panel composed of Judges Ivan Čukalović (Presiding), Altay Suroy and Gjyljeta Mushkolaj.

8. The Court deliberated on the Referral in private session on 23 May 2011.

Summary of the facts

9. On date 15 March 2007 the District Court in Prishtina by Judgment P.nr.529/2006 the Applicant was convicted of attempted aggravated murder of a policeman, Valdet Bajrami, and he was acquitted of the attempted aggravated murder of another policeman, Faruk Hoxha. He was also convicted of the unauthorized ownership, control, possession or use of weapons. The Applicant following conviction was sentenced to an aggregate term of three years of imprisonment.

10. On date 5 July 2007 the Supreme Court of Kosovo by Judgment Ap.nr.200/07 rejected as ungrounded the appeal of the Applicant. The Court revised part of the verdict of the District Court Judgment P.nr.529/2006 in relation to the length of sentence for the charge of

aggravated murder and increased it to a term of three years and six months. The Court also sent back for retrial to the District Court the part of the verdict of the District Court Judgment P.nr.529/2006 relation to the acquittal of the charge of attempted aggravated murder of Faruk Hoxha. The Court verified the sentence of one year imprisonment for the possession or use of weapons and imposed an aggregated sentence of four years imprisonment.

11. On date 12 December 2008 the District Court in Prishtina in its Judgment P.nr.465/07 found the Applicant guilty of attempted aggravated murder Faruk Hoxha and he was sentenced to an aggregated sentence of four years and six month of imprisonment.

Applicant's allegation

12. The Applicant deems that he was charged of a criminal offense he did not commit. He also complains that during the search at his flat the Police used weapons and excessive physical force, injured him beat him and tortured him.

13. Consequently, the Applicant claims that his Fundamental Human Rights granted in Article 23 [Human Dignity] of the Constitution has been violated. Article 23 provides:

Article 23 [Human Dignity]

Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.

14. The Applicant stated that the reason he did not appeal the second Decision of the District Court in Pristina was that he feared that the Supreme Court might increase his sentence.

15. On a reading of the entirety of the Referral lodged by the Applicant what is being implied is that the Applicant was not granted a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights and Fundamental Freedoms. However, that is not specifically pleaded nor is it grounded on any documents lodged with the Referral.

Assessment of the Admissibility of the Referral

16. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility

requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

17. Article 49 of the Law reads as follows:

"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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced."

18. The challenged Judgement of the District Court in Prishtina (P.nr.465/07) was made on 12 December 2008 and delivered to the applicant on 10 March 2009. The Applicant filed the Referral with the Secretariat of the Constitutional Court on 5 October 2010. Based on the submitted documents the Referral has not been filed within the four month time limit pursuant to Article 49 of the Law.

19. Even if the Referral had been submitted within the time allowed under the Law the question of the exhaustion of all legal remedies must be addressed. As to the Applicant's Referral, the Court refers to Article 113.7 of the Constitution in conjunction with Article 47.2 of the Law, which provides:

"113.7 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."

"47.2 The individuals may submit the referral in question only after he/she has exhausted all legal remedies provided by the law"

20. Based on the documents submitted by the Applicant, despite the advice of the District Court in Prishtina, dated 12 December 2008, that he can address the Supreme Court of Kosovo with an appeal against its Judgment, he has not used this legal right.

21. The Court also notes that a mere suspicion on the perspective of the matter is not sufficient to exclude an applicant from his obligations to appeal before the competent bodies (see Whiteside v the United Kingdom, decision of 7 March 1994, Application no. 20357/92, DR 76, p.80).

22. Previously the Court emphasized that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the

opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803194, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679100, decision of 28 April 2004).

23. The Court applied this same reasoning when it issued a Resolution on Inadmissibility on 27 January 2010 on the grounds of non exhaustion of remedies in Case No. KI41/09, AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo, and in its Decision of 23 March 2010 in Case No. KI. 73/09, Mimoza Kusari Lila vs. The Central Election Commission.

24. The Court therefore finds that the Applicant has not exhausted all legal remedies available to him provided by law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT this Referral as Inadmissible;

II. The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Dr.Iliriana Islami	Prof. Dr. Enver Hasani

Alomerovic Muris vs. Judgments A. no. 198/2009 and Mia no. 7/2009 of the Supreme Court

Case KI 105-2010, decision of 1 November 2011

Keywords: administrative dispute, authorized representative, equality before the law, individual referral, interim measures, manifestly ill-founded referral, property registration, protection of legality (property)

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional rights were infringed by a judgment of the Supreme Court, which affirmed decisions of a lower court and an administrative agency rejecting an application for registration of land on the ground that registration was attempted by an unauthorized representative. The applicant argued that the judgment of the Supreme Court violated Articles 24.1 and 46.1 of the Constitution, infringing his rights to equal protection and property.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Rule 36.1(c) because the Applicant failed to produce *prima facie* evidence substantiating a Constitutional violation, citing *Vanek v. Slovak Republic*. Pursuant to Article 27 of the Law on the Constitutional Court and Rule 54.1 of the Rules of Procedure, the Court denied the Applicant's request for interim measures because the Referral was inadmissible and no matter was pending before the Court.

Pristina, 03. November 2011
Ref. No.: RK 152/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 105/10

Applicant

Alomerovic Muris

Constitutional Review of Judgments A.no. 198/2009 of 17 July 2009 and Mia no. 7/2009 of 27 August 2010 of the Supreme Court of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Alomerovic Muris, residing in Mitrovica, represented by Mr. Shefkije Bunjaku, a lawyer practicing in Pristina, and acting under a certified power of attorney, dated 28 October 2010.

Challenged decision

2. The Applicant challenges the Judgments of the Supreme Court no. 198/2009 of 17 July 2009 and Mia no. 7/2009 of 27 August 2010, the latter having been served on him on 10 September 2010.

Subject Matter

3. The Applicant requests an assessment of the constitutionality of the Judgments of the Supreme Court, alleging that the Supreme Court wrongly found that the Applicant's representative was not to be considered as an authorized person, competent to file a request for parcelization and transfer of immoveable property with the relevant instance of the Municipality of Mitrovica.

4. He alleges that, thereby, the Supreme Court infringed his rights under Article 24 [Equality before the Law] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

5. Furthermore, the Applicant also requests the Court to impose an interim measure.

Legal Basis

6. Article 113.7 of the Constitution, Articles 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121) (hereinafter: the "Law") and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

7. On 15 October 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

8. On 16 December 2010, the President, by Order Nr.GJR 105/10, appointed Judge Iliriana Islami, as Judge Rapporteur. On the same date, the President, by Order Nr.KSH. 105/10, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Enver Hasani.

9. On 19 January 2011, the Referral was forwarded to the Supreme Court.

10. On 4 October 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

11. On 27 November 2008, the Department for Cadaster and Geodesy of the Municipality of Mitrovica rejected the request of the Socially Owned Enterprise "Gornji Ibar" from Rozaje, Montenegro (hereinafter: "the SOE Gornji Ibar") related to the parcelization and transfer of rights of certain cadastral parcels into the Immoveable Property Rights Register, and refused to register these parcels, due to a lack of relevant evidence which would justify the legal grounds for the request.

12. The Department reasoned that the SOE had been given the possibility to complete the documentation within a certain deadline, but that this had never been done; considering the long period passed and the doubts existing about the originality of the documents presented by the representative of the SOE, the Municipal Services had tried to trace the original documentation, necessary to eliminate the obstacles to register the property, however without success.

13. On 2 December 2008, a complaint was filed with the Kosovo Cadastral Agency (hereinafter: "KCA") against the Department's decision of 27 November 2008 by Mr. E.K., the authorized representative of the Shareholder Association "2M" Rozaje, registered in Podgorica, with an office in Mitrovica. (N.B. The SOE "Gornji Ibar" and the company "2 M" Rozaje were established, together with 4 other companies, as new enterprises after the mother company "Trgovina" from Rozaje (Montenegro) was dissolved by the Shareholders Assembly on 31 July 1999).

14. By decision of 22 January 2009, the KCA rejected the complaint, reasoning that the case was about the "SOE Gornji Ibar" and immovable property located in Mitrovica, whereas the Shareholder Association "2M" Rozaje had authorized E.K. to represent the enterprise "2M" Rozaje, registered in Montenegro. According to the KCA, this showed that there were 2 entities with different names, the first was the SOE "Gornji Ibar", which was requesting registration of immovable property rights, and the other was the entity called Shareholder Association "2M" Rozaje, which had authorized E.K. from Mitrovica to represent it.

15. The KCA further stated that, according to UNMIK Regulation 2002/12 and Law 03/L-067, the KTA and PAK, respectively, were the only trustee for the property of SOE "Gornji Ibar" and could, therefore, be the only party in the procedure. Therefore, E.K., as the authorized person of the legal entity, called "2M" Rozaje, did not meet the legal conditions laid down by Article 38 of Law no. 02/L-28 on Administrative Procedure, whereby only interested parties allowed by law may initiate a procedure, which, in the present case, were KTA and PAK, respectively. The KCA concluded that the complaint [of E.K.] had to be rejected as having been filed by an unauthorized person.

16. The administrative appeal, submitted by SOE "Gornji Ibar" to the Supreme Court, was rejected as ungrounded on 17 July 2009, the Court being of the opinion that the allegations of the plaintiff were in contradiction with the factual situation as established by the KCA and the evidence in the case file, which showed that E.K. was authorized by "2M" Rozaje to represent it, and not by the plaintiff SOE "Gornij Ibar". The KCA's conclusion that E.K. was an unauthorized party was, therefore, fair and the law had not been violated.

17. The request for protection of legality, submitted by the State Prosecutor on the ground that the judgment did not contain any reasons as far as the decisive facts were concerned, was rejected as ungrounded in the Supreme Court's judgment of 27 August 2010. The Court held that lack of reasoning as to decisive facts did not represent a ground on which the

State Prosecutor could file a request for protection of legality and it approved in its entirety the conclusion of the first instance that the legal representative of the Applicant was KTA, respectively, PAK.

Applicants' allegations

18. The Applicant alleges that the contested decisions of the Municipality of Mitrovica, the Kosovo Cadastral Agency and the Supreme Court violate Article 24 [Equality before the Law], paragraph 1, as well as Article 46 [Protection of Property], paragraph 1, by infringing its right to equal legal protection and to property.

19. In the Applicant's opinion, the Supreme Court rejected as ungrounded the request for protection of legality without providing any reasoning why the same court, in the administrative proceedings, found its representative, E.K., illegitimate.

Assessment of the admissibility of the Referral

20. As to the Applicant's allegation that his right guaranteed by Article 24 [Equality Before the Law] and Article 46 [Protection of Property] of the Constitution have been violated, the Court observes that, in order to be able to adjudicate the Applicants' complaint, it is necessary to first examine whether he has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

21. In this respect, the Court notes that an Applicant can not complain that the regular courts have committed errors of fact or law, unless and in so far as they may have infringed rights and freedoms protected by the Constitution.

22. In this connection, the Constitutional Court emphasizes that it is not a court of fourth instance, when considering the decisions taken by ordinary courts. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

23. The Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, *mutatis mutandis*, Resolution on Inadmissibility in Case No. KI. 49/10 Abdullah Shkodra - Constitutional Review of the

Judgment of the District Court of Gjilan, AC.no. 70/2010, dated 15 April 2010, of 10 March 2011).

24. As to the present case, the Court notes that the administrative authorities and the Supreme Court only dealt with the preliminary question whether E.K. could be considered as a person authorized to submit, on behalf of the Applicant, a request for parcelization and transfer of property rights of certain cadastral parcels and had come to the conclusion that this was not the case. So far, these institutions have apparently not dealt with the underlying question regarding property rights, claimed by the Applicant.

25. With regard to the question whether the Applicant had been properly represented before the different instances, the Court considers that the Applicant has not shown in which manner the Judgments of the Supreme Court were unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision as to the Admissibility of Application no_ 17064/06 of 30 June 2009 and Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005) and amounted to an infringement of the constitutional rights invoked by the Applicant.

26. In these circumstances, the Referral must be rejected as manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure which provides: *"The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded."*

Assessment of the request for interim measure

27. As to the Applicant's request to the Court for interim measures, the Court refers to Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, stipulating that, at any time when a Referral is pending before the Court and the merits of the Referral have not been adjudicated by the Court, a party may request interim measures. However, taking into account that the Referral was found inadmissible, the Applicant is not entitled under Rule 54 (1) of the Rules of Procedure to request interim measures.

FOR THESE REASONS

The Constitutional Court, pursuant to Rules 36 (1.c) and 56 (2) of the Rules of Procedure, on ... 2011, ...

DECIDES

I. TO REJECT the Referral as inadmissible;

II. TO REJECT the Request for Interim Measure;

III. This Decision shall be notified to the Parties and shall be published 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**
Dr. Iliriana Islami	Prof. Dr. Enver Hasani

Bejta Vitija vs. Decision No. 5022876 of the Pension Administration Department within the Ministry of Labour and Social Welfare

Case KI 38-2011, decision of 3 November 2011

Keywords: administrative dispute, disability pension, inadmissible *ratione temporis,* individual referral, pensions

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his constitutional rights were infringed by a 2008 ruling of the Pension Administration Department that upheld a 2006 decision invalidating his pension. The Applicant failed to appeal the 2008 ruling to the Supreme Court within the 30-day deadline.

The Court held that the Referral was inadmissible pursuant to Articles 49 and 56 of the Law on the Constitutional Court because it was not filed within four months of a Constitutional violation occurring after the implementation of the Constitution.

Pristina, 6 October 2011
Ref. No.: RK /11

DRAFT RESOLUTION ON INADMISSIBILITY

in

Case No. KI 38/11

Applicant

Bejta Vitija

Constitutional Review of the Decision of the Pension Administration Department within the Ministry of Labour and Social Welfare, No. 5022876, dated 1 December 2008.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Bejta Vitija, residing in Prishtina.

Challenged decision

2. The Applicant challenges the Decision of the Pension Administration Department of Kosovo (hereinafter: "DAPK") within the Ministry of Labour and Social Welfare, No. 5022876, of 1 December 2008.

Subject matter

3. The Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 16 March 2011 requesting the Court to *"*[...] *grant me my rights in line with my disabilities* [...]*"* because *"I am in a grave health condition and suffer from several diseases in my head and I am not capable of doing any easy or ordinary job."*

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 16 March 2011, the Applicant submitted the Referral to the Court.

6. On 18 April 2011, the President, by Order No. GJR. 38/11, appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same date, the

President, by Order No. KSH. 38/11, appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Gjyljeta Mushkolaj and Iliriana Islami.

7. On 29 April 2011, the Court requested the Applicant, pursuant to Article 48 of the Law,:

   a. to accurately clarify what rights and freedoms he/she claims to have been violated; and
   b. what concrete act of a public authority is subject to challenge.

8. On 10 May 2011, the Applicant submitted additional documents to the Court, but did not reply to the questions posed by the Court on 29 April 2011.

9. On 20 June 2011, the Court communicated the Referral to the Pension Administration Department.

10. On 4 October 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

11. On 29 December 2004, DAPK rendered a decision approving the Applicant's request for an invalidity pension, since he *"fulfilled the requirements foreseen in the Law (No. 2003/23) on disability pensions in Kosovo."*

12. On 13 December 2006, DAPK abrogated its decision of 29 December 2004 and terminated the payment of the pension based on the report of the Commission for re-evaluation, monitoring and selection pursuant to Section 7.3 and Section 7.4 of the Law (No. 2003/23) on disability pensions in Kosovo. Based on the report, the Applicant did not fulfill the requirements foreseen in the Law on Disability Pensions. The Applicant complained to the Supreme Court against this decision.

13. On 24 December 2007, the Supreme Court rejected the Applicants complaint as unfounded and upheld the decision of DAPK of 13 December 2006 (Judgment A.no. 342/2007). The Supreme Court considered that, based on the submitted evidence, the Applicant was not entitled to a disability pension.

14. On 12 November 2008, the Applicant complained once more to DAPK claiming his right to a disability pension.

15. On 1 December 2008, DAPK rendered a decision, rejecting the complaint of the Applicant, since the Applicant did not fulfill the requirements of Section 3 of the Law on Disability Pensions (Decision 5022876). The Applicant has had a right to file a complaint with the Supreme Court within 30 days, but based on the submissions of the Applicant he has not filed such a complaint.

Assessment of the admissibility of the Referral

16. The Applicant alleges that the Court should *"[...] grant me my rights in line with my disabilities [...]" because "I am in a grave health condition and suffer from several diseases in my head and I am not capable of doing any easy or ordinary job."*

17. However, in order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

18. In this respect, the Court notes that Article 56 of the Law enables an authorized party to initiate a procedure as to matters falling within the jurisdiction of the Court (since the entry into force of the Constitution on 15 June 2008) and having arisen in last instance, before the entry into force of the Law (on 15 January 2009) and to do so within the relevant deadlines which would begin to be counted on the day of entry into force of the Law. Hence, an applicant can complain to the Court about a Judgment issued by the final instance court, which had been served upon him after 15 June 2008, but before 15 January 2009, if he files the Referral with the Court within a period of four months (see Article 49 of the Law) after the date of entry into force of the Law, i.e. before 15 May 2009. In this case, the Applicant challenges the decision of DAPK of 1 December 2008, a date which is prior to 15 June 2008, the date of the entry into force of the Constitution.

19. It follows that the Referral is out of time pursuant to Article 56 (in conjunction with Article 49) of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 56 (in conjunction with Article 49) of the Law, and Rule 56 (2) of the Rules of Procedure, on ... 2011, ...

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Kadri Kryeziu	Prof. Dr. Enver Hasani

Avni Kumnova vs. Decision No. 142/07 of the Supreme Court

Case KI 39-2009, decision of 3 November 2011

Keywords: contract dispute, discipline and conduct of employees, equality before the law, human dignity, individual referral, protection of legality, right to effective legal remedies, right to work and exercise profession, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 23, 24 and 49 of the Constitution, as well as Article 13 of the European Convention on Human Rights and Fundamental Freedoms, were infringed by a judgment of the Supreme Court, which reversed decisions of the lower courts and rejected the Applicant's claim that his employment was terminated in violation of law and the applicable collective bargaining contract. The Applicant argued that the judgment of the Supreme Court was unjust because it erroneously applied the law when deciding that his employer had acted fairly.

The Court concluded that the Referral was admissible because the Applicant had exhausted all legal remedies pursuant to Article 113.7, complied with Article 48 of the Law on the Constitutional Court ("Law") by specifying the particular rights and freedoms that were allegedly violated, and submitted the Referral within the 4-month deadline mandated by Article 49 of the Law.

The Court noted that its discretion was limited to disposing of allegations of Constitutional violations, such as whether the Applicant had received a fair trial, as opposed to resolving other legal or factual disputes, citing *Garcia Ruiz v. Spain*, *Case of Sevdail Avdyli* and *Edwards v. United Kingdom*. The Court held that the Applicant had failed to prove that the Supreme Court proceedings had deprived him of an effective remedy, or that the Supreme Court's judgment was unjust or arbitrary, citing *Vanek v. Slovak Republic*. In addition, the Court held that the Applicant was unable to prove that his Constitutional rights were affected by a breach of the Constitution. Accordingly, the Court issued a judgment reflecting that there was no Constitutional violation as alleged by the Applicant.

Pristina, 03 november 2011
Ref. No.: AGJ 82/11

JUDGMENT

in

Case No. KI 39/09

Applicant

Avni Kumnova

Constitutional Review of the Decision of the Supreme Court of Kosovo
No. 142/07, dated 27 May 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Referral

1. The Applicant is Mr. Avni Kumnova from Pristina.

2. The Applicant challenges the Judgment of the Supreme Court of 27 May 2009, served upon him on 23 June 2009.

3. The Applicant requests the constitutional review of the judgment of the Supreme Court No. 142/07 of 27 May 2009, which, in the Applicant's opinion, has denied him the protection of Articles 23 [Human Dignity]; 24 [Equality before the Law]; and 49 [Right to Work and Exercise of Profession] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and as well as Article 13 [Right to Effective Remedy] of the European Convention on Human Rights (hereinafter: "ECHR").

4. The Referral is based on Article 113.7 of the Constitution, Article 22.7 and 22.8 of the Law (No. 03/L-121) on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: "the Law") and Section 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

5. On 18 September 2009, the Applicant filed a Referral with the Court challenging Decision No.142/07 of the Supreme Court, dated 27 May 2009.

6. On 8 February 2010, the Secretariat communicated the Referral to the Supreme Court, which submitted its reply on 10 February 2010.

7. On 15 March 2010, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Snezhana Botusharova and Ivan Čukalovič.

8. On 24 May 2010, the Constitutional Court requested to the Municipal Court of Pristina the complete file of the case of Mr. Avni Kumnova. The Municipal Court of Pristina sent to the Constitutional Court the entire file in respect to the proceedings before the regular Courts.

9. On 24 May 2010, the Constitutional Court requested the Applicant some clarification to certain questions. The Applicant has not replied to these questions and the letter of the Constitutional Court was returned by the Post Office to the Constitutional Court, since there was nobody to receive the letter at the address indicated by the Applicant.

10. On 9 July 2010, the President, by Order No.KSH.39-n/10, changed Order No.KSH. 39-09/10 of 15 March 2010, replacing Judge Robert Carolan as member of the Review Panel with Judge Iliriana Islami. The Presiding Judge is, therefore, now Judge Ivan Čukalovič.

Summary of facts

11. On 16 March 2005, the Applicant signed a labour contract with the company Iber-Lepenc for an indefinite period of time, by which the Applicant would be employed as engineer for electro-technical equipment maintenance at PS Hidrosistem in Pristina. The contract, inter alia, provided that "the contracting parties may resign from the contract, as per conditions provided by Law and Collective Contract"[1].

[1] Article 12 of the labour contract of 16 March 2005

12. Iber-Lepenc decided, by Decision No. 01-1429 of 11 July 2005, signed by the General Director, to put an end to the labour relation with the Applicant for the following reasons: unsatisfactory performance of duties; unjustified refusal to perform the obligations of the labour contract; behaviour of such a serious nature that it would be unreasonable to expect the employment relationship to continue; and unjustified absence from work.

13. On 20 July 2005, the Applicant filed a complaint with the Management Board of Iber-Lepenc, challenging the termination of his labour contract.

14. At the same time, on 21 July 2005, the Applicant requested the Labour Inspectorate of the Ministry of Labour and Social Welfare to assess the legality of the employer's decision. On 28 July 2005, the Inspector, after having considered the submissions presented by both parties, replied that the decision, by which Iber-Lepenc had terminated the labour relation with the Applicant, did not have any legal effect.

15. The Inspector concluded that not the General Director, but a disciplinary commission appointed by the employer or the Management Council or Enterprise Board, pursuant to Article 24 of the Collective Contract (disciplinary accountability and procedure), should have been the body competent to impose disciplinary measures in cases of serious violation of job requirements. Therefore, Iber-Lepenc, as the employer, could not decide on disciplinary liability in cases of a serious violation of job requirements, but only a disciplinary commission.

16. The Inspector further ruled that the omission of legal advice in the Decision No. 01-1429 was in violation of the fundamental right to protect labour relations and ordered (1) Iber-Lepenc to eliminate the irregularities and (2) Iber-Lepenc's Management Board to annul Decision No. 01-1429.

17. On 20 July 2005, the Applicant submitted an objection. On 29 July 2005, the Management Board of Iber-Lepenc refused the submitted objection and confirmed the contested decision.

18. Thereupon the Applicant initiated proceedings before the Municipal Court of Pristina in order to assess the legality of Iber-Lepenc's decision to terminate his labour contract. On 24 April 2006, the Municipal Court found that Decision 01-1429 was not in compliance with the legal provisions applicable at the time, when Iber-Lepenc terminated the labour relation with the Applicant. It further concluded that the disputed decision was unlawful and, as such, had to be annulled, because it was in contradiction with UNMIK Regulation 2001/27 of 8 October 2001 on

Essential Labour Law in Kosovo and the Law on Labour Relations. The Municipal Court ordered Iber-Lepenc to restore the Applicant in his position and duties and in all his rights based on the labour contract from 30 June 2005 - the date of termination - until the Applicant's return to work.

19. Iber-Lepenc filed an appeal against this judgment with the District Court in Pristina. On 2 February 2007, the District Court in Pristina rejected the appeal as unfounded and upheld entirely the factual conclusions and legal reasoning of the Municipal Court, stating that the latter's judgment did not contain any substantial violations of the provisions of the contested procedure, but was based on a fair assessment of the factual situation and rightful application of material rights. The District Court further argued that the Iber-Lepenc's disputed decision, by which the disciplinary measure of termination of the working relation with the Applicant was imposed, was a consequence of disciplinary procedure provisions, but that the employer had not initiated such a disciplinary procedure, pursuant to the normative acts applicable in the case of the Applicant as well as to Articles 59, 60 and 61 of the Law on Basic Rights of Labour Relations, applicable in Kosovo.

20. The employer then submitted a revision to the Supreme Court. On 27 May 2009, the Supreme Court found that the lower instance courts had erroneously applied the substantive law, since, in case of application of Article 11.2 of UNMIK Regulation 2001/27, the employer should only notify the employee in writing of his intentions to terminate the labour contract and that such notice should include the reasons for such termination.

21. The Supreme Court considered that "according to the provisions of UNMIK Regulation 2001/27 on Essential Labour Law in Kosovo", it was provided that the termination of the labour contract might occur without the obligation of initiating a disciplinary procedure, and that the employer was only under the obligation to notify the employee on his intention of terminating the labour contract in serious cases of misconduct, or unsatisfactory performance of job duties by the employee, and that such notice should include the reasons for such termination, as had been done by Iber-Lepenc.

22. Hence, the Supreme Court granted the request for revision by Iber Lepenc, rejecting the Applicant's claim as ungrounded and finding that the judgments of both lower instance courts should be amended.

23. Thereupon, the Applicant submitted a request for protection of legality to the State public prosecutor and seized the Office of the Ombudsperson, but both actions were unsuccessful.

Applicant's allegations

24. The Applicant alleges that the Supreme Court, by its judgment No. 142/07 of 27 May 2009, violated his fundamental rights and freedoms as provided by Articles 23 [Human Dignity], 24 [Equality before the Law] and 49 [Right to work and Exercise of Profession] of the Constitution and Article 13 [Right to Effective Remedy] ECHR. In the Applicant's view, the Supreme Court erroneously found that Iber-Lepenc had acted fairly and in accordance with the law, when terminating the labour contract, and erroneously applied legal provisions, thus denying him the above fundamental rights.

Assessment of the admissibility of the Referral

25. The Court examined the documentation available and examined whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution.

    Article 113 (7) establishes that

    "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."

26. The Court concludes, from the documentation filed, that the Applicant has exhausted all legal remedies provided by law in that he had a final Appeal rejected by the Supreme Court.

27. On the other side, Article 48 of the Law provides that:

    "In his/her referral, the Applicant 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."

28. The Applicant alleges that his rights as guaranteed by Articles 23 [Human Dignity], 24 [Equality before the Law] and 49 [Right to work and Exercise of Profession] of the Constitution and Article 13 [Right to Effective Remedy] ECHR have been violated.

29. In addition, Article 49 of the Law provides that:

"The referral should be submitted within a period of 4 months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, the deadline shall be counted from the day when the law entered into force."

30. The Applicant's referral was lodged with the Constitutional Court on 18 September 2009, whereas the latest decision in relation to the present case is that issued by the Supreme Court of Kosovo, dated 27 May 2009. Thus the Court concludes that the Referral is filed in compliance with Article 49 of the Law.

31. Therefore, the Court concludes that the legal criteria have been fulfilled and the Referral is admissible.

Assessment of substantive legal aspects of the Referral

32. The Applicant complains about a labour dispute between him and his employer, Iber-Lepenc, which ended with Judgment No. 142/07 of the Supreme Court of 27 May 2007.

33. In respect of the Applicant's claim, the Court notes that a labour dispute determines the civil rights and obligations of the employee and the employer and that, therefore, Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Fair Trial] of the ECHR are, inter alia, applicable (see, *mutatis mutandis*, *Judgment ECrtHR of 10 July 2003, Application 53795/00, Farinha vs. Portugal*).

34. In the present case, the Applicant submitted his request for judicial review of the decision of Iber-Lepenc to terminate his labour contract to the Municipal Court which ruled that the employer had violated applicable law, since he should have established a disciplinary commission in accordance with the provisions of the labour contract and Article 24 of the Collective Contract. Iber-Lepenc's appeal to the District Court was rejected for the same reasons.

35. However, the Supreme Court considered that the lower instance courts had erroneously applied the law and that, in accordance with UNMIK Regulation 2001/27 on Essential Labour Law in Kosovo, the termination of a labour contract might occur without the obligation for the employer to initiate a disciplinary procedure in serious cases of misconduct or unsatisfactory performance of job duties by the employee. The Supreme Court further considered that the employer was, therefore, only under the obligation to notify the employee of his intention to terminate the

labour contract, and such notice should only include the reasons for such termination, as had been done by Iber Lepenc.

36. The Applicant complains that the Supreme Court erroneously found (1) that the employer had acted fairly and in accordance with the law, when terminating the labour contract, and (2) erroneously applied the legal provisions, thus denying him the above fundamental rights.
37. The Applicant alleges that, in these circumstances, his rights as guaranteed by Articles 23 [Human Dignity], 24 [Equality before the Law] and 49 [Right to work and Exercise of Profession] of the Constitution and Article 13 [Right to Effective Remedy] ECHR have been violated.

38. The Constitutional Court notes the Applicant's complaints stem from his disagreement with Decision 142/07 of the Supreme Court of 27 May 2009, rejecting his claim which had originally been successful before the District and Municipal Courts.

39. The Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts, including the decision of the Supreme Court. It is the role of these courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, Garcia Ruiz v. Spain, no. 30544/96, Para. 28, European Court of Human Rights [ECHR] 1999-I; and Resolution on Admissibility in Case KI 13/09, Sevdail Avdyli of 17 June 2010).

40. The Constitutional Court can only assess whether the evidence has been presented in such a way and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see mutatis mutandis, Application No. 13071/87, Edwards v. United Kingdom, Decision of the European Commission of Human Rights of 10 July 1991).

41. In the present case, the Constitutional Court examined the procedure before the Supreme Court on the basis of the submissions of the Applicant and found that neither has he provided any proof that the procedure before the Supreme Court did not constitute an effective remedy and that the Judgment of the Supreme Court was unjust or arbitrary, when his claim was rejected (see mutatis mutandis, Vanek v. Slovak Republic, Application No. 53363/99, Decision of European Court of Human Rights of 31 May 2005), nor has he been able to point to a breach of the Constitution that effected his constitutional rights. Therefore, the Court concludes that there has been no violation of the Applicant's rights, guaranteed by the Constitution.

FOR THESE REASONS

Pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56(2) of the Rules of Procedure, the Constitutional Court, by a majority, in its session held on 29 March 2011,

DECIDES

I. The Referral is admissible.

II. There is no violation of the rights as alleged by the Applicant.

III. This Decision shall be notified to the Parties and shall be published 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**
Almiro Rodrigues	Prof. Enver Hasani

Fatime Kabashi vs. Judgment Rev. No. 28/2010 of the Supreme Court

Case KI 70-2010, decision of 3 November 2011

Keywords: exhaustion of legal remedies, individual referral, manifestly ill-founded referral, right to work and exercise profession

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that her right to work and exercise a profession under Article 49 of the Constitution was infringed by a judgment of the Supreme Court, which quashed decisions of lower courts annulling her employer's termination of her employment. The applicant argued that the judgment of the Supreme Court was unjust because it was arbitrary and without a legal basis.

The Court held that the Referral was inadmissible because she failed to exhaust remedies by appealing her dismissal to the Independent Oversight Board, which has jurisdiction over appeals against public authorities, citing *AAB-RIINVEST University L.L.C. vs. Government of Kosovo*, and Article 47.2 of the Law on the Constitutional Court, and because she failed to make a *prima facie* showing that the Supreme Court was unfair or arbitrary, citing *Shub v. Lithuania*. The Court noted that its role is limited to disposing of Constitutional complaints, not resolving factual disputes, citing *Sevdail Avdyli* and *García v. Spain*, and ensuring fair proceedings, citing *Edwards v. United Kingdom*.

Pristina, 03.November 2011
Ref. No.: RK 153/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 70/10

Applicant

Fatime Kabashi

Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev.no. 28/2010, dated 30 June 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge
Applicant

1. The Applicant is Mrs. Fatime Kabashi, residing in Prizren, represented by Dr. Sc. Hazër Susuri, a practicing lawyer in Prizren.

Challenged court decision

2. The decision challenged by the Applicant is the Judgment of the Supreme Court of Kosovo (hereinafter: the "Supreme Court"), Rev.no.28/2010, dated 30 June 2010, which was served upon the Applicant on 13 July 2010.

Subject matter

3. The Applicant alleges a violation of Article 49 [Right to work and exercise profession] of the Constitution of the Republic of Kosovo (hereinafter: the “Constitution”).

Legal basis

4. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rule 56(2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

5. On 30 July 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”).

6. On 26 August 2010, the Referral was forwarded to the Supreme Court.

7. On 21 October 2010, by Decision of the President No.GJR. 70/10, Judge Snezhana Botusharova was appointed as Judge Rapporteur. On the same date, the President, by Decision No. KSH. 70/10, appointed the Review Panel composed of Judges Ivan Čukalović (Presiding), President Enver Hasani and Judge Iliriana Islami.

8. On 19 January 2011, the Court requested additional documents from the Applicant, who submitted them on the same day.

9. Also on the same day, the Court requested the complete case file from the Municipal Court of Prizren, which submitted it on 28 January 2011.

10. On 21 February 2011, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court.

Summary of facts

11. On 1 September 2003, the Applicant signed a contract of employment valid from 1 September 2003 until 31 August 2004 for the position as a school teacher at Leke Dukagjini, Prizren (hereinafter: the "Employer"). This contract of employment was transformed into an indefinite contract of employment.

12. On 23 January 2004, the Applicant's request for leave to visit her daughter in Zambia from 26 of January 2004 to 26 of February 2004 was granted by the Department of Education and Science, Prizren.

13. On 7 December 2004, the Applicant requested once more unpaid leave – this time from 17 January 2005 until 21 of February 2005 - to visit her daughter, who was about to give birth.

14. On 23 December 2004, the Department of Education and Science in Prizren rejected the request of the Applicant, because unpaid leave was only meant (1) for a newly born child and could only be granted if there was no one else to take care of it and (2) for medical treatment abroad. Nevertheless, the Applicant took the leave and left for Zambia.

15. On 12 January 2005, the Applicant visited the emergency ward of the University Hospital in Lusaka, Zambia, where the doctor prescribed the Applicant bed rest for two weeks and to avoid travelling.

16. On 23 January 2005, the employer was notified by a third party that the Applicant had fallen ill and could not travel, until she got better. The employer was further informed that the Applicant had received his letter, refusing the Applicant's request for unpaid leave, but since she had already paid the tickets and prepared everything for the trip, there was no way back.

17. On 24 January 2005, the Applicant's contract of employment was terminated, on the ground that she had been absent from work in violation of Administrative Direction No. 2003/2 implementing UNMIK Regulation No. 2001/36 on the Kosovo Civil Service (hereinafter: Administrative Direction 2001/36), Article 30.1 (b), (c), (d) and Article 5 of the Administrative Direction of the Ministry of Science and Technology (No. 44/2004) of 24 August 2004 (hereinafter: "Administrative Direction 44/2004").

18. On 26 January 2005, the Applicant visited the emergency ward at the University Hospital in Lusaka, Zambia, again.

19. On 1 March 2005, the Applicant filed a claim with the Department of Education and Science in Prizren, stating that she had been ill and that she had notified the employer thereof, which was the reason why she could not come to work.

20. On 4 March 2005, the Department of Education and Science in Prizren rejected the claim of the Applicant as unfounded and upheld the decision on termination of the employment contract.

21. On 15 March 2005, the Applicant filed a complaint against the decision of the Department of Education and Science in Prizren to the Regional Office of the Ministry of Education in Prizren, which, on 21 March 2005, rejected the complaint of the Applicant as unfounded.

22. On 6 June 2005, the Applicant filed a complaint against the decision of the Regional Office of the Ministry of Education in Prizren to the Inspectorate Office with the Ministry of Education, Science and Technology.

23. On 11 July 2005, the Applicant filed a claim with the Municipal Court of Prizren requesting the annulment of the decision on the termination of the employment contract. The Applicant claimed that she had notified the employer that she was out of the country and that she had fallen ill. Hence, she could not return to work.

24. On 13 January 2006, the Inspectorate Office at the Ministry of Education, Science and Technology rejected the claim of the Applicant as unfounded. The Applicant apparently did not appeal against this decision to the Ministry of Education, Science and Technology within 30 days.

25. On 5 April 2006, the Municipal Court of Prizren upheld the Applicant's claim annulling the termination of the contract of employment as unlawful because the Applicant had reasons for being absent since she had fallen ill (C.no. 527/05).

26. The employer filed a complaint with the District Court of Prizren, which on 6 October 2006, upheld the complaint of the employer, quashing the judgment of the Municipal Court and sending it to the Municipal Court for retrial (Ac.no. 341/06). The District Court concluded that the Applicant had disregarded the employer's decision, rejecting the Applicant's request for unpaid leave. That the Applicant fell ill, while she was visiting her daughter, was no valid reason for being absent from work.

27. On 26 March 2008, the Municipal Court retried the case and upheld the Applicant's claim annulling the termination of the contract of employment. The Municipal Court concluded that there was no legal basis in the Administrative Direction 44/2004 for the employer to terminate the contract of employment. Further, the employer had not acted in accordance with UNMIK Regulation No. 2001/27 on Essential Labour Law in Kosovo (hereinafter: "UNMIK Regulation 2001/27").

28. The employer filed a complaint with the District Court, which, on 6 November 2009, rejected the complaint and upheld the Judgment of the Municipal Court (Ac. No. 284/08). The District Court concluded that the Municipal Court had correctly applied the substantive law and verified correctly the factual situation.

29. On 25 November 2009, the employer submitted a complaint on points of law to the Supreme Court against the Judgment of the District Court and the Municipal Court, claiming that the Municipal Court had no jurisdiction to decide, because it was an administrative issue and the Applicant should have directed the claim to the Independent Oversight Board (hereinafter: the "IOB") which is competent to decide on issues concerning civil servants.

30. On 30 June 2010, the Supreme Court quashed the judgments of the District and Municipal Court and rejected the claim of the Applicant as unfounded, stating that the lower instances had wrongly judged the

factual situation as well as wrongly applied the substantive law (Rev.I.no. 28/2010). In the Supreme Court's opinion, the Applicant had been absent from work without authorization, even though she had been informed the day before that her request for unpaid leave had been rejected. With regard to the substantive law, the Supreme Court reiterated that UNMIK Regulation 2001/36 and Administrative Instruction 44/2004 were applicable instead of UNMIK Regulation 2001/27.

Applicant's allegations

31. The Applicant alleges that the Supreme Court has rendered its judgment in violation of Article 49 of the Constitution which stipulates that the right to work is guaranteed by the state. She maintains that this guarantee was denied to her by the state judicial authority, respectively, the Supreme Court through its anti-constitutional judgment.

32. The Applicant claims that she was dismissed from work without any legal reasons and that her employment contract was terminated without any legal basis in an arbitrary manner by the employer.

Assessment of the admissibility of the Referral

33. As to the Applicant's complaint that Article 49 [Right to Work and Exercise Profession] of the Constitution was violated, the Court observes that, in order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, as further specified in the Law and the Rules of Procedure.

34. In this respect, reference is made to Article 47.2 of the Law, providing:

"The individuals may submit the referral in question only after he/she has exhausted all legal remedies provided by the law".

35. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999).

36. In this regard, the Court notes that the Applicant, as a civil servant, could have submitted an appeal against her dismissal to the Independent Oversight Board, which is the competent body to hear and determine appeals against public authorities. However, the Applicant apparently did not make use of this remedy.

37. The Court, therefore, determines that, in this respect, the Applicant has not exhausted all legal remedies available to her under applicable law.

38. Furthermore, an Applicant cannot complain that the regular courts have committed errors of fact or law, unless and in so far as they may have infringed rights and freedoms protected by the Constitution.

39. In this connection, the Court maintains that it is not a court of fourth instance, when considering the decisions taken by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, Resolution on Inadmissibility in Case No. KI 13/09, Sevdail Avdyli, of 17 June 2010 and, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

40. The Constitutional Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, for instance, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87 adopted on 10 July 1991).

41. In the present case the Applicant was successful in her law suits before the Municipal and District Courts, but the Supreme Court quashed the lower courts' decisions for having wrongly applied the substantive law. In this respect, the Court notes that the Applicant has not submitted any evidence showing that the finding of the Supreme Court was unfair or tainted by arbitrariness (see mutatis mutandis, Shub v. Lituania, ECHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

42. The Court, thus, concludes that the Applicant neither has substantiated her complaint regarding the alleged violations nor has she exhausted all legal remedies available to her under applicable law.

FOR THIS REASON

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (2) of the Rules of Procedure, by majority,

DECIDES

I. TO REJECT the Referral as Inadmissible.

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Prenk Shllaku vs. Decision No. 9/128 of the Government of Kosovo

Case KI 77-2010, decision of 3 November 2011

Keywords: compensation of property right, exhaustion of legal remedies, expropriation, individual referral, interim measures, protection of property, right to property

The Applicant filed a Referral pursuant to Articles 113.7 and 116.2 of the Constitution, asserting that his right to property under Article 46 of the Constitution was infringed and that the Government's expropriation decision subjected him to an arbitrary deprivation of his property without adequate compensation. The Applicant also requested the suspension of the expropriation as an interim measure pending disposition of the Referral.

The Court held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court because the Applicant's appeal of the expropriation decision was pending in the Supreme Court, reflecting that all legal remedies had not yet been exhausted. The Court also denied the request for an interim measure pursuant to Article 116.2 of the Constitution and Article 27 of the Law on the Constitutional Court because the Applicant had failed to substantiate that there was potential for irreparable damage and that it would be in the public interest.

Pristina, 03 November 2011
Ref. No.:RK 150/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 77/10

Applicant

Prenk Shllaku

Constitutional Review of the Decision of the Government of the Republic of Kosovo No. 9/128, dated 11 June 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Prenk Shllaku of Shpendi Village - Prizren

Challenged Decision

2. The Applicant challenges the Final Decision of the Government of Kosovo No. 9/128 dated 11 June 2010 (hereinafter: "Decision of the Government") as he claims that it is in contradiction to Articles 15 and 36 of the Law on Expropriation No. 3/L 139 and in violation of Article 46 of the Constitution of the republic of Kosovo (hereinafter referred to as: the "Constitution"). The Applicant also seeks an interim measure prohibiting the implementation of the Decision of the Government from the date of the submission of the Referral until a merit based decision is given by the Constitutional Court of Kosovo (hereinafter: the "Court").

Legal Basis

3. Articles 113.7 and 116.2 of the Constitution, Articles 20 and 27 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the "Law") and Rules 55 and 56 of the Rules of Procedure of the Constitutional Court (hereinafter referred to as: the "Rules").

Subject Matter

4. The matter concerns the Decision of the Government of Kosovo on the expropriation of private immovable property being part of parcels No.328 and No.329 of the cadastral zone of Shpendi - Prizren.

5. The Applicant also requests the Court to suspend the Decision of the Government approving the expropriation of the private immovable property parcels No.328 and No.329 of the cadastral zone of Shpendi - Prizren, in order to avoid the risk of irreparable damage and in the public interest. The Applicant claims also that the interim measures are necessary in order to ensure his constitutional right to property under Article 46 of the Constitution and articles 8, 17 and 30 of the [Universal] Declaration on Human Rights.

Proceedings before the Court

6. On 16 August 2010 the Applicant filed a Referral with the Secretariat of the Constitutional Court. The Applicant requests the Court to suspend the Decision of the Government on expropriation of the private immovable property parcels No.328 and No.329 of the cadastral zone of Shpendi - Prizren, in order to avoid the risk of irreparable damage and in the public interest.

7. The Applicant claims that the interim measures are necessary in order to protect the constitutional right to property under Article 46 of the Constitution and articles 8, 17 and 30 of the Universal Declaration on Human Rights.

8. The President of the Court appointed Judge Altay Suroy as Judge Rapporteur and he appointed a Review Panel comprising Judges Almiro Rodrigues, presiding and Judges Kadri Kryeziu and Gjyljeta Mushkolaj.

9. On 21 February 2011 the Court deliberated on the matter.

Summary of the facts

10. The Applicant is the owner of the immovable property No.328 and No.329 of the cadastral zone of Shpendi – Prizren.

11. On date 11 June 2010 a Decision of the Government, No. 9/128, approved the expropriation of part of the immovable property contained in parcels No.328 and No.329 of the cadastral zone of Shpendi in order to build the Vermicë – Merdare Motorway.

12. On date 27 July 2010 the Applicant submitted an appeal to the Supreme Court of the Republic of Kosovo (hereinafter: Supreme Court) challenging the Decision of the Government. The case is still pending before the Supreme Court.

Applicant's allegation

13. The Applicant complains that this right to property (Article 46 of the Constitution) has been violated and he was subjected to an arbitrary deprivation of his property without being given adequate compensation.

Interim Measures

14. Article 116.2 of the Constitution provides:

Article 116 [Legal Effect of Decisions]

2. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages.

15. Article 27 of the Law on the Constitutional Court provides:

Article 27 Interim Measures

1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.

2. The duration of the interim measures shall be reasonable and proportionate.

16. One of the tests for the granting of interim measures is whether unrecoverable damages will be suffered. If the Court were to find that the challenged Decision of the Government was unconstitutional then any damage suffered by the Applicant could be calculated and be ordered to be paid to the Applicant. There would therefore be no loss to the Applicant.

17. The Applicant has not put forward any convincing arguments that the Court should suspend the Decision of the Government regarding the expropriation of the private immovable property parcels No.328 and No.329 of the cadastral zone of Shpendi - Prizren.

18. The applicant has, therefore, not substantiated the irreparable damage he would allegedly suffer or that the interim measures would be in the

public interest. The Court therefore refuses the request for interim measures.

Assessment of the Admissibility of the Referral

19. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

20. As to the Applicant's Referral, the Court refers to Article 113.7 of the Constitution, which provides as follows:

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.

21. The Court also refers to article 47.2 of the Law, stipulating that:

The individuals may submit the referral in question only after he/she has exhausted all legal remedies provided by the law.

The Court concludes that from the submitted documents by the Applicant himself that the appeal is still pending before the Supreme Court.

22. As indicated in case No. KI.41/09 AAB-RIINVEST University vs. the Government of the Republic of Kosovo (Resolution Nr. RK-04/10 of the Constitutional Court of the Republic of Kosovo, dated 27 January 2010), the Court wishes to emphasise that the rationale for the exhaustion rule, as interpreted by the European Court of Human Rights (hereinafter: ECHR) (see Article 53 of the Constitution), is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see, mutatis mutandis, ECHR, Selmouni vs. France, No. 25803/94, decision of 28 July 1999).

23. However in his submission, the Applicant has not substantiated why he considers that legal remedies are not be available to him, and if they were available, how they would not be effective and, therefore, not need to be exhausted. On the contrary the Applicant has clearly not exhausted all available remedies in view of the fact that he has not awaited the Appeal that is pending before the Supreme Court. The Court therefore finds that the Referral is inadmissible pursuant to the non fulfilment of

the requirements of Article 113.7 of the Constitution and Article 47.2 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 20 and 27 of the Law, and Rules 55 and 56 of the Rules, unanimously held in its session on 21 February 2010,

DECIDES

I. To REJECT the request for interim measures.

II. To REJECT this Referral as inadmissible.

III. The Secretariat shall notify the Parties of the Decision and shall publish it 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**
Altay Suroy	Prof. Dr. Enver Hasani

The Insurance Association of Kosovo vs. Article 14.1.7 of Law No. 03/L-179 on the Red Cross of the Republic of Kosovo

Case KI 118-2010, decision of 14 November 2011

Keywords: actio popularis, authorized parties, economic relations, economy, equality before the law, expropriation, individual/group referral, right to work and exercise profession, taxation of obligatory insurance premiums

The Applicant, the Insurance Association of Kosovo, filed a Referral pursuant to Article 113.7 of the Constitution, contending that the imposition of a charge on insurance companies of 1% of the value of all obligatory insurance premiums by Article 14.1.7 of Law No. 03/L-179 on the Kosovo Red Cross was an unjust deprivation that violated Articles 3, 10, 24, 49 and 119.2 of the Constitution. The Applicant also requested an interim measure prohibiting implementation of the Law until disposition of the Referral.

The Court held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution, Article 48 of the Law on the Constitutional Court and Rule 36 of Rules of Procedure because the Applicant is not a natural or legal person whose constitutional rights were personally or directly affected by a measure or act of a public authority, citing *AAB-RIINVEST University L.L.C. vs. Government of Kosovo* and *Vanek v. Slovak Republic*. The Court noted that the Constitution does not provide for the bringing of an *actio popularis* in which an unaffected individual makes an abstract complaint.

Pristine, 14.Novembe 2011
Ref. No.:RK160 /11

RESOLUTION ON INADMISSIBILITY

In

Case No. KI 118/10

Applicant

The Insurance Association of Kosovo

Constitutional Review of Article 14.1.7 of Law No.03/L –179 on the Red Cross of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is the Insurance Association of Kosovo having an address at 95, Enver Maloku Street, Pristina, through Fatos Zajmi, Fatbardh Makolli and Rrustem Qehaja the representatives of, Illyria, Siguria and Sigkos Insurance Companies, respectively.

Challenged Law

2. The Applicant seeks the annulling of Article 14.1.7 of the Law No.03/L – 179 on the Red Cross of the Republic of Kosovo. The Applicant also sought an interim measure prohibiting the implementation of Article 14.1.7 of the Law from the date of the submission of the Referral until a merit based decision is given by the Court.

Subject Matter

3. The matter concerns Article 14.1.7 of the challenged Law which provides that the Red Cross of Kosovo shall be financed, partly, by the imposition of 1% of the gross premium for compulsory motor insurance in Kosovo.

4. Article 14.1.7 of the challenged Law provides as follows:

   "1. For the purpose of fulfilling its tasks and objectives stipulated by this Law, the Red Cross of Kosovo shall acquire means from the following sources: ...
   1. 7 obligatory insurance of the vehicles 1% (one percent) from gross prim of the value of vehicle insurance; ..."

Legal Basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 20 of Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Section 54 of the Rules of Procedure of the Constitutional Court (hereinafter referred to as: the Rules).

Proceedings before the Court

6. On 26 November 2010 the Applicant filed the Referral with the Secretariat of the Constitutional Court.

7. The President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and he appointed a Review Panel comprising Judges Robert Carolan, presiding, and Judges Altay Suroy and Almiro Rodrigues.

8. The Court deliberated on the preliminary Report of the Judge Rapporteur dealing with the request for Interim Measures in private session on 13 December 2010 and declined to grant Interim Measures and a Decision was issued to the parties to that effect on 17 December 2010.

9. On 27 January 2011 the Referral was submitted to the Assembly of Kosovo for a response. No response was received from the Assembly.

10. A letter was received from the Insurance Association of Kosovo notifying the Constitutional Court of a change of address for the Association.

11. The Court deliberated in private session on the admissibility of the Referral on 23 May 2011.

Allegations of the Applicant

12. The Applicant maintains that the imposition of a charge on insurance companies of 1% of the value of all obligatory insurance premiums contained in the Law will result in an unjust and unconstitutional deprivation. The amount alleged to be at stake, according to the Applicant based on recent values of insurance premiums in the Republic of Kosovo, amounts to a charge of €490.232,21 in each calendar year.

13. The Applicant maintains that the challenged Article of the Law contravenes the following Articles of the Constitution:

Article 3 Equality before the law
Article 10 Economy
Article 24 Equality before the law
Article 49 Right to labour and exercise of profession
Article 119.2 Economic Relations – General Principles

Admissibility of the Referral

14. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

15. In this respect, article 113.7 of the Constitution states:

"Individual persons 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."

16. Furthermore, article 48 of the Law states:

"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."

17. In this Referral the Insurance Association of Kosovo wishes to challenge a particular Article of the Law on the Red Cross of Kosovo. In order for the Applicant to do that they must be a natural or legal person (see case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41 /09) whose constitutional rights are personally or directly affected by a measure or act of a Public Authority. The Constitution does not provide for the bringing of an *actio popularis*. In other words, an Applicant cannot complain in the abstract about measures by public authorities which have not been applied to them personally, such as is the case before this Court.

18. In the present case, the Applicant is an association representing a sectional interest i.e. insurance companies who conduct business in the Republic of Kosovo. It cannot be that this Applicant can show that it has been directly and currently violated by a public authority in its rights and freedoms guaranteed by the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to Admissibility of Application no. 53363/99 of 31 May 2005).

19. The challenged Article of the Law on Law No.03/L –179 on the Red Cross of the Republic of Kosovo does not affect the Applicant as it refers to levies or taxes on Insurance Companies and to no other legal body or association. It follows that the Applicant is not an authorized party and the Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT this Referral as Inadmissible;

II. The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Shemsedin Ademi vs. Administrative Instruction No. 14/2009 on Vehicle Registration

Case KI 16-2011, decision of 14 November 2011

Keywords: administrative dispute, exhaustion of legal remedies, fees imposed by the government, individual referral, interim measures, vehicle registration issues

The Applicant filed a Referral pursuant to Articles 113.7 and 116.2 of the Constitution, contending that Administrative Instruction No. 14/2009 on Vehicle issued by the Ministry of Internal Affairs (MIA) violated Article 21.1 of the Constitution because it required the Applicant to pay a fee for replacement of license plates despite the fact that they were undamaged, which contradicted a provision of the Instruction. The Applicant requested an interim measure requiring restitution of the fee to him and suspending the mandatory fee for all citizens until disposition of the Referral.

The Court held that the Referral was inadmissible pursuant to Articles 113.1 and 113.7 of the Constitution because the Applicant failed to exhaust all legal remedies, noting that he did not pursue an appeal to the Supreme Court before submitting a Referral, citing *Whiteside v. the United Kingdom*, *Selmouni v. France*, *AAB-RIINVEST University L.L.C. vs. Government of Kosovo,* and *Mimoza Kusari Lila vs. The Central Election Commission*. The Court denied the request for interim measures pursuant to Article 116.2 of the Constitution and Article 27 of the Law on the Constitutional Court because the Applicant did not substantiate the potential for irreparable damage or that such measures would be in the public interest.

Pristine, 14.November 2011
Ref. No.:RK159/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 16-11

Applicant

Shemsedin Ademi

Constitutional Review of Administrative Instruction No.14/2009 on Vehicle Registration dated 14 September 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjylieta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Ademi Shemsedin, having an address in the Village of Pozharan in the Municipality of Vitia.

Challenged Decision

2. The Applicant challenges the constitutionality of Administrative Instruction No.14/2009 on Vehicle Registration issued by the Ministry of Internal Affairs (MIA). The Applicant states that the MIA, by obliging citizens to fees without proper legal grounds, is acting in contradiction to Article 21.1 of the Constitution of the Republic of Kosovo.

Legal Basis

3. The Referral is based on Articles 113.7 and 116.2 of the Constitution of the Republic of Kosovo; Articles 20 and 27 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rules 55 and 56 (2) of the Rules of Procedure of the Constitutional Court (hereinafter referred to as the Rules of Procedure).

Proceedings before the Constitutional Court

4. On 11 February 2011, the Applicant filed a Referral with the Constitutional Court.

5. The President of the Constitutional Court appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Robert Carolan (presiding), Kadri Kryeziu and Gjyljeta Mushkolaj.

6. The Constitutional Court deliberated on the Referral on 7 July 2011.

Summary of Facts

7. On 28 January 2011 the Applicant was using on his car license plate number 316-KS-264. He went to the Municipal Vehicle Registration Centre in Vitia to renew his vehicle registration. There, the Applicant was asked by a centre employee to hand over license plate 316-KS-264.

8. The Applicant handed over license plate 316-KS-264 and he was charged with a new fee of €20 (twenty) for the new license plates.

9. The Applicant submitted with his referral a Payment Order Receipt No.1320000204, dated of 12 January 2011.

10. The Applicant alleges he requested an explanation for the charge for new license plates as he handed over his license plate 316-KS-264 without any damage, and was told by the staff that they were supposed to do so.

Legal arguments presented by the Applicant

11. The applicant alleges his license plate was not damaged and he was charged €20 in error and not in accordance with Article 11, Section 3 of the Administrative Instruction No.14/2009 on Vehicle Registration. Article 11, Section 3 provides:

    "*In the case of damage of DVR or plates the party should present the damaged DVR or plates to the CVR and afterwards he receives a new DRV or plates, which he pays according to the Decision on Tariffs, while the damaged DVR or plates is archived.*"

12. The Applicant claims that the described facts represent a reality of violation of human rights by the MIA. Moreover, he states that obliging citizens to pay fees without a legal basis is in contradiction to Article 21.1 of Constitution of the Republic of Kosovo. Article 21.1 provides:

    "*Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order in the Republic of Kosovo.*"

13. The Applicant requests the Constitutional Court:

a. To grant "an immediate enforcement of a temporary measure until the main trial against the MIA for termination of application of the administrative fee of €20 for the new license plates on the occasion of vehicle registration, and

b. To decide in favour of the citizens and protect their rights by suspending the Administrative Instruction 14/2009 requiring the payment of €20 for new vehicle license plates until a decision is issued based on the merits of the case.

Assessment of the admissibility of the referral

14. The admissibility requirements are laid down in the Constitution and further specified in the Law and the Rules of Procedure.

15. Article 113.1 and 113.7 of the Constitution establish the general legal frame required for admissibility. It provides:

"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."

16. Based on the documents submitted by the Applicant, despite the advice of the District Court in Prishtina, dated 12 December 2008, that he can address the Supreme Court of Kosovo with an appeal against its Judgment, he has not used this legal right.

17. The Court also notes that a mere suspicion on the perspective of the matter is not sufficient to exclude an applicant from his obligations to appeal before the competent bodies (see Whiteside v the United Kingdom, decision of 7 March 1994, Application no. 20357/92, DR 76, p.80).

18. Previously the Court emphasized that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803194, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned.

As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679100, decision of 28 April 2004).

19. The Court applied this same reasoning when it issued a Resolution on Inadmissibility on 27 January 2010 on the grounds of non exhaustion of remedies in Case No. KI41/09, AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo, and in its Decision of 23 March 2010 in Case No. KI. 73/09, Mimoza Kusari Lila vs. The Central Election Commission.

Interim Measures

20. Article 116.2 of the Constitution provides:

Article 116 [Legal Effect of Decisions]

2. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages.

21. Article 27 of the Law on the Constitutional Court provides:

Article 27 Interim Measures

1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.
2. The duration of the interim measures shall be reasonable and proportionate.

22. One of the tests for the granting of interim measures is whether unrecoverable damages will be suffered. If the Court were to find that the challenged Decision was unconstitutional then any damage suffered by the Applicant could be calculated and be ordered to be paid to the Applicant. There would therefore be no loss to the Applicant.

23. The Applicant has not put forward any convincing arguments that the Court should suspend Administrative Instruction No.14/2009 on Vehicle Registration issued by the MIA.

24. The applicant has, therefore, not substantiated the irreparable damage he would allegedly suffer or that the interim measures would be in the public interest. The Court therefore refuses the request for interim measures.

25. The Court also finds that the Applicant has not exhausted all legal remedies available to him provided by law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113(7) of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 36 of the Rules of Procedure, unanimously

DECIDES

I. TO REJECT this Referral as Inadmissible;

II. To REJECT the request for Interim Measures;

III. The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Kosovo Chamber of Advocates, Prishtina -- Regional Branch Gjakova vs. Decision of the Board of Directors of the Municipality of Gjakova and the Decision of the Director of the Directorate for Economic Development in the Municipality of Gjakova

Case KI 31-2011, decision of 24 November 2011

Keywords: authorized parties, individual/group referral, interim measures, protection of property, right to work and exercise profession, sanction for failure to pay utility bill

The Applicant, the Gjakova Regional Branch of the Chamber of Advocates, filed a Referral pursuant to Article 113.7 of the Constitution, contending that Decisions of the Board of Directors of Gjakova Municipality and Director of the Gjakova Directorate for Economic Development violated Articles 7, 46, 49 and 119 of the Constitution because they conditioned vehicle registration on verification that heating bills and, in the case of businesses, company taxes have been paid whereas neither the Central Heating Company nor the Municipal Assembly issue verification documents, making registration of vehicles impossible. The Applicant also argued that attorneys are not covered by the decisions since they do not pay a company tax.

The Court held that the Referral was inadmissible pursuant to Article 113.7 because the Applicant was neither a natural or legal person whose constitutional rights were personally or directly affected by an act of a public authority, nor the authorized legal representative of a direct victim of the challenged decisions. The Court denied the request for interim measures pursuant to Article 27 of the Law on the Constitutional Court and Rule 54.1 of the Rules of Procedure because there was no matter pending before the Court after the ruling on inadmissibility.

Pristine, 24 November 2011
Ref. No.: RK125 /11

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 31/11

Applicant

Kosovo Chamber of Advocates, Prishtina – Regional Branch Gjakova

Constitutional Review of the Decision of the Board of Directors of the Municipality of Gjakova, dated 18 January 2011, and the Decision of the Director of the Directorate for Economic Development in the Municipality of Gjakova, dated 19 January 2011.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is the Kosovo Chamber of Advocates, Pristina – Regional Branch Gjakova, from Gjakova, represented by the President of the Regional Branch of Gjakova, Mr. Teki Bokshi.

Challenged decision

2. The Applicant challenges the Decision of the Board of Directors of the Municipality of Gjakova, dated 18 January 2011, and the Decision of the Director of the Directorate for Economic Development in the Municipality of Gjakova, dated 19 January 2011.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the constitutionality of (1) the Decision of the Board of Directors of the Municipality of Gjakova, dated 18 January 2011, according to which one cannot register a vehicle if one cannot confirm to have paid the heating bill and the company tax, and (2) the Decision of the Director of the Directorate for Economic Development in the Municipality of Gjakova, of 19 January 2011, implementing that decision.

4. The Applicant claims that the abovementioned decisions violate Articles 7 [Values], 46 [Protection of Property], 49 [Right to Work and Exercise Profession] and 119 [General Principles] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

5. Furthermore, the Applicant also requests the Court to impose an interim measure to suspend the implementation of the challenged decisions, until the Court takes a final decision.

Legal basis

6. Article 113.7 of the Constitution, Articles 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121) (hereinafter: the "Law") and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

7. On 2 March 2011, the Applicant submitted the Referral to the Court.

8. On 19 April 2011, the President, by Order No. GJR. 31/11, appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur. On the same date, the President, by Order No. KSH. 31/11, appointed the Review Panel composed of Judges Almiro Rodrigues (Presiding), Kadri Kryeziu and Iliriana Islami.

9. On 11 May 2011, the Court communicated the Referral to the Board of Directors of the Municipality of Gjakova and the Director of the Directorate for Economic Development in the Municipality of Gjakova.

10. On 8 June 2011, the Court requested additional clarification from the Applicant as to who the Applicant is. No reply has been received so far.

11. On 4 October 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. On 18 January 2011, the Board of Directors of the Municipality of Gjakova adopted the decision that legal and natural persons cannot register their vehicles if they do not provide a confirmation from the City Central Heating Company that they have paid their heating bill and, in

case of legal persons, a verification from the Municipal Assembly of Gjakova that they have paid their company tax.

13. On 19 January 2011, the decision of 18 January 2011 was implemented through a decision by the Director of the Directorate for Economic Development of the Municipality of Gjakova.

Applicant's allegations

14. The Applicant states that the City Central Heating Company does not issue a confirmation if one has not paid the heating bill and the Municipal Assembly of Gjakova does not issue a verification if one has not paid the company tax.

15. The decision of 18 January 2011 is allegedly unconstitutional, since it limits/ or makes the registration of a vehicle impossible. It, therefore, violates Article 49 [Right to Work and Exercise Profession] of the Constitution, since the vehicle is an important means of transportation for an attorney to conduct activities pertinent to his profession. It further violates Articles 7 [Values], 46 [Protection of Property] and 119 [General Principles] of the Constitution.

16. Furthermore, the Applicant alleges that attorneys do not need to pay company tax, since they are registered with the Kosovo Chamber of Advocates and not with the Municipality, nor the Kosovo Business Registration Agency. By being registered with the Kosovo Chamber of Advocates, attorneys obtain the license and authorization to work.

Assessment of the admissibility of the Referral

17. The Applicant alleges that the Decision taken by the Board of Directors of the Municipality of Gjakova on 18 January 2011, as implemented by the Municipality's Director for Economic Development on the following day, violates its rights guaranteed by Articles 7 [Values], 46 [Protection of Property], 49 [Right to Work and Exercise Profession] and 119 [General Principles] of the Constitution.

18. The Court observes that, in order to be able to adjudicate the Applicants' complaint, it is necessary to first examine whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

19. In this respect, the Applicant must first show that its constitutionally guaranteed rights and freedoms have been personally or directly affected

by the act of the public authority. If the Applicant is unable to do so, it has no standing before the Court as a victim.

20. In this respect, the Court notes that the Applicant has neither shown that it was itself personally or directly affected by the contested Decisions, nor has it submitted any evidence that it is, in fact, authorized by those, who, in the Applicant's submissions, are direct victims of the challenged Decision, to represent their interests before this Court.

21. It follows, that the Referral is Inadmissible pursuant to Article 113.7 of the Constitution.

Assessment of the request for interim measure

22. As to the Applicant's request to the Court for interim measures, the Court refers to Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, stipulating that, at any time when a Referral is pending before the Court and the merits of the Referral have not been adjudicated by the Court, a party may request interim measures. However, taking into account that the Referral was found inadmissible, the Applicant is not entitled under Rule 54 (1) of the Rules of Procedure to request interim measures.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law, and Rule 56 (2) of the Rules of Procedure, on 23 November 2011,

DECIDES

I. TO REJECT the Referral as inadmissible;

II. TO REJECT the Request for Interim Measures;

III. This Decision shall be notified to the Parties and shall be published 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**
Dr.Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

H.C. "Emin Duraku" SH.A. vs. Privatization Decision of waves 45-A and 46 of the Kosovo Privatization Agency

Case KI 99-2010, decision of 24 November 2011

Keywords: individual referral, interim measures, privatization issue, protection of property, right to fair and impartial trial, right to liberty and security

The Applicant, a joint stock company, filed a Referral pursuant to Article 113.7 of the Constitution, contending that its rights under Articles 7 and 46 of the Constitution, as well as various provisions of the European Convention on Human Rights and Fundamental Freedoms, were infringed by a decision of the Kosovo Privatization Agency privatizing the company, which had been transformed in 1991 from a "Socially Owned Enterprise" to a privately owned company in which the employees held shares. The Applicant argued that privatization of the company was unjust and unlawful because its previously transformation was in accordance with the law applicable in 1991. The Applicant requested for interim measures.

The Court held that the Referral was premature and inadmissible pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court because two aspects of the matter were pending before the Trial Panel of the Special Chamber of the Supreme Court, emphasizing that the rationale for the exhaustion rule was based on the assumption that the Kosovo legal system will provide an effective remedy for constitutional violations, citing *AAB-RIINVEST University L.L.C. vs. the Government of Kosovo* and *Selmouni v. France*. Finally, the Court denied the request for interim measures pursuant to Rule 54.1 of the Rules of Procedure due to the inadmissibility ruling.

Pristine, 24 November 2011
Ref. No.: RK158/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 99/10

Applicant

H.C. "Emin Duraku" SH.A.

Constitutional Review of the Privatization Decision of waves 45-A and 46 of the Kosovo Privatization Agency of Kosovo, dated 7 September 2010 and 4 October 2010, respectively.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is the Joint Stock Company H.C. Emin Duraku in Gjakova, duly represented by the Head of the Board, Myrteza Dyla from Gjakova.

Challenged decision

2. The decision challenged by the Applicant is the Decision for privatization, wave 45-A of 7 September 2010 and wave 46 of 4 October 2010, by the Privatization Agency of Kosovo (hereinafter: "PAK"), which were published on the webpage of PAK on the same day.

Subject matter

3. The Applicant alleges that PAK's decision to privatize Joint Stock Company H.C. Emin Duraku is in violation of:

    a. Article 7 [Values] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution");
    b. Article 46 [Protection of Property] of the Constitution;
    c. Article 6.1 [Right to a fair trial] in conjunction with Article 13 [Right to an effective remedy] of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: "ECHR") for not providing a Judgment within a reasonable time period;
    d. Article 5 [Right to liberty and security] of ECHR; and

e. Article 1 [Protection of Property] of Protocol 1 of ECHR.

4. Further, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to impose interim measures, banning or postponing the sale of:
a. NewCo Emin Duraku Edico L.L.C Gjakova and NewCo Emin Duraku, Industrial Complex, L.L.C in Wave 45-A; and
b. NewCo Emin Duraku, Warehouse Complex Gjakova in Wave 46.

Legal basis

5. Article 113.7 of the Constitution, Articles 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: "the Law") and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

6. On 8 October 2010, the Applicant submitted the Referral to the Court.

7. On 16 December 2010, the President, by Order No. GJR. 99/10, appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur. On the same date, the President, by Order No.KSH. 99/10, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Snezhana Botusharova.

8. On 17 January 2011, the Referral was forwarded to the Special Chamber of the Supreme Court of Kosovo (hereinafter: the "Special Chamber").

9. On 11 February 2011, the Referral was forwarded to PAK.

10. On 27 April 2011, a request for additional documents was sent to the Special Chamber, which replied on 6 May 2011 that the case is still pending with the Special Chamber.

11. On 27 April 2011, a request for additional documents was sent to the Applicant, which has not yet responded.

12. On the same day, a request for additional documents was sent to PAK, which replied on 4 May 2011 providing that:

a. On 29 April 2010, the Board of Directors of PAK approved the report of the working group that the Applicant is a Socially Owned Enterprise;

b. On 2 November 2010, the Special Chamber of the Supreme Court (Decision SCC-08-0237) approved the request of the Applicant for interim measures. Consequently, PAK has suspended all procedures in respect to the Applicant concerning its privatization.

13. On 3 June 2011, PAK submitted additional documents to this Court providing that the Appellate Panel of the Special Chamber on 19 May 2011 quashed the decision of the Trial Panel of the Special Chamber on interim measures and ordered the Trial Panel to retry the request for a preliminary injunction.

14. On 4 October 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

15. In 1991, the Workers Council (highest authority of the Socially Owned Enterprise) decided to transform the Socially Owned Enterprise (hereinafter: "SOE") "Emin Duraku" in Gjakova into a Joint Stock Company (J.S.C.) – private company – with employees as owners of the shares. Following this, contracts on the sale of shares were concluded with the workers of Emin Duraku.

16. On 31 December 1991, the SOE "Emin Duraku" in Gjakova was registered as a J.S.C. before the Commercial Court in Gjakova and was registered as such in the UNMIK Registration Office in 2000.

17. On 19 November 2002, the Applicant filed a request with the Lawyers Association of Kosovo, Chambers of Commerce of Gjakova, requesting a professional opinion regarding the legal validity of the property transformation of former SOEs of Gjakova conducted during 1991-1993.

18. On 22 November 2002, the Lawyers Association replied to the Applicant's request, holding that the transformation of former SOEs of Gjakova, which was conducted in accordance with the Law on Enterprises (Official Gazette of SFRY 77/1988), was legal and legitimate and as such the transformation was valid.

19. In 2006, the Applicant filed a complaint with the Commercial District Court in Pristina, requesting to instruct the Kosovo Business Registration Agency at the Ministry of Trade and Industry (hereinafter: "KBRA") to register SOE Emin Duraku.

20. On 24 May 2006, the Commercial District Court of Pristina upheld the complaint of the Applicant and ordered KBRA to register the Applicant (III.C.no. 131/2006).

21. On 13 July 2007, the Kosovo Trust Agency (predecessor of PAK) sent to Socially Owned Enterprises of Gjakova a proposal for reforming the SOE Enterprises of Gjakova. Kosovo Trust Agency (hereinafter: "KTA") proposed:

    a. To sell in an open tender all socially owned shares (remainder), in all cases when this does not exceed the 50 % of the total of the capital of the enterprise;
    b. All preliminary obligations remain with the enterprise whereby from the income generated from the sale of shares/socially owned capital/employees 20 % should be allocated to employees in conformity with the UNMIK Regulation 2003/13;
    c. As a precondition to implement this option, it should be preliminarily determined that the transformation of the enterprise did take place in accordance with the applicable laws, and it should be determined whether the transformation was not made in contradiction with the ECHR; and
    d. In the case when transformation was made of less than 50 % of the shares, the enterprise should be sold in accordance with the KTA standards of spin off.

22. On 3 August 2007, the SOE's of Gjakova sent a counter proposal to the KTA with some small amendments:

    a. The percentage of capital which has not been transformed to Joint Stock Companies can be privatized;
    b. The Shareholders of the Joint Stock Company are entitled to pre-purchase of shares;
    c. The untransformed shares should be retendered in another round in the beginning of October 2007;
    d. All preliminary obligations should be distributed proportionally according to the percentage of transformation of capital determined in the auditing. From other income gained from the sale of shares to employees, the amount of 20 % shall be allocated to employees in conformity with UNMIK Regulation 2003/13; and
    e. It should be determined whether the transformation of enterprises into shareholder companies did take place in accordance with applicable laws and not in contradiction with the European Convention of Human Rights.

23. On 22 July 2008, the Applicant filed a complaint with the Special Chamber, stating that the SOE Emin Duraku should be considered as a shareholder company.

24. On 29 April 2010, the Board of PAK decided that the Emin Duraku was a SOE.

25. On 20 July 2010, the Applicant filed a request with the Review Panel of PAK to annul the decision of the Board of PAK to consider Emin Duraku as a SOE.

26. On 10 August 2010, the Board of Directors of the Executive Branch of the Municipality of Gjakova proposed to PAK to suspend the decision to privatize Emin Duraku in Wave 45A pending the conclusion of an auditing procedure, since the company had not undergone such auditing procedure, or pending the conclusion of the judicial procedure initiated by lawsuits filed by the Applicant with the Special Chamber in 2008 (No. 134/2010).

27. On 28 August 2010, the Applicant requested the Special Chamber to impose an interim measure against the sale of the real estate and other assets of the Applicant through privatization.

28. On 7 September 2010, PAK decided to privatize in wave 45 A:

    a. New Company Emin Duraku, Edico Sh.P.K Gjakova; and
    b. New Company Emin Duraku, Industrial Complex, Sh.P.K

29. On 4 October 2010, PAK decided to privatize in wave 46:

    a. New Company Emin Duraku, Warehouse Complex Sh.P.K Gjakova

30. On 2 November 2010, the Special Chamber approved the Applicant's request for interim measures until the final decision is taken by the Special Chamber. Pursuant to this decision (SCC-08-0237), PAK is prohibited to take any actions to privatize the Applicant. PAK appealed against the decision on interim measures to the Appellate Panel of the Special Chamber.

31. On 19 May 2011, the Appellate Panel of the Special Chamber upheld the appeal of PAK and quashed the decision of the Trial Panel of the Special Chamber, ordering the Trial Panel to retry the request for a preliminary injunction (Decision ASC-10-0088).

32. From the case file, the Court notes that the retrial procedure regarding the interim measure is still pending before the Trial Panel of the Special Chamber. Also the lawsuit filed with the Trial Panel of the Special Chamber dated 22 July 2008, is still pending before it.

Applicant's allegations

33. The Applicant alleges that the transformation of Emin Duraku in 1991 was done in accordance with the applicable laws at the time (the so called "Markovic" laws):

    a. Law on Enterprises, Official Gazette of SFRY No.77/88, 40/89, 46/90 and 61/90;
    b. Law on Official Gazette of SFRY No.42/90 and 61/90;
    c. Law on Securities Official Gazette of SFRY 64/89;
    d. Law on Socially Owned Capital Official Gazette of SFRY No.84/89 and 46/90;
    e. Law on Payment of Personal Income Official Gazette of SFRY 37/90.

34. Further, the Applicant claims that the authorized representatives of the Applicant several times submitted verbal requests and requests in writing demanding the recognition of the company.

35. Allegedly, the actions undertaken so far by the officials of KTA have harmed the enterprise and made it incur losses due to its undefined status.

Assessment of the admissibility of the Referral

36. The Applicant complains that PAK's decision to privatize H.C. Emin Duraku is in violation of Article 7 [Values], Article 46 [Protection of Property] of the Constitution, Article 6.1 [Right to a fair trial] in conjunction with Article 13 [Right to an effective remedy], Article 5 [Right to liberty and security] of ECHR and Article 1 [Protection of Property] of Protocol 1 of ECHR.

37. However, in order for a Referral to be admissible, the Applicant must first show that he/she has fulfilled all admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure, in particular, whether the Applicant has exhausted all legal remedies available under the applicable law, as required by Article 113.7 of the Constitution and Article 47.2 of the Law.

38. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or remedy

the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999.).

39. As to the present Referral, the Court notes that the Trial Panel of the Special Chamber has not yet rendered a decision as to the lawsuit the Applicant submitted to it on 22 July 2008.

40. In these circumstances, the Court considers that the Applicant has not exhausted the remedies available to it under the applicable laws of Kosovo pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law.

Assessment of the request for interim measure

41. As to the Applicant's request to the Court for interim measures, the Court refer to Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, stipulating that, at any time when a Referral is pending before the Court and the merits of the Referral have not been adjudicated by the Court, a party may request interim measures. However, taking into account that the Referral was found inadmissible, the Applicant is not entitled under Rule 54 (1) of the Rules of Procedure to request interim measures.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.2 of the Law, and Rule 56 (2) of the Rules of Procedure, on 23 November 2011,

DECIDES

I. TO REJECT the Referral as inadmissible;

II. TO REJECT the Request for Interim Measures;

III. This Decision shall be notified to the Parties and shall be published 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**
Dr.Gjyljeta Mushkolaj	Prof. Dr. Enver Hasani

Shaqir Prevetica vs. Decision CI. no. 46/02 of the Municipal Court of Pristina, Decision Ac. 592/2002 of the District Court of Pristina, Decision CI. No. 130/05 of the Municipal Court of Pristina, Decision Ac. No. 56/2006 of the District Court of Pristina and Decision CI. No. 05/08 of the Municipal Court of Pristina

Case KI 24-2009, decision of 25 November 2011

Keywords: exhaustion of legal remedies, individual referral, pensions, right to compensation for unpaid salaries, right to fair and impartial trial

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that an unspecified right to compensation was infringed by actions of the Pristina Municipal and District Courts because of delays in disposition of a pension claim originating in 2001, prolonging a temporary social assistance arrangement involving an amount lesser than his pension. The matter was complicated by the privatization of his former employer in 2007 and an appeal was still pending in the District Court.

The Court held that the Referral was inadmissible pursuant to Articles 53 and 113.7 of the Constitution, and Article 47.2 on the Law of the Constitutional Court due to a failure to exhaust all legal remedies, noting that an appeal was still pending in the District Court and the Applicant's failure to assert why that remedial effort would be futile, citing *AAB-RIINVEST University vs. the Government of Kosovo*. The Court also held that the Referral was inadmissible because the Applicant failed to specify the Constitutional rights and freedoms that were violated, citing Article 48 of the Law on the Constitutional Court and, generally, decisional law of the European Court on Human Rights.

Prishtina,25 November 2011
Ref. No.: RK162 /11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 24/09

Applicant

Shaqir Prevetica

Assessment of the constitutionality of Decision CI.no.46/02 of the Municipal Court of Pristina dated 10 September 2002, Decision Ac.592/2002 of the District Court of Pristina dated 01 February 2005, Decision CI.No.130/05 of the Municipal Court off Pristina dated 06 June 2005, Decision Ac.No.56/2006 of the District Court of Pristina dated 21 November 2007 and Decision CI.No.05/08 of the Municipal Court of Pristina dated 01 April 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Shaqir Prevetica**,** residing in Pristina.

The Challenged Decisions

2. The Applicant challenges Decision CI.no.46/02 of the Municipal Court of Pristina dated 10 September 2002, Decision Ac.592/2002 of the District Court of Pristina dated 01 February 2005, Decision CI.No.130/05 of the Municipal Court of Pristina dated 06 June 2005, Decision Ac.No.56/2006 of the District Court of Pristina dated 21 November 2007 and Decision CI.No.05/08 of the Municipal Court of Pristina dated 01 April 2009 relating to alleged violation of his rights to compensation for employment.

Subject Matter

3. The matter concerns the alleged violation of his rights to compensation for employment arising from the court Decisions mentioned above.

Legal Basis

4. Art. 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution); Article. 20 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

5. On 01 July 2009 the Applicant submitted by post to the Constitutional Court (hereinafter referred to as the Court) a Referral concerning proceedings in the above mentioned Courts in relation to proceedings which he had brought against "Kosova" Hotel and Tourism Company in Pristina.

6. The President of the Court appointed Judge Altay Suroy as Judge Rapporteur and he appointed a Review Panel comprising Judges Robert Carolan, presiding and Judges Snezhana Botusharova and Ivan Čukalović.

7. On 11 January 2010 the Applicant submitted to the Court the copy of the lawsuit for damages in the amount of 66,348 Euro against the respondent, "Kosova" Hotel and Tourism Company in Pristina, filed with the Special Chamber of the Supreme Court of Kosovo as well as the Direction of the Special Chamber of the Supreme Court of Kosovo SCC-0112, dated 13 July 2009, requesting the Applicant to regulate the lawsuit and to attach the evidence.

8. On 17 December 2010 the Court held its final deliberations on the Referral

Summary of the facts

9. The Board of Directors of "Kosova" Hotel and Tourism Company in Pristina by Decision No. 177, dated 12 December 2001, permitted the Applicant to have the right to social assistance from 1 February 2002 in the amount of 70% of the average of the personal income in that Company pending the final resolution of his lawful pension by the respective state institution.
10. On date 10 September 2002 the Municipal Court in Pristina by Decision CI.no.46/02 rejected as unfounded the claim of the applicant against the Decision No. 177, dated 12.12.2001, of "Kosova" Hotel and Tourism Company in Pristina.

11. On date 01 February 2005 the District Court in Pristina by Decision Ac.592/2002 found the claim of the Applicant grounded and sent back the case to the Municipal Court for retrial.

12. On date 06 June 2005 the Municipal Court in Pristina by Decision CI.No.130/05 refused the lawsuit of the Applicant on the grounds of delay.

13. On date 21 November 2007 the Decision Ac.No.56/2006 of the District Court in Pristina reversed the Decision of the Municipal Court in Pristina and sent back the case to the first instance court for review.

14. On date 01 April 2009 the Decision CI.No.05/08 of the Municipal Court in Pristina suspended the proceedings since the "Kosova" Hotel and Tourism Company in Pristina was privatized and its liquidation ended on 11 April 2007.

15. The Applicant appealed this Decision and the matter is now pending before the District Court in Pristina.

Applicant's allegations

16. The Applicant in his referral is requesting to the Court to assess the constitutionality of the decisions of the Municipal Court in Pristina and District court in Pristina, through which, according to his allegations, his rights to employment compensation have been violated, however he has not base his referral by reference to any particular Articles of the Constitution.

17. The applicant claims that the Decisions of the Municipal Court in Pristina CI. No. 46/02 dated 10 September 2002, CI.No.130/05, dated 06 June 2005, and CI. No. 05/08 dated 01 April 2009, and the Decisions of the District Court in Pristina Ac.592/2002 dated 01 February 2005, and Ac. No. 56/2006 dated 21 November 2007, have delayed the decision-making based on merits.

Assessment of the Admissibility of the Referral

18. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

19. As to the Applicant's Referral, the Court refers to Article 113.7 of the Constitution, which reads as follows:

"Individuals are 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."

and to article 47.2 of the Law, stipulating that:

"The individuals may submit the referral in question only after he/she has exhausted all legal remedies provided by the law".

20. The Applicant's appeal to the District Court of Pristina is still pending and no final decision has yet been delivered. There arose a new set of facts in relation to the progress of the Applicant's case before the courts by virtue of the privatisation of his former employer. That privatisation was finalised in 2007.

21. As indicated in case No. KI.41/09 AAB-RIINVEST University vs. the Government of the Republic of Kosovo (Resolution Nr. RK-04/10 of the Constitutional Court of the Republic of Kosovo, dated 27 January 2010), the Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human Rights (see Article 53 of the Constitution), is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights.

22. Furthermore, in the Referral, the Applicant has not substantiated why he considers that legal remedies would not be available and if available, would not be effective and, therefore, not need be exhausted.

23. As to the Applicant's Referral, the Court refers to Article 48 of the Law on Constitutional Court of the Republic of Kosovo which reads as follows:

"The applicant of the request is obliged to mention and clearly define which rights and freedoms have been violated and which relevant Act of the public authority is also contested."

24. The Applicant in his submission has not mentioned or clearly defined which rights and freedoms he alleges have been violated.

25. *As to the Applicant's Referral, the Court refers to Article 6 of the* European Convention on Human Right (hereinafter referred to as *ECHR) which reads as follows:*

    "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[...]"

26. The Constitutional Court is mindful of its obligation to interpret constitutional rights in a manner consistent with the case law of the ECHR. The Applicant's case cannot be considered an excessive or unreasonable time from the moment that a new set of facts had to be considered arising from the Privatization of the "Kosova" Hotel and Tourism Company in Pristina which was finalised in 2007.

27. In these circumstances, the applicant cannot be considered to have fulfilled the requirements under Article 113.7 of the Constitution, respectively, he has not exhausted all legal remedies.

FOR THESE REASONS

The Constitutional Court, pursuant to Art. 113(7) of the Constitution, Art. 20 of the Law, and Art. 56(2) of the Rules of Procedure, unanimously,

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Art. 20(4) of the Law; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. Dr. Enver Hasani

Naser Rexhepi vs. Decision of the Commercial District Court VI.C. No. 54/2003, and Decisions Ac. No. 39/2003 and Rev. E no. 11/2003 of the Supreme Court

Case KI 48-2010, decision of 1 December 2011

Keywords: execution of judgment, inadmissible *ratione temporis*, individual referral, right to fair and impartial trial, right to privacy, right to work and exercise profession

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his Constitutional rights under Articles 10, 22, 31, 36 and 49 were infringed by decisions of the Supreme Court affirming the Commercial District Court's rejection of the Applicant's claim against the Kosovo Protection Corps for non-payment of a bill for fuel supplied by the Applicant in 1999 and 2000.

The Court held that the Referral was inadmissible *ratione temporis* pursuant to Article 113.7 and Article 46 of the Law on the Constitution because it relates to events occurring prior to implementation of the Constitution, citing *Blečić v. Croatia*, *Jasiúnienè vs. Lithuania*.

Pristine, 1 December 2011
Ref.No.:RK 154/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI. 48/10

Applicant

Naser Rexhepi

Constitutional Review of the Decision of the Commercial District Court VI.C. no. 54/2003, dated 15 April 2003;
and
Decisions' of the Supreme Court of Kosovo Ac. no. 39/2003, dated 19 June 2003 and Rev.E no. 11/2003, dated 18 May 2004.

CONSTITUTIONAL COURT OF REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Judge
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
IIiriana Islami, Judge

Applicant

1. The applicant is Mr. Naser Rexhepi from the village of Korretica e Ulët, Municipality of Drenas, represented by Imer Ibriqaj, a practicing lawyer from Komoran.

Challenged decisions

1. Challenged decisions with the Constitutional Court are:

    a. Resolution VI.C.No 54/2003, dated 15 April 2003 - District Commercial Court;
    b. Resolution Ac.No 39/2003, dated 19 June 2003 - Supreme Court of Kosovo;and
    c. Resolution Rev.E No 11/2003, dated 18 May 2004 - Supreme Court of Kosovo.

Subject matter

2. The subject matter of the case submitted with the Constitutional Court of the Republic of Kosovo on 30 June 2010 is the review of the constitutionality and legality of the decisions of the District Commercial Court – Resolution VI.C. No. 54/2003, dated 15 April 2003, the Resolution of the Supreme Court of Kosovo – Ac. No. 39/2003, dated 19 June 2003, and the Resolution of the Supreme Court of Kosovo Rev.E No 11/2003, dated 18 May 2004.

Legal basis

3. Article 113.7 in conjunction with Article 21.4 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the "Constitution"), Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2009 (hereinafter referred to as: the "Law"), and Rule 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the "Rules").

Proceedings before the Court

4. The Applicant submitted his Referral with the Constitutional Court on 25 June 2010.

5. On 30 June 2010, the Applicant submitted an "Act of Permanent Representation" (Power of Attorney) certified with the Municipal Court of Gllogovc for his legal representative in the form of the additional document.

6. On 26 August 2010, the Constitutional Court sent a notification letter, Ref. No. DRLSA-1262/10 mb, to the Supreme Court of Kosovo regarding the Applicant's Referral, and requested a written reply, but within the legal time limit the Constitutional Court did not receive any reply.

7. On 16 December 2010, after considering the report of the Judge Rapporteur Ivan Čukalović, the Review Panel composed of Judges Robert Carolan (Presiding) and Prof. Dr. Enver Hasani and Dr. Iliriana Islami, members of the panel, on the same day made its recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts

8. According to the allegations of the Applicant, Mr. Naser Rexhepi, NTP (Commercial Enterprise) Fer Treg, seated in Drenas (Gllogovc), whose owner he is, supplied Kosovo Protection Corps (hereinafter referred to as: the "KPC") with fuel from 7 July 1999 until 1 June 2000 and he supports this with the copy of the report of the First Protection Zone of the KPC in Skenderaj, prot. No. 106/00, dated 5 July 2000, which bears the stamp and is signed by the Commander of the Zone, Major General Sami Lushtaku, sent to the KPC General Headquarters, in which it was specified that this zone was supplied with fuel in the total amount of DEM 80,763.44 or converted into Euros 41,293. Naser Rexhepi claims he has not received this amount and that KPC owes it to him.

9. By Resolution E, No. 100/2002, dated 7.10.2002, on allowing the execution, the District Commercial Court allowed the execution according to which the KPC, in the capacity of the respondent, was to pay to the plaintiff, NTP Fer Treg, owned by Naser Rexhepi, the amount of €41,293.89 in the name of the debt within 8 days.

10. On 15 April 2003, the District Commercial Court, acting upon the rejection of the KPC, issued the Resolution VLC. No. 54/2003 annulling its previous decision E, No. 100/2002, dated 7 October 2002, and considered the proposal on allowing the execution as a claim, whereas in item 2 (two) of this Resolution, it rejected the claim of NTP Fer Treg, owned by Naser Rexhepi, as inadmissible.

11. On 19 June 2003, the Supreme Court of Kosovo, by Resolution Ac. No. 39/2003, rejected plaintiff's appeal as ungrounded and left in force the Resolution of the District Commercial Court in Prishtina, VL.C No. 54/2003, dated 15 April 2003.

12. The plaintiff, NTP Fer Treg, owned by Naser Rexhepi, submitted a revision with the Supreme Court and this court, through the Resolution Rev. No.11/2003, rejected plaintiff's revision by confirming the Resolution of the Supreme Court Ac, No. 39/2003, dated 19 June 2003.

13. The same plaintiff filed another claim with the District Commercial Court on the same issue, but this time it was against: 1. KPC, 2, Lieutenant-General Agim Çeku, and 3. the Department of Justice, seated in Prishtina, and this claim against the first respondent was rejected as an adjudicated matter, whereas for the other two respondents it was rejected as inadmissible through the Resolution III, C. No. 213/2005, dated 27 October 2005.

14. Acting upon plaintiff's appeal, the Supreme Court of Kosovo rejected plaintiff's appeal by Resolution Ac. No. 94/2005, dated 14.12.2005, for the first part of the enacting clause of the Resolution of the District Commercial Court – respectively for the issue of debt regarding KPC, whereas the part regarding the third respondent has been amended, and the case was sent to the Municipal Court in Prishtina as a competent court.

15. Finally, unsatisfied with abovementioned Judgments, on 26 June 2010, Mr. Naser Rexhepi, submitted a Referral with the Constitutional Court of Republic of Kosovo.

Applicant's allegations

16. The Applicant through his representative alleged that the said court decisions have violated his rights guaranteed by the Constitution, such as: Article 10 [Market Economy], Article 22, items 1, 2, 7, 23, 24, 25, 26, Article 31 [Right to a Fair Trial], Article 36 [Right to Privacy], Article 49 [Right to Work and Exercise Profession], etc.

17. The applicant also claimed that by Resolution E, No. 100/2002, dated 7 October 2002, on allowing the execution, the District Commercial Court allowed the execution according to which the KPC, in the capacity of the respondent, was supposed to pay to him, as the plaintiff, the amount of €41,293.89 in the name of the debt within 8 days. Afterwards, by the Resolution of the same Court, VI. C. No. 54/2003, dated 15.04.2003, issued upon the rejection of the KPC, according to the Applicant the first Resolution, which was in favor of the Applicant, was unlawfully quashed and the plaintiff's claim was rejected as inadmissible. The Supreme Court of Kosovo, by Resolution Ac. No. 39/2003, dated 19 June 2003, and Resolution Rev. E No 11/2003, dated 18 May 2004, rejected the appeal, respectively the revision against the Resolution for the annulment of the Resolution E. No. 100/2002, dated 7 October 2002, which was in favor of the Applicant.

Assessment of the admissibility of the Referral

18. In order to be able to adjudicate on the Applicant's Referral, the Court initially refers to Article 113.7 in conjunction with Article 21.4 of the Constitution which read:

    "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.";* and

    "Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."

19. The Court also takes into consideration:

    Article 46 of the Law on the Constitutional Court of the Republic of Kosovo concerning individual Referrals, which stipulates:
    The Constitutional Court receives and processes a referral submitted in accordance with Article 113, Paragraph 7 of the Constitution, if it determines that all legal requirements have been met.

20. By analyzing the documents of the case file submitted by the Applicant, it is established that the last Resolution regarding his case was rendered by the court on 14 December 2005, whereas the party has received it on 15 February 2006.

21. Always considering the time limits, the Court notes that the applicant has requested the review of the constitutionality of the acts of **public authorities** (the last Resolution of the Supreme Court of Kosovo Ac.No.94/2005, dated 14 December 2005) which date from a time period before the entry into force of the Constitution of the Republic of Kosovo (15 June 2008), the Constitutional Court thus cannot review the constitutionality of the juridical acts which have allegedly violated any constitutionally guaranteed right, because at that time, those rights have neither been determined nor guaranteed by the Constitution since the Constitution itself did not exist, **I therefore conclude that the referral is *ratione temporis*** inadmissible in relation to the Constitution. (see Blečić v. Croatia, Application No. 59532/00, ECHR Judgment of 29 July 2004 where the ECHR had declared inadmissible that Application because the provisions of the European Convention on Human Rights do not oblige the contracting parties on any act that has been issued or a juridical situation that has seized existing **prior to the entry into force of the Convention.**

22. The European Court had used such reasoning when it declared inadmissible **Jasiiiniene vs. Lithuania** (see *mutatis mutandis Jasiiiniene vs. Lithuania, Application no. 41510/98, ECHR Judgments of 6 March and 6 June 2003).*

23. Under these circumstances, the Court considers that the Applicant has not met the admissibility requirements. and it therefore:

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law and Rule 36.3 (h) of the Rules of Procedure, on the session of 16 December 2010, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible because it is *ratione temporis* incompatible with the Constitution.

II. The Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on Constitutional Court.

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Ombudsperson of the Republic of Kosovo vs. Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111

Case KO 119-2010, decision of 8 December 2011

Keywords: equality before the law, justification for enactment of laws, legislative power, pensions, presumption of constitutionality of laws, referrals by Ombudsperson, role of Deputies of the Assembly

The Applicant filed a Referral pursuant to Article 113.2(1) of the Constitution, asserting that Articles 14.1.6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy were incompatible with the Constitution on four levels: (1) it provides Deputies with pensions that are more favorable than those offered to other citizens, which is inconsistent with the constitutional principles of equality, rule of law, non-discrimination and social justice; (2) the pensions are clearly disproportionate with average pensions in Kosovo, and are therefore disharmonious with the principles of democracy, equality, non-discrimination and social justice encompassed by Article 7 of the Constitution; (3) the arrangement allows for a retired Deputy's reinstatement to a public sector or publicly funded job held by the Deputy before service in the Assembly; and, (4) there is no justification for treating Deputies' pensions so differently from those of other citizens. In response, the Assembly asserted that the Law on Rights and Responsibilities of the Deputy was enacted legitimately.

The Court held that the Referral was admissible because the Ombudsperson was authorized by Articles 113.2 and 135.4 of the Constitution to make the Referral, and that the Referral was submitted within the 6-month deadline set by Article 30 of the Law on the Constitutional Court, calculated from the date of the challenged law's enactment.

On the merits, the Court considered the challenged provisions of the legislation, compared them to similar arrangements for legislators in 16 other countries and reviewed relevant decisions by the Constitutional Courts of Croatia, Montenegro and Macedonia. The Court reached five conclusions: (1) the pension arrangement unreasonably deviated from the pension provisions of UNMIK Regulation No. 2005/20 and Law No. 03/L-084; (2) the legislation provided an insufficient definition of the benefit, which does not resemble severance pay, a salary increase, life insurance or bonus, and it may constitute a gift without a clearly demonstrated public purpose, meaning that the Assembly had no constitutional authority to enact it; (3) the disputed pensions were distinctly disproportional to average Kosovo pensions and therefore no apparent legitimate public purpose for such

discriminatory treatment; (4) the challenged pensions were 8-10 times higher than basic pensions set by the Kosovo Budget, and such disproportionate treatment raises questions about the Assembly's consideration of Articles 3, 7 and 24 of the Constitution when enacting the legislation; and, (5) the Assembly never provided a reasonable explanation of the legitimate aim of the disputed legislation, depriving it of the general presumption of Constitutionality, and neither the Minister of Finance nor the Central Bank provided an explanation or justification concerning the fiscal or economic implications of the enactment, which occurred despite strenuous objections by some Deputies. Finally, the Court decided that the pension arrangement was incompatible with the Constitution, but added that the Assembly had the discretion to enact a Constitutionally appropriate pension plan for Deputies and their surviving family members in the event of death or injury.

For the reasons stated, the Court issued a Judgment reflecting that the Referral was admissible, concluding that the relevant provisions of the Law on Rights and Responsibilities of the Deputy were not compatible with Articles 3.2, 7 and 74 of the Constitution, invalidating the relevant provisions, holding that the Court's interim order suspending the implementation of the relevant provisions had become permanent, and declaring that the Judgment was immediately effective.

Pristine, 8 December 2011
Ref. No.:AGJ165 /11

JUDGMENT

in

Case No. KO 119/10

Applicant

Ombudsperson of the Republic of Kosovo

Constitutional Review of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge.

Applicant

1. The Applicant is the Ombudsperson of the Republic of Kosovo.

Challenged law

2. The Applicant requests the annulment of Article 14, paragraph 1.6, and Articles 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010.

Subject matter

3. The Applicant requests the constitutional review of Article 14, paragraph 1.6, and Articles 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010.

Legal basis

4. Article 113.2 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), and Articles 20 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 26 November 2010, the Ombudsperson filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 29 November 2010, the President of the Court, by Decision No. GJR. 119/10, appointed Judge Robert Carolan as Judge Rapporteur. On the same date, the President of the Court, by Decision No. KSH. 119/10, appointed the Review Panel composed of Judges Ivan Čukalović (Presiding), Kadri Kryeziu and Gjyljeta Mushkolaj.

7. On 17 December 2010, the Court considered the report of the Judge Rapporteur concerning the Referral in a closed session and reached the decision on the application of the interim measure for a period of no longer than three months from the issuance of the decision immediately suspending the application of Article 14 paragraph 1.6, and Articles 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, with the same duration.

8. The Court extended the application on interim measures on a number of subsequent occasions and finally, by Order dated 20 October 2011, extended the application until 31 December 2011 and the Court remained seized of the matter.

9. On 21 December 2010, the Court notified the President of the Assembly of Kosovo regarding the Referral, and asked if the Assembly had any response regarding the Referral submitted with the Court.

10. On 24 January 2011, Mr. Jakup Krasniqi, President of the Assembly, sent an official document informing the Court that the Assembly was informed of the interim measure applied by the Court regarding the suspension of the application of the said articles of the Law on Rights and Responsibilities of the Deputy as long as the interim measure was in force and he also stressed that considering the fact that the Assembly of Kosovo has been dissolved as of 2 November 2010, he cannot provide an adequate answer until the constitution of the new legislature of the Assembly of Kosovo.

11. On 16 May 2011, Mr. Ismet Krasniqi, the Secretary of the Assembly, submitted to the Secretary General of the Court a response prepared by the Assembly's Committee for Legislation dated 11 May 2011. That response concluded that the legislation subject to this referral complied with the Constitution because it was enacted pursuant to the Rules of Procedure of the Assembly.

12. On 5 July 2011 and on 22 November 2011, the Court deliberated on the Referral and the response and decided on the admissibility and the merits of the Referral.

The facts

13. On 4 June 2010, the Assembly of the Republic of Kosovo (hereinafter: the "Assembly") adopted the Law on Rights and Responsibilities of the Deputy with 74 (seventy-four) votes "for", 2 (two) votes "against" and 2 (two) "abstains".

14. Between 7 October 2008 and 16 March 2010, the Commission on Legislation and Judiciary met at least seven (7) different times to discuss this proposed legislation. On 21 October 2008, the Commission received the comments of the OSCE with respect to this legislation. The OSCE specifically recommended:

    "Supplementary Pension provisions should be deleted as it is excessive in relation to regular pension rules. Such a provision would put a heavy burden on the State budget." (*See* Specific Comments and Proposed Amendments to the Draft Law on the Rights and Responsibilities of the Deputy, OSCE).

15. On 14 December 2009, one member of the Commission recommended that a decision on enacting this legislation should be delayed until there were "better political and economic conditions."

16. On 13 June 2008, the Assembly adopted Law on Kosovo Pensions Trust, No. 03/L-084.

17. The following NGOs: National Democratic Institute of Kosovo (NDI), Forum for Civic Initiatives (FIQ), "Speak Up" Movement, Community Building Mitrovica (CMB), addressed to the President of the Republic of Kosovo on 21 June 2010 with a request not to promulgate this pension Law.

18. On 25 June 2010, Mr. Bahri Hyseni, Chairperson of the Committee on Legislation and Judiciary of the Assembly of Kosovo, requested from the Secretariat of the Assembly to correct the clerical error that was made in the Law on Rights and Responsibilities of the Deputy, respectively Article 22 of the Law, that the retirement age should be 55 years of age, and not as it was approved in the plenary session of 4 June 2010, that the retirement age should be 50 years of age.

19. On 25 June 2010, the Assembly approved Mr. Bahri Hyseni's request to correct the clerical error that was made in the session of 4 June 2010. Mr. Bahri Hyseni's request was approved with 73 (seventy-three) votes "for" and 2 (two) votes "against".

20. On 5 July 2010, the Law on Rights and Responsibilities of the Deputy was promulgated by the Decree of the President of the Republic of Kosovo DL-029-2010.

21. On 19 July 2010, the Ombudsperson Institution received a submission from a number of Non-Governmental Organisations (NGOs): National Democratic Institute of Kosovo (NDI), Forum for Civic Initiatives (FIQ), Youth Initiative for Human Rights (YIHR), Kosovar Stability Initiative (IKS), Initiative for Progress (INPO), Balkan Institute of Policies (IPOL), Council for the Defense of Human Rights and Freedoms (KMDLNJ), "Speak Up" Movement, Community Building Mitrovica (CMB), Policy and Advocacy Centre (QPA) and Syri Vision, which jointly addressed to the Ombudsperson Institution requesting the Constitutional Court of the Republic of Kosovo, pursuant to duties and responsibilities vested on it by Law, to assess the constitutionality of Article 22 of the Law on Rights and Responsibilities of the Deputy.

22. The abovementioned NGOs considered this Article constituted a violation of the Constitution of the Republic of Kosovo and requested to ban the implementation of the law, as was foreseen from 1 January 2011 until the Constitutional Court rendered a decision on merits regarding this issue.

23. The Law on Rights and Responsibilities of the Deputy was published in the Official Gazette of the Republic of Kosovo on 20 July 2010.

24. On 21 July 2010, the Union of Kosovo Pensioners joined the NGOs' request.

25. On 16 May 2011, Mr. Ismet Krasniqi, the Secretary of the Assembly, submitted to the Secretary General of the Court a response prepared by the Assembly's Committee for Legislation dated 11 May 2011. That response concluded that the legislation subject to this referral complied with the Constitution because it was enacted pursuant to the Rules of Procedure of the Assembly.

26. On 26 July 2011, the Central Bank of Kosovo in its letter signed by Mr. Gani Gërguri, Governor of the Central Bank, notified the Constitutional Court that there was no correspondence between the Central Bank and the Kosovo Assembly concerning the fiscal and economic impact of enacting this Law, No. 03/L-111.

27. On 27 July 2011, the Ministry of Finance, in its letter signed by Minister Mr. Bedri Hamza, notified the Constitutional Court that the Ministry of Finance had received a written request from the Kosovo Assembly about

the financial cost or impact of the proposed law. The Ministry had prepared a report in response to this request, but the report was never delivered to the Assembly because further consultation was needed before this law could be enacted. However, the Kosovo Assembly on 4 June 2010 approved this law without the assessment of the Minister of Finance of the economic and fiscal impact of this law, No. 03/L-111.

28. These two responses were forwarded to the Assembly of the Republic of Kosovo in late August, 2011 for their information only. No response was requested. No response or comment has been received.

29. On 4 August 2011, the Constitutional Court received written materials described as "travaux preparatoires" relating to a different Members of Parliament pension law, 02/L-144, that was adopted by the Assembly in 2007 but never approved by the Special Representative of the Secretary General for the United Nations and, therefore, never enacted. Nothing in those materials related to the subject law, No. 03/L-111, challenged by the Ombudsperson in this Referral.

Applicant's claims

30. The Ombudsperson claims, *inter alia*, that the Law on Rights and Responsibilities of the Deputy contains provisions that "enable deputies of Kosovo Assembly to realize pensions that are more favorable than any other pension benefit for the other citizens, and that they are inconsistent with constitutional principles of equality, rule of law, non-discrimination and social justice".

31. The Ombudsperson also "notices that supplementary pensions foreseen by Article 22 of the Law on Rights and Responsibilities of the Deputy are clearly disproportionate to the average pensions in the country, and as such, they are not in harmony with values proclaimed in Article 7 of the Constitution of the Republic of Kosovo, whose constitutional order is based on the principles of democracy, equality, non-discrimination and social justice".

32. Moreover, Article 38 of the Law on Rights and Responsibilities of the Deputy provides the deputies with the possibility of being reinstated to the respective job position if he/she has been employed in the public sector or in any institution financed through public means before the start of the mandate. This provides them the certainty concerning employment; they do not risk remaining jobless if they have been part of the public sector before the start of the mandate of the deputy. They can also find some other job position when it is known that the general retirement age in Kosovo is 65 years of age.

33. Finally, according to the Ombudsperson, "the privileged status of the deputies of the Assembly of Kosovo in the existing legal order of the Republic of Kosovo does not present a sufficient reasoning for that high level of deviation from general principles in the area of pensions".

Response of the Assembly

34. A representative of the Assembly responded that the legislation subject to this referral complies with the Constitution because it was enacted pursuant to the Rules of the Assembly.

Admissibility of the Referral

35. Before determining the formal criteria on the admissibility of the Referral, the Court should provide an answer to two main issues:

    a. If the Ombudsperson is an authorized party to raise a constitutional issue; and
    b. If the issue raised before this Court is a constitutional issue.

36. In order to provide an adequate answer to the two said issues, the Court refers to Article 113.2 of the Constitution, which stipulates:
    "…
    The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

    […]

    c. the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;

    d. the compatibility with the Constitution of municipal statutes.
    …"

    and to Article 135.4 of the Constitution, which also stipulates:

    "The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution."

37. Based on the abovementioned constitutional definitions, the Ombudsperson has competencies to refer constitutional matters to the Constitutional Court, and the Ombudsperson's request for the

constitutional review of the compatibility of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, fulfils the legal criterion of Article 113.2 of the Constitution for "the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government."

38. Furthermore, the Referral was submitted to the Constitutional Court prior to the six months from the day upon which the Law was to enter into force. Thus, the time requirement under Article 30 on the Law of the Constitutional Court of the Republic of Kosovo has been met.

39. This is a constitutional issue and it is suitable for constitutional review by the Constitutional Court.

Applicable law

40. In order to give a complete answer and based on the Constitution on the Referral submitted with it for review, the Constitutional Court shall consider the applicable legislation on pensions in Kosovo, that is:

Law on Rights and Responsibilities of the Deputy, No. 03/L-111

41. Article 14.1 (6) of the Law stipulates that:

"…

Financial and material benefits of the deputy

The deputy during the exercise of his/her mandate has a right on compensation for:

e. basic salary;

f. transitional salary after the end of the mandate;

g. participation in sessions and meetings of the committees;

h. parliamentary functions;

i. monthly expenses;

j. supplementary pension; and

k. other rights determined by this Law.

..."

42. Article 22 of this Law provides:

"...
Supplementary pension

1. The deputy, after the end of his mandate, has the right on supplementary pension, if a deputy has practiced his/her task for at least one mandate and is fifty-five (55) years of age.

2. The deputy who fulfils the conditions defined in paragraph 1 of this Article, realizes a supplementary pension in amount of fifty percent (50%) of the compensation of the deputy. The deputy that has served two (2) mandates under conditions defined in paragraph 1 of this Article realizes a supplementary pension of a deputy in amount of sixty percent (60%) of the basic compensation and the one who served in three and more mandates in amount of seventy percent (70%) of the basic salary.
..."

43. Article 23 provides:

"...
1. The rights and responsibilities of a deputy, determined with this law, start to run from year 2001, with certification of the mandate of the deputy.

2. The status of the deputy for legislature 1990-2000 shall be regulated with special law.
..."

44. Article 24 of the same Law provides:

"...
Pension basis

As basis for determining the supplementary pension of the deputy is used the basic recent salary that the deputy realizes in the Assembly.

The overall sum of the supplementary pension of the deputy cannot be higher than seventy percent (70 %) of the basic salary of the deputy.
..."

45. Article 25 of the Law provides:

> "...
> *Pension for disability reason*
>
> *1. The deputy to whom because of the injury while performing his/her task was in general disabled for work, has a right on supplementary pension of a deputy regardless of the retirement seniority, age and his mandate as deputy.*
>
> *The Pension from paragraph 1 of this Article is determined in sum of seventy percent (70 %) of the basic salary.*
> ..."

46. Article 26 of the Law provides:

> *Special circumstances*
>
> *"Criterion to realize and determine the amount of the pension is the overall retirement seniority, realized in and outside the country."*

47. Article 27 provides:

> "...
> *Family pension*
>
> *Members of the family of the deputy who has passed away and who used the supplementary pension are entitled to the family pension in the amount of seventy percent (70 %) of that pension on the day he passed away.*
>
> *The foreseen procedures for fulfillment of rights for the regular pension are applicable also for achieving the supplementary pension of the deputy.*
>
> *The right to a family pension has spouse and children until the age of eighteen (18), respectively until the age of twenty-two (22), if they continue the high schooling.*
> ..."

Pension Trust Law of Kosovo

48. When the Assembly enacted this Law, No. 03/L-084, Amending UNMIK Regulation No. 2005/20 Amending UNMIK Regulation 2001/35 on

Kosovo Pensions Trust, was a law already in effect since 2008. Article 3 of that law stipulates that:

"...
In Section 1 of the Regulation, the paragraph entitled "BPK" shall be replaced in its entirety by the following:

"CBK" means the Central Bank of the Republic of Kosovo that is responsible as an independent agency under article 142 of the Constitution for licensing, supervision and regulation of Pension Funds, Pensions Providers, Asset Managers Open-end Vehicles, and Custodians according to this Law, and has responsibilities for supervision of the Kosovo Pensions Savings Trust.
..."

49. Article 6 of the same Law stipulates:

"...
Section 2.2 of the Regulation shall be replaced in its entirety by the following Section 2.2:

2.2 The setting of economic policy with respect to Pensions, as part of budgetary and fiscal policy, shall be the responsibility of the Government. The Government shall accomplish this policy through the Ministry of Labour and Social Welfare in coordination with the Ministry of Finance and Economy. The Minister of Labour and Social Welfare, the Minister of Finance and Economy, the Governor of the CBK, and others appointed by the Prime Minister, will comprise an inter-ministerial Pension Policy Working Group. The Pension Policy Working Group will propose further rules and regulations as necessary to effectuate pension policy and will make recommendations to the Government with respect to the Kosovo Pensions Savings Trust and the licensing, regulation and supervision of Pensions in Kosovo.
..."

50. Administrative Instruction No. 15/2009 for Growth of Pension for Implementation of Decision of the Government No. 02/51, Article 2 provides:

"The right to benefit in increasing the basic pension of 45 euros to 80 euros and all has: Current users of basic pension who were insured and contribute payer, based on the relationship of work, [...]"

51. Article 3 stipulates:

"Conditions and criteria for increasing the pension benefit basis: The applicant must age 65 and have minimum 15 years experience of pension insurance, according to the provisions of the Pension Security and disability, among them at least 7 years and 7 months experience working in Kosovo."

The Substance of the Referral

52. In assessing this referral the Court should keep in mind that generally all legislation is presumed constitutional until proven otherwise. This Court's mandate is only to assess the constitutionality of a decision or legislative act, not to assess its legality or whether it is supported by good public policy. *(See Article 112 of the Constitution)*

53. In assessing whether a law violates the Constitution, the Court should consider the following provisions of the Constitution:

a. Article 16:

1. The Constitution is the highest legal act of the Republic of Kosovo. Laws and their legal acts shall be in accordance with this Constitution. (Emphasis Added)
2. The power to govern stems from the Constitution.
3. The Republic of Kosovo shall respect international law.
4. Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution. (Emphasis added)

b. Article 3:

1. The exercise of public authority in the Republic of Kosovo shall be based upon principles of equality of all individuals before the law [...].

c. Article 7 provides:

The constitutional order of the Republic of Kosovo is based upon the principles of freedom, peace, democracy, equality [...].

d. Article 4.2 of the Constitution provides:

"The Assembly of the Republic of Kosovo exercises the legislative power."

e. Article 65 [Competencies of the Assembly]

'The Assembly of the Republic of Kosovo:

'(1)adopts laws, resolutions and other general acts;…..'

f. Article 74 of the Constitution provides:

"Deputies of the Assembly of Kosovo shall exercise their function in the best interest of the Republic of Kosovo and, pursuant to the Constitution, Laws and Rules of Procedure of the Assembly."

Restrictions on Legislative Discretion

54. There are restrictions on the right or authority of the Assembly to enact legislation:

"…
(1) The legislation must comply with the Constitution and the principles of the Constitution.
(2) Legislation which affects individuals, corporate or personal, must have a legitimate aim and must be proportional to the rights of all citizens of Kosovo.
(3) Legislation which provides a direct special benefit for members of Parliament must be based on reasons that are supported by clear and legitimate public purposes.
…"

55. It is on this basis that the challenged legislation must be analyzed. Did the Assembly when enacting this law consider those principles and did it determine what the legitimate purpose of this law was? There is no evidence before this Court to suggest that the Assembly used that analysis in enacting this legislation.

56. This Court has previously pointed out that the Constitution is based on the doctrine of the separation of powers. In its Judgment in Case No. KO 98/11, dated 20 September 2011, Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo the Court said, at paragraph 44, *"The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of the separation of powers and the checks and balances among them. The separation of powers is one of the bases that guarantees the democratic functioning of a State. The essence of the independence and effective functioning of these branches is the immunity provided to the persons embodying these powers."*

57. Article 4.2 of the Constitution explicitly states that the Assembly exercises the legislative power. There is no other reference in the

Constitution to any other branch of government having that authority or responsibility. Article 74 suggests in a broad and general manner that the Assembly shall exercise that sole function in the best interests of the Republic of Kosovo and the Constitution.

58. In applying that standard to this legislation the Constitution requires that the Assembly acknowledge that all individuals are equal before the law (Article 3) and that the Constitution is based upon the principle of equality (Article 7). In applying these principles the Assembly also must acknowledge that equal protection of the law shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions (Article 24.3). In other words, the village police officer is not necessarily entitled to the same compensation as the Prime Minister or a physician because each may have differing duties, responsibilities and skills.

59. In enacting laws the Assembly must act within the parameters of Article 24 of the Constitution [Equality Before the Law], which provides:

"...
All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they have been imposed have been fulfilled.
..."

Analyses of the Legislation

60. Even though the law challenged in this Referral is described as a "supplemental pension" it has many features more similar to a supplemental post employment gift than a traditional supplementary pension for the following reasons:

I. Unlike a typical pension none of the beneficiaries are required to contribute anything towards funding of the "pension."

II. The "pension" is to be applied retroactively, and prospectively, to any deputies who had previously served in the Assembly since 2001 some of whom may already have retired.

III. The "pension" may also be paid to beneficiaries who, subsequent to their terms in the Assembly, return to work for the government or now take work for the government.

IV. This legislation was enacted without comment or review by certain government officials previously established by law in Kosovo to review pension policy. That Law, No. 03/L-084, provided that several government officials from the various ministries and the Central Bank of Kosovo were responsible for establishing pension policy in Kosovo.

V. This is not a "bonus" because typically, a bonus is an additional single inducement to a prospective candidate to take a position or a single end of a fiscal cycle reward for extraordinary performance related to specific performance goals being met or exceeded.

VI. This is not a salary increase. Salary increases generally have only prospective application for those who may consider becoming deputies in the future or renewing their mandates. This legislation has retroactive application making it more like a gift than a salary adjustment. *(See Article 11, On Salaries of Civil Servants, Law No. 03/L-147, 13 May 2010.)*

VII. This is not "severance pay." Severance pay is usually for a defined limit of time or amount paid to an employee after he or she leaves their employment. This legislation authorizes payment of an unlimited amount for an unlimited period of time. (*See Article 22.2 On Salaries of Civil Servants, Law No. 03/L-147, 13 May 2010.*)

VIII. Funding of this pension is from the general budget of the government of Kosovo, not from a separate pension trust fund authorized by the pension law of Kosovo or a private pension fund authorized to make annuity payments to the recipients over their lifetimes as is normal with respect to regular pension funds.

IX. This legislation is different than the law relating to regular pensioners in Kosovo, who, in order to win the right to pension from Kosovo Budget, should be at least 65 years old (old age pension) or at least 65 years old and have at least 15 years of work experience of pension insurance (*see Article 3.1.1 of Administrative Instruction*

No. 15/2009 for Growth of Pension for Implementation of Decision of the Government No. 02/51).

Analyses of the role of Deputies

61. Deputies in the Assembly have duties and obligations different than others in the rest of society. They have a limited time mandate, unique working hours, the possibility of not being re-elected. They must retire from any executive post in the public administration or in any publicly owned enterprise and not exercise any other executive function as provided by law.

62. Therefore, to attract qualified candidates for these positions the Assembly is allowed to compensate new prospective candidates for the position of deputy in the Assembly in a manner and in a monetary amount that may be different than the compensation for other members of society as long as it is reasonably related to the legitimate goal of attracting qualified candidates to the position in view of the demands of the position and the insecurity involved with the position. There is no evidence that the Assembly in enacting this legislation considered these factors.

63. This pension legislation is also retroactive for any deputy who served in the Assembly since 2001 regardless of whether he or she is still serving. When different pension or compensation legislation is made retroactive to compensate former deputies of the Assembly there should be a special finding by the Assembly how that legislation accomplishes the purpose of attracting qualified candidates to campaign for and accept the position of a deputy with all of its unique authority, responsibility and sacrifice. It does not appear that the Assembly made any findings with respect to this issue.

Pensions for deputies in other countries

64. While deciding on the Ombudsperson's referral, the Court could take judicial notice of the pensions for deputies in some other countries, such as Austria, Czech Republic, Estonia, Latvia, Luxembourg, and Slovakia. Members of Parliament (MPs) realize their pension insurance rights in accordance with the general legal act that determines the right to pension insurance for all employees alike, without having a special fund for MPs. *See, Act No. 155/1995 Coll., on pension insurance, which came into effect on 1 January 1996 (Czech Republic), Funded Pensions Act Passed 14 April 2004 (Republic. of Estonia), Fonds et Régimes Complémentaires de Pension (Luxembourg). Act No. 43/2004 Coll. on old-age pension saving (Slovak Republic).*

65. Another practice has been established in England (*see* Statutory Instruments 2009 No. 1920 Pensions - The Parliamentary Pensions (Amendment) Regulations 2009) and France (see The M.P.s' pension scheme, which was set up by the Chamber of Deputies on December 23, 1904 is funded by a contribution provided by the parliamentary allowance and by a subvention included in the budget of the National Assembly*(see:http://www.assembleenationale.fr/english/synthetic_files/file_15.asp)*), whereby MPs are obliged to realize their pension rights through the pension fund of the Parliament, which is a kind of a special pension insurance funded from deputies' incomes and supplemented from the budget of the parliament. The Italian Parliament also has a special pension fund for its members; however, the MPs are obliged to contribute to this pension fund with 5.6 % of their salary (*see http://www.legco.gov.hk/yr00-01/english/library/ein7.pdf*).

66. Whereas Denmark, Cyprus, Romania, Sweden, Finland and Montenegro have regulated this issue through different legal acts, mainly particular laws and regulations, such as the case of the Republic of Kosovo, but in different ways, and this does not apply only to MPs but senior officials as well, e.g., in Denmark, the pension age of the deputy is 67 years of age, in Cyprus it is 60 years of age, and the obligatory contribution of 1.75% of deputy's salary to the pension fund, in Romania, pension contributions are obligatory, in Sweden, the state pension scheme applies for deputies as well, but they are also supported by the parliament pension scheme (*see* *http://www.legco.gov.hk/yr00-01/english/library/ein7.pdf*).

67. In the United States of America pensions for members of Congress (Assembly), like all other Federal government employees, are financed through a combination of employee and employer contributions. This pension is a supplementary pension to the basic Social Security pension all required of all American citizens, including members of Congress. The amount of the pension is based upon years of service and average salary but is not retroactive for those members of Congress who served before the law was enacted. (*See Federal Employees' Retirement System Act of 1986 (P.L. 99-335) and Congressional Research Service Report for Congress: Retirement Benefits for Members of Congress, 9 February 2007.*)

Analysis of other Constitutional Court Decisions

68. The Court also considered the fact that the Constitutional Courts of Macedonia and Montenegro have declared as unconstitutional provisions of particular laws with the same pension privileges for deputies. Whereas the Assembly of the Republic of Croatia had reduced

deputies' pensions before a similar issue was decided by the Constitutional Court of Croatia.

A. Macedonian Constitutional Court Decision

69. On 12 April 2006, the Macedonian Constitutional Court declared a Macedonia law that awarded to members of parliament, not other public officials, a different and more generous pension than the general pension afforded to all other citizens of Macedonia unconstitutional. It found that this law violated Article 9 and 32 of the Macedonian Constitution. Article 9 provided that all citizens are equal before the Constitution and the laws. Article 32 provides that everyone under equal conditions is open to every job. The Court concluded that it could not find arguments that would justify this kind of compensation that only is provided to MPs and not to other public officials who also participate in the work of the authorities or bodies that are elected. The Court found that this law did not correspond to the principle that every employee has the right to appropriate remuneration in accordance with his contribution to the work and the principle of equality between the holders of public office.

70. That Court stated:

> *"[…] With the disputed legal provisions, the legislator has established different conditions and manner of implementation of early retirement which are based cannot be anything other than the acquisition of rights under privileged conditions and relate only to the lawmakers, not all public officials who are in the same social status or all citizens without giving reasonable grounds exist, which the legislator puts citizens in an unequal position, which is in direct contradiction with Article 9 of the Constitution."* (See Decision of the Constitutional Court of the Republic of Macedonia, No 191/2005-0-1, dated 04.12.2006, § 5 point 45).

71. Apparently, the Macedonian Court concluded that the Macedonian Parliament had an obligation pursuant to Macedonian law or the Macedonian Constitution to make detailed findings justifying why members of its Parliament were entitled to unique and favorable pension benefits because of the nature of their work and responsibilities in comparison to other public officials or members of the Macedonian society in general.

B. Croatian Constitutional Court decision

72. In a similar case in 2003 the Constitutional Court of Croatia found that similar pension legislation did not violate the Croatian Constitution even when the legislation had retroactive application. That Court held that

different regulations for parliamentary pensions than for pensions in general are grounded in the special legal position of members of Parliament. *(See File No. U-1/949/1999.)*

73. The Applicants in that case claimed that the pension legislation violated principles of equality, social justice and equal status of members of the same social categories. In finding the allegations ungrounded that Court reasoned that:

"Different regulations for parliamentary pensions than for pensions in general, in the view of the Constitutional Court, are grounded in the special legal position of members that emerges from the way in which they acquire office, the duties of members and the legal nature of their office, increased responsibility in performing the duties of member, public nature of the work, limitation of office, incompatibility with performing any other work, abandoning their previous professions and the like."

C. Constitutional Court of Montenegro decision

74. In a similar case the Constitutional Court of Montenegro declared that a special supplementary pension for deputies and other state officials who carry out the highest state functions was in violation of the Constitution of Montenegro. *(See Nol 33/08 of the Official Gazette of Montenegro, U. no. 86/08, 43/09, 103/09 and 108/09, dated 24 December 2009.)*

75. The challenged law authorized certain state officials, including deputies, to a pension of from 55% to 85% of their basic salaries similar to the challenged legislation in this referral. In declaring this law unconstitutional the Montenegran Court stated:

"Regulation of the rights to pension is one of the lawful rights that the citizens are entitled to. In this regard, the legislator is authorized to regulate that right, and therefore, to change, supplement and abolish it depending on the different circumstances, such as the financial capability, the implementation of the measures of social policy and alike. However, when regulating such relations, the legislator is obliged to take into consideration the limits set by the Constitution, and particularly those that derive from the principles of rule of law and social justice and from those principles by which are protected certain constitutional properties and values."

.....

".... The Constitutional Court establishes that the legal position of the state officials pursuant to Article 1, paragraph 2 of the Law has its

specificities that derive from the Constitution, so the regulation of their pensions is a manner that is different from the general system of pension insurance can be based on their special legal position, legal nature of mandated political functions derived from the Constitution, increased responsibilities in conducting such functions, publicity of work, limitations of term, incompatibility to carry out other jobs for the duration of the term, leaving of the earlier occupation or profession at that time, etc., The privileged pension of the state official, due to the nature of their constitutional duties and responsibilities could consequently represent legal expression of such specificities, but it must always be proportionate with general social and economic conditions in the country." (Emphasis added.)

Conclusion

76. By determining the right to supplementary pension for the deputies of the Assembly of Kosovo in the amount of 50%, 60% or 70% of the actual basic salary of the deputy, depending on the number of mandates of the deputy spent in the Assembly and by determining the age of 55 as the other essential condition to gain the right to supplementary pension, it appears that the Assembly unreasonably deviated from the general rules of gaining the right to a pension set forth with UNMIK Regulation No. 2005/20 and the Law No. 03/L-084 of the Assembly of Kosovo.
77. If this is not a "supplementary pension", which it appears that it may not be, there is an insufficient description of what this legislation is: (1) severance pay; (2) salary increase; (3) bonus; (4) life insurance, or (5) gift. Since it does not have the characteristics of severance pay, salary increase, life insurance or bonus, it may be a gift without a clearly demonstrated public purpose for which there is no constitutional authority for the Assembly to award.

78. In this Referral it appears that the pensions to be paid to the retired Deputies are distinctly disproportional with the average pensions in the country. The constitutional order is based on the principles of democracy, equality, non-discrimination and social justice. It appears that because the proposed pensions are to be paid from the general budget of the Republic of Kosovo without a contribution from the Deputies and because it will result in a substantial pension (50% of the compensation for one completed mandate) that this legislations creates discrimination against the members of the general public and all other pensioners in Kosovo and infringes against the principles of equality and social justice enshrined in the Constitution without a sufficient explanation or justification of any legitimate public purpose for such discriminatory treatment.

79. The Court should also note that the Law on the Rights and Responsibilities of the Deputy, by determining pensions to the scale of 50%, 60%, and 70% of the current salary of the deputy has set pensions that will be 8-10 times higher than basic pensions that are also paid by Kosovo Budget. Such a disproportion concerning the retirement age, as well as the amount of pension compared to the basic pension, without any justification concerning the purposes aimed to be achieved, raises serious questions whether the Assembly considered Articles 7, 3 and 24 of the Constitution of Kosovo when it enacted this law.

80. The Assembly of Kosovo has not provided, at the time of enactment or thereafter, a reasonable explanation concerning the "legitimate aim it has pursued" in enacting the legislation challenged by the Ombudsperson. Without such a justification this legislation loses the general presumption that it is constitutional and compatible with the Constitution. Indeed, it appears from the minutes of the Legislative and Judicial Committee, several observers strongly recommended that this legislation not be adopted and at least one member of the Assembly suggested that this was not the appropriate time to enact such legislation. Notwithstanding these objections, this legislation was enacted without an explanation or justification or comment from the Minister of Finance or the Central Bank with respect to the fiscal or economic implications of enacting this law.

81. Therefore, it must be concluded that Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, are not compatible with the Constitution of the Republic of Kosovo.

82. The Court's decision does not prevent the Assembly from enacting pension legislation for members of the Assembly nor does it prevent the Assembly from enacting legislation compensating families of members of the Assembly from being compensated in an appropriate amount if the deputy dies or is injured while serving as long as the Assembly considers the requirements of the Constitution in enacting such legislation.

FOR THESE REASONS, PURSUANT TO ARTICLE 113.2 OF THE CONSTITUTION AND ARTICLES 20 AND 27 OF THE LAW AND RULE 56 (1) OF THE RULES, THE COURT UNANIMOUSLY

I. Holds the Referral admissible;

II. Concludes that Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of

the Deputy, No. 03/L-111, of 4 June 2010, is not compatible with Articles 3.2, 7 and 74 of the Constitution of the Republic of Kosovo;

III. Holds that Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, is null and void ;

IV. Holds that the provisions of the Court's interim order of 18 October 2011 suspending the implementation of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111, of 4 June 2010, and most recently extended on 20 October 2011, becomes a permanent order of the Court.

V. Orders that this Judgment be served on the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette; and,

VI. Declares that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

Fadil Selmanaj vs. Judgment A. no. 170/2009 of the Supreme Court

Case KI 108-2010, decision of 5 December 2011

Keywords: administrative dispute, exhaustion of legal remedies (exception), individual referral, interested party, right to access to a court, right to fair and impartial trial, right to judicial protection, service of process, termination of employment

The Applicant, a terminated municipal employee who won reinstatement from the Independent Oversight Board, filed a Referral pursuant to Article 113.7 of the Constitution, asserting that he should have been included as an interested party in his former employer's appeal of the favorable disposition in his employment case to the Supreme Court. The Applicant asserted that his right to a fair trial, which the Court construed as falling under Articles 31 and 53 of the Constitution and Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), was infringed because neither the employer nor the Supreme Court notified him of the appeal or its disposition.

The Court held that the Referral was admissible pursuant to Article 113.7 because prescribed remedies were unavailable to the Applicant in view of the failure of the Supreme Court to serve him with a copy of the judgment as an interested party, citing Articles 52.6 and 53 of the 1977 Law on Administrative Disputes, *AAB-RIINVEST University L.L.C. vs. Government of Kosovo*, *Cinar v. Turkey*, *Colozza v. Italy*, *Sejdovic v. Italy*, and because the Court found that there was no evidence that the Applicant was informed about either the potential for reopening the Supreme Court case or initiating a new matter.

On the merits, the Court held that the Applicant should have been summoned to the court proceedings, which would have given him notice of the appeal and an opportunity to present arguments and evidence, noting that the Supreme Court initiated the proceedings and reached a conclusion without notice to the Applicant. The Court noted that under Article 31 of the Constitution everyone is entitled to equal protection of rights in court proceedings, as well as a fair and impartial public hearing, and that it is bound under Article 53 of the Constitution to resolve disputes consistently with the European Court of Human Rights (ECtHR), which implicates similar guarantees under Article 6.1 of the ECHR. It reasoned that, although the right to take part in civil or criminal proceedings is not expressly mentioned in Article 6.1, the ECtHR recognized that the right is implicit, citing *Colozza v. Italy* and *Ziliberg v. Moldova*. The Court reasoned that Article 31 and Article 6.1 were therefore applicable in the Applicant's case.

The Court noted that the right to a fair trial is derived from the right to judicial protection under Article 54 of the Constitution, which includes a right to court access, citing *Golder v. the United Kingdom*, and the right to court resolution of a dispute, as well as an opportunity to prepare a case and attend hearings, citing *Gusak v. Russia*. The Court highlighted that a party's right to court access would be abrogated if the party was kept ignorant about court proceedings and decisions, especially when court decisions may bar further examination of the claim, citing *Sukhorubchenko v. Russia*. The Court determined that the Applicant's employer submitted an appeal regarding a case in which the Applicant was the prevailing party, and that the appellate outcome could have had a substantial impact on the Applicant's civil rights. It also noted that although Article 16 of the Law on Administrative Disputes deems any person potentially affected by disposition of a dispute to be a necessary party, the Applicant was not included.

For the reasons stated, the Court issued a Judgment reflecting a breach of Article 31 of the Constitution and Article 6.1 of the ECHR, declaring that the disputed Supreme Court judgment was invalid, remanding the case to the Supreme Court for reconsideration in conformity with the Court's Judgment, and retaining jurisdiction over the case pending compliance with its Judgment.

Pristine, 05 December 2011
Ref. No.: AGJ. 163/11

JUDGMENT

in

Case No. KI108/10

Applicant

Fadil Selmanaj

**Constitutional Review of Judgment of
The Supreme Court of Kosovo A.no.170/2009 of 25 September 2009**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge.

The Applicant

1. The Applicant is Mr. Fadil Selmanaj, residing in Mitrovica.

Challenged Decision

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo A.no.170/2009 of 25 September 2009, which was made known to him on 18 October 2010.

3. The Applicant requests an assessment of the constitutionality of the Judgment of the Supreme Court, because of an alleged *"lack of official communication between Supreme Court and the respondent",* which, according to the Applicant, *"provides room for suspicions that we are dealing here with manipulations and that as a consequences of this, [he] as an interested party, [has been] materially and morally damaged"*.

4. The Applicant also requests the Constitutional Court (hereinafter, the Court) to *"through its decision to repel or annul the Supreme Court Judgment A.nr.170/2009, dated 25 September 2009, due to shortcomings related to lack of evidence from the respondent party, whose obligation was to present proofs and facts in ...[the Applicant's] legal interest."*

5. The Applicant wants to achieve the fulfillment of his rights related to his labour contract.

Legal Basis

6. The Referral is based on Art. 113 (7) of the Constitution of the Republic of Kosovo (hereinafter, the Constitution); Article 20 of Law No. 03/L-121 on the Court of the Republic of Kosovo (hereinafter, the Law), and Rule

56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules).

Proceedings before the Court

7. On 28 October 2010, the Applicant filed a Referral with the Secretariat of the Court.

8. On 7 December 2010, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Robert Carolan (Presiding), Enver Hasani and Gjyljeta Mushkolaj.

9. On 11 January 2011, the Constitutional Court informed the Supreme Court of Kosovo that the Applicant submitted his referral, requesting the Court to assess the constitutionality of the Supreme Court Judgment A. No. 170/2009, dated 25 September 2009.

10. On 24 February 2011, the Constitutional Court requested additional information from the Applicant confirming whether he has ever been notified of the petition submitted by the Municipality of Mitrovica in which the Municipality requested the annulment of the Decision of the Independent Oversight Board.

11. On 2 March 2011, the Applicant informed the Court that he had never received the petition submitted by the Municipality of Mitrovica, nor had he ever been informed about the case pending before the Supreme Court.

12. On 5 April 2011, the Constitutional Court informed the Supreme Court about the Applicant's allegations specified above and asked it to confirm whether the Applicant has ever been informed about the petition submitted by the Municipality of Mitrovica and whether he has ever been informed about the case pending before the Supreme Court.

13. On 12 April 2011, the Supreme Court informed the Constitutional Court that the Applicant's case file was delivered to the Municipal Assembly of Mitrovica on 17 October 2010.

14. On 25 May 2011, the Constitutional Court informed the Municipal Assembly of Mitrovica about the Applicant's allegations and asked the Municipal Assembly to deliver the file case to the Court.

15. On 10 June 2011, the Public Municipal Attorney of the Municipality of Mitrovica sent to the Court a copy of the petition dated 24 February 2009 and a copy of the judgment of the Supreme Court.

16. On 7 July 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

17. On 6 October 2011, the Court deliberated and adopted this judgment.

The facts of the case

18. In 2001, the Applicant was employed in the post of Director of the Directorate for Geodesy, Cadaster and Property within the Municipal Assembly of Mitrovica. His employment contract was valid until 9 March 2008.

19. On 11 January 2008, the Mayor of Mitrovica issued Decision No. 01/49, appointing the Directors of the Municipal Directorates in the Municipality of Mitrovica. However, the Applicant was not reappointed.

20. On 10 March 2008 and on 30 April 2008, the Applicant filed a complaint to the Directorate of Administration and Personnel against the Decision No.01/49, but he did not receive any response to his complaint.

21. On 2 October 2008, the Applicant filed an appeal to the Independent Oversight Board of Kosovo (hereinafter, IOBK), challenging Decision No.01/49 and proposing that his appeal be upheld as grounded. In particular, the Applicant requested that he be provided a workplace that complies with his professional experience and qualifications and his employment contract be thus respected.

22. On 10 February 2009, the IOBK adopted Decision no.02 (285)2008, finding that the Applicant's appeal was grounded. Then, it compelled the employment authority that *"within the deadline of 15 days from the date of the present decision, to facilitate the fulfillment of appellant's rights deriving from the labour relation in compliance with provisions of Article 11 para 11.1 of the Administrative Directive no 2003/2 on the implementation of regulation no 2001/36 of the Kosovo Civil Service, is reassigned to another post of the same level and degree of payment in harmony with his professional skills and training, if it is not possible to return him to the workplace and job description provided by the employment contract"*.

23. That Decision, no.02 (285)2008, also provided that the Director of the Directorate of Administration and Personnel was responsible to implement that decision and that the IOBK should inform the Assembly of Kosovo about non-compliance.

24. Moreover, it was stated in the "legal advice" section of the IOBK decision that this decision is *"final in the administrative procedure and no appeal is allowed against the present decision. However the present decision can be subject of court review in compliance with the laws in force"*.
25. On 24 February 2009, the Municipality of Mitrovica challenged the decision of the IOBK before the Supreme Court, alleging mainly that *"directors of the municipal directorates are not civil servants and enjoy the status of political appointees…"*.

26. Meanwhile, on 5 March 2009, the Applicant informed the IOBK that Decision no.02 (285)2008 was not enforced and therefore he requested IOBK to take the necessary measures prescribed by law in order to enforce the above mentioned decision.

27. On 25 September 2009 the Supreme Court of Kosovo issued Judgment A. no 170/2009 and upheld the suit of the Municipality of Mitrovica**.** Consequently, the decision of the IOBK, A no.02 (285)2008, was annulled.

28. That judgment reads that, on 20 March 2009, the Supreme Court requested the IOBK to submit the case file and its response to the suit. This request was reiterated on 9 June 2009, warning IOBK that, if the case file was not submitted within the provided deadline, the Supreme Court would decide the complaint without the case file. The Judgment further reads that the IOBK did not provide any response to the Supreme Court's second request, it did not submit the case file and thus it did not provide any response to the suit. The Supreme Court Judgment A. no 170/2009 of 25 September 2009 does not contain any reference to the Applicant having been at any stage involved in this administrative dispute as an interested party. Moreover, the Supreme Court had not notified the Applicant or served him with a copy of the challenged judgment.

29. The Applicant stated that, during an occasional visit to the Municipality premises, he "heard" that the judgment had been issued by the Supreme Court. Then, the Applicant requested the Supreme Court to give him a copy of judgment A. no 170/2009.

30. On 8 October 2010, the Supreme Court confirmed having "received your [of the Applicant] letter on 04.10.2010, whereby you requested to be delivered a copy of the judgment A. nr. 170/2009". The Supreme Court further informed the Applicant that it "does not do the expedition [delivery] of decisions, so you can have recourse to the Independent

Oversight Board of Kosova (first instance body) for the realization of your rights".

31. Consequently, on 18 October 2010, the Applicant approached IOBK and, upon his request, he was given a copy of the judgment of the Supreme Court.

32. There is no evidence to show that the Applicant received a copy of the Municipality's petition to the Supreme Court or any notification that the case was pending or was finalized at the Supreme Court.

Arguments of the Applicant

33. The Applicant argues that he is an interested party in the proceedings which started and reached a final decision in the Supreme Court.

34. He alleges that he has never been notified of the existence of any stage of such proceedings and learnt about the final decision only by chance.

35. The Applicant appears to conclude that his right to fair trial, guaranteed by Article 31 of the Constitution, has been violated by the actions and omissions of the administrative and judicial bodies.

Reply and comments

36. The Court has not received replies and/or comments from the Supreme Court or from Mitrovica Municipality relating to the Applicant's allegations.

Relevant legal background

37. On 25 September 2009, the date of the Judgment of the Supreme Court, the Constitution of the Republic of Kosovo was already in force.

38. Article 16 of the 1977 Law on Administrative Dispute establishes that *"the third person to whom the nullification of the challenged act would be in direct damage (interested party) has in the dispute the position of the party"*.

39. Furthermore, Article 27 of that Law on Administrative Dispute obliges a petitioner to submit an additional copy together with accompanying documents of the petition to any interested party as well.

40. Finally, Article 33 of the same Law on Administrative Dispute prescribes the obligation of the Court to deliver a copy of the petition to any interested party.

Admissibility of the Referral

41. The admissibility requirements are laid down in the Constitution and further specified in the Law and the Rules of Procedure.

42. The Court refers to Article 113 (7) of the Constitution, which provides:

"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".

43. The Court has to consider whether the Applicant has exhausted all remedies provided by law. For that purpose, the Court takes into account that the IOBK Decision no.02 (285)2008 stated that "the decision is final in the administrative procedure and no appeal is allowed against the present decision. However the present decision can be a subject of court review in compliance with the laws in force" (legal advice of that decision).

44. The Court notes that the Applicant has never received a copy of the judgement from the Supreme Court. Moreover, the Supreme Court by its letter dated 8 October 2010 effectively did not provide the Applicant with a copy of the judgement and referred him to approach IOBK and then ask for a copy of the judgement. Thus, it seems that the Applicant did not have prescribed remedies at his disposal.

45. The Court also notes that the 1977 Law on Administrative Disputes does not generally provide for an Appeal.

46. However, Article 52(6) of the 1977 Law on Administrative Disputes provides that the procedure concluded by a Judgement or a Decision may be re-opened *"if the interested party did not have an opportunity to participate in the procedure"*. Article 53 of the same Law further provides that the request for re-opening of the procedure *"can be initiated within the time limit of 30 days from the date when the party learnt the reason for the re-opening"*.

47. The Court refers to its case AAB-RIINVEST University L.L.C., Prishtina, vs. Government of the Republic of Kosovo, KI. 41 /09, of 27 January 2010, where it was stated as follows.

"(...) applicants are only required to exhaust remedies that are available and effective. Discretionary or extraordinary remedies need not to be exhausted, for example requesting a court to revise its decision (see, mutatis mutandis, ECHR, Cinar v. Turkey, no 28602/95, decision of 13 November 2003)".

48. The European Court of Human Rights (ECtHR) considers that *"when a domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence' (...),that person should, once he becomes aware of the proceedings, be able to obtain, from the court which has heard him, a fresh determination of the merits of the charge".* (See Colozza v. Italy, 12 February 1985, para 27, Series A no. 89, para 29.)

49. If there is a procedure allowing such a fresh determination, a litigant should in principle try to use it: leave to appeal out of time against a judgment given in absentia may be a remedy that needs to be exhausted, but, in the particular circumstances of the case, it would not be effective. (See Sejdovic v. Italy [GC]. No. 56581/00 paras 43 and 47-55, ECHR 2006-II.)

50. The Court notes that there is no evidence that the Applicant has been either informed of the possibility of reopening the procedure before the Supreme Court or that the Applicant would have the opportunity of appearing at a new procedure to present his arguments.

51. Thus, the Court considers that the abovementioned jurisprudence of ECtHR applies *mutatis mutandis* to the case in the sense that the Applicant is not required to exhaust extraordinary legal remedies that appear not to be effective.

52. Therefore, taking into account the circumstances of the case, the case law of this Court as well as the ECtHR, the Constitutional Court concludes that the Applicant's referral is admissible.

Substantive legal aspects of the Referral

53. As stated earlier, the Applicant's claims that the Judgment of the Supreme Court violated his right to fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (the Convention).

54. Article 31 [Right to Fair and Impartial Trial] of the Constitution prescribes as follows:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

55. Furthermore, Article 53 [Interpretation of Human Rights Provisions] of the Constitution prescribes 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".

56. In addition, Article 6 (1) of the European Convention on Human Rights reads:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]"

57. On one hand, the Applicant alleges more precisely that he is an interested party to the proceedings and that his right to a fair trial has been violated due to the actions and omissions of the administrative and judicial bodies.

58. The ECtHR considers that, although the right to take part in a hearing is not expressly mentioned in Article 6 (1), *"the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing".* (See Colozza v. Italy, 12 February 1985, p 27, Series A no. 89.) *"Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in his criminal trial. This includes, inter alia, a right not only to be present, but also to hear and follow the proceedings. This right is implicit in the very notion of an adversarial procedure".* (See Ziliberg v. Moldova, no. 61821/00. p.40, 1 February 2005.)

59. Moreover, Article 6 (1) applies to both civil and criminal proceedings. Even though Article 6 (2) and (3) state that they apply to criminal proceedings, the ECtHR considers that Article 6, "*read as a whole*", may apply also to civil proceedings.

60. The Constitutional Court is bound, under Article 53 of the Constitution, to interpret human rights and fundamental freedoms guaranteed by the Constitution *"consistent with the court decisions of the European Court of Human Rights"*.

61. The Court notes again that, in the Applicant's case, proceedings started and reached a final decision in the Supreme Court, without the Applicant having been present in such proceedings and without him being notified of the Decision taken.

62. Therefore, the Constitutional Court finds that Article 6 (1) of the Convention and Article 31 of the Constitution are applicable to the Applicant's case.

63. Furthermore, the Applicant alleges that his absence during the course of the proceedings and the lack of notification to him of the final decision violates his right to a fair trial.

64. The fundamental right to a fair trial is derived from the fundamental right to judicial protection, guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution. In fact, the right to a fair trial is a general reference to a complex of other rights, including, the right to access to a court.

65. The Court reiterates that the procedural guarantees laid down in Article 6 of the European Convention on Human Rights secure to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way, it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. (See *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, pp. 13-18, §§ 28-36.) The right of access to a court includes not only the right to institute proceedings but also the right to obtain a "determination" of the dispute by a court.

66. In that respect, the ECtHR considered that *"a litigant should be summoned to a court hearing in such a way as not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare his case and to attend the court hearing*. (See Gusak v. Russia, 7 June 2011, *Application no. 28956/05,* para 27.)

67. The ECtHR further considered that *"a litigant's right of access to a court would be illusory if he or she were to be kept in the dark about the developments in the proceedings and the court's decisions on the claim, especially when such decisions are of the nature to bar further*

examination. (See Sukhorubchenko v Russia, Judgment of 10 February 2005, para 53.)

68. In the case at issue, the IOBK adopted Decision no.02 (285)2008, finding that the Applicant's appeal is grounded and it compelled the municipality of Mitrovica, *"within the deadline of 15 days from the date of the present decision, to facilitate the fulfillment of appellant's rights deriving from the labour relation (...)".*

69. Meanwhile, the municipality of Mitrovica challenged the decision of IOBK before the Supreme Court. The Supreme Court of Kosovo delivered Judgment A. no 170/2009, upholding the suit of the municipality of Mitrovica and, **c**onsequently, annulled the decision of the IOBK A 02(285). The Applicant claims that he was completely put aside during all these proceedings.

70. In fact, the Municipality of Mitrovica filed a petition with the Supreme Court in the file case where the Applicant was already a party. Thus, the Applicant was a stranger to that petition, in spite of the fact that the petition impacted substantially on the determination of his civil rights. That conclusion is corroborated by Article 16 of the Law on administrative disputes which prescribes that the "*the third person to whom the nullification of the challenged act would be in direct damage (interested party) has in the dispute the position of the party".*

71. Also, it must be stated that the IOBK, as "a*n independent oversight board for civil service shall ensure the respect of the rules and principles governing the civil service" (*Article 101 (2) of the Constitution).

72. Furthermore, *"the judicial power (...) ensures equal access to the courts"* and *"the Supreme Court of Kosovo is the highest judicial authority"* (Articles 102 and 103 of the Constitution)

73. The case file requested by the Supreme Court was exactly the same case where the Applicant filed an appeal to the IOBK, against the Decision No.01/49 of the municipality of Mitrovica. Therefore, the Applicant and the municipality of Mitrovica were the very parties to the case and the IOBK acted as a "first instance body", as mentioned by the Supreme Court in its letter of 8 October 2010.

74. The Court considers that the foregoing ECtHR jurisprudence also applies *mutatis mutandis* to the present case, particularly, in that that the Applicant should have been summoned to the court proceedings in such

a way as not only to have knowledge of its existence but also to present arguments and evidence during the course of proceedings.

75. Therefore, it must be concluded that there was a violation of Article 31 of the Constitution, in conjunction with Article 6 (1) of the European Convention on Human Rights.

FOR THESE REASONS, THE COURT UNANIMOUSLY

I. Declares the Referral admissible;

II. Holds that there has been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 [Right to a Fair Trial] of the European Convention of Human Rights;

III. Declares invalid the Judgment of the Supreme Court of Kosovo A.no.170/2009 of 25 September 2009;

IV. Remands the Judgment to the Supreme Court for reconsideration in conformity with the judgment of this Court;

V. Remains seized of the matter pending compliance with that order;

VI. Orders this Judgment be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VII. Declares that this Judgement is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Sami Bunjaku vs. Decision of the Trial Panel of the Special Chamber of the Supreme Court, SCC 10-0079, and the Constitutionality of UNMIK Administrative Direction No. 2008/6 amending and replacing UNMIK Administrative Direction No. 2006/17, implementing UNMIK Regulation No. 2002/13 on the establishment of a Special Chamber of the Supreme Court of Kosovo Trust Agency Related Matters

Case KI 34-2011, decision of 8 December 2011

Keywords: authorized parties, discrimination, equality before the law, exhaustion of legal remedies, human dignity, individual referral, language issues, right to fair and impartial trial

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 5, 23, 24 and 31 of the Constitution were infringed by a decision of the Special Chamber of the Supreme Court, which dismissed the Applicant's claim for verification of land ownership because of his failure to abide by an Order requiring translation of all court submissions into English as required by UNMIK Regulation No. 2002/13. The Applicant argued that the judgment of the Special Chamber was unjust because it required the use of a non-official language when communicating with the court, adding that a remedy would be in the public interest.

The Court held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court because his appeal to the Appellate Panel of the Special Chamber was still pending, which reflected a failure to meet the prerequisite of exhaustion of all legal remedies, citing *AAB-RIINVEST University L.L.C. vs. the Government of Kosovo* and *Selmouni v. France.* The Court also held pursuant to Article 113.2 of the Constitution that the Applicant was not an authorized party to a challenge of the constitutionality of a law.

Pristina, 8 December 2011
Ref. No.: RK 167/11

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 34/11

Applicant

Sami Bunjaku

Constitutional Review of the Decision of the Trial Panel of the Special Chamber of the Supreme Court, SCC 10-0079, dated 21 January 2011,

and the

Constitutionality of UNMIK Administrative Direction No. 2008/6 amending and replacing UNMIK Administrative Direction No. 2006/17, implementing UNMIK Regulation No. 2002/13 on the establishment of a Special Chamber of the Supreme Court of Kosovo Trust Agency Related Matters

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Sami Bunjaku from Gjakova, represented by Mr. Avdi Rizvanolli, a practicing lawyer from Gjakova.

Challenged decision

2. The Applicant challenges the Decision of the Trial Panel of the Special Chamber of the Supreme Court (hereinafter: the "Special Chamber"), SCC 10-0079, of 21 January 2011, which was served upon the Applicant on 28 January 2011.

3. Furthermore, the Applicant challenges also the constitutionality of UNMIK Administrative Direction No. 2008/6 amending and replacing UNMIK Administrative Direction No. 2006/17, implementing UNMIK Regulation No. 2002/13 on the establishment of a Special Chamber for

Trust Agency Related Matters of the Supreme Court of Kosovo (hereinafter: UNMIK AD No. 2008/6).

Subject matter

4. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the constitutionality of the Decision of the Trial Panel of the Special Chamber, SCC 10-0079, and the constitutionality of UNMIK AD No. 2008/6, whereby his rights guaranteed by Articles 5 [Languages], 23 [Human Dignity], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to fair trial] in conjunction with Article 14 [Prohibition of discrimination] of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the "ECHR") have been violated.

Legal basis

5. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 1 February 2011, the Applicant submitted the Referral to the Court.

7. On 18 April 2011, the President, by Order No. GJR. 34/11, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President, by Order No. KSH. 34/11, appointed the Review Panel composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and Kadri Kryeziu.

8. On 6 May 2011, the Court requested the Applicant, whether he had appealed the Decision of the Special Chamber, SCC 10-0079, of 21 January 2011 to the Appellate Panel of the Special Chamber.

9. On 16 May 2011, the Applicant submitted to the Court the additional information requested, providing that he appealed the Decision of the Special Chamber, SCC 10-0079, of 21 January 2011 to the Appellate Panel of the Special Chamber.

10. On 15 June 2011, the Court communicated the Referral to the Special Chamber of the Supreme Court.

11. On 3 October 2011, the Court requested the Special Chamber to submit its comments on the complaint of the Applicant, where after the Special Chamber replied on 12 October 2011 that:

    "…
    According to the Section 25.7. of UNMIK AD 2008/6 the submissions of the proceedings have to be delivered to the SCSC in Albanian, Serbian or English. However, if they are submitted only in Albanian or Serbian, an English translation of the submissions and supporting documents: shall, as well be submitted to the court. If the party (a natural person) is not able, due to his/her financial situation, to take care of the translation of the documents on his/her own expenses, the court can grant the party upon an application exemption from the court fees and the assistance in translation.

    The Trial Panel of the SCSC has with its decision on 21 January 2011 dismissed the claim of Sami Bunjaku and the others as inadmissible because the Claimant submitted the English translation of only the claim and the history of the respective cadastral plots but no translation of the other documents. The Claimant has appealed against the decision of the Trial Panel to the Appellate Panel of the SCSC. The appeal is still pending in the Appellate Panel. Therefore, it is not possible for the SCSC furthermore to take stance on the Complaint of Sami Bunjaku in a case which is still pending in the court.
    …"

12. On 24 November 2011, the Review Panel considered the Report of the Judge Rapportuer and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

13. On 19 April 2010, the Applicant initiated a procedure to verify his alleged ownership right before the Trial Panel of the Special Chamber.

14. On 22 November 2010, the Trial Panel of the Special Chamber issued an order to the Applicant, pursuant to Article 28.4 of UNMIK AD 2008/6, whereby the Applicant was requested to translate within two weeks the complaint and the documents into English.

15. On 8 December 2010, the Applicant only partially fulfilled the Order.

16. On 21 January 2011, the Trial Panel of the Special Chamber rendered a decision rejecting the Applicant's complaint, since the Applicant did not fulfill its order (SCC-10-079) of 22 November 2010.

17. On 31 January 2011, the Applicant appealed the Decision of the Trial Panel of the Special Chamber, SCC 10-0079, of 21 January 2011 to the Appellate Panel of the Special Chamber complaining that according to Article 5 of the Constitution, the official languages in Kosovo are Albanian and Serbian and that he is not obligated to translate the documents into English.

Applicant's allegations

18. The Applicant alleges that the UNMIK AD 2008/6 is in violation of Articles 5 [Languages], 23 [Human Dignity], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to fair trial] in conjunction with Article 14 [Prohibition of discrimination] of ECHR.

19. Furthermore, the Applicant alleges that nowhere in the world the parties are obliged to communicate with the court in a language which is not an official language, according to the Constitution. In this respect, the Applicant poses the question whether the Court is at the service of itself or for the citizens.

Assessment of the admissibility of the Referral

20. The Applicant alleges that his right guaranteed by Articles 5 [Languages], 23 [Human Dignity], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to fair trial] in conjunction with Article 14 [Prohibition of discrimination] of ECHR have been violated. The Court observes that, in order to be able to adjudicate the Applicant's complaint, it is necessary to first examine whether he has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

21. In this respect, the Court emphasizes that it can only decide on the admissibility of a Referral, if the Applicant shows that he/she has exhausted all effective legal remedies available under applicable law pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law, providing:

    "113.7 of the Constitution: 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."

"47.2 of the Law: The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

22. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see mutatis mutandis, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).

23. In the present case, the Court finds that the Applicant has filed an appeal against the Decision of the Special Chamber, SCC 10-0079, of 21 January 2011 to the Appellate Panel of the Special Chamber complaining that according to Article 5 of the Constitution, the official languages in Kosovo are Albanian and Serbian and that he is not obligated to translate the documents into English. The Appellate Panel of the Special Chamber has not yet rendered a decision in this matter. If his claim before the Appellate Panel would not be successful, then the Applicant can bring a Referral before this Court.

24. It follows, that the Applicant has not exhausted all legal remedies available under applicable law, as required by Article 113.7 of the Constitution and Article 47(2) of the Law.

25. As to the request of the Applicant to review the constitutionality of UNMIK AD No. 2008/6, the Court notes that only authorized parties under Article 113.2 of the Constitution are entitled to submit the question of compatibility of laws with the Constitution. Therefore, the Applicant is not an authorized party under Article 113.2 of the Constitution.

26. For these reasons, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.7 and 113.2 of the Constitution, Article 47 (2) of the Law, and Rule 56 (2) of the Rules of Procedure, on 24 November 2011, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Xhevrije Haliti vs. Judgment Rev. No. 588/2008 of the Supreme Court

Case KI 91-2011, decision of 8 December 2011

Keywords: individual referral, judicial protection of rights, manifestly ill-founded referral, right to fair and impartial trial, right to liberty and security, right to work and exercise profession, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that her rights under Articles 31, 49 and 54 of the Constitution were infringed by a judgment of the Supreme Court, which reversed a decision of the lower courts and rejected the Applicant's claim against Raiffeisen Bank for termination of employment, arguing that it was not a fair and impartial outcome.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Articles 102, 103 and 113.7 of the Constitution and Rule 36.1(c) of the Rules of Procedure because the Applicant merely expressed dissatisfaction with the outcome and failed to specify the manner in which her rights were violated and at which stage of the proceedings the violation occurred, citing *Mezotur-Tiszacugi Tarsulat v. Hungary*. The Court added that its role was limited to resolving Constitutional controversies, not factual disputes, citing *Akdivar v. Turkey*.

Prishtina, on.8 December 2011.
Ref. No.:RK166/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 91/11

Applicant

Xhevrije Haliti

Request for Constitutional review of the Judgment of the Supreme Court of Kosovo Rev. No. 588/2008 of 14 April 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasni-prsident
Kadri Kryeziu, Deputy-President
Robert Carolan, judge
Altay Suroy, judge
Almiro Rodrigues, judge
Snezhana Botusharova, judge
Ivan Čukalović, judge
Gjyljeta Mushkolaj, judge and
Iliriana Islami, judg

Applicant

1. The applicant is Mrs. Xhevrije Haliti from Ferizaj residing in ”Astrit Bytyqi” Street no. 65, represented by the authorized lawyer Mr. Halil Ilazi from Ferizaj.

Challenged decision

2. The challenged decision of the public authority alleging the violation of the rights guarantied by the Constitution of Kosovo is the Judgment of the Supreme Court, Rev. no. 588/2008 dated 14 April 2011 which applicant of the Referral claims to have received by 2 June 2011.

Subject matter

3. The subject matter of the referral submitted with the Constitutional Court of the Republic of Kosovo on 4 July 2011, is the assessment of the Constitutionality of the Judgment of Supreme Court of Kosovo, Rev. no. 388/2008 of 14 April 2011, which had approved the Revision of the respondent “Raiffeisen Bank” where the applicant worked since 2002 and than on October 2003 her working relation was terminated.

Alleged violations of the rights guaranteed by the Constitution

4. The applicant alleges that with the judgment of the Supreme Court are violated the rights guaranteed by the Constitution of the Republic of Kosovo as follows: Article 49 (the right to work and profession), Article 31 (the right to fair and impartial trial), Article 54 (the right to judicial protection of the rights) and Article 6 of European Convention of Human Rights (hereinafter: ECHR).

Legal basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: Constitution), Article 47 of the Law no. 03/L-121 for the Constitutional Court of the Republic of Kosovo dated 16 December 2009 entered into force on 15 January 2010 (hereinafter referred to as: Law) and Article 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: Rules).

The complaint of the applicant

6. The applicant claims that the Supreme Court with the Judgment Rev. no. 588/2008 dated 14 April 2011, denied her the right to work, which right recognized otherwise the Municipal Court of Ferizaj with the Judgment C. no. 470/03.04.2007 and the District Court of Prishtina with Judgment AC. no. 497/07 dated 14 October 2008.

Proceeding before the Court

7. On 4 July 2011 Constitutional Court received the referral of Mrs. Xhevrije Haliti presented before the Court by the authorized lawyer Mr. Halil Ilazi and registered under No. KI 91/11.

8. On 17 August 2011 by the decision GJR 91/11 President of the Court appointed Judge Robert Carolan as Judge Rapporteur.

9. On the same day President of the Court appointed the Review Panel composed by Altay Suroy (Presiding) and judges Ivan Čukalović and Dr. Gjyljeta Mushkolaj.

10. Constitutional Court had informed the Supreme Court and the representative of the Applicant on 5 August 2011, for registration of the case, but had not received any comment from any party, within the legal deadline.

11. The Constitutional Court deliberated on the Referral on 30 November 2011 and review panel proposed to the full court for inadmissibility of the referral.

Summary of the facts

12. On October 1 2003, Mrs. Xhevrije has received written notice from "Raiffeisen Bank" that from October 1, 2003, based on Article 1 of her labor contract, that she will be ".....terminated from her employment at the bank, while the termination of employment is due to reorganization

and excessive number of employees in the branch office of this bank in Ferizaj."

13. On 3 April 2007 the Municipal Court of Ferizaj issued Judgment Ac. no. 470/03, which approved the claim of the plaintiff Ms. Xhevrije Haliti, and annulled the decision on the unilateral termination of her employment contract, and at the same time obliged the respondent "Raiffeisen Bank" to compensate to plaintiff the cost of proceedings in the amount of 708.00 €.

14. On 14 October 2007 the District Court of Prishtina, acting on the appeal of "Raiffeisen bank" rendered the Judgment Ac. no. 297/2007, which rejected the appeal of the respondent "Respondent Bank" and confirmed the Judgment of the Municipal Court of Ferizaj C. no. 470/03 of 3 April 2007.

15. According to the claim of the lawyer Mr. Halil Ilazi, as representative of Ms. Xhevrije Haliti, upon the Judgment of the District Court in Prishtina Ac. Nr. 497/2007, the "Raiffeisen Bank" had returned Mrs. Xhevrije Haliti to work and she continues to work in this institution as of 1 November 2011.

16. On 14 April 2011 the Supreme Court decided upon Revision of the respondent "Raiffeisien Bank" and rendered the Judgment Rev. no. 588/2008, which approved the Revision of the respondent and changed the Judgment of the District Court of Prishtina AC. No. 497/2007, dated 14 October 2008 and Judgment of Municipal Court in Ferizaj C. no. 470/2003 dated 3 April 2007 , therefore REFUSED the claim suit of the plaintiff Xhevrije Haliti to revoke the termination of her employment contract and return her to the workplace at "Raiffeisen Bank" –branch in Ferizaj.Supreme Court

17. Supreme Court in the reasoning part of the Judgment Rev. no. 588/2008 concluded that the lower instances in this case have decided correctly evaluated the factual situation but have applied wrongfully the material law. Hence, the Supreme Court concluded that the legal qualification of the lower instance Courts that the termination of labour Contract for the applicant was done in breach of Article 11.1 of Regulation 2001/27 of Essential Labour Law in Kosovo is unacceptable, because Article 11.4 (b) of the same law foresees that **repeated violations** are sufficient ground for termination of employment contract which according to the Supreme Court occurred in this case and according to this legal qualification quashed the lower instances decisions.

18. On June 6 2011, 4 days after the receipt of Judgment of the Supreme Court which decided on the Revision presented by "Raiffeisen Bank" on the labor dispute that has to do with it, Mrs. Xhevrije Haliti signed a new employment contract for an indefinite period that was conditioned with the work performance of employee and may be subject to termination under the conditions laid down in Article 8.

19. Finally, despite the fact that she had a new labor contract with the same employer, Mrs. Xhevrije Haliti, through her lawyer Mr. Halil Ilazi on 4 July 2011 filed a referral for assessing the Constitutionality of Judgment of Revision of Supreme Court Rev. no. 588/2008 of 14. April 2011.

Assessment of the admissibility of the referral

20. The Court observes that, to be able to adjudicate the applicant's complaint, it is necessary to first examine whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

21. In this connection, the Court refers to Article 113(7) of the Constitution, which provides:

    "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".*

    The Court also stipulates:

    Rule 36 of the Rules of Procedure of the Constitutional court which provides:

    "(1*) The Court may only deal with Referrals if:*
    c) The Referral is not manifestly ill-founded.

22. Referring to the supposed violation of the rights guaranteed with the Constitution of the Republic of Kosovo and other international conventions and instruments, the Court emphasizes:

23. In Article 102 [General principles of the Judicial System] item 3 of the Constitution in item 2 also provides that: "Courts shall adjudicate based on the Constitution and the Law".

24. In article 103 **[Organization and the jurisdiction of the Courts],** of the Constitution item 2 also clearly provides: "Supreme Court is the highest judicial authority".

25. In this regard there are not any facts that the Supreme Court in deciding on the request for revision which is expressively authorized pursuant to Article 212 of the LCP has violated Article 31.2 (the right to fair and impartial trial) article 54 (the juridical protection of rights), or Article 6 of the ECHR (right to fair and impartial trial) for which the applicant has alleged that have been violated.

26. In fact, the applicant apart from expressing the dissatisfaction for Revision issued by the Supreme Court has not argued convincingly why the trial "was not fair and impartial" in which manner it has been treated as unequal or what stage of the procedure was against the Constitution.

27. The fact that the applicant who filed referral with the Constitutional Court, continues to work at "Raiffeisen Bank" and that has a new employment contract, is not essential for legal issues and does not argue possible violations of Constitution in the challenged Judgment, because it happened after the Supreme Court decided on the Revision, and was not part of the evidence presented before that Court. Moreover, the representative of the applicant has noted in the application that the new employment contract between the Applicant and her employer, after the Supreme Court has decided on the revision of the respondent, it is a new fact which does not directly affect in this legal issue, but however according to him is not inconsistent with law.

28. Constitutional Court is not a Court of verifying facts. and in this case the determination of the right and complete factual situation is under the full jurisdiction of the regular courts and the role of the Constitutional Court is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. It cannot act as a "fourth instance court" (see mutatis mutandis, i.a. Akdivar against Turkey, 16 September 1996 , R.J.D. 1996-IV, paragraph 65).

29. The simple fact that the applicants are dissatisfied with the case outcome, cannot serve then as the right to raise an arguable referral for violation of the Article 31 of the Constitution (see *mutatis mutandis* ECHR, Judgment Ap. Nr. 5503/02, Mezotur-Tiszazugi Tarsulat against Hungary, Judgment of 26 July 2005).

30. In this regard the Constitutional Court should find no evidence that the Supreme Court has not made a "fair and impartial trial" by bringing the

decision as to the above revision and does not find that with that decision a violation the rights guaranteed by the Constitution.

31. In this respect the applicant of referral failed to "sufficiently argue his allegation", therefore I recommend to the Review Panel in accordance with the rule 36.2 (c) and (d) to refuse the referral as manifestly ill-founded

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56 (2) of the Rules of Procedure, on 30 November 2011, unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

Shahe Ramaj vs. Government of the Republic of Kosovo, Ministry of Health

Case KI 102-2011, decision of 12 December 2011

Keywords: actio popularis, authorized parties, discrimination in employment, equality before the law, health and social protection, human rights, individual referral, international agreements and instruments

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that the Ministry of Health (MOH) violated Articles 21.1, 21.3 and 24.1 of the Constitution when failing to promulgate the Law on Health Insurance ("Law"). The Applicant argued that lower courts had not responded to his complaint, that MOH had promulgated many other laws, that the Government claims that there is no budget for the Law but has funded other projects and that the failure to promulgate the Law was discriminatory.

The Court held that the Referral was inadmissible pursuant to Articles 113.1 and 113.7 of the Constitution because she has not substantiated her claim, that a public authority had violated her individual rights and freedoms, as guaranteed by the Constitution, adding that the Constitution does not provide for an abstract complaint by *actio popularis*.

Pristine, 12 December 2011
Ref. No.: RK176/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 102/11

Applicant

Shahe Ramaj

vs

Government of the Republic of Kosovo, Ministry of Health

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mrs. Shahe Ramaj residing in Terdece, Municipality of Gllogoc.

Subject matter

2. The Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 28 July 2011 complaining that the Government of the Republic of Kosovo (hereinafter: the "Government"), Ministry of Health has not promulgated the Law on Health Insurance.

3. The Applicant complains, that the Government, Ministry of Health, has violated:

    a. Article 21.1 and 3 [General Principles] and Article 24.1 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution");
    b. Article 29 of the Universal Declaration of Human Rights;
    c. Article 1 [Obligation to respect human rights] and Article 14 [Prohibition of discrimination] of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereinafter: "ECHR"); and
    d. Article 2 of the International Covenant on Civil and Political Rights and its Protocols.

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 28 July 2011, the Applicant submitted the Referral to this Court.

6. On 17 August 2011, the President, by Order No. GJR. 102/11, appointed Deputy-President Kadri Kryeziu as Judge Rapporteur. On the same date, the President, by Order No. KSH. 102/11, appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Enver Hasani and Gjyljeta Mushkolaj.

7. On 24 October 2011, the Court communicated the Referral to the Ministry of Health, which replied on 9 November 2011 providing that the Draft Law on Health Insurance has been prepared and that the Ministry of Health is waiting only for the evaluation of the budget implications by the Ministry of Finance in order to proceed the Draft Law on Health Insurance to the Government.

8. On 29 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on inadmissibility of the Referral.

Summary of facts

9. On 28 March 2011, the Applicant filed a claim with the Municipal Court of Pristina against the Government, Ministry of Health, for not promulgating the Law on Health Insurance.

10. On 29 April 2011, the Applicant filed a request with the Municipal Court requesting it to review her claim.

11. On 24 May 2011, the Applicant filed a submission on modification of the claim with the Municipal Court.

12. On 31 May 2011, the Applicant filed a complaint with the Judicial Inspectorate of the Kosovo Judicial Council (hereinafter: the "KJC") against the Municipal Court in Pristina for failure to review and resolve her claim.

13. On 8 June 2011, the Office of the Disciplinary Counsel (hereinafter: the "ODC") of the KJC ruled that the Applicant's request is premature taking into consideration the fact that she had submitted her claim to the Municipal Court only on 28 March 2011 (ZPD/11/kb/0472).

14. On 13 June 2011, the Applicant filed a complaint against the decision of the ODC with the KJC.

Applicant's allegations

15. The Applicant alleges that:

    a. so far she has not received any response from the KJC nor from the Municipal Court in Pristina.

    b. the Government, respectively the Ministry of Health, has promulgated a lot of Laws, while the Law on Health Insurance has not been promulgated.

    c. the Government, has stated that there is no budget to promulgate this Law, but this is not true. The Government has enacted a lot of laws and has allocated a budget for the construction of many social housing buildings in Kosovo, for the construction of universities in Kosovo and for the motorway in Kosovo. It has funds for everything, but not for the Law on Health Insurance.

    d. By not promulgating this Law, the Government of Kosovo has made the biggest possible discrimination that a country could do to its citizens, especially this category.

Assessment of the admissibility of the Referral

16. The Applicant alleges that her rights guaranteed by Articles 21.1 and 3 [General Principles] and 24.1 [Equality Before the Law] of the Constitution, Article 29 of the Universal Declaration of Human Rights, Article 1 [Obligation to respect human rights] and Article 14 [Prohibition of discrimination] of ECHR and Article 2 of the International Covenant on Civil and Political Rights and its Protocols have been violated by the Government, Ministry of Health, by not promulgating the Law on Health Insurance. The Court observes that, in order to be able to adjudicate the Applicant's complaint, it is necessary to first examine whether she has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

17. In this respect, the Court refers to Article 113.1 of the Constitution which provides:

    "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".

and Article 113.7 of the Constitution:

"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."

18. Accordingly, the Court emphasizes that the Constitution does not provide for an "actio popularis", i.e. individuals cannot complain in the abstract about legislation or governmental acts which have not been applied to them personally through a measure of implementation.

19. From the submitted documents, the Court notes that she has not substantiated that a public authority has violated any of her individual rights and freedoms guaranteed by the Constitution, as required by Article 113.7 of the Constitution.

20. Accordingly, the Applicants' Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.1 and 113.7 of the Constitution, Article 47 of the Law, and Rule 56 (2) of the Rules of Procedure, on 29 November 2011, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Mr.Sc.Kadri Kryeziu	Prof. Dr. Enver Hasani

Bujar Luzha vs. Directorate for Urbanism, Cadastre and Environmental Protection of Kaçanik Municipal Assembly

Case KI 39-2010, decision of 12 December 2011

Keywords: administrative dispute, confirmation of ownership, eminent domain, eviction, execution of decision, exhaustion of legal remedies, individual referral, interim measures, protection of property

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his to protection of property under Article 46 of the Constitution was infringed by a resolution of the Directorate for Urbanism, Cadastre and Environmental Protection because it contradicted interim measures granted by the Prishtina District Court as part of his challenge of his landlord's effort to evict him from rented property.

The Court held that the Referral was premature and inadmissible pursuant to Rule 47.2 of the Law on the Constitutional Court because he had not yet exhausted all legal remedies, noting that a remedy for non-compliance with interim measures is available through the lower courts, citing *AAB-RIINVEST University L.L.C. vs. the Government of Kosovo* and *Selmouni v. France*.

Pristine, 12 December 2011
Ref. No.: RK164/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 39/10

Applicant

Bujar Luzha

vs.

Directorate for Urbanism, Cadastre and Environmental Protection of Kaçanik Municipal Assembly

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Bujar Luzha, residing in Kaçanik.

Challenged decision

2. The Applicant challenges the Resolution 06 nr. 6924/2009, of 26 August 2009, of the Directorate for Urbanism, Cadastre and Environmental Protection.

Subject matter

3. Applicant's Referral relates to an alleged violation of Article 46, paragraphs 1 and 2 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter referred to as the "Constitution").

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law and Rule 56 (2) of the Rules of Procedure.

Proceedings before the Court

5. On 31 May 2010, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the "Court").

6. On 2 June 2010, the President, by Decision Nr. GJR. 39/11, appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President, by Decision Nr. KSH. 39/10, appointed the Review Panel

composed of judges: 1. Robert Carolan (Presiding), 2. Mr. sc. Kadri Kryeziu and 3. Dr. Iliriana Islami.

7. On 24 August 2010, a copy of Applicant's Referral was sent to Kaçanik Municipal Assembly (hereinafter referred to as "Kaçanik MA") respectively to the Directorate for Urbanism, Cadastre and Environmental Protection (hereinafter referred to as "DUCEP").

8. On 4 October 2011, the Applicant submitted additional documents to the Court.

9. On 6 June 2011, Kaçanik MA submitted a reply to the Referral.

10. On 22 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts of administrative proceedings

11. On 7 July 2009, Kaçanik MA, through Notification nr. 06. nr. 5146/2009, requested the Applicant to vacate the location that was rented to him by Kaçanik MA, respectively by DUCEP, by 7 August 2009.

12. On 27 July 2009, the Applicant submitted an appeal with Kaçanik MA and objected Notification nr. 06. nr. 5146/2009 to vacate the location that was rented to him by the former Kaçanik MA, through Decision 05. nr 463-70/86, of 8 July 1987.

13. On 3 August 2009, Kaçanik MA, respectively DUCEP, through Resolution Nr. 6035/2009, rejected Applicant's request and decided that Notification nr. 06. nr. 5146/2009, of 7 July 2009, should still remain in force, reasoning that the main entrance to the town of Kaçanik from M2 Highway was planned to be built at the location where provisional business premises were located, and based on Decision 05. nr 463-70/86, of 8 July 1987, the Applicant is a provisional user.
14. On 7 August 2009, the Applicant submitted an appeal with the Ministry of Spatial Planning (hereinafter referred to as "MSP") within the determined time limit, against Resolution nr. 6035/2009, of 3 August 2009, of Kaçanik MA. The Applicant stressed in his appeal that the location in question is not property of Kaçanik MA, but of the Ministry of Transport, Post and Telecommunications, respectively of the Directorate for Roads.

15. On 26 August 2009, DUCEP, through Resolution Nr. 6924/2009, again rejected Applicant's appeal, leaving in force Notification nr. 06. nr.

5146/2009, of 7 July 2009, and Resolution Nr. 6035/2009, of 3 August 2009, for the removal of the provisional building, stressing that the provisional building the Applicant was allowed to use in 1987, is located in the cadastral plot, known as uncategorized Public Roads, administered by the municipality of Kaçanik.

16. On 5 October 2009, the Applicant requested Kaçanik MA to submit to him the process concerning the forcible execution of the demolition of the building.

17. On 6 June 2011, Kaçanik municipality submitted its reply to the Referral defending the execution of its decision for the demolition of Applicant's building, reasoning it with the fact that the Applicant has been duly notified to remove his building. It also claims that the Applicant filed an appeal and referred to cadastral plot 1849, which is property of the Directorate for Roads in Prishtina. It also stress that resolution of The District Court in Prishtina for imposing interim measures concerns to the cadastral plot 1849, and not to cadastral plot 1850, which is registered in the possession list no. 1159 as social property – uncategorized Roads – of Kaçanik municipality.

Summary of the facts of court proceedings

18. On 22 July 2009, the Applicant filed a lawsuit under number C. nr. 133/2009 with the Municipal Court in Kaçanik requesting the imposition of interim measures and confirmation of ownership, but the court did not approve Applicant's request for the imposition of interim measures.

19. On 7 August 2009, the Applicant filed an appeal with the District Court in Prishtina against Resolution C. nr. 133/2009, of 22 July 2009, and asked for the approval of the request for interim measures.

20. On 22 September 2009, the District Court in Prishtina issued Resolution Ac. nr. 923/2009 approving Applicant's request for interim measures, whereby it prevented the respondent, the Directorate for Roads in Prishtina, and the third parties to undertake any action that would damage the building erected in the cadastral plot 1849, at the place called "Dushkaja", with a culture of roads of first category, registered in the possession list nr. 1159 CO, while the issue of demolition and pulling down of the building is to be settled in an administrative proceeding.

21. On 29 September 2009, despite the fact that the District Court in Prishtina approved Applicant's request for the imposition of interim measures, Kaçanik MA did not implement the decision of the court to stop the pulling down of the building, but it violently ordered its

demolition, although Decision Ac. nr. 923/2009 had been placed on the building to suspend all actions concerning the building.

22. On 15 January 2010, the Applicant submitted a request with Ombudsperson's Institution (hereinafter referred to as "OI"). This Institution considered the execution of Resolution Nr. 5156/09, of 29 September 2009, as unconstitutional, while Kaçanik MA, respectively DUCEP, was informed that the District Court in Prishtina has approved Applicant's request for the imposition of interim measures, so the action taken by Kaçanik municipal authorities is in contradiction to Article 124, paragraph 6, of the Constitution of the Republic of Kosovo. OI requested information from Kaçanik MA regarding the non-execution of interim measures issued by the District Court in Prishtina on 22 September 2009, in a reasonable time no later than 26 February 2010, in order to proceed further with Applicant's request.

Applicant's allegations

23. The Applicant claims that Kaçanik municipal authorities, through Resolution 06 nr. 6924/2009, of 26 August 2009, decided unlawfully because the authority that issued the decision, according to the Applicant, was incompetent and it decided despite the fact that the District Court in Prishtina has approved his request for the imposition of interim measures. These violations have been confirmed by OI, as mentioned in paragraph 18 of this Report.

The assessment of the admissibility of the Referral

24. The Applicant claims that his right guaranteed by Article 46, paragraphs 1 and 2 [Protection of Property] of the Constitution has been violated. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure of the Court, in particular, it should prove whether he has exhausted all legal remedies provided by law.

25. After having examined all relevant facts and evidence, the Courts notes that the Applicant had filed a lawsuit with the Municipal Court in Kaçanik and he had requested the confirmation of ownership over the disputed property, as well as the application of interim measures on the same issue, but Applicant's statement of claim had been rejected as ungrounded by the latter. The Applicant thus filed an appeal with the District Court in Prishtina requesting the application of interim measures and the prohibition of the demolition of the building in the cadastral plot 1849, since the latter had determined the real factual

situation as reasonable and Applicant's request for the application of interim measures as grounded pursuant to Article 297.1(b) of LCP, from the fact that the Municipal Court had erroneously determined the substantive law, because Kaçanik municipality did not correctly and accurately specify to the Applicant what actions he should undertake to vacate the location, since two cadastral plots were in question. Subsequently, despite the fact that the District Court in Prishtina had approved Applicant's request for the application of interim measures, Kaçanik MA ordered the demolition of the building.

26. However, the Court finds that even if alleged violations of constitutionally guaranteed rights existed, the Applicant was to have realized his right through regular court proceedings, b y filing a lawsuit with the competent court requesting the compensation of the damage caused by Kaçanik MA authorities.

27. From the abovementioned facts, it results that Applicant's Referral is premature because he has not proven he has exhausted all effective legal remedies available under the law, which clearly stipulates:

Article 47.2 [Law on the Constitutional Court]

"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".

28. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights (see Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see *mutatis mutandis*, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).

29. Therefore, it results that Applicant's Referral is inadmissible pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.2 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, on 22 November 2011, unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Altay Suroy	Prof. dr. Enver Hasani

Dede Bala vs. Judgments of the Municipal Court of Pristina P. No. 2630/2006, the District Court of Pristina Ap. No. 242/2007 and the Supreme Court of Kosovo Pkl. Nr. 101/2010

Case KI 42-2011, decision of 12 December 2011

Keywords: criminal matter, human rights, individual referral, intent to commit criminal offense, interim measures, judicial protection of rights, leniency, manifestly ill-founded referral, mitigating circumstances, restitution, right to fair and impartial trial, sufficiency of evidence, tax evasion

The Applicant, who was convicted of income tax evasion, filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 7.1, 54 and 102 of the Constitution were infringed by a judgment of the Supreme Court, which affirmed decisions of the lower courts rejecting the Applicant's claims that statements that he made during police questioning were improperly admitted as evidence, the offense of conviction was unrecognized by law and there was insufficient evidence of his intent to commit a crime.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Rules 36.1(c) and 36.2 of the Rules of Procedure because he failed to produce *prima facie* evidence substantiating a Constitutional violation, citing *Vanek v. Slovak Republic*. It also noted the lack of evidence that the Supreme Court proceedings were in any way unfair or tainted by arbitrariness, citing *Shub v. Lithuania*. Furthermore, the Court denied the Applicant's request for suspension of his prison sentence as an interim measure pursuant to Article 27 of the Law on the Constitutional Court for failure to demonstrate the potential for irreparable damage if the measure is not granted or that it would be in the public interest.

Pristina, 12 December 2011
Ref. No. RK173/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 42/11

Applicant

Dede Bala

Constitutional Review of the Judgments of, the Municipal Court of Pristina P.No.2630/2006, the District Court of Pristina Ap.No 242/2007 and the Supreme Court of Kosovo Pkl.nr.101/2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Dede Bala from the Municipality of Gjakova.

Subject Matter

2. The Applicant claims a violation of Article 7.1 [Values], Article 31 Paragraph [Right to a fair and impartial trial] in conjunction with Articles 6 and 13 of the European Convention on Human Rights (hereinafter the "Convention"), Article 54 [Judicial Protection of Rights], and Article 102 Paragraph 2 [General Principles of Judicial System] of the Constitution of the Republic of Kosovo (hereinafter the "Constitution"). The Applicants also alleges violation of Article 1 Protocol No.1 to the Convention.

Legal Basis

3. The Referral is based on Art. 113.7 of the Constitution; Articles 46, 47, 48 and 49 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Rules of Procedure)

Challenged court decisions

4. In his referral the Applicant challenges the Judgment of the Municipal Court of Pristina P.No.2630/2006 dated 26 March 2007. He also

challenges the Judgment of the District Court of Pristina Ap.No.242/2007 dated 27 May 2010 and the Judgment of the Supreme Court of Kosovo Pkl.nr.101/2010 dated 30 December 2010.

Procedure before the Court

5. On 28 February 2011 the Applicant submitted a letter with arguments for appeal to the Constitutional Court of Kosovo (hereinafter the "Court").

6. On 24 March 2011 the Applicant submitted the Referral to the Court.

7. In his Referral, the Applicant is also seeking an interim measure to suspend his prison sentence, until such time as the Constitutional Court decides and evaluates the constitutionality of the challenged decisions.

8. On 18 April 2011 the President appointed Judge Snezhana Botusharova as Judge Rapporteur and a Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Kadri Kryeziu.

9. On 29 November 2011, after having considered the Report of the Judge Rapporteur, the Review Panel, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

10. On 26 March 2007 the Municipal Court of Pristina in its decision, P.No.2630/2006, found the Applicant guilty of committing tax evasion under Article 249 Paragraph 2, in conjunction with Paragraph 1 of the Provisional Criminal Code of Kosovo (UNMIK/REG/2003/25, hereinafter: the "PCCK").

11. The Municipal Court sentenced the Applicant to one year imprisonment to serve after the Verdict becoming final and binding , and fined him €12,000 which he had to pay within one year from the date of the Verdict becoming final and binding, in 12 equal instalment. The sentence was also to cover the time the Applicant spent in detention from 11 December 2006 through 26 March 2007.

12. The Applicant was also obliged to compensate the injured party for the material damage by paying the amount of €31,914.17 within 15 days of the Verdict becoming final.

13. The Municipal Court found that the material benefit acquired by the commiting of the criminal offense by the accused amounted to at least €212,761.15. In this case confiscation of the gain made was not possible

so the difference between the net gain and the damages (€180,846.98) was to be paid to the Kosovo Consolidated Budget.

14. The Applicant appealed the Judgment to the District Court. He alleged, that there were procedural violations in contradiction with the provisions of Article 403, Paragraph 1, items 9 and 12, Paragraph 2 items 1 and 2, of the Provisional Criminal Procedure Code of Kosovo (UNMIK/REG/2003/26 hereinafter PCPCK). He reached this conclusion because, he was taken into questioning by an officer of the Sector for Investigation of Economic Crimes and Corruption in Pristina, prior to the presentation of evidence, whereby he claims he had his statement truncated and he was precluded from the use and presentation of material evidence during questioning since the day of the arrest and onward. He claimed the verdict was contradictory and does not contain reasons on the decisive facts, the issuance of an indictment was not preceded by investigative actions which, he believed would acknowledge in a righteous and complete manner the factual state, and his rights to a defence were violated since he was not allowed to use documentation that he had at his disposal, to the benefit of his defence, from the moment of his arrest.

15. The Applicant also claims there were violations of Article 404 Paragraph 1 items 1, 2, 4 and 5 of the PCPCK because; the act for which he was prosecuted was not envisaged as a criminal offence under UNMIK Regulation 2000/20 on Tax and Administration which was in force until 30 April 2005. A criminal offence under Article 15 Paragraph 1 of the PCCK requires intention to evade or avoid tax which the Applicant did not have. The verdict was based, among other things, on the provisions of Article 71 of the PCPCK which envisages the possibility for the issuance of penalties on the amalgamation of criminal offences, whereas it is known that the Applicant was only accused of one criminal offence, the conduct of which has not been proven by the Municipal Court and finally the Municipal Court has established the factual situation incorrectly.

16. On 27 of May 2010 the District Court of Pristina in its decision Ap.No.242/2007 partially approved the appeal and amended the sentence with regard to the verdict on penalty, consequently the Supreme Court reduced the Applicant's sentence to nine months. In justifying this decision the Supreme Court claimed that the original verdict of the Municipal Court did not assess all the mitigating circumstances at the required level, in particular that the Applicant had a family and had no previous criminal record.

17. The District Court held that; the challenged verdict was concrete and clear, there were no contradictions within itself and the reasons presented in the confronted verdict. The District Court did not find that in the confronted verdict there were fundament violation of the PCPCK, the factual state was corroborated in a rightful and complete manner. According to the conclusion and opinion of the Court the financial expert and the Municipal Court rightly applied the criminal law when it concluded that the actions of the Applicant included elements of the criminal offence of tax evasion under Article 249 Paragraph 2 in relation to Paragraph 1 of the PCCK. On this basis the rest of the verdict remained unchanged.

18. On 12 August 2010 the Applicant submitted a request for protection of legality based again on violations of Article 403 Paragraphs 1 and 12 as well as Paragraph 2, item 1 of the PCPCK and Article 404 Paragraph 1 items 1, 2, 4 and 5 of the PCPCK.

19. The Supreme Court of Kosovo, by its Judgment Pkl.nr.101.2010, dated 30 December 2010, rejected the Applicant's request for protection of legality. The Supreme Court held that; the Applicant's complaint that the he was taken in for questioning by officers of the Section for Investigating Economic Crimes and Corruption before any evidence was provided was not a violation of Article 403 Paragraph 1, subparagraph 9, none of the evidence was classed as unacceptable and the claims that the Applicant's right to protection was violated turned out to be ungrounded because the minutes of the Court hearing showed that he had enjoyed all rights provided to him by law and that he was given the opportunity to defend himself through all stages of the criminal procedure.

20. The Supreme Court held that while the crime of tax evasion is not foreseen under Regulation 2000/20 on Tax and Administration the it is foreseen under Article 249 Paragraph 2 of the PCCK. It was also covered by the Criminal Law of Kosovo (hereinafter "CLK") which was applicable until the year 2004, when the PCCK was adopted. However since the PCCK foresees a more lenient sentence for the crime of tax evasion than the CLK, this was applied, in conformity with the applicable laws, as the most favourable law for the accused.

21. The Applicant's claim that the he did not know that such actions were prohibited because he only completed elementary school and was legally and factually misled, according to the Supreme Court, are absurd due to the fact that the Defendant first claimed that an inapplicable law was applied and that the resolution was grounded on unacceptable evidence. He then claimed that there was no confirmation that the accused did

commit the crime, only to conclude in the end that the accused did in fact evade taxes, but was misled, which is completely contradictory.

Applicant's allegations

22. The Applicant alleges that there was a violation of Article 7 Paragraph 1 of the Constitution because the courts failed to respect the principles of compliance with human rights and freedoms and rule of law, which the constitutional order of the Republic of Kosovo is based on.

23. The Applicant claims that the courts failed to provide full and proper support to the Applicant in the protection of his rights as guaranteed by the Constitution, namely they failed in properly judging the criminal/legal dispute. According to him, the courts therefore acted in contradiction with the provisions of Article 31, Paragraph 1 and 2 of the Constitution in conjunction with Article 6 and 13 of the European Convention on Human Right (hereinafter "ECHR").

24. The Applicant alleges that the courts failed to offer proper judicial protection to the Applicant, as guaranteed by Article 54 of the Constitution.

25. The Applicant claims that the Courts violated Article 102 Paragraph 2 of the Constitution which states that: "The judicial power is unique, independent, impartial…" because the courts made decisions in opposition with the law and to the detriment of the Applicant.

Preliminary assessment of interim measure

26. As regards the Applicant's request that the Constitutional Court issue an interim measure to suspend his prison sentence, the Court considers that the submissions of the Applicant do not contain sufficient evidence or reasons, which might justify the granting of an interim measure.

27. In particular, the Applicant has not shown, as required by Article 27 of the Law, that he will suffer irreparable damage, if an interim measure is not granted. Moreover, it has not been established that the imposition of interim measures would be in the public interest.

28. Therefore, the requirements for the imposition of interim measures are not satisfied and the Applicant's' request must be rejected.

Preliminary assessment of admissibility

29. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court first needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, further specified in the Law on the Constitutional Court and the Rules of Procedure.

30. In this respect the Court recalls that according to Rule 36(1)(c) "*the Court may only deal with Referrals if the Referral is not manifestly ill-founded*."

31. Rule 36 (2) of the Rules of Procedure further prescribes that:

"The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

a) the Referral is not prima facie justified, or

b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

d) when the Applicant does not sufficiently substantiate his claim;"

32. The Applicant has not submitted any prima facie evidence indicating a violation of his rights under the Constitution (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

33. The Court finds the Applicant's claims for, *inter alia*, the finding of a violation of Article 31 of the Constitution in conjunction with Articles 6 and 13 of the Convention as well as Article 1 Protocol No.1 of the Convention entirely unsubstantiated.

34. The Court notes that the Supreme Court addressed the Applicant's allegations in its Judgment Pkl.nr.101.2010 of 30 December 2010. Having taken this into consideration the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis,* Shub v Lithuania, ECtHR Decision as to the Admissibility of Application no.17964/06 of 30 June 2009).

35. The Court concludes, therefore, that the Referral is manifestly ill-founded, within the meaning of Article 36 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113.7 of the Constitution, Article 27 of the Law and Rule 36 of the Rules of the Procedure unanimously:

DECIDES

I. TO REJECT the request for interim measure;

II. TO REJECT the Referral as Inadmissible;

III. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Snezhana Botusharova	Prof. Dr. Enver Hasani

Lutfi Dervishi vs. Decisions of the District Court of Pristina: Kp. no. 196/2009, PPS. no. 02/2009, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, P. no. 309/10, P. no. 340/10, KA no. 278/10 and KA. no. 309/10

Case KI 80-2011, decision of 12 December 2011

Keywords: admissibility of evidence, criminal matter, due process, exhaustion of legal remedies, extension of investigation, individual referral, right to fair and impartial trial, right to liberty and security, service of process

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Article 31 of the Constitution, and Articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, were infringed because he was never informed of an extension of a criminal investigation, he was not informed about an unwarranted search and a subsequent suppression of evidence, and he was not informed of the prosecutor's appeal of a judge's ruling on the indictment. In essence, the Applicant argued that he was deprived of fundamental due process and equality of arms.

The Court held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court for failure to exhaust all potential remedies because the case was still pending in the trial court and pretrial remedies were still available, citing *AAB-RIINVEST University L.L.C. vs. Government of Kosovo* and *Selmouni v. France* regarding the assumption that the Kosovo legal system will provide an effective remedy for constitutional violations.

Pristina, 12 December 2011
Ref. No.: RK174/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 80/11

Applicant

Lutfi Dervishi

Constitutional Review of the Decisions of the District Court of Pristina:

Kp. no. 196/2009, dated 8 June 2009,

PPS. no. 02/2009, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, dated 1 March 2011,

P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, dated 27 April 2011.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Lutfi Dervishi, represented by Mr. Linn Slattengren a practicing lawyer from Pristina.

Challenged decisions

2. The Applicant challenges the following Decisions of the District Court in Pristina:

    a. Kp. no. 196/2009, of 8 June 2009, which allegedly was never served upon the Applicant;

    b. PPS. no. 02/2009, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, of 1 March 2011, which allegedly was picked up by the representative of the Applicant on 1 March 2011; and

c. P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10, of 27 April 2011, which allegedly was picked up by the representative of the Applicant on 27 April 2011.

Subject matter

3. The Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court") to assess the constitutionality of the Decisions of the District Court in Pristina, whereby his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 [Right to fair trial] and Article 5 [Right to liberty and security] of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the "ECHR") have allegedly been violated.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 9 June 2011, the Applicant submitted the Referral to the Court.

6. On 17 August 2011, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Enver Hasani and Altay Suroy.

7. On 15 September 2011, the Applicant, informing the Court that "the Prishtina District Court has set the case for trial starting 4 October 2011", requested information on "the status of proceedings" and whether the Court "expects to take any action before the trial date".

8. On 19 September 2011, the Court informed the Applicant that the Case has been registered and is being reviewed by the Court. On the same date, the Court communicated the Referral to the District Court of Pristina.

9. On 11 October 2011, the Court communicated the Referral to the EULEX Prosecutor in Pristina.

10. On 22 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 12 November 2008, the Prosecutor started Investigations against the Applicant for the criminal offences of Articles 139.1 and 23 of the Criminal Code of Kosovo (hereinafter, the "CCK"), for an initial period of six months.

12. On 22 May 2009, the Prosecutor filed a request with the District Court of Pristina to extend the investigations for a further six months.

13. On 31 May 2009, the pre-trial judge of the District Court of Pristina rejected the request to extend the investigation for further six months (GJPP 361/08). It reasoned that *"In the present case, the investigations have started on the 12th of November 2008, thus the initial investigation term of six (6) months has expired on 12 May 2009. The application of the Public Prosecutor to extend the investigations for further six (6) months has been filed with the District Court of Prishtine/Pristina on the 22nd of May 2009, with a delay of ten (10) days. Thus, the investigation, being already expired at the time when the application for the extension has been filed by the Public Prosecutor (22nd of May 2009), cannot be further extended"*, pursuant to Articles 94, 95 and 225 of CCK.

14. In June 2011, the Prosecutor filed an appeal against this decision to the Appellate Panel of the District Court of Pristina.

15. On 8 June 2009, the Appellate Panel of the District Court of Pristina approved the appeal of the Prosecutor and granted him/her the request for extension of investigation (Kp. no. 196/2009), taking into account that *"Article 225 of CCK does not state expressively that the application for extension of investigations should be filed in a timely continuance with the development of the until then investigations."* Against this decision, pursuant to Article 431 (2) of CCK no appeal is permitted.

16. On 9 November 2009, the pre-trial judge approved another extension for more six months.

17. On 11 January 2010, the pre-trial judge approved another extension for more six months.

18. On 12 May 2010, the Supreme Court approved an extraordinary extension of investigations for additional six months.

19. On 15 October 2010, an indictment was filed with the District Court of Pristina (PPS 41/09).

20. On 20 October 2010, indictment (PPS. No. 107/10) was filed with the District Court of Pristina.

21. On 29 November 2010, the indictments of 15 and 20 October 2010 were joined.

22. On 14 December 2010 and 6 January 2011, the confirming Judge held a confirmation hearing concerning the joined indictments.

23. On 31 January 2011, the District Court of Pristina rendered a decision on admissibility of evidence, ruling that some of the evidence seized was done in violation of the law and rights of the Applicant (PPS. No. 02/2009).

24. On 8 February 2011, the Prosecutor filed an appeal against this decision to the three judge panel of the District Court of Pristina. In addition, on 22 February 2011, the Applicant filed a response to the appeal of the Prosecutor.

25. On 1 March 2011, the three panel judge of the District Court of Pristina granted the appeal of the Prosecutor and annulled the decision of 31 January 2010, reasoning that "it is not possible during the confirmation hearing for the judge to hear live evidence or, in the opinion of the Panel, to make a final determination of the facts that led to the seizure of evidence. This is the exclusive province of the trial panel" Hence the case was returned to the confirming Judge to issue a ruling on the indictment only pursuant to Article 316 of CCK (PPS. no. 02/2009, P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10).

26. On 2 March 2011, the confirming Judge confirmed partially the indictment against the Applicant (KA 278/10, P 309/10, KA 309/10, P 340/10).

27. The Prosecutor appealed against this decision to the three judge panel of the District Court of Pristina. The Applicant also filed a response to the appeal of the Prosecutor.

28. On 27 April 2011, the three judges' panel of the District Court of Pristina granted the appeal of the Prosecutor and modified the ruling of the

confirming Judge of 2 March 2011 in that all charges were confirmed (P. no. 309/10, P. no. 340/10, KA. no. 278/10 and KA. no. 309/10).

Applicant's allegations

29. The Applicant alleges what follows.

(i) Violation of the right to fair and impartial hearing

a. The Applicant was never informed of the court ruling on extension of the investigation and this ruling was never served on him. Therefore, the Applicant could not appear or appeal this clearly unjust and illegal ruling (on extension of the investigation). Hence, he was denied the right to public hearing.

b. The Applicant claims that the investigation was ongoing during two years without him being given a public hearing. Hence, he was also denied a fair and impartial public hearing as to the criminal charges within a reasonable time..

c. The Applicant was not informed about the ruling on the extension of the investigation. Hence, he was denied an impartial public hearing as to the criminal charges.

(ii) Violation of the equality of arms principle

d. The Applicant claims that an unwarranted "search" was conducted at the Medicus clinic and no inventory of the "search" has been provided to him. He further claims that, on 31 January 2011, the confirming Judge [...] issued a ruling suppressing the evidence seized [...]. Subsequently, the Prosecutor filed a secret appeal against the ruling of the confirming Judge. The defense was never served with this appeal. The Prosecutor, as a matter of comity, informed the Applicant of the appeal. Counsel filed a response with the appellate panel [...]. Hence, he was denied the equality of arms and a fair and impartial trial.

(iii) Violation of due process

e. The Applicant claims that, on 2 March 2011, the confirming Judge issued a ruling confirming the indictment against him [...]. [...] the Prosecutor filed a secret appeal against the ruling of the confirming Judge. The defense was never served with this appeal either. The Prosecutor again informed the undersigned of the fact of the appeal. Counsel filed a

response with the appellate panel [...]. Hence, he was denied fundamental due process as to the criminal charges.

30. In sum, the Applicant is alleging mainly a violation of the right to fair and impartial hearing, violation of the principle of equality of arms and violation of due process.

31. All the violations have been allegedly committed during the investigation, the pre-trial stage of the criminal proceedings which are still pending.

32. Almost all the contested decisions were subject to Appeal, where it was decided, namely, that "the issue of admissibility of evidence should properly be determined by the trial panel".

33. The Applicant basis his allegations mainly on Article 6 [Right to Fair Trial] and Article 5 [Right to Liberty and Security] of the ECHR.

34. Article 5 (4) and Article 6 (1) of the ECHR pursue different purposes [right to liberty and security; and right to fair and impartial trial]. Consequently, the criminal head of Article 6 does not apply to proceedings for the review of the lawfulness of detention falling within the scope of Article 5 (4), which is the *lex specialis* in relation to Article 6. (See *Reinprecht v. Austria*, §§ 36, 39, 48 and 55).

35. In general, Article 5 has to do with the right to be informed about the charges, while Article 6 deals with the right to challenge and discuss the charges.

36. It is up to the trial Judge, and if necessary up to the main trial, to consider the alleged violations and determine on the criminal charges. The trial Judge must then apply the Code of Criminal Procedure in a way consistent with the Constitution and the European Convention case-law.

Assessment of the admissibility of the Referral

37. The Court emphasizes that it can only decide on the admissibility of a Referral, if the Applicant shows that he/she has exhausted all effective legal remedies available under applicable law.

    Article 113.7 of the Constitution establishes that "*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.*"

On the other side, Article 47.2 of the Law provides that *"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

38. The principle of subsidiary requires that the Applicant exhausts all procedural possibilities in the regular proceedings in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right.

39. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the legal order of Kosovo will provide an effective remedy for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Prishtina vs. the Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see mutatis mutandis, ECHR, Selmouni vs. France, no. 25803/94, Decision of 28 July 1999).

40. In fact, as a general rule, the Constitutional Court will only intervene where there are infringements of the interpretation of the Constitution or the laws do not comply with the Constitution, but only after exhaustion of all legal remedies provided by law.

41. In the present case, the Court notes that the case is still pending before the regular court, where the Applicant will still be able to raise his complaints before the trial Judge about the alleged violation of his rights during the pretrial period. Thus, the Court considers that there is no final decision yet to be challenged before this Court.

42. Therefore, the Applicant has not exhausted all legal remedies, including the last instance, available under applicable law, as required by Article 113.7 of the Constitution and Article 47(2) of the Law.

43. For all the foregoing, the Referral is inadmissible

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 (2) of the Law, and Rule 56 (2) of the Rules of Procedure, on 22 November 2011, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Almiro Rodrigues	Prof. Dr. Enver Hasani

Kadri Bytyqi vs. Order of the Special Chamber No. SCEL 09-0009

Case KI 83-2011, decision of 12 December 2011

Keywords: deadline issue, exhaustion of legal remedies, human dignity, individual referral, language issues, termination of employment

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 23 and 55 of the Constitution were infringed by an Order of the Special Chamber of the Supreme Court because it failed to include him in the list of employees entitled to a 20% share of proceeds from the sale of the privatized enterprise THE "Theranda" in Prizren.

The Court held that the Referral was premature and inadmissible pursuant to Article 47.2 of the Law on the Constitutional Court and Rule 36.1(a) of the Rules of Procedure because the Applicant had failed to prove that he exhausted all possible legal remedies by responding to the Special Chamber's request for a justification for his late filing, citing *AAB-RIINVEST L.L.C. v. Government of Kosovo* and *Selmouni vs. France*. The Court also found that the Referral was inadmissible pursuant to Article 49 of the Law and Rule 36.1(b) because he failed to submit the Referral within four months of the date of service of the Order in controversy.

Pristine, 12 December 2011
Ref.No.:RK168/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 83/11

Applicant

Kadri Bytyqi

Constitutional Review of the Order of the Special Chamber No. SCEL 09-0009, dated 26 October 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Kadri Bytyqi residing in Hoqë e Qytetit, Municipality of Prizren.

Challenged decision

2. The Applicant challenges the Order of the Special Chamber no. SCEL 09-0009, dated 26 October 2010, served on the Applicant on 30 October 2010.

Subject matter

3. Applicant's Referral is related to the alleged violation of Article 23 [Human Dignity], Article 24 [Equality Before the Law] and Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law and Rule 56(2) of Rules of Procedure.

Proceedings before the Court

5. On 20 June 2011, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 21 June 2011, the Court requested from the Applicant to submit the Order of the Special Chamber SCEL 09-0009, dated 26 October 2011 together with the receipt of the said Order that has been served on him.

7. On 29 June 2011, the Applicant submitted the reply to the request.

8. On 17 August 2011, the President, by Order No. GJR. 83/11, appointed Judge Robert Carolan as Judge Rapporteur. On the same day, the President, by decision No. KSH. 83/11, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović.

9. On 25 August 2011, the Referral was communicated to the Special Chamber.

10. On 7 September 2011, the Applicant again submitted a reply to the request.

11. On 25 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

12. The Applicant has worked as a cook in the socially-owned enterprise THE (Tourism and Hospitality Enterprise) "Theranda" in Prizren from 7 July 1983 until 31 July 1995 and again continued to work from 21 June 1999 until 18 November 2002,when his contract was terminated by the said enterprise.

13. On 21 January 2002, THE "Theranda" through notification No. 16 informed the Applicant that the labor relationship would be terminated on 18 November 2002 even though the Applicant's contract was to expire on 20 January 2003.

14. On 26 October 2010, the Special Chamber issued Order no. SCEL-09-0009 and responded to Applicant's complaint filed against the Kosovo Privatization Agency (hereinafter: "PAK"). Pursuant to Article 10.6 (a) of UNMIK Regulation 2003/13 the Special Chamber states that the deadline for filing a complaint against the employees' list who have not benefited from the 20% (percent) of the enterprise THE "Theranda" was 10 days and that this deadline had expired on 13 June 2009, whereas the Applicant has filed a complaint on 21 September 2010. For this reason the Applicant has been invited to give explanations and provide evidence regarding the failure to file the complaint within the legal time limit, otherwise, as the Order of Special Chamber stated, the complaint would be rejected as inadmissible.

Applicant's allegations

15. The Applicant alleges that the Special Chamber of Supreme Court issuing the said Order has violated his constitutionally guaranteed rights, by not including him in the list of eligible employees entitled to 20 % share of proceeds from the sale of the privatized enterprise THE "Theranda" in Prizren.

Assessment of the admissibility of Referral

16. The Applicant alleges that his right guaranteed by Articles 23 [Human Dignity], 24 [Equality Before the Law] and 55 [Limitations on Fundamental Rights and Freedoms]5 [Languages], of the Constitution have been violated. The Court, in order to be able to adjudicate the Applicant's Referral, first needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and Rules of Procedure of the Court.

17. In the present case, the Court notes that the Applicant has not proved that he has exhausted all available legal remedies as it is prescribed by the Constitution, the Law and the Rules of Procedure.

18. This conclusion is based on the fact that the Special Chamber has requested the Applicant to substantiate and provide evidence regarding the delay in filing the complaint against the list of employees who have not benefited from the share of 20% of the funds of enterprise THE "Theranda" in Prizren within the time limit, stipulated by UNMIK Regulation 2003/13. There is no evidence that the Applicant ever responded to the Special Chamber's request. Consequently, based on this fact it appears that the Applicant for his case had not received yet a final decision and he has not proved that he has used the possibility that was given to him by the Special Chamber to substantiate his complaint.

19. Consequently, the Referral is considered premature due to the fact that the Applicant has failed to prove that he has exhausted all legal remedies available under the law in force.

20. The requirement for exhaustion of legal remedies is laid down in Article 47.2 of Law, which reads:

Article 47.2 [Individual Requests]

"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".

21. The rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right

the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (See Resolution on Inadmissibility: AAB-RIINVEST L.L.C., Prishtina vs. Government of Republic of Kosovo, KI-41/09 dated 21 January 2010 and mutatis mutandis, ECHR, Selmouni vs. France, no. 25 803/94, Decision of 28 July 1999).

22. However, even if the Applicant had exhausted all effective legal remedies, another important requirement that the Applicant should have fulfilled was to submit the Referral for the realization of a certain right within the time limit established in the Law and Rules of Procedure of the Court.

23. In the present case, from the Applicant's submissions it clearly appears that the Order of Special Chamber No. SCEL -09-0009, of 26 October 2010, was served on the Applicant on 30 October 2010, whereas the Applicant filed his Referral with the Constitutional Court on 20 June 2011, which is more than 4 months from the date of service of the said Order. Therefore, it results that the Referral has been filed after the time limit prescribed in Article 49 of the Law, and it should have been filed with the Court on 1 March 2011.

24. Article 49 of the Law on Constitutional Court explicitly provides:

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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced.

25. Under these circumstances, the Referral must be rejected as being out of time, pursuant to Article 49 of the Law and Rule 36 (b) of the Rules of Procedure.

26. Consequently, pursuant to Article 113.7 of the Constitution and Article 47.2, Article 49 of the Law, Rule 36. (a) and (b) of Rules of Procedure, the Applicant's Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.2 and Article 49 of the Law on the Constitutional Court, and Rule 56 (2) of the Rules of Procedure, on 25 November 2011, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law on the Constitutional Court; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. Dr. Enver Hasani

Rexhep Ademi vs. Reconsideration decision HPCC/REC/101/2008 of the Housing and Property Claims Commission

Case KI 84-2011, decision of 12 December 2012

Keywords: conflict of laws, eviction, individual referral, international agreements and instruments, manifestly ill-founded referral

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that Article 22 of the Constitution was violated when the Kosovo Property Agency evicted the Applicant and his family from their apartment for nonpayment of rent.

The Court held that the Referral was manifestly unfounded and inadmissible pursuant to Article 48 of the Law on the Constitutional Court and Rule 36.2(b) under the Rules of Procedure because the Applicant failed to submit *prima facie* evidence substantiating a constitutional violation, citing *Vanek v. Slovak Republic.* After examining the evidence, the Court did not find that the proceedings were in any way unfair or tainted by arbitrariness, citing *Shub v. Lithuania.*

Prishtina, 12. December 2011
No. ref.: RK170/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 84/11

Applicant

Rexhep Ademi

Constitutional review of the reconsideration decision of the Housing and Property Claims Commission HPCC/REC/101/2008 of 19 June 2008

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Rexhep Ademi from Mitrovica, Mitrovica Municipality.

Challenged Decision

2. The Applicant challenges the reconsideration decision of the Housing and Property Claims Commission (hereinafter: HPCC) HPCC/REC/101/2008 of 19 June 2008, by which was upheld the decision HPCC/d/108/2004/C of 13 February 2004.

Subject Matter

3. The subject matter is the reconsideration decision HPCC/REC/101/2008 of 19 June 2008, which to Applicant's allegations violated Article 22 [Direct Application of International Agreements and Instruments] of the Constitution of the Republic of Kosovo and the European Social Charter of 1996.

Legal Basis

4. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo dated 16 December 2008 (hereinafter: the "Law") and Rule 56(2) of the Rules of Procedure.

Proceedings before the Constitutional Court

5. On 21 June 2011, the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 26 July 2011, the Constitutional Court informed Mr. Rexhep Ademi and the Kosovo Property Agency (hereinafter: KPA) which is the legal

successor of HPCC, that the proceedings on review of constitutionality in case No. KI-84-11 have been initiated.

7. On 29 August 2011, the KPA in its reply informed the Court in details about the proceedings on decision HPCC/REC/101/2008 of 19 June 2008.

8. On 13 October 2011, the Constitutional Court requested from KPA additional documentation with evidence when the decision HPCC/REC/101/2008 of 19 June 2008, was served to the Applicant.

9. On 17 October 2011, KPA submitted to the Constitutional Court a copy of the return receipt proving that, on 31 March 2011, the Applicant has received the decision HPCC/REC/101/2008 of 19 June 2008.

10. On 21 November 2011, after deliberating on the report of Judge Ivana Čukalović, the Review Panel composed of Judges Almiro Rodrigues (Presiding), Dr. Gjyljeta Mushkolaj and Dr. Iliriana Islami, proposed to the full Court to reject the Referral as inadmissible.

Summary of the Facts

11. The Commission for Housing claims of the Construction Material Industry in Zvečan (hereinafter: CMIZ) by its decision, of 26 March 1980, on the temporary use of the apartment No.220, gave to the Applicant in a temporary use the apartment located in premises of the old Directorate in Mitrovica.

12. According to the Applicant's allegations, he lived in that apartment with other 6 family remembers *„till end of August 1998, when paramilitary Serbian forces, using force, evicted him from the flat…"*.

13. After the war he returned to the apartment, but before the HPCC were initiated proceedings on claim DS309975 submitted by V.G., requesting to get back in possession the flat in Gavril Principi Street 231.

14. By decision HPCC/D/108/2004/C of 13 February 2004 was confirmed the right to the apartment possession in favor of V.G., this decision was served to the Applicant on 23 November 2007.

15. The Applicant objected the decision HPCC/D/108/2004/C of 13 February 2004.

16. In the reconsideration proceedings, by decision HPCC/REC/101/2008 of 19 June 2008, was upheld the decision HPCC/d/108/2004/C of 13 February 2004, by which the right to the apartment possession was determined in favor of V. G.

17. The apartment has remained in possession of the Applicant, in which according to the Applicant's allegations, "*he lives for continuous 18 years*", for what he has the confirmation of the Independent Organ of the Directorate for Housing and Property.

18. The decision HPCC/REC/101/2008 of 19 June 2008 becomes final, what is indicated in the instruction on legal remedies of the UNMIK Regulation No. 23/1999 Article 2.7 :

Final decisions of the Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo.

19. Later on, the Applicant concluded a contract on leasing the immovable property from the KPA, on 27 May 2011, the KPA sent out the last warning on eviction from the leased flat, due to a failure to meet the obligations of leasing contract (non-payment of rent), in the last warning was indicated that if he fails to meet the obligations stipulated in the lease contract by 2 June 2011, the KPA will be forced to terminate the leasing contract.

20. On 15 June 2011, the KPA due to non-payment of rent evicted the Applicant and his family from the flat concerned.

Applicant's Allegations

21. The Applicant believes that his rights as a citizen of the Republic of Kosovo have been violated by the HPCC and its legal successors, KPA, that the decisions taken are inconsistent with the Constitution of Kosovo and international documents on human rights.

22. The Applicant considers that the KPA's decision is inconsistent with Article 22 of the Constitution, which provides the Direct Applicability of the International Agreements and Instruments, and which, in case of a conflict, have priority over provisions of laws and other acts of public of public institutions, so in this case the European Social Charter of 1996 has been violated.

Assessment of the admissibility of the Referral

23. The Applicant alleges that Article 22. (Direct Applicability of the International Agreements and Instruments) of the Constitution of Kosovo and the European Social Charter of 1996 are basis for his Referral.

24. Article 48 of the Law on the Constitutional Court of the Republic of Kosovo stipulates:

    „ 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.“

25. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, Garcia Ruiz v. Spain, no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-1).

26. The Applicant has not submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (see, Vanek v. Slovak Republic, ECtHR Decision as to the Admissibility of Application No. 53363/99 of 31 May 2005). The Applicant does not emphasize in what manner Article 22 and the European Social Charter of 1996 sustain his Referral, as provided by Article 113.7 of the Constitution and Article 48 of the Law.

27. In the present case, the Applicant was afforded ample opportunities to present his case and to contest the interpretation of the law which he considered incorrect, before the Housing and Property Claims Commission, and that twice. Having examined the proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see mutatis mutandis, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

28. In conclusion, the Referral does not meet the admissibility criteria. He failed to provide evidence that the challenged decision, allegedly, violated his rights and freedoms.

29. It follows that, the Referral is manifestly ill-grounded pursuant to Rule 36 (2b) of the Rules of Procedure which provides that:„ *The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that*

b)when the presented facts do not in any way justify the allegation of a violation of the constitutional rights".

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, Rule 56.2 and Rule 36 (2b) of the Rules of Procedure, in session held on 25 November 2011, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Muhamet Bucaliu vs. Notification of the State Prosecutor, KMLC no. 37/11

Case KI 92-2011, decision of 12 December 2011

Keywords: equality before the law, execution of judgment, individual referral, interim measures, judicial protection of rights, manifestly ill-founded referral, protection of legality (property), right to fair and impartial trial, service of process

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, contending that his rights under Articles 24.1, 31.1 and 54 were infringed by the State Prosecutor's determination that there were no grounds for a protection of legality procedure concerning the sale of his immovable property to a creditor over the Applicant's objection, by the Ferizaj Municipal Court's failure to deliver its execution decision to him and by the Prishtina District Court's rejection of his appeal of the sale. The Applicant requested an interim measure prohibiting the sale of property.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Rule 36.1(c) of the Rules of Procedure because the Applicant failed to prove that the District Court's decision was unfair or tainted by arbitrariness, citing *Shub v. Lithuania* and *Vanek v. Slovak Republic*, adding that the District Court gave careful consideration to the Municipal Court's handling of the proceedings, and that the State Prosecutor found no legal grounds for a protection of legality procedure. The Court rejected the delivery claim pursuant to Rule 36.3(e) because it was resolved previously. It noted that the Court's role is limited to resolving allegations of constitutional violations and that it is not competent to dispose of alleged factual or legal challenges outside of a constitutional context, which applies to judgment execution proceedings, citing *Hornsby v. Greece*, *Edwards v. United Kingdom*. The Court denied the request for interim measures pursuant to Article 27 of the Law on the Constitutional Court and Rule 54.1 of the Rules of Procedure in view of the Referral's inadmissibility.

Pristine, 12 December 2011
Ref. No.: RK175/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 92/11

Applicant
Muhamet Bucaliu

Constitutional Review of the Notification of the State Prosecutor, KMLC. no. 37/11, dated 2 June 2011.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Muhamet Bucaliu residing in Ferizaj, who submitted a first Application (Case No. KI 20/10) to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 4 March 2010. The Case was rejected as inadmissible on 15 October 2010.

Challenged decision

2. With the present Application, the Applicant challenges Notification KMLC. no. 37/11 of the State Prosecutor, dated 2 June 2011, by which the latter rejected the Applicant's request, dated 13 May 2011, to initiate a request for protection of legality regarding Resolution Ac. No. 116/2011 of the District Court in Pristina of 19 April 2011. The Notification was served on the Applicant on 2 June 2011.

Subject matter

3. The present Case is a follow-up of Case No. KI 20/10. The Applicant complains now that the Municipal Court in Ferizaj, by Resolution 4/2008 of 13 December 2010, sold his immovable property to the creditor despite his objections and that the District Court in Pristina, by Resolution Ac. No. 116/2011 of 19 April 2011 refused his appeal.

Moreover, the Applicant complains that the State prosecutor, with Memo KMLC, No. 37/2011, informed him that there was no legal ground to initiate the procedure for the protection of legality.

4. The Applicant alleges, that Article 24 (1) [Equality before the Law], Article 31 (1) [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") have been violated.

5. The Applicant also requests the Court to decide on his request for interim measures against the execution procedure in respect to his property in order to avoid any risk of irreparable damage.

Legal basis

6. Article 113.7 of the Constitution, Articles 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

7. As to the Applicant's previous Case KI. No. 20/10, on 13 July 2010, the Constitutional Court found the Referral inadmissible on the ground that the Applicant had failed to show that he had exhausted all legal remedies as provided by applicable law, since he could have complained to the Municipal Court of Ferizaj and the District Court of Pristina that he had not received Decision E.No. 04/08 of 11 January 2008 of the Municipal Court of Ferizaj and that the same Court, in its execution decision, had gone outside the limitations of the claim. Instead, the Applicant only submitted a claim against the evaluation of the value of the property.

8. On 7 July 2011, the Applicant submitted a new Referral to this Court.

9. On 17 August 2011, the President, by Order No. GJR. 92/11, appointed Judge Ivan Čukalovič as Judge Rapporteur. On the same date, the President, by Order No. KSH. 92/11, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Snezhana Botusharova and Iliriana Islami.

10. On 3 November 2011, the Court communicated the Referral to the State Prosecutor. No reply has been received so far.

11. On 25 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. From the documents submitted by the Applicant in connection with the new Application, it appears that, on 13 December 2010, the Municipal Court in Ferizaj held the third session of the public sale of the Applicant's immovable property (Cadastral Plot No.1071 in Ferizaj), which, under a mortgage agreement (No. 11715/H, registered by the Municipal Cadastral Office of Ferizaj under Protocol No. 25-72217092-00584) with the Raiffeisen Bank as the creditor, had been deposited as a pledge for a credit given to the debtor "Nera Impex" in Ferizaj. According to the Applicant, no buyer had been notified.

13. On the same day, the Municipal Court in Ferizaj, by Resolution E. 4/08, sold the property to the Raiffeisen Bank, as the highest bidder, despite the objections of the Applicant and his representative against these execution proceedings.

14. On 22 December 2010, the Applicant complained against the decision of the Municipal Court to the District Court in Pristina, arguing that the court of first instance had wrongfully assessed the factual situation.

15. On 19 April 2011, the District Court of Pristina, by Decision Ac. No. 116/2011, rejected the Applicant's claim as unfounded and confirmed Resolution E. No. 04/2008 of 13 December 2010 of the municipal Court in Ferizaj.

16. On 13 May 2011, the Applicant submitted a request for protection of legality to the State Prosecutor against both the decisions of the Municipal Court of Ferizaj and of the District Court of Pristina.

17. On 2 June 2011, the State Prosecutor found that there was no legal basis for the request (Notification KMLC No. 37/11).

Applicant's allegations

18. The Applicant alleges that:

    a. the provisions of Articles 24.1, 31.1 and 54 of the Constitution of the Republic of Kosovo have been violated.

b. article 47.2 of the Law on Execution Procedure is violated, because the Decision of the Municipal Court E. No. 4/08, dated 11.01.2008, was never delivered to him personally, hence, he could not complain against this decision.

c. the legal provisions addressed in the request to the State Prosecutor, dated 13 May 2011, as well as those mentioned in the basic appeal and supplementing appeals have been violated.

Assessment of the admissibility of the Referral

19. In his new submissions, the Applicant alleges that his rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution have been violated by the Municipal Court in Ferizaj, the District Court in Pristina and the State Prosecutor.
20. The Applicant's complaint that he has never received Decision E. No. 4/08 of the Municipal Court of Ferizaj of 11 January 2008 was already rejected by this Court in its Resolution on Inadmissibility in Case No. KI. 20/10 and will, therefore, not be dealt with here, pursuant to Rule 36(3) (e) of the Rules.

21. The Court first observes that, in order to be able to adjudicate the Applicant's new complaint, it is necessary to first examine whether he has fulfilled all admissibility requirements, laid down in the Constitution as further specified in the Law and the Rules of Procedure.

22. In respect to the present Referral, the Court notes that an Applicant can not complain that the regular courts have committed errors of fact or law, unless and in so far as they may have infringed rights and freedoms protected by the Constitution. This is true for the main proceedings as well as for the execution proceedings after the actual trial is over. In this respect the Court refers to ECtHR Judgment of 19 March 1997, Hornsby v. Greece (Reports 1997, 495), where the ECtHR stated that "Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6."

23. In this connection, the Constitutional Court emphasizes that it is not a court of fourth instance, when considering the decisions taken by the ordinary courts. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

24. The Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, mutatis mutandis, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, Application No. 13071/87 adopted on 10 July 1991).

25. As to the present Referral, the Court considers that the District Court in Pristina, in its Resolution Ac. No. 116/11 of 19 April 2011, carefully considered the way in which the Municipal Court in Ferizaj handled the public sale of the mortgaged property of the Applicant in accordance with the mortgage agreement, registered at the Directorate of Cadastre in Ferizaj. Also the State Prosecutor found no legal grounds to initiate a request for the protection of legality.

26. The Applicant has, therefore, not shown that Resolution Ac. No. 116/11 of the District Court in Pristina was unfair or tainted by arbitrariness (see mutatis mutandis, Shub v. Lithuania, ECHR Decision as to the Admissibility of Application No. 17064/06 of 30 June 2009 and Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application No. 53363/99 of 31 May 2005) and amounted to an infringement of the constitutional rights invoked by the Applicant.

27. In these circumstances, the Court concludes that the Referral is manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure which provides: *"The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded."*

28. Accordingly, the Applicant's Referral must be rejected as inadmissible.

Assessment of the request for an interim measure

29. As to the Applicant's request to the Court for interim measures, the Court refers to Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, stipulating that, at any time when a Referral is pending before the Court and the merits of the Referral have not been adjudicated by the Court, a party may request interim measures. However, taking into account that the Referral was found inadmissible, the Applicant is not entitled under Rule 54 (1) of the Rules of Procedure to request interim measures.

FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36 (1.c), Rule 54 (1) and Rule 56 (2) of the Rules of Procedure, on 25 November 2011, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the Request for Interim Measure;

III. This Decision shall be notified to the Parties and shall be published 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**
Ivan Čukalović	Prof. Dr. Enver Hasani

Nikollë Qetta vs. Judgment of the Supreme Court Rev. No. 361/2010 and the Resolution of the District Court in Peja AC. No. 111/2010

Case KI 96-2010, decision of 12 December 2011

Keywords: compensation of property right, exhaustion of legal remedies, expropriation, human rights, individual referral, manifestly ill-founded, protection of property, right to fair and impartial trial, right to property, service of process, specification of rights violated

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 31, 46 and 53 of the Constitution, and Articles 1 and 6 of the European Convention on Human Rights, were infringed by decisions of the Supreme Court and the Peja District Court concerning the Applicant's ownership rights to two distinct parcels of land. The Applicant's appeal of the District Court decision was pending before the Supreme Court when the Referral was filed. He failed to produce evidence of non-payment of compensation for the land relating to the Supreme Court judgment in controversy.

The Court held that the District Court aspect of the Referral was premature and inadmissible pursuant to Article 113.7 and Rule 36.1(a) of the Rules of Procedure because the pending appeal in the Supreme Court reflected a failure to exhaust potential legal remedies, citing *Selmouni v. France* for the assumption that the Kosovo legal system will provide an effective remedy for constitutional violations. The Court also held that the Supreme Court aspect of the Referral was inadmissible pursuant to Article 48 of the Law on the Constitutional Court and Rule 36.2(b) because the Applicant failed to make out a *prima facie* case substantiating that the specified constitutional violations occurred. The Court noted that its role was to resolve allegations of constitutional violations and not to dispose of factual or ordinary legal disputes, citing *Garcia Ruiz v. Spain* and *Vanek v. Slovak Republic.*

Pristine, 12.December. 2011
Ref. No.: RK171/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI-96/10

Applicant

Nikollë Qetta

Constitutional Review of Judgment of the Supreme Court of Kosovo Rev. No. 361/2010 dated 24 April 2010 and the Resolution of the District Court in Peja AC. No. 111/2010 dated 16 June 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Nikollë Qetta from Gjakova, represented by attorney Franjo Pal Jankova from Prishtina.

Challenged decisions

2. Challenged decision is the Judgment of the Supreme Court of Kosovo rev.no.361/2010, dated 24 April 2010, served on the Applicant on 7 June 2010, rejecting the revision on this case and upholding previous decisions of the District and Municipal court authorities regarding subject matter. Challenged decision is also the Resolution of the District Court in Peja AC. No. 111/2010 dated 16 June 2010.

Subject Matter

3. The subject matter is the judgment of the Supreme Court of Kosovo rev.no.361/2010 dated 22 April 2010 and the Resolution of the District Court in Peja AC. No. 111/2010 dated 16 June 2010, by which according to the Applicant's allegations, his rights concerning property have been violated, rights guaranteed with Articles 31, 46, and 53 of the Constitution of the Republic of Kosovo and Articles 1 and 6 of the

European Convention on Human Rights (Rights to Property and Rights to Fair and Impartial Trial).

Legal Basis

4. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 of the Law no. 03/L-121 on Constitutional Court of the Republic of Kosovo, dated 16 December 2008 (hereinafter referred as: „Law“) and Rule 56 (2) of the Rules of Procedure.

Proceedings before the Court

5. On 4 October 2010, the Applicant filed the Referral with the Constitutional Court of Republic of Kosovo.

6. On 15 November 2010, the Constitutional Court notified Mr. Franjo Pal Jankova and the Supreme Court on initiated proceedings for the constitutional review of their decision in Revision No. Rev. 361/2007, dated 22 April 2010.

7. On 4 April 2011, the Court requested additional documentation from the Municipality of Gjakova – Directorate for property and legal matters as well as from the lawyer Franjo Pal Jankova.

8. On 19 April 2011, replying to the Court, in its letter 11No.465-2528/11 the Municipality of Gjakova submitted to the Court their findings concerning the matter together with the additional documentation.

9. On 4 May 2011, at Court’s request, lawyer Franjo Pal Jankova submitted the additional documentation.

10. On 17 June 2011, the Constitutional Court requested from the Municipal Court in Gjakova additional documentation and clarification as to the status of the case before this Court.

11. On 28 June 2011, the Municipal Court in Gjakova submitted the additional documentation and clarified the status of the proceedings of the case before that Court.

12. On 19 July 2011, the Constitutional Court requested from the District Court in Peja supplementing documentation and clarification as to the status of proceedings of this case before that Court.

13. On 5 August 2011, the District Court in Peja submitted the case file and answers regarding the status of the case proceedings before the District Court in Peja.

14. On 21 November 2011, after considering the report of the Judge Rapporteur Ivan Čukalović, the Review Panel composed of Judges: Robert Carolan (Presiding), Altay Suroy and Snezhana Botusharova made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts with regard to the Resolution of the District Court in Peja AC. No. 111/2010 of 16 June 2010

15. By resolution of the Municipal Directorate for property and legal matters in Gjakova No. 19-465-7/ 1986, dated 28 July 1986, the Applicant was expropriated the property on cadastral parcel No.5133/34 which is a house with area of 79 m2 and the yard with area of 400 m2.

16. As per Public Attorney's suggestion the expropriation was carried out for the benefit of the Gjakova Municipality, for SMCI needs in the field of housing and public utilities for the purpose of constructing „Kosta Novaković" road, and of the other road for building plots.

17. The Resolution of the Municipal Directorate for property and legal matters in Gjakova No. 19-465-7/ 1986, dated 28 July 1986, was forwarded to the parties in the proceedings, against which the parties did not use the legal remedies provided by the law, therefore, the Resolution became final and binding on 16 September 1986, and was forwarded to the competent authorities to change the ownership in the cadastral books.

18. Within the legal time frame the Public Attorney in Gjakova Municipality, after evaluating the value of the expropriated building and the land made an offer in order to reach an agreement on compensating the expropriated property.

19. On the session held on 6 October 1988 in the Directorate for property and legal matters in Gjakova, in presence of both parties no agreement was achieved regarding the compensation on the expropriated property.

20. Municipal authorities by act 19No. 465-7/1986, dated 11 October 1988, forwarded the case to the Municipal Court in Gjakova, in order to determine the compensation on the expropriated property in non-contentious proceedings.

21. On 3 November 1988, the Municipal Court in Gjakova by Resolution V. No. 520/88 determines the compensation on the expropriated property; the Resolution was handed to the in law of the Applicant, Valentina Jankopali, on 24 November 1988, who lives in the same household with the Applicant.

22. On 23 February 2010, the Applicant files a complaint on the Resolution of the Municipal Court in Gjakova V. No. 520/88, 3 November 1988, alleging that the Applicant never received the Resolution and his in-law Valentina Jankopali is half-literate person.

23. On 16 June 2010, the District Court in Peja by Resolution AC.No.111/2010 rejects the complaint ungrounded and upheld the Resolution of the Municipal Court in Gjakova V. No. 520/88, dated 3 November 1988.

24. On Resolution of the District Court in Peja AC.No.111/2010, dated 16 June 2010, the Applicant on 22 July 2010 filed for revision with the Supreme Court of the Republic Kosovo.

25. The case on revision is still pending and since 6 September 2010 is before the Supreme Court of Kosovo, which decides upon revision.

Summary of facts with regard to the Judgment of the Supreme Court of Kosovo Rev. No. 361/2010 of 22 April 2010

26. Proceedings on Judgment of the Municipal Court in Gjakova C.No.331/01, dated 11 December 2002, in which the Municipal Court in Gjakova received a claim of Musë Mirakaj and obliged the Applicant to hand over in possession the southern part of the cadastral parcel No. 5133/33 in total area of 0.02,36 ha, and at the same time binds the Applicant to compensate the procedural costs in amount of 1.176,17 Euro, what does not apply to the parcel 5133/34 but only to parcel 5133/33, for which the Applicant did not provide any evidence that the compensation has not been paid to him.

27. Also, the appellate proceedings on Judgment of the District Court in Peja Ac.No. 234/03, dated 16 February 2007, as well as the proceedings on revision with the Supreme Court of Kosovo Judgment rev. No. 361/2007, dated 22 April 2010, on what the Applicant based his request with the Constitutional Court of Kosovo do not apply to parcel 5133/34, regarding which the non-contentious proceedings to determine the procedural compensation are still pending with the Supreme Court of Kosovo, but only to parcel 5133/33, for which the Applicant did not provide any proof that the compensation has not been paid to him.

Applicants Allegations

28. The Applicant claims that, by Judgment of the Supreme Court of Kosovo rev.No.361/2010**,** dated 22 April 2010, rejecting the revision on this matter and upholding the previous decisions of the Municipal and Court authorities on the contested matter, were violated his rights on property matters, as rights guaranteed by Articles 31, 46, and 53 of the Constitution of the Republic of Kosovo.

29. Moreover, he alleges that with this judgment were violated rights to a fair and impartial trial and rights to property, provided by Articles 1 and 6 of the European Convention on Human Rights, which is an integral part of the Constitution of the Republic of Kosovo.

Assessment of the admissibility of Referral with regard to the Resolution of the District Court in Peja AC. No. 111/2010 of 16 June 2010

30. In order to be able to adjudicate the Applicants' request, the Court needs first to examine whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure. In this regard, the Court refers to Article 113.7 of the Constitution:

"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."

31. From the documentation furnished upon request, it follows that the Applicant has not exhausted all legal remedies provided by law, since his request for revision was filed in non-contentious proceedings to determine the compensation on cadastral parcel 5133/34 against the Resolution of the District Court in Peja AC.No.111/2010, dated 16 June 2010, what is the essential request of the Applicant, is still pending with the Supreme Court in Prishtina, recorded under NDR.520/88, dated 23 August 2010.

32. The Court concludes that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see, *mutatis mutandis, ECtHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999*).

33. It follows that the request for constitutional review of the Resolution of the District Court in Peja AC. No. 111/2010 of 16 June 2010 is inadmissible for consideration, pursuant to Rule 36 (1a) of the Rules of Procedure which provides: "The Court may only deal with Referrals if: a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted."

Assessment of the admissibility of Referral with regard to the Judgment of the Supreme Court of Kosovo Rev. No. 361/2010 of 24 April 2010

34. The Applicant alleges that Article 31 (Right to a fair and impartial Trial), Article 46 (Protection of Property) and Article 53 (Interpretation of Human Rights Provisions) of the Constitution of Kosovo and Article 6 (Right to a fair trial) of the European Convention on Human Rights are basis for his Referral.

35. Article 48 of the Law on Constitutional Court provides that::

„In his/her referral, the Applicant 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."

36. Regarding the request for constitutional review of the Judgment of the Supreme Court of Kosovo Rev. No. 361/2010 of 24 April 2010, the Constitutional Court, under the Constitution, is not a court of appeal, in respect of the decisions taken by ordinary courts. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, Garcia Ruiz v. Spain, no. 30544/96, Para. 28, European Court of Human Rights [ECtHR] 1999-I).

37. The Applicant has neither substantiated an allegation nor has he submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (see mutatis mutandis, Vanek v. Slovak Republic, Application No. 53363/99, Decision of ECHR regarding the admissibility of the Referral, dated 31 May). The Applicant did not specify how do Articles 31, 46 and 53 substantiate his request, as provided by Article 113.7 of the Constitution and Article 48 of the Law.

38. The Applicant alleges that his rights have been violated due to erroneous establishment of facts and application of law, without clearly stating how these decisions infringed his constitutional rights.

39. In the present case, the Applicant was afforded numerous opportunities to present his case and to contest the interpretation of the law which he considered incorrect, before the Municipal, District and Supreme Court. After considering the proceedings as a whole, The Constitutional Court did not find that the relevant proceedings were in any way unfair or arbitrary (see *mutatis mutandis*, Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no_17064/06 of 30 June 2009).

40. Finally, this Referral does not meet the admissibility requirements. The Applicant failed to point out and to provide evidence that the challenged decision allegedly violated his constitutional rights and freedoms.

41. It follows that the Referral for constitutional review of the Judgment of Supreme Court of Kosovo Rev. No. 361/2010 of 24 April 2010 is manifestly ill-founded, pursuant to Rule 36 (2b) of the Rules of Procedure which stipulates that "*The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:... b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights".*

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 (2) of the Law, and Rule 36 (1a) and 36 (2b) of the Rules of Procedure, in its session, held on 21 November 2011, unanimously

DECIDED

I. **TO REJECT** the Referral as inadmissible in its entirety;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Ivan Čukalović	Prof. Dr. Enver Hasani

Shefkat Perdibuka and Suhejla Morina vs. Resolution Rev. No. 228/2007 of the Supreme Court

Case KI 17-2011, decision of 12 December 2011

Keywords: deadline issue, equality before the law, exhaustion of legal remedies, individual referral, protection of property, recusal of judge, retrial request, right to fair and impartial trial, right to property

The Applicants filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 24, 31 and 46 of the Constitution, and provisions of the European Convention on Human Rights, were infringed by a judgment of the Supreme Court, which ruled that the Applicants' appeal of a disposition of a property dispute by the lower courts was inadmissible. Counsel for the Applicants alleged that they received the disputed decision about four months after it was issued.

The Court held that the Referral was inadmissible pursuant to Article 49 of the Law on the Constitutional Court and 36.1(b) of the Rules of Procedure because it was filed more than four months from the issuance of the final judgment in controversy, citing a return receipt as proof of receipt of the disputed decision.

Prishtina, 12.December 2011
No. ref.: RK169/11

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 17/11

Applicants

Shefkat Perdibuka and Suhejla Morina

Constitutional review of the Resolution of the Supreme Court of Kosovo
Rev. No.228/2007 of 13 May 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicants are Shefkat Perdibuka and Suhejla Morina from Prizren, represented by the practicing lawyer Naim Qelaj from Prizren.

Challenged decision

2. The Applicants challenge the Resolution of the Supreme Court of Kosovo Rev. No. 228/2007 of 13 May 2010, by which was rejected the claim against the Resolution of the District Court in Prizren Ac. No. 490/2006 of 16 May 2007, regarding the determination of rights to the immovable property concerned.

Subject matter

3. The Applicants challenge the Resolution of the Supreme Court of Kosovo Rev. No. 228/2007 of 13 May 2010, alleging that this decision violates Article 24, Article 31 and Article 46 of the Constitution of the Republic of Kosovo, as well as the Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 and Article 21.4 of the Constitution, and Art. 20, 22.7 and 22.8 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the „Law“) and Rule 56 paragraph 2 of the Rules of Procedure.

Proceedings before the Constitutional Court

5. On 14 February 2011, the Applicants filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the „Court“).

6. On 24 March 2011, the Constitutional Court notified the lawyer Naim Qelaj, Supreme Court of Kosovo, District Court in Prizren and the

Municipal Court in Prizren that proceedings on reviewing the constitutionality of the Resolution of the Supreme Court of Kosovo Rev. No.228/2007, of 13 May 2010, have been initiated.

7. The President, by Decision No.GJR.17/11, of 2 March 2010, appointed Judge Altay Suroy as Judge Rapporteur. On the same day, the President, by Decision No.KSH.17/11 appointed the review Panel composed of Judges Snezhana Botusharova (Presiding), Prof. Dr. Ivan Čukalović and Prof. Dr. Iliriana Islami.

8. On 31 March 2011, the Supreme Court of Kosovo, in its reply to the Constitutional Court of Kosovo, stated that they have nothing to add and that its opinion on the subject matter is presented in the Judgment of the Supreme Court of Kosovo.

9. On 4 April 2011, the District Court in Prizren, in its reply to the Constitutional Court of Kosovo, stated that they have nothing to add and that its opinion on the subject matter is presented in the Judgments that are subject of the constitutional review with the Constitutional Court.

10. On 13 April 2011, the lawyer Naim Qelaj, in his letter to the Constitutional Court requested exemption of Judge Altay Suroy, since Judge Altay Suroy was the lawyer of the opposite party in the regular court proceedings.

11. On 5 May 2011, Judge Altay Suroy, based on Article 18.1.3 of the Law on Constitutional Court of the Republic of Kosovo, requested exemption from this case.

12. On 4 August 2011, the Constitutional Court obtained evidence (the return receipt) that the lawyer of Applicants, Gani Tigani, on 3 July 2010, received the Resolution of the Supreme Court of Kosovo Rev. No. 228/2007 of 13 May 2010.

13. The President, by Decision No.GJR.17/11 of 10 October 2011, appointed Judge Robert Carolan as the new Judge Rapporteur.

14. Judge Altay Suroy did not participate in any stage after the registration of the Referral and requested from the Court to be exempt from participation in deliberation. The Court approved his request.

15. On 23 November 2011, after reviewing the report of Judge Robert Carolan, the Review Panel composed of Judges Snezhana Botusharova (Presiding), Prof. Dr. Ivan Čukalović and Prof. Dr. Iliriana Islami, proposed to the full Court to reject the Referral as inadmissible.

Summary of the facts

16. The Municipal Court in Prizren, by Judgment P.No.671/89 of 21 January 1993, rejected as unfounded the suit of plaintiffs B.K., Y.K., G.K., M.K, N.M. maiden name K., and M. D. maiden name K., requesting to determine that they were the owners of the house and the yard in Prizren, in „ The League of Prizren Square " street, No.13, on cadastral parcel No. 1911, arable land of IV class with surface of 24,30 acres and arable land of V class with surface of 50 acres, both at the place called „Kamenica" cadastral parcel No.5190, requesting that the respondents (Applicants of this Referral) Shefkat Perdibuka and Suhejla Morina maiden name Xhana recognize the right to the property and allow plaintiffs to enroll as owners.

17. On the Judgment of the Municipal Court in Prizren P.No.671/89 of 21 January 1993, the plaintiffs B.K., Y.K., G.K., M.K, N.M. maiden name K., and M.D. maiden name K. have filed a complaint with the District Court in Prizren.

18. The District Court in Prizren, by judgment Ac. No. 658/93 of 30 December 1993, reversed the Judgment P.No.671/89 of 21 January 1993, of the Municipal Court in Prizren, adopted the claim of plaintiffs B.K., Y.K., G.K., M.K, N.M. maiden name K., and M.D. maiden name K. and determined that they were owners based on the heritage of the house with the yard in Prizren, in „ The League of Prizren Square " street, No.13, on cadastral parcel No. 1911, arable land of IV class with surface of 24,30 acres and arable land of V class with surface of 50 acres, both at the place called „Kamenica" cadastral parcel no.5190, ordering that the respondents (Applicants of this Referral) Shefkat Perdibuka and Suhejla Morina maiden name Xhana recognize the right to the property and allow plaintiffs to enroll as owners with the relevant authorities.

19. On the Judgment of the District Court in Prizren Ac. No. 658/93 of 30 December 1993, the respondents (Applicants of this Referral) Shefkat Perdibuka and Suhejla Morina declared two extraordinary legal remedies: request for revision and suggestion for retrial.

20. Deciding upon the request on the revision the Supreme Court of Serbia, by Resolution Rev. No. 5088/94 of 28 April 1995, rejects as inadmissible the revision on judgment of the District Court in Prizren Ac. No. 658/93 of 30 December 1993.

21. Deciding upon the suggestion for retrial the Municipal Court in Prizren, by Resolution C. No. 248/94 of 6 March 2006, rejects the suggestion for retrial as ungrounded.

22. The respondents (Applicants of this Referral) Shefkat Perdibuka and Suhejla Morina filed a complaint with the District Court in Prizren, against the Resolution of the Municipal Court in Prizren C. No. 248/94 of 6 March 2006.

23. The District Court in Prizren, by Resolution Ac. No. 490/2006 of 16 May 2007, changes the reasoning of the Resolution of the Municipal Court in Prizren C. No. 248/94 of 6 March 2006, and rejects the suggestion for retrial as out of time.

24. The respondents (Applicants of this Referral) Shefkat Perdibuka and Suhejla Morina filed for a Revision with Supreme Court of Kosovo, of the Resolution of the District Court in Prizren Ac. No. 490/2006 of 16 May 2007.

25. The Supreme Court of Kosovo, by Resolution Rev. No. 228/2007 of 13 May 2010, rejects as inadmissible the revision of the Resolution of the District Court in Prizren Ac. No. 490/2006 of 16 May 2007.

26. On 3 July 2010, the lawyer Gani Tigani, who represented the respondents (Applicants of this Referral) Shefkat Perdibuka and Suhejla Morina received the Resolution of the Supreme Court of Kosovo Rev. No. 228/2007 of 13 May 2010 (evidence; the receipt of the Supreme Court of Kosovo).

27. In the case file is also the statement of the lawyer Gani Tigani that, the Resolution of the Supreme Court of Kosovo Rev. No. 228/2007 of 13 May 2010, was served upon the Applicants with delay “around the 1 November 2010 “ (case file – marked page 49).

Applicants’ allegations

28. The Applicants allege that with the Resolution of the Supreme Court of Kosovo Rev. No. 228/2007 of 13 May 2010, by which is rejected the complaint on Resolution of the District Court in Prizren Ac. No. 490/2006 of 16 May 2007, concerning the determination of ownership rights to the immovable property concerned, was violated the Constitution of the Republic of Kosovo, and that Article 24 (Equality before the Law), Article 31 (Right to Fair and Impartial Trial) and Article 46 (Protection of Property), as well as Article 6 ECHR (Right to Fair and Impartial Trial).

Preliminary assessment of the admissibility of the Referral

29. In order to be able to adjudicate the Applicants' Referral, the Court needs to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law on the Constitutional Court and the Rules of Procedure.

30. With regard to Applicants' Referral, the Court refers to Article 49. of the Law which provides as follows:

„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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."

31. From the submission can be found that the Referral was not filed within the time lines provided by the Article 49 of the Law.

32. The latter decision is the Resolution of the Supreme Court of Kosovo Rev. No. 228/2007 of 13 May 2010, what the Applicants received through their lawyer Gani Tigani, on 3 July 2010, (evidence; the return receipt of the Supreme Court of Kosovo), the Applicants submitted their Referral to the Constitutional Court on 14 February 2011. This means that they submitted their Referral to the Court beyond the deadline provided by Article 49 of the Law.

33. It follows that the Referral is inadmissible pursuant to Article 36 (1b) of the Rules of Procedure, providing that "*The Court may only deal with Referrals if: b)the Referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant,"*

FOR THESE REASONS

The Constitutional Court pursuant to Article 113.7 of the Constitution, Article 49 of the Law on Constitutional Court, Rule 36 (1b) and Rule 56 (2) of the Rules of Procedure, in session held on 23 November 2011, unanimously

DECIDES

I. To REJECT this Referral as inadmissible;

II. The Secretariat shall notify the Parties of the Decision and shall publish it in the Official Gazette in accordance with Article 20.4 of the Law; and

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Robert Carolan	Prof. dr Enver Hasani

Sitaram, Chaulagai, Krishna Bandur Chamlagai, Chandra Kala Chauhan and Hom Bahadur Battarai vs. Decision of the High Court of Minor Offence in Pristina, GJL. nos. 1258/2010, 1259/2010, 1260/2010, 1261/2010

Case KI 121-2010, decision of 14 December 2011

Keywords: administrative dispute, deportation, exhaustion of legal remedies, individual referral, interim measures, manifestly ill-founded referral

The Applicants filed a Referral pursuant to Article 113.7 of the Constitution, asserting that their rights under Articles 24 and 32 of the Constitution were infringed when the High Court for Minor Offences issued an unfavorable decision in a deportation matter despite objections from the Applicants that administrative appeals related to the issue were still pending. The Applicants also contended that the subsequent unfavorable dispositions of the administrative appeals infringed on their Article 32 rights since they were unable to appeal the rulings because copies were never served on them. The Applicants requested postponement of the deportations on grounds that they would impose a financial hardship and risk the health of a pregnant Applicant and her fetus.

Regarding the administrative proceedings, the Court held that the Referral was inadmissible pursuant to Article 113.7 of the Constitution because the Applicants failed to exhaust all legal remedies, noting that they had not substantiated their claim that they were unaware of the disposition of the administrative appeal, citing *AAB-RIINVEST University L.L.C. vs. Government of Kosovo* for the proposition that exhaustion of remedies is necessary because there is an assumption that the Kosovo legal system will provide an effective remedy for Constitutional violations. Concerning the criminal proceedings, the Court held that the Applicants merely disputed factual findings and applications of law by the lower courts, highlighting that the Court is limited to resolving allegations of Constitutional violations, such as whether a trial was fair. In that regard, the Court found that the proceedings were not unfair or arbitrary, citing *Shub v. Lithuania*. In view of the inadmissibility of the Referral, the Court denied the request for interim measures pursuant to Article 27 of the Law, and Rules 54.1 and 55.9 of the Rules of Procedure.

Pristina, 14 December 2011
Ref. No.: RK/11

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 121/10

Applicants

Sitaram Chaulagai
Krishna Bandur Chamlagai
Chandra Kala Chauhan and
Hom Bahadur Battarai

Constitutional Review of the Decisions of the High Court for Minor Offence in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, 1261/2010, dated 22 November 2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. The Applicants are: (1) Sitaram Chaulagai, (2) Krishna Bandur Chamlagai, (3) Chandra Kala Chauhan, and (4) Hom Bahadur, represented by Mr. Linn Slattengren, a practicing lawyer in Pristina.

Challenged court decision

2. The Applicants challenge the decisions of the High Court for Minor Offences in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, and 1261/2010 of 22 November 2010.

Subject matter

3. The Applicants allege that the relevant court decisions show that they were discriminated against, contrary to Article 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and that they were never given the opportunity to proof the factual situation before the relevant authorities, amounting to a violation of Article 32 [Right to Legal Remedies] of the Constitution.

4. They further complain that *"The High Court of Minor Offences and the Municipal Court of Minor Offence did not take into account the fact that an administrative appeal has been exercised at the administrative level against the decision issued by the Review Commission for Permanent and Temporary Residence Permits of MIA, on the basis of which the Directorate for Migration and Foreigners [DMF] deportation order was issued, nor did they take into account the facts, evidence or arguments that prove the contrary of what is said in the Review Commission for Permanent and Temporary Residence Permits of MIA and Court's decisions respectively."*

5. Furthermore, the Applicants request the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to impose interim measures, postponing the deportation order, for the reason that the deportation would cause them material damage of 30.000 Euro, and that it would distress emotionally one of the Applicants, Ms Chandra Kala Chauhan, considering the fact that she was pregnant. She claims that her health and the health of her foetus would be seriously put in danger.

Legal basis

6. Article 113.7 of the Constitution, Articles 22 and 27 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121), (hereinafter: the "Law") and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

7. On 3 December 2010, the Applicants submitted the Referral to this Court.

8. On 7 December 2010, the President, by Order No. GJR. 121/10, appointed Judge Iliriana Islami as Judge Rapporteur. On the same date, the President, by Order No.KSH. 121/10, appointed the Review Panel

composed of Judges Robert Carolan (Presiding), Altay Suroy and Almiro Rodrigues.

9. On 13 December 2010, the Court granted the Applicants' request for an interim measure, until the Court would have adjudicated the Referral.

10. On 11 January 2011, the Court received the reply from the High Court for Minor Offences, to which the Referral had been communicated for comments. The High Court emphasized that the Referral contained a host of deficiencies, be it procedurally or substantially.

11. On 12 January 2011, the Court requested clarification from the Review Commission for Permanent and Temporary Residence Permit in respect to its final decision.

12. On 24 January 2011, the Court received a clarification from the Review Commission for Permanent and Temporary Residence Permits, explaining that, on 11 November 2010, the Applicants appealed against the Commission's decision and that, on 30 November 2010, the Appeals Commission took a decision on the Applicants' appeal, in accordance with Article 46(1), item 1.3 of the Law No. 03/L-126, thereby rejecting the appeal. In the decision of 30 November 2010 the Applicants were informed that they had 30 days to initiate an administrative complaint before the Supreme Court.

13. On 24 May 2011, the Court requested additional clarification by the Applicants on the following issues:

    (1) whether, in accordance with Article 241-246 of the Law on Minor Offences, they had appealed against the decisions of the High Court for Minor Offences in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, and 1261/2010 of 22 November 2010;
    (2) whether, in accordance with Article 228-233 of the same law, they had requested a repetition of the procedure.
    (3) if the answer would be positive to any of the questions, whether they had submitted details to that effect;
    (4) if the answer to these questions would be negative, whether they could explain the reasons for that.
    (5) whether they had filed any appeal with the Supreme Court against the decision of the Commission for Review of Foreigners Appeals, No. 1361, of 1 December 2010, and, if not, to explain the reasons for that.

14. On 1 June 2011, the Applicants replied, stating that:

”[…]

(1) We have submitted appeals against the decisions of the Municipal Court for Minor Offences to the High Court for Minor Offences which rejected our appeals and upheld the decisions of the first instance court. That exhausted our appeal rights under the law. After a careful legal analysis we considered that the request for protection of legality, made by us, was inadmissible. Thus, no request for protection of legality was filed.

(2) No proposal to repeat the procedure was filed with the competent court. Based on the factual background and circumstances or the matter, we considered that use of this extraordinary legal remedy was not admissible.

(3) We respectfully submit that we have never received a decision from the second instance administrative organ which serves as an appellate panel. We have filed an appeal against the decisions of the Commission for Review of the Permits for Temporary and Permanent Residence, acting as an administrative organ of the first instance, to the Appeals Commission for Temporary and Permanent Residence of Foreign Persons acting as an administrative appellate panel but no decision on this appeal was served to us or the claimants.

[…]”

15. On 10 June 2011, the Court requested additional clarification from the Review Commission, Appeals Committee, DMF, Municipal Court for Minor Offence and the High Court for Minor Offence on the following issues:

From DMF

(1) was the Deportation Order served upon the Applicants in a language that they understand? If not, why not?
(2) Have the Applicants been informed about the legal remedies available to them against the Deportation Order?

16. On 14 June 2011, DMF submitted to the Court the deportation order that was issued for the Applicants and sent to the Applicants in the English version and the Albanian version with the legal advice that the Applicants had the right to appeal against the deportation order within eight days, but that the appeal did not suspend the execution of the deportation order. Furthermore, DMF stated that the Applicants where

notified verbally but had, in the presence of the attorney Mr. Bardhë Ademaj, refused to receive the deportation order.

From the Municipal Court for Minor Offence and High Court for Minor Offence

(1)was the judgment of the Court served upon the Applicants in a language that they understand?

17. On 22 June 2011, the High Court for Minor Offence replied stating that the judgment of the Court was served on the Applicants in English, pursuant to Article 17 of the Law (No. 02/L-37) on the use languages.

***From the Review Commission**:*

(1) whether the Applicants had been invited to the session of the Review Commission, where the evidence submitted by the DMH officials hds been discussed?
(2) whether the Decision of the Review Commission had been served on the Applicants in a language that they understand? If not, why not?

18. On 24 August 2011, the Review Commission replied, stating that:

"[…]

(1) The review commission had not invited the Applicants to the session of the Review Commission, because the Review Commission considered that there was no need to invite the Applicants to the session. The annulment of the residence permit had been done based on the police report, which was presented before the Review Commission and confirmed that the Applicants had violated the legal provisions of the Law on Foreigners.

(2) The decision taken by the Review Commission was sent to the Applicants in the Albanian language, because the Applicants had submitted the request for temporary residence permit in the Albanian language.

[…]"

From the Appeals Committee

(1) to submit the Minutes of the Appeal session, taken at the Committee's session, in accordance with Article 18 [Minutes of the

Meeting], paragraph 1, of the Administrative Instruction No. 01/2010 – MIA of the Ministry of Internal Affairs.

(2) whether the Decision of the Appeals Committee had been served upon the Applicants in a language that they understand? If not, why not?

(3) How could the Applicants be aware of the possibility to initiate a judicial procedure before the Supreme Court, if the Decision of the Appeals Committee was not served upon the Applicants in a language that they understand?

(4) to submit a copy of the receipt showing that the Decision was served upon the Applicants.

19. On 24 August the Appeals Committee replied stating that:

"[…]

(1) The decision taken by the Appeals Committee was sent to the Applicants in the Albanian language, because the Appeals Committee was not obliged to do so and because the attorney of the Applicants submitted the complaint in the Albanian language and the mother tongue of the director of the law firm Interex Associates Mr. Bejtush Isufi was Albanian.

(2) According to the information given by officials of DMF, the decision was provided to the attorney of the Applicants which had refused to receive it.

…"

20. On 23 November 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

21. The first Applicant, Sitaram Chaulagai, a Nepalese citizen, came to Kosovo in October 2009 and established a business, the restaurant "Good Morning Global Group" in Pristina. He apparently obtained the necessary licence, whereafter he was joined, in early 2010, by the three other Applicants, who were issued a Foreigners Identification Card by the Ministry of Internal Affairs (hereinafter: "MIA") and a Temporary Residence Permit valid until 23 October 2010. They also received an Initial Work Permit from the Ministry of Labour and Welfare, which would expire on 21 October 2010, to work in the restaurant.

22. The restaurant "Goodmorning Global" opened a branch office as well, apparently registered under the name "Mount Everest Restaurant". This branch office was, however, discontinued for financial reasons and another branch was opened, the "Bollywood Restaurant", where the Applicants started to work.

23. On 4, 5 and 6 October 2010 inspectors of the Department of Migration and Foreigners of MIA conducted inspections at the business addresses of the restaurant "Good Morning Global" and the "Bollywood Restaurant". The DMF officials also contacted the Tax Inspectorate at the Ministry of Trade and Industry requesting information about the status of the "Bollywood Restaurant". According to the report submitted by the Tax Inspectorate, the "Bollywood Restaurant" had, according to its information, never had any turnover.

24. On 5 October 2010, three of the Applicants were requested to go to DMF, where their work and residence permits were confiscated, as well as their passports. On 6 October 2010, the same thing happened to the fourth Applicant.

25. On 9 October 2010, DMF filed a claim with the Municipal Court for Minor Offences in Pristina to initiate minor offences proceedings against the Applicants.
26. On 26 October 2010, the Review Commission for Permanent and Temporary Residence Permits of MIA issued decisions to terminate the temporary residence permit of each Applicant, for the reason that, based on the inspection reports of DMF of 4, 5 and 6 October 2010, the business, on the basis of which the temporary residence permits had been issued, did not exist. Furthermore, the Review Commission instructed DMF to issue Deportation Orders under Article 58 [Execution of Deportation] of the Law on Foreigners.

27. On 1 November 2010, the decision of the Review Commission was served on the Applicants, who submitted an appeal with the Appeals Committee of the Review Commission on 11 November 2010.

28. Also on 1 November 2010, DMF issued Expulsion Orders to the Applicants, which were apparently not accepted by the Applicants, for the reason that they were only in the Albanian language (N.B. copies of the expulsion orders in the English language were submitted by DMF to the Court with the following information written on the orders: "Person is notified verbally and refused to take a removal order in the presence of the lawyer").

29. The DMF officials instructed the Applicants to be present at the Minor Offences Court in Pristina on 9 November 2010.

30. On 8 November 2010, the Applicants were informed by DMF, that the Ministry of Labour and Social Welfare had rendered a decision annulling their work permits. Apparently, no such decision has been delivered to the Applicants, which would have enabled them to challenge the decision.

31. On 9 November 2010, the Applicants appeared before the Minor Offences Court in Pristina and requested the Court to reject the initiation of proceedings as inadmissible for the reason that they were premature, since their appeals against the decision of the Review Commission were still pending before the Appeals Committee. However, the Minor Offences Court declared the Applicants guilty of staying in Kosovo, while their residence permit had expired on 26 October 2010, fined each of them with a fine of 100 Euros and ordered their immediate deportation from the territory of Kosovo without a right to re-enter for a period of 2 years, pursuant to Article 58 of the Law on Foreigners.. According to Article 55(3) of the Law, an appeal against an order to leave shall not suspend the execution of the order. The Applicants appealed against these decisions to the High Court of Minor Offences.

32. On 22 November 2010, the High Court on Minor Offences rejected the appeals of the Applicants as unfounded. The High Court ruled that it had reviewed the allegations set out in the appeals, the challenged decisions and the statements of the Applicants deposited in the main hearing in the first instance court, on 9 November 2010, in which they partly admitted to having committed a minor offence, but argued that they did not accept to sign the decision on deportation, issued by DMF, because they didn't understand why it was issued, and that they didn't act on it. The High Court further reasoned that, based on other facts from the case files, also the factual situation was certainly ascertained as per the ruling of the appealed decision of the Municipal Court and that, therefore, the submitted complaints were rejected as unfounded, while the challenged decisions were upheld as fair and based on the law.

33. The High Court concluded, that the first instance court did not violate the minor offence procedure provisions, respectively, nor did it erroneously apply the substantive law. It further ascertained that the imposed sentence for the Applicants and the issuance of the protection measure were determined according to the level of responsibility, therefore there was no legal basis for the abolishment of the challenged decisions, or the rejection of the request for the initiation of minor offence proceedings, as proposed by the Applicants and, respectively, the

decisions for their forced and immediate deportation from the territory of the Republic of Kosovo. The High Court also informed the Applicants that no appeals were allowed against its decision.

34. On 30 November 2010, after having heard the Applicants, the Appeals Committee, dealing with the Applicants' appeals against the decision of the Review Commission of 26 October 2010, rejected their appeals, stating that the Review Commission had rendered rightful decisions based on the foreseen legal procedure, because the Applicants had failed to act in accordance with the legal provisions of the Law of Foreigners and the Administrative Instructions for the application of that Law. The Appeals Committee, therefore, unanimously decided, in accordance with Article 46(1)(3) of the Law on Foreigners, providing that the competent body may revoke the stay of a foreigner in Kosovo [...] who is granted a temporary stay, [...], if he/she stays in Kosovo contrary to the purpose for which the temporary stay is issued. It, therefore, upheld the decision of the Review Committee to reject the permit for temporary residence in Kosovo. The decision further indicated that the Applicants might initiate a judicial procedure before the Supreme Court within 30 days from the reception of the decision by the Applicants.

Applicants' allegations

35. The Applicants allege that the Review Commission for Permanent and Temporary Residence Permits inspected at the wrong address of the discontinued branch, and claim that their business still exists, even to the present day, which can be simply checked by visiting their premises.

36. They further allege that, when presented with the removal order, they had to engage a lawyer in order to find out what they were supposed to sign. They then went, together with the attorney, to DMF, where the attorney requested to be given the Expulsion Order, but the officials of DMF refused to do so, arguing that, since the Applicants had initially refused to accept the document, DMF could not now give the documents to the Applicants' representative. According to the Applicants' attorney, the Applicants were never served with the Deportation Order and, therefore, were not provided with the possibility to appeal. Instead, the officials of DMF had advised them to go to the Municipal Court for Minor Offences.

37. The Applicants further allege that it is evident that none of the requirements cited in Article 79 [Retention of Documents], paragraph 1, of the Law on Foreigners were met and that, consequently, the confiscation of their identity papers had no legal basis.

38. The Applicants also allege that the expulsion order is an administrative act, issued by the first instance administrative bodies, based on Article 128 of the Law on Administrative Procedure; hence the Appeals Commission within the MIA did not take into account the fact that, by exercising the legal remedy, the execution of the administrative act should have been suspended. Moreover, the Applicants allege that, pursuant to Articles 128(2)(a), (b), (c) and (d) of that Law, the administrative bodies had not submitted any evidence on the basis of which the exercise of the complaint procedure against the competent administrative bodies would have been foreclosed. In their opinion, Article 128(3) obliges the administrative body to inform the party about the reasons for the non-suspension of the administrative act, which that body had not done.

39. Furthermore, the Applicants complain that the Municipal Court for Minor Offences did not take into account the fact that an administrative appeal was pending against the decision of the Review Commission to deliberate the complaints on the basis of which the Expulsion Order was issued by the DMF.

40. Moreover, the High Court of Minor Offences and the Municipal Court of Minor Offence ignored the fact that an administrative appeal had been exercised at the administrative level against the decision issued by the Review Commission for Permanent and Temporary Residence Permits of MIA, on the basis of which the Directorate for Migration and Foreigner had issued the removal order, nor did they take into account the facts, evidence or arguments that would have proven the contrary of what was said in the Review Commission and Court's decisions respectively.

41. Furthermore, the Applicants allege that their submissions were not taken into account, because they were the exact opposite of what was said in the decision of the Review Commission and that of the High Court for Minor Offences.

42. Mrs. Chandra Kala Chauhan, who was pregnant at the time of the submission of the Referral, alleges that her doctor has recommended her to rest, but did not recommend to her a bed regime, which implies that the Applicant can move around.

Assessment of the admissibility of the Referral

43. The Court notes that the Applicants complain about two issues:

    1. The administrative proceedings before the Review Commission and the Appeals Commission;

2. The proceedings before the Municipal Minor Offences Court and the High Court for Minor Offences;

44. In this respect, in order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

45. These requirements are essentially: referring the matter to the Court in a legal manner (Article 113 (1) of the Constitution); having exhausted all legal remedies provided by law (Article 113 (7) of the Constitution); filing the referral within a certain deadline (Articles 49 and 56 of the Law); clarifying what rights and freedoms have been violated; indicating what concrete act(s) of a public authority is (are) subject to challenge (Article 48 of the Law); justifying the Referral; and, attaching the necessary supporting information and documents (Article 22 of the Law), including other elements of information.

1. As to the administrative proceedings

46. In order to be able to consider the Applicants' complaint about the administrative proceedings before the Review Commission and the Appeals Commission and their allegation that they have been denied the right to legal remedies as guaranteed by Article 32 of the Constitution, the Court considers that it is necessary to first examine whether the Applicants have exhausted all legal remedies available to them under applicable law.

47. In this connection, the Court refers to Article 113.7 of the Constitution which provides as follows:

"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".

48. This means that, as to the administrative proceedings before the Review Commission and the Appeals Commission, the Applicants should have shown to this Court to have exhausted all available remedies , including an appeal to the Adminstrative Chamber of the Supreme Court.

49. In this respect, the Court notes that the Decision of the Appeals Commission (Commission for Review of Foreigners Appeals) dated 30 November 2010, contains information about the legal remedy against its decision in the following terms: "Against this decision, within a period of 30 (thirty) days from its reception, the unsatisfied party may initiate an

administrative conflict with the Supreme Court of the Republic of Kosovo".

50. When requested by this Court why the Applicants had not made use of this remedy, the Applicants' lawyer replied that no decision on this appeal was served to him or the Applicants.

51. However, when this Court requested the Appeals Committee "Whether the Decision of the Appeals Commission had been served upon the Applicants in a language that they understand and, if so, why not?", the Appeals Commission replied that "The decision has been sent to the Applicants in the Albanian language, because the Appeal Commission is not obliged to do so and because the lawyer of the Applicants submitted the complaint in the Albanian language and the mother tongue of the director of the law firm is Albanian". The Commission further mentioned that, "on 3 December 2010 the original of the decision has been given to the DMF. According to information given by the official of DMF, this decision has been placed at the disposal of the legal representative of the claimant [...], which refused to receive the decision. Copies of the decision have been stored with the Division for Foreigners [...]."

52. In these circumstances, the Court must come to the conclusion that the Applicants have not sufficiently substantiated that they were not at all aware of the outcome of the proceedings before the Appeals Commission or had no access to the text of its Decision. It follows that they have not complied with the above exhaustion rule, the rationale of which is to afford the authorities concerned, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see: Resolution on Inadmissibility: AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, of 27 January 2010 and, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999).

2. As to the proceedings before the Municipal Court for Minor Offences and the High Court for Minor Offences

53. As to the complaint that the decisions of the Municipal Court of Minor Offence and of the High Court for Minor Offence violated the Applicants' rights guaranteed by:

a. Article 24 [Equality Before the Law] of the Constitution since the court, allegedly, only dealt with the technical matters and declared them

guilty for not implementing the Deportation Order, whereas it did not review at all the "arbitrary manner for the issuance of that decision"; and

b. Article 32 [Right to Legal Remedies] of the Constitution, since the Applicants were, allegedly, denied their right to a legal remedy at the administrative level, and did not have the possibility to prove to the Commission that the assessment of the factual situation was conducted in an entirely incorrect manner leading to the residence permit being revoked and the issuance of the deportation order,

the Court emphasizes that, under the Constitution, it is not to act as a court of fourth instance, when considering the decisions taken by ordinary courts. It is the role of ordinary courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis,* Garcia v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).

54. The Court can only consider whether the evidence has been presented in such a manner, and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicants has had a fair trial (see among other aorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

55. In the present case, the Applicants merely dispute whether the Municipal Court for Minor Offences and the High Court for Minor Offences correctly applied the applicable law and disagree with the courts' factual findings with respect to their cases.

56. Having examined the proceedings before these courts as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

57. Taking into account the above considerations, it follows that the Referral as a whole must be rejected as manifestly ill-founded.

Assessment of the Request for Interim Measures

58. As to the Applicants' request for interim measures, which the Court granted on 13 December 2010, "until it would have adjudicated the Referral", the Court refers to Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, stipulating that, at any time when a

Referral is pending before the Court and the merits of the Referral have not been adjudicated by the Court, a party may request interim measures. However, taking into account that the Referral was found inadmissible, the interim measures that were granted by this Court have now expired under Rule 55 (9) of the Rules of Procedure to request interim measures.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.2 of the Law, and Rule 36 and 56 (2) of the Rules of Procedure, on 23 November 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. TO DECLARE that the Interim Measures have expired;

III. This Decision shall be notified to the Parties and shall be published 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**
Dr. Iliriana Islami	Prof. Dr. Enver Hasani

Faik Hima, Magbule Hima and Bestar Hima vs. Judgment A. No. 983/08 of the Supreme Court

Case KI 70-2011, decision of 16 December 2011

Keywords: discrimination, expropriation, individual referral, manifestly ill-founded referral, recusal of judge, right to property

The Applicant filed a Referral pursuant to Article 113.7 of the Constitution, asserting that his rights under Articles 7, 21, 22 and 24 of the Constitution, as well as Article 6 and Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, were infringed by a judgment of the Supreme Court, which rejected his request for restitution of expropriated immovable property in Gjakova because it was time-barred.

The Court held that the Referral was manifestly ill-founded and inadmissible pursuant to Article 48 of the Law on the Constitutional Court and Rule 36.1 of the Rules of Procedure because it sought a determination of whether the Supreme Court correctly applied the law and facts, which is beyond the Court's limited discretion to only resolve alleged violations of constitutional law, citing *Garcia v. Spain*. The Court found that the Supreme Court proceedings were not in any way unfair or arbitrary, citing *Shub v. Lithuania* and *Vanek v. Slovak Republic*, and that the Applicant had failed to make a *prima facie* showing in that regard.

Pristina, 13 December 2011
Ref. no.: RK/11

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 70/11

Applicants

Faik Hima
Magbule Hima
Bestar Hima

Constitutional Review of the Judgment of the Supreme Court, A. No. 983/08, dated 7 February 2011.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge and
Iliriana Islami, Judge

Applicants

1. The Applicants are Mrs. Faik Hima, Magbule Hima and Bestar Hima residing in Gjakova.

Challenged decision

2. The Applicants challenge the Judgment of the Supreme Court, A. No. 938/08, of 7 February 2011, which was served on the Applicants on 10 March 2011.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") of the constitutionality of the Judgment of the Supreme Court, A. No. 938/08, by which it rejected the Applicants' request for restitution of the expropriated immovable property in Gjakova.

4. The Applicants complains that:

a. The party was not enabled to file an appeal with the Kosovo Central Government, because the decision of the President of the Municipality of Gjakova mentioned an erroneous legal remedy. Consequently, the right to an effective access to justice was made impossible.

b. This expropriation case was initiated on 2 May 2002 and has been prolonged until now, thus violating the standard established under the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols for solving the case "…within a

reasonable deadline…", Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

c. There has been a violation of the principle of prohibition of discrimination, because the procedural and substantive law that is the most favourable to the party has not been applied.

d. The right to property provided for and guaranteed under Article 1 – Protection of Property, Protocol no. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been violated.

Legal basis

5. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, No. 03/L-121, (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 26 May 2011, the Applicants submitted the Referral to the Court.

7. On 9 August 2011, the Court communicated the Referral to the Supreme Court.

8. On 17 August 2011, the President, by Decision No. GJR. 70/11, appointed Deputy-President Kadri Kryeziu as Judge Rapporteur. On the same date, the President, by Decision No. KSH. 70/11, appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Enver Hasani and Gjyljeta Mushkolaj.

9. On 21 November 2011, Judge Gjyljeta Mushkolaj informed the Court that, on 21 November 2011, she had written to the President of the Court that, due to the family relationship with the Applicant, she wished to be excluded "ex officio" from participating in the proceedings before the Court in Case KI 70/11, pursuant to Rules 8(1)(1) of the Rules of Procedure and Article 18 (1)(2) of the Law.

10. On 25 November 2011, the President, by Decision No. KSH 70/11, pursuant to Rule 8.2 of the Rules of Procedure, replaced Judge Gjyljeta Mushkolaj with Judge Iliriana Islami as member of the Review Panel.

11. On 12 December 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on inadmissibility of the Referral.

Summary of the facts

12. On 1 June 1984, the Municipal Department for Property Legal Issues in Gjakova (hereinafter: the "Department"), expropriated immovable property of the Applicants' family for the purpose of constructing a Monument for the fighters who fell during the Second World War (Decision No. 03-463-17/17).

13. On 2 May 2002, the Applicants filed a request for restitution with the Department, since, allegedly, the expropriated immovable property was not used for the purpose that it was expropriated for. However, the Department, apparently, never took a decision.

14. On 12 April 2007, the Applicants filed a request with the Department and with the Kosovo Cadastral Agency to decide on the Applicants request, since the Department had not taken a decision on the matter for five years.

15. On 21 May 2007, the Kosovo Cadastral Agency ordered the Department to render a decision in the Applicants' case (Conclusion no. 03/278/07).

16. On 30 July 2007, the Department suspended the procedure because *"it was ascertained that some parcels were in the ownership of the Municipal Assembly of Gjakova". "Based on such an ascertained situation this department deems that the procedure on this matter should be terminated once the circumstances of the ascertained state are verified."* (No. 03-463-17-14/02).

17. On 18 August 2007, the Applicants filed a complaint against the conclusion of the Department with the Chief Executive Officer of the Municipal Assembly of Gjakova to annul the conclusion of the Department.

18. On 10 September 2007, the Chief Executive Officer of the Municipal Assembly of Gjakova rejected the complaint of the Applicants as unfounded (Decision No. 11-03-463-17-14/02).

19. On 20 September 2007, the Applicants filed a complaint against the decision of the Chief Executive Officer of the Municipal Assembly of Gjakova with the Kosovo Cadastral Agency.

20. On 19 November 2007, the Kosovo Cadastral Agency approved the complaint of the Applicants as founded and annulled the decision of the Chief Executive Officer of the Municipal Assembly of Gjakova and the case was sent back for retrial to the Department (Decision No. 799/07), "*since in this specific matter no other body can decide on this administrative matter except for the body that conducted the expropriation*".

21. On 27 June 2008, the Department rejected the request of the Applicants as unfounded since "*the immovable property was expropriated for the purpose of building a memorial in "Qabrat" for the soldiers who fell during World War II.*" (Decision No. 03-463-17-14/02).

22. On 8 July 2008, the Applicants complained against the decision of the Department to the Municipality Mayor of the Municipal Assembly of Gjakova (hereinafter: the "Mayor").

23. On 21 July 2008, the Mayor rejected the complaint of the Applicants as unfounded and upheld the decision of the Department (Decision No. 11-03-463-17-14/02).

24. On 4 August 2008, the Applicants complained against the decision of the Mayor to the Supreme Court.

25. On 7 February 2011, the Supreme Court rejected as unfounded the complaint of the Applicants reasoning that:

"...

Pursuant to Article 21 paragraph 4 and 5 of Law on Expropriation of SAPK (Official Gazette of the Socialist Autonomous Province of Kosova dated April 28th 1978) it is foreseen that a final decision on expropriation shall be annulled based on a request of the previous owner of the expropriated immovable property, if the user of the expropriated property in the time period of three years, since the decision became final, has not carried out, as per the nature of the facility, the necessary works on that object. Once 10 years have passed since the date when the decision on expropriation became final a claim for annulment of the decision cannot be submitted.

While pursuant to provisions of article 10 (4) of Law on Amendments and Supplementations of Law on Expropriation "Official Gazette of Kosovo", dated 22 November 1986) it is foreseen that once a parcel of land is expropriated a final decision on expropriation shall be annulled through a claim submitted by the previous owner, if in the time period of 5 years since the decision came into power, no works have taken

place on preparing and arranging the land. After the period of 6 years have passed since the day the decision on land expropriation was taken, no claim for annulment of this decision can be submitted (Article 10 (4)).

The Supreme Court confirms that the claimants submitted their claim for the annulment of the decision on expropriation after the expiration of time period pursuant to the above-mentioned provisions, as the claimants submitted the request for annulment of the expropriation decision in May 2002.

…"

Applicant's allegations

26. The Applicants make the following allegations:

a. the Mayor of the Municipality of Gjakova mentioned an erroneous legal remedy by giving the legal advice that a complaint should be filed with the Supreme Court and not with the Kosovo Cadastral Agency. Consequently, the right to effective approach to justice was made impossible.

b. The case has not been decided "…within a reasonable deadline…".

c. The Supreme Court should have applied the procedural and substantive law that is more favourable to the party, i.e. Article 36 of Law on Expropriation of Serbia "Official Gazette of RS"53/95.

d. The right to property has been violated.

e. There is no international criterion or standard that would allow taking away a private property from a citizen and not use it for the expropriated destination**.**

Assessment of the admissibility of the Referral

27. The Applicants allege that his right guaranteed by Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments] and 24 [Equality Before the Law] of the Constitution and Article 6 [Right to fair trial] of ECHR and Article 1 of Protocol 1 of ECHR have been violated. The Court observes that, in order to be able to adjudicate the Applicant's complaint, it is necessary to first examine whether he has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

28. In this connection, the Court refers to Article 48 of the Law:

"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."

29. Under the Constitution, it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (constitutionality). Thus, the Court is not to act as a court of fourth instance, when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

30. Therefore, the Constitutional Court can only consider whether the proceedings, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, mutatis mutandis, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87 adopted on 10 July 1991).

31. In the present case, the Applicants merely dispute whether the Supreme Court correctly applied the applicable law and disagree with the courts' findings.

32. Having examined the proceedings before the Supreme Court as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see mutatis mutandis, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

33. In conclusion, the Applicant has neither built a case on a violation of his right to a fair trial by the Supreme Court nor has he submitted any prima facie evidence on such a violation (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

34. It follows that the Referral is manifestly ill-grounded pursuant to Rule 36 1. (c) of the Rules of Procedure which provides that *"The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded."*

FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36 1. (c) and Rule 56 (2) of the Rules of Procedure, on 12 December 2011, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20 (4) of the Law;

III. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Kadri Kryeziu	Prof. Dr. Enver Hasani

Ilaz Halili and 20 other former employees of Kosovo Energy Corporation vs. 21 Individual judgments of the Supreme Court

Cases KI 76-2010, KI 82-2010, KI 83-2010, KI 102-2010, KI 111-2010, KI 122-2010, KI 127-2010, KI 11-2011, KI 15-2011, KI 18-2011, KI 45-2011, KI 47-2011, KI 48-2011, KI 50-2011, KI 57-2011, KI 60-2011, KI 69-2011, KI 71-2011, KI 73-2011, KI 75-2011, KI 79-2011, decision of 27 December 2011

Keywords: continuing violation, contract dispute, disability pension, individual/group referral, invalidity pension, legitimate expectation, pensions, right to fair and impartial trial

The Applicants, 21 former employees of the Kosovo Energy Corporation (KEK), filed Referrals pursuant to Article 113.7 of the Constitution, asserting that their rights to property and a fair trial, which the Court construed as references to Article 1 Protocol 1 to the European Convention on Human Rights (ECHR) and Article 6 of the ECHR, were infringed by 21 judgments issued by the Supreme Court. The Applicants argued that they were unjustly deprived of pecuniary interests and were unable to obtain a remedy from ordinary courts. The Supreme Court reversed lower court decisions and approved KEK's unilateral annulment of compensation agreements ("Agreements") following early termination of the Applicants' employment contracts that had otherwise provided them with rights to compensation until the Kosovo Fund on Pension-Invalidity Insurance was established and functioning. On the one hand, the Supreme Court concluded that KEK had fulfilled its obligations under the compensation agreement because the Invalidity and Pension Insurance Fund (IPIF) had been established, triggering termination of the agreement. On the other hand, the Ministry of Labour and Social Welfare (MLSW) disputed the Supreme Court's findings, acknowledging that pensions for permanently disabled persons and individuals older than 65 years, but adding that the Law on Pensions establishing an IPIF had not yet been adopted.

As to admissibility, the Court held that 15 Applicants were authorized parties pursuant to Article 113.7 of the Constitution, that they had fulfilled the exhaustion requirements of Article 113.7 and Article 47.2 of the Law on the Constitutional Court ("Law"), and that the 4-month deadline provided by Article 49 of the Law was inapplicable because the alleged Constitutional violation was continuing in nature. The Court held that the corresponding 15 Referrals were admissible, and that the 6 remaining Referrals were only partly admissible, excluding claims for compensation beyond the Applicants' 65th birthdays while including claims for compensation relating to the period prior to their 65th birthdays.

As to the merits, the Court highlighted the rights to property encompassed by Article 46 and Article 1 of Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Court reasoned that the Applicants had a legitimate expectation to temporary compensation under the Agreements until the IPIF became functional, an entitlement that was protected by Article 1 of Protocol No. 1, citing *Ibrahimi*, *Prokshi* and *Mërlaku*, as well as *Gratzinger and Gratzingerova v. the Czech Republic*. The Court concluded that KEK's unilateral cancellation of the Agreements prior to the IPIF's implementation infringed on their pecuniary property interests, and violated Article 46 and Article 1 of Protocol 1 of the ECHR.

Noting the rights to a fair and impartial trial guaranteed by Article 31.1 of the Constitution and Article 6 of the ECHR, the Court cautioned that ordinary courts must resolve factual, as well as procedural and substantive legal disputes, citing *Garcia Ruiz v. Spain*, whereas its focus is on whether an Applicant received a fair trial, citing *Edwards v. United Kingdom*. The Court emphasized that courts are obliged to give reasons for their judgments, although the level of necessary detail may vary, citing Article 6.1 of the ECHR, *Ibrahimi*, *Prokshi* and *Mërlaku*. Importantly, the Court noted, the Applicants argued that a Law on Pension establishing the IPIF had not yet been adopted, an assertion that was confirmed by the MLSW. The Court concluded that the Supreme Court made no attempt to resolve the Applicants' argument, suggesting that Article 74.3 of the Law on Contract and Torts in conjunction with Article 18 of the 1983 Law on Pension and Invalidity Insurance may have supported the argument. Accordingly, the Court concluded that the Supreme Court had violated Article 31 and Article 6.1 (ECHR) when failing to address the specific, pertinent and important arguments made by the Applicants, citing *Ibrahimi*, *Prokshi* and *Mërlaku*.

For the reasons stated, the Court issued a Judgment regarding its holdings on admissibility, the violations of Article 46 in conjunction with Article 1 Protocol 1 to the ECHR, and Article 31 in conjunction with Article 6 of the ECHR. The Judgment also invalidated the Supreme Court judgments, remanded the cases for reconsideration in conformity with the holdings, and retained jurisdiction pending compliance with the Judgment.

Pristina, 27 December 2011
Ref. No.: AGJ181/11

JUDGEMENT

in

Case No.

KI 76/10, KI 82/10, KI 83/10, KI 102/10, KI 111/10, KI 122/10, KI 127/10, KI 11/11, KI 15/11, KI 18/11, KI 45/11, KI 47/11, KI 48/11, KI 50/11, KI 57/11, KI 60/11, KI 69/11, KI 71/11, KI 73/11, KI 75/11, KI 79/11

Applicants

Ilaz Halili and 20 other former employees of Kosovo Energy Corporation

Constitutional Review of 21 Individual Judgments of the Supreme Court of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Introduction

1. This Judgment concerns Referrals made by the Applicants listed below which were lodged with the Constitutional Court by twenty-one (21) former employees of the Kosovo Energy Corporation (KEK) between August 2010 and June 2011.

2. The present cases are similar– to Case KI No. 40/09, "Imer Ibrahimi and 48 other former employees of Kosovo Energy Corporation against 49 Individual Judgments of the Supreme Court of the Republic of Kosovo" and "Gani Prokshi and 15 other former employees of the Kosovo Energy Corporation against 16 Individual Judgments of the Supreme Court of the Republic of Kosovo" and "Isuf Mërlaku and 25 other former employees of Kosovo Energy Corporation". The Constitutional Court in all Judgments found that there has been a violation of Article 46 of the Constitution of the Republic of Kosovo (Protection of Property) in conjunction with Article 1 Protocol 1 to the European Convention on

Human Rights as well as that there has been violation of Article 31 of the Constitution (Right to Fair and Impartial Trial) in conjunction with Article 6 of the European Convention on Human Rights with in relation to some of those Applicants. Consequently it was decided to declare invalid the Judgments delivered by the Supreme Court in some of those cases and Remand those cases to the Supreme Court for reconsideration in conformity with the judgment of this Court (see the Judgments of the Constitutional Court of 23 June 2010, 18 October 2010 and 10 March 2011).

The Applicants in the present case are as follows:

3. In this Judgment for ease reference the Applicants may be referred to collectively as "Ilaz Halili and twenty (20) other former employees of the Kosovo Energy Corporation (KEK)".

1) Ilaz Halili
2) Agron Abdullahu
3) Raif Banda
4) Preq Halili
5) Sadik Grajqevci
6) Imer Salihu
7) Fejzullah Sallovah
8) Beqir Banolla
9) Mehdi Grajqevci
10) Kamer Dumani
11) Shukrije Kajtazi
12) Elheme Rexhepi
13) Ali Selmani
14) Adem Bajqinovci
15) Ismail Osmani
16) Bajram Pllana
17) Izet Rama
18) Bajram Namani
19) Ahmet Jashanica
20) Maliq Berisha
21) Muharrem Kovaqi

The Applicants challenge the following Judgments of the Supreme Court of Kosovo adopted in the cases of:

1) Ilaz Halili, Rev.nr. 432/08, të datës 10.02.09
2) Agron Abdullahu, Rev.nr. 122/08, të datës 27.01.09
3) Raif Banda, Rev.nr. 49/09, të datës 02.02.09

4) Preq Halili, Rev.nr. 104/09, të datës 20.04.09
5) Sadik Grajqevci, Rev.nr. 552/08, të datës 10.03.09
6) Imer Salihu, Rev.nr. 67/09, të datës 02.02.09
7) Fejzullah Sallovah, Rev.nr. 471/08, të datës 10.03.09
8) Beqir Banolla, Rev.nr. 527/08, të datës 23.02.09
9) Mehdi Grajqevci, Rev.nr. 93/09, të datës 02.06.09
10) Kamer Dumani, Rev.nr. 79/09, të datës 23.02.09
11) Shukrije Kajtazi, Rev.nr. 203/09, të datës 15.07.09
12) Elheme Rexhepi, Rev.nr. 46/09, të datës 02.02.09
13) Ali Selmani, Rev.nr. 405/09, të datës 10.03.10
14) Adem Bajqinovci, Rev.nr. 51/09, të datës 11.02.09
15) Ismail Osmani, Rev.nr. 57/09, të datës 25.02.09
16) Bajram Pllana, Rev.nr. 61/2009, të datës 02.02.09
17) Izet Rama, Rev.nr. 166/09, të datës 27.04.09
18) Bajram Namani, Rev.nr. 151/09, të datës 27.04.09
19) Ahmet Jashanica, Rev.nr. 135/08, të datës 27.01.09
20) Maliq Berisha, Rev.nr. 463/08, të datës 11.02.09
21) Muharrem Kovaqi, Rev.nr. 242/08, të datës 10.02.09

Subject matter

4. The subject matter of this Referral is the assessment of the constitutionality of the individual Judgments delivered by the Supreme Court of the Republic of Kosovo in the twenty-one (21) individual cases of the Applicants against KEK as specified above.

Legal basis

5. The Referral is based on Article 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Section 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the facts as alleged by the Parties

6. The facts of these Referrals are similar to those in “the Case of Imer Ibrahimi and 48 other former employees of the Kosovo Energy Corporation v. 49 individual Judgments of the Supreme Court of the Republic of Kosovo” and “the Case of Gani Prokshi and 15 other former employees of the Kosovo Energy Corporation v. 16 Individual Judgments of the Supreme Court of the Republic of Kosovo” and “Isuf Mërlaku and 25 other former employees of Kosovo Energy Corporation” See the

Judgments of Constitutional Court of Kosovo, (hereinafter referred to as "the case of Ibrahimi and others" dated 23 June 2010, "the case of Prokshi and others" dated 18 October 2010 and " the case of Merlaku and others" dated 10 March 2011).

7. In the course of 2001 and 2002, each of the Applicants in this Referral, as with the Applicants in the said Judgment of 23 June 2010, signed an Agreement for Temporary Compensation of Salary for Termination of Employment Contract with their employer KEK. These Agreements were, in substance, the same.
8. Article 1 of the Agreements established that, pursuant to Article 18 of the Law on Pension and Invalidity Insurance in Kosovo (Official Gazette of the Social Autonomous Province of Kosovo No 26/83, 26/86 and 11/88) and at the conclusion of KEK Invalidity Commission, the beneficiary (i.e. each of the Applicant) is entitled a temporary compensation due to early termination of the employment contract until the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.

9. Article 2 of the Agreements specified that the amount to be paid monthly to each Applicant was to be 206 German Marks.

10. Article 3 specified that "payment shall end on the day that the Kosovo Pension-Invalidity Insurance Fund enters into operation. On that day onwards, the beneficiary may realize his/her rights in the Kosovo Pension and Invalidity Insurance Fund (the Kosovo Pension Invalidity Fund), and KEK shall be relieved from liabilities to the User as per this Agreement."

11. On 1 November 2002, the Executive Board of KEK adopted a Decision on the Establishment of the Pension Fund, in line with the requirements of UNMIK Regulation No 2001/30 on Pensions in Kosovo. Article 3 of this Decision reads as follows: "The Pension Fund shall continue to exist in an undefined duration, pursuant to terms and liabilities as defined with Pension Laws, as adopted by Pension Fund Board and KEK, in line with this Decision, or until the legal conditions on the existence and functioning of the Fund are in line with Pension Regulations or Pension Rules adopted by BPK."

12. On 25 July 2006, the KEK Executive Board annulled the above mentioned Decision on the Establishment of the Supplementary Pension Fund and terminated the funding and functioning of the Supplementary Pension Fund, with effect from 31 July 2006. According to the Decision of 25 July 2006, all beneficiaries were guaranteed full payment in line with the Fund Statute. Furthermore the total obligations towards beneficiaries were 2, 395,487 Euro, banking deposits were 3,677,383

Euro and asset surplus from liability were 1,281,896 Euro. The Decision stated that KEK employees that are acknowledged as labour disabled persons by the Ministry of Labour and Social Welfare shall enjoy rights provided by the Ministry. On 14 November 2006, KEK informed the Central Banking Authority that "decision on revocation of the KEK Pension Fund is based on decision of the KEK Executive Board and the Decision of the Pension Managing Board… due to the financial risk that the scheme poses to KEK in the future".

13. According to the Applicants, KEK terminated the payment stipulated by the Agreements in the summer of 2006 without any notification. The Applicants claim that such an action is in contradiction to the Agreements signed.
14. The Applicants also claim that it is well known that the Kosovo Pension Invalidity Fund has not been established yet.

15. On the other hand, in the original case, KEK contested the Applicants' allegations arguing that it was widely known that the Invalidity Pension Fund had been functioning since 1 January 2004.

16. According to KEK, the Applicants were automatically covered by the national invalidity scheme pursuant to UNMIK Regulation No 2003/40 on Promulgation of the Law on Invalidity Pensions in Kosovo (Law No 2003/23).
17. KEK further argued that on 31 August 2006 it issued a Notification according to which all beneficiaries of the KEK Supplementary Fund had been notified that the Fund was terminated. The same notification confirmed that all beneficiaries were guaranteed complete payment in compliance with the SPF Statute, namely 60 months of payments or until the beneficiaries reached 65 years of age, pursuant to the Decision of the Managing Board of the Pension Fund of 29 August 2006.

18. KEK further argued that the Applicants did not contest the Instructions to invalidity pension and signature for early termination of employment pursuant to the conclusion of the Invalidity Commission.

19. The Applicants sued KEK before the Municipal Court in Prishtina, requesting the Court to order KEK to pay unpaid payments and to continue to pay 105 Euro (equivalent to 206 German Marks) until conditions are met for the termination of the payment.

20. The Municipal Court in Prishtina approved the Applicants' claims and ordered monetary compensation. The Municipal Court of Prishtina found (*e.g. the Judgment C. Nr. 2140/2006 of 25 June 2007 in the case of the first Applicant Ilaz Halilii*) that the conditions provided by Article

3 of the Agreements have not been met. Article 3 of the Agreements provides for salary compensation until exercise of the Applicants' right, "which means an entitlement to a retirement scheme, which is not possible for the plaintiff, because he has not reached the age of 65."

21. The Municipal Court further stated in the above quoted judgment that payment of compensation cannot be connected to provisions of the Supplementary Pension Statute, since the Agreements were signed earlier and the Statue has not provided that the Agreements that entered into earlier cases shall cease to be valid. This Court also clarified that according to Article 262 of the Law on Obligations and Contracts the creditor (i.e. an Applicant) was entitled to seek performance of the obligation, while the debtor (i.e. KEK) is bound to perform such obligation.
22. KEK appealed against the judgments of the Municipal Court to the District Court, arguing, *inter alia,* that the Municipal Court judgment was not fair because the Agreements were signed with the Applicants because of the invalidity of the Applicants and that they cannot claim continuation of their working relations because of their invalidity.

23. KEK reiterated that the Court was obliged to decide upon the UNMIK Regulation 2003/40 on the promulgation of the Law on Invalidity Pensions according to which the Applicants were entitled to an invalidity pension.

24. The District Court in Prishtina rejected the appeals of KEK and found their submissions ungrounded.

25. KEK submitted a revision to the Supreme Court because of an alleged essential violation of the Law on Contested Procedure and erroneous application of material law. It repeated that the Applicants were entitled to the pension provided by the 2003/40 Law and that because of humanitarian reasons it continued to pay monthly compensation after the Law entered into force. It argued that the age of the applicant was not relevant but that his invalidity was.

26. The Supreme Court accepted the revisions of KEK, and quashed the judgments of the District Court and the Municipal Court in Prishtina and rejected as unfounded the Applicants' lawsuits.

27. The Supreme Court argued that the manner of termination of employment was considered lawful pursuant to Article 11.1 of UNMIK Regulation 2001/27 on the Basic Labour Law in Kosovo.

28. In its Judgment in the case of the first applicant Ilaz Halili, Rev. No. 432/2008 of 10 February 2009, the Supreme Court stated*: "Taking into account the undisputed fact that the respondent party fulfilled the obligation towards the plaintiff, which is paying salary compensation according to the specified period which is until the establishment and functioning of the Invalidity and Pension Insurance Fund in Kosovo effective from 1 January 2004, the Court found that the respondent party fulfilled the obligation as per the agreement. Thus the allegations of the plaintiff that the respondent party has the obligation to pay him the temporary salary compensation after the establishment of the Invalidity and Pension Insurance Fund in Kosovo are considered by this Court as unfounded because the contractual parties until the appearance of solving condition- establishment of the mentioned fund have fulfilled their contractual obligations…*"

29. On 15 May 2009, Kosovo Ministry of Labour and Social Welfare issued the following note: "*The finding of the Supreme Court of Kosovo, in its reasoning of e.g. Judgment Rev. No. 338/2008, that in the Republic of Kosovo there is a Pension and Invalidity and Pension Insurance Fund which is functional since 1 January 2004 is not accurate and is ungrounded. In giving this statement, we consider the fact that UNMIK regulation 2003/40 promulgates the Law No 2003/213 on the pensions of disabled persons in Kosovo, which regulates over permanently disabled persons, who may enjoy this scheme in accordance with conditions and criteria as provided by this law. Hence let me underline that the provisions of this Law do not provide for the establishment of a Pension and Invalidity Insurance in the country. Establishment of the Pension and Invalidity Insurance Fund in the Republic of Kosovo is provided by provisions of the Law on pension and Invalidity Insurance funds, which is in the process of drafting and approval at the Government of Kosovo*." The same note clarified that at the time of writing that note, the pension *inter alia* existed "*Invalidity pension in amount of 45 Euro regulated by the Law on Pensions of Invalidity Persons (beneficiaries of these are all persons with full and permanent Invalidity)" as well as "contribution defined pensions of 82 Euro that are regulated by Decision of the Government (the beneficiaries of these are all the pensioners that have reached the pensions age of 65 and who at least have 15 years of working experience)*".

Complaints

30. The Applicants complain that their rights have been violated because KEK unilaterally annulled their Agreements although the condition prescribed in Article 3, the establishment of the Kosovo Pension-

Invalidity Insurance Fund) had not been fulfilled. The Applicants further argued that they have not been able to remedy such violation before the ordinary courts. While all the Applicants do not explicitly complain of a violation of the European Convention on Human Rights (ECHR), it appears from the Applicants' submissions that the subject of the complaints are their property rights (as guaranteed by Article 1 Protocol 1 to the ECHR) as well as their right to fair trail (as guaranteed by Article 6 of the ECHR).

Summary of the proceedings before the Court

31. Between August and June 2011, the Applicants individually, filed the Referrals to the Constitutional Court. The President of the Court appointed Judge Kadri Kryeziu as Judge Rapporteur and appointed a Review Panel of the Court composed of Judges Altay Suroy (Presiding), Enver Hasani and Iliriana Islami.

32. On 8 July 2011, after having considered the Report of the Judge Rapporteur Kadri Kryeziu, the Review Panel, composed of Altay Suroy, Enver Hasani and Iliriana Islami made a recommendation to the full Court on the admissibility of the Referral.

33. On the same day the Court deliberated and voted on the case.

Admissibility

34. As was done in the case *of "Ibrahimi and others", "Prokshi and others" and "Mërlaku and others"*, already referred to, in order to be able to adjudicate the Applicants' Referral the Constitutional Court needs first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution.

35. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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";

and to Article 47.2 of the Law, stipulating that:

"The individual may submit the referral in question only after he/she has exhausted all legal remedies provided by the law."

36. The Court further has to consider whether Applicants submitted their Referral within the four months time limit prescribed by Article 49 of the Law. In this connection, the Constitutional Court refers to Article 49 of the Law, which stipulates that:

"*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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced…"*

37. The Court recalls that in the present case, as in the cases of *"Ibrahimi and others*", *"Prokshi and others" and "Mërlaku and others"*, the Applicants still suffer from the unilateral annulment of their Agreements signed by KEK. They raised the same argument as the Applicants in the earlier that it is well known that the Pension and Invalidity Insurance Fund has not been established to date. Therefore, there is a continuing situation. As the circumstance of which the Applicants complain continued, the four months period as prescribed in Article 49 of the Law is inapplicable to these cases.

38. The Constitutional Court is cognizant that some of the Applicants were older than 65 years at the time of submitting his Referral to this Court.

39. These Applicants are: Ilaz Halili (1945), Raif Banda (1944), Imer Salihu (1944), Bajram Namani (1945), Ahmet Jashanica (1942) and Muharrem Kovaqi (1945).

40. The Constitutional Court recalls that according to the Note issued by the Ministry of Labour and Social Welfare on 15 May 2009 persons who have reached the pensions age of 65 and who have at least 15 years of working experience are entitled to pension in a monthly amount of 82 Euro. The substance of this Note was confirmed by the representative of the Ministry at the public hearing that the Constitutional Court held on 30 April 2010 in the case of Ibrahimi and others.

41. It appears consequently that the above listed Applicants are entitled for pension from the moment when they reached the age of 65.

42. However, their complaint to the extent of unpaid compensation for the period prior to that moment, on account of a continuing situation, remains at issue.

43. Therefore, the Referrals of the Applicants: Ilaz Halili, Raif Banda, Imer Salihu, Bajram Namani, Ahmet Jashanica and Muharrem Kovaqi are partly admissible.

44. With regard to the remaining Applicants, the Constitutional Court does not find any reason for inadmissibility of the Referral.

45. The Court further considers that it is appropriate to join the Referrals pursuant to Rule 37 of the Rules of Procedure.

Merits

46. The Court recalls its Judgments of 23 June 2010, 18 October and 10 March 2011 adopted in the earlier KEK cases in which the it found that there has been a violation of Article 46 of the Constitution of the Republic of Kosovo (Protection of Property) in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights as well as that there has been violation of Article 31 of the Constitution (Right to Fair and Impartial Trial) in conjunction with Article 6 of the European Convention on Human Rights with regard to the same Applicants. Consequently it was decided to declare invalid the judgments delivered by the Supreme Court in the Applicants' cases and remit those judgments to the Supreme Court for reconsideration in conformity with the judgment of this Court.

i. as regards the Protection of Property

47. The Applicants complain that their rights have been violated because KEK unilaterally annulled their Agreements although the condition prescribed in Article 3 (i.e. Establishment of the Kosovo Pension-Invalidity Insurance Fund) had not been fulfilled. In substance, the Applicants complain that there has been a violation of their property rights.

48. At the outset, the following legal provisions should be recalled:

Article 53 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."

Article 46 [Protection of Property] of the Constitution reads as follows

1. *The right to own property is guaranteed.*
2. *Use of property is regulated by law in accordance with the public interest.*
3. *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*

Article 1 of Protocol No. 1 of the European Convention on Human Rights provides

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

49. According to the case law of European Court of Human Rights, an Applicant can allege a violation of Article 1 of Protocol no. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision.
50. Furthermore, "possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfillment of the condition" (see the judgements in the cases of "Ibrahimi and others", "Prokshi and others" and "Mërlaku and others").

51. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, confer on the Applicant a title to a substantive interest protected by Article 1of Protocol No. 1 to the ECHR. (See the judgements in the cases of *"Ibrahimi and others", "Prokshi and others"and "Mërlaku and others").*

52. The Constitutional Court notes that, at the time of concluding the Agreements between the Applicants and KEK, these type of agreements have been regulated by the Law on Contract and Torts (Law on Obligations) published in Official Gazette SFRJ 29/1978 and amended in 39/1985, 45/1989, 57/1989.

    Article 74(3) of the Law on Contract and Torts reads as follows:

    "After being concluded under rescinding condition (raskidnim uslovom) the contract shall cease to be valid after such condition is valid."

53. The crux of the matter is therefore whether the rescinding condition under which the Agreements were signed has been met. Answering that question will allow the Constitutional Court to assess whether the circumstances of this Referral, considered as a whole, confer on the Applicants title to a substantive interest protected by Article 1of Protocol No. 1 to the ECHR.

54. The Constitutional Court notes that it is clear from the documents and it is undisputable between the parties that the "rescinding condition" under which the Agreements have been signed is the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.

55. In this respect, the Constitutional Court also notes that, according to the Ministry of Labour and Social Welfare, the establishment of the Pension and Invalidity Insurance Fund, was to be provided by the Law on Pension and Invalidity Insurance Funds. This was in the process of drafting and approval with the Government of Kosovo.

56. The Constitutional Court considers that the Applicants, when signing the Agreements with KEK, had a legitimate expectation that they would be entitled to the monthly indemnity in the amount of 105 Euro until the Pension and Invalidity Insurance Fund was established.

57. Such legitimate expectation is guaranteed by Article 1 of Protocol No. 1 to the Convention, its nature is concrete and not a mere hope, and is based on a legal provision or a legal act, i.e. Agreement with KEK (*the* judgements in the cases *case of "Ibrahimi and others", "Prokshi and*

others" and "Mërlaku and others"); also *mutatis mutandis* Gratzinger and Gratzingerova v. the Czech Republic (dec.), no. 39794/98, para 73, ECHR 2002-VII).

58. Therefore, the Constitutional Court considers that the Applicants have a "legitimate expectation" that their claim would be dealt in accordance with the applicable laws, in particular the above quoted provisions of the Law on Contract and Torts and the Law on Pension and Invalidity Insurance in Kosovo, and consequently upheld (see judgements in the cases *of "Ibrahimi and others"*, "*Prokshi and others" and "Mërlaku and others"*).
59. However, the unilateral cancellation of the Agreements, prior to the rescinding condition having been met, breached the Applicants' pecuniary interests which were recognized under the law and which were subject to the protection of Article 1 of Protocol No. 1. (see *the* judgements in the cases *of "Ibrahimi and others"*, "*Prokshi and others" and "Mërlaku and others"*).

60. Consequently, the Constitutional Court concludes that there is a violation of Article 46 of the Constitution in conjunction Article 1 of Protocol 1 to the European Convention on Human Rights.

ii. as regards the right to fair trail

61. The Applicants further complain that they have not been able to the remedy violation of their property rights before the ordinary courts.

Article 31 [Right to Fair and Impartial Trial] of the Constitution, reads as follows:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts other state authorities and holders of public powers.

Article 6 of the European Convention on Human Rights

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

62. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts, including the Supreme Court. In general, "Courts shall adjudicate based on the Constitution and

the law" (Article 102 of the Constitution). More precisely, the role of the ordinary courts is to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, *García Ruiz v. Spain* [GC], no. 30544/96, paragraph 28, European Court on Human Rights [ECHR] 1999-I).

63. On the other hand, "The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution" (Article 112. 1 of the Constitution. Thus, the Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see among others authorities, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No 13071/87 adopted on 10 July 1991).

64. According to the jurisprudence of the European Court of Human Rights, Article 6 paragraph 1 of the ECHR obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is, moreover, necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. Thus the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case (see the judgements in the cases of *"Ibrahimi and others", "Prokshi and others" and "Mërlaku and others"*).

65. In the present case, the Applicants requested the ordinary courts to determine their property dispute with the KEK. The Applicants referred, in particular, to the provision of Article 3 of the Agreements, stating that the Law on Pension that establishes Pension and Invalidity Insurance Fund has not been adopted yet. This fact has been confirmed by the representative of the responsible Ministry of Labour and Social Welfare.

66. However, the Supreme Court made no attempt to analyze the Applicants' claim from this standpoint, despite the explicit reference before every other judicial instance. Instead the Supreme Court view was that it was an undisputed fact that the respondent party (KEK) fulfilled the obligation towards the plaintiff, which was paying salary compensation according to specified period which was until the establishment and

functioning of the Invalidity and Pension Insurance Fund in Kosovo effective from 1 January 2004.

67. It is not the task of the Constitutional Court to decide what would have been the most appropriate way for the ordinary courts to deal with the Applicants' argument, i.e. fulfilling the rescinding condition of Article 3 of the Agreements, which fulfilment is also regulated by Article 74(3) of the Law on Contract and Torts taken in conjunction with Article 18 of the 1983 Law on Pension and Invalidity Insurance.

68. However, in this Court's opinion, the Supreme Court, by neglecting the assessment of this point altogether, even though it was specific, pertinent and important, fell short of its obligations under Article 6 para 1 of the ECHR.(see the cases of "*Ibrahimi and others"*, "*Prokshi and others" and "Mërlaku and others"*).

69. In view of the above, the Constitutional Court concludes that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

FOR THESE REASONS,

THE COURT UNANIMOUSLY DECIDES AS FOLLOWS:

I. TO JOIN THE REFERRALS;

***II*. TO DECLARE AS**

a) *Admissible* the Referral with regard to the following Applicants:

KI 82/10 Agron Abdullahu
KI 102/10 Preq Halili
KI 111/10 Sadik Grajqevci
KI 127/10 Fejzullah Sallovah
KI 11/11 Beqir Banolla
KI 15/11 Mehdi Grajqevci
KI 18/11 Kamer Dumani
KI 45/11 Shukrije Kajtazi
KI 47/11 Elheme Rexhepi
KI 48/11 Ali Selmani
KI 50/11 Adem Bajqinovci
KI 57/11 Ismail Osmani

KI 60/11 Bajram Pllana
KI 69/11 Izet Rama
KI 75/11 Maliq Berisha

b) *Partly admissible* the Referral with regard to the following Applicants:

KI 76/10 Ilaz Halili
KI 83/10 Raif Banda
KI 122/10 Imer Salihu
KI 71/11 Bajram Namani
KI 73/11 Ahmet Jashanica
KI 79/11 Muharrem Kovaqi

III. TO FIND THAT

a) There has been a violation of Article 46 of the Constitution of the Republic of Kosovo in conjunction with Article 1 Protocol 1 to the European Convention on Human Rights, in the cases of all Applicants.

b) *There has been violation of Article 31 of the Constitution* in conjunction with Article 6 of the European Convention on Human Rights with regard to the same Applicants who suffered violation of Article 46 of the Constitution.

IV. *Declares invalid the judgments delivered by the Supreme Court* in the following cases:

1) Ilaz Halili, Rev.nr. 432/08, të datës 10.02.09
2) Agron Abdullahu, Rev.nr. 122/08, të datës 27.01.09
3) Raif Banda, Rev.nr. 49/09, të datës 02.02.09
4) Preq Halili, Rev.nr. 104/09, të datës 20.04.09
5) Sadik Grajqevci, Rev.nr. 552/08, të datës 10.03.09
6) Imer Salihu, Rev.nr. 67/09, të datës 02.02.09
7) Fejzullah Sallovah, Rev.nr. 471/08, të datës 10.03.09
8) Beqir Banolla, Rev.nr. 527/08, të datës 23.02.09
9) Mehdi Grajqevci, Rev.nr. 93/09, të datës 02.06.09
10) Kamer Dumani, Rev.nr. 79/09, të datës 23.02.09
11) Shukrije Kajtazi, Rev.nr. 203/09, të datës 15.07.09
12) Elheme Rexhepi, Rev.nr. 46/09, të datës 02.02.09
13) Ali Selmani, Rev.nr. 405/09, të datës 10.03.10
14) Adem Bajqinovci, Rev.nr. 51/09, të datës 11.02.09
15) Ismail Osmani, Rev.nr. 57/09, të datës 25.02.09
16) Bajram Pllana, Rev.nr. 61/2009, të datës 02.02.09
17) Izet Rama, Rev.nr. 166/09, të datës 27.04.09

18) Bajram Namani, Rev.nr. 151/09, të datës 27.04.09
19) Ahmet Jashanica, Rev.nr. 135/08, të datës 27.01.09
20) Maliq Berisha, Rev.nr. 463/08, të datës 11.02.09
21) Muharrem Kovaqi, Rev.nr. 242/08, të datës 10.02.09

V. REMAND these Judgments to the Supreme Court for reconsideration in conformity with the judgment of this Court

VI. REMAINS seized of the matter pending compliance with that Order.

This Judgment shall have effect immediately on delivery to the parties.

Done at Prishtina this day of 30 November 2011

Judge Rapporteur	**President of the ConstitutionalCourt**
Mr.Sc.Kadri Kryeziu, Deputy-President	Prof. Dr. Enver Hasani

Fahrudin Megjedovic, Deputy Chairperson for Communities of the Municipal Assembly in Peja vs. Decision of the Municipal Assembly of Peja on the appointment of the Deputy Mayor of Municipality for Communities, dated 15 February 2010

Case KI 32-2010, decision of 3 March 2011

Keywords: minority representation, referral by Vice President of Municipal Assembly for Communities, right to effective legal remedies, right to election

The Applicant, the Deputy Chairperson for Communities of the Peja Municipal Assembly, filed a Referral pursuant to Article 62.4 of the Constitution, asserting that a decision of the Peja Municipal Assembly infringed the right to effective legal remedies and the right to election. The Applicant argued that the Municipal Assembly acted unlawfully by allowing its Chairperson to cast a deciding vote for election of the Deputy Mayor for Communities when the votes of members of the Assembly representing the Communities were split equally. The Applicant contended that the Assembly acted unlawfully when denying his requests for annulment of the election pursuant to Article 61.3 of the Law on Local Self-Government, and for a new election.

The Court found that the Referral was admissible because it alleged a specific breach of constitutionally guaranteed rights, and because the Referral was submitted by the Deputy Chairperson for Communities, a person authorized to do so under Articles 62.3 and 62.4 of the Constitution.

On the merits of the Referral, the Court held that the deciding vote cast by the Assembly Chairperson was an impermissible influence on the election of the Deputy Mayor for Communities. The Court reasoned that only Municipal Assembly members from non-majority communities were authorized to cast votes, and that election of the Deputy Mayor for Communities must be decided by a majority vote, which did not occur in this instance. Accordingly, the Court issued a Judgment finding a violation of Articles 45, 54 and 57 of the Constitution, declaring that the election of the Deputy Mayor for Communities was void, ordering a new election for Deputy Mayor for Communities, and requiring the Assembly to report to the Court regarding its compliance with the judgment within 90 days of its publication.

Pristina, 3 March 2011
Ref. No.: AGJ 85/11

JUDGMENT

in

Case No. KI 32/10

Applicant

Fahrudin Megjedovic, Deputy Chairperson for Communities of the Municipal Assembly in Peja

Constitutional review of the Decision of the Municipal Assembly of Peja on the appointment of the Deputy Mayor of Municipality for Communities, dated 15 February 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge,
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Applicant is Mr Fahrudin Megjedovic, Deputy Chairperson for Communities of the Municipal Assembly of Peja.

The Challenged Decision

2. The Applicant challenges the Decision of the Municipal Assembly of Peja on the appointment of the Deputy Mayor for Communities made on 15 February 2010.

Subject Matter

3. The subject matter of the referral filed to the Constitutional Court of the Republic of Kosovo (hereinafter: "the Court"), dated 17.05.2010, is the Assessment of Constitutionality of the Decision of the Municipal Assembly of Peja on the appointment of the Deputy Mayor of Municipality for Communities, dated 15 February 2010.

Legal Basis

4. The Applicant's Referral is based on Article 62.4 of the Constitution of the Republic of Kosovo (hereinafter: "the Constitution"), Article 55.4 of the Law No.03/L040 on the Local Self-Government of the Assembly of Republic of Kosovo (hereinafter: "the Law"), and Section 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "Rules of Procedure").

Proceedings before the Court

5. On 17 May 2010 the Deputy Chairperson for Communities of the Municipal Assembly in Peja (hereinafter: MA Peja) filed a Referral with the Court requesting the assessment of the constitutionality of the Decision of the Municipal Assembly made on 15 February 2010 in relation to the election of the Deputy Mayor for Communities for the Municipality of Peja.

6. On 02 July 2010, the President of the Court, pursuant to the Rules of Procedures, appointed Judge Kadri Kryeziu to be Judge Rapporteur, and appointed a Review Panel composed of Judge Robert Carolan (presiding), Judges Altay Suroy and Snezhana Botusharova.

7. On 05 July 2010, the Secretariat of the Court notified the Municipality of Peja of the Referral and requested its response. The Court notes, with regret, that the Municipality of Peja did not provide any response to that request.

8. The Review Panel considered the Report of the Judge Rapporteur and recommended to the Court the admissibility of the referral. The full Court deliberated on the referral in private session.

Summary of the facts

9. On 15 January 2010, the Municipal Assembly of Peja held its inaugural session following the Local Elections held on 15 November 2009. Item 6

on the agenda was the proposal for the appointment of the Deputy Mayor for Communities.

10. The minutes disclose that "On the proposal by Mayor Dr. Ali Berisha, pursuant to the legal provisions in force and consultations at the highest institutional level, the appointees for Deputy Mayor and Deputy Mayor for Communities" were:

    1. Mr Gazmend Muhaxheri, Deputy Mayor;
    2. Mr Ibish Bajrami, Deputy Mayor for Communities; and
    3. Mr Drenko Todorovic, Deputy Mayor for the Serb community.

11. Mr Fahrudin Megjedovic, who is a municipal assembly member from the Bosniak community and also the Deputy Chairperson of the Municipal Assembly for Communities in Peja, contested the appointment as he considered the Decision unlawful. His reaction was made publicised in the print and broadcast media.

12. At the next session of the Municipal Assembly, held on 15 February 2010, item 7 (seven) of the agenda was a repeat of the vote for the position of Deputy Mayor for Communities even though Mr Ibish Bajrami was recorded as having been already been appointed to that position on 15 January 2010. At this session, the Mayor of the Municipality again proposed Mr Ibish Bajrami for the position of Deputy Mayor for Communities.

13. The proposal presented by the Mayor was put to a vote by the Chairperson of the Assembly, and out of 40 municipal assembly members present, 38 voted in favour and 2 voted against the proposal. The vote of the assembly members from Communities was split in two: two were in favour and two were against the proposal of the mayor. In the events that happened the Assembly Chairperson then purported to cast a deciding vote in favour of Mr Ibish Bajrami and announced him duly elected.

14. On 19 February 2010, the Applicant, in his capacity as Deputy Chairperson of the Municipal Assembly for Communities filed a complaint with the Ministry of Local Government Administration (hereinafter: "MLGA"), outlining the procedure followed for the election of Mr Ibish Bajrami for the position of the Deputy Mayor for Communities in the Municipality of Peja. He requested the MLGA to render a decision annulling the decision of the MA Peja, dated 15 February 2010, and to compel the MA Peja to repeat the voting process for the election of the Deputy Mayor for Communities. In the events that happened the MLGA did not annul the decision of the MA Peja.

15. On 13 April 201, the Applicant filed a request with the Mayor, where he requested that at the next meeting of the Committee for Policies and Finance, and at the next session of the Municipal Assembly, the agenda should again include the issue of the election of Deputy Mayor for Communities.

16. The matter was not included in the Agenda for the next meeting of the Municipal Assembly

17. In a letter dated 21 February 2010 the MGLA informed the Municipality of Peja that, in compliance with the report from its observers present in the session of 15 February 2010 of the MA Peja, it had reached the conclusion that the election of the Deputy Mayor for Communities was conducted not in contradiction with Article 61.3 of the Law on Local Self-Government. The MGLA ordered the MA Peja to review the decision in question within the deadline provided by Article 82.2 of the Law on Local Self-Government.

18. On 11 March 2010 the Municipality of Peja provided its response in writing to the MLGA, where it stressed that the Decision of the Municipal Assembly for the election of the Deputy Mayor for Communities, dated 15 February 2010, was legal and regular, and thus the MA Peja does not consider that there is a reason to suspend the decision or review it.

Applicant's allegations

19. The Applicant alleges that the Decision of the Municipal Assembly in Peja violated the constitutional rights for an effective legal remedy and the right to be elected. According to the applicant, the election of the Deputy Mayor for Communities by the Municipal Assembly was done in violation of Article 61.3 of the Law No.03/L-040 on Local Self-Government, adopted by the Assembly of the Republic of Kosovo. The Applicant requests the assessment of the constitutionality and legality of the decision in question.

20. In essence the Applicant maintains that the Chairperson had no right to give a casting vote to Mr Bajrami when the members of the Assembly representing the members of Communities split equally in favour and against the proposal. Consequently, the Applicant maintains that Mr Bajrami's appointment was unlawful and in breach of the Constitutional rights of the members of Communities.

Assessment of the admissibility of the Referral

21. Article 82 of the Law on Local Self Government deals with procedures for the review of the legality of acts by Municipalities in Kosovo. It provides a discretion to the Minister for Local Government to refer questions of the legality or constitutionality of acts or decision of the Municipality to the District Court. The Article provides as follows:

> ***Article 82***
> ***The Procedure for the Review of Legality***
>
> *82.1. If the supervisory authority considers a decision or other act of a municipality to be inconsistent with the Constitution and laws, it may request that the municipality reexamine such decision or act. The request shall state the grounds of the alleged violation of the Constitution or law and shall not suspend the execution of the municipal decision or other act at issue.*
> *82.2. The municipal body shall respond to request for re-examination within 30 days of notification of receipt of such request.*
> *82.3. If the municipal body accepts the request for re-examination, it may suspend the execution of the contested decision or act pending the deliberation by the municipal authorities.*
> *82.4. If the municipal body fails to respond within the deadline or rejects the request or upholds the contested decision or act, the supervisory authority may challenge the act in question in the District Court competent for the territory of the municipality within 30 days following the failure to respond, notification of the rejection or the upholding of the contested decision or act.*
> *82.5. The District Court may order, by interim measure the suspension of the application of the contested decision or act or other temporary acts in accordance with the applicable law.*

22. This power of referral of the matter to the District is discretionary only. It was not exercised by the relevant Minister. Because the Minister did not exercise his discretion no other avenue of appeal against the decision of MA Peja of 15 February was available other than to refer the matter to the Constitutional Court.

23. Pursuant to Article 113 (1) of the Constitution the Constitutional Court decides only on matters referred to the court in a legal manner by authorised parties. Mr Megjedovic brings this Referral as Deputy Chairperson for Communities of a Municipality, being a person authorised to refer acts or decisions of the Municipality that are alleged to be in violation of their rights to the Constitutional Court.

24. In this respect, the Court refers to the provisions of Article 62.3 and 62.4 of the Constitution in relation to representation in the institutions of Local Government which provide as follows:

Article 62.3

The Vice President for Communities shall promote inter-Community dialogue and serve as formal focal point for addressing non-majority Communities' concerns and interests in meetings of the Assembly and its work. The Vice President shall also be responsible for reviewing claims by Communities or their members that the acts or decisions of the Municipal Assembly violate their constitutionally guaranteed rights. The Vice President shall refer such matters to the Municipal Assembly for its reconsideration of the act or decision.

Article 62.4

In the event the Municipal Assembly chooses not to reconsider its act or decision, or the Vice President deems the result, upon reconsideration, to still present a violation of a constitutionally guaranteed right, the Vice President may submit the matter directly to the Constitutional Court, which may decide whether or not to accept the matter for review.

25. The Referral alleges a breach of constitutionally guaranteed rights and it brought by an authorised person. The Court is satisfied that the Applicant has the proper legal standing and authority to bring this referral to the Constitutional Court and that the Referral is therefore admissible.

Merits

26. It is recalled that the Applicant challenges the Decision of the Municipal Assembly of Peja on the appointment of the Deputy Mayor for Communities made on 15 February 2010. From the facts submitted it is clear that the Applicant's complaint relates to the special rights and protection that is given to persons belonging to the non-majority communities in the Republic of Kosovo. Such special position of non-majority communities is reflected in particular in guaranteed representation, in certain circumstances, in Municipalities and in the Assembly of Kosovo.

27. This status arises originally in law from the terms of the Comprehensive Proposal for the Kosovo Status Settlement, dated 26 March 2006, commonly referred to the Ahtisaari plan. Indeed, one area that receives particular attention is that dealing with the rights of communities and its

members as provided for in Article 3 of the Comprehensive Proposal, which provides:

Article 3
Rights of Communities and Their Members

3.1 Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of Kosovo (hereinafter referred to as Communities) shall have specific rights as set forth in Annex II of this Settlement, in addition to the human rights and fundamental freedoms provided for in Article 2 of Annex I of this Settlement.

3.2 Kosovo shall guarantee the protection of the national or ethnic, cultural, linguistic and religious identity of all Communities and their members. Kosovo shall also establish the constitutional, legal and institutional mechanisms necessary for the promotion and protection of the rights of all members of Communities and for their representation and effective participation in political and decision-making processes, as set forth in Annexes I and II of this Settlement.

28. The Annexes referred to in Article 3 of the Comprehensive Proposal deal with substantive protection given to Communities and their members.

29. The Constitution also has a special Chapter dealing with the Rights of Communities and their members. Chapter III of the Constitutions from Article 57 to 62 substantially reflect and also augment the obligations and the rights contained in the Comprehensive Proposal. Article 57 dealing with the General Principles of the Rights of Communities provides as follows:

Article 57
[General Principles]

1. Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in Chapter II of this Constitution.
2. Every member of a community shall have the right to freely choose to be treated or not to be treated as such and no discrimination shall result from this choice or from the exercise of the rights that are connected to that choice.
3. Members of Communities shall have the right to freely express, foster and develop their identity and community attributes.

4. The exercise of these rights shall carry with it duties and responsibilities to act in accordance with the law of the Republic of Kosovo and shall not violate the rights of others.

30. This Court drew attention to the constitutional and statutory protections given to Communities in its Judgment in the case of Cemail Kurtesi vs. The Municipality of Prizren, KO 01-09, dated 18 March 2010. This Court refers to that Judgment now and to the setting out of the nature of the institutions of Local Self Government and their obligations in relation to the right of Communities and their members, (see, *inter alia,* paragraphs 17, 30, 31, 32, 35, 36 and 38 of the said Judgment).

31. The substance of the Referral to be considered by the Court relates to whether the proposal, election and appointment of the Deputy Mayor for Communities for Peja was constitutional and whether the circumstances surrounding his election and appointment breached any provision of the Constitution. Let us turn therefore to consider the particular statutory provisions that apply to how the Deputy Mayor is elected.

32. Article 61 of the Law on Local Self Government, Law Nr. 03/L-40, dated 20 February 2008, provides for the proposal and election and the duties of the Deputy Mayor for Communities in Municipalities where at least ten percent (10%) of the citizens belong to communities not in the majority in those Municipalities. It provides as follows:

Article 61
Deputy Mayor for Communities

61.1. There shall be a Deputy Mayor for Communities in those municipalities where at least 10% of the citizens belong to non-majority communities.
61.2. The Deputy Mayor for Communities shall be elected for the same term of office as the Mayor.
61.3. The appointment and dismissal of the Deputy Mayor for Communities shall be proposed by the Mayor and shall get approval of the majority of the municipal assembly members present and voting and the majority of the municipal assembly members present and voting belonging to the non-majority communities.
61.4. The deputy mayor for communities shall assist the Mayor and provide him/her advice and guidance to the Mayor on issues related to the non-majority communities.
61.5. When the post of the Deputy Mayor becomes vacant, the Mayor shall appoint a new one no later than thirty days after the vacancy arises according to the procedures of paragraph 3 of this Article.
61.6 The Article 59 on the conflict on interest of the Mayor shall apply mutatis mutandis to the Deputy Mayor for Communities.

33. The mechanism provides for three events to occur for his/her election. The first of these is that the Deputy Mayor for Communities is proposed by the Mayor of the Municipality. The second is that that the majority of the members of the Municipal Assembly vote for the person proposed. The third event is that a majority of the municipal assembly members present and voting belonging to the non-majority Communities must also vote for him/her.

34. According to the minutes of the meeting of the Municipality Assembly of the 15 February 2010 the first two events occurred. Mr Bajrami was proposed by the Mayor of the Municipality and he received the overwhelming majority of the members of the Municipal Assembly present and voting. However he did not get a majority of the votes of the members belonging to the non-majority Communities. They were tied: two voted for Mr Bajrami and two voted against him.

35. Let us turn therefore to the provisions of Article 48 of the Law on Local Self Government which deals with voting at the Municipal Assembly. It provides:

> ***Article 48***
> ***Voting***
>
> *48.1. At all meetings of the Municipal Assembly and its committees, each member including the chairperson shall have one vote, but the chairperson shall have an additional casting vote if an equal number of votes are cast for and against a proposal.*
>
> *48.2. Unless otherwise explicitly provided for in this law, decisions of the Municipal Assembly or of a committee shall be adopted by the majority of the members present and voting.*
>
> *48.3. Abstentions shall be noted for the purpose of establishing the quorum, but shall not otherwise be taken into account for the voting results.*

36. Generally, in the event of the casting of an equality of votes, an event that is likely over time, many assemblies, legislatures and parliaments will provide that one person shall have a casting vote in order to avoid deadlock and to enable business to be completed. In the case of the Municipalities in Kosovo this casting vote is given, by the provisions of Article 48.1 quoted above, to the Chairperson of the Assembly. Because of the equality of votes that occurred in the election for the Deputy Mayor for Communities the Chairperson of the Municipal Assembly decided in Mr Bajrami's favour and he was therefore declared elected.
37. The essential question is whether the Chairperson of the Municipal Assembly had the power to give the casting vote in those circumstances.

The wording of Article 48.1 refers to "all meetings of the Municipal Assembly and its committees". Certainly the election by the members of the non-majority Communities was not a meeting of a committee of the Assembly. Nowhere does the legislation provide that this business was "committee" business.

38. Therefore, was the election of the Deputy Mayor for Communities by the members of the non-majority Community, the third event referred to above, a "meeting of the Municipal Assembly" in the circumstances where the Assembly had already approved his election by an overwhelming majority? The Court finds that it was not. The vote at that stage was not a vote of the full Municipal Assembly. Instead it was a vote of a subset of the Assembly. A subset that is not contemplated by Article 48.1 and special rules and protections applied to that vote and there was no provision for the use of a casting vote in the event of an equality of votes in those circumstances.

39. Because of the special protections that Communities and their members enjoy under the Constitution and the law this Court is led to the conclusion that there was an interference with the particular rights of the Communities when the Chairperson intervened when the vote split equally. He did not have the right to use a casting vote to resolve that particular deadlock. The members of the Municipal Assembly who were from the non-majority Community were the only ones who could make that decision for themselves and the law required them to do so by majority.

40. The Court is of the view that participation in voting, and the use of a casting vote by the Chairperson caused a direct influence in the decision for the election of the Deputy Mayor for Communities, which violated the rights of other communities by not respecting their will because the vote in the assembly by the assembly members from communities was a tie: 2 votes in favour and 2 votes against the proposal made by the Mayor.

41. Accordingly, the Applicant's rights guaranteed by Articles 45 and 54 of the Constitution in conjunction with Article 57 of the Constitution have been violation by the election of Mr Bajrami as Deputy Mayor for Communities of Peja on the casting vote of the Chairperson of the Municipal Assembly.

FOR THESE REASONS, THE COURT UNANIMOUSLY DECIDES as follows:

I. DECLARES that the Referral is admissible;

II. FINDS that there is a violation of Articles 45 and 54 in conjunction with Article 57 of the Constitution of Kosovo by the election of Mr Ibish Bajrami as Deputy Mayor for Communities of Peja on the casting vote of the Chairperson of the Municipal Assembly;

III. DECLARES the election of the Deputy Mayor for Communities for the Municipality of Peja held on 15 February 2010 void;

IV. ORDERS the Municipal Assembly to initiate a new election for the Deputy Mayor for Communities, in conformity with this Judgment;

V. REQUIRES the Municipal Assembly to report to the Court on the steps it has taken to comply with this Judgment before the expiry of three months from the date of its publication;

In compliance with Article 20.4 of the Law on the Constitutional Court, the present Judgment shall be communicated to the parties and shall be published in the Official Gazette;

The present Judgment shall enter into force immediately and may be subject to editorial review.

Judge Rapporteur	**President of the Constitutional Court**
Mr. Sc. Kadri Kryeziu	Prof. Dr. Enver Hasani

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