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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 has been compiled by the "Project Legal Reform" implemented by Deutsche Gesellschaft fur Internationale Zusammenarbeit (GIZ),, 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.

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BULLETIN OF CASE LAW 2013

OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

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Foreword

It is with great pleasure that I am writing this Foreword to the Bulletin of Case Law 2013 of the Constitutional Court as the fourth publication of its kind since the Court's establishment in the fall of 2009. In the Foreword of the first Bulletin of Case Law covering decisions of the Court taken in the years 2009 and 2010, I wrote that "It is the mark of a democratic country committed to the Rule of Law that justice is administered in public and that its courts will fearlessly and openly pronounce its Decisions and Judgments and to make them available to the public." How right I was in saying so, because year after year until now the Constitutional Court has shown that it adjudicates all referrals submitted to it in fairness and transparency. It is not a secret that the people of Kosovo consider that the Constitutional Court is one of the most valued and respected public institutions in the country. Therefore, I am proud to present the Bulletin of Case Law 2013 as a further proof of the Court's maturity and highest standards of decision-making.

As for the Bulletin of Case Law 2012, the publication of the present Bulletin has been made possible by a generous donation made by the German International Cooperation (GIZ), for which the Court is very thankful.

The decisions contained in this Bulletin reflect once more the diversity of the constitutional issues raised before the Court by authorized parties, whether they are natural or legal persons or public authorities. This shows that the furthering of the Rule of Law happens at all levels of Kosovo society to be finally tested before the Constitutional Court as the final authority for the interpretation of the Constitution.

It is my wish that also this Bulletin will become a practical tool in the hands of all legal practitioners in Kosovo and, where possible, will guide them in their decision-making process. In order to make sure that future Bulletins of Case Law will be as useful as the previous ones, it would be most welcome if legal practitioners would make known to the Secretariat of the Court any suggestions they may have to make the Bulletins even more user-friendly, in particular, as to access to relevant decisions through easier searching.

Prof. Dr. Enver Hasani
President of the Constitutional Court

KI 164/11, Jetullah Mustafa, date 21 January 2013 - Constitutional Review of Decision, Rev. no. 538/2008, of the Supreme Court, dated 28 June 2011.

Case KI 164/11, Resolution on Inadmissibility, of 3 July 2013.

Keywords: Individual Referral, non-exhaustion of legal remedies, Resolution on Inadmissibility

The Applicant requests the execution of Decision Ac. No. 89/93 of the District Court in Pristina, 9th of February 1998 in which the RWSC was ordered to reinstate the Applicant to his original job or a similar position.

Furthermore, the Applicant alleges that in its judgment of 22 January 2003, the Municipal Court in Pristina did not acknowledge: From what date the time period stipulated by the Statute of Limitations had begun to run. How the Municipal Court decided the compensation figure to which the Applicant would be entitled.

Lastly, the Applicant puts forward that generally the Court Proceedings were lengthy and unfair and specifically that the decision of the Supreme Court of 28 June 2011 showed bias and lacked suitable adjudication.

In such circumstances, the Court concludes that the Applicant has not exhausted all legal remedies available to him under the applicable law.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 164/11
Applicant
Jetullah Mustafa
Constitutional Review of Decision, Rev. no. 538/2008, of the Supreme Court, dated 28 June 2011.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of
Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge.

Applicant

1. The Applicant is Mr. Jetullah Mustafa, residing in Pristina.

Challenged Decision

2. The decision challenged by the Applicant is the Decision, Rev. no. 538/2008, of the Supreme Court of 28 June 2011, which was received by the Applicant on 20 September 2011.

Subject Matter

3. The Applicant requests that Decision, No. 89/98, of the District Court of 9 February 1998, by which his request for compensation for the period of 3 December 1993 to 2 October 1998 had been granted, be executed in its entirety and not partially, as has been done by the Municipal Court so far.

4. The Applicant further claims that the decision of the Supreme Court of 28 June 2011, which he received on 20 September 2011 was not appropriately adjudicated and biased.

Legal Basis

5. The Referral is based on Article 113.7 of the Constitution, Article 20 of the 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 Constitutional Court

6. On 20 December 2011, the Applicant filed a referral with the Court.

7. On 17 January 2012, the President of the Court, by Order No. 164/11 GJR, appointed Judge Ivan Čukalovič as Judge Rapporteur. On the same date, the President of the Court, by Order No. 164/11 KSH, appointed the Review Panel consisting of Judges Robert Carolan (Presiding), Altay Suroy and Gjylieta Mushkolaj.

8. On 2 July 2012, President Enver Hasani replaced Gjylieta Mushkolaj on the Review Panel, whose mandate as a Judge of the Constitutional Court came to an end on 26 June 2012.

9. On 3 July 2012, 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. On 3 December 1993, the employment contract of the Applicant, a permanent worker in the Labour Organisation of the Regional Water Supply Company "Batllava" Pristina (hereinafter: RWSC), was terminated.

11. By decision L. no. 407/96 of 1 July 1997, the Municipal Court in Pristina found that the Applicant's employment had been illegally terminated. The Applicant's ex-employer appealed this decision.

12. On 9 February 1998, by Ac. No. 89/98, the District Court in Pristina rejected the appeal as ungrounded and ordered RWSC to reinstate the Applicant to the original employment or to a similar position. The rights of the employment relationship were to necessarily be retained.

13. On 21 October 1998, the Applicant returned to work.

14. On 12 February 1999, the Municipal Court in Pristina approved the Applicant's request for the execution of his claim for salaries due to

him between the 9th of February, 1998 and the 21st of September of the same year.

15. In a letter to the RWSC on 26 February 2001, the Applicant further claimed for compensation for the period from 3rd of December, 1993 to 21st of October, 1998. A letter dated 5th of April, 2001 in turn refused his request.

16. The Applicant filed a claim with the Municipal Court in Pristina on 26 December 2001 for compensation of damages for non-payment of salary during this period.

17. This was refused by the Municipal Court in Pristina by Decision C1. NO. 545/2001 of 22 January 2003. The Municipal Court adjudicated that the Applicant had lost the right to compensation for unpaid salaries over this period on the grounds that by Article 376 (1) of the Law on Obligations, the Statute of Limitations allows 3 years to claim compensation payments and the applicant was thus 4 months and 17 days outside the time frame. However, the Municipal Court did not elaborate as to what date they took into account in order to come to this conclusion.

18. On 17 February 2005, by decision CI. No. 377/ 2004, the Municipal Court in Pristina rejected the Applicant's further claim for compensation of unpaid salaries of 3rd of December 1993 to 21st of October, 1998, on the grounds that the Applicant was not entitled to it as by virtue of Article 376 (1) of the Law on Obligations, the Statute of Limitations stipulating 3 years to seek compensation. The Applicant appealed this to the District Court in Pristina.

19. The District Court in Pristina dismissed the Applicant's appeal on 14 October 2005, by Decision Ac. No. 521/ 2005. It felt the Municipal Court had acted fairly in deciding the Applicant's request for back pay was outside the time limits stipulated in the Statute of Limitations and keeping the period of bombardments of March to June 1999 in mind. Thus, the District Court confirmed Judgement CI. No. 377/ 2004 of the Municipal Court in Pristina.

20. On 31 August 2007, the Applicant requested a repetition of procedure of the Municipal Court, proposing Decision I. no. 2074/98 of the Municipal Court of 12th of February (see paragraph 4 above) as fresh evidence.

21. By Decision CI. No. 377/2004 (19th of September 2007), the Municipal Court rejected the request, inter alia, on the ground that the time limit of 30 days within which the request for repetition of procedure should have been submitted from the moment of discovery of said evidence had expired. The Applicant appealed this decision to the District Court.

22. The District Court rejected the Applicant's appeal by Decision Ac. No. 907/2007 of 27 August 2008. Thereupon, the Applicant filed a request for revision with the Supreme Court.

23. On 28 June 2011, by Decision Rev. no. 538/2008, the Supreme Court rejected the Applicant's request for revision, deeming it ungrounded. The Supreme Court opined that the lower courts had correctly applied the deadline for repetition of procedure-30 days from discovery of fresh evidence- and it had in fact expired.

24. The Applicant received the Supreme Court's decision on 20 September 2011.

Applicant's allegations

25. The Applicant requests the execution of Decision Ac. no. 89/93 of the District Court in Pristina, 9th of February 1998 in which the RWSC was ordered to reinstate the Applicant to his original job or a similar position.

26. Furthermore, the Applicant alleges that in its judgment of 22 January 2003, the Municipal Court in Pristina did not acknowledge:

    a. From what date the time period stipulated by the Statute of Limitations had begun to run.

    b. How the Municipal Court decided the compensation figure to which the Applicant would be entitled.

27. Lastly, the Applicant puts forward that generally the Court Proceedings were lengthy and unfair and specifically that the decision of the Supreme Court of 28 June 2011 showed bias and lacked suitable adjudication.

Assessment of the admissibility of the Referral

28. From the Applicant's submission, it appears that two sets of proceedings are of issue:

    a. The proceedings concerning the unpaid salaries, ending with Decision Ac. No. 521/ 2005 of 14 October 2005 in the District Court in Pristina, by which the Judgement CI. No 277/ 2004 of the Municipal Court in Pristina of 17 February 2005 was confirmed;

    b. The proceedings concerning the repetition of procedure, ending on 28 June 2011 in Decision Rev. no. 538/2008 of the Supreme Court.

29. Regarding the proceedings enumerated in a, the Court noted that they relate to events taking place prior to 15 June 2008, the date of entry into force of the Constitution of the Republic of Kosovo. It follows that the Applicant's complaint is outside the jurisdiction of the Court and thus incompatible "ratione temporis" with the provisions of the Constitution and the Law (see mutatis mutandis, Jasioniene v. Lithuania, Application 41510198, EctHR Judgements of 6th of March and 6th of June 2003, and Case No. KI 61/09, Adler Com v. Order of President of Municipality of Gjakova).

30. As to the proceedings in b, the Court notes that the Supreme Court, in its Decision Rev. no. 538/2008 of 28 June 2011 (received by the Applicant on 20 September 2011) ruled that the lower courts had applied the law fairly in deciding the request for repetition of procedure, pursuant to Article 423(1) of the Law on Contentious Procedure. This request should have been submitted within a timeframe of 30 days from the day the party had the opportunity to submit new facts.

31. In this respect, the Court needs to consider whether the Applicant has fulfilled the admissibility requirements set out in Article 113.7 of the Constitution and Article 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 provided by the law.

32. The rational for the exhaustion rule is to afford the authorities concerned (including the courts) the opportunity to prevent or rectify the alleged Constitutional violation (see, mutatis mutandis, Selmouni v. France, no. 25803/94, decision of the 28th of July 1999 and Case

No. KI 41/09 AAB-Rinvest University v. Kosovo Government, Resolution of 27th of January, 2010).

33. In the Applicant's case, the Court notes that the courts found, pursuant to the Law on Contentious Procedure, that the Applicant initiated the repetition proceedings out of time. As a result, the courts were prevented from taking the newly submitted evidence into consideration.

34. In such circumstances, the Court concludes that the Applicant has not exhausted all legal remedies available to him under the applicable law.

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 3 July 2012, 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
Ivan Čukalović

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 83/12, Muhamet Ukalo and Neime Ukalo, date 21 January 2013- Constitutional Review of the Judgment of the Supreme Court, Rev. No. 521/2009, dated 4 June 2012.

Case KI 83/12, Resolution on Inadmissibility of 27 November 2012

Keywords: manifestly ill-founded, protection of property, right to fair and impartial trial, violations of individual rights and freedoms

The applicants filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging the decision of the Supreme Court, Rev. No. 521/2009, of 4 June 2012, because the Applicants, allegedly, are *"[…] owners of the contested immovable property because they have inherited it. This right, by the Constitution, is untouchable and guaranteed. However, with the regular courts judgments, the right to property is with A.Q.."* Furthermore, the Applicants also allege that the Municipal Court in Prizren on 2 June 2008 was impartial because it did not act in accordance with the remarks given by the Supreme Court.

On the issue of the admissibility of the Referral, the Court held that the Referral was inadmissible because the Applicants did not substantiate claim on constitutional grounds and did not provide evidence that his rights and freedoms has been violated by the Supreme Court.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 83/12
Applicants
Muhamet Ukalo
Neime Ukalo
Constitutional Review of the Judgment of the Supreme Court, Rev. no. 521/2009, dated 4 June 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Referral was submitted by Mr. Muhamet Ukalo and Mrs. Neime Ukalo, residing in Prizren (hereinafter: the "Applicants").

Challenged decision

2. The Applicants challenge the Judgment of the Supreme Court, Rev. no. 521/2009, of 4 June 2012, which was served on them on 1 August 2012.

Subject matter

3. The Applicants alleges that the abovementioned judgment violated their rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), namely Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property], and by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the "ECHR"), namely Article 6 (Right to a fair trial) and Article 1 (Protection of property) of Protocol 1 to the ECHR.

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the 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 17 September 2012, the Applicants submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 5 October 2012, the President of the Constitutional Court, with Decision No.GJR.KI-83/12, appointed Judge Ivan Čukalovič as Judge Rapporteur. On the same date, the President of the Constitutional Court, with Decision No.KSH.KI-83/12, appointed the Review Panel composed of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Kadri Kryeziu.

7. On 5 November 2012, the Referral was communicated to the Supreme Court.

8. On 27 November 2012, 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

9. On 21 February 1963, the Applicant's father entered into a sales contract for immovable property with the Socially Owned Company "KBI Progress" (hereinafter: SOE "KBI Progress").

10. On 15 April 1967, the immovable property was sold to a third person, A.Q.

11. On 6 December 1968, the Applicant's father entered into a gift contract for another immovable property with the SOE "KBI Progress".

12. On 1 February 2001, the Municipal Court in Prizren (Judgment C. no. 69/2000) approved the Applicant's claim and confirmed that the contracts entered on 21 February 1963 and on 6 December 1968 are null. Further, the Municipal Court obligated the SOE "KBI Progress" to

admit the Applicant's as owners of the immovable property and hand over for free use and possession as well as permit the registration in cadastral service in the name of the Applicant's the immovable property. The Municipal Court in Prizren held that *"Pursuant to Article 37 of the Law on Basic Property (Official Gazette 6/1980, Socialist Federal Republic of Yugoslavia, January 30, 1980) the owner can by claim request the return of the immovable property under the condition that the Applicant can confirm that he/she is entitled to ownership over the returned immovable property."* Furthermore, the Municipal Court held that the contracts that the Applicant's father had entered into are null because they were entered into under pressure and consequently do not have any legal effect. This Judgment became final and binding on 26 March 2001.

13. On 4 April 2001, the Municipal Court in Prizren (Decision C. no. 69/2000) issued a ruling whereby it corrected its Judgment of 1 February 2001. The Municipal Court of Prizren had erroneously not included the total amount of the surface of the immovable property that is to be returned to the Applicant's. This ruling became final and binding on 20 April 2001.

14. On 30 April 2001, the Applicant's filed a proposal with the Municipal Court in Prizren for execution of the final and binding Judgment of the Municipal Court in Prizren.

15. On 22 June 2001, the Municipal Court in Prizren (E. no. 22/01) allowed the execution. On 5 July 2002, A.Q. filed an objection and requested the Municipal Court in Prizren to declare the decision on execution of 22 June 2001 as inadmissible.

16. On 30 August 2002, the Municipal Court in Prizren (Decision E. no. 22/01) suspended the procedure of execution because A.Q. claimed that A.Q. has property right over the contested immovable property. The Municipal Court in Prizren further advised A.Q. to initiate a civil contested procedure to solve who is the rightful owner over the immovable property and to confirm that the execution is inadmissible.

17. On 1 October 2002, A.Q. filed a claim with the Municipal Court in Prizren against the Applicant's and the SOE "KBI Progress" in order to declare the execution as inadmissible and to confirm A.Q.'s right to ownership.

18. On 17 December 2002, the Municipal Court in Prizren (Judgment C. no. 556/02) approved A.Q.'s claim confirming that A.Q. is the owner of the

contested immovable property based on possession, tenure, and obligated the Applicant's to recognize A.Q.'s right and to permit the registration of the contested immovable property. Furthermore, the Municipal Court in Prizren declared the execution of the Municipal Court decision E. no. 22/01 of 22 June 2001 as inadmissible. The Municipal Court in Prizren held:

a. that A.Q. never took part in the in the proceedings when the Municipal Court issued its Judgment (C. no. 69/2000) on 1 February 2001 and found first about the proceedings when the Municipal Court in Prizren went to the contested immovable property to execute its decision;

b. that A.Q. is a possessor in trust over the contested immovable property from 1970 until now. A.Q. has possessed the contested immovable property based on a valid legal transaction – sale –purchase agreement signed on 15 April 1967. A.Q. has used the contested immovable property without being obstructed by anyone or in any way. Furthermore, A.Q. was not aware of an ongoing procedure as to the contested immovable property until the Municipal Court in Prizren went to the contested immovable property to execute decision E. no. 22/01 of 22 June 2001;

c. that it is true that the contested immovable property was registered as socially owned property when it was sold to the SOE "KBI Progress" on 21 February 1963, but since the contracts were declared null by the Municipal Court in Prizren on 1 February 2001 (Judgment C. no. 69/2000), then the contested immovable property has never been as social property;

d. that A.Q. has gained the right to property based on possession – tenure – pursuant to Article 28 paragraph 4 of the Law on Basic Property (Official Gazette 6/1980, Socialist Federal Republic of Yugoslavia, January 30, 1980).

The Applicant's complained against this Judgment to the District Court in Prizren.

19. On 28 January 2004, the District Court in Prizren (Judgment Ac. no. 254/2003) rejected as unfounded the Applicant's complaint and upheld the Judgment of the Municipal Court in Prizren of 17 December 2002.

The Applicant's filed a request for revision to the Supreme Court against this judgment.

20. On 21 July 2004, the Supreme Court (Judgment Rev. no. 137/2004) approved the request for revision and annulled the lower courts judgment and returned to the first instance court the case for retrial. The Supreme Court held that *"Substantial violations of provisions of contentious procedure stand in the fact that there is a contradiction between what it is said in the reasoning and evidence administered in the session for the main review."* Furthermore, the Supreme Court also held that it *"[...] cannot accept the conclusion of the second instance court, since by the Law on Amendment of Law on Basic Property (Official Gazette of Yugo. 29/96) was deleted Article 29 of the Law on Basic Property, which envisaged that the right of ownership to socially owned property with acquisition by prescription, after this amendment on socially owned property can be gained the right to ownership with acquisition by prescription. According to the evaluation of the Supreme Court, the legal norm is rendered to regulate the legal relations in the future, unless explicitly was stated that this norm has retroactive impact. By the abovementioned law was not envisaged that this norm has retroactive impact."*

21. On 2 June 2008, the Municipal Court in Prizren (Judgment C. no. 160/04) approved A.Q.'s claim confirming that A.Q. is the owner of the contested immovable property based on possession, tenure, and obligated the Applicant's to recognize A.Q.'s right and to permit the registration of the contested immovable property. Furthermore, the Municipal Court in Prizren declared the execution of the Municipal Court decision E. no. 22/01 of 22 June 2001 as inadmissible. The Municipal Court in Prizren held:

    a. that A.Q. never took part in the in the proceedings when the Municipal Court issued its Judgment (C. no. 69/2000) on 1 February 2001 and found first about the proceedings when the Municipal Court in Prizren went to the contested immovable property to execute its decision;

    b. that A.Q. is a possessor in trust over the contested immovable property from 1970 until now. A.Q. has possessed the contested immovable property based on a valid legal transaction – sale –purchase agreement signed on 15 April 1967. A.Q. has used the contested immovable property without being obstructed by anyone or in any way. Furthermore, A.Q. was not aware of an ongoing procedure as

to the contested immovable property until the Municipal Court in Prizren went to the contested immovable property to execute decision E. no. 22/01 of 22 June 2001;

c. that it is true that the contested immovable property was registered as socially owned property when it was sold to the SOE "KBI Progress" on 21 February 1963, but since the contracts were declared null by the Municipal Court in Prizren on 1 February 2001 (Judgment C. no. 69/2000), then the contested immovable property has never been as social property;

d. that A.Q. has gained the right to property based on possession – tenure – pursuant to Article 28 paragraph 4 of the Law on Basic Property (Official Gazette 6/1980, Socialist Federal Republic of Yugoslavia, January 30, 1980).

e. that *"pursuant to given remarks in the ruling of Supreme Court of Kosovo Rev. no. 137/04 dated 21.07.2005, the court concluded that based on legal rules, which were applicable at the time when this legal relation is established between the claimant A.Q. and previous owner Gj.Q. was valid until entering into force of the law on basic property, the possessor in trust gains the right to ownership after consecutive possession for 20 years, although he was legal possessor. In the concrete case the claimant by all means is possessor in trust since by signing this legal valid contract has considered herself as owner and based on this she was a possessor. On any kind of procedure that took place afterward the claimant was not informed and she did not even know of any development of any procedure in relation to the contested immovable property and neither in relation to the development of this procedure in this court."*

The Applicant's complained against this Judgment to the District Court in Prizren.

22. On 13 October 2009, the District Court in Prizren (Judgment Ac. no. 405/2008) rejected as unfounded the Applicant's complaint and upheld the Judgment of the Municipal Court in Prizren of 2 June 2008. The Applicant's filed a request for revision to the Supreme Court against this judgment.

23. On 4 June 2012, the Supreme Court (Judgment Rev. no. 521/2009) rejected as unfound the request for revision and upheld the judgment of the District Court of 13 October 2009.

Applicant's allegations

24. The Applicants alleges that the Supreme Court judgments, the District Court judgments and the Municipal Court judgments were taken in violation of Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution and Article 6 (Right to a fair trial) and Article 1 (Protection of property) of Protocol 1 to the ECHR, because the Applicants, allegedly, are *"[...] owners of the contested immovable property because they have inherited it. This right, by the Constitution, is untouchable and guaranteed. However, with the regular courts judgments, the right to property is with A.Q.."*

25. Furthermore, the Applicants allege that A.Q. *"[...] is not a possessor in trust of the contested immovable property, especially from the day when the Municipal Court in Prizren annulled the contracts [...]",* i.e. from 1 February 2001.

26. The Applicants also alleges that the Municipal Court in Prizren on 2 June 2008 was impartial and as such violated their rights as guaranteed by the Constitution, Article 31 [Right to Fair and Impartial Trial], because the Municipal Court on 2 June 2008 did not act in accordance with the remarks given by the Supreme Court in its judgment of 21 July 2004, Judgment Rev. no. 137/20.

Assessment of the admissibility of the Referral

27. 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.

28. Rule 36 1 (c) of the Rules of Procedure provides that *"The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded."*

29. In this respect, the Court emphasizes that 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 Constitution (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. 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 among other authorities, Report of the Eur. Commission of 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 regular courts entirely applied the applicable law and disagree with the regular courts' factual findings with respect to their case.

32. As a matter of fact, the Applicants did not substantiate a claim on constitutional grounds and did not provide evidence that their rights and freedoms have been violated by that the regular courts. Therefore, the Constitutional Court cannot conclude 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. Therefore, the Applicants did not show why and how the regular courts decided "in a partial manner", thus denying their right to property.

34. It follows that the Referral is inadmissible because it is manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure.

FOR THESE REASONS,

The Constitutional Court, pursuant to Rule 36 (1.c) and Rule 56 (2) of the Rules of Procedure, on 27 November 2012, 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
Ivan Čukalovič

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 81/12, Hazër Susuri and Baki Hoxha, date 29 January 2013- Constitutional Review of the Ruling of the Supreme Court of Kosovo Pkl. No. SS/2012, dated 18 June 2012

Case KI 81/12, decision of 15 January 2013

Keywords: individual referral, manifestly ill-founded, request for protection of legality, subsidiary prosecutors, public prosecutor, right to legal remedies, judicial protection of rights

The Applicants filed their Referral based on Article 113.7 of the Constitution of Kosovo, claiming that their constitutional rights have been violated by the decision of the Supreme Court of the Republic of Kosovo. The Applicants among others claimed that as subsidiary prosecutors they enjoy the same rights as the Public Prosecutor to file the request for protection of legality. The Supreme Court determined that the Applicants were unauthorized to file a request for protection of legality.

The Court concluded that the Applicants have not substantiated their allegations, and that the decision of the Supreme Court was clear and that there is a logical connection between the legal basis and given reasoning. The Constitutional Court also emphasized that the issues of facts and law are under the jurisdiction of regular courts and that the Constitutional Court cannot act as an appellate court or a court of fourth instance. In addition, the Court also elaborated on constitutional obligation with regards to respecting the principle of separation of powers. Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution and Rule 36 (1) c) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI81/12
Applicants
Hazër Susuri and Baki Hoxha
Constitutional Review of the Resolution of the Supreme Court of Kosovo Pkl. no. 88/2012 dated 18 June 2012

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicants

1. Applicants are Mr. Hazër Susuri and Mr. Baki Hoxha with residence in Prizren.

Challenged decision

2. Resolution of the Supreme Court of Kosovo Pkl.no.88/2012 dated 18 June 2012.

Legal basis

3. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 20, 22.7 and 22.8 of the Law Nr.03/L-121 on 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: the Rules of Procedure).

Subject matter

4. Subject matter has to do with the right of the Applicants as subsidiary plaintiffs in using extraordinary legal remedies, respectively the request for protection of legality.

Proceedings before the Court

5. On 5 September 2012, the Applicants submitted the Referral in the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 5 October 2012, the President, by Decision No. GJR.KI-81/12, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same day, the President, by Decision No.KSH.KI-81/12, appointed the Review Panel composed of judges Almiro Rodrigues (Presiding), Mr.sc. Kadri Kryeziu and Prof. Dr. Enver Hasani.

7. On 1 November 2012, the Applicants were notified about the registration of the Referral. On the same day, the Referral was communicated to the Municipal Court in Gjilan and to the Supreme Court of the Republic of Kosovo.

8. On 6 December 2012, 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 as submitted by the Applicants

9. On 29 November 2011, Municipal Court in Gjilan by the Resolution Ka.no.111/2010 in the preliminary procedure rejected the indictment of the subsidiary plaintiffs (Applicants), by which is alleged that the accused X (now the judge of the Supreme Court), has committed the criminal offence of issuing unlawful judicial decisions, by violating Article 346 of Criminal Code of Kosovo, because it has terminated the criminal procedure, with a justification that there is no sufficient evidence to support the grounded suspicion for committing criminal offence by the Accused.

10. On 19 January 2012, the Criminal Panel of the Municipal Court in Gjilan rejected as ungrounded the appeal of the Applicants and determined that there was no sufficient evidence, which support the grounded suspicion that the defendant has committed criminal offence, unlawful issuance of judicial decisions from Article 346 of PCCK, and that the judge for confirmation of preliminary procedure has rightly rejected the indictment of subsidiary plaintiffs (Applicants).

11. On 18 June 2012, the Supreme Court of Kosovo by the Resolution Pkl.no.88/2010, rejected as inadmissible the request for protection of legality filed by the Applicants and *inter alia* determined:

> "*...the request for protection of lawfulness, was presented by an UNAUTHORIZED PERSON, i.e. the subsidiary plaintiffs who enjoy the same rights to which enjoys the public prosecutor, except those which belong Prosecutor as an AUTHORITY OF THE STATE (Article 65 of the CPCK), therefore, and the right to submit the request for protection of lawfulness exclusively belongs to the Public Prosecutor of Kosovo and not the subsidiary plaintiff, and due to this, the request as such is prohibited and rejected, was filed by unauthorized person".*
>
> *"To the request for protection of legality of the defendant the Public Prosecutor of Kosovo has responded, with the submission KMLP.II.nr.91/12 dated 12.6.2012, proposing that the request for protection of legality to be dismissed as inadmissible as it has been submitted by an unauthorized person."*

Applicant's allegations

12. The Applicants request from the Court:

a) To declare their Referral as admissible;

b) To declare invalid and unconstitutional the Resolution of Supreme Court Pkl.No.88/2010 dated 18 June 2012, because it is in contradiction with Article 32 [Right to Legal Remedies] of the Constitution, denying the Applicants the right to legal remedies, respectively the right of using extraordinary legal remedies, request for protection of legality against the Resolution of the Municipal Court in Gjilan KA.no.111/2010 dated 29 November 2011, as well as it is a violation of the Article 54 [Judicial Protection of Rights] of the Constitution, since the Applicants were deprived the right to use extraordinary legal remedies that the Applicants enjoy in capacity of the subsidiary plaintiffs in cases when the Public Prosecutor does not initiate criminal prosecution;

c) To adopt the request for protection of legality as legal and constitutional submitted by the Applicants against the Resolution of the Municipal Court in Gjilan KA.no.111/2010 dated 29 November 2011;

d) The Applicant also noted:

"*…pursuant to the Rule 63 (5) of the Rules of Procedure, Supreme Court of Kosovo in Prishtina is obliged to submit information to the Constitutional Court on the measures taken for execution of the Judgment of the Constitutional Court".*

13. Finally, the Applicants allege that pursuant to Article 65.1 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK), as subsidiary plaintiffs, enjoy the same rights as the Public Prosecutor to file the request for protection of legality. The Applicants also allege that Article 452.1 of PCPCK determine the Public Prosecutor as an entity for filing the request of protection of legality, but in this case the functions of the Public Prosecutor were transferred *ex lege* to the Applicants, because the Public Prosecutor gave up the criminal prosecution and that also during the procedure of the subsidiary claim, did not initiate criminal prosecution.

Relevant legal provisions

14. Article 65 of PCPCK provides:

"(1) The subsidiary prosecutor shall have the same rights as the public prosecutor except those belonging to the public prosecutor as a public official."

"(2) In proceedings conducted on the petition of a subsidiary prosecutor, up until the end of the main trial, the public prosecutor has the right to undertake prosecution and to support the charge."

15. Article 443 paragraph of PCPCK provides:

"(1) The reopening of criminal proceedings may be requested by the parties and defence counsel. After the death of the convicted person, the reopening may be requested by the public prosecutor or by the spouse, the extramarital spouse, a blood relation in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a sister or a foster parent of the convicted person."

16. Article 452 paragraph 1 of PCPCK provides:

(1) A request for protection of legality may be filed by the Public Prosecutor for Kosovo, the defendant or his or her defence counsel. Upon the death of the defendant, such request may be filed on

behalf of the defendant by the persons listed in the final sentence of Article 443, paragraph 1 of the present Code."

Preliminary assessment of admissibility of the Referral

17. In order to be able to adjudicate the Applicant's Referral, 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.

18. Article 113.7 of the Constitution states:

"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. In this case, the Court notes that the Applicants filed appeals and request for protection of legality at two levels of regular judiciary, respectively in the Municipal Court in Gjilan and in the Criminal Panel of the latter as well as in the Supreme Court of Kosovo, and consequently all legal remedies pursuant to Article 113.7 of the Constitution have been exhausted.

20. Based on the case file of the Referral, the Court notes that the conclusions of the Supreme Court are clear and that there is logical connection between legal basis and given reasoning, which shows that the decision of the Supreme Court is not characterized by unfairness or arbitrariness.

21. In the concrete case, the Court notes that the Supreme Court has taken into account, among the other, the proposal of the Public Prosecutor that the request for protection of legality, filed by the Applicants in capacity of subsidiary plaintiffs, should be rejected as inadmissible, because it was filed by unauthorized persons.

22. The Court reminds the Applicants that respective provisions of PCPCK, in fact allows discretion to the Public Prosecutor and the Supreme Court to conclude as they have concluded in the concrete case.

23. The Court also reminds the Applicants that it has constitutional obligation to respect the principle of separation of powers, independence of the bodies of the state power, guaranteed by the Constitution and the control and balance between them, while acting

differently would be in contradiction with the abovementioned principle and consequently unconstitutional.

24. In a similar way, the Court concluded on 12 December 2011 in the Resolution on Inadmissibility in the case KI-92/11 Applicants Muhamet Bucaliu – Constitutional Review of Notification of State Prosecutor KMLC. No. 37/11, dated 2 June 2011.

25. In this respect, the Applicants have not substantiated their allegations, by explaining in what manner and why was committed a violation, or by providing evidence which would point out that any of their rights guaranteed by Constitution was violated.

26. Constitutional Court is not a court of finding facts and in this case wants to note that finding of fair and complete factual situation, is full jurisdiction of regular courts and that its role is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments, therefore cannot act as a "fourth instance court",*(see mutatis mutandis, i.a., Akdivar against Turkey, 16 September 1996, R. J. D, 1996-IV, para. 65. Also see the Resolution on Inadmissibility in the case No. KI-86/11 -Applicant Milaim Berisha –Referral for Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev. no. 20/09, dated 1.3.2011 rendered by Court 5 April 2012).*

27. Furthermore, the Referral does not indicate that the Supreme Court acted in arbitrary or unfair manner. It is not the task of the Constitutional Court to replace its assessment of facts with those of regular courts, as a general rule, it is a task of these courts to assess the evidence before them. The task of the Constitutional Court is to verify whether the proceedings in regular courts were fair, in their entirety, including the manner how that evidence was taken, *(see Judgment ECtHR App. No 13071/87 Edwards against United Kingdom, paragraph 3, dated 10 July 1991).*

28. The fact that the Applicants do not agree with the outcome of the case cannot serve them as a right to rise an arguable claim for violation of Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution *(see mutatis mutandis Judgment ECtHR Appl. no. 5503/02, Mezotur Tiszazugi Tarsulat against Hungary, Judgment dated 26 July 2005).*

29. In these circumstances, the Applicants have not substantiated by evidence their allegations and violations of Article 32 [Right to Legal

Remedies] and 54 [Judicial Protection of Rights] of the Constitution, because the presented facts do not indicate in any manner that the regular court of three instances denied the rights, guaranteed by the Constitution.

30. Consequently, the Referral is manifestly ill-founded and should be rejected as inadmissible pursuant to the Rule 36 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, Pursuant to Article 113.7 of the Constitution and Article 20 of the Law and in compliance with the Rule 36 (1) c of the Rules of Procedure, on 7 December 2012, 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
Arta Rama-Hajrizi

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 84/12, Independent Union of Pensioners and of Labour Disabled Persons of Kosovo, represented by Mr. Rifat Halili, President of the union, branch in Vushtrri, date 29 January 2013,- Request for improvement of welfare of pensioners and for the realization of the right of obtaining pensions for labour disabled persons from state authorities

Case KI 84-2012, Resolution on Inadmissibility of 6 December 2012

Keywords: new Law on pensioners and labour disabled persons, Law on Health Insurance, individual referral, legal person, unauthorized party

The Applicant submitted referral based on Article 113.7 of the Constitution, in capacity of legal person, by alleging that by non-adoption of the Law on pension and disability insurance and the Law on Health Insurance, as well as by refusal of giving pensions to labour disabled person by the governmental authorities, the pensioners' rights as guaranteed by: Article 3.1 [Equality Before the Law], 7.1 [Values], 16.1 [Supremacy of the Constitution], 19 paragraph 1 and 2 [Applicability of the International Agreements], Article 22 paragraph 1, 2 and 3 [Direct Applicability of International Agreements and Instruments], Article 23 [Human Dignity], Article 25.1 [Right to Life], Article 27 [Prohibition of Torture, Cruel, Inhuman or Degrading Treatment], Article 51 paragraph 1 and 2 [Health and Social Protection], Article 84.2 [Competencies of the President], Article 119-4 [General Principles] of the Constitution of the Republic of Kosovo and Article 7, 22 and 25.1 of the Universal Declaration of Human Rights were violated.

The Court noted that the Applicant did not specify any act of public authority, by which he alleges that his rights, guaranteed by the Constitution and International Conventions that are directly applied in the Republic of Kosovo, have been violated. He only raised the issues that have to do with the regulation of social policy, respectively of the improvement of welfare of pensioners and labour disabled persons, requesting from the Court to clarify why the requests of the Applicant, regarding the rights of pensioners and of labour disabled persons were not taken into account by the state authorities.

In this case, the Court referred to Article 113, paragraph 1, of the Constitution, which provides:*"'The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties."* This paragraph explicitly provides who may be considered as authorized party to refer constitutional matters with respect to the constitutional review of an act by a public authority and the constitutionality of a law. Thus, the Court considers that the Applicant is not an authorized party to refer constitutional matters *in abstracto* with respect to the regulation of the status of the pensioners and

labour disabled persons. For this reason, in accordance with Article 113.1 of the Constitution this Referral is considered as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 84/12
Applicant
Independent Union of Pensioners and of Labour Disabled Persons of Kosovo, represented by Mr. Rifat Halili, president of the union, branch in Vushtrri
Request for improvement of welfare of pensioners and for the realization of the right of obtaining pensions for labour disabled persons from state authorities

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, Presdient
Ivan Čukalović,
Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almira Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
and Arta Rama Hajrizi, Judge

Applicant

1. The Applicant is Independent Union of Pensioners and of Labour Disabled Persons of Kosovo, branch in Vushtrri, represented by its President, Mr. Rifat Halili.

Subject matter

2. The subject matter of the case submitted in the Constitutional Court of the Republic of Kosovo (hereinafter: the Constitution) has to do with the Referral/appeal of the Independent Union of Pensioners and of Labour Disabled Persons of Kosovo, branch in Vushtrrifor improvement of welfare of pensioners of the Republic of Kosovo and exercising the right of obtaining pensions for labour invalids.

3. The Applicant also submitted the following requests:

a. To set a pension and disability level for contribution payers at the amount of 60% from the average salary of employees in the Administration and in Public Services;

b. To bring a new law on pensioners and labour disabled , because there is no law on pension and disability insurance ;

c. To bring a Law on Health Insurance, because 13 years have passed and this law has not been adopted.

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (hereinafter: the "Law"), and Rule 28 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 2012, the Applicant submitted an incomplete Referral to the Court.

6. On 25 September 2012, the Applicant was required to complete the submitted Referral with necessary documentation.

7. On 1 October 2012, the Applicant submitted the response to the request and the Referral was registered under the no. KI84/12.

8. On 5 October 2012, the President of the Court, with Decision No. GJR. KI 84/12 appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court, with Decision No. KSH. KI 84/12 appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Altay Suroy (member) and Ivan Cukalovic (member).

9. On 6 December 2012, the Review Panel after having considered the report of the Judge Rapporteur, made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 3 June 2003, the Independent Union of Pensioners and of Labour Disabled Persons of and the Union of Independent Trade Unions of Kosovo, filed a claim with the Municipal Court in Prishtina, as it is said,

against the Republic of Serbia, by referring to the former Constitution of Kosovo (Official Gazette of SAPK, no. 4/1974, the Law on pension and disability insurance, Official Gazette of SAPK, no./26/1983 and no. 26/1986, Official Gazette of SAPK, no. 44/1983).

11. Independent Union of Pensioners addressed a request to the Prime Minister of the Government of Kosovo for the implementation of the Decision of Kosovo Assembly dated 7 July 2005 and has requested to draft a law on pension and disability insurance (act no.01.05.2006, addressed the Minister of Health, for undertaking measures to bring a law as well as the request for cure of pensioners in the account of the state).

12. Later, the Applicant (Union) wrote to the President of Kosovo Assembly, notifying him of, as it is said, the violation of the law on pension and disability insurance and of the violation of UNMIK Regulation no. 1999/24 dated 12 December 1999 on payment of pensions. The Applicant also wrote a letter to the President of Kosovo, where among the other things, it requested to talk about the state of pensioners and the possibility of improvement of their welfare. According to the Union, President of Kosovo did not accept to talk about the abovementioned issues (act, no. 6/22.01.2007). Later, the Applicant wrote to the Minister of LSW and asked from him that the law on pensions and labour disabled persons and UNMIK Regulation no. 1999/24, be implemented. The Applicant also addressed all political parties and requested support in exercising the rights of pensioners, by implementing the law in force.

13. The Applicant states that it wrote continuously to the state authorities and requested from them exercising of its rights to pension and disability insurance. Finally, it stated that the deputies of Kosovo Assembly of the Republic of Kosovo were informed about the dissatisfaction and disregard towards requests of pensioners and of labour disabled persons by the competent authorities of the country.

Applicant's allegations

14. The Applicant alleges that by non-adoption of the Law on pension and disability insurance and the Law on Health Insurance, as well as by refusal of giving pensions to labour disabled person by the governmental authorities, the pensioners' rights as guaranteed by: Article 3.1 [Equality Before the Law], 7.1 [Values], 16.1 [Supremacy of the Constitution], 19 paragraph 1 and 2 [Applicability of the International Agreements], Article 22 paragraph 1, 2 and 3 [Direct Applicability of International Agreements and Instruments], Article 23 [Human Dignity], Article 25.1

[Right to Life], Article 27 [Prohibition of Torture, Cruel, Inhuman or Degrading Treatment], Article 51 paragraph 1 and 2 [Health and Social Protection], Article 84.2 [Competencies of the President], Article 119.4 [General Principles] of the Constitution of the Republic of Kosovo and Article 7, 22 and 25.1 of the Universal Declaration of Human Rights were violated.

Preliminary assessment of admissibility of the Referral

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

16. The Applicant seems to be unsatisfied with the governmental authorities that are competent to foresee and regulate issues that have to do with social policy, respectively the regulation of the status of pensioners and of labour disabled persons. The Applicant also complains on the decisions issued by the authorities of the Ministry of Labour and Social Welfare (MLSW), regarding the refusal of the right to obtain pensions for labour disabled persons.

17. The Applicant has also addressed to the Court his concerns over the Law on Pension Insurance for the pensioners and labour disabled persons, as well as unreasonable delay in adoption of the Law on Health Insurance by the Government of the Republic of Kosovo, respectively by the respective ministry.

18. The Court notes that the Applicant did not specify any act of public authority *(see, Article 48 of the Law on Constitutional Court),* by which he alleges that his rights guaranteed by the Constitution and International Conventions that are directly applied in the Republic of Kosovo have been violated. He only raised the issues that have to do with the regulation of social policy, respectively of the improvement of welfare of pensioners and labour disabled persons, requesting from the Court to clarify why the requests of the Applicant, regarding the rights of pensioners and of labour disabled persons were not taken into account by the state authorities.

19. The Court refers to Article 113.1 of the Constitution, which provides:

Article 113 [Jurisdiction and Authorized Parties]

1. "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties."

20. In the present case, the Applicant has requested from the Court to call on Government authorities, respectively the responsible ministries to draft a law on pensioners and labor disabled persons and to adopt a law on health insurance.

21. In this regard, the Court refers to Article 4 of the Constitution which clearly establishes the form of government and the separation of powers:

"Article 4 [Form of Government and Separation of Power]
[...]
2. The Assembly of the Republic of Kosovo exercises the legislative power.
[...]
4. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentarian control."

22. Article 65 of the Constitution clearly sets forth the competencies of the Assembly of the Republic of Kosovo:

Article 65 [Competencies of the Assembly]
[...]
(1) adopts laws, resolutions and other general acts;

23. Further, Article 93 of the Constitution clearly sets forth the competencies of the Government:

Article 93 [Competencies of the Government]

The Government has the following competencies:

(1) proposes and implements the internal and foreign policies of the country;

[...]

(3) proposes draft laws and other acts to the Assembly;

(4) makes decisions and issues legal acts or regulations necessary for the implementation of laws;

24. Nevertheless, Article 113 of the Constitution clearly establishes the authorized parties that may refer constitutional matters with respect to the constitutional review of an act by a public authority and the constitutionality of a law.

25. In fact the Applicant in this case acts as a legal person and refers to Article 113.7 of the Constitution as a legal basis for the filing of his Referral.

26. Having assessed and carefully analyzed the Applicant's requests, the Court finds that the Applicant as a legal person cannot be considered an authorized party to refer constitutional matters *in abstracto* with respect to his request for the issuance and adoption of laws even though the Applicant possesses legitimate authority to represent and protect the interests and the rights of the trade union, in this case, the rights of the pensioners and labor disabled persons.

27. Furthermore, the Constitution of the Republic of Kosovo does not provide for *actio popularis* which is a modality of individual complaint enabling every person who seeks to protect the public interest and constitutional order to approach the Constitutional Court with certain questions and requests hinting at a violation of the constitutional rights to a certain individual or group.

28. Therefore, the Court considers that the Applicant is not an authorized party to refer constitutional matters in abstracto with respect to the regulation of the status of the pensioners and labour disabled persons. For this reason, in accordance with Article 113.1 of the Constitution this Referral is considered as inadmissible.

29. Consequently, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 56.2 of Rules of Procedure, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 of the Constitution and Rule 56.2 of the Rules of Procedure, on 6 December 2012, unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and it 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
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 92/12, Sali Hajdari, date 29 January 2013- Constitutional review of the Law on Pensions

Case KI-92/12, Resolution on Inadmissibility of 6 December 2012

Keywords: individual referral, actio popularis, pensions, law unauthorized person.

The Referral was submitted pursuant to Article 113.7 of the Constitution of Kosovo, requesting from the Constitutional Court to make a comment on the Law on Pensions and the way how the length of service is calculated. The Applicant has not furnished any evidence which would be of significance for the Court's decision, even though the Court had requested in writing from the Applicant to supplement his Referral in a way that is prescribed by Law.

In the present case, the Applicant has requested *"a comment on the Law on Pensions*" which does not yet apply to the Applicant, by not specifying what rights, guaranteed by the Constitution, were violated to the Constitution.

Deciding on the referral of the Applicant Sali Hajdari, the Constitutional Court considers that the Applicant is not an authorized party to challenge the constitutionality of the Law on Pension in abstract and consequently this Referral should be declared inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI92/12
Applicant
Sali Hajdari
Constitutional review of the Law on Pensions

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is Sali Hajdari from Municipality of Gjilan.

Challenged decision

2. The Applicant challenges the Law on the Pensions, but he does not specify its number or date of adoption.

Subject matter

3. Subject matter of the Referral is the Applicant's request to the Constitutional Court to make a comment on the Law on Pensions and the way how the length of service is calculated.

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 of 15 January 2009(hereinafter: the Law) and Rule 56 paragraph 2 of the Rules of Procedure.

Proceedings before the Court

5. On 12 September 2012, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. The President by Decision (no. GJR.92/12 of 5 November 2012) appointed Judge Snezhana Botusharovaas Judge Rapporteur. On the same date, by Decision no. KSH. 92/12 the President appointed the Review Panel composed of Judges: Robert Carolan(Presiding), Altay Suroyand Ivan Čukalović.

7. On 6 December 2012, after having considered the report of Judge Snezhana Botusharova, the Review Panel composed Judges: Robert Carolan (Presiding), Altay Suroy and Prof. dr. Ivan Čukalović made a recommendation to the full Court on the inadmissiblity of the Referral.

Summary of facts

8. The Applicant has not furnished any evidence which would be of significance for the Court's decision, even though the Court had requested in writing from the Applicant to supplement his Referral in a way that is prescribed by Law.

Applicant's allegations

9. The Applicant alleges the following:

> *"Honorable Court I am requesting from you to make a comment on the Law on Pensions, with respect to the length of service. I have worked in SCI (Self-governing Community of Interest) for employment in Gjilan before the war for over 14 years, and after the war I work in the same place which is now called REC (Regional employment center) in Gjilan. Now I am about to retire and based on the information I have, in order for me to obtain a pension in the amount of 81 €, according to the Law, it is required that I have 15 years of length of service before the war as the length of service after the war is not recognized so I will receive only 45 €."*

10. The Applicant further considers:

> *"Honorable Court I have 27 years of length of service from both the employment before and after the war. How is it possible for me to be compared with those who do not have a single day of service, if we*

calculate 27 years of employment and 10 years under outrageous occupier make a total of 37 years of employment and despite this to be treated as if I did not work a single day, I consider that this Law violates my human rights.“

“Honorable Court, my colleagues who accepted the occupier and remained employed during the occupation are now in a more favorable position and they will receive a 81 € pension and poor me I will be left with 45 €.“

11. The Applicant addresses the Court with the following request:

“So that I would not prolong this any further, I believe that you understand what I request from you. Please do return to me a comment as to whom should I address or should I just come to terms with these discriminatory laws and receive those 45 € like those who have never worked. “

Assessment of the admissibility of the Referral

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

13. In this regard, the Court refers to Article 113. paragraphs 1 and 7 of the Constitution:

“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.“

14. In the present case, the Applicant has requested “*a comment on the Law on Pensions*” which does not yet apply to the Applicant. In this regard the Constitution clearly defines in Article 113 of the Constitution who may request a constitutional review of laws.

15. This kind of request for „ *a comment on the Law on Pensions* “ for the benefit of all Kosovar pensioners shows that the Applicant challenges the said Law in abstract. If this is the intent of the Applicant, as an individual he cannot be considered an authorized party.

16. In fact, the Applicant refers to Article 113.7 of the Constitution as the legal basis for the filing of his Referral. Besides that, the Applicant did not present any arguments which would prove that he is a direct victim by the adoption of this Law.

17. Article 113 paragraphs 2, 6 and 8 of the Constitution clearly stipulate who are the authorized parties that can address the Court on questions of abstract review of constitutionality of laws.

18. In addition, Kosovo's constitutional legal system does not provide for *„actio popularis",* which is a modality of individual complaints that make possible for any individual who seeks to protect the public interest and the constitutional order to address the Constitutional Court in cases of such violations even if he/she lacks the status of victim.

19. Therefore, the Court considers that the Applicant is not an authorized party to challenge the constitutionality of the Law on Pension in abstract and consequently this Referral should be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.1 and 113.7 of the Constitution, Articles 46, 47 and 48 of the Law and Rules 36 (1a) and 36 (3c) of the Rules of Procedure, in the session of 6 December 2012, 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
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 76/12, Qamil Xhemajli, date 29 January 2013- Constitutional review of unspecified decision of the Government of Kosovo, regarding pension of the doctor of sciences in the University of Prishtina.

Case KI-76/12, Resolution on Inadmissibility of 23 November 2012

Keywords: Individual referral, manifestly ill-founded.

The Applicant submitted Referral pursuant to Article 113.7 of the Constitution of Kosovo, by challenging unspecified decision of the Government of the Republic of Kosovo regarding the pension of the doctor of sciences, who work in the University of Prishtina, which the Applicant did not specify by number, date or any other way, nor where that decision was published and in this way did not state the content of the decision, which he considers unconstitutional.

The subject matter of the Referral are the rights, which the Applicant considers he is entitled to pursuant to unspecified decision of the Government of the Republic of Kosovo regarding the pensions of the doctor of sciences, who work in the University of Prishtina, because of which the Applicant considers that the same rights should belong to other doctors of science, who did not work in UP, or who have not completed U.P.

The Applicant did not specify the constitutional provisions, which he considers to have been violated and he did not offer further which would be important for the decision of the court, although the court requested in written from the Applicant to submit the decision of the Government, which he considers unconstitutional.

Deciding on the Referral of the Applicant Qamil Xhemajli, the Constitutional Court after reviewing the proceedings in entirety concluded that the Applicant did not manage to state and sufficiently substantiate his claim by which decision of the Government of the Republic of Kosovo were allegedly violated his constitutional rights and freedoms, since he did not attach the latter to the Referral of the Constitutional Court. From this it results that the referral is manifestly ill-founded, because the Applicant did not sufficiently substantiate his claim.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI76/12
Applicant
Qamil Xhemajli
Constitutional Review of unspecified decision of the Government of the Republic of Kosovo regarding pension of the doctor of sciences in the University of Prishtina.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Qamil Xhemajli from the Municipality of Peja.

Challenged decision

2. Unspecified decision of the Government of the Republic of Kosovo regarding the pension of the doctor of sciences, who work in the University of Prishtina (hereinafter: U.P.) according to which they are entitled to the pension of 1000 euro, which the Applicant did not specify by number, date or any other way, nor that decision was published and in this way did not state the content of the decision, which he considers unconstitutional.

Subject matter

3. The subject matter of the Referral are the rights, which the Applicant considers he is entitled to pursuant to unspecified decision of the Government of the Republic of Kosovo regarding the pensions of the doctor of sciences, who work in the University of Prishtina , because of which the Applicant considers that the same rights should belong to other doctors of science, who did not work in UP, or who have not completed U.P.

Legal basis

4. The Referral is based on the Article 113.7 and on Article 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 15 January 2009, (hereinafter: the "Law"), and Rule 28 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 August 2012, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: „the Court").

6. On 17 August 2012, the Constitutional Court notified the Applicant to fill his referral in the form prescribed by the Constitutional Court, and at the same time to submit to the court the decision which he considers unconstitutional, as well as evidence that by that decision were violated his rights.

7. On 23 August 2012, the Applicant submitted the filled form for submission of the Referral, but not the decision of the Government, which he considers unconstitutional.

8. On 04 September 2012, by the decision no. GJR.76/12 the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur. On the same day, by the decision no.KSH. 76/12 the President appointed the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova andKadri Kryeziu.

9. On 23 November 2012, after considering the report of Judge Ivan Čukalović, the Review Panel composed of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova andKadri Kryeziu, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts

10. On 02 July 1986, the Applicant finished his PhD studies in the University of Belgrade .

11. On 19 June 2012, the Applicant filed appeal to Ombudsperson regarding the decisions of the Government of the Republic of Kosovo on pensions of the doctors of sciences who work in the UP.

12. On 30 July 2012, Ombudsperson Institution submitted to the Applicant the Notification on inadmissibility, where among the other is stated as following:

"From the evidence introduced and circumstances described in your appeal it results that the procedures related to your case are ongoing with the competent authorities. The Ombudsperson pursuant to Article 20, paragraph 1.3 of the Law on the Ombudsperson, has decided to reject the appeal as unfounded."

13. The Applicant did not offer further evidence, which would be important for the decision of the court, although the court requested in written from the Applicant to submit the decision of the Government, which he considers unconstitutional.

Applicant's allegations

14. The Applicant asserts the following:

"My complaint has to do with the decision of the government of RK regarding the pension of the doctors of sciences of the UP with the pension of 1000€ per month. This decision has been published by RTK. I have requested from the authorities, the decision in question but I have not received any answer."

From the Deputy Prime minister and Minister of Justice Mr. Hajredin Kuqi, on 08.07.2012, I have requested that this decision to be supplemented also for the doctors of sciences that have contributed to the Kosovo economy, but the answer has lacked as usually."

15. The Applicant further considers that:

"By this selective decision are violated the laws, because in all the University diplomas (Zagreb and Belgrade) writes that the "doctor of sciences is entitled to the rights as set in the law".

This decision is selective, offending, unlawful, and non-constitutional because it divides the doctors of sciences in two groups: a) those that

more meritorious and b) those that are less meritorious which an unprecedented absurd."

16. The Applicants address the Constitutional Court by following Referral:

"I request from your court to announce the decision of the Government of Kosovo as non-constitutional.

I state that in 1996 I have been forcibly retired and that I had to wait for 12 years to fulfill the condition to get the pension of aged.

I am an aged person (74 years old) and I suffer from incurable diseases and I have fewer chances to use this legal right."

Preliminary assessment of admissibility of the Referral

17. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and the Law and the Rules of Procedure of the Court.

18. Regarding this, the Court refers to the Article 113. paragraphs 1 and 7 of the Court:

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

2. 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. *Article* 48 of the Law on Constitutional Court of the Republic of Kosovo 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."

20. Apart from this, the Rule 36 (2) (d) provides:

2. The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:
d) when the Applicant does not sufficiently substantiate his claim;"

21. The Applicant has not submitted any *prima facie* evidence, which indicate on the violation of his constitutional rights (*See, Vanek against Republic of Slovakia, Decision of ECHR on the admissibility of request, no. 53363/99 dated 31 May 2005*).

22. The Applicant claims that his rights were violated by the decision of the Government of the Republic of Kosovo regarding the pensions of the doctors of science who work in the University of Prishtina, by not submitting the decision by which were violated Applicant's constitutional rights.

23. Finally, the admissibility criteria were not met by this Referral. The Applicantdid not manage to state and sufficiently substantiate his claim by which decision of the Government of the Republic of Kosovo were allegedly violated his constitutional rights and freedoms, since he did not attach the latter to the Referral of the Constitutional Court.

24. From this it results that the referral is manifestly ill-founded, pursuant to the Rule 36 (2d) of the Rules of Procedure, which *provides „2. The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: d) when the Applicant does not sufficiently substantiate his claim;*

FOR THESE REASONS

The Constitutional Court pursuant to Article 113.7 of the Constitution, Article 46, Articles 47 and 48 of the Law and Rule 36 (2d) of the Rules of Procedure, in the session held on 23 November 2012, 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
Ivan Čukalović

President of the Constitutional Court
Prof.Dr.EnverHasani

KI 68/12, Haxhi Morina, date 29 January 2013,-Constitutional Review of the Judgment of the Supreme Court, A. no. 313/2009, dated 26 March 2012.

Case KI 68/12, Resolution on Inadmissibility of 27 November 2012

Keywords: equality before the law, manifestly ill-founded, non-exhaustion, right to fair and impartial trial, violations of individual rights and freedoms

The applicant filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging the decision of the Supreme Court, A. no. 313/2009, of 26 March 2012, because the Applicant has a final and binding decision from the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality of 27 May 2008, which approved the Applicant's request and returned possession and ownership of the immovable property that was expropriated from him.

On the issue of the admissibility of the Referral, the Court held that the Referral was inadmissible because the Applicant did not substantiate a claim on constitutional grounds and did not provide evidence that his rights and freedoms has been violated by the Supreme Court. Furthermore, the Court found that the Applicant has filed an appeal to the Appellate Panel of the Special Chamber, which so far has not decided the matter.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 68/12
Applicant
Haxhi Morina
Constitutional Review of the Judgment of the Supreme Court, A. no. 313/2009, dated 26 March 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Referral was submitted by Mr. Haxhi Morina, residing in Gjakova (hereinafter: the "Applicant"), represented by Mr. Rexhep Gjikolli, a practicing lawyer from Gjakova.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court, A. no. 313/2009, of 26 March 2012, which was served on him on 23 May 2012.

Subject matter

3. The Applicant alleges that the abovementioned judgment violated his rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), namely Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial].

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rule 56 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 July 2012, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 4 September 2012, the President of the Constitutional Court, with Decision No.GJR.KI-68/12, appointed Judge Ivan Čukalovič as Judge Rapporteur. On the same date, the President of the Constitutional Court, with Decision No.KSH.KI-68/12, appointed the Review Panel composed of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Kadri Kryeziu.

7. On 26 September 2012, the Referral was communicated to the Supreme Court, the Special Chamber of the Supreme Court, the Kosovo Cadastral Agency and the Privatization Agency of Kosovo.

8. On 5 November 2012, the Court requested information from the Municipal Court in Gjakova and from the Special Chamber of the Supreme Court as to the status of the case No. SCC-06-0214, of 8 March 2010.

9. On 12 November 2012, the Municipal Court in Gjakova replied to this Court providing the information that the Applicant on 29 June 2011 has filed a complaint against the Municipal Court Judgment C. no. 700/06 of 25 November 2010. This complaint has been sent to the Special Chamber of the Supreme Court on 26 October 2011 for review and decision.

10. On 14 November 2012, the Special Chamber replied to this Court providing the information that regarding to the case SCC-06-0214 *"[…] the Special Chamber has not decided on the merits of the case yet. This case is due to be settled on the Appellate Panel of the Special Chamber."*

11. On 27 November 2012, 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 7 May 1981, the Secretariat for Economy and Finances in the Municipality of Gjakova, (Decision 03-465-26/1978), expropriated the Applicant's immovable property for the needs of SH.A.M. "Mustafa Bakija". Pursuant to this decision this immovable property was registered in the cadastre under the name of SH.A.M. "Mustafa Bakija", Gjakova.

13. On 12 July 1994, the Applicant filed a request to the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality requesting the return of the immovable property because SH.A.M. "Mustafa Bakija" never used the property for the purpose that it was expropriated.

14. On 27 May 2008, the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality (Decision 11 no. 19-465-11/94-08):

    a. approved the Applicant's request and returned possession and ownership of the immovable property that was expropriated from him;

    b. the Directorate for Urbanism, Cadastre and Protection of the Environment in Municipality of Gjakova, has to un-register as owner SH.A. "STARTI" (former SH.A.M. "Mustafa Bakija") in Gjakova, and register the immovable property in the name of the Applicant: and

    c. SH.A. "STARTI" (former SH.A.M. "Mustafa Bakija") in Gjakova was ordered to return the immovable property to the Applicant's possession.

    The Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality held that the immovable property expropriated was not used for the set destination, i.e. to construct a polygon for practical exercise of drivers and buses, and this factual situation was concluded by visiting the site and respective experts. Hence, pursuant to Article 8 of the Law on Amendment and Supplement and Law on Construction (Official Gazette of KSAP, no.42/86), the Directorate of Legal and Property Issues and Land Consolidation of Gjakova came to the conclusion that the foreseen presumptions were fulfilled according to Article 8, for returning the expropriated immovable property, since within the time-limit of 5 years, from the day of determination of construction, the user did not

attain the purpose for which the immovable property was expropriated.

Against this decision, was allowed a complaint within 30 days. Since no one complained against this decision, it became final and binding on 11 August 2008.

15. The Applicant, in accordance with the Decision of the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality, filed a request with the Cadastral Agency in the Municipality of Gjakova to register the immovable property under his name.

16. On 18 November 2008, the Cadastral Office in the Municipality of Gjakova suspended temporarily the administrative matter on transferring the ownership of the immovable property to the Applicant. The Cadastral Office in Gjakova held that in order to register the Applicant as owner of the immovable property, is needed the consent of the Privatization Agency of Kosovo, who is, according to UNMIK Regulation no. 2002/12 on establishment of Kosovo Trust Agency, competent for socially owned enterprises and its assets.

17. On 1 December 2008, the Cadastral Office in the Municipality of Gjakova rejected the Applicant's request to register the immovable property under his name in accordance with the Decision of the Directorate of Legal and Property Issues and Land Consolidation of Gjakova Municipality because the Applicant did not submit the consent of the Privatization Agency of Kosovo to register the immovable property under his name. The Cadastral Office in Gjakova held that *"Pursuant to UNMIK Regulation, no. 2002/12 KTA, now PAK, administers publicly owned enterprises and socially owned enterprises, therefore starting from this is required also the consent for transferring the ownership in the cadastres."*

18. The Applicant filed a request for re-assessment to the Cadastral Office in the Municipality of Gjakova.

19. On 9 December 2008, the Cadastral Office in the Municipality of Gjakova upheld the decision of 1 December 2008. The Applicant filed a complaint against this decision with the Kosovo Cadastral Agency.

20. On 31 March 2009, the Kosovo Cadastral Agency rejected as unfounded the Applicant's complaint and upheld the decision of the Cadastral

Office of Gjakova of 9 December 2008. The Applicant filed a complaint against this decision with the Supreme Court.

21. On 26 March 2012, the Supreme Court (Judgment A. no. 313/2009) rejected as unfounded the Applicant's claim. The Supreme Court held that the Kosovo Cadastral Agency has properly decided the issue.

Procedure before the Special Chamber

22. On 11 May 2006, the Applicant initiated a procedure with the Special Chamber of the Supreme Court requesting it to confirm the ownership over the contested immovable property.

23. On 24 October 2006, the Special Chamber rendered a decision (SCC-06-0214) whereby the claim against SH.A.M. "Mustafa Bakija" was referred to the Municipal Court in Gjakova for adjudication. The case with the Municipal Court in Gjakova was registered with number C. no. 700/06.

24. On 8 March 2010, the Applicant filed a request for interim measures with the Special Chamber and the Municipal Court in Gjakova.

25. On 25 November 2010, the Municipal Court in Gjakova (Judgment C. no. 700/06) rejected the Applicant's claim as ungrounded. On 26 June 2011, the Applicant filed an appeal against this Judgment to the Special Chamber.

26. On 28 August 2012, the Appellate Panel of the Special Chamber served the Applicant's appeal to the respondent and Privatization Agency of Kosovo for response.

27. On 26 September 2012, Privatization Agency of Kosovo submitted a response on the appeal.

28. Therefore, regarding the concerned case, the Special Chamber has not decided on the merits of the case yet. This case is due to be settled on the Appellate Panel of the Special Chamber.

Applicant's allegations

29. The Applicant alleges that the Supreme Court judgment, the Decision of the Kosovo Cadastral Agency and the Decision of the Cadastral Office in Gjakova were taken in violation of Article 24 [Equality Before the Law] of the Constitution, because the Applicant has a final and binding decision from the Directorate of Legal and Property Issues and Land

Consolidation of Gjakova Municipality of 27 May 2008, which approved the Applicant's request and returned possession and ownership of the immovable property that was expropriated from him. Further, the Directorate for Urbanism, Cadastre and Protection of the Environment in Municipality of Gjakova was ordered to register the ownership under the Applicant's name.

30. In this respect, the Applicant alleges that the Privatization Agency of Kosovo has been put above the law because the Cadastral Agency requested the Applicant to have the consent of Privatization Agency of Kosovo in order to register the ownership over the immovable property.

31. Furthermore, the Applicant alleges that the procedure for returning the property was initiated before Privatization Agency of Kosovo was established and that Privatization Agency of Kosovo has never taken any procedural action.

32. The Applicant also alleges that the Special Chamber of the Supreme Court violated his rights as guaranteed by the Constitution, Article 24 [Equality Before the Law], because the Special Chamber approved the Applicant's neighbors request for temporary measures while the Applicant's request, allegedly, was not even reviewed by the Special Chamber, although the case was identical with the neighbors.

33. Furthermore, allegedly, the Applicant claims that his right to a fair trial was violated.

Assessment of the admissibility of the Referral

34. The Applicant alleges that his right guaranteed by Article 24 [Equality Before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution 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.

35. As to the challenged judgment of the Supreme Court of 26 March 2012, Judgment A. no. 313/2009, whereby the Applicant's claim was rejected as unfounded and the Kosovo Cadastral Agency decision was upheld, the Court emphasizes that 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 Constitution (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).

36. 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 among other authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

37. In the present case, the Applicant merely disputes whether the Supreme Court entirely applied the applicable law and disagrees with the Supreme Courts' factual findings with respect to his case.

38. As a matter of fact, the Applicant did not substantiate a claim on constitutional grounds and did not provide evidence that his rights and freedoms has been violated by the Supreme Court. Therefore, the Constitutional Court cannot conclude 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).

39. Therefore, the Applicant did not show why and how the Supreme Court decided "in a partial manner", thus denying his right to property.

40. It follows that the Referral is inadmissible because it is manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure.

41. As to the Applicant's allegation that the Special Chamber of the Supreme Court violated his rights as guaranteed by the Constitution, 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."

42. 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).

43. In the present case, the Court finds that the Applicant has filed an appeal against the judgment of the Municipal Court in Gjakova, Judgment C. no. 700/06, to the Appellate Panel of the Special Chamber alleging that he is the owner of the immovable property because SH.A.M. "Mustafa Bakija" never used the property for the purpose that it was expropriated and requested that SH.A.M. "Mustafa Bakija", under administration of Privatization Agency of Kosovo, to recognize his right of ownership and to allow this right to be registered in the cadastre registers. The Appellate Panel of the Special Chamber has not yet rendered a decision in this matter.

44. 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, because the issue of who is the rightful owner of the contested immovable property is still not resolved by the Appellate Panel of the Special Chamber.

45. For these reasons, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law and Rule 36 (1.c) and Rule 56 (2) of the Rules of Procedure, on 27 November 2012, 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
Ivan Čukalovič

President of the Constitutional Court
Prof. Dr. Enver Hasani

KO 131/12, Dr. Shaip Muja and 11 Deputies of the Assembly of the Republic of Kosovo, date 29 January 2013, -Constitutional Review of Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, adopted by the Assembly of the Republic of Kosovo on 13 December 2012.

Case KO 131/12, Decision on Interim Measures, of 24 December 2012.

Keywords: Referral by Deputies of the Assembly of the Republic of Kosovo, Right to Work and Exercise Profession, interim measure.

Applicants claim that, *inter alia*, the Law on Health contains provisions that puts healthcare employees in unequal positions to employees of other public institutions and thus in unequal position with employees of other public institutions before the law."

The Applicants request to evaluate compliance of Articles 18, 19, 41 and 60 of the challenged law with the Constitution of the Republic of Kosovo.

The Applicants further request the Court to impose interim measures suspending the implementation of the Law until the Court makes the final decision on this Referral.

In order to avoid the possible violation of the public interest and constitutional guaranteed right to a health protection, the Court considers that there are grounds for interim measures for a limited duration.

In order to avoid violation of this right guaranteed by the Constitution, the Court reiterates the need to impose interim measures for a limited duration.

Therefore, without prejudging the final outcome of the Referral, the request of the Applicant for interim measure is granted, and unanimously is decided to grant interim measures for a duration until 31 January 2012 from the date of adoption of this Decision and to suspend the implementation of the Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, of 13 December 2012, for the same duration;

DECISION EXTENDING INTERIM MEASURES
in
Case No. KO131/12
Applicant
Dr. Shaip Muja and 11 Deputies of the Assembly of the Republic of Kosovo
Constitutional Review of Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, adopted by the Assembly of the Republic of Kosovo on 13 December 2012.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Introduction

1. On 24 December 2012, the Constitutional Court granted interim measures in relation to the above Referral. In its decision, the Constitutional Court, inter alia, decided:

> *"...*
> *I. TO GRANT interim measures;*
>
> *II. TO GRANT interim measures for a duration until 31 January 2013 from the date of the adoption of this Decision;*
>
> *III. TO IMMEDIATELY SUSPEND the implementation of the Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, of 13 December 2012, for the same duration;*
> *..."*

2. As to the extension of the above Interim Measures, the Court reiterates that "health protection" is a constitutional category and as such a public interest that is inalienable and inviolable human right of each individual.

3. In this respect, bearing in mind that the time limit for Interim Measures imposed by the Court on 24 December 2012 will expire on 31 January 2013 and that the Court took on 24 January 2013 a decision to hold a public hearing, without prejudging the final outcome of the Referral the time limit of the Interim Measure is to be extended with three (3) months.

FOR THESE REASONS

The Court, pursuant to Article 116(2) of the Constitution, Article 27 of the Law on the Constitutional Court and Rule 55 of the Rules of Procedure of the Constitutional Court, having deliberated on the matter on 24 January 2013, unanimously

DECIDES

I. TO EXTEND the time limit of the Interim Measures imposed by the Court in its original decision of 24 December 2012 by a further period of three (3) months until 30 April 2013;

II. TO REMAIN seized of the matter;

III. This Decision shall be notified to the Parties; and

IV. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 39/11, Tomë Krasniqi, date 29 January 2013- Constitutional review of Notification No. 311/07 of 13 April 2007 and Certificate No. 322/07 of 30 April 2007 of the Ministry of Labor and Social Welfare

Case KI 39/11, Resolution on Inadmissibility, dated 27 November 2012

Keywords: Individual referral, non-exhaustion of legal remedies

The Applicant alleges violation of Article 1 (2) [Definition of State]; Article 22 [Direct Applicability of International Agreements and Instruments]; Article 23 [Human Dignity]; Article 24 (1) [Equality Before the Law]; Article 31 (1) [Right to Fair and Impartial Trial]; Article 32 [Right to Legal Remedies]; Article 46 [Protection of Property]; Article 51 [Health and Social Protection] of the Constitution of the Republic of Kosovo, in conjunction with Article 1 [Obligation to respect Human Rights]; Article 6 (1) [Right to a fair trial]; Article 13 [Right to an effective remedy]; Article 14 [Prohibition of discrimination]; with Article 1 of the Protocol No. 12 [General prohibition of discrimination] of the Convention.

In this case, the applicant has not pursued the administrative procedure until the end and in an almost parallel manner he initiated a civil procedure before the Municipal Court in Prishtina, without being served with the final decision of the administrative procedure. Therefore, the applicant has failed to act in conformity with Article 113.7 of the Constitution and Article 47 of Law on the Constitutional Court.

The Court dismisses the referral as inadmissible, because of the non-exhaustion of legal remedies, as set out in Article 113.7 of the Constitution and Article 47 of the Law.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI39/11
Applicant
Tomë Krasniqi
Constitutional review of Notification no. 311/07 of 13 April 2007 and Certificate no. 322/07 of 30 April 2007 of the Ministry of Labor and Social Welfare

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Tomë Krasniqi, a pensioner residing in Prishtina.

Challenged decisions

2. Notification no. 311/07 of 13 April 2007 and Certificateno. 322/07 of 30 April 2007 of the Ministry of Labor and Social Welfare.

Legal basis

3. Article 113.7 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 15 January 2009, (hereinafter: the Law), and Rule 56.2 of the Rules of Procedure (hereinafter: Rules of Procedure).

Subject matter

4. The subject matter treats the loss of his pensioner status, respectively the ceasing of pension payments that the Applicant had acquired by way of final decision No.181 – 1/98 of 11 June 1998 from the Kosovo Pension and Disability Insurance Fund in Prishtina.

Procedure before the Court

5. On 16 March 2011, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 18 April 2011, the President by Decision No. GJR. KI-39/11, appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur. On the same date, the President, by Decision No. KSH. 39/11, appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Altay Suroy and Kadri Kyeziu.

7. On 6 July 2011, the Applicant was notified of the registration of the Referral. On the same date the Referral was communicated to the Ministry of Labor and Social Welfare, Municipal Court in Prishtina and the Institution of Ombudsperson.

8. On 4 August 2011, the Ministry of Labor or Social Welfare replied to the Referral of the Applicant.

9. On 14 October 2011, the Applicant submitted to the Court a document containing a legal interpretation of the "acquired right" entitled "THE ACQUIRED RIGHT IN PENSION AND ITS LEGAL CERTAINTY".

10. On 19 July 2012, the President by Decision (No. GJR.KI-39/11) appointed Judge Altay Suroy as Judge Rapporteur after the term of office of Judge Gjyljeta Mushkolaj as Judge of the Court had ended. On the same date the President by Decision no. KSH 62/12 appointed the new Review Panel consisting of Judges Robert Carolan (presiding), Enver Hasani and Kadri Kryeziu.

11. On 27 November 2012, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Background of the Referral

12. On 3 May 1998, the Applicant acquired the right to old age pension.

13. On 11 June 1998, the Applicant by final resolution no. 181-1/98 of the Pension and Disability Insurance Fund of Kosovo acquired the status of pensioner.

14. On the basis of his work and previous employment, and in accordance with the applicable legislation and according to the principles of solidarity and reciprocity as well as in compliance with the Law on Pension and Disability Insurance, the Applicant acquired this right under the Regional Community Fund for Kosovo Pensions in Prishtina.

15. The Applicant enjoyed the right to retirement pension until November 1998, but due to the circumstances in Kosovo in early 1999, the Applicant's right to retirement pension was terminated without any legal ground.

Summary of the facts related to the administrative proceedings

16. On 11 April 2007, the Applicant filed an appeal with the Department of the Kosovo Pension Administration (hereinafter: DKPA), within the Ministry of Labor and Social Welfare (hereinafter: the Ministry), in relation to his status as a pensioner acquired by final decision no. 181-1/98 of 11 June 1998 from the Pension and Disability Insurance Fund of Kosovo.

17. On 13 April 2007, the DKPA issued a notice with Ref. no. 311/2007 and *inter alia* informed the Applicant that the problem of failing to pay pensions acquired on the basis of contributions currently represents one of the unresolved political questions.

18. On 30 April 2007, the DKPA issued the certificate No. 322/07 which *inter alia* stated that the Applicant is in the evidences of pension payments acquired on the basis of contributions from the Pensions and Disability Insurance in Prishtina since 1998 and onward".

19. On 24 January 2008, the Applicant filed a request to the Ministry-DKPA to recognize his pension rights based on paid contributions.

20. On 11 September 2009, the Supreme Court of Kosovo by Judgment no. 280/09 obliged the Ministry – DAPK to recognize the right of the Applicant as a contribution-payer pensioner.

21. On 23 September 2009, while the procedure in the Supreme Court of Kosovo was still pending, the Ministry –DKPA by decision 104474, recognized the right of the Applicant as contribution-payer to be paid a monthly sum of 35 €, and informing the Applicant that he may appeal against the decision of the Ministry –DAPK within 15 days from the date of receipt of decision to the Board of Appeal in DAPK.

22. On 19 November 2010, the Supreme Court of Kosovo by Resolution A. 837/2009 requested the plaintiff (Applicant) that, within 15 days from the day of receipt of the respondent' resolution (Ministry –DKPA) no. 280/09 of 11 September 2009, he should state whether he was satisfied with the decision, or would not give up his claim. The Applicant was informed that unless he did not act according to the decision, the Supreme Court would suspend the procedure.

23. On 23 February 2011, the Supreme Court, by Resolution A. no. 837/2009, suspended the procedure, noting inter alia:

> *"The Resolution of the Court no. 9/2009, dated 1 June 2010, has been submitted to the plaintiff (Applicant) on 27 November 2010. The Applicant has not replied within the deadline by the Resolution.*
>
> *Since the plaintiff (Applicant) has not replied within the deadline, the Court, in compliance to the Article 32 paragraph 1 of LCP,decides as in the enacting clause of this decision".*

24. On 4 August 2011, the Ministry - DKPA responded to the Court in relation to the Applicant's referral, noting inter alia that the Applicant was granted the right of the basic pension and contribution-payer pension, and that the issue of pension from the former Yugoslav Federation fund can be resolved only after inter-state negotiations.

Summary of the facts regardingthe civil proceeding

25. On 4 May 2007, the Applicant filed a claim (C. No. 1155/07) with the Municipal Court in Prishtina against the Government, respectively the Ministry DKPA, requesting to be reinstated with the status of a contribution pensioner and to be compensated for due and unpaid pensions to the amount of 18.360 €.

26. On 14 January 2008, the Applicant requested the Municipal Court in Prishtina to hold a hearing on claim C. No. 1155/07 of 4 May 2007.

27. On 16 June 2008, the Applicant filed a second request to the Municipal Court in Prishtina to hold a hearing on the claim C. No. 1155.07 of 4 May 2007.

28. On 17 December 2008, the Applicant repeated his request to the Municipal Court in Prishtina to hold a hearing on the claim.

29. On 9 January 2009, the Applicant filed a further submission with the Municipal Court Prishtina to conclude that the Applicant has the status of a pensioner with full pension rights payable from 1 December 1998 onwards on the basis of contributions paid by him for 40 years of work.

30. Moreover, on the basis of the above submission, the Applicant requested the Municipal Court in Prishtina, to oblige the Republic of Kosovo respectively the Ministry –DKPA, as the responding parties, to pay the pension due from 1 December 1998 until the submission of the claim, to an amount of 18.360 €, and starting from May 2007 to pay him the amount of 180 € per month, as long as he is entitled to this payment, as well as his procedural expenses, all these within 15 days from the date when the judgment became final.

31. On 28 June 2010, the Applicant filed another claim with the Municipal Court in Prishtina in which he requested the court to speed up the procedure and schedule the date for the main hearing in relation to his case, because since the submission of the claim more than 3 (three) years had passed.

Proceedings in other institutions

32. On 30 September 2009, the Ombudsperson Institution, upon the request of the Applicant, requested the Municipal Court in Prishtina to be informed of the actions taken by it in respect to the claim of the Applicant.

33. The Municipal Court in Prishtina replied to the request of the Ombudsperson Institution, underlining that it has received the claim by the Applicant, as well as the respondent's response, and that will proceed further with this dispute in order of the cases received at the Court."

Applicant's allegation

34. The Applicant claims a violation of Article 1 (2) [Definition of State], Article 22 [Direct Applicability of International Agreements and Instruments, Article 23 [Human Dignity], Article 24(1) [Equality before the Law], Article 31 (1) [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], Article 51 [Health and Social Protection] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction to the Article 1 [Obligation to Respect Human Rights], Article 6 (1) [The Right to a Fair trial], Article 13 [Right to effective remedy], Article 14 [Prohibition of

discrimination], Article 1 of the Protocol No.1 [Protection of Property], Article 1 of Protocol No.12 [General Prohibition of Discrimination] of the Convention.

35. The Applicant claims that the institutions of the Republic of Kosovo by their actions, respectively by their non-actions have violated the abovementioned provisions of the Constitution and the Convention to his detriment, and that he was discriminated and denied, among others, his property rights, health and social protection, the right to fair trial and the right to effective remedies.

36. The Applicant claims that his request has to do with general public interest and not just with his own interest. The general public interest includes pensioners of all categories (old age pensioners, disability and family pensioners).

37. The Applicant, in the administrative procedure requested from the respondent (Ministry –DPAK) to enable him the periodic payment of due and unpaid pensions, and to compensate him the damage caused, from the date when he claims that he has been denied this right. To fulfill this right, the Applicant claims that he has filed requests, appeals and repeated requests and has received negative reply.

38. Finally, the Applicant requests from the Court:

- Reinstatement of the lost status of pensioner, that he acquired by his own individual work on the basis of his previous employment by paying obligatory legal contributions throughout all the time while he enjoyed the status of insured person; and

- Full compensation on the basis of due and unpaid requests (pensions), according to the obtained pension installments and unpaid from the date when the Applicant has been terminated the pension installments up to the date of their payment in accordance with the applicable legal provisions;

- To decide on the merits for the concrete case referring to the public legal interest;

- To decide specifically by applying the possible justice mechanisms through the Municipal Court in Prishtina, that in the capacity of the regular court of competent jurisdiction to accomplish the personal and legal interest of the Applicant;

- To decide on the Applicant's notification and other litigant parties, and those interested.

Assessment on the admissibility of Referral

39. 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 criteria laid down in the Constitution and further specified in the Law and the Rules of Procedure.

40. As to the Applicant's claim that his Referral does not concern only him as an individual but is of general public interest, the Court reiterates that the Constitution of Kosovo does not provide for an *actio popularis,* meaning that individuals cannot complain in abstract or challenge directly actions or failure to act by public authorities. The Constitution of Kosovo provides recourse to individuals regarding actions or failure to act by public authorities only within the scope provided by Articles 113.1 and 113.7 of the Constitution, which requires the Applicants to show that they are: (1) authorized parties, (2) directly affected by a concrete act or failure to act by public authorities, and (3) that they have exhausted all legal remedies provided by law. It follows that the Applicant's Referral on the grounds of public interest does not meet the afore-mentioned criteria and must therefore be rejected as inadmissible. *(see Resolution on Inadmissibility KI51/1O, Zivic Ljubisa, Constitutional Review of the Decision of President of the Republic of Kosovo on the appointment of Mr. Zdravkovic Goran as a member of the Central Election Commission representing the Serbian Community, dated 2 March 2012).*

41. The Applicant has initiated two procedures, almost simultaneously, in order to reinstate him into the status of pensioner and to compensate unpaid pensions since 1 December 1998 until now: (1) the civil procedure before the Municipal Court in Prishtina on 4 May 2007 which is still pending, and (2) the administrative procedure initiated on 11 April 2007 before the Ministry- DKPA which ended with the Supreme Court's Resolution (A.nr. 837/2009 of 23 February 2011).

42. The Supreme Court, by Resolution A. no. 837/2009 of 23 February 2011, suspended the administrative procedure in accordance with Article 32 paragraph 1 of the Law on Administrative Conflicts since the Applicant did not declare within the period prescribed by the resolution.

43. Article 32 paragraph 1 of the Law on Administrative Conflicts provides:

> "If during the court proceedings, the institution takes some other action derogating from the administrative act which the administrative dispute has been initiated, as well as in the case of the Article 26 of this law after the administrative act is to be brought, that institution will inform, besides the plaintiff, also the court were the case of administrative dispute has been initiated. In that particular case the court will ask the plaintiff to state in a time limit of 15 days whether he is satisfied with a new act or whether he maintains his complaint or will extend his accusation with additional reasons. If the plaintiff states that he is satisfied with subsequent act, or does not state the opposite in a term described by paragraph 1 of this article, the court will bring the decision on suspension of proceeding. If the plaintiff does state that he is not satisfied with new act, the court will continue proceeding".

44. As to the administrative procedure initiated within the Ministry-DPAK regarding the realization of his rights, the Applicant believed that he had received a negative reply and therefore without completing the administrative proceedings, he initiated a civil lawsuit before the Municipal Court in Prishtina. However, in the Courts view, the Applicant must prove why he has not exhausted the administrative procedure, and show that the legal remedies available to him under Kosovo law were insufficient or unfruitful, or that there were special circumstances which exempted the Applicant form the obligation to exhaust such remedies, instead of pursuing the administrative procedure till the end. The Applicant's mere doubt does not exempt him from the obligation to exhaust the given legal remedy. (see: *Epözdemir v. Turkey, no. 57039/00, Resolution of 31 January 2002; Pellegriti v. Italy, no.77363/01, Resolution of 26 May 2005; MP Golub v. Ukraine, no.6778/05,Resolution of 18 October 2005).*

45. As to the present case, the Applicant has not proven that the administrative proceedings, which he had initiated, were ineffective or unfruitful, save for his statement that he has received negative reply. And at the same time the Applicant has conducted civil procedure also against the Ministry - DKPA with the Municipal Court in Prishtina, which was initiated on 4 May 2007.

46. In this respect, 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".

47. The rationale for the exhaustion rule is to afford the authorities concerned, including the regular courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The exhaustion rule is based on the subsidiary character of the procedural framework of constitutional justice *(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).*

48. In the present case, the Applicant did not follow the administrative procedure to the end, and almost simultaneously initiated civil proceedings before the Municipal Court in Prishtina, without having received a final decision in the administrative procedure. The Applicant therefore, failed to comply with Article 113.7 of the Constitution and Article 47 of the Law on the Constitutional Court.

49. Furthermore, in relation to the lawsuit lodged by the Applicant with the Municipal Court of Prishtina, the Court refers to Article 31 paragraph 2 [Right to Fair and Impartial Trial] of the Constitution:

"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".

50. The Court emphasizes the aforementioned constitutional provision envisages expedited procedure in cases where individuals face criminal charges, whereas the case at issue has to do with a lawsuit, whereby the Municipal Court in Prishtina has received a reply from the respondent party, and it has also emphasized that it will proceed further with the lawsuit in question according to the order of the cases arrived at the selfsame court.

51. Consequently, the Referral should be rejected as inadmissible for non-exhaustion of all legal remedies specified under Article 113.7 of the Constitution and Article 47 of the Law.

FOR THESE REASONS

The Constitutional Court, Pursuant to Article 113.7 of the Constitution and Article 47 of the Law and in compliance with the Rules of Procedure, on 27 November 2012, unanimously:

DECIDES

I. TO DECLARE the Referral 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
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 74/12, Agim Stublla, date on 30 January 2013- Request for constitutional review of the Resolution of the Supreme Court of the Republic of Kosovo PN. No. 410/2012, dated 5 June 2012

Case KI 74/12, Resolution of 9 January 2013.

Keywords: Individual referral, manifestly ill-founded, Resolution on inadmissibility

The Applicant in his Referral, submitted on 10 September 2012, requests "the constitutional review of the Resolution of the Supreme Court PN. No. 410/2012, dated 5 June 2012". The Applicant requests from the Constitutional Court to annul decisions of the regular courts and review the court process according to the Article 442 of the Criminal Procedure Code of Kosovo.

The Court finds that the Applicant "did not sufficiently substantiate his allegation", therefore, the Court finds that pursuant to the Rule 36 paragraph 2 items c and d, the Referral should be rejected as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 74/12
Applicant
Agim Stublla
Request for constitutional review of the Resolution of the Supreme Court of the Republic of Kosovo PN.No. 410/2012, dated 5 June 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Agim Stublla from Lluzhan village, Podujeva municipality.

Challenged decision

2. The challenged decisions of the public authority, allegedly violating rights guaranteed by the Constitution, are the Resolution of the Supreme Court PN. No. 410/2012, dated 5. june 2012, Resolution of the District Court PN. No. 65/2012, dated 3 April 2012, Resolution of the Municipal Court in Lipjan KP. No. 30/2011, dated 8 December 2011 and Judgment of the Municipal Court in Lipjan P. No. 129/2009, dated 13 February 2010.

Subject matter

3. The subject matter of the Referral submitted t the Constitutional Court of the Republic of Kosovo, on 7 August 2012, is the constitutional review of the Resolution of the Supreme Court PN. No. 410/2012, dated 5 June 2012,the Resolution of the District Court PN. No. 65/2012, dated 3 April 2012, Resolution of the Municipal Court in Lipjan KP. No. 30/2011, dated 8 December 2011 and Judgment of the Municipal Court in Lipjan

P. No. 129/2009, dated 13 February 2010, whereby the Applicant requests from the Constitutional Court to annul decisions of the regular courts and review the court process according to the Article 442 of the Criminal Procedure Code of Kosovo.

Alleged violations of the rights guaranteed by the Constitution

4. The Applicant did not specify in his Referral particular violations of rights guaranteed by the Constitution.

Legal basis

5. 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, of 15 January 2010 (hereinafter: the Law), and Article 29 of Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. The Court has noticed that, earlier, on 13 September 2010, the Applicant filed a Referral to the Court with the same subject matter, which was registered in the respective register under number KI 84/10.

7. Concerning the Referral KI 84/10, Applicant of which was Mr. Stublla, on its session held on 23 February 2011, with majority of votes rejected the Referral as inadmissible.

8. On 7 August 2012, the Applicant submitted his Referral to the Constitutional Court.

9. On 4 September 2012, by Decision GJ.R 74/12, the President appointed judge Arta Rama-Hajrizi as Judge Rapporteur. On the same day the President appointed the Review Panel composed of judges Almiro Rodrigues (presiding), Kadri Kryeziu and Enver Hasani.

10. On 2 October 2012, the Constitutional Court notified the District Court in Prishtina and the Supreme Court regarding the registration of the Referral.

11. On 4 October 2012, the Supreme Court replied to the Court's request to submit comments on the Referral, stating that all the arguments concerning this matter were given in the reasoning of the decision.

Summary of facts

12. The Applicant served as police officer with the Kosovo Police Service since 12 March 2001.

13. In March 2009, the Applicant was accused of having committed a criminal offence - theft and on 13 February 2010, by decision P.No. 129/2011 of the Municipal Court in Lipjan was sentenced with three months imprisonment, which he would not serve, if, in the time-frame of one year, he does not commit another criminal offence.

14. All evidence submitted by Mr. Stublla in his new Referral concerning the Judgment of the Municipal Court in Lipjan P.No.129/2009 and Judgment of the Supreme Court PKL No. 69/2010, dated 6 August 2010, are completely the same as in the first Referral filed to this Court on 13 September 2010.

15. However, in his new Referral the Applicant as new facts not reviewed by the Constitutional Court has presented: Resolution of the Supreme Court PN. No. 410/2012, dated 5 June2012, Resolution of the District Court PN. No. 65/2012, dated 3 April 2012, Resolution of the Municipal Court in Lipjan KP. No. 30/2011, dated 8 December 2011.

16. On 8 December 2011, Municipal Court in Lipjan issued a Resolution KP. No. 30/2011, acting upon the request for reopening of the criminal procedure, rejecting Applicant's request with reasoning that he did not provide any new evidence which would make a grounded request, and that he only repeated his allegations already reviewed by this court.

17. On 3 April 2012, the District Court in Prishtina acting upon Applicant's appeal issued the Resolution PN. No. 65/2012, with a reasoning that in this particular case the Applicant failed to meet legal requirements for reopening of the criminal procedure provided by Article 442 of CPCK, therefore, rejected his appeal as unfounded, and upheld the Resolution of the Municipal Court in Lipjan KP. No. 30/2011, dated 8 December 2011.

18. On 5 June 2012, the Supreme Court of Kosovo acting upon the Applicant's appeal issued the Resolution Pn. No. 410/2012, rejecting the appeal as inadmissible with the reasoning that the Resolution of the second instance court was final and that the appeal as a regular remedy was not allowed.

19. Finally, unsatisfied with the above-mentioned decisions, on 8 August 2012, the Applicant addressed, again, to the Constitutional Court of Kosovo.

Applicant's allegations

20. The Applicant alleges violation of his human rights guaranteed by the Constitution, without specifying what rights he alleges to have been violated.

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 the admissibility requirements laid down in the Constitution.

22. In this regard, the Court refers to the Rule 36 (1.c) and 36 (3.3) of the Rules of Procedure of the Constitutional Court , which stipulates:

"(1) The Court may only deal with Referrals if:

c) The Referral is not manifestly ill-founded "

and

"(3) A Referral may also be deemed inadmissible in any of the following cases:

(e) the Court has already issued a Decision on the matter concerned and the Referral does not provide sufficient grounds for a new Decision;"

23. In this aspect, concerning the matter raised by the Applicant regarding the Judgment of the Municipal Court in Lipjan p. no 129/2009 and the Judgment of the Supreme Court PKL no. 69/2010, dated 6. august 2010. god., the Court finds that this matter has already been adjudicated by decision KI 84/10, and the Court will not re-adjudicate the constitutionality of these legal acts.

24. In this regard, even the ECtHR in cases (X vs. Germany application No. 1860/63, Duclos vs. France application No. 20940/92, dated 17/12/96, emphasized that the Referral shall be rejected as inadmissible in cases when the Applicant repeats the appeal that was formulated in the previous Referral.

25. However, having in mind that the Applicant, in capacity of new facts, has submitted the Resolution of the Supreme Court PN. no. 410/2012, dated 5 June 2012, Resolution of the District Court PN. no. 65/2012, dated 3 April 2012, and Resolution KP. no . 30/2011 of the Municipal Court in Lipjan, dated 8 December 2011, concerning the procedure of the request on repetition of the procedure, which is different from the procedure of the protection of legality that was the subject matter of the first Referral, the Court, based on the ECtHR case law *"Where the applicant submits new information, the application will not be essentially the same as a previous application", will consider the new facts of the new Referral, (see Chappex v. Switzerland application no. 20338/92, dated 12/10/1994 and Patera v. the Czech Republic application no. 25326/03, dated 10/01/2006).*

26. Based on this, the Constitutional Court having reviewed the constitutionality of the Resolution of the Supreme Court PN. No. 410/2012, date 5 June 2012, Resolution of the District Court PN. No. 65/2012, dated 3 April 2012, and the Resolution of the Municipal Court by KP. No. 30/2011, dated 8 December 2011, did not find any fact that there was violation of any of the rights guaranteed by the Constitution. In fact, the Applicant apart from expressing the dissatisfaction with the Resolutions of the regular courts the Applicant has not argued convincingly his allegations that the trial was not "fair and impartial", in what way he was treated unequally and what stage of the proceedings was unconstitutional.

27. Article 102 [General Principles of the Judicial System] item 3 of the Constitution provides that "Courts shall adjudicate based on the Constitution and the law", and Article103 [Organization and Jurisdiction of Courts) item 2 of the Constitution clearly stipulates that;" The Supreme Court of Kosovo is the highest judicial authority."

28. The Constitutional Court is not the fact finding court, and in this case emphasizes that the fair and complete determination of factual situation is under full jurisdiction of the regular courts and that its role is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and therefore it cannot act as the "court of fourth instance", (see, *mutatis mutandis*, i.a., Akdivar against Turkey, 16 September 1996, R.J.D, 1996-IV, para. 65).

29. The fact that the Applicant is unsatisfied with the outcome, cannot serve as the right to file an arguable claim on violation of the Article 31 of the Constitution (*see mutatis mutandis* Judgment ECHR Appl. No.

5503/02, Mezotur-Tiszazugi Tarsulat against Hungary, Judgment dated 26 July 2005).

30. In these circumstances, the Constitutional Court does not find any fact that the regular courts have not "adjudicated fair and impartially", by taking decisions that might have violated his rights guaranteed by the Constitution.

31. The Applicant "did not sufficiently substantiate his allegations", therefore, the Court finds that pursuant to the Rule 36 paragraph 2 items c and d, the Referral should be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution and Rule 36.2 (c) and (d.) of the Rules of Procedure, in its session held on 21 November 2012, 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
Arta Rama-Hajrizi

President of the Constitutional Court
Prof. Dr. Enver Hasani

KO 97/12, Ombudsperson, date 30 January 2013, -Constitutional Review of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, dated 12 April 2012.

Case KO 97/12, Decision on interim measures of 24 January 2013

Keywords: economy, interim measures, freedom of association, law incompatible with the constitution, protection of property

The applicant filed a Referral pursuant to Article 113.2 (1) of the Constitution of Kosovo challenging the Constitutionality of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, because the implementation of the law would create irreparable damage on the civil society.

In this respect, bearing in mind that the time limit for Interim Measures imposed by the Court on 24 December 2012 will expire on 31 January 2013 and that the Court took on 24 January 2013 a decision to hold a public hearing, without prejudging the final outcome of the Referral the time limit of the Interim Measure is to be extended with three (3) months.

DECISION EXTENDING INTERIM MEASURES
in
Case No. KO 97/12
Applicant
The Ombudsperson
Constitutional Review of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Introduction

1. On 24 December 2012, the Constitutional Court granted interim measures in relation to the above Referral. In its decision, the Constitutional Court, inter alia, decided:

"...

I. *TO GRANT interim measures;*

II. *TO GRANT interim measures for a duration until 31 January 2013 from the date of the adoption of this Decision;*

III. *TO IMMEDIATLY SUSPEND the implementation of the Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, for the same duration;*

..."

2. As to the extension of the above Interim Measures, the Court reiterates that the implementation of the Law No. 04/L-093 on Banks, Microfinance Institutions and Non-Bank Financial Institutions, more precisely the disputed Articles 90, 95 (1.6), 110, 111 and 116 could cause

an unrecoverable damage to the functioning of the NGO's as well as to the civil society and the public interest in the Republic of Kosovo.

3. In this respect, bearing in mind that the time limit for Interim Measures imposed by the Court on 24 December 2012 will expire on 31 January 2013 and that the Court took on 24 January 2013 a decision to hold a public hearing, without prejudging the final outcome of the Referral the time limit of the Interim Measure is to be extended with three (3) months.

FOR THESE REASONS

The Court, pursuant to Article 116(2) of the Constitution, Article 27 of the Law on the Constitutional Court and Rule 55 of the Rules of Procedure of the Constitutional Court, having deliberated on the matter on 24 January 2013, unanimously

DECIDES

I. TO EXTEND the time limit of the Interim Measures imposed by the Court in its original decision of 24 December 2012 by a further period of three (3) months until 30 April 2013;

II. TO REMAIN seized of the matter;

III. This Decision shall be notified to the Parties; and

IV. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 99/12, Emine Tahiri, date 01 February 2013- Constitutional review of the Judgment of the Supreme Court of Kosovo Ac. no. 583/2012, dated 14 September 2012

Case KI-99/12, Resolution on Inadmissibility of 06 December 2012

Keywords: Individual referral, pension, right to pension for persons with disabilities, manifestly ill-founded.

The Applicant submitted Referral pursuant to Article 113.7 of the Constitution of Kosovo, by challenging the Judgment of the Supreme Court of Kosovo Ac. no. 583/2012 of 14 September 2012 which rejected the lawsuit filed against the Resolution of Ministry of Labor and Social Welfare (hereinafter: MLSW) - Department of Pension Administration (DPA) no. 5079885 of 27 January 2012 by which the Applicant's request for recognition of the right to disability pension was rejected.

The Applicant does not specify which Article of the Constitution of Kosovo has been violated by the Decision of the Supreme Court. The Applicant addresses the Constitutional Court with the request to assess the legality of the judgment and decisions of administrative bodies that have conducted this procedure, to overrule them and oblige the Supreme Court and the Ministry of Labor and Social Welfare to avoid legal violations and to extend her right to use the disability pension, which has been unfairly terminated.

Deciding upon the referral of the Applicant Emine Tahiri, after having examined the proceedings in their entirety, the Constitutional Court did not find that the pertinent proceedings were in any way unfair or arbitrary. Therefore, the Court decided that the Referral is manifestly ill-founded, because the presented facts do not in any way justify the allegation of a violation of the constituitonal rights.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI-99/12
Applicant
Emine Tahiri
Constitutional review of the Judgment of the Supreme Court of Kosovo
Ac. no. 583/2012 of 14 September 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is Emine Tahiri from village Batllava, Municipality of Podujeva.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo Ac. no. 583/2012 of 14 September 2012 which rejected the lawsuit filed against the Resolution of Ministry of Labor and Social Welfare (hereinafter: MLSW) – Department of Pension Administration (DPA) no. 5079885 of 27 January 2012 by which the Applicant's request for recognition of the right to disability pension was rejected.

Subject matter

3. The subject matter is the Judgment of the Supreme Court of Kosovo Ac. no. 583/2012 of 14 September 2012 by which the Applicant's request for recognition of the right to disability pension was rejected and Applicant's request to the Constitutional Court to *"…review the legality of the Judgment and decisions of administrative bodies that have conducted the proceedings…"*

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 of 15 January 2009(hereinafter: the Law) and Rule 56 paragraph 2 of the Rules of Procedure.

Proceedings before the Court

5. On 16 October 2012 the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. The President by Decision (no. GJR.99/12 of 31 October 2012) appointed Judge Snezhana Botusharovaas Judge Rapporteur. On the same date, by Decision no. KSH. 99/12 the President appointed the Review Panel composed of Judges: Robert Carolan(Presiding), Altay Suroy and Ivan Čukalović.

7. On 19 November 2012, the Constitutional Court notified the Applicant and Supreme Court of Kosovo of the initiation of constitutional review proceeding on the decisions in case no. KI-99-12.

8. On 6 December 2012, after having considered the report of Judge Snezhana Botusharova, the Review Panel composed of Judges: Robert Carolan (Presiding), Altay Suroy and Prof. dr. Ivan Čukalović made a recommendation to the full Court on the inadmissiblity of the Referral.

Summary of the facts

9. The Applicant was granted the right to disability pension during the period from 2006 until 21 December 2011: twice in duration by one year and on the third time in duration of three years.

10. The Applicant requested from MLSW – DPA to extend her right to disability pension. MLSW – DPA by Decision no. 5079885 of 29 December 2011 rejected the request for reconsideration of the use of the right to disability pension.

11. On 26 January 2012, the Applicant announced an appeal against the Decision of the MLSW – DPA no. 5079885 of 29 December 2011.

12. Deciding upon the appeal of the Applicant MLSW – DPA Council of Appeals for disability pensions in Prishtina by Decision no. 5079885 of 27 January 2012 rejected Applicant's request for recognition of the right to disability pension and confirmed Decision of MLSW – DPA no. 5079885 of 29 December 2011.

13. Against the Decision of MLSW – DPA Council of Appeals for disability pensions in Prishtina no. 5079885 of 27 January 2012 the Applicant filed a lawsuit with the Supreme Court of Kosovo.

14. Deciding upon the lawsuit of the Applicant, the Supreme Court of Kosovo by Judgment Ac. no. 583/2012 of 14 September 2012 rejected the lawsuit of the Applicant with the reasoning:

> *"From the case file it is obvious that the body of the first instance with the decision nr. 5079885, dated 29.12.2011 rejected the claimant's application for the acknowledgement of the right to pension with disability with the reason that it does not meet the criteria under article 3 of the Law 2003/23 on disability pensions and it bases the said decision on the conclusion and the opinion of the medical commission of the first instance body dated 20.12.2011 which assessed that the permanent disability to work was not manifested to the claimant as provided by the above mentioned legal provision.*
> *In the appeal procedure the sued body obtained the conclusion and the opinion of the medical commission nr. 5079885 dated 20.02.2012 for the assessment of the medical commission of the persons with disability of the body of the fact which is consistent with the conclusion and the opinion of the medical commissions given before, therefore by the challenged decision it rejected as unfounded the appeal of the claimant and confirmed the challenged decision.*
>
> *Considering that the medical commissions authorized by law have confirmed that the claimant is not disabled for work, the court finds that the administrative bodies have duly applied the provision of the article 3 of the abovementioned Law, on the basis of which the application of the claimant for the acknowledgement of the right to disability pension has been rejected."*

Applicant's allegations

15. The Applicant does not specify which Article of the Constitution of Kosovo has been violated by the Decision of the Supreme Court except for alleging the following:

The case file contains evidence - medical reports, hospital release sheets certifying the serious health condition of the party, release sheet no. 7814 dated 30.12.2003 follow up sheet for histopathological examination and Cytological dated 22, 12.2003, ultra-sonographic abdomen report dt.27.12.2005, Diagnostic Center report Endocrinological dated 28.05.2005 Report no.1793 dated 09.09.2005 and personal cards oncology Tirana.
The administration authority has not acted in conformity with the health status of the party and of the evidence and facts presented, but with no legal grounds in the revaluation procedure has rejected the request for the extension of the right to retirement of persons with disabilities without providing any justification for the reason of rejection of the request only upon a finding that to the party do not exist causes for recognition-extension of the right to a pension of persons with disabilities.

16. The Applicant addresses the Constitutional Court with the following request:

"By submitting the application to the Court we wish that the Constitutional Court of the Republic of Kosovo assess the legality of the judgment and decisions of administrative bodies that have conducted this procedure, to overrule them and oblige the Supreme Court and the Ministry of Labor and Social Welfare to avoid legal violations and to extend my right to use the disability pension. My right to this (pension) has been unfairly terminated."

Assessment of the admissibility of Referral

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

18. Article 48 of the Law on the Constitutional Court of the Republic of Kosovo 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."

19. Under the Constitution, the Constitutional Court is not a court of appeal in respect of the decisions taken by regular 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 [GC), no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-1).

20. The Applicants have not provided any *prima facie* evidence which would point to a violation of her constitutional rights (see Vanek vs. Slovak Republic, ECHR decision on admissibility, Application no. 53363/99 of 31 May 2005). The Applicant does not specify what right was violated to her and what Article of the Constitution supports her Referral, as it is stipulated in Article 113.7 of the Constitution and Article 48 of the Law.

21. In the present case, the Applicant has been provided numerous opportunities to present her case and to challenge the interpretation of the law, which she considers as being incorrect, before the Doctor's Commissions of both first and second instance, MLSW – DPA and the Supreme Court of Kosovo. After having examined the proceedings in their entirety, the Constitutional Court did not find that the pertinent 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).

22. Finally, admissibility requirements have not been met in this Referral. The Applicant has failed to point out and support with evidence the allegation that her constitutional rights and freedoms have been violated by the challenged decision.

23. It therefore results that the Referral is manifestly ill-founded in accordance with Rule 36 (2b) of the Rules of Procedure which provides: *„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 48 of the Law and Rule 36 (2b) of the Rules of Procedure, in the session of 6 December 2012, 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
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 71/12 , Fikrije Sermaxhaj, date 01 February 2013- Constitutional Review of the Decision of the District Court in Pristina, Ac.no.273/2012, dated 27 April 2012

Case KI71/12, Resolution on Inadmissibility, of 27 November 2012

Keywords: individual referral, manifestly ill-founded, resolution on inadmissibility

The Applicant challenges the Decision of the District Court in Prishtina, Ac. No. 273/2012, of 27 April 2012. The Applicant proposed to the Constitutional Court to protect her rights since she is a person who has no house of her own and that, pursuant to the challenged decision, she has to leave her apartment.

The Applicant's main argument in support of her referral is that she is unemployed, and she has a child of 9 years of age, and that she does not possess any movable or immovable property.

The Applicant has neither built a case on a violation of any of her rights guaranteed by the Constitution, nor has she submitted any *prima facie* evidence on such a violation, therefore, the Constitutional Court declared the Referral inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI71/12
Applicant
Fikrije Sermaxhaj
Constitutional Review of the Decision of the District Court in Pristina Ac.no.273/2012 dated 27 April 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Fikrije Sermaxhaj, residing in Pristina.

Challenged decision

2. The challenged decision is the Decision of the District Court in Pristina Ac.no.273/2012 dated 27 April 2012.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the constitutionality of the Decision of the District Court in Pristina Ac.no.273/2012 dated 27 April 2012 by which the Applicant's appeal in the execution proceedings has been rejected.

4. In her Referral the Applicant proposed to the Constitutional Court to protect her rights since she is a person who has no house of her own and that pursuant to the challenged decision she has to leave her apartment.

Legal Basis

5. The Referral is based on Art. 113.7 of the Constitution; Articles 46, 47, 48 and 49 of 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

6. On 23 July 2012, the Applicant submitted a referral with the Constitutional Court.

7. On 4 September 2012, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and a Review Panel composed of Judges Snezhana Botusharova (Presiding), Ivan Cukalovic and Arta Rama-Hajrizi.

8. On 27 November 2012, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of Facts

9. From the documents submitted in support of the Applicant's referral the following facts can be summarized.

10. On 7 November 2000 the Applicant as a buyer signed a contract on purchase of the apartment located in Pristina with a seller M.C. This contract was certified before the Municipal Court in Pristina on 24 August 2000 under VR no 1875/2000.

11. On an unspecified date the Applicant and M.C. signed certificate confirming that the Applicant paid a full purchasing price in the amount of 63,000 German Marks for the apartment to M.C.

12. On 17 December 2008, the Municipal Court in Pristina issued Judgment C. no 2977/07 and approved the statement of claim of claimant M.I. against the Applicant.

13. By that judgment the Applicant was obliged to pay 32,000 Euro to the claimant in the name of paid money for the purchased apartment in Pristina. In the reasoning of the judgment it was mentioned that the Applicant is a sister-in-law of the claimant. It was also mentioned that the Applicant "did not offer any evidence if she had any money to buy the contentious apartment…while on the other hand has resulted as not contentious the fact that the claimant for years has worked in

Switzerland where he earned money, therefore at this situation the court came into conclusion that the respondent did not posses money to purchase apartment, while the money in the name of sale-purchase price of the apartment paid the claimant…"

14. While the Applicant had possibility to submit an appeal against this judgment to the District Court in Pristina, it is not clear if she did that.

15. The judgment mentioned above (C.no 2977/07 of the Municipal Court in Pristina dated 17 December 2008) became final and executable on an unspecified date.

16. It appears that pursuant to the Law on Executive Procedures on 27 April 2012, the District Court in Pristina issued challenged Decision Ac. No. 273/2012. By that Decision the appeal of the Applicant was rejected as ungrounded and the Decision of the Municipal Court in Pristina E.no 2902/2012 and the Conclusion on the selling of the immovable property dated 27 December 2011 was confirmed.

17. From the reasoning it can be asserted that the Municipal Court in Pristina, as the court of the first instance, issued a Decision on Execution, E.no 2902/2010, as well as conclusion on selling the immovable property to the creditor M.I. It seems that M.I. was only bidder in the public sale of the aforementioned apartment who has offered the price of 32,000 Euro. Pursuant to that decision (E.no 2902/2010) the Applicant was obliged to handover the apartment to the M.I. .Furthermore, it was stated that the Applicant's appeal against the Municipal Court in Pristina (E.no 2902/2010) is ungrounded since from the case files it is clear that the ruling and of the first instance court and conclusion of selling were made through a public sale and that the only bidder was the creditor (i.e. M.I.)

18. Finally, on 5 June 2012, the Municipal Court in Pristina, issued Conclusion E.no 2902/2010 scheduling the eviction of the Applicant for 26 June 2012.

Applicable Law

19. Law on Executive procedure (No. 03/L-008) in Articles 12 and 14 prescribe remedies against decisions issued in the executive procedure as follows:

"Article 12

Remedies for attacking decisions

12.1 In the executive procedure, regular legal remedies are objection and appeal, if these are not excluded by this law.

12.2 Against the decision of first instance decision might be filed an objection, while appeal might be filed only in the cases foreseen by this law.

12.3 The objection is presented to the court which has issued the decision in the time frame of 7 days from the day of delivery of decision, unless otherwise foreseen by this law. About the objection decides the court which has issued the decision.

12.4 Against the issued decision regarding the objection might be filed an appeal within time-frame of 7 days from the day of delivery of decision.

12.5 For the filed appeal is competent to decide the court of second instances.

12.6 The objection and appeal does not halt the executive procedure, but fulfillment of the request of proposer for execution is adjourned until the first instance court decides on presented objection. Exceptionally, when with the executive title is assigned obligation on legal nutrition, or if the execution is conducted through transfer of money from transaction account of legal person in the account of the same type of the proposer of execution, but also in other cases foreseen by this law, the credit might be realized even before the decision for objection of debtor.

12.7 Against the conclusion, as type of decision, in principle is not permitted a legal remedy.

Article 14
Extra-ordinary legal remedies

14.1 Against the final decision issued in executive and security procedure is not permitted the revision and repetition of the procedure.

14.2 Restitution into previous state is permitted only in case of non-preservation of time limit for filing an objection and appeal against the executable decision for compulsory execution."

Applicant's Allegations

20. The Applicant's main argument in support of her referral is that she is unemployed, and she has child of 9 years of age, and that she does not possess any movable or immovable property.

Assessment of the Admissibility of the Referral

21. The Constitutional Court would like to recall that, 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 District Court in Pristina, 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, Garcia Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I, see also Resolution on Inadmissibility in case no 70/11, Applicants Faik Hima, Magbule Hima and Bestar Hima, Constitutional review of the Judgment of the Supreme Court, A. No 983/08 dated 7 February 2011).

22. In this regard the Constitutional Court notes from the facts submitted in the Referral, the Applicant have used all legal remedies prescribed by the Law on Executive Procedure cited above, by submitting the appeal against Decision on Execution(E.no 2902/2010) issued by the Municipal Court in Pristina and that the District Court in Prisitina have taken into account and indeed answered her appeals on the points of law.

23. The Court, therefore, considers that there is nothing in the Referral which indicates that the case lacked impartiality or that proceedings were otherwise unfair (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

24. In conclusion, the Applicant has neither built a case on a violation of any of her rights guaranteed by the Constitution nor has she 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).

25. It follows that the Referral is manifestly ill-founded pursuant to Rule 36 1. (c) of the Rules of Procedure which provides that *"The Court may only deal with Referrals f: c) the Referral is not manifestly ill-founded*."

FOR THESE REASONS

Pursuant to Article 113.7 of the Constitution and Rule 36 of the Rules of Procedure of the Constitutional Court the Constitutional Court, unanimously:

DECIDES

I. TO DECLARE the Referral 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
Robert Carolan

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 67/12, Shaban Kadrija, date 01 February 2013- Constitutional Review of the Supreme Court Judgment Rev. I. No. 366/2009, dated 15 March 2012

Case KI67/12, Resolution on Inadmissibility, of 27 November 2012

Keywords: individual referral, manifestly ill-founded

The Applicant claims that his rights to work as guaranteed by the Constitution and international standards have been violated.

The Applicant expects the Constitutional Court to enable him to return to his earlier workplace. He requests the Court to nullify all judgments issued by regular courts. The Applicant also requests that the Constitutional Court order a monetary compensation for his alleged loss of income including the court fees.

The Court considers that there is nothing in the Referral which indicates that the case lacked impartiality or that proceedings were otherwise unfair. The Applicant has neither built a case on a violation of any of his rights guaranteed by the Constitution nor has he submitted any *prima facie* evidence on such a violation, thus, the Constitutional Court declares the Referral inadmissible as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI67/12
Applicant
Shaban Kadrija
Constitutional Review of the Supreme Court Judgment Rev. I. No. 366/2009 dated 15 March 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Shaban Kadrija, residing in village Muzeqine, Municipality of Shtime.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo Rev. I. no. 366/ 2009 of 15 March 2012.

Subject matter

3. The Applicant claims that his rights to work as guaranteed by the Constitution and international standards have been violated.

4. The Applicant expects the Constitutional Court to enable him to return to his earlier workplace. He requests the Court to nullify all judgments issued by regular courts. The Applicant also requests that the Constitutional Court order a monetary compensation for his alleged loss of income including the court fees.

Legal Basis

5. The Referral is based on Article 113. 7 of the Constitution, Articles 46, 47, 48 and 49 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: 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

6. On 12 July 2012, the Applicant filed the Referral with the Constitutional Court of Kosovo (hereinafter: the Court).

7. On 4 September 2012, the President of the Court appointed Judge Robert Carolan as a Judge Rapporteur and a Review Panel composed of Judges: Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

8. On 27 November 2012, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the Facts

9. On 6 January 1990, the Municipal Assembly of Shtimje, Directorate of Social Incomes issued Decision No 04-011-17 according to which the Applicant established full time permanent employment with Directorate of Social Income as from 1 January 1990. The Applicant was assigned to work duties of Clerk for Collection of taxes.

10. On 12 October of the same year, the Municipal Assembly of Shtimje, Directorate of Social Incomes issued a new Decision No 118-21/90 by which the Applicant's employment was terminated without the Applicant's consent. The reasoning given was that he participated in the Independent Trade Union one-day general strike of employees of Albanian nationality on the 3rd of September, which the Directorate considered "as absent without justification" from the workplace. Furthermore, as the Applicant did not finish his work and, thus, was refusing his employment obligations, the MA considered that his behaviour was impeding the work and duties of other employees.

11. The Independent Trade Union of E.O.A. Sub-branch in Shtimje issued a statement(dated 18th of September 2002), on request of the Applicant, which states that the Trade Union has approached the Municipal Body, UNMIK and the Central Organization of Kosovo in the attempt of restoring him (and other similarly dismissed employees) to their previous positions of employment.

12. After the war, since the Applicant was not restored to his previous position of employment, he attempted to restart employment with the Municipal bodies of Shtime, assuming that this position of employment remained his.

13. However, on the 16 March 2004, the Municipality of Shtime announced a vacancy (02. No. 111/406) for this position in the "KohaDitore" newspaper.The Applicant was interviewed for the Vacancy but was not hired.

14. It appears the Applicant filed two Appeals of the decision of the Interviewing Panel to the Appeals Commission of the Municipality of Shtime (no. 13 filed 15 December 2003, and no. 07/708 filed 07 May 2004). Both were rejected as ungrounded, deciding the procedure of the vacancy announcement and the work of the Selection Committee was in compliance with the law, respectively with UNMIK Regulation no. 2001/36 on KCS and Administrative Direction no. 2003/2 on implementation of UNMIK Regulation no. 2001/36 on KCS.

15. On 21 July 2004, the Applicant filed an appeal against the Independent Oversight Board of Kosovo, which by its decision A. 02/52/2004 rejected the Applicant's appeal and the decision of the Appeals Commission of 06 July 2004 was left in force.

16. Consequently, on 26 December 2006, the Applicant submitted his claim to the Municipal Court of Ferizaj against the Municipality of Shtime as the respondent. He requested that the Municipal Court of Ferizaj annul the decision on selection of candidates according the vacancy 02 No 111/406 dated 16 march 2004.

17. The Municipal Court in Ferizaj in its judgment C. no. 171/ 07 of 15 May 2008 determined that the Interview Panel had respected procedures foreseen by the aforementioned UNMIK Regulations in their selection and rejected the Applicant's claim as ungrounded.

18. The District Court of Pristina in its judgment Ac. No. 1018/08 of 06 April 2009, accepted the assessment of the first instance court (i.e. Municipal Court in Ferizaj) in entirety, asserting that it had rightly determined the factual situation, correctly applied the substantive law and that the judgement did not contain violations of provisions of the contested procedure.

19. The Applicant then submitted a petition for revision against the judgment of the District Court in Pristina, due to substantial violations of the provisions of the Law on Contested Procedure and erroneous application of the substantive law.

20. On 15 March 2012, the Supreme Court of Kosovo, issued judgment Rev. I. no. 366/2009 and rejected the Applicant's revision request as ungrounded. The Supreme Court in its reasoning stated that "the court of second instance has rightfully applied substantive law when it rejected the appeal of claimant and confirmed the first instance judgment, which reasons are completely accepted by this court."

21. The Supreme Court also asserted that "the allegations of the claimant in the revision that the vacancy "was not transparent, but that only applications were distributed," did not stand, because the file document announced a vacancy and published it in "Koha Ditore" newspaper. The Supreme Court further asserted that "the interviewing committee of the respondent .....evaluated candidates according to the documentation submitted by the candidates and that the candidate HH was evaluated with the highest number of candidates...."

Applicant's Allegations

22. The Applicant alleges that he suffered injustice, most notably, since according to him, the interviewing panel for hiring to work was mainly comprised of persons with a political party background.

23. The Applicant further alleges that the regular courts did not pay attention to such injustice, and that according to him; the courts did not pay much attention to the substance of his problem and its legality.

Assessment of the Admissibility of the Referral

24. As it was mentioned earlier, the Applicant's main argument is that that injustice was made to him, most notably, since according to him, the interviewing panel for hiring to work was mainly comprised of persons with a political party background.

25. The Constitutional Court would like to recall that, 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, Garcia Ruiz v. Spain [GC], no.30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I, see also Resolution on Inadmissibility in case no 70/11, Applicants Faik Hima, Magbule Hima and Bestar Hima, Constitutional review of the Judgment of the Supreme Court, A. No 983/08 dated 7 February 2011).

26. In this regard the Constitutional Court notes from the facts submitted in the Referral, the Applicant used all legal remedies available, and that the regular courts took into account and indeed answered his appeals on the points of law.

27. The Court, therefore, considers that there is nothing in the Referral which indicates that the case lacked impartiality or that proceedings were otherwise unfair (see mutatis mutandis, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

28. In conclusion, the Applicant has neither built a case on a violation of any of his rights guaranteed by the Constitution nor has he submitted any prima facie evidence on such a violation (see Vanek v. SlovakRepublic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).

29. It follows that the Referral is manifestly ill-founded 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

Pursuant to Article 113.7 of the Constitution and Rule 36 of the Rules of Procedure of the Constitutional Court the Constitutional Court, unanimously:

DECIDES

I. TO DECLARE the Referral 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
Robert Carolan

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 75/12, Faton Sefa, date 01 February 2013- Constitutional Review of Judgment of the Supreme Court, Rev. no. 106/2010, dated 2 May 2012.

Case KI 75/12, Resolution on Inadmissibility of 27 November 2012

Keywords: manifestly ill-founded, protection of property, right to fair and impartial trial, right to work and exercise profession, violations of individual rights and freedoms

The applicant filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging the decision of the Supreme Court, Rev. no. 106/2010, of 2 May 2012, because both the District Court in Peja and the Supreme Court, allegedly, ignored the procedural violations before the disciplinary procedure. Furthermore, the Applicant alleges that the termination of the Applicant's employment contract was in contradiction with UNMIK Regulation 2001/27 because he never had a meeting with the company and the termination of employment relationship never specified what legal provisions were violated by him.

On the issue of the admissibility of the Referral, the Court held that the Referral was inadmissible because the Applicant did not substantiate a claim on constitutional grounds and did not provide evidence that his rights and freedoms has been violated by the Supreme Court.

RESOLUTION ON INADMISSBILITY
in
Case No. KI 75/12
Applicant
Faton Sefa
Constitutional Review of Judgment of the Supreme Court, Rev. no. 106/2010, dated 2 May 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Faton Sefa, residing in Gjakova, represented by Mr. Teki Bokshi, a practicing lawyer from Gjakova.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court of the Republic of Kosovo Rev. no. 106/2010 of 2 May 2012, which was served on the Applicant on 20 June 2012.

Subject matter

3. The subject matter of the Referral is the assessment of the constitutionality of the Judgment of the Supreme Court Rev. no. 106/2010 of 2 May 2012, whereby, allegedly, his rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), namely Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], Article 49 [Right to Work and Exercise Profession], Article 53 [Interpretation of Human Rights Provisions], Article 102 [General Principles of the Judicial System], and by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "ECHR"), namely Article 6 (Right

to a fair trial) and Article 1 (Protection of property) of Protocol 1, were 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 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").

Proceeding before the Court

5. On 13 August 2012, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 17 August 2012, the Applicant submitted the Power of Attorney.

7. On 4 September 2012, the President of the Court, with Decision No.GJR.KI-75/12, appointed Judge Robert Carolan as Judge Rapporteur. On the same date, the President of the Court, with Decision No.KSH.KI-75/12, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Arta Rama-Hajrizi.

8. On 12 October 2012, the Court requested clarification from the Supreme Court in respect to their Judgment Rev. no. 106/2010 of 2 May 2012. The Constitutional Court, while reviewing the Referral noted that the copy of the Judgment Rev. no. 106/2010 contained a discrepancy between the date of the main hearing, which was 09.04.2012, and the date of publication of the Judgment referred to at the end of that Judgment, which was 09.02.2012. This meant that the Judgment was published 2 months before the date of the main hearing.

9. On 25 October 2012, the Supreme Court replied to the Constitutional Court providing a Decision on correcting the Judgment Rev. no. 106/2010 whereby it was provided that the correct date should be 2 May 2012.

10. On 27 November 2012, 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 18 August 2006, the company "Hidrosistemi Radoniqi" in Gjakova (hereinafter: the "Company") terminated the Applicants employment contract because the Applicant had allegedly not fulfilled his work obligations pursuant to the employment contract.

12. On 24 August 2006, the Applicant filed a request for review to the Board of the company "Hidrosistemi Radoniqi".

13. Although this decision is not in the referral or the case file, the Applicant alleges that on 25 August 2006, the Disciplinary Commission upheld the decision of 18 August 2006 of the company to terminate the Applicant's employment contract.

14. On 30 August 2006, the Applicant complained against the decision of the Disciplinary Commission to the General Manager of the company.

15. Although this decision is not in the referral or the case file, the Applicant alleges that on 21 September 2006, the General Manager found as ungrounded the Applicant's complaint against the disciplinary commission.

16. Neither the Applicant's employment contract nor the minutes of the Disciplinary Commission are in the referral or the case file.

17. It is not clear whether the Applicant was invited to participate in the proceedings before the Disciplinary Commission.

18. On 8 January 2009, the Municipal Court in Gjakova (Judgment C. no. 172/08) annulled the Decision of the Disciplinary Commission of 25 August 2006 and the Decision of the General Manager of 21 September 2006. Further, the Municipal Court ordered the company to reinstate the Applicant in his work position and, if this return cannot be made due to objective reasons, then the Applicant should be "... systemized at work and work duties in compliance with professional background and skills achieved at work". The Municipal Court held that "the reasons for termination are conditioned under standard terms attached to employment and Basic Law of Labour of Kosovo." Furthermore, the Municipal Court held that "The review was conducted without the invitation of and without the presence of the employee, so it was impossible for him to present his defense." The company filed a complaint to the District Court in Peja against the Municipal Court's judgment.

19. On 9 February 2010, the District Court in Peja (Judgment Ac. no. 176/09) amended the Municipal Court Judgment of 8 January 2009 and the Applicant's claim was rejected as ungrounded. The District Court in Peja held that "[...] the substantive law was applied erroneously [...]", because the termination of the employment contract was done in accordance with the provisions, Article 11.2 and Article 11.4 (b), of the UNMIK Regulation 2001/27 on Essential Labour Law in Kosovo (hereinafter: "UNMIK Regulation 2001/27"). Moreover, the District Court also held that disciplinary measures were imposed on the Applicant and since the Applicant continued with other violations of work duties, the company in accordance with the UNMIK Regulation 2001/27 informed the Applicant in written and had a meeting as to the violations of the work duties and also the reasons for termination of the employment relationship were explained. The Applicant then filed a request for revision with the Supreme Court against the District Court judgment.

20. On 2 May 2012, the Supreme Court (Judgment Rev. no. 106/2010) rejected as unfounded the request for revision. The Supreme Court held that the *"[...] employment relationship of claimant is terminated in compliance with the procedure determined by applicable law, thus each claim in the revision based on this is inadmissible."*

Applicant's allegations

21. The Applicant alleges that the Judgment of the District Court in Peja and the Supreme Court was taken in violation of his constitutional rights as guaranteed by the Constitution and ECHR because both the District Court in Peja and the Supreme Court, allegedly, ignored the procedural violations before the disciplinary procedure.

22. Further, the Applicant alleges that the termination of the Applicant's employment contract was in contradiction with UNMIK Regulation 2001/27 because he never had a meeting with the company and the termination of employment relationship never specified what legal provisions were violated by him.

Assessment of the admissibility of the Referral

23. 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.

24. In this respect, the Court refers to 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.*"

25. Further, the Court refers also to Rule 36 (1.c) of the Rules of Procedure, which determines that: *"The Court may only deal with Referrals if:c) the Referral is not manifestly ill-founded."*

26. In this respect, the Court emphasizes that 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 Constitution (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).

27. 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 among other authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

28. As a matter of fact, based on the submitted documents by the Applicant, the Court considers that the Applicant has not submitted any evidence that shows whether he was invited or not to participate in the disciplinary proceedings and whether the Supreme Court ignored this fact or not. The mere disagreement with the Judgment coupled with the enumeration of some constitutional provisions is not enough to build a case on constitutional violation.

29. Therefore, the Court finds that the Applicant does not meet the requirements for admissibility as foreseen by Article 48 of the Law and Rule 36 (1.c) of the Rules of Procedure and thus the Referral is manifestly ill-founded and must be rejected as inadmissible (*see Resolution on Inadmissibility Case no. KI 13/09, Sevdail Avdyli against Judgment of Supreme Court A. No. 533/2006 dated 11 September 2006 and Judgment of Supreme Court A. No. 533/2006 dated 2 December 2006, 17 June 2010*).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 48 of the Law and Rule 36 (1.c) and Rule 56 (2) of the Rules of Procedure, on 27 November 2012, 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
Robert Carolan

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 104/12, Azem Kabashi, Tahir Badalli, Osman Zajmi and Nafije Krasniqi, date 01 February 2013- Review of the Constitutionality and Legality of the final list of 20 % of the sale proceeds from the privatization of the Socially Owned Enterprise "Industria Ushqimore", Prizren, drafted by the Privatization Agency of Kosovo.

Case KI 104/12, Resolution on Inadmissibility of 6 December 2012

Keywords: individual referral, manifestly illfounded, UNMIK Regulation No. 2003/13 on the Transformation of the right of use to Socially Owned Immovable Property

The applicants filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging the Privatization Agency of Kosovo list of workers eligible for 20 % of the sale proceeds from the privatization of the Socially Owned Enterprise "Industria Ushqimore", Prizren, because PAK has wrongfully interpreted the provisions, Articles 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13 on the Transformation of the right of use to Socially Owned Immovable Property.

On the issue of the admissibility of the Referral, the Court held that the Referral was inadmissible because the Applicants have not: a. submitted any supporting documentation whether they have exhausted all the legal remedies; b. substantiated a claim on constitutional grounds; and c. provided any evidence that their rights and freedoms have been violated by a public authority.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 104/12
Applicants
Azem Kabashi
Tahir Badalli
Osman Zajmi
Nafije Krasniqi
Review of the Constitutionality and Legality of the final list of 20 % of the sale proceeds from the privatization of the Socially Owned Enterprise "Industria Ushqimore", Prizren, drafted by the Privatization Agency of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicants

1. The Referral was submitted by Mr. Azem Kabashi, residing in the Korishë Village of Prizren, Mr. Tahir Badalli, residing in the Zhur Village of Prizren, Mr. Osman Zajmi, residing in Prizren, and Mrs. Nafije Krasniqi, residing in Prizren.

Challenged decision

2. The Applicants challenge Privatization Agency of Kosovo (hereinafter: "PAK") list of workers eligible for 20 % of the sale proceeds from the privatization of the Socially Owned Enterprise "Industria Ushqimore", Prizren, (hereinafter: the "SOE").

Subject matter

3. The Applicants allege that PAK has wrongfully interpreted the provisions, Articles 10.1, 10.2 and 10.4 of UNMIK Regulation No.

2003/13 on the Transformation of the right of use to Socially Owned Immovable Property (hereinafter: UNMIK Regulation No. 2003/13).

4. The Applicants do not refer to any provision of the Constitution.

Legal basis

5. Article 113.7 of the Constitution, Article 22 of the 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

6. On 19 October 2012, the Applicants submitted a proposal to assess the constitutionality and the legality of the PAK list of workers eligible for 20 % of the sale proceeds from the privatization of the SOE with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

7. On 23 October 2012, the Court requested the Applicants to complete the Referral in accordance with Rule 36.4 of the Rules of Procedure which provides: *"In the event that a Referral to the Court is incomplete or it does not contain the information necessary for the conduct of the proceedings, the Court shall request that the Applicant make the necessary corrections within a specified time-limit, not exceeding 30 days."* The Applicants have not submitted a reply to this request.

8. On 5 November 2012, the President of the Constitutional Court, with Decision No.GJR.KI-104/12, appointed Judge Robert Carolan as Judge Rapporteur. On the same date, the President of the Constitutional Court, with Decision No.KSH.KI-104/12, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

9. On 8 November 2012, the Referral was communicated to PAK.

10. On 6 December 2012, 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 19 October 2012, the Applicants submitted only a five page Referral composed of: 1. Proposal for Review of the Constitutionality and Legality of the final list of 20 % drafted by the Privatization Agency of Kosovo; 2. The PAK list of workers eligible for 20 % of the sale proceeds from the privatization of the SOE published in the daily news paper Kosova Sot; and 3. UNMIK Regulation 2003/13.

Applicants' allegations

12. The Applicants alleges that PAK has wrongfully applied and interpreted the provisions, Articles 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13, when it removed the Applicants from the list of eligible workers for 20 % of the sale proceeds from the privatization of the SOE because they did not have three years of work with the SOE. Instead, allegedly, PAK has inserted four other workers who have not worked with the SOE at all.

13. The Applicants allege that they have worked with the SOE from 2001 until 2011 and that they meet the requirement of Article 10.1, 10.2 and 10.4 of UNMIK Regulation 2003/13.

Assessment of the admissibility of the Referral

14. 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.

15. In this respect, the Court refers to Article 113.1 [Jurisdiction and Authorized Parties] of the Constitution which provides that "*The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*"

16. The Court also refers to Rule 29 (2) (Filing of Referrals and Replies) which provides that: " (2) *The Referral shall also include: (a) the name and address of the party filing the referral; (b) the name and address of representative for service, if any; (c) a power of Attorney for representative, if any; (d) the name and address for service of the opposing party or parties, if known; (e) a statement of the relief sought; (f) a succinct description of the facts; (g) the procedural and substantive justification of the referral; and (h) the supporting documentation and information.*" Furthermore, pursuant to Rule 29 (3) it is provided that: *"(3) Copies of any relevant documents submitted in support of the referral shall be attached to the referral when filed. If*

only parts of a document are relevant, only the relevant parts are necessary to be attached."

17. In the present case, the Applicants have not:

    a. submitted any supporting documentation whether they have exhausted all the legal remedies;

    b. substantiated a claim on constitutional grounds; and

    c. provided any evidence that their rights and freedoms have been violated by a public authority.

18. It follows that the Referral is inadmissible because it is manifestly ill-founded pursuant to Rule 36 (2) of the Rules of Procedure which provides 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;."*

FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36 (2) and Rule 56 (2) of the Rules of Procedure, on 6 December 2012, 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**
Robert Carolan	Prof. Dr. Enver Hasani

KI 79/10, Izet Zejnullahu, date 01 February 2013- Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev.No.93/2010, dated 30 June 2010

Case KI 79/10, Resolution on Inadmissibility, of 6 March 2013

Keywords: Individual referral, manifestly ill-founded

The Applicant claims that the Supreme Court of the Republic of Kosovo has violated Article 21, paragraph 1 (General Principles); Article 31, paragraphs 2 and 3 (Right to Fair and Impartial Trial); Article 49, paragraph 1 (Right to Work and Exercise Profession); Article 102, paragraph 2 (General Principles of the Judicial System); and Article 104, paragraph 1 (Appointment and Removal of Judges) of the Constitution.

The Applicant claims also that the Supreme Court has violated Article 6 of the European Convention on Human Rights (Right to a fair trial).

The Applicant requests the court to impose an interim measure.

Since the Applicant challenges only whether the Supreme Court applied the right law and made a proper substantive conclusion, it seems that the Applicant simply requests from this Court to annul a legal decision of the Supreme Court. Therefore, this referral is manifestly ill-founded in relation to violation of his constitutional rights or human rights and therefore, it is inadmissible.

The Applicant could not substantiate any constitutional violation which would cause him irreparable damages, such as a monetary reward from his previous employer due to illegal contract termination, there is no valid ground to impose an interim measure.

The Applicant did not provide evidences or arguments to substantiate imposing of an interim measure.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI79/10
Applicant
Izet Zejnullahu
Constitutional Review of the Judgment of the Supreme Court of Kosovo,
Rev. No. 93/2010, 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

The Applicant

1. The Applicant is Izet Zejnullahu residing in Vushtri. He is represented by a Lawyer, Zait Xhemajli, 30 Meto Bajraktari Street,Prishtina.

Challenged Decision

2. Judgment of the Supreme Court of Kosovo, Rev. No. 93/2010, dated 30 June 2010.

Subject Matter

3. The Applicant challenged the decision of Kosovo Police Service in Pristina to terminate his employment contract as a police officer.

Legal Basis

4. 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

5. The Applicant submitted a Referral to the Constitutional Court on 26 August 2010. The Court acknowledged the making of the Referral to the Applicant on 30 August 2010.

6. On 1 September 2010, the President of the Court appointed Judge Robert Carolan to be the Judge Rapporteur and on the same date, he appointed a Review Panel comprised of Judges Snezhana Botusharova (Presiding), Enver Hasani and Iliriana Islami.

7. The Court notified the making of the Referral to the Supreme Court of Kosovo and to the Ministry of Internal Affairs of the Republic of Kosovo.

8. The Ministry of Internal Affairs replied to the notification on 4 April 2011.

9. On 6 March 2012 the Review Panel considered the Preliminary Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the Facts

10. The Applicant had been employed by the Kosovo Police but was dismissed from the Police in 2008, pursuant to Decision of the Disciplinary Committee, dated 28 January 2008, and Decision of the Appeals Board of the Ministry of Internal Affairs – Kosovo Police, dated 23 March 2008.

11. The reasons given for dismissing him were that when the Applicant applied for membership of the Kosovo Police, he stated in his Application that there were no procedures initiated against him for illegal actions. However, the information provided was not correct. On 26 October 2002, the Applicant was asked in his employment application, *"....were you ever arrested or were you subject of any investigation procedure?"* To this question the Applicant answered *"No"*.

12. It subsequently transpired that the Applicant had, in fact, been arrested in the Federal Republic of Germany for a serious criminal offence committed in Manheim, Germany, during 1998-1999. That investigation determined that he spent one day in prison following his arrest.

13. The Applicant was successful in his challenge to the decision to dismiss him from the Police in the Municipal Court and in the District Court. However, the Supreme Court, in its Judgment, Rev. No. 93/2010, of 30 June 2010, stated that the false presentation of the circumstances of his conviction was a justification for his dismissal.

Allegations of the Applicant

14. The Applicant alleged that the Supreme Court violated Article 21, Paragraph 1 (General Principles); Article 31, Paragraphs 2 and 3 (Right to Fair and Impartial Trial); Article 49, Paragraph 1 (Right to Work and Exercise Profession); Article 102, Paragraph 2 (General Principles of the Judicial System); and Article 104, Paragraph 1 of the Constitution (Appointment and Removal of Judges).

15. The Applicant also alleged that the Supreme Court violated Article 6 of the European Convention on Human Rights (Right to a fair trial).

16. The Applicant requested that the Constitutional Court impose interim measures.

Response of the Opposing Party

17. The Ministry of Internal Affairs replied to the Court by letter dated 4 April 2011 reaffirming the obligation of members of the Police contained in the Police Regulations, part of which required the following: *"Applicants and employees should be sincere and always say or write the truth, regarding all the matters related to official service, including the date when they apply for the service, no matter if they are under the oath or not".*

Assessment of the Admissibility of the Referral

18. 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, Garcia Ruiz v. Spain [GC], no. 30544/96, § 28, European Court on Human Rights [ECHRJ1999-1).

19. 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, Constitutional Court Judgment of 23 June 2010, of

the Kosovo Energy Corporation against 49 individual judgments of the Supreme Court of the Republic of Kosovo, paras 66 and 67).

20. Having examined proceedings before the ordinary 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 as to the Admissibility of Application no_17064/06 of 30 June 2009)

21. Furthermore the Applicant had 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).

22. Because the Applicant merely disputed whether the Supreme Court applied the proper law and reached the proper factual conclusion it appears that the Applicant is simply asking this Court to reverse the legal decision of the Supreme Court. Therefore, this referral is manifestly ill-founded with respect to a violation of any of his constitutional or human rights, and consequently is inadmissible.

Assessment of the Substantive Legal Aspects of the Referral

23. As the Referral is inadmissible, there is no substantive basis for the Applicant's referral.

24. Because the referral is inadmissible and since the Applicant did not establish that if he were to prove a constitutional violation that he would suffer unrecoverable damages such as a monetary award from his previous employer for wrongful termination, there is no valid basis for the imposition of interim measures.

25. The Applicant has produced no evidence or argument to ground the granting of interim measures.

FOR THESE REASONS

The Court, following deliberations on 06 March 2012, pursuant to Articles 113.7 of the Constitution, Articles 20 of the Law and Rule 56.2 of the Rules, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible,

II. This Decision is to be notified to the Applicant, and

III. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

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

KI 101/12, Arianit Dyla, date 14 February 2013- Constitutional review of the Decision of the Supreme Court, Pzd. no. 42/2012, of 18 June 2012

Case KI 101/12, Resolution on inadmissibility of 18 January 2013

Keywords: individual referral, manifestly ill-founded, resolution on inadmissibility

The Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to assess the constitutionality of the decision of the Supreme Court, whereby his rights, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to Fair Trial) of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) were allegedly violated.

Furthermore, the Applicant requests from the Court to impose interim measure "[...] on the postponement of serving the imprisonment sentence, until the Constitutional Court of the Republic of Kosovo decides on this referral." The Applicant does not provide any other argument on why the Court should impose the interim measure.

The Court concluded that the referral for alleged violations is rejected as manifestly-ill founded and rejected the request for interim measure.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI 101/12
Applicant
Arianit Dyla
Constitutional Review of the Decision of the Supreme Court, Pzd. no. 42/2012, dated 18 June 2012.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

Applicant

1. The Referral was filed by Mr. Arianit Dyla from Gjakova (Applicant).

Challenged decision

2. The Applicant challenges the Decision of the Supreme Court, Pzd. no. 42/2012, of 18 June 2012, which was received by the Applicant on an unspecified date.

Subject matter

3. The Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court") to assess the constitutionality of the Decision of the Supreme Court, whereby his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to fair trial] of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the "ECHR") have allegedly been violated.

4. Furthermore, the Applicant request the Court to impose interim measures *"[...] postponing the serving of sentence with imprisonment until the Constitutional Court of the Republic of Kosovo decides in*

relation to this Referral." The Applicant does not provide any further argument on why the Court should impose interim measures.

Legal basis

5. The Referral is based on 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 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 October 2012, the Applicant submitted the Referral to the Court.

7. On 31 October 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (Presiding), Ivan Čukalovič and Arta Rama-Hajrizi.

8. On 13 November 2012, the Court informed the Supreme Court of the Republic of Kosovo of the filing of the Referral.

9. On 11 December 2012, the Court communicated the Referral to the State Public Prosecutor.

10. On 18 January 2013, 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 18 May 2010, the Municipal Court of Gjakova found the Applicant guilty of having committed the criminal act of Article 253 (1.1) in conjunction with Article 23 of the Provisional Criminal Code of Kosovo (hereinafter, "PCCK"), and sentenced him to six (6) months of imprisonment (Judgment P. no. 566/2005). The Municipal Court held that *"The second defendant Arianit Dyla during court hearing and in his final word states that, willingly knowing in advance the consequences, he admits the guilt for criminal offence for which he is charged for and requests from the court to give a mitigated sentence."* It further held that *"In this factual situation the Court confirmed the criminal act based on the voluntarily admittance of guilt by the defendants B.S. and Arianit Dyla, and other evidence filed in this case. The court particularly evaluated the defence of the second defendant*

Arianit Dyla, who admits the criminal offence by which he is accused of, but by admitting the criminal offence it does not mean that the same is acquitted from guilt."

12. On 31 October 2011, the District Court in Peja (Judgment Ap. no. 87/2010) rejected as unfounded the Applicant's appeal and upheld the Judgment of the Municipal Court in Gjakova.

13. The Applicant filed a request with the Municipal Court in Gjakova to postpone the execution of the sentence.

14. On 12 December 2011, the Municipal Court in Gjakova (Decision Esp. no. 405/2011) ordered the Applicant to submit evidence due to the serious acute disease and to submit report on his health condition, issued by the Medical Institution where he is being treated, within the time-limit of 8 days.

15. On 27 December 2011, the Municipal Court in Gjakova (Decision Esp. no. 405/2011) rejected the request to postpone the execution of the sentence.

16. On 24 January 2012, the District Court in Peja (Decision Pn. No. 09/12) rejected as unfounded the Applicant's complaint and upheld the decision of 27 December 2012 of the Municipal Court. The District Court held that the Applicant has not submitted sufficient evidence that would prove his claim of suffering from a disease.

17. On 30 January 2012, the Supreme Court (Judgment Pkl. no. 134/2011) rejected as unfounded the Applicant's request for protection of legality against the Judgment of the Municipal Court in Gjakova of 18 May 2010. The Supreme Court held *"From the Minutes of the Court hearing and from the judgment of first instance it is seen that the matter was adjudicated by the court panel composed of judges (H.H.) and two lay judges which is in full compliance with the provision of Article 22 paragraph 1 of Provisional Criminal Procedure Code of Kosovo, also the allegation for holding the Court hearing without his presence and his defence counsel does not stand, because (always referring to the case files, respectively Minutes of the court hearing) from which it is seen that Arianit Dyla has stated that, voluntarily knowing the consequences of such action, he admits the guilt, and the court has found that all legal terms have been met pursuant to Article 315 paragraph 1 of PCCK for admitting the guilt by the accused, thus the court hearing is in compliance with Article 359, paragraph 5 of PCCK."*

18. On 18 June 2012, the Supreme Court (Decision Pzd. no. 42/2012) rejected as unfounded the Applicant's request for mitigation of sentence. The Supreme Court held that *"The circumstance, which the Applicant has now presented in this request for extraordinary mitigation of sentence, serious health condition, and that he is under continuous therapy is a new circumstance that occurred after rendering the judgment but not of such nature as to justify the extraordinary mitigation of sentence."*

Allegations of Applicant

19. The Applicant alleges what follows.

    a. *"The judgments contain substantial violations, which are relevant for this stage of procedure, respectively violations of criminal law Article 451 paragraph (1) item 1) of PCPCK, substantial violations of the law of criminal procedure, envisaged by Article 403, paragraph 1 of provisions of criminal procedure whereby such violations have impacted on legality of court decision, in compliance with Article 451 paragraph (1) item 3) of CCK."*

    b. *"Above all, the matter was adjudicated by one individual judge at first instance."*

    c. *"In other words, the panel session was held without my presence and my defence counsel. It is important that it was held without my presence and based on that was violated my right to defence."*

    d. *"The Court did not present any evidence."*

    e. *"The court was obligated to determine and individualize actions of each accused, separately."*

    f. *"The amount of goods allegedly stolen, described in the enacting clause of judgment is not confirmed."*

    g. *"The Supreme Court of Kosovo in Judgment Pzd. no. 42/2012 dated 18.06.2012 has rejected his request without giving proper reasons in order for that judgment to be considered as fair and just."*

Admissibility of the Referral

20. The Court can only decide on the admissibility of a Referral, if the Applicant shows that he/she have fulfilled the admissibility requirements laid down in the Constitution and that are further specified in the Law and Rules of Procedure.

21. As seen above, on 30 January 2012 the Supreme Court ruled that "*From the Minutes of the Court hearing and from the judgment of first instance it is seen that the matter was adjudicated by the court panel composed of judges (H.H.) and two lay judges which is in full compliance with the provision of Article 22 paragraph 1 of Provisional Criminal Procedure Code of Kosovo, and also the allegation for holding the Court hearing without his presence and his defence counsel does not stand, because (always referring to the case files, respectively Minutes of the court hearing) from which it is seen that Arianit Dyla has stated that, voluntarily knowing the consequences of such action, he admits the guilt, and the court has found that all legal terms have been met pursuant to Article 315 paragraph 1 of PCCK for admitting the guilt by the accused, thus the court hearing is in compliance with Article 359, paragraph 5 of PCCK.*"

22. On 18 June 2012, the Supreme Court also ruled that *"The circumstance, which the Applicant has now presented in this request for extraordinary mitigation of sentence, serious health condition, and that he is under continuous therapy is a new circumstance that occurred after rendering the judgment but not of such nature as to justify the extraordinary mitigation of sentence."*

23. In this respect, the Constitutional Court of Kosovo does not have an appellate jurisdiction and can not intervene on theory that regular 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 court of fourth instance (*see* Case No. KI 07/09, Demë Kurbogaj and Besnik Kurbogaj against Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008 and Supreme Court Judgment Ap. no. 510/2007 of 26 March 2008, Resolution on Inadmissibility of 19 May 2010).

24. It is the role of regular 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).

25. The Court can only consider 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 authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

26. In the present case, the Applicant merely disagrees with the courts' findings with respect to the case and indicates some legal provisions of the Constitution and the PCPCK as having been violated by the challenged decision (Judgment Pzd. 42/2012) of the Supreme Court.

27. Namely, the Applicant does not explain how and why the Supreme Court violated his rights and violated the provisions of the PCPCK.

28. In sum, the Applicant does not show that the proceedings before the Supreme Court 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).

29. Rule 36 (2) d) of the Rules foresees that "the Court shall reject a Referral as being manifestly ill-founded when it is satisfied that (…) the Applicant does not sufficiently substantiate his claim".

30. Therefore, taking into account the above considerations, it follows that the Referral on the alleged violations must be rejected as manifestly ill-founded.

Request for Interim Measures

31. Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, provide that "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.

32. 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 27 of the Law, Rule 36 (2.d), Rule 54 (1) and Rule 56 (2) of the Rules of Procedure, on 18 January 2013, unanimously,

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
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 106/12, Lulzim Ramaj, date 14 February 2013,- Request for recognition of KLA member status.

Case KI 106/12, Resolution on Inadmissibility of 29 January 2013

Keywords: follow up case, individual referral, *res judicata*, request not to disclose identity, violation of individual rights and freedoms

The applicant, Mr. Lulzim Ramaj, filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo. The present Referral is a follow-up of Case No. KI 32/11. The Applicant complains now that the Kosovo Liberation Army (KLA) organization is *"Refusing to issue a certificate that I was a KLA member – and denial of recognition of the KLA member status, Publication of the case in media and defamations of the KLA [...]"*.

On the issue of the admissibility of the Referral, the Court held, that the Referral was inadmissible because the Applicant failed to submit evidence and failed to provide new and sufficient grounds for a new Decision. The Court, therefore, held that the Referral is to be rejected as Inadmissible, because the Constitutional Court has already decided the Applicant's case with Case No. KI. 32/11., i.e. the case is res judicata. Furthermore, as to the request for not having his identity foreclosed, the Applicant has not provided supporting grounds and evidence substantiating the request on the Applicant not having his identity foreclosed. Therefore, the Court rejected it as ungrounded.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 106/12
Applicant
Lulzim Ramaj
Request for recognition of KLA member status

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Referral

1. The Referral was submitted by Mr. Lulzim Ramaj, residing in Peja (the Applicant).

2. On 3 March 2011, the Applicant submitted a first Application (Case No. KI 32/11) to the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court"). The Case was rejected as inadmissible on 18 January 2012.

Subject Matter

3. The present Referral is a follow-up of Case No. KI 32/11. The Applicant complains now that the Kosovo Liberation Army (KLA) organization is *"Refusing to issue a certificate that I was a KLA member – and denial of recognition of the KLA member status, Publication of the case in media and defamations of the KLA […]"*.

4. In this respect the Applicant claims that *"[…] this is in contradiction to Article 21, paragraph 1, Article 24, paragraph 1, Article 36, paragraph 1 and Article 41 paragraph 1 of the Constitution of the Republic of Kosovo; Article 1, Article 2 paragraph 1, Article 7, Article 8 and Article 29 paragraph 2 of the Universal Declaration on Human Rights; Article 2 paragraph 1 (a) and (b), Article 5 paragraph 11 and 2, Article 8*

paragraph 2, Article 8 paragraph 2, Article 14 paragraph 1, Article 25 paragraph 1, Article 26 of the International Covenant on Civil and Political Rights; and Article 1 (Obligation to enforce human rights) and Article 14 (prohibition of Discrimination) of the European Convention on Human Rights and its Protocols."

5. Furthermore, the Applicant requests the Court not to have his identity foreclosed without providing any further reasons.

Legal basis

6. The Referral is based on 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

7. On 18 January 2012, the Constitutional Court, in a previous Case KI. No. 32/11, found the Referral inadmissible on the ground that the Applicant's petition was still pending before the Supreme Court. Thus, the Applicant's Referral was premature. That conclusion was consistent with the information given to the Applicant by the Kosovo Judicial Council on "his submission related to the delay in deliberation by the Supreme Court of Kosovo does not meet the time criterion to be considered as being delayed by the Court". There is still a pending submission to the Supreme Court.

8. On 22 October 2012, the Applicant submitted a new Referral to this Court.

9. On 4 December 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalovič.

10. On 29 January 2013, 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. No new information in relation to the previous case KI 32/11 has been submitted to the Court.

12. The facts, as described in case 32/11, were as it follows bellow.

13. On 17 September 2010, the Applicant submitted to the Peja branch of the KLA Veteran organization a request for recognition of the status of KLA veteran and also requested the issuance of the "KLA booklet".

14. On 12 October 2010, due to administrative silence by the Peja branch, based on Article 131 of Law on Administrative Procedure in Kosovo (Law no. 02/L-28), the Applicant filed an appeal to the Central Organization of KLA Veterans in Pristina.

15. On 13 December 2010, the Applicant submitted a petition before the Supreme Court of Kosovo in Pristina due to the fact that he did not receive a decision in respect of his appeal to the Central Organization of KLA Veterans.

16. On 28 December 2010 and on 29 January 2011, the Applicant submitted appeals to the Kosovo Judicial Inspectorate against inaction by the Supreme Court.

17. On 9 February 2011, the Applicant received a letter from the Office of Disciplinary Counsel of the Kosovo Judicial Council whereby he was informed that his submission related to the delay in deliberation by the Supreme Court of Kosovo and did not meet the time criterion to be considered.

18. On 9 February 2011, the Applicant made a further request to the Kosovo Judicial Council requesting the review of his appeals of 28 December 2010 and 29 January 2011.

19. The facts in case KI 106/12 follows below.

20. On 1 March 2011, the Applicant filed an appeal against the Central Organization of KLA Veterans in Pristina, without mentioning to which institution he appealed.

21. On 23 March 2011, the Applicant changed his appeal and instead of requesting the recognition of veteran KLA status he requested to have the status as member of KLA.

22. On 4 July 2012, the Applicant filed a submission to the Supreme Court which, according to the Applicant, has not yet replied. The Applicant does not mention what submission he filed and for what he filed.

23. On 18 July 2012, the Applicant filed a complaint with the Kosovo Judicial Council against the Supreme Court for not having reviewed and solved his case

24. On 24 August 2012, the Applicant filed an appeal against the Kosovo Judicial Council with the Kosovo Judicial Council due to administrative silence and for having rejected his appeal of 18 July 2012. According to the Applicant, he has not yet received a reply.

25. Furthermore, no supporting documentation and information was provided on the reasons for the Applicant to have his identity foreclosed.

Admissibility of the Referral

26. 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.

27. In this respect, the Court refers to Rule 36 (3) (e) which provides: *"A Referral may also be deemed inadmissible in any of the following cases: the Court has already issued a Decision on the matter concerned and the Referral does not provide sufficient grounds for a new Decision;"*

28. The Applicant's complaint that he was refused the recognition of KLA member status was already rejected by this Court in its Resolution on Inadmissibility in Case No. KI. 32/11.

29. The Applicant has failed to provide new and sufficient grounds for a new Decision. The only new information that the Applicant has brought before this Court is that he wants to change his request from recognition of KLA veteran status to member of KLA status. Furthermore, the Applicant has not submitted with this Court a final act issued by a public authority that he challenges before this Court. Moreover, the procedure that the Applicant undertook after Resolution on Inadmissibility in case KI 32/11 concerns also that the Applicant instead of requesting KLA veteran status is now requesting to have his member of KLA status.

30. Therefore, pursuant to Rule 36(3) (e) of the Rules, the Court will not deal with this Referral.

31. In these circumstances, the Court concludes that the Referral, pursuant to Rule 36 (3.e) of the Rules of Procedure, is inadmissible, because the Court has already decided on the concerned matter.

32. As to the Applicant's request for not having his identity foreclosed, the Applicant has not provided supporting grounds and evidence substantiating the request on the Applicant not having his identity foreclosed. Therefore, the Court rejects it as ungrounded.

FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36 (3.e) of the Rules of Procedure and Rule 56 (2) of the Rules of Procedure, on 29 January 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible, because the Constitutional Court has already decided the Applicant's case with Case No. KI. 32/11., i.e. the case is *res judicata*;

II. TO REJECT the request on the Applicant not having his identity foreclosed

III. TO NOTIFY this Decision to the Parties; and

IV. TO PUBLISH this Decision in accordance with Article 20 (4) of the Law;

V. This Decision is effective immediately.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 87/12, Afrim Rexhepi, dated 14 February 2013 - Constitutional Review of the Judgment of the Supreme Court, Ap.nr.119/2010, dated 10 October 2011

Case KI87/12, Resolution of 21 January 2013.

Keywords: Individual referral, out of time

The Applicant requests the Constitutional Court "to open investigations against those involved in this Judgement, because as a consequence of the involved persons, I have been damaged and convicted with imprisonment for 3 years and 2 months, not being guilty, and even though I was endangered with fire arms, no one took it into consideration, and I am not such a person as the public prosecutor described me".

The Applicant does not show any basic right or freedom or any constitutional provision, which, allegedly, has been violated by the Judgment of the Supreme Court of Kosovo.

The Court, further notes that the applicant's referral was filed with the Constitutional Court on 1 October 2012, i.e. almost tend months out of the time set forth in Article 49 of the Law.

Therefore, the referral has not been filed with the Court in a legal manner, as provided in Article 113, (1) of the Constitution and is declared inadmissible due to the time limit.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI87/12
Applicant
Afrim Rexhepi
Constitutional Review of the Supreme Court Judgment Ap.no 119/2010, dated 10 October 2011

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
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

Applicant

1. The referral was filed by Afrim Rexhepi (Applicant), residing in Pristina.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo, Ap. no 119/2010, dated 10 October 2011, and served on the applicant on 30 December 2011.

Subject matter

3. The Applicant claims about the aggregation of imprisonment sentence against him and of the rejection of his appeal as being ungrounded.

Legal basis

4. The referral is based on Article 113.7 of the Constitution, Articles 49 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 1 October 2012, the Applicant submitted the Referral to the Court.

6. On 31 October 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Kadri Kryeziu and Enver Hasani.

7. On 3 November 2012, the Secretariat sent a letter to the Applicant, requesting him to complete his application to the Constitutional Court. On 14 November 2012, notwithstanding the aforementioned, the Secretariat informed the Applicant that his referral has been registered.

8. On 14 November 2012, the Secretariat informed the Supreme Court with the Applicant's referral.

9. On 30 November 2012, the District Court in Pristina provided the Secretariat with a copy of the signed receipts of the challenged Judgments of the Supreme Court of Kosovo. According to the signed receipts, the Applicant received the challenged Judgment of the Supreme Court on 30 December 2011.

10. On 21 January 2013, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 10 October 2011, the Supreme Court of Kosovo issued the challenged judgment (Ap .no 119/2010) and approved the Appeal of the Public Prosecutor in relation to the sentence.

12. Thus, the Supreme Court adjudicated the aggregate imprisonment sentence against the Applicant in duration of 3 (three) years and (2) two months. The appeal of the Applicant's defence counsel was rejected as ungrounded.

Applicant's allegations

13. The Applicant requests from the Constitutional Court *"to open investigation against the involved in this judgment because as consequence of people involved in it I am damaged and sentenced with 3 years and 2 months of imprisonment without being guilty although I was endangered with gun fire no one took this into consideration and I am not that kind of man as described by public prosecutor".*

14. The Applicant does not indicate any right or fundamental freedoms or any constitutional provision which have been alleged violated by the Supreme Court Judgement.

Admissibility of the Referral

15. Article 113 [Jurisdiction and Authorized Parties] of the Constitution establishes that

> *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".*

16. The Court refers to the Article 49 [Deadlines] of the Law, which 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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force."*

17. In addition, Rule 36 [Admissibility Criteria] of the Rules provides 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.*

18. The Court notes that the final court decision was issued by the Supreme Court (Ap.no 119/2010) on 10 October 2011 and it was served on the Applicant on 30 December 2011.

19. The Court further notes that the Applicant's referral was submitted to the Constitutional Court on 1 October 2012, meaning almost ten months after the time limit prescribed by Article 49 of Law.

20. Thus, the Referral was not submitted to the Court in a legal manner, as prescribed by Art 113 (1) of the Constitution.

FOR THESE REASONS

Pursuant to Article 113.7 of the Constitution, Article 49 of the Law and Rule 36 para.1 (b) of the Rules of Procedure the Constitutional Court, unanimously:

DECIDES

I. TO DECLARE the Referral 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

KI 123/12, Bajrush Gashi, date 14 February 2013- Constitutional Review of the Decision of the Supreme Court, Pzd. no. 65/2012, dated 10 September 2012.

Case KI 123/12, Resolution on Inadmissibility of 29 January 2013

Keywords: follow up case, individual referral, *res judicata*, violation of individual rights and freedoms

The applicant, Mr. Bajrush Gashi, filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo. The present Referral is a follow-up of Case No. KI 06/12. The Applicant complains now that the procedures before the District Court were in violation of the Constitution and the Provisional Criminal Procedure Code of Kosovo.

On the issue of the admissibility of the Referral, the Court held that the Referral was inadmissible because the Applicant failed to submit evidence and failed to provide new and sufficient grounds for a new Decision. The Court, therefore, held that the Referral is to be rejected as Inadmissible, because the Constitutional Court has already decided the Applicant's case with Case No. KI. 06/12., i.e. the case is res judicata.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 123/12
Applicant
Bajrush Gashi
Constitutional Review of the Decision of the Supreme Court, Pzd. no. 65/2012, dated 10 September 2012.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Referral

1. The Referral was submitted by Mr. Bajrush Gashi residing in the village, Hoqa e Vogël, Municipality of Rahovec (the Applicant).

2. On 27 January 2012, the Applicant submitted a first Application (Case No. KI 06/12) to the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court").

3. On 9 May 2012, the Court declared the Referral admissible and found a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter, the "Constitution") and Article 6 [Right to a fair trial] of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the "ECHR").

Subject Matter

4. The present Referral is a follow-up of Case No. KI 06/12. The Applicant complains now that:

"...

a. The decision of the District Court in Prizren was non-transparent without facts and arguments.

b. *The Prosecutor of the case while questioning the key witness of this case expelled him from his office by threatening him that if he does not cooperate he will send him to prison.*

c. *My request and the request of my defense was that V.E. to be heard as witness. The Prosecutor and Judge V.D. refused this.*

d. *Judge V.D. in the court of first instance was presiding judge and also member of the Panel in the Supreme Court. Judge V.D. participated directly and indirectly in all my appeals, only to defend the non-transparent decision of the District Court.*

e. *I filed appeal for this in the Constitutional Court and you have given me this right and you have returned it for review.*

f. *The Supreme Court has only changed the panel and decided in the same way as before.*

5. In this respect, the Applicant claims that his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of ECHR have been violated.

Legal basis

6. 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

7. On 9 May 2012, the Constitutional Court, in previous Case KI. No. 06/12, declared the Referral admissible and found a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of ECHR on the ground that "[...] in the circumstances of the case the impartiality of the Supreme Court is capable of appearing to be open to doubt and that the Applicant's fears in this respect can be considered subjectively and objectively justified." because "[...] the same judge that presided the panel in the District Court in Prizren also participated in the Panel of the Supreme Court deciding on his request for mitigation of the sentence".

8. Then, the Constitutional Court "DECLARED invalid the Decision, Pzd. no. 67/2011, of the Supreme Court of 12 December 2011, which violates Article 31 of the Constitution and Article 6 of ECHR" and "REMANDED the Decision, Pzd. no. 67/2011, of the Supreme Court of 12 December 2011 to the Supreme Court for reconsideration in conformity with the Judgment of this Court, pursuant to Rule 74 (1) of the Rules of Procedure".

9. On 17 October 2012, the Supreme Court notified the Constitutional Court that they have reconsidered their Decision in conformity with the Constitutional Court Judgment, i.e. taking the decision by a different composition of Judges (Decision Pzd. no. 65/2012 of 10 September 2012).

10. On 4 December 2012, the Applicant submitted a new Referral to this Court.

11. On 10 January 2013, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (Presiding), Kadri Kryeziu and Enver Hasani.

12. On 29 January 2013, 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

13. No new information in relation to the previous case KI 06/12 has been submitted to the Court.

14. The facts, as described in case KI 06/12, were in summary as it follows below.

15. On 19 May 2009, the District Court of Prizren found the Applicant guilty of having committed the criminal act of Article 138.6 in conjunction with 138.1 and Article 328.2 of the Provisional Criminal Code of Kosovo (hereinafter, "PCCK"), and sentenced him to 4 years and 4 months of imprisonment (Judgment P. no. 26/09). The Applicant appealed against this judgment to the Supreme Court. The Public Prosecutor also appealed against this Judgment as regards the part that had to do with the co-defendant G.M.

16. On 8 December 2010, the Supreme Court rejected as unfounded the Applicant's and the Public Prosecutor's appeal and confirmed the District Court Judgment (Judgment Ap. no. 259/2009).

17. On 12 December 2011, the Supreme Court rejected the Applicant's request for extraordinary mitigation of the sentence as unfounded (Judgment Pzd. no. 67/2011).

18. In this respect, the Applicant alleged before the Constitutional Court that the Judge who was the presiding judge of the District Court in Prizren and decided his case also took part in the decision of the Supreme Court on his request for extraordinary mitigation of the sentence (the judge in question).

19. Furthermore, the Applicant claimed that the judge in question had to inform the Supreme Court that the judge in question was Presiding Judge in District Court in Prizren and was to be disqualified to participate in the Supreme Court panel.

Admissibility of the Referral

20. The Court needs to first examine whether he has fulfilled all admissibility requirements, laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

21. In this respect, the Court refers to Rule 36 (3) (e) which provides: *"A Referral may also be deemed inadmissible in any of the following cases: the Court has already issued a Decision on the matter concerned and the Referral does not provide sufficient grounds for a new Decision;"*

22. The Applicant's complaint, as to Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of ECHR, was already dealt with by this Court in its Judgment in Case No. KI. 06/12.

23. The Applicant has failed to provide new facts and sufficient grounds for a new Decision.

24. Furthermore, the Supreme Court has already notified the Constitutional Court that it have acted in conformity with the constitutional Judgment (see Decision Pzd. no. 65/2012 of 10 September 2012).

25. Therefore, pursuant to Rule 36(3) (e) of the Rules, the Court will not deal with this new Referral.

26. In these circumstances, the Court concludes that the Referral, pursuant to Rule 36 (3.e) of the Rules of Procedure, is inadmissible, because the Court has already decided on the concerned matter.

FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36 (3.e) and Rule 56 (2) of the Rules of Procedure, on 29 January 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible, because the Constitutional Court has already decided the Applicant's case with Case No. KI. 06/12., i.e. the case is *res judicata*;

II. TO NOTIFY this Decision to the Parties; and

III. TO PUBLISH this Decision in accordance with Article 20 (4) of the Law.

IV. This Decision is effective immediately.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 116/12, Lulzim Ramaj, date 14 February 2013- Constitutional review of the Telecommunications Regulatory Authority Decision, 1218/2/12 dated 12 June 2012

Case KI 116/12, decision of 25 January 2013

Keywords: individual referral, out of time referral, abuse of the right of petition, disclosure of identity, equality before the law, right of access to public documents

The Applicant filed the Referral based on Article 113.7 of the Constitution, claiming that his constitutional rights have been violated because the Post and Telecommunication of Kosovo has unlawfully collected money from him, delayed his postal deliveries, postal deliveries have been served to him unclean and that he has been subjected to insults and threats by the CEO of the Regional Post Office in Peja.

The Court firstly determined that the Applicant's Referral was out of time, namely it was not submitted to the Court in compliance with Article 49 of the Law. The Court further reasoned that the Applicant abused with his right to petition because he has repeatedly filed similar referrals which in the past have been declared inadmissible.

The Court also rejected the Applicant's request not to disclose his identity. Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (3) d) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI116/12
Applicant
Lulzim Ramaj
Constitutional review of the Telecommunications Regulatory Authority Decision 1218/2/12 dated 12 June 2012

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Lulzim Ramaj, residing in Peja.

Challenged decision

2. The Applicant challenges the Telecommunications Regulatory Authority Decision 1218/2/12, dated of 12 June 2012 and served on him on 13 June 2012.

Subject matter

3. The subject matter of the Referral is the Applicant's complaint that the Regional Post Office in Peja has illicitly collected money from him, delayed his postal deliveries, postal deliveries have been served to him unclean and that he has been subjected to insults and threats by the CEO of the Regional Post Office in Peja.

4. The Applicant also requests from the Constitutional Court not to disclose his identity.

Legal basis

5. The referral is based on Article 113.7 of the Constitution; Article 20 of the 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 Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Court

6. On 12 November 2012, the Applicant submitted a referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 4 December 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and a review panel composed of Judges Snezhana Botusharova, presiding, Kadri Kryeziu and Enver Hasani.

8. On 4 January 2013, the Court notified the Applicant and the Telecommunications Regulatory Authority about the registration of the Referral.

9. On 25 January 2013, 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. On 18 January 2012, the Applicant lodged a complaint against postal officers of the Regional Post Office in Peja, alleging illicit collection of 0.10 € per post-card, as Administrative Instruction No. 2005/4 for Universal Postal Services does not envisage postal tax for post-cards.

11. On 10 February 2012, the Applicant made a request to the Post Office to provide him with the price list of Kosovo postal services.

12. On 13 February 2012, the Applicant received a phone call from the CEO of the Regional Post Office in Peja and was told that the price list can be found in the walls of the Post Office premises as well as in the web-page of the Post Office.

13. On 15 February 2012, the Applicant lodged a complaint against the Regional Post Office in Peja to the Telecommunications Regulatory Authority (hereinafter, TRA).

14. On 21 February 2012, the Applicant lodged a complaint against a certain postal office employee in Prishtina, to the Directorate of Kosovo's Mails,

due to concealment of the weight of the delivery letters. The Applicant got no reply.

15. On 25 April 2012, the Applicant lodged a complaint against the TRA Decision No.937/2/12, dated 14 March 2012, to the Supreme court of Kosovo. The Applicant thus far has received no reply.

16. On 24 August 2012, the Applicant notified the Judicial Council of Kosovo that the Supreme Court of Kosovo has not reviewed his lawsuit.

Applicant's allegations

17. The Applicant claims a violation of Articles 21 paragraph 1 [General Principles], 24 paragraph 1 [Equality before the Law], 36 paragraph 1[Right to Privacy], 41 paragraph 1 [Right of Access to Public Documents] of the Constitution as well as Articles 1 [Obligation to respect human rights] and 14 [Prohibition of discrimination] of the European Convention on Human Rights. The Applicant also invokes violation of provisions of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

18. The Applicant alleges that the Post Office has illicitly collected money from him, delayed his postal deliveries, postal deliveries have been served to him unclean and that he has been subjected to insults and threats by the CEO of the Regional Post Office in Peja.

19. The Applicant *inter alia* requests the Court:

- To oblige TRA to remove the CEO of the Regional Post Office of Peja from office;
- To remove the manager of Kosovo Postal Services form office;
- To remove the postal supervisor of the Regional Post Office in Peja from office;
- To remove form office the supervisor of the Postal Transit Center;
- To remove from office a certain employee of the Regional Post Office in Peja against whom the Applicant had lodged a complaint dated 21 July 2012;
- To remove from office all the employees who have abused their official duties based on postal evidence propounded by the

Applicant and to fine each one of them individually in the amount of 5.000 € based on the provisions of the Law on Postal Services and the Labor Law;

- To be paid indemnity in the amount of 2.500.500 (two million and five hundred thousand) €;
- To be paid indemnity for the notes in the amount of 300.000 (three hundred thousand €);
- To exempt him from financial burden of judicial proceedings based on Article 31 paragraph 6[Right to Fair and Impartial Trial] of the Constitution.

Admissibility of the Referral

20. 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.

21. The Court refers to Article 49 of the Law, which reads:

> *"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 form the day the law entered into force".*

22. The Court notes that the contested TRA decision was served to the Applicant on 13 June 2012 and that the Applicant had submitted the Referral on 12 November 2012.

23. Thus, the Applicant should have submitted his referral, at the latest, on 13 October 2012, in order to comply with the legal deadline for submitting a referral as set forth in Article 49 of the Law. The Applicant submitted his referral on 12 November 2012, a month beyond the prescribed legal deadline.

24. It follows that the referral is out of time.

25. The Court also refers to the Rule 36.3.d) of the Rules of Procedure, which provides:

A referral may also be deemed inadmissible in any of the following cases:

d) the Court considers that the referral is an abuse of the right of petition;

26. The Court also takes note that the Applicant has filed 4 different referrals including this one with the Court. The referrals filed by the Applicant are as follows:

- Resolution on Inadmissibility in Case no. KI126/10 Applicant Lulzim Ramaj – Constitutional Review of the Decision of the Ministry of Transport and Telecommunication No. 140, dated 25 January 2010, rendered by the Court on 19 January 2012;

- Resolution on Inadmissibility in Case no. KI32/11 Applicant Lulzim Ramaj – Request for recognition of KLA veteran status, rendered by the Court on 20 April 2012;

- Referral KI106/12 which is yet to be reviewed by the Court and which has as a subject matter the Applicant's request in relation to his KLA veteran status.

27. The Court refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which reads:

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".

28. The Court stresses that the case-law of the European Court of Human Rights expounds several ways which indicate the Applicants tendency to abuse with their right to petition. And one of them is when Applicants repeatedly lodge vexatious and manifestly ill-founded applications with the Court that are similar to an application that they have lodged in the past that has already been declared inadmissible *(see M.v. the United kingdom (dec.), and Philis v. Greece (dec.)).*

29. In the instant case, the Court notes that the Applicant has filed 4 different referrals whereby 2 of them have already been declared inadmissible.

30. In the instant case, the Court considers that the Applicant has indeed abused with his right to petition, because he has filed similar referrals which in the past have been declared inadmissible.

31. In addition, the Applicant has not provided supporting grounds and evidence substantiating the request on the Applicant not having his identity foreclosed.

32. The Court considers that he has not substantiated in any way whatsoever as to *why* his identity should not be disclosed.

33. Therefore, the Court rejects as ungrounded the request not to disclose his identity.

34. In all, the Referral does not meet the requirements laid down in Article 49 of the Law and Rule 36. 3. d) of the Rules of Procedure and must be rejected as inadmissible and the request on protection of identity must be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, Pursuant to Article 113.7 of the Constitution and Article 49 of the Law and in compliance with the Rule 36 (3) d of the Rules of Procedure, on 25 January 2013, unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible;

II. TO REJECT the request on the Applicant not having his identity foreclosed;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

V. This Decision is effective immediately.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 78/12, Bajrush Xhemajli, date 19 Februeary 2013- Constitutional Review of the Supreme Court Decision Pkl. No. 70/2012, dated 22 June 2012.

Case KI 78/12, Judgment of 24 January 2013

Keywords: interim measures, individual referral, right to fair and impartial trial, violations of individual rights and freedoms.

The applicant filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging the Supreme Court Judgment, Pkl. No. 70/2012, of 22 June 2012, because the Supreme Court without any firm reasoning did not examine the evidence proposed by the defense. Furthermore, the Applicant requested interim measures because "If a favourable judgment of the Constitutional Court would cause possible retrial of the case, where the Applicant would be acquitted of responsibility, then the absence of such an interim measure would subject the Applicant to serving an unlawful and undeserved sentence."

On the issue of the admissibility of the Referral, the Court held, based upon the plain language of Article 113.7 that the referral was admissible because in the present Referral Mr. Bajrush Xhemajli contests the constitutionality of Decision Pkl. no. 70/2012 of the Supreme Court, dated 22 June 2012. Therefore, the Applicant must be considered as an authorized party, entitled to refer this case to the Court and to have exhausted all legal remedies as provided by law, pursuant to Article 113.7 of the Constitution. As to the requirement of Article 49 of the Law that the Applicant must have submitted the Referral within a period of four (4) months, the Court determines from the submissions of the Applicant that the Applicant was served with the above Decision of the Supreme Court on 26 July 2012, while the Applicant submitted the Referral to the Court on 23 August 2012, i.e. within the four months time limit as provided by Article 49 of the Law. Further, the Applicant has set out in detail what rights under the Constitution and the ECHR have allegedly been violated and by what public authority. Hence, the Court also finds that the Applicant has fulfilled the requirement of Article 48 of the Law.

On the merits of the Referral, the Court held that the manner in which the evidence was handled in the Applicant's case demonstrates a complex of decisions which are mutually reinforcing in their impact on the fairness of the Applicant's trial. Firstly, the regular courts consistently refused to authorize a supplemental expertise into contributory factors in the accident. Secondly, the regular courts justified this refusal on the basis that the situation was sufficiently clear to them on the basis of the existing expert report. However, the expert report in question was based on the police report, sketches and

photographs, without the expert proceeding to verify by his own, individual efforts any of the information contained in the police reports. The validity of the police reports also were not corroborated at any stage of the proceedings by an authorized judicial official or court. It is questionable to what extent the Applicant was ever in any position to challenge the contents of the police reports themselves, even if he was able to challenge the expert report based on these police reports. In the light of these deficiencies in the handling of the evidence in the Applicant's case, the Court finds that, when viewing the fairness of the criminal proceedings in the Applicant's case as a whole, that it cannot be said that he has benefitted from a 'fair trial' within the meaning of Article 6 ECHR and Article 31 of the Constitution. The Curt declared null and void the decision of the Supreme Court of Kosovo and remanded the decision to the Supreme Court for reconsideration in conformity with the judgment of this Court.

JUDGMENT
in
Case No. KI 78/12
Applicant
Bajrush Xhemajli
Constitutional Review of the Supreme Court Judgment, Pkl. No. 70/2012, dated 22 June 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Bajrush Xhemajli, represented by the Lawyers' Association "Sejdiu & Qerkini", Limited Liability Company Prishtina.

Challenged decision

2. The Applicant challenges the Supreme Court Judgment, Pkl. No. 70/2012, of 22 June 2012, which was served on the Applicant on 26 July 2012.

Subject matter

3. The Applicant claims that the challenged Judgment violates his rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 31 [Right to Fair and Impartial Trial], the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter: "ECHR"), Article 6 (Right to a fair trial), and the Universal Declaration on Human Rights, Article 10.

4. Moreover, the Applicant requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to impose interim measures because:

a. *"[...] an execution of this unconstitutional judgment would deprive the Applicant of his freedom for months, and even years [...]" and "would cause irreparable damages to the Applicant, since he would be deprived of his freedom without enjoying due criminal trial, as guaranteed by the Constitution."*

b. *"If a favourable judgment of the Constitutional Court would cause possible retrial of the case, where the Applicant would be acquitted of responsibility, then the absence of such an interim measure would subject the Applicant to serving an unlawful and undeserved sentence."*

c. *"[...] deprivation of freedom cannot be turned over because [...] it would not compensate the time in which the Applicant would be serving his sentence, and the physical and psychic impact such sentence would leave on the Applicant. This is to be accentuated even more when considering the poor health condition of the Applicant, in which case, the Applicant would not enjoy adequate health care within a correctional institution."*

Legal basis

5. Article 113.7 of the Constitution, Article 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"), Rule 54 and 56 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 23 August 2012, the Applicant submitted his Referral to the Court.

7. On 4 September 2012, the President, by Decision No. GJR. KI 78/12, appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same day, the President, by Decision No. K. SH. KI. 78/12, appointed the Review Panel composed of judges Altay Suroy (Presiding), Almiro Rodrigues and Snezhana Botusharova.

8. On 5 September 2012, the Court notified the Supreme Court and the State Prosecutor of the Referral.

9. On 21 September 2012, the Court granted the Applicant's request for an interim measure, until 31 December 2012.

10. On 21 September 2012, the Court requested the Supreme Court to submit the Case file of P. no. 485/09 of 26 November 2010, Ap. no. 134/2011 of 8 March 2012 and Pkl. no. 70/2012 of 22 June 2012, including also the minutes of the trial courts of all instances involved in this case.

11. On 19 November 2012, the Court once again requested the Supreme Court to submit the Case file of P. no. 485/09 of 26 November 2010, Ap. no. 134/2011 of 8 March 2012 and Pkl. no. 70/2012 of 22 June 2012, including also the minutes of the trial courts of all instances involved in this case.

12. On 20 November 2012, the Supreme Court replied to this Court submitting the Case file of P. no. 485/09 of 26 November 2010, Ap. no. 134/2011 of 8 March 2012 and Pkl. no. 70/2012 of 22 June 2012, including also the minutes of the trial courts of all instances involved in this case.

13. On 5 December 2012, the Court, bearing in mind the necessity to consider the response of the Supreme Court which was received on 20 November 2012, extended the time limit of the interim measure imposed by the Court in its original Decision of 24 September 2012 by a further period of three months until 31 March 2013.

14. On 24 January 2013, the Court deliberated and voted on the case.

Summary of facts

15. On 21 May 2009, a traffic accident occurred between four vehicles. As a result, one person died and others were injured. On the day of the traffic accident, the police, who were called to the scene of the traffic accident, had drawn up reports of the persons involved in the traffic accident, taken pictures of the traffic accident and drawn up a report on the data of the tracks on the road (i.e. measured the length of the brake tracks, the final position of the vehicles etc.).

16. On the same day, the police took a statement of one of the drivers, I.G., who was involved in the traffic accident.

17. On 22 May 2009, the police took statements of the witnesses, K.G. and K.Sh., who also were involved in the traffic accident.

18. On 23 May 2009, the police took the statement of one of the drivers, S.Gj., who also was involved in the traffic accident.

19. On 28 May 2009, the police took the statement of another of the drivers, D.B., who as well was involved in the traffic accident.

20. On 1 June 2009, the police submitted the case to the District Public Prosecutor in Prishtina.

21. On 9 June 2009, police officer, D.B., filed an additional report to the District Public Prosecutor notifying him/her that there has been a technical mistake in the case submitted on 1 June 2009, i.e. with the name of one of the drivers that was involved in the traffic accident. Instead of I.G. it should be I.H.

22. On 18 June 2009, the Traffic Investigation Unit of the Police submitted the autopsy report to the District Public Prosecutor.

23. On 7 July 2009, the police took the statement of the Applicant who was involved in the traffic accident.

24. On an unspecified date, the police officer, D.B., filed an additional rapport to the District Public Prosecutor in Prishtina notifying him/her that, on 9 July 2009, a statement was taken from the Applicant and a copy of his driver license was obtained from him.

25. On an unspecified date, the police officer, D.B., drew up a report on the investigation of the traffic accident including information as to: a) which vehicles were involved and who were involved, including the injuries; b) the condition of the road; c) statements of persons involved; d) the tracks on the road (the tracks on the road and the final position of the vehicles were explained); e) a description of the accident; f) undertaken actions (the police on the scene of the traffic accident, had drawn up sketches, had taken pictures and necessary measurements had been done); g) remarks (because the police had not been able to contact the Applicant, they did not have his driver license); h) conclusion (based on site inspection and evidence found on site of the traffic accident the police found that the Applicant was reasonable suspect of having committed the criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 [Endangering Public Traffic] of the Provisional Criminal Code of Kosovo (hereinafter: "PCCK") which provides: *"(1) Whoever violates the law on public traffic and endangers public traffic, human life or property on a large scale and thereby causes light bodily injury to a person or material damage exceeding*

1.000 EUR shall be punished by a fine or by imprisonment of up to five years. (3) When the offence provided for in paragraph 1 or 2 of the present article is committed by negligence, the perpetrator shall be punished by a fine or by imprisonment of up to two years. (5) When the offence provided for in paragraph 3 of the present article results in serious bodily injury or substantial material damage, the perpetrator shall be punished by imprisonment of six months to five years and when such offence results in the death of one or more persons, the perpetrator shall be punished by imprisonment of one to eight years."

26. On 4 September 2009, the District Public Prosecutor in Prishtina took the decision (PP. no. 565/6/2009) to initiate investigation against the Applicant due to reasonable suspicion for having committed the criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 [Endangering Public Traffic] of the PCCK.

27. On 10 September 2009, the District Prosecutor questioned the Applicant as to the traffic accident (Minutes PP. no. 565-6/2009). The Applicant stated that he was driving 60-70 km/h on the left side of the road towards Ferizaj when a vehicle tried to drive by him on his right side and from that moment on he did not remember anything more. The Applicant states that he also remembered one vehicle 20 meters in front of him and another vehicle 20 meters behind him.

28. On 10 September 2009, the District Public Prosecutor interviewed a witness/injured party, D.B., who testified that he/she was on his/her way to Prishtina and that he/she did not remember the traffic accident or who hit him/her because after the collision he/she lost conscious and did not remember anything (Minutes PP. no. 565-1/2009).

29. On 10 September 2009, the District Public Prosecutor interviewed (Minutes PP. no. 565-1/2009) a witness/injured party, I.H., who testified that he/she was on his/her way to Hajvali driving 50-60km/h on the left side. I.H. further testified that in front of him/her was a vehicle on the right side and suddenly from nowhere came a vehicle who tried to drive by on his/her right side and tried to drive in front of his/her vehicle on the left side like a scissor between his/her vehicle and the other vehicle in front of him/her on the left side. I.H. states that his/her vehicle was hit by the vehicle in this moment. Pursuant to the minutes, I.H. does not know whether the vehicle who hit him/her had driven fast or not but he/she had heard that the vehicle that had hit him had driven very fast. I.H. also stated in the minutes that he/she did not remember how the events followed after his/her vehicle was hit.

30. On 25 September 2009, the District Public Prosecutor interviewed a witness/injured party, H.R., who is the father of the deceased person in the traffic accident but who himself was not there when the traffic accident happened (Minutes PP. no. 565-1/2009).

31. On 30 September 2009, the District Public Prosecutor in Prishtina filed a request (PP. no. 565-1/2009) with the District Court in Prishtina to order a traffic expert to investigate and prepare a report. The traffic expert was to provide an expertise on the circumstances of the accident, the speed of vehicle at the moment of accident, road and climate conditions, and validate other facts and circumstances relevant to the prosecution of this criminal offence.

32. On 7 October 2009, the District Court in Prishtina (GJPP. no. 246/09) ordered an expert to provide an expert witness report in the criminal case. The District Court further held that *"The Traffic expert must validate all circumstances in which the accident had occurred, the speed of vehicle at the moment of accident, road and climate conditions, and validate other facts and circumstances relevant to the prosecution of this criminal offence."*

33. On 14 October 2009, the traffic expert completed his report on the traffic accident and made his conclusion *"Based on the detailed analysis of the documentation in my possession, based on the investigative report, sketch and photographs of the site, photographs of damaged vehicles, and statements of involved parties and witnesses [...]."* the driver of the vehicle Nissan, i.e. the Applicant was the sole contributor to the accident.

34. On 24 November 2009, the District Public Prosecutor' Office filed indictment (PP. no. 565-1/2009) with the District Court in Prishtina against the Applicant for having committed the criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 [Endangering Public Traffic] of the PCCK. The District Public Prosecutor' Office proposed to the confirmation judge to read the opinion of the medical reports as to the injuries, the traffic expert report and the autopsy report, to look at the sketches of the traffic accident and the pictures.

35. On 1 March 2010, the Applicant submitted a statement to the confirming judge at the District Court objecting that the indictment and proposed that the confirming judge do not confirm the indictment. The Applicant argued that:

a. the indictment is general and does not contain any supportive evidence;

b. the indictment is not in conformity with Article 305 paragraph 1 and 4 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: "PCPCK");

c. the indictment is mainly based on the traffic expert report which only contains a description of the traffic accident based on the information obtained by the police. The traffic expert report does not give acceptable clarification as to other factors and circumstances that might have contributed to the traffic accident. Hence, the Applicant proposed that another expertise be selected, i.e. a so called super expertise.

36. On 1 March 2010, the confirming judge confirmed the indictment against the Applicant (Ka. no. 438/2009).

37. On 1 October 2010, during the main trial hearing the Applicant once more contested the traffic expert report for having shortcomings, for being unclear and because there was still a dilemma as to other factors that might have contributed to the traffic accident. Consequently, the Applicant requested the court to summon the traffic expert to give further clarifications and if he did not give further clarifications to order a super expertise to perform an evaluation and to order an expert to look at the technical condition of the vehicle. Following, the Applicant's remarks, the District Court decided to summon the traffic expert to provide clarifications in respect to his traffic expert report. As to the Applicant's proposal to order an expert that will look into the technical condition of the vehicle, a decision will be taken during the main trial.

38. On 18 November 2010, the main trial continued whereby the traffic expert answered the Applicant's question. In this main trial hearing, the traffic expert held that *"From the case file we have only evidence as to the subjective causes, i.e. from the parties involved in the accident, while other evidence such as the road and the mean's for causing the accident we do not have. I have only analyzed the case file, I have not taken part on sight of the traffic accident."* Following the questioning of the traffic expert, the Court rejected the Applicant's proposal to order a super expertise and to appoint an expert to look at the technical condition of the vehicle *"because the court considered that the traffic expert report and the provided clarifications by the expert were enough to assess the factual situation."*

39. On 23 November 2010, the Applicant in his final statement repeated once again his request for having a super expert evaluation done and to order an expert to look at the technical condition of the vehicle.

40. On 26 November 2010, the District Court in Prishtina (Judgment P. no. 485/09) found the Applicant guilty of having committed the criminal offence under Article 297 paragraph 5 in conjunction with paragraph 1-3 of the PCCK. The District Court in Prishtina held that the testimonies of the injured parties were without contradictions, and in accordance with the expertise and the testimony of the traffic expert, forensics expertise on injuries caused to the injured parties and the autopsy report on the deceased. Therefore, the District Court fully trusted their testimony. Moreover, the Court also relied on the autopsy report and the expertise of the traffic expert. As to the Applicant's allegations the District Court stated *"[...] at no phase of the proceedings was verified the technical condition of the vehicle of the accused even though it was a legal obligation, according to the court's assessment, it was an irrelevant circumstance since [...] the traffic accident was caused as a consequence of actions of the accused after hitting the vehicle that was moving on the left side of the road, and of the injuries caused in this accident, as per the autopsy report, with fatal consequences and serious and light body injuries, as verified by the report of the forensics expert, while the report of the traffic expert found that there were no errors from other participants in the traffic that would be a contributing factor to this accident. Therefore, according to the court's assessment such a defense was aiming at justifying the incriminating actions of the accused as well as evading the criminal responsibility."*

41. Against this judgment the Applicant filed a complaint to the Supreme Court.

42. On 8 March 2012, the Supreme Court (Judgment Ap. no. 134/2011) rejected as ungrounded the complaint of the Applicant. The Supreme Court concluded that the place and time when the accident occurred, as well as the participants and the consequences had been verified in their entirety and in a fair manner. Furthermore:

"...

According to the findings of the Supreme Court, there were no indications that the vehicle of the accused was not in a regular condition, because he never claimed such a fact, while on the other hand, the traffic expert has found that the sliding of the vehicle may have been caused due to a malfunction in the braking system, but in

this concrete case, the sliding of the vehicle was not due to that, but the vehicle of the accused slid after hitting/crashing with the vehicle which he tried to overtake. The first instance court has fairly found that the finding of the expert was fair [...] this evidence was in compliance with other evidence examined."

According to the complaint another factor - "road factor" had an impact in causing the accident, due to which fact the factual situation was erroneously assessed. Therefore, according to the complaint the cause of this accident is the lack of fences between the traffic lanes. However, this fact has been emphasized by the defense even "during the first instance proceedings and from the traffic expert was" requested a response and the expert had clearly stated that the existence of fences might have had an impact in avoiding such an accident of such proportions but not that this was the cause of such an accident.

According to the assessment of the Supreme Court the complaint that the expert has given an unprofessional conclusion and opinion that are not substantiated by the administered evidence is ungrounded. However, at the time of the expertise, the expert, as he stated himself, had access to the entire case file and his conclusion and opinion confirm, that there is no ambiguity or contradictions with other administered evidence, such as, sketches and pictures of the place of occurrence, where one can see the tracks on the road, damages and the final positioning of the vehicles, as well as testimonies of the witnesses heard.

..."

Against this Judgment the Applicant submitted a request for protection of legality with the Supreme Court.

43. On 22 June 2012, the Supreme Court (Judgment Pkl. no. 70/2012) rejected as ungrounded the request for protection of legality. Moreover, the Supreme Court concluded that *"the defense of the accused during all phases of the proceedings has repeated the same allegations, also now with this extraordinary legal remedy, respectively alleging that the factual situation was not fairly assessed, because of the fact that according to them the court did not manage to accurately assess who contributed to causing this accident with fatal consequences: human factor, road factor, or technical factor (eventual technical failure), therefore, according to them, in such circumstance, it was necessary to order the performance of a super expertise. All these allegations that were sufficiently answered by the panel of this court are ungrounded. The Court may appoint another expert or conduct a super expertise in*

case of a contradiction on experts' opinions, failures or reasonable doubts as to the accuracy of the given opinion, if the data in the experts' conclusions (when we have two) differ profoundly or when their conclusions are ambiguous, not complete and in contradiction with itself or the reviewed circumstances and when all these cannot be avoided by repeated interviews of the experts. In this concrete situation, none of these circumstances would force the court to request performance of a super expertise."

44. On 17 April 2012, the Municipal Court in Ferizaj (Resolution ED. no. 17/12) adopted the request of the Applicant to postpone the execution of the sentence of imprisonment for a 3 (three) months period.

45. On 18 July 2012, the Municipal Court in Ferizaj (Resolution ED. no. 17/12) approved the request of the Applicant again to postpone the execution of the sentence of imprisonment for a 2 (two) months period. The Applicant was obliged to show up on 19 September 2012 to start serving the sentence.

Applicant's allegations

46. The Applicant alleges the following:

(i) Violation of the principle of equality of arms between the parties in the procedure.

- The Applicant alleges that *"[...] the regular courts, without any firm reasoning, did not examine the evidence proposed by the defense. The evidence that the regular courts did not administer is relevant to determine whether he is guilty or innocent. In the proceedings before the District Court in Prishtina the Applicant's defense requested from the court to also examine the evidence related to the share of responsibility of other actors in the traffic accident, in particular the speed of the vehicle which was hit by the Applicant's vehicle, [...], as well as the technical examination of the vehicle that the Applicant was driving that day. This was requested by the defense, based on the statements of the traffic expert [...], according to whom there were three factors that contribute to traffic accidents: the human factor, the road factor and the vehicle factor. Having in mind the fact that on the concrete criminal-legal issue, a traffic expert was engaged to examine the relevant facts, he tried to give an answer on the existence and nonexistence of the two first*

factors and their contribution to causing the traffic accident. For this reason, always having in mind the vehicle factor could have been the contributor to the concrete accident, the court should have examined this evidence as well, by engaging a vehicle expert, in order to confirm the impact or nonimpact of this factor to cause such accident. By denying this the Court violated Applicant's rights."

(ii) The District Court in Prishtina based its decision on the testimony of a person, who could not provide information on the accident.

- The Applicant alleges that *"Mr. [...] was not a direct observer of the event and therefore he should not have been heard in the capacity of a witness."*

(iii) The assessment of the District Court in Prishtina, regarding the expertise of the traffic expert.

- The Applicant alleges that *"In the reasoning part of the Judgment (page 7), the Court finds that "the Court relied upon the expertise, with the reasoning that the expert report provided an explanation as to the data examined from the case file, on which such expertise was grounded, but also on scientific methods used by the expert in his expertise". This assessment of the expertise by the Court is very superficial and non-critical. The expertise is a piece of evidence, similar to any other evidence in a criminal proceeding, and consequently, the Court must examine such evidence by reasoning on its logical sequence. The Court cannot conclude that the expertise is in compliance with scientific methods, because if the Court was aware of the scientific methods, it would not need to hire an expert. There are many scientific rules in relation to determining the speed of a vehicle before causing an accident. Therefore, we consider that the request of the Applicant's (now the convicted) defence to repeat the expertise, or another expertise by another traffic expert, was reasonable and aimed at verifying the scientific methods used in this criminal case."*

(iv) Judgment of Supreme Court Ap. no. 134/2011.

- The Applicant alleges that *"The Supreme Court of Kosovo, acting as a second instance court, has not provided accurate*

legal/constitutional reasons in the aspect of all facts which are relevant for rendering a lawful decision, but in explicit manner, without any assessment, found as ungrounded the appealed allegations of the Applicant."

(v) Judgment of Supreme Court of Kosovo Pkl. no. 70/2012.

- The Applicant alleges that *"the Supreme Court does not provide any reason for which it would consider the traffic expert report as fair, but only gives trust to the assessment of the District Court in Prishtina, without any critical assessment of such an appealed allegation."*

47. Furthermore, the Applicant refers to Kraska v Switzerland, where the *"European Court stated that the effect of Article 6.1 is to make possible to the competent court to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision"* (*see Kraska v. SUISSE, Application no. 13942/88, Judgment of 19 April 1993).*

48. According to Applicant, *"the court should conduct a proper examination of the arguments and evidence of the parties, while assessing their relevance to the decision to be delivered."* (*see Quadrelli v. Italy, Application no. 28168/95, Judgment of 11 January 2000*).

49. In addition, the Applicant refers to Bonisch v Austria, where *"the European Court found violation of Article 6.1 of the European Convention where it was difficult for defense to obtain appointment of a counter-expert"* (*see BÖNISCH v. AUSTRIA, Application no. 8658/79, Judgment of 6 May 1985).*

50. The Applicant alleges also that "*This court (ECtHR) also found violation of Article 6.1 of the European Convention where hearing of other experts (including a private expert who had come to different results) was refused by the court, since only an expert of the Institute, who concluded to the detriment of the defendant was heard (see Brandstetter v. Austria, Application no. 13468/87, Judgment of 28 August 1991, G.B. v. France, Application no. 44069/98, Judgment of 2 October 2001 and Benderskiy v. Ukraine, Application no. 22750/02, Judgment of 15 November 2007).*

Applicable legal provisions regarding investigation and evidence

Provisional Criminal Procedure Code of Kosovo (UNMIK Regulation 2003/26) of 6 July 2003

51. Article 152 of the PCPCK:

"...
(1) The rules of evidence set forth in the present Chapter shall apply in all criminal proceedings before the court and, in cases provided for by the present Code, to proceedings before a prosecutor and the police.

(2) The court according to its own assessment may admit and consider any admissible evidence that it deems is relevant and has probative value with regard to the specific criminal proceedings and shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility.

(3) The court may reject an application to take evidence:

1) If the taking of such evidence to supplement other evidence is unnecessary or is superfluous because the matter is common knowledge;

2) If the fact to be proven is irrelevant to the decision or has already been proven;

3) If the evidence is wholly inappropriate or unobtainable; or

4) If the application is made to prolong the proceedings.

..."

52. Article 153 of the PCPCK:

"...

(1) Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe.

(2) The court cannot base a decision on inadmissible evidence.

..."

53. Article 154 of the PCPCK:

"...

(1) The court shall rule on the admissibility of evidence upon an application by a party or ex officio.

(2) A party shall raise an issue relating to admissibility of evidence at the time when the evidence is submitted to the court and in particular in the proceedings on the confirmation of the indictment. Exceptionally it may be raised later, if the party did not know such issue at the time when the evidence was submitted or if there are other justifiable circumstances. The court may request that the issue be raised in writing. In the absence of an application by a party, the court must rule on the admissibility of evidence ex officio if at any time during the proceedings a suspicion arises about the legality of evidence.

(3) The court shall give reasons for any ruling it makes on the admissibility of evidence. If a ruling on the admissibility of evidence is rendered in the pre-trial stage of the proceedings it can be challenged by a separate appeal to a three-judge panel within forty-eight hours of the receipt of the ruling.

(4) Inadmissible evidence shall be excluded from the file and sealed. Such evidence shall be kept by the court, separated from other records and evidence. The excluded evidence may not be examined or used in the criminal proceedings, except in an appeal against the ruling on admissibility.

(5) At all stages of the proceedings, the court has a duty to ensure that no inadmissible evidence, or reference to or testimony of, such evidence is included in the file or presented at the main trial or at hearings before the main trial.

(6) Evidence which has been found by a ruling to be inadmissible may be found by a ruling at a later stage in the proceedings to be admissible.

…"

54. Article 155 of the PCPCK:

"…

(1) In any questioning or examination it is prohibited to:

> *1) Impair the defendant's freedom to form his or her own opinion and to express what he or she wants by ill-treatment, induced fatigue, physical interference, administration of drugs, torture, coercion or hypnosis;*

2) Threaten the defendant with measures not permitted under the law;

3) Hold out the prospect of an advantage not envisaged by law; and

4) Impair the defendant's memory or his or her ability to understand.

(2) The prohibition under paragraph 1 of the present article shall apply irrespective of the consent of the subject of the questioning or examination.

(3) If questioning or examination has been conducted in violation of paragraph 1 of the present article, no record of such questioning or examination shall be admissible.

…"

55. Article 156 of the PCPCK:

"…

(1) A statement by the defendant given to the police or the public prosecutor may be admissible evidence in court only when taken in accordance with the provisions of Articles 229 through 236 of the present Code. Such statements can be used to challenge the testimony of the defendant in court (Article 372 paragraph 2 of the present Code).

(2) A statement of a witness given to the police or the public prosecutor may be admissible evidence in court only when the defendant or defence counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings.

…"

56. Article 176 of the PCPCK:

"…

(1) An expert analysis shall be ordered in writing by the court on the motion of the public prosecutor, the defence or ex officio. The order shall specify the facts to be established or assessed by an expert analysis, as well as the persons to whom the expert analysis shall be entrusted. The order shall be served on the parties.

(2) If a particular kind of expert analysis falls within the domain of a professional institution or the expert analysis can be performed in the framework of a particular public entity, the task, especially if it is a complex one, shall as a rule be entrusted to such professional institution or public entity. The professional institution or public entity shall designate one or several experts to provide the expert analysis.

(3) If the court designates an expert witness, it shall as a rule designate one expert witness, but if the expert analysis is complicated, it shall designate two or more expert witnesses.

(4) If there are at the court certain expert witnesses who have been permanently designated for some kind of expert analysis, other expert witnesses may only be designated if there is danger in delay or if the permanent expert witnesses are prevented from attendance or if other circumstances demand it.

…"

57. Article 185 of the PCPCK:

"…

If the opinion of expert witnesses contains contradictions or deficiencies, or if a reasonable doubt arises about the correctness of the presented opinion, and the deficiencies or doubt cannot be removed by a new hearing of expert witnesses, the opinion of other expert witnesses shall be sought.

…"

58. Article 200 of the PCPCK:

"…

(1) The police shall investigate criminal offences and shall take all measures without delay, in order to prevent the concealment of evidence.

(2) As soon as the police obtain knowledge of a suspected criminal offence prosecuted ex officio either through the filing of a criminal report or in some other way, they shall without delay, and no later than twenty-four hours from the receipt of this information, inform the public prosecutor and thereafter provide him or her with further reports and supplementary information as soon as possible.

(3) The public prosecutor shall direct and supervise the work of the judicial police in the pre-trial phase of the criminal proceedings.

…"

59. Article 221 of the PCPCK:

"…

(1) The investigation shall be initiated by a ruling of the public prosecutor. The ruling shall specify the person against whom an investigation will be conducted, the time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, and evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge.

(2) The result of investigative actions (such as collection of evidence) shall be made part of the file on the investigation.

(3) The investigation shall be conducted and supervised by the public prosecutor.

(4) The public prosecutor may undertake investigative actions or authorize the judicial police to undertake investigative actions relating to the collection of evidence.

…"

60. Article 254 of the PCPCK:

"…

(1) The public prosecutor or the court can order a site inspection or a reconstruction to examine the evidence collected or to clarify facts that are important for criminal proceedings.

(2) Such site inspection or reconstruction shall be conducted by the pre-trial judge or the presiding judge, by the public prosecutor or by the police. The public prosecutor and police may conduct such site inspection or reconstruction for their own knowledge to assist in their determination of credibility or fact-finding, but in such case, where notice to the defendant or

his or her defence counsel is not given, the results are inadmissible in court. The public prosecutor may repeat such site inspection or reconstruction with notice as required by the present article. If so, the results shall then be admissible.

(3) The defendant and his or her defence counsel have the right to be present at the site inspection or reconstruction.

(4) A reconstruction shall be conducted by recreating facts or situations under the circumstances in which on the basis of the evidence taken the event had occurred. If facts or situations are presented differently in testimonies of individual witnesses, the reconstruction of the event shall as a rule be carried out with each of the witnesses separately.

(5) In reconstructing an event care must be taken not to violate law and order, offend public morals or endanger the lives or health of people.

(6) In conducting a site inspection or a reconstruction, the assistance of specialists in forensic science, traffic and other fields of expertise may be obtained to protect or describe the evidence, make the necessary measurements and recordings, draw sketches or gather other information.

(7) An expert witness may also be invited to attend a site inspection or reconstruction, if his or her presence is considered of service by the public prosecutor or the court.

…"

61. Article 387 of the PCPCK:

"…

(1) The court shall base its judgment solely on the facts and evidence considered at the main trial.

(2) The court shall be bound to assess conscientiously each item of evidence separately and in relation to other items of evidence and on the basis of such assessment to reach a conclusion whether or not a particular fact has been established.

…"

Admissibility of the Referral

62. In order to be able to adjudicate the Applicant's Referral, 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.

63. The Court needs to determine first whether the Applicant is an authorized party within the meaning of Article 113.7 of the Constitution, stating 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."* In this respect, the Referral was submitted with the Court by an individual.

64. Furthermore, an Applicant, in accordance with Article 49 of the Law, must submit the Referral within 4 months after the final court decision. On 22 June 2012, the Supreme Court took the Judgment Pkl. no. 70/2012, whereas the Applicant received the Judgment on 26 July 2012. The Applicant submitted the Referral to the Court on 23 August 2012. Therefore, the Applicant has met the necessary deadline for filing a referral to the Constitutional Court.

65. In addition, the Supreme Court is considered "as a last instance court to adjudicate the issue in this criminal proceeding". As a result, the Court also determines that the Applicant has exhausted all the legal remedies available to him under Kosovo law.

66. Finally, Article 48 of the Law establishes: *"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."* In this respect, the Court notes that the Applicant challenges the Supreme Court Judgment, Pkl. no. 70/2012, whereby, he alleges that his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR and Article 10 of the Universal Declaration of Human Rights have been violated. Therefore, the Applicant has also fulfilled this requirement.

67. Since the Applicant is an authorized party and has met the necessary deadlines to file a referral with the Court, the Court determines that the Applicant has complied with all requirements of admissibility.

The merits

68. Since the Applicant has fulfilled the procedural requirements for admissibility, the Court needs to examine the merits of the Applicant's complaint.

69. With reference to the submissions of the Applicant, the Court notes that the Applicant's claim relates to the manner in which the various trial courts handled the evidence in the proceedings against him. The principle claim of the Applicant concerns the consistent refusal of the regular courts to authorize a supplementary expertise to verify the contribution of technical and roadway factors to the accident. However, this claim also includes the broader issue of assessment of the evidence as a whole. Specifically, the Court notes that the report of the expert witness formed the predominant foundation for the Applicant's conviction. As such, the expert's report was entirely based upon police reports, sketches and photographs taken at the accident site prior to the involvement of the Public Prosecutor. This complex of elements relating to the handling of evidence by the trial courts raises questions as to the fairness of the trial proceedings.

70. In this respect, the Court notes that the Applicant requested additional evidence to be examined by the regular courts because, in his opinion, it would have been relevant and persuasive to properly determine his guilt or innocence. According to the Applicant, the evidence to be administered concerns the share of responsibility of other actors in the traffic accident, in particular the speed of the vehicle which was hit by the Applicant's vehicle, as well as the technical examination of the vehicle that the Applicant was driving that particular day. This was requested by the Applicant, based on the testimony of the traffic expert, according to whom there were three factors that contribute to traffic accidents: the human factor, the road factor and the vehicle factor.

71. In this case the Applicant was involved in a four automobile traffic accident on 21 May 2009 with the automobile he was operating being one of the automobiles involved in this accident where one person died as a result of injuries sustained in the automobile accident. The District Public Prosecutor alleges in its indictment of the Applicant that the Applicant violated the following criminal law: *"Whoever violates the law on public traffic and endangers public traffic, human life or property on a large scales […]"* (see Article 297 paragraph 5 in conjunction with paragraph 1-3 [Endangering Public Traffic] of the Provisional Criminal Code of Kosovo).

72. In this respect, the Court notes that the District Public Prosecutor then has the burden of proving beyond a reasonable doubt that on 21 May

2009 that the Applicant: (1) violated the public traffic laws; (2) that this violation endangered public traffic and human life or property; and, (3) that the violation was large or more than a minor violation. The Applicant, however, does not have to prove anything because he is presumed innocent of the charges until and unless the District Public Prosecutor proves him guilty beyond a reasonable doubt of all three elements of this charge. (*see* Article 3 of the Provisional Criminal Procedure Code of Kosovo).

73. In the present case the Court notes from the case file that none of the eye witnesses to the accident could recall what happened on 21 May 2009. This is reaffirmed from the minutes with the testimony of the injured parties:

a. the injured party D.B. stated that *"I do not remember the moment when the accident occurred, I did not see who hit me. After the crash, I lost my conscience, and I do not remember anything. "*

b. H.R. was heard as a witness although he was not present when the accident occurred.

c. the injured party B.B. stated that *"I do not remember anything because I lost my conscience and I regained conscience at the hospital."*

d. the injured party V.B. stated that *"I do not remember how it came to the crash, and I do not know on what lane of the road we were driving. I only remember the moment after the crash,"*

e. the injured party I.H. stated that he *"[…] does not know whether the vehicle who hit him/her had driven fast or not but he/she had heard that the vehicle that had hit him had driven very fast. He/she, also, does not remember how the events followed after his/her vehicle was hit."*

74. The Court further notes that the traffic expert appointed by the regular trial court never examined any of the vehicles, including the one driven by the Applicant, involved in this accident. He also did not examine the conditions of the road where the accident happened. The court's traffic expert merely examined the police reports that were prepared several days after the accident happened.

75. In addition, the Court notes from the case file that the traffic expert testified that there were three factors that can contribute to the cause of an automobile accident: (1) the human factor; (2) the road factor; and, (3) the vehicle factor. He agreed that he did not examine either the road factor or the vehicle factor even though he rendered an opinion which resulted in the trial court finding beyond a reasonable doubt that the Applicant's driving conduct on 21 May 2009 violated the public traffic law and that his conduct "[...] on a large scale [...]" was the proximate cause of the accident and death of one of the persons involved in the accident.

76. The Court further notes that repeatedly and in a timely fashion, the Applicant asked the regular courts to allow another expert to examine the vehicles, the road conditions and the police reports and to then give his or her expert opinion with respect to the cause of the accident or whether there were more than one contributing factors to the cause of the accident. This request was made by the Applicant for the purpose of determining whether any of the automobiles involved in the accident had mechanical malfunctions that would have caused them to not operate properly at the time of the accident. If the automobiles or the road conditions created conditions making it impossible or more difficult to control the automobiles that evidence would according to the Applicant be a factor in determining whether he could have controlled the conditions that caused the accident. If he could not have controlled those conditions, that would be a relevant factor for the trial court to consider in deciding whether the District Public Prosecutor had proved beyond a reasonable doubt that the Applicant was responsible "on a large scale" for the traffic accident. (*see* Judgment of the Supreme Court, Pkl. no. 70/2012).

77. The Court, however, notes that in response to the Applicant's request the District Court merely concluded that it had enough evidence without ever considering the condition of the automobiles or the road conditions and without ever giving a reason for this conclusion. (*see*Judgment of the District Court, P. no. 485/09).

78. Similarly, the Court notes that, the Supreme Court, while admitting that the traffic expert testified that the sliding of the Applicant's vehicle on the day of the accident may have been caused due to a malfunction in the brake system, concluded that the opinion of the trial court expert was fair without giving any detailed reasons for its conclusion. (*see*Judgment of the Supreme Court, Ap. no. 134/2011).

79. The Supreme Court further held that another expert may be appointed or a super expertise may be conducted in case of a contradiction of experts' opinions, or reasonable doubts on the accuracy of the given opinion in accordance with Article 152 paragraph 3 of the PCPCK, which provides: *"The court may reject an application to take evidence: 1) If the taking of such evidence to supplement other evidence is unnecessary or is superfluous because the matter is common knowledge; 2) If the fact to be proven is irrelevant to the decision or has already been proven; 3) If the evidence is wholly inappropriate or unobtainable; or 4) If the application is made to prolong the proceedings."*.

80. In this regard, the question before this Court is whether in this context the trial court and the Supreme Court violated Applicant's constitutional "[...] right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence." However, this Court cannot, and will not attempt to determine whether under the law or the evidence there is sufficient evidence to find the Applicant guilty of the crime. It will only attempt to answer whether procedurally the regular courts violated the Applicant's rights pursuant to the Constitution.

81. In this connection, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which, as far as relevant, provides:

> *"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."*
>
> and Article 6 [Right to a fair trial] of the ECHR which, as far as relevant, provides:
>
> *"3. Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"*

82. The Court observes that Article 6 (3.d) consists of three distinct elements, namely: a) right to challenge witnesses for the prosecution (or test other evidence submitted by the prosecution in support of their case); b) right, in certain circumstances, to call a witness of one's choosing to testify at trial, i.e. witnesses for the defence; and c) right to

examine prosecution witnesses on the same conditions as those afforded to the defence witnesses.

83. Moreover, as to the elements relating to the handling of evidence by the trial courts, the Court notes that although the admission of unlawfully obtained evidence does not in itself violate Article 6, but the ECtHR has held in the Schenk case (*see* Schenk v. Switzerland, 12 July 1988) that it can give rise to unfairness on the facts of a particular case.

84. In this regard, in the Vidal case, (*see* Vidal v. Belgium, Application no. 12351/86, Judgment of 22 April 1992), there was a claim that by failing to call the four defence witnesses Vidal had requested, the Court of Appeal in Belgium had deprived him of his only means of establishing his innocence. In the concrete case, the applicant had originally been acquitted after several witnesses had been heard. When the appellate court substituted his conviction, it had no fresh evidence; apart from the oral statements of the applicant and the prisoner, it based its decision entirely on the documents in the case-file. The ECtHR held that *"As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. More specifically, Article 6 para. 3 (d) (art. 6-3-d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system; it "does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter". The Brussels Court of Appeal did not hear any witness, whether for the prosecution or for the defence, before giving judgment. The concept of "equality of arms" does not, however, exhaust the content of paragraph 3 (d) of Article 6 (art. 6-3-d), nor that of paragraph 1 (art. 6-1), of which this phrase represents one application among many others. The task of the European Court is to ascertain whether the proceedings in issue, considered as a whole, were fair as required by paragraph 1 (art. 6-1)."*

85. The ECtHR further held that, *"The applicant had originally been acquitted after several witnesses had been heard. When the appellate judges substituted a conviction, they had no fresh evidence; apart from the oral statements of the two defendants (at Liège) or the sole remaining defendant (at Brussels), they based their decision entirely on the documents in the case-file. Moreover, the Brussels Court of Appeal gave no reasons for its rejection, which was merely implicit, of the submissions requesting it to call Mr Scohy, Mr Bodart, Mr Dauphin and Mr Dausin as witnesses. To be sure, it is not the function of the*

Court to express an opinion on the relevance of the evidence thus offered and rejected, nor more generally on Mr Vidal's guilt or innocence, but the complete silence of the judgment of 11 December 1985 on the point in question is not consistent with the concept of a fair trial which is the basis of Article 6 (art. 6). This is all the more the case as the Brussels Court of Appeal increased the sentence which had been passed on 26 October 1984, by substituting four years for three years and not suspending the sentence as the Liège Court of Appeal had done. In short, the rights of the defence were restricted to such an extent in the present case that the applicant did not have a fair trial. There has consequently been a violation of Article 6 (art. 6)."

86. Moreover, in the V.D. case (*see* V.D. v. Romania, Application no. 7078/02, Judgment of 28 June 2010) a Romanian national was sentenced to ten years' imprisonment for rape, five years for incest and six months for armed robbery. The decision was based mainly on statements given to the village police by the applicant's grandmother and her neighbor. It was further based on the statements of five indirect witnesses and on a forensic medical report which did not include a DNA test, despite the applicant's requests to that effect. The court further gave judgment without hearing evidence from a defence witness whom the applicant sought to have examined, as the witness had failed to appear when summoned, and without any prints being taken at the scene of the alleged crime.

87. In this case, the ECtHR held that *"A DNA test would at least have confirmed the victim's version of events or provided V.D. with substantial information in order to undermine the credibility of her account. However, the courts had not authorised any such test."* The ECtHR further held that *"There had also been other shortcomings in the investigation conducted on 1 April 2001, including the failure of the police to search for any traces of assault at the scene."* Consequently, the ECtHR held that there had been a violation of Article 6 (1) and (3.d) of ECHR. In the instant case, V.D. had not been afforded an opportunity to defend his case and his conviction had been based mainly on a statement by the victim, which had not been read out to him at any point during the proceedings. Nor had any other steps been taken to enable him to challenge the victim's statements and her credibility.

88. Also in the Case of Elsholz (Elsholz v. Germany, Application no. 25735/94, Judgment of 13 July 2000), the ECtHR held that *"[…] because of the lack of physiological expert evidence and the circumstance that the Regional Court did not conduct a further hearing although, in the Court's view, the applicant's appeal raised questions of*

fact and law which could not adequately be resolved on the basis of the written material at the disposal of the Regional Court, the proceedings taken as a whole, did not satisfy the requirements of a fair and public hearing within the meaning of Article 6. There has thus been a breach of this provision."

89. Following the above mentioned, the Court notes that the "Equality of arms" principle requires that each party be afforded a reasonable opportunity to present its case under the conditions that do not place it at a substantial disadvantage vis-à-vis another party. Although, there is no exhaustive definition as to what are the minimum requirements of "equality of arms", there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties. These may include opportunities to adduce evidence.

90. In this respect, the Court notes that the refusal by a court to nominate an expert, hear a witness or to accept other types of evidence might in certain circumstances render the proceedings unfair unless such limitations are consistent with the principle of "equality of arms", the full realization of which is the essential aim of Article 6 (3) (d) and also Article 31 of the Constitution.

91. Further, persons alleging a breach of Article 6 (3) (d) must prove not only that they were not permitted to call a certain witness, but also that hearing the witness was absolutely necessary in order to ascertain the truth, and that the failure to hear the witness prejudiced the rights of the defence and fairness of the proceedings as a whole.

92. The Court notes that in the instant case the regular courts found the Applicant guilty of having committed the criminal act of Article 297 paragraph 5 in connection with paragraph 1 of the PCCK, relying exclusively on the testimony of the injured parties, the report of the traffic expert, forensics expertise on injuries caused to the injured parties and the autopsy report on the deceased proposed by the prosecution.

93. As to whether the Applicant was or was not permitted to call a certain witness, the Court notes that, after examining the traffic expert, the Applicant raised the issue of undertaking a "super expertise", i.e. appointing a vehicle expert. However, this was rejected because the regular courts considered that *"the report of the traffic expert and the explanation provided by the traffic expert were sufficient for ascertaining the factual situation"* and there was no *"case of a*

contradictory experts' opinions, or reasonable doubts on the accuracy of the given opinion". The Court, however, notes that there was only one expert opinion on which the courts based their assessment. Hence, the question of contradictory opinions could not arise.

94. The Court, furthermore, notes that the Applicant considered the testimony of the traffic expert to be insufficient for ascertaining the factual situation, because according to the testimony of the traffic expert there were three factors that contribute to traffic accidents: the human factor, the road factor and the vehicle factor. However, the traffic expert in his report only ascertained the human factor and according to the Applicant it would have been relevant and persuasive to properly determine his guilt or innocence to ascertain also the other two factors, i.e. the road factor and the vehicle factor.

95. In this respect, the Court also notes that Article 185 of the PCPCK foresees that *"If the opinion of expert witnesses contains contradictions or deficiencies, or if a reasonable doubt arises about the correctness of the presented opinion, and the deficiencies or doubt cannot be removed by a new hearing of expert witnesses, the opinion of other expert witnesses shall be sought."* This provision with the word *shall* oblige the Court to seek another expert witness if the criteria are met. As to the question whether the criteria are met or not, the Court notes that the traffic expert himself stated that the technical factor could indeed be a relevant factor, but that such a factor could not be ascertained because no investigation of the vehicle was done. Moreover, the Court also notes that Article 176 of the PCPCK foresees the possibility of appointing one or several experts if the expert analysis is complicated or if other circumstances demand it.

96. If a super expertise would have been ordered by the regular courts, it may have either confirmed the initial report of the traffic expert or confirmed the version of the Applicant that there were other underlying factors involved in the cause of the traffic accident.

97. Furthermore, the Court observes that the traffic expert based his opinion only on the case file, such as sketches and photo documents of the place of the accident and the testimonies of the witnesses heard, and did not form his own independent opinion.

98. The Court further notes that another guarantee of the PCPCK for ensuring a right to fair trial and for ascertaining the factual situation is provided by Article 254 of the PCPCK: *"The public prosecutor or the court can order a site inspection or a reconstruction to examine the*

evidence collected or to clarify facts that are important for criminal proceedings. The defendant and his or her defence counsel have the right to be present at the site inspection or reconstruction.A reconstruction shall be conducted by recreating facts or situations under the circumstances in which on the basis of the evidence taken the event had occurred. If facts or situations are presented differently in testimonies of individual witnesses, the reconstruction of the event shall as a rule be carried out with each of the witnesses separately. In conducting a site inspection or a reconstruction, the assistance of specialists in forensic science, traffic and other fields of expertise may be obtained to protect or describe the evidence, make the necessary measurements and recordings, draw sketches or gather other information." However, the Court notes, that the regular courts did not order a reconstruction in order to clarify facts that were important for the criminal proceedings.

99. Additionally, as to the admission of unlawfully obtained evidence which can give rise to unfairness on the facts of a particular case, the Court notes that Article 200.2 of the PCPCK foresees that *"As soon as the police obtain knowledge of a suspected criminal offence prosecuted ex officio either through the filing of a criminal report or in some other way, they shall without delay, and no later than twenty-four hours from the receipt of this information, inform the public prosecutor and thereafter provide him or her with further reports and supplementary information as soon as possible."* This is done because the PCPCK, Article 200.4 oblige the public prosecutor to direct and supervise the work of the judicial police in the pre-trial phase of the criminal proceedings. The Court notes that also Article 221.4 foresees the direct engagement of the public prosecutor: *"The public prosecutor may undertake investigative actions or authorize the judicial police to undertake investigative actions relating to the collection of evidence."*

100. In this respect, the Court has no evidence in the case file that the police complied with Article 200.2, i.e. notifying the public prosecutor within 24 hours from the receipt of a suspected criminal offence or whether the Public Prosecutor supervised the investigative actions especially since the accident was a fatality. The Court notes that the police collected evidence on 21 May 2009, on the day of the traffic accident, and took statement of witnesses. On 1 June 2009, the police submitted the case to the District Public Prosecutor in Prishtina (*see paragraph 15 and further of this Judgment*). The Court notes that the police officer, D.B. who, on an unspecified date, drew up a report on the investigation of the traffic accident mentioned that "*In respect to the case, the Municipal Public Prosecutor was informed, Prosecutor on duty D.H., who did not*

visit the site but has authorized to undertake investigative actions [...]. However, the Court does not have any evidence that this was done.

101. The Court further notes, based on the case file that the only evidence that was taken through the order of the Court and by the request of the prosecutor was the traffic expert.

102. In addition, the Court notes that the District Public Prosecutor only on 4 September 2009 took the decision to initiate the investigation for the purposes of securing evidence pursuant to Article 221.1 of the PCPCK which provides: *"The investigation shall be initiated by a ruling of the public prosecutor. The ruling shall specify the person against whom an investigation will be conducted, the time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, and evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge."* This action was taken after three (3) months and after the Police had already gathered evidence. The Court notes that after this decision, the only evidence that was secured was the taking of the statement of the parties involved and the request for a traffic expert. Notwithstanding this, the regular courts took also into consideration the gathering of the evidence made by the police, which was done as stated above without the direct supervision of the Public Prosecutor (*see trial hearing of 18 November 2010*) and as can be seen from the case file without the police or the public prosecutor notifying the Applicant about the evidence that was gathered.

103. In this respect, based on Article 153 of the PCPCK *"Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe."* and *"The court cannot base a decision on inadmissible evidence."* Notwithstanding this, the regular courts took into consideration all the above mentioned evidence when deciding the Applicant's guilt.

104. The Court finds that the manner in which the evidence was handled in the Applicant's case demonstrates a complex of decisions which are mutually reinforcing in their impact on the fairness of the Applicant's trial. Firstly, the regular courts consistently refused to authorize a supplemental expertise into contributory factors in the accident. Secondly, the regular courts justified this refusal on the basis that the situation was sufficiently clear to them on the basis of the existing expert

report. However, the expert report in question was based on the police report, sketches and photographs, without the expert proceeding to verify by his own, individual efforts any of the information contained in the police reports. The validity of the police reports also were not corroborated at any stage of the proceedings by an authorized judicial official or court. It is questionable to what extent the Applicant was ever in any position to challenge the contents of the police reports themselves, even if he was able to challenge the expert report based on these police reports.

105. In the light of these deficiencies in the handling of the evidence in the Applicant's case, the Court finds that, when viewing the fairness of the criminal proceedings in the Applicant's case as a whole, that it cannot be said that he has benefitted from a 'fair trial' within the meaning of Article 6 ECHR and Article 31 of the Constitution.

106. Consequently, the Court holds that the right to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6 of ECHR has been violated because the failure to grant the requests of the Applicant for a supplementary expertise prejudiced the rights of the defence and fairness of the proceedings as a whole and deprived the Applicant of the opportunity to put forward arguments in his defense on the same terms as the prosecution.

FOR THESE REASONS

The Constitutional Court, in its session of 24 January 2013,

I. DECLARES, unanimously, the Referral admissible.

II. HOLDS, by majority, that there has been a breach of Article 31 [Right to Fair and Impartial Trial] and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights.

III. DECLARES, by majority, invalid the Judgment of the Supreme Court of Kosovo Pkl. no. 70/2012 of 22 June 2012.

IV. REMANDS, by majority, the Judgment of the Supreme Court for reconsideration in conformity with the judgment of this Court;

V. GRANTS, by majority, the request for interim measure until the time the Supreme Court of Kosovo reconsiders the matter as per *ratio decidendi* of this Court.

VI. REMAINS seized of the matter pending compliance with this order;

VII. ORDERS this Judgment to be notified to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VIII. DECLARES that this Judgment is effective immediately.

Judges Altay Suroy, Almiro Rodrigues and Snezhana Botusharova are attaching their Joint Dissenting Opinion to this Judgment to be published with it.

Judge Rapporteur
Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

Joint Dissenting Opinion
of
Judges Altay Suroy, Almiro Rodrigues, and Snezhana Botusharova
Case No. KI 78/12
Applicant
Bajrush Xhemajli
Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo, Pkl.No. 70/2012, dated 22 June 2012

1. We take note of the judgment of the Majority of Judges of the Constitutional Court (hereinafter 'the Majority'). However, we cannot agree with it for the reasons that follow.

The Scope of the Referral

2. The Applicant complains about the fairness of the trial in which he was convicted of the offence of Endangering Public Traffic. The Applicant alleges that the criminal trial in his case violated Article 31 of the Constitution of Kosovo and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

3. Specifically, the Applicant claims that the regular courts rejected his request to order supplementary expertise into certain circumstances surrounding the traffic accident in which he was involved. The Applicant alleges that, by rejecting this request, the regular courts violated his right to a fair trial. Specifically, the Applicant alleges that he did not benefit from 'equality of arms' with the prosecution in his trial, as required for a fair trial, because the District and Supreme courts refused to take additional expert testimony.

4. We note that the Applicant, during the various court proceedings in his case, did not raise any concerns about violations of the Rules of Evidence affecting the admissibility of evidence by the District and Supreme courts. We consider that the Majority expanded its review beyond the Referral to include a discussion of the validity of the evidence relied upon by the District and Supreme courts. In our opinion, this discussion is outside the scope of the Referral and thus out of the case before the Constitutional Court.

5. Furthermore, it is not the role of the Constitutional Court to assess the admissibility of evidence in criminal trials, but it must limit itself to reviewing the criminal proceedings as a whole for their compliance with the right to a fair trial.

As to the Facts in General

6. We consider that there are factual elements in the case-file as submitted by the Applicant which are not fully reflected in the Majority's judgment, but which could have led to different conclusions. Therefore, we re-state the facts of the case as they appear to us from the case-file.

As to the Indictment

7. The submitted Referral originates in a road traffic accident that occurred on 21 May 2009. At approximately 08:30, the Applicant was driving his official vehicle, Nissan Terrano, from Pristina to his place of work at Ferizaj. He was alone in the vehicle. Just outside of Pristina, at Veternik, the Applicant became involved in an accident also involving three other vehicles. One driver of another vehicle was killed, while several other occupants of vehicles suffered severe physical injuries.

8. Reportedly, the police gathered evidence at the site including taking photographs of the vehicles, their relative positions following the accident and marks on the road surface, as well as making sketches of the site. In the following days, the police gathered statements from the various persons involved in the accident, to the extent possible given their medical conditions. A number of witnesses, including the Applicant, remained unconscious in hospital for various periods of time ranging from a week to several weeks as a result of their injuries.

9. On 14 October 2009, a traffic expert commissioned by the District Public Prosecutor submitted a report based on the evidence collected by the police. The traffic expert's report detailed the causes of the accident, estimated the speeds and relative positions on the road of the several vehicles involved, and identified the actions of the Applicant as the cause of the accident.

10. On 24 November 2009, the Prosecutor submitted an indictment charging the Applicant with the criminal offence of Endangering Public Traffic, under paragraph 5 of Article 297 of the Provisional Criminal Code of Kosovo (PCCK).

11. On 1 March 2010, this indictment was confirmed by the District Court of Pristina (Ka. No. 438/09).

12. The indictment (PP. No. 565-1/2009) specifies that the indictment was based on the following evidence:

"The factual situation was ascertained in entirety based on submissions of the defence of defendant Bajrush Xhemajli, testimonies of damaged parties/witnesses, expert report of traffic expert, crime scene sketch, and photographic documentation, and forensic opinions and conclusions on the injured persons."

13. On 1 March 2010, the Applicant filed an objection to the indictment with the Confirmation Judge at the District Court of Pristina. The Applicant objected to the findings of the traffic expert, claiming that this expertise formed almost the entire basis of the indictment and that it contained a number of deficiencies.

14. Specifically, the Applicant stated:

"The expertise contains a description of the accident and the crime scene, based on records obtained from the police. The expertise, amongst others, finds the

'sole cause of the accident, which to my opinion is the driver of the vehicle Nissan, register plates 000-KS-035, who drove in a higher speed than allowed, by recklessly overtaking the VW van on the right side, and returning again recklessly to the left lane, thereby hitting the VW van, and by overtaking the van, he lost control, sliding to the opposite side of the road, and hitting other vehicles, Mercedes 124 and Ford Mondeo, driving on the opposite direction, in their traffic lanes, in a regular manner.
From the case files and technical analysis of this accident, I have not found any other omissions of other participants, which would be contributing factors to the accident.'

The expertise and the final opinion provided remain flawed and unclear, since no acceptable explanations were provided on causes and circumstances contributing to the accident.

Therefore, the expertise has failed to provide any explanation on the VW van, which was driving on the left side of the road. The expertise should have provided explanations on these circumstances:

- *Should the Van have been moving-driving on the left lane, as it was moving, or should it have been on the right lane, which is used normally for slower vehicles;*

- *Could the Van have seen, and has the driver seen the vehicle Nissan taking over, and has it taken proper measure (reduce speed) to allow unimpeded overtake? This circumstance required specific addressing, since according to the crime scene report, and the simulated accident, as part of expertise, it is clear that the vehicle Nissan, driven by the accused, hit the Van with his rear left side, so only a little remained to complete the overtake.*

The expertise is flawed and unclear also on the circumstances of speed of driving of other vehicles in the accident. The expertise does not speak of the parameters used by the expert in finding that the vehicle Nissan was speeding at 100 km/h.

In consideration of the statement of the accused, that the speed of his vehicle at the time of the accident was 60-70 km/h, and the fact that the traffic was dense at that part of the road, the opinion and the finding of the expert is ungrounded on this circumstance as well.

15. Based on these assertions, the Applicant requested the District Court to commission another expert report. The applicant stated:

> *"For these reasons I consider that the indictment could not have been grounded upon this piece of evidence, and to eliminate these flaws and uncertainties, and always with a view of full and accurate ascertainment of the factual situation, I hereby propose that another expert, or team of experts, is hired to provide a super-expertise."*

As to the Trial

16. On 1 October 2010, the District Court of Prstina conducted a hearing where testimony was taken from witnesses, and reports were read out of forensic experts and of the traffic expert. The Applicant requested clarifications on the traffic expert report, and the traffic expert was summoned to appear in Court.

17. On 18 November 2010, the Court continued with the taking of evidence and heard the traffic expert. The traffic expert explained how he had reached his conclusions, what methodology he had used to calculate the speeds of the various vehicles, and responded to specific questions put to him when cross-examined by the Applicant.

18. In particular, the expert clarified that he had not found evidence to suggest any malfunction of the Applicant's vehicle. The expert clarified his assessment that the Applicant's vehicle had been overtaking another vehicle on the right hand side before moving to the left and hitting the other vehicle. The expert also confirmed that he had compiled his report based on the investigation files, and had not visited the crime scene himself.

19. At this point, the Applicant requested the Court to appoint supplemental expertise. The Applicant sought clarifications on two points:

    a. The expertise was confusing, and a super- expertise was needed to come to the truth as to the causes and/or causing persons of the accident; and
    b. A technical-expertise was needed to make an assessment of the condition of the Applicant's vehicle in order to determine whether a technical malfunction had contributed to the accident.

20. The District Court denied this request, explaining its ruling in the following terms:

    "In relation to the proposal of defence on hiring a super-expertise on traffic, and expert of machinery, the Court considers that the traffic witness report and the explanation provided by the expert are sufficient for ascertaining the factual situation, and hereby renders the following:

    DECISION

    Rejecting the proposal of defence of the accused to hire super-expertise and expert of machinery to assess the technical condition of the Nissan vehicle before the accident."

21. The Court continued with the taking of evidence, and read out the autopsy report and the crime scene report compiled by the Kosovo Police. The photographic evidence taken at the crime scene was viewed.

22. At this point the Court asked the Applicant if he had any statements to make in his defence, and he expressed his wish to remain silent at this time, pending his closing arguments on defence.

23. On 23 November 2010, the Applicant submitted his closing arguments on defence regarding the charges against him. In this submission the

Applicant declared that he had always accepted his liability and/or guilt for this accident, but he refuted that he was *"the sole cause of the accident"*.

24. The Applicant considered that the Court had exclusively relied upon the report of the traffic expert, and that this report was confusing on a number of points. Specifically, the Applicant considered that the Court was obligated to seek further expert evidence as to (1) the speed his vehicle was travelling; (2) the behaviour of the driver of the vehicle he was overtaking; and (3) the technical condition of his vehicle.

25. On 26 November 2010, the District Court of Pristina convicted the Applicant of the criminal offence of Endangering Public Traffic, as per paragraph 5 of Article 297 of the PCCK. The Applicant was sentenced to a term of imprisonment of 2 years and 6 months, and a 3 year prohibition of driving upon completion of his prison sentence.

26. Regarding the Applicant's objections to the traffic expertise, the Court stated:

> *"The Court also assessed the expert report by expert Yll Koshi, and his statement to the court hearing, on elaborating his conclusions and opinions in the report, and after a full and comprehensive elaboration, it found that this expertise is precise, objective, and grounded upon scientific and professional rules, due to the reason that the expert has detailed the records as per the case files, on which he had grounded his expertise, and therefore, the Court gave full trust to the expertise, while finding the remarks of defence unclear, hypothetical and ungrounded upon any concrete evidence."*

27. Subsequently, the Applicant filed an appeal to the Supreme Court against the District Court judgment.

28. Specifically, the Applicant complained that the District Court had not taken into account whether other factors and/or persons could have contributed to causing the accident. The Applicant claimed that, because additional expertise was not taken to clarify these other factors, this should have led to a conclusion that there was a reasonable doubt as to whether the applicant was the sole cause of the accident.

29. On 8 March 2012, the Supreme Court refused the appeal as ungrounded.

30. Subsequently, the Applicant filed a request for protection of legality with the Supreme Court.

31. Both in his appeal and in his request for protection of legality to the Supreme Court, the Applicant relied upon the same arguments in his defence that he had made to the District Court.

32. On 22 June 2012, the Supreme Court refused the request for protection of legality as unfounded, reasoning that:

> *"the defense of the accused during all phases of the proceedings has repeated the same allegations, also now with this extraordinary legal remedy, respectively alleging that the factual situation was not fairly assessed, because of the fact that according to them the court did not manage to accurately assess who contributed to causing this accident with fatal consequences: human factor, road factor, or technical factor (eventual technical failure), therefore, according to them, in such circumstance, it was necessary to order the performance of a super expertise. All these allegations that were sufficiently answered by the panel of this court are ungrounded. The Court may appoint another expert or conduct a super expertise in case of a contradiction on experts' opinions, failures or reasonable doubts as to the accuracy of the given opinion, if the data in the experts' conclusions (when we have two) differ profoundly or when their conclusions are ambiguous, not complete and in contradiction with itself or the reviewed circumstances and when all these cannot be avoided by repeated interviews of the experts. In this concrete situation, none of these circumstances would force the court to request performance of a super expertise."*

33. We consider that the decision of the Supreme Court thoroughly analysed the arguments submitted by the Applicant, it is based on a reasonable and reasoned assessment of the evidence, and it is within its competence and discretion.

As to the case-law of the European Court of Human Rights

34. Regarding the assessment of evidence by the regular courts, we recall the case-law of the European Court of Human Rights (Elsholz v. Germany, No. 25735/94, 13 July 2000, para. 66):

> *"The Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and that, as a general rule, it is for the national courts to assess the evidence before them. The Court's task under the Convention is rather to ascertain whether the proceedings as a whole, including the way in which evidence was*

taken, were fair (see, mutatis mutandis, the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45 and 46, and the H. v. France judgment of 24 October 1989, Series A no. 162-A, p. 23, §§ 60-61).

35. In consequence, it is not up to the Constitutional Court to determine whether the District and Supreme courts had correctly assessed the evidence presented in the Applicant's case. It is the duty of the Constitutional Court to determine whether the proceedings as a whole were fair.

36. We disagree with the finding of the Majority, as stated at paragraph 105 of the Judgment, that:

> *"[…] when viewing the fairness of the criminal proceedings in the Applicant's case as a whole, it cannot be said that he has benefitted from a 'fair trial' within the meaning of Article 6 ECHR and Article 31 of the Constitution".*

37. In fact, we note that the Applicant did not dispute his liability for the traffic accident on the basis of which he was convicted, but merely contests that he was the sole cause. He had consistently asked for additional expertise to determine whether or not there may have been any other contributing causes, whether human or technical, of which he suggested a number of possibilities.

38. We further note that the Applicant has been given the opportunity to raise his concerns regarding these various other possible contributing factors with the traffic expert, and with the District and Supreme courts. We note that the traffic expert had responded to his concerns regarding the factors raised by the Applicant, and had explained why each of these factors did not apply to the actual accident.

39. In addition, we note that both the District and Supreme courts in turn had considered the Applicant's concerns, and had determined that the report of the traffic expert, the responses of the traffic expert to the applicant's questions, coupled with the other evidence presented, had adequately and completely addressed those concerns.

40. As such, it cannot be said that the Applicant was not afforded ample opportunity to question the evidence and to have his questions be taken seriously. Nor can it be said that the Applicant was prevented in any way from presenting an expertise or any other evidence in his defence, on his own initiative.

41. With respect to the refusal of the courts to order additional expertise, which is not the same as a refusal to admit evidence presented on the Applicant's behalf, the Majority refers specifically to paragraph 4 of Article 31 of the Constitution, which states:

> *"4. Everyone charged with a criminal offence has the right to examine witnesses and to obtain obligatory attendance of witnesses, experts and other persons who may clarify the evidence."*

42. The Majority also refers to paragraph 3(d) of Article 6 of the European Convention, which states:

> *"3. Everyone charged with a criminal offence has the following minimum rights:*
>
> > *d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"*

43. The Majority relied on a number of judgments of the European Court of Human Rights (ECtHR) in support of their conclusions. However, the cited judgments are misplaced and, as such, cannot logically support the conclusion of the Majority.

44. The first such judgment is the case of Vidal v. Belgium, No. 12351/86, 22 April 1992. In that case, the ECtHR stated: *"As a general rule, it is for the national courts to assess evidence before them as well as the relevance of the evidence which defendents seek to adduce." [...] "...it does not require the attendance and examination of every witness on the accused's behalf; its essential aim, as indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter."*

45. In that case, the Court of Appeal in Belgium had based its decision entirely on the case file and had refused to summon four named witnesses presented by the defence. Furthermore, the Court of Appeal gave no reasons for its rejection of this request. The complete silence of the court on this request, coupled with the court's verdict increasing the sentence, was found to be incompatible with the concept of a fair trial under Article 6 ECHR.

46. In contrast, in the Applicant's case, the District and Supreme courts all considered the Applicant's request for supplementary expertise, and they each provided detailed reasons for their rejection. No witnesses or

other evidence presented by the defence were refused. Furthermore, the Supreme Court on appeal did not alter the Applicant's sentence or otherwise modify the verdict of the District Court. As such, the Applicant's case must be differentiated from the Vidal case mentioned above.

47. The second case mentioned by the Majority is the judgment in V.D. v. Romania, No. 7078/02, 28 June 2010. That case concerned a refusal by the courts to order a DNA test, as requested by a suspect in a case of rape. The findings of a DNA test would have provided information which could have been crucial to a finding of guilt for the criminal offense of rape. As such, this expertise went to the heart of the matter of proving guilt or innocence.

48. In contrast, in the Applicant's case, the responsibility for the accident giving rise to the criminal charges is not essential under the appeal scrutiny, as the Applicant did not dispute his liability for the traffic accident on the basis of which he was convicted. The Applicant has merely raised the possibility that there could have been other contributory factors. As such, the requested expertise is incidental to the finding of guilt or innocence, rather than central. Therefore, the Applicant's case must also be differentiated from the case of V.D. v. Romania.

49. The third case mentioned is Elsholz v. Germany (cited above). This case concerned a father seeking visiting rights with his minor son. The father had requested a psychological evaluation of his son, in order to clarify the boy's state of mind in relation to certain statements that the boy had made regarding his father. The ECtHR in that case found that the refusal by the national courts to award any visiting rights to the father had already violated his right to respect for his family life. As such, the fair trial issue of the rejected request for a psychological expertise contributed to the ultimate violation of the father's rights to respect for his family life.

50. In contrast, in the Applicant's case, no other violations of the Applicant's rights have been found. As such, the rejection by the District and Supreme courts to order any supplemental expertise did not affect the Applicant's other rights. Again, the Applicant's case must be differentiated from the case Elsholz v. Germany.

Conclusion

51. In conclusion, we find that, in contrast with the Majority decision, the Applicant was afforded adequate opportunity to question the evidence presented in his case. At the Applicant's request, the traffic expert was called to clarify his report, and the Applicant had the opportunity to raise his concerns about the expertise. From the court file, it can be observed that the traffic expert responded to each of the Applicant's questions with reasoned replies. As such, we cannot agree with the Majority that there has been any infringement of the applicant's rights to 'equality of arms' with the prosecution in the trial against him.

52. In particular, we find that the Applicant's justification for his request for additional expertise was not founded on the argument that he was not responsible for the accident which led to his conviction for Endangering Public Traffic.

53. Rather, his request for additional expertise was founded on the argument that other factors could have contributed to the accident, and he sought to have these possible other factors explored in order for them either to be accepted or ruled out by the courts.

54. Indeed, the traffic expert had taken note of the Applicant's concerns and had conceded that these concerns could 'in principle' have contributed to the accident, but that in the concrete circumstances of the case they did not.

55. We further find that it is not the role of the criminal courts to explore and examine every possible alternative explanation for an event, but to reach a reasonable finding on guilt or innocence.

56. Finally, we find, within the facts of the case, that the trial against the Applicant was conducted in a fair manner and that the conclusion of his case was based on a reasonable and reasoned assessment of the evidence by the District and Supreme courts.

57. In addition, we find that it is not up to the Constitutional Court to determine whether the District and Supreme courts had correctly assessed the evidence presented in the Applicant's case, as the Majority has done.

58. In all, the Applicant was provided the opportunity of examining the witnesses against him, and he was not prevented from presenting witnesses and expert witnesses on his behalf, under the same conditions as those against him.

59. Therefore, we conclude that there has been no violation of the Applicant's right to a fair and impartial trial under Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a Fair Trial] of the European Convention on Human Rights. Consequently, the Referral should have been refused as unfounded.

Respectfully submitted,

Altay Suroy	Almiro Rodrigues	Snezhana Botusharova
Judge	Judge	Judge

Concurring Opinion
of
Judge Robert Carolan
Case No. Kl 78/12
Applicant
Bajrush Xhemajli
Constitutional Review of the Judgment of the Supreme Court of the Republic of
Kosovo, Pkl.No. 70/2012, dated 22 June 2012

I concur with the opinion and judgment of the Majority in this case for all of the reasons cited in the opinion of the Majority and for several additional reasons.

In this case the Applicant was indicted for the criminal offence of Endangering Public Traffic in violation of Article 297. Paragraph 5 of the Provisional Criminal Code of Kosovo (hereinafter: "PCCK') That law specifically provides:

> *"(1) Whoever violates the law on public traffic and endangers public traffic, human life or property on a large scale and thereby causes light bodily injury to a person or material damage exceeding 1.ooo EUR shaIl be punished by a fine or by imprisonment of up to five years. (3) When the offence provided for in paragraph 1 or 2 of the present article is committed by negligence, the perpetrator shall be punished by a fine or by imprisonment of up to two years. (5l When the offence provided for in paragraph 3 of the present article results in serious bodily injury or substantial material damage, the perpetrator shall be punished by imprisonment of six months to five years and when such offence results in the death of one or more persons, the perpetrator shall by punished by imprisonment of one to eight years."*
>
> *(emphasis added.)*

Before any defendant charged with violating this criminal law can be convicted of that offense it must be proven beyond a reasonable doubt that:

(1) The defendant violated a traffic law; and,

(2) The defendant's act(s) endangered public traffic, human life or property; and,

(3) The defendant's act was "on a large scale" or the greatest cause of the injury or death.

This law recognizes that there can be multiple causes of a traffic accident. It does not punish or make criminal an act which simply may be one of many causes of an automobile accident unless it is the major cause of the accident. Simple negligence in driving an automobile resulting in injury or death is not a crime punishable by this statute. The negligence must be "large" or gross negligence before there is a violation of this statute.

To prove beyond a reasonable doubt that the Applicant's driving conduct was the major cause of the accident the first instance court, as the finder of fact in Applicant's case, was required to examine all the evidence and all of the possible causes of the accident. In this case, the first instance court did not make such an examination even after repeated requests by the Applicant for the first instance court to make such an examination. Indeed, the court appointed, traffic expert in Applicant's case candidly admitted:

> "*From the case file we have only evidence as to the subjective causes, i.e. from the parties involved in the accident, while other evidence such as the road and the mean's for causing the occident we do not have. I have only analyzed, the case file, I have not taken part on sight of the traffic accident."*

According to the testimony of the traffic expert there are three factors that contribute to traffic accidents: (1) the human factor, (2) the road factor and (3) the vehicle factor. But the traffic expert in his report in the Applicant's case only ascertained the human factor, not the road factor or the vehicle factor even though he conceded that examining those additional factors would have been relevant to reaching an opinion as to the cause of the accident and whether such cause was on a "large scale." As a result it was never determined whether the Applicant's vehicle or those of the other three drivers involved in the accident had unknown mechanical problems at the time of the accident that might have contributed to the cause of the accident. It was never determined whether the road conditions might have contributed to the accident. In addition, the speed and driving conduct of the other drivers was never corroborated by examining the impact and damage to the other vehicles involved in the accident. None of the answers to any of these questions was ever allowed to be submitted to the first instance court despite repeated requests by the Applicant to appoint an expert to perform a through investigation and examination in an attempt to answer these questions in determining whether the Applicant was the cause of the accident on 'a large scale".

In response the Applicant's repeated requests for another expert examination the first instance court stated:

"……the court considered that traffic expert report and the provided clarifications by the expert were enough to assess the factual situation."

The first instance court never gave any reasons why it reached this conclusion even when its own traffic expert testified that the vehicle factor and the road factor can contribute to the cause of an automobile accident.

At the close of his trial in the first instance court on 23 November 2010 the Applicant admitted that he had some responsibility for the cause of the accident, but he never admitted or stated that he violated a traffic law, that he endangered human life or property or that his driving conduct was "on large scale" the cause of the accident resulting in the death of another human being. He consistently maintained his innocence of the criminal charges and repeatedly asked the first instance court to appoint a traffic expert to thoroughly examine all the factors that could have caused the accident.

Some of have suggested that because the Applicant admitted that this his driving conduct was a cause of the accident that it is irrelevant and immaterial whether the first instance court denied his request to have a through expert traffic investigation performed. This is an erroneous conclusion. Applicant did not plead guilty to the charges or admit that he was guilty of the charges. If he had so acted, there would have been no reason for a criminal trial.

Because there was a trial, all three elements of the charge against the Applicant had to be proven beyond a reasonable doubt. The Applicant repeatedly asked the first instance court to appoint a traffic expert who could perform a thorough investigation of the accident examining all of the factors that could contribute to an accident to render an expert opinion on the cause of the accident. This request was repeatedly denied, a denial that was a violation of the Applicant's Constitutional rights pursuant to Article 31.4 of the Constitution.

Some have suggested that this Court has impermissibly assessed the evidence in the Applicant's case. This also is an erroneous conclusion. All this Court has done is conclude that procedurally the Applicant was not allowed to have relevant evidence and witnesses presented in his trial. Because the Applicant was not allowed to have such evidence presented, he did not receive a far trial as required by the Constitution. Indeed, because of the first instance court's refusal to allow an additional traffic expert to examine the evidence, the evidence, the scene and the vehicles involved without any reasoned explanation, it is virtually impossible to assess the evidence in this case. As a result, this Court is not assessing the evidence. Rather, it is only assessing

whether the Applicant's Constitutional procedural rights were violated. In this case, they were repeatedly violated.

Respectfully submitted,
Robert Carolan
Judge

KI 149/11, Shefqet Aliu, date 25 February 2013- Constitutional Review of the Decision of the Special Chamber of the Supreme Court of Kosovo, ASC-09-0106, dated 7 October 2011.

Case KI 149/11, Resolution on Inadmissibility of 5 December 2012

Keywords: economy, equality before the law, interim measures, individual referral, manifestly illfounded, right to fair and impartial trial, right to legal remedies, right not to be tried twice for the same criminal act, violations of individual rights and freedoms

The applicant filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging the decision of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo, because it enabled a company to win a tender which previously was annulled with a final judgment, i.e. the Court judged in favour of one party to the detriment of other party. The Applicant further requested the Court to impose interim measures stopping the execution of the Judgment of the Special Chamber, ASC-09-0106, for the reason that all conditions are fulfilled for issuance of temporary measure for stopping the execution and the probability exists for causing damage on the right of this applicant.

On the issue of the admissibility of the Referral, the Court held that the Referral was inadmissible because the Applicant does not explain how and why the Appellate Panel of the Special Chamber (Judgment ASC-09-0106) violated the principle res judicata, the right to equality before the law, and the right to legal remedies. Further, 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.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 149/11
Applicant
Shefqet Aliu
Constitutional Review of the Decision of the Special Chamber of the Supreme Court of Kosovo, ASC-09-0106, dated 7 October 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Shefqet Aliu (hereinafter, "Applicant"), represented by Mr. Shabi Sh. Isufi, a practicing lawyer from Gjilan.

Challenged decision

2. The Applicant challenges the decision of the Appellate Panel of Special Chamber of the Supreme Court of Kosovo (hereinafter, the "Appellate Panel") ASC-09-0106 of 7 October 2011, which was served on him on 18 October 2011.

Subject matter

3. The Applicant alleges that the abovementioned decision violated his rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter, the "Constitution"), Article 10 [Economy], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies] and Article 34 [Right not to be Tried Twice for the Same Criminal Act].

4. Furthermore, the Applicant requests the Court to impose interim measures stopping the execution of the Judgment of the Special

Chamber, ASC-09-0106, for the reason that *"[…] all conditions are fulfilled for issuance of temporary measure for stopping the execution of the mentioned judgment* ***fomus boni iuris*** *– the probability exists that the main right for requesting and* ***periculum in mora*** *– direct danger for causing damage on the right of this applicant."* Moreover, the execution of the Judgment would cause the *"[…] workers of the radiator factory and the state of Kosova an un-repairable damage, because the sale value of the SOE "Jugoterm" from 1.100.00 €uro, is smaller than the production material of the company."*

Legal basis

5. The Referral is based on 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 16 November 2011, the Applicant filed the Referral with the Court.

7. On 5 December 2011, the Applicant requested the Court to impose interim measures.

8. On 17 January 2012, the President appointed Judge Iliriana Islami as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Gjyljeta Mushkolaj.

9. On 17 April 2012, the Court requested the Applicant to clarify the following:

"…

First, the case between "ENG Office" and the KTA (0056) before the Special Chamber of the Supreme Court occurred without you being present, Why did you not submit a request with the Supreme Court to be present as an interested third party in this case? If you were not aware of the case as it was ongoing, why did you not start a new case lodging your complaints with the Supreme Court?

Secondly, what is your material interest that prompted you to request that the results of the tender be invalidated in the first place'?

Thirdly, why did you not request that the Supreme Court call "ENG Office" as a third party or a witness during your case SCC-06-0475?

Finally, please supply copies of all of the documents you submitted when you applied to the Supreme Court.

…"

10. On 24 April 2012, the Applicant replied to the Court providing:

"…

a) *The issue of the Private Enterprise "ENG Office" from Gjilan and KTA, which is referred to number SCC-08-0056 dated 13.11.2009 in the Special Chamber of the Supreme Court of Kosovo was conducted without my presence, since I was not involved as party in the procedure according to contentious matter, which refers to number SCC-06-0475 dated 08.08.2007, in which matter with the Ruling of SCSC, SCA-08-00007 dated 06.03.2008, was rejected the request for review filed by "ENG Office", and this ruling was promulgated as final, legally binding and without any right to appeal and review. Since we had to do with a final ruling SCA–08–0007 dated 06.03.2008, by which was rejected the request for review filed by "ENG Office", and Judgment SCC-06-0475 was confirmed, it consists that legal matter was over, therefore I could not foresee that Enterprise ENG Office, could continue with the legal procedure in relation to cancelled tender filed by "ENG Office" according to the abovementioned Judgment. Based on this fact, there was no need to initiate a new case in relation to the issue that had to do with Publicly Owned Enterprise 'Jugoterm", since I have expected all the time that it will be re-tendered. In relation to your question on why I did not initiate a new case to file it to the Kosovo Supreme Court, this I could not have done, since we had to do with adjudicated matter, while when Judgment SCC-08-0056 dated 13.11.2009, was confirmed according to Judgment ASC-09-0106 and now it has final form, therefore I could not file any legal remedy of any court, since after rendering the Ruling SCA -08-0007 was rejected the request for review filed by "ENG Office", and this Ruling was final, legally binding and against it could not have been appealed and reviewed, since SCSC by its decisions had violated the Constitution and the Law, by deciding for the second time on the matter, which earlier adjudicated.*

b) My material interest that urged me to ask for cancellation of tender firstly was "ENG Office" according to the winning had cancelled in a biased way our previous agreement and had eliminated me as shareholder of 30%.

c) In relation to the raised question, on why it was not required from Kosovo Supreme Court to be invited "ENG Office", as a third party on the case SCC-06-0475, this was not necessary to be done, because "ENG Office" was involved in this case and has filed a request to review SCSC, which was a regular legal remedy, but by the Ruling SCA -08-0007 dated 06.03.2008 was rejected the request private enterprise 'ENG Office" for review, therefore from this fact consists that 'ENG Office" was engaged as a party to the matter SCC-06-0475.

d) In relation to the request to offer copies and documents when we applied in Kosovo Supreme Court, attached to this response, we send you the claim filed by Shefqet Aliu in Kosovo Supreme Court, while other evidences which might eventually serve you in this case, are found in the request filed by PAK in Kosovo Constitutional Court dated 12.12.2011, under the protocol number 4360 and the case number KI 160/11.

..."

11. On 26 November 2012, President Enver Hasani replaced Judge Iliriana Islami as Judge Rapporteur with Judge Almiro Rodrigues and Judge Gjylieta Mushkolaj on the Review Panel with Judge Ivan Čukalovič, because their mandate as Judges of the Constitutional Court came to an end on 26 June 2012.

12. On 26 November 2012, the Referral was communicated with the Privatization Agency of Kosovo (hereinafter, "PAK") and the Special Chamber of the Supreme Court (hereinafter, the "Special Chamber").

13. On 5 December 2012, 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

14. In 2006, the Kosovo Trust Agency (hereinafter, the "KTA") tendered the sale of New Co "Jugoterm" in Gjilan. The bidders who applied for the published tender were "ENG Office" Gjilan, NPT "Kalabira" represented

by Shefqet Aliu (i.e. the Applicant), and "Install Engineering" Prishtina. "ENG Office" from Gjilan was announced as winner.

15. On 14 November 2006, the Applicant complained to the Special Chamber, requesting the tender procedure to be annulled because, allegedly, there were hidden agreements amongst the bidders, whereby he himself was part of these agreements, and thus the rules of tender were violated.

16. On 8 August 2007, the Special Chamber issued a judgment (Judgment SCC-06-0475), whereby it partly admitted the claim. The Special Chamber obliged KTA to annul the tender, in which the Public Enterprise "Eng Office" was announced the winner of the sale of New Co "Jugoterm", because the Special Chamber found that there were irregularities with the tender procedure. The part of the claim through which is requested from the Special Chamber to order KTA to organize a new tender for the abovementioned New Co is rejected because it is up to KTA to decide a new tender or not.

17. The "Eng Office", which had bought New Co "Jugoterm", and the Applicant requested the same Special Chamber to review the Judgment of the Special Chamber of 8 August 2007.

18. On 5 February 2008, the same Special Chamber (Decision SCA-08-0007) rejected "Eng Office's" request for review, reasoning that no new factual or legal allegation were raised and that the Judgment of the Special Chamber of 8 August 2007 was in accordance with applicable law. This decision was final and binding and could not be appealed.

19. On 3 March 2008, "Eng Office" filed a claim with the Special Chamber against KTA for having violated the rules of tender and proposed that KTA should be obliged to sign the agreement with "Eng Office" as the winner in the bidding process and to pay compensation for material and non-material damages.

20. On 16 April 2008, "Eng Office" filed a request with the Special Chamber to grant an injunction stopping PAK from undertaking any measures in respect to NewCo "Jugoterm".

21. On 14 November 2008, the Special Chamber (Decision SCC-08-0056) granted the request for injunction and PAK was *"[…] enjoined from carrying on any procedure, of whatsoever nature, relative to the privatization of the enterprise Jugoterm until final judgment is delivered in this case."* The Special Chamber held that *"[…] taking into*

account all the facts as they are now before the Chamber, the Chamber finds that the Claimant may Indeed prima facie suffer irreparable harm should the enterprise be tendered afresh and awarded to a third party."

22. On 22 October 2009, the Trial Panel of the Special Chamber of the Supreme Court of Kosovo (hereinafter, the "Trial Panel") partly admitted "Eng Office's" claim. The Trial Panel concluded (Judgment SCC-08-0056) that "Eng Office" is the winning bidder, obliged KTA and PAK to find the mean and the procedure in order to conclude the tender and obliged KTA to pay compensation for material damage. The Trial Panel concluded based on the evidence submitted that the annulment made by the KTA Managing Director is invalid because the Board of Directors is the only authorized body to annul the tender. Further, the Trial Panel concludes that this case cannot be considered *res judicata* because the parties in the judgment SCC-06-0475 of 8 August 2007 were different from those that are in this case and the request is also different.

23. On 17 December 2009, PAK filed an appeal with the Appellate Panel against the judgment of 22 October 2009, because the judgment is violating the principle of *res judicata*.

24. On 7 October 2010, the Appellate Panel (Judgment ASC-09-0106) rejected PAK's complaint as unfounded and upheld the judgment of the Trial Panel of 22 October 2009 (Judgment ASC-08-0056). The Appellate Panel ruled that *"Due to the fact that Claimant of the case in question was not the party of the previous legal process and since the company did not have regular chances to present evidence which support its stance and use ordinary remedies which are in disposal of the party in procedure, from these procedural cases in total should be drawn the conclusion that the previous judgment cannot prevent the claim review of the Claimant ENG Office."*

Applicant's allegations

25. The Applicant alleges that the Special Chamber "with its final judgment annuls the tender, whereas later with another final judgment enables the Private Enterprise ENG office from Gjilan to win this tender which was earlier annulled with a final judgment. This action of the court is contrary to the Constitution of the Republic of Kosovo, for the reason that the court enables ENG office from Gjilan to win a tender which was annulled with a final decision, then a new decision is taken on a matter

already once judged. With these actions the provision of Article 10 and Article 34 of the Constitution of the Republic of Kosovo are violated.

26. Furthermore, the Applicant alleges that the Special Chamber with its final Judgments has *"illegally favoured ENG office in Gjilani, while denying the rights of 2 other participants and thus violating the provision Article 24 of the Constitution of the Republic of Kosovo in which the equality of the parties is provided before the law."* In this respect, the Applicant also claim that *"the Special Chamber intentionally or unintentionally violated the provisions of Article 31 and 32 of the Constitution of the Republic of Kosovo for exceeding its authority by judging in favour of either party to the detriment of other party and at the interest and at the expense of the state and on the other hand to make other parties impossible the right in using the remedies."*

Admissibility of the Referral

27. The Court notes that the Applicants complain about a violation of the principle *res judicata, a* violation of the right to e*quality befo*re the law, and a violation of the right to *legal remedies.*

28. In this respect, the Court first examines whether the Applicant have fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

29. As seen above, the Appellate Panel, with a very well reasoned decision, ruled that *"Due to the fact that Claimant of the case in question was not the party of the previous legal process and since the company did not have regular chances to present evidence which support its stance and use ordinary remedies which are in disposal of the party in procedure, from these procedural cases in total should be drawn the conclusion that the previous judgment cannot prevent the claim review of the Claimant ENG Office".*

30. Meanwhile, the Court emphasizes that, under the Constitution, it is not up to it to act as a court of fourth instance, when considering the decisions taken by ordinary courts.

31. 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).

32. The Court can only consider 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 authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

33. In the present case, the Applicant merely disagrees with the courts' findings with respect to the case and indicates some legal provisions of the Constitution as having been violated by the challenged decision (Judgment ASC-09-0106) of the Appellate Panel of the Special Chamber.

34. Namely, the Applicant does not explain how and why the Appellate Panel of the Special Chamber (Judgment ASC-09-0106) violated the principle *res judicata,* the right to e*quality befo*re the law, and the right to l*egal remedie*s

35. In sum, the Applicant does not show that the proceedings before the Special Chamber 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).

36. Rule 36 (2.d) of the Rules foresees that "the Court shall reject a Referral as being manifestly ill-founded when it is satisfied that (…) the Applicant does not sufficiently substantiate his claim".

37. Therefore, taking into account the above considerations, it follows that the Referral on the alleged violations must be rejected as manifestly ill-founded.

Request for Interim Measures

38. Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, provide that "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.

39. 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 (2.d) of the Rules of Procedure, Article 27 of the Law and Rule 54 (1) of the Rules of Procedure and Rule 56 (2) of the Rules of Procedure, on 5 December 2012, unanimously,

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
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 139/12, Besnik Asllani, date 25 February 2013- Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo PKL. no. 111/2012, dated 30 November 2012

Case KI 139/12, decision on the request for interim measures and the resolution on inadmissibility of 29 January 2013

Keywords: individual referral, request for interim measure, criminal dispute, right to fair and impartial trial, principle of legality and proportionality in criminal cases, manifestly ill-founded

The Applicant alleges that the Judgment of the Supreme Court violated his constitutional rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 33 [Principle of legality and Proportionality in Criminal Cases] as well as violation of Article 6, in conjunction with Article 13 of ECHR. The Applicant requested the Constitutional Court to annul the judgment of the District Court and two judgments of the Supreme Court and to return the case to retrial in the District Court in Prishtina, according to instructions regarding the use of the standard of the proof beyond any reasonable doubt, as well as the interpretation of the criminal law in accordance with the principle of presumption of innocence.

In this case, the Constitutional Court notes that the grounds of appeal to the Supreme Court, either on second instance or on protection of legality, consist of allegations related with substantial violation of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction.

The Court considered that those allegations may be of the domain of legality. The Constitutional Court further notes that before the District and Supreme Courts no allegation was made by the Applicant on the basis of constitutionality, either implicitly or in substance raising an alleged violation of his fundamental freedoms and human rights guaranteed by the Constitution.

Therefore, the Court concluded that the Applicant has neither built nor shown a *prima facie* case either on the merits or on the admissibility of the Referral. In all, the Court concluded that the Referral is inadmissible as manifestly ill-founded. As to the request for interim measure, the Court further considered that, the referral being inadmissible as manifestly ill-founded, the request for interim measures is without object and thus it is rejected.

DECISION ON THE REQUEST FOR INTERIM MEASURES AND THE RESOLUTION ON INADMISSIBILITY
Case No. KI139/12
Applicant
Besnik Asllani
Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo PKL.no. 111/2012, dated 30 November 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mr. Besnik Asllani residing in Prishtina, represented by Mr. Bejtush Isufi, lawyer.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court of the Republic of Kosovo PKL. no. 111/2012, dated 30 November 2012 and served on the Applicant on 18 December 2012.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, by which the Applicant alleges that his right to a fair and impartial trial has been violated.

4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) to impose interim measure, suspending the execution of the Judgment of District Court in Prishtina P.no.433/2009, dated 7 September 2010.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: "the Constitution"), Article 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo, dated 15 January 2009 (hereinafter: the Law) and the Rule 28 and 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules).

Proceeding before the Court

6. On 31 December 2012, the Applicant submitted his Referral to the Court.

7. On 17 January 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalović.

8. On 22 January 2013, the Court notified the representative of the Applicant and informed the Supreme Court that the Referral was registered under the no. KI 139/12.

9. On 29 January 2013, the Review Panel after having considered the report of the Judge Rapporteur, made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. On 5 October 2009, the Prosecutor filed an indictment (PP. no. 668-6/2009) in the District Court in Prishtina, accusing the Applicant of having committed a criminal offence of attempted extortion.

11. On 7 September 2010, the District Court in Prishtina rendered a Judgment (P.no.433/2009), whereby the Applicant was found guilty of the criminal offence of attempted extortion and sentenced to imprisonment of 1 (one) year and 6 (six) months.

12. On 7 March 2011, the Prosecutor filed an appeal against that Judgment, requesting more severe punishment for the then accused.

13. On 11 January 2012, the Supreme Court of Kosovo rendered a Judgment (Ap.nr.155/11), whereby it modified the Judgment of the District Court

(P.nr.433/2009 dated 7 September 2010), regarding the legal qualification of the criminal offence and partially approved the appeal of the prosecutor. Therefore, the abovementioned judgment was modified only with respect to the decision on imposition of punishment, imposing the punishment of imprisonment of four (4) years and also applying the fine at the amount of 1000 (thousand) euro.

14. On 8 March 2012, the Applicant filed with the Supreme Court a request for protection of legality, alleging that the court of first instance has erroneously determined the factual situationand applied the law, and proposing the court to modify the judgment of the District Court in Prishtina (P.no.433/2009) and the Judgment of the Supreme Court (Ap.no.155/11), and to acquit the Applicant of charges or return the matter for retrial.

15. On 30 November 2012, the Supreme Court of Kosovo rejected (PKL. no. 111/2012) the request as ungrounded, upholding the judgment of the Supreme Court (Ap.no.155/11, dated 11 January 2012). The Supreme Court concluded that the issues raised by the Applicant's defense cannot be the subject matter of the request for protection of legality.

Applicant's allegations

16. The Applicant alleges that the Judgment of the Supreme Court violated his constitutional rights guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 33 [Principle of legality and Proportionality in Criminal Cases] as well as violation of Article 6, in conjunction with Article 13 of ECHR.

17. The Applicant requested the Constitutional Court to annul the judgment of the District Court and two judgments of the Supreme Court and to return the case to retrial in the District Court in Prishtina according to instructions regarding the use of the standard of the proof beyond any reasonable doubt, as well as the interpretation of the criminal law in accordance with the principle of presumption of innocence.

18. More precisely, the Applicant "request from the Constitutional Court of Kosovo to respond to three questions:

    a) Has the standard of proof "beyond any reasonable doubt" was used to determine the guilt of Besnik Asllani by the District Court in Prishtina and by Supreme Court of Kosovo (acting as the court of second instance)?

b) Has the principle of legality been violated in this case by three instances?

c) Has the Applicant had a fair trial due to lack of adequate reasoning by the Supreme Court of Kosovo acting upon the request for protection of legality?"

The request for interim measure

19. The Applicant also requests the Court to impose interim measures, suspending "the execution of the punishment provided by the Judgment of the District Court in Prishtina [P.no.433/2009, of 7 September 2010] upheld by the Supreme Court of Kosovo[Ap.nr.155/11, of11 January 2012] until this issue ended in the Constitutional Court of Kosovo".

20. The Applicant alleges that:

"In the present case, in case of non-approval of the request for interim security measure, the Applicant will suffer irreparable damage. This is so due to the fact that despite the guilt was not proved by any evidence, he will be deprived of fundamental human right-freedom and should go to serve the sentence of imprisonment soon. The referral of the Applicant is also grounded prima facie, because it can be clearly seen that he was punished being based only on a doubt, which was never proved and that the legal system failed to offer him necessary legal assistance."

21. In this respect, the Court refers to Article 116 (2) [Legal Effect of Decisions] of the Constitution that establishes:

"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."

22. The Court also takes into account Article 27 of the Law that 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."

23. In addition, Rule 54 (1) of the Rules of Procedure foresees 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..

24. Finally, Rule 55 (1) of the Rules of Procedure foresees that

> *"A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals".*

25. Furthermore, in order to the Court impose interim measure it should, pursuant to Rule 55 (4) of the Rules of Procedure, find that:

> *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*
>
> *(c) the interim measures are in the public interest.*
>
> *If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application".*

Admissibility of the Referral

26. On that subject, the Court refers to Article 113. paragrph 1 and 7 [Jurisdiction and Authorized Parties] which establishes that

> *1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*

27. Article 47 (2) of the Law on Court also establishes that:

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

28. The Court also recalls 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."

29. In addition, Rule 36 (1) a) and c) of the Rules provides that

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.

30. The Court considers that the Applicant complied with the prescribed deadline of four months counted from the day upon he has been served with the judgment of the Supreme Court; justified the referral with the relevant facts and a clear reference to the supposedly alleged violations; expressly challenges the Judgment of the Supreme Court as being the concrete act of public authority subject to the review; clearly points out the relief sought; and attaches the different decisions and other supporting information and documents.

31. As said above, the Applicant alleges mainly that the Judgment of the Supreme Court violated his constitutional right guaranteed by Article 31 [Right to Fair and Impartial Trial].

32. The Applicant claims that "the Supreme Court of Kosovo acting upon the request for protection of legality, submitted by the Applicant, rendered the judgment that is quite formal. This decision of the court does not provide any adequate reasoning regarding the allegations filed by the defence".

33. The Court notes that the District Court Judgment (P.no.433/2009) reads:

The accused Besnik Asllani, in his defense, did not admit the criminal offense in the item I of the enacting clause of the indictment of the attempted extortion from Article 267 par.2 in conjunction with par. 1 in conjunction with Article 20 of the CCK, while he pleaded guilty for the criminal offense from the Article 328 paragraph 2 of the CCK" (unauthorized ownership, possession, control or use of weapons).

34. The District Court Judgment (P.no.433/2009) further reads:

"Such a factual situation, besides the administered evidence and analyzed above, the Court determined also from the certificates on taking of items, confiscation of weapons and bullets, telephones, the ballistic examination report, the report on email examination, report on examination of telephone devices, report on interception of telephone conversation between the accused and the injured party, different reports on application of covert technical measures according to the court orders, entry-exits and SMS between the accused and the injured as well as photo documentation of investigations".

35. The Applicant appealed the District Court Judgment to the Supreme Court *"due to substantial violation of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction with the proposal that the appealed judgment is annulled or modified so that the accused is acquitted of charge for the criminal offence of extortion, while more lenient punishment to be imposed for the criminal offence of unauthorized ownership, possession, control or use of weapons from Article 328, par.2 of PCCK".*

36. The Supreme Court (Ap.no.155/2011, of 11 January 2012), after thoroughly having analyzed the grounds of appeal, found that *"the appealed allegations above are not grounded".*

37. The Applicant submitted the request for protection of legality against the judgment of the Supreme Court, *"due to substantial violations of criminal procedure provisions pursuant to Article 403 paragraph 1 item 12 of CCPK, violation of criminal law and other violations of criminal procedure, which have impacted on legality of court decision, by proposal that the Supreme Court annuls judgment of first instance and that of second instance and to return the case for retrial and reconsideration of the Court of first instance, or to acquit the convict of charge".*

38. The Supreme Court (Pkl.no.111/2012, of 30.11.2012), after reviewing the claim in the request for protection of legality found that the request was ungrounded.

39. The Constitutional Court notes that the grounds of appeal to the Supreme Court, either on second instance or on protection of legality, consist of allegations related with substantial violation of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction.

40. The Constitutional Court considers that those allegations may be of the domain of legality.

41. The Constitutional Court further notes that before the District and Supreme Courts no allegation was made by the Applicant on the basis of constitutionality, either implicitly or in substance raising an alleged violation of his fundamental freedoms and human rights guaranteed by the Constitution.

42. In that respect, the European Court (see Case of Fressoz and Roire v. France (Application no. 29183/95), Judgment of 21 January 1999) reiterated, *mutatis mutandis*, that "the purpose of the rule [rule on exhaustion] referred to above is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. That rule must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (see the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 19, § 27, and the Akdivar and Others v. Turkey judgment of 16 September 1996, Reports 1996-IV, pp. 1210-11, §§ 65-69)".

43. In accordance with the principle of subsidiarity, the Applicant is under the obligation to exhaust all legal remedies provided by law, as stipulated by Article 113 (7) and the other legal provisions, as mentioned above.

44. In fact, the purpose of the exhaustion rule is, in the case, allowing to the District and Supreme Courts the opportunity of settling an alleged violation of the Constitution. The exhaustion rule is operatively

intertwined with the subsidiary character of the constitutional justice procedural frame work. (*See, mutatis mutandis, Selmouni v. France [GC], § 74; Kudła v. Poland [GC], § 152; Andrášik and Others v. Slovakia (dec.).*

45. Thus the principle of subsidiarity requires that the Applicant exhaust 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. Otherwise, the Applicant is liable to have its case declared inadmissible by the Constitutional Court, when failing to avail itself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a giving up of the right to further object the violation and complain. (See *Resolution, in Case No. KI. 07/09, Demë KURBOGAJ and Besnik KURBOGAJ, Review of Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008, paragraph 18*).

46. Whenever a judicial decision is challenged on the basis of some legal position that is unacceptable from the viewpoint of human rights and fundamental freedoms, the regular courts that delivered the decision must be afforded with the opportunity to reconsider the challenged decision. That means that, every time a human rights violation is alleged, such an allegation cannot as a rule arrive to the Constitutional court without being considered firstly by the regular courts.

47. In the instant case, the Applicant should have implicitly or in substance complained before the District and Supreme Courts against the alleged violation of its right to fair trial, as those Courts also "shall adjudicate based on the Constitution and the law" (Article 102 (3) of the Constitution).

48. In practice, nothing prevented the Applicant of having complained before the District and Supreme Courts about the alleged violation of his right to fair trial. If those Courts would consider the violation and would fix it, it would be over; if they either did not fix the violation or did not consider it, the Applicant would have met the requirement of having exhausted all remedies, in the sense that those Courts were allowed the opportunity of settling the alleged violation.

49. In fact, that analysis is in conformity with the European Court jurisprudence which establishes that applicants are only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time, that is to say, that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects

of success (*Sejdović v. Italy*[GC], no. 56581/00, ECHR 2006-II § 46).It must be examined whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (*D.H. and Others v. the Czech Republic* [GC], §§ 116-22).

50. The Constitutional Court also applied this same reasoning when it issued the resolutions on inadmissibility on the grounds of non exhaustion of remedies (See: on 04December2012, in the Case No. KI 120/11, Ministry of Health v. Constitutional Review of the Decision of the Supreme Court A.No.551; on 27 January 2010, in the Case No. KI41/09, AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo; and on 23 March 2010, in its Decision in the Case No. KI. 73/09, Mimoza Kusari Lila vs. the Central Election Commission).

51. As a matter of principle and of fact, the Applicant cannot as a rule complain directly before the Constitutional Court about an alleged violation of his human rights and fundamental freedoms violation, without having raised implicitly or in substance such an alleged violation before the District and Supreme Courts.

52. However, the Constitutional Court considers that the facts of the case do not allow a compelling conclusion on that the grounds of appeal *"substantial violation of the of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction"*, alleged before the Supreme Court, meet the test of the European Court. Therefore, there is no need to further consider the matter in the circumstances of the case.

53. Moreover, the Court considers that the Applicant has not substantiated and supported with evidence the alleged violation of his rights by the Supreme Court.

54. In fact, the Applicant's allegation for violation of constitutional rights do not present prima facie sufficient ground for filing the case in the court; the Applicant's unsatisfaction with the decision of the Supreme Court cannot be a constitutional ground to complain before the Constitutional Court.

55. Furthermore, the Court notes that, for a prima facie case on meeting of requirements for admissibility of the Referral, the Applicant must show that the proceedings in the Supreme Court, viewed in their entirety,

have not been conducted in such a way that the Applicant has had a fair trial or other violations of the constitutional rights might have been committed by the Supreme Court during trial.

56. In this respect, the Court recalls 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".

57. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

58. Thus, the Court is not to act as a court of third instance, in the present case, 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).

59. Moreover, the Applicant alleges that the Supreme Court, when deciding on his request for protection of legality, did not provide clear reason regarding the rejection of the submitted request and the he also complains that the Supreme Court was not committed to deal with the case in a right manner.

60. However, the Applicant does not explain why and how his rights were violated, he does not substantiate a prima facie claim on constitutional grounds and did not provide evidence showing that his rights and freedoms have been violated by Supreme Court and so his right to impartial and fair trial guaranteed by Article 31 of Constitution and Article 6 of the ECHR has been violated.

61. Thus, the Constitutional Court cannot consider that the relevant proceedings in the Supreme Court were in any way unfair or arbitrary (see mutatis mutandis, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

62. Ins fact, the Applicant did not show prima facie why and how the Supreme Court violated his rights as guaranteed by Articles 31 [Right to Fair and Impartial Trial] and Article 33 [Principle of Legality and Proportionality in Criminal Cases] as well as violation of Article 6 in conjunction with Article 13 of ECHR.

63. Therefore, the Court concludes that the Applicant has neither built nor shown a prima facie case either on the merits or on the admissibility of the Referral.

64. In all, the Court concludes that the Referral is inadmissible as manifestly ill-founded.

65. The Court further concludes that, the referral being inadmissible, the request for interim measures is without object and thus must be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 116 (2) of the Constitution, Articles 27 and 48 of the Law, and in accordance with Rules 36.1 (c), 55 and 56 (2) of the Rules, on 29 January, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the request for interim measures;

III. TO NOTIFY this Decision to the Parties; and

IV. TO PUBLISH this Decision in accordance with Article 20(4) of the Law.

V. This Decision is effective immediately.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 15/12, Xhavit Gashi, date 25 February 2013- Constitutional Review of the Decision of the Supreme Court Rev. I. No. 314/2009, dated 10 January 2012

KI15/12, Resolution on Inadmissibility, of 29 January 2013

Keywords: individual referral, manifestly ill-founded, the right to work

The Applicant addressed the Constitutional Court with the request to order the Ministry of Labour and Social Welfare to return the Applicant to his previous job or to work duties that correspond to his professional background, as well as to compensate his personal income.

The Applicant also requests the Constitutional Court to reject all aforementioned judgments, because according to the Applicant, in his case justice was not respected.

The Applicant does not state which Article of the Constitution was violated by the Judgment of the Supreme Court and of other regular courts.

The Constitutional Court concludes that the Referral is inadmissible as manifestly ill-founded because the presented facts do not in any way justify the allegation of a violation of the constitutional rights.

RESOLUTION ON INADMISSIBILITY
In
Case No. KI 15/12
Applicant
Xhavit Gashi
Constitutional Review of the Decision of the Supreme Court
Rev. I. No. 314/2009, dated 10 January 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Xhavit Gashi with residence in Prishtina.

Challenged Decision

2. The challenged decision is the Judgment of the Supreme Court Rev. I. No. 314/2009 dated 10 January 2012.

Subject Matter

3. The subject matter refers to the request of the Applicant to order the Ministry of Labour and Social Welfare to return the Applicant to his previous job position or to work duties that correspond to his professional background, as well as to compensate his personal income.

Legal Basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, in conjunction with Article 22 of the Law No. 03/L-121 on Constitutional Court (hereinafter: the Law) and Rule 56 (2) of Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 20 February 2012, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. By Decision of the President on the appointment of Judge Rapporteur with No. GJR. KI 15/12 dated 21 February 2012, Judge Gjyljeta Mushkolaj was appointed as Judge Rapporteur. On the same day, by Decision of the President No. KSH. 15/12, the Review Panel was appointed, composed of judges: Snezhana Botusharova (presiding), Ivan Čukalović (member), and Iliriana Islami (member).

7. By Decision of the President on the replacement of Judge Rapporteur with No. GJR. KI 15/12 dated 2 July 2012, Judge Kadri Kryeziu was appointed as Judge Rapporteur. On the same day, by Decision of the President No. KSH. 15/12, the Review Panel was appointed, composed of judges: Snezhana Botusharova (presiding), Ivan Čukalović (member), and Enver Hasani (member).

8. On 10 December 2012, the Constitutional Court notified the Applicant and the Supreme Court on the registration of the Referral.

Summary of the Facts

9. *According to the documents attached to his Referral, the Applicant was employed as driver in the former Pension and Disability Insurance Fund of Employees in Prishtina. Hisemployment relationship continued until 1 October 2000.*

10. *As a result of the process of establishment of the Department of Health and Social Welfare (established by UNMIK Regulation No. 2000/10), on 25 September 2000, job vacancies for the employment of personnel were announced. After his application and the recruitment procedures were completed, the Applicant was not hired in the position.*

11. *On 24 March 2003, the Applicant filed a claim against the Ministry of Labor and Social Welfare in the Municipal Court in Prishtina, requesting the return to his previous work as "driver", or to another job position or work duties that correspond to his professional background, as well as compensation of his income.*

12. *Municipal Court in Prishtina, by its Judgment Cl. No. 85/2003 dated 23 September 2004, rejects the statement of claim of the Applicant, by evaluating that neither the Department of Health and Social Welfare*

and nor the Ministry of Labour and Social Welfare have the continuity and are not the successors of the former Fund for Pension and Disability Insurance and as a result of this, the Ministry of Labor and Social Welfare cannot be forced to return the Applicant to work.

13. The Applicant filed an appeal against the Judgment of the Municipal Court to the District Court in Prishtina. The District Court in Prishtina, by its Judgment AC. No. 415/05 dated 19 February 2007 decided "that the court of first instance in the correctly determined factual situation has applied provisions of the substantive law, has rightly applied provisions of contested procedure when it rejected the statement of claim of the claimant."

14. The Applicant also filed revision against the Judgment of the District Court to the Supreme Court of Kosovo. The Supreme Court, by its judgment Rev. I. No. 314/2009 dated 10 January 2012 rejected the revision of the Applicant as ungrounded, by considering [...] "*as right and lawful the legal stance and the reasoning of the courts of lower instances according to which was rejected the statement of claim of the claimants, since the court of first instance determined that neither the Department of Administration of Health and Social Welfare established with UNMIK Regulation no. 2000/10, nor the Administrative Department of Labour and Employment established with UNMIK Regulation 2000/24, as well as the Ministry of Labour and Social Welfare, included as a respondent in this contest, are the successors of that Fund on Pension and Disability Insurance of Employees of Kosovo, whose employee was the claimant. The claimant has not established employment relationship with the respondent and that the respondent does not have obligation towards the claimant and that the same lacks passive legitimacy as the party in procedure".*

Allegations of the Applicant

15. The Applicant does not state which Article of the Constitution was violated by the Judgment of the Supreme Court and of other regular courts.

16. The Applicant addresses the Constitutional Court by the Referral [...] *"to decide in my favor, because the Ministry of Labor and Social Welfare made injustice against me, by dismissing me from my job, without any legal support."*

17. The Applicant also requests the Constitutional Court to reject all aforementioned judgments, because according to the Applicant, justice was not respected in his case.

Admissibility of the Referral

18. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution, and further specified in the Law and the Rules of Procedure.

19. Article 48 of the Law on Constitutional Court of the Republic of Kosovo 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."

20. The Applicant does not state which right was violated to him and which Article of the Constitution supports his Referral, as it is provided in Article 113.7 of the Constitution and Article 48 of the Law.

21. According to the Constitution, the Constitutional Court is not a court of appeal, where the decisions rendered by the regular courts are reviewed, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law *(*See*, mutatis mutandis,* Garcia Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-1*)*

22. The Applicant did not present any *prima facie* evidence that would show the violation of his constitutional rights (See, *mutatis mutandis,* Vanek against Republic of Slovakia, ECtHR Decision regarding admissibility of the Application, no. 53363/99 dated 31 May 2005).

23. In this case, the Applicant was offered many opportunities to present his case before the regular courts. After the review of the proceedings in their entirety, the Constitutional Court has not determined that the proceedings were otherwise unfair and arbitrary *(*See*, mutatis mutandis,* Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009*)*.

24. *It follows that the Referral is manifestly ill-founded pursuant to Rule 36.2 (b) 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, pursuant to Article 48 of Law, and Rule 36.2 (b) of the Rules of Procedure, on 17 January 2013, 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
Kadri Kryeziu

President of the Constitutional Court
Dr. Enver Hasani

KI 21/12, Bedri Selmani, date 25 February 2013 – Constitutional review of the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Trust Agency Related Matters, ASC-09-2006, of the date 13 October 2011

Case KI21/12, Resolution on Inadmissibility, of 29 January 2013

Keywords: individual referral, manifestly ill-founded, privatization

In its referral, the Applicant claims the following: 1. His ownership rights over the funds he had invested for the refurbishment of "Autoservis" in the total amount of 1,356,882.00 €; 2. His ownership rights over the invested funds in Hotel and Restaurant "Victory", in the total amount of 1,527,832.00 €; 3. The right to use the urban land plot on which the "Autoservis" and Hotel and Restaurant "Victory" have been constructed; 4. The right to the priority to buy in the privatization proceedings of Socially Owned Enterprise on which the building of "Autoservis" and Hotel and Restaurant "Victory" were constructed.

The Applicant alleges that the judgments of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, that of the Trial Panel and the Appellate Panel have violated his rights guaranteed by the Constitution, namely Article 119 [General Principles], paragraph 1 and 2, and Article 121 [Property], paragraph 1 of Chapter IX [Economic Relations] of the Constitution.

The Constitutional Court concluded that the Referral is manifestly ill-founded because the Applicant did not sufficiently substantiate his claim on violation of rights guaranteed by the Constitution.

RESOLUTION ON INADMISSIBILITY
In
Case No. KI21/12
Applicant
Bedri Selmani
Constitutional review
of the Judgment of the Trial Panel of the Special Chamber of the Supreme Court of Kosovo on Trust Agency Related Matters, SCC-06-0144 of the date 30 March 2009 and the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Trust Agency Related Matters, ASC-09-2006, of the date 13 October 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Bedri Selmani from Prishtina.

Challenged Decision

2. The Applicant challenges the Judgment of the Trial Panel of the Special Chamber of the Supreme Court of Kosovo on Trust Agency Related Matters (hereinafter: the Trial Panel), SCC-06-0144 dated 30 March 2009, and the Judgment of Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Trust Agency Related Matters (hereinafter: the Appellate Panel), ASC-09-0006 dated 12 October 2011.

Subject Matter

3. The Applicant alleges that the aforementioned Judgmentsviolated his rights guaranteed by the Constitution, namely Article 119 [General

Principles], paragraph 1 and 2, and Article 121 [Property], paragraph 1 of Chapter IX [Economic Relations] of the Constitution.

Legal Basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, in conjunction with Article 22 of the Law No. 03/L-121 on Constitutional Court (hereinafter: the Law) and Rule 56 (2) of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 2 March 2012, the Applicant submitted the Referral to the Court.

6. On 5 March 2012, the President appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (presiding), Altay Surroy and Gjyljeta Mushkolaj.

7. On 4 December 2012, the President signed a Decision on Replacement of Judges in the Review Panel, composed of Judges Robert Carolan (presiding), Altay Surroy and Ivan Čukalović.

8. On 10 December 2012, the Referral was communicated to the Special Chamber of the Supreme Court and to the Kosovo Agency of Privatization.

Summary of the Facts

9. On 5 April 2000, the Applicant, claiming to be the Founder, Owner and Director General of the Private Enterprise "Autokosova" concluded an Agreement with the Socially Owned Enterprise "Autoprishtina" in Prishtina (hereinafter: the Agreement). The Socially Owned Enterprise is the successor enterprise of Working Organization Vehicle House "Boshko Cakic" established in December 1989. The Applicant claims that according to the Agreement, he undertook to "renovate and rehabilitate" a building owned by the Socially Owned Enterprise "Autoprishtina". The partnership Agreement was registered in UNMIK Business Registry on 15 December 2000.

10. On 10 November 2000, the Supervisory Board of the Socially Owned Enterprise "Autoprishtina" unilaterally terminated the co-operation with the Applicant. Although the Socially Owned Enterprise claimed to have terminated the Agreement 2000, the workers of the Socially Owned Enterprise worked for Autoprishtina-Autokosova or another

entity owned by the applicant up to October 2003. In October 2003, the workers cut ties with the Autoprishtina-Autokosova and commenced to operate the auto-servicing and spare parts business independently of Autoprishtina-Autokosova or any other entity associated with the applicant.

11. On 3 April 2006, the Applicant raised the dispute before the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters. In its initial claim the Applicant sought a preliminary injunction. This application was withdrawn by the Applicant at the oral hearing on 13 December 2006.

12. On 18 January 2007, the Applicant filed a submission requesting Hotel and Restaurant "Victory" be joined as a Claimant in the Proceedings. The Special Chamber made an order on joining Hotel and Restaurant "Victory" as the Second Claimant to the proceedings. A number of other amendments have been made to the claim, the last being the amendment of February 2007. The Applicant in its claim requested the following: the amount of 1,219,446.22 € to be paid to Autoprishtina-Autokosova in order to recognize the right to ownership on invested funds in the socially owned facility "Autoservis"; The amount of 1,036,994.32 € to be paid to Hotel and Restaurant "Victory" in order to recognize the right to ownership on invested funds in construction of the private hotel facility; Recognition of Autoprishtina-Autokosova's right to use the land containing "Autoservis"; Recognition of Hotel and Restaurant "Victory"'s right to use land containing Hotel Victory; Declaration of Autoprishtina-Autokosova's priority right to purchase the socially owned facility and land on which "Autoservis" is situated and Declaration of Hotel and Restaurant "Victory"'s priority right to purchase the socially owned land on which Hotel Victory is situates.

13. Kosovo Trust Agency (hereinafter: KTA) filed a defense and Counterclaim on its own behalf and on behalf of the Socially Owned Enterprise.

14. The Trial Panel of the Special Chamber in its Judgment SCC-06-0144 of 30 March 2009 rejected the claim against Socially Owned Enterprise "Autoprishtina" as ungrounded, rejected the request for a preliminary injunction against KTA as withdrawn and rejected the counterclaim of KTA as inadmissible.

15. On 15 May 2009, the Applicant lodged an appeal against the Judgment of the Trial Panel, SCC-06-0144, dated 30 March 2009. The appeal is based on grounds of essential violations of the Law on Contested

Procedure, on wrongful or incomplete determination of facts of the case and on wrongful application of the substantive law.

16. On 18 November 2009, the KTA on behalf of itself and of the Socially Owned Enterprise Autoprishtina filed the response to the appeal, in which it maintained that the arguments of the Appellants are without any legal basis, requesting that the appeal should be rejected and the judgment of the Trial Panel of the Special Chamber upheld.

17. On 13 October 2011, the Appellate Panel of the Special Chamber in its Judgment ASC-09-0006 rejected the appeal as ungrounded, decided to uphold the Judgment of the Trial Panel of 30 March 2009 and amended the judgment of the Trial Panel by adding the following sentence: "the claim of Hotel and Restaurant "Victory" is rejected as ungrounded".

18. On 17 October 2011, the Judgment of the Appellate Panel was submitted to the Applicant.

19. On 30 January 2012, the Applicant filed a request for protection of legality of the Judgment of the Appellate Panel to the State Prosecutor.

20. On 2 February 2012, the State Prosecutor in its Announcement No. 6/2012 "found no legal ground to file a request for protection of legality".

Allegations of the Applicant

21. As stated above, the Applicant alleges that the judgments of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, that of the Trial Panel and the Appellate Panel have violated his rights guaranteed by the Constitution, namely Article 119 [General Principles], paragraph 1 and 2, and Article 121 [Property], paragraph 1 of Chapter IX [Economic Relations] of the Constitution.

22. In its referral, the Applicant claims the following: 1. His ownership rights over the funds he had invested for the refurbishment of "Autoservis" in the total amount of 1,356,882.00€; 2. His ownership rights over the invested funds in Hotel and Restaurant "Victory", in the total amount of 1,527,832.00€; 3. The right to use the urban land plot on which the "Autoservis" and Hotel and Restaurant "Victory" have been constructed; 4. The right to the priority to buy in the privatization proceedings of Socially Owned Enterprise on which the building of "Autoservis" and Hotel and Restaurant "Victory" were constructed.

23. The Applicant concludes his claim, alleging that "*This action of the Special Chamber of the* Supreme *Court of Kosovo on Kosovo Trust Agency Related Matters that was taken while violating in a flagrant way the provisions of the civil proceedings (foreseen with the Law on Contested Procedure), contradicts the provisions of the Law on Foreign Investments and provisions of the Constitution of Republic of Kosovo itself, more specifically – with Article 119, par.2, related to paragraph 1 of the same Article (Article 119) and Article 121, paragraph 1".*

Admissibility of the Referral

24. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules.

25. The Court should first examine if the Applicant is an authorized party to submit a Referral with the Court, pursuant to the requirements of Article 113.7 of the Constitution. As to the present Referral, the Court notes that the Applicant is a natural person and an authorized party pursuant to the requirements of Article 113.7 [Individual Referrals] of the Constitution.

26. The Court has also to determine whether the Applicant has met the requirements of Article 113 (7) of the Constitution and Article 47 (2) of the Law.

> Article 113, paragraph 7 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 Applicant has shown that it has exhausted all legal remedies available under the applicable laws.

27. The Applicant must also prove to have met the requirements of Article 49 of the Law concerning the submission of the Referral within the legal time limit. It can be seen from the case file that the Applicant on 30 January 2012, filed a request for protection of legality of the Judgment of the Appellate Panel to the State Prosecutor whereas the Applicant submitted the Referral with the Court on 2 March 2012, meaning that

the Referral has been submitted within the four month deadline prescribed by the Law and Rules of Procedure.

28. In the present Referral, the Applicant has been provided numerous opportunities to present his case before the regular courts. Meanwhile, the Court emphasizes that, under the Constitution, it is not up to it to act as a court of fourth instance, when considering the decisions taken by regular 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 [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).

29. The Court can only consider 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 among other authorities, R*eport of the Eur*. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

30. As a matter of fact, the Applicant has not substantiated a claim on constitutional grounds and has not provided evidence that his rights and freedoms have been violated by the regular courts (See, *mutatis mutandis*, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

31. Rule 36. 2 (d) of the Rules foresees that "*the Court shall reject a Referral as being manifestly ill-founded when it is satisfied that (…) the Applicant does not sufficiently substantiate his claim.*"

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of Law, and Rule 36.2 (b) and (d) of the Rules of Procedure, on 17 January 2013, 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
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 44/11, Rufki Suma, date 25 February 2013- Constitutional Review of the decision of the Kosovo Privatization Agency to sell the Socially Owned Enterprise "Sharr Cem", dated 14 December 2010.

Case KI 44/11, Resolution on Inadmissibility of 5 December 2012

Keywords: locus standi, human dignity, violations of individual rights and freedoms, violation of free competition

The applicant filed a Referral pursuant to Article 113.4 of the Constitution of Kosovo challenging the decision of the Kosovo Privatization Agency (hereinafter: "PAK"), whereby the Socially Owned Enterprise "Sharr Cem" was privatized on 14 December 2010. The Applicant claims that the privatization of Sharr Cem was done in contradiction with the PAK directions on Generic rules of tender for privatization (Ordinary spin-off) and Generic rules of tender for liquidation, Law (No. 03/L-067) on the Privatization Agency of Kosovo, Law on Protection of Competition and Article 119 [General Principles] of the Constitution, since the privatization occurred without PAK publicly announcing it.

On the issue of the admissibility of the Referral, the Court held that the Referral was inadmissible because the Applicant's allegation that a violation has occurred under Article 113.4, in the instant case, is incompatible with the Constitution because the competences of the Municipality under abovementioned article in order to submit a Referral to this Court are limited to the following: the laws or acts of the government infringing upon the responsibilities or diminishing the revenues of the municipality that otherwise is provided by Law on Local Self-Government and the European Charter on Local Self-Government.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 44/11
Applicant
Rufki Suma
Constitutional Review of the decision of the Kosovo Privatization Agency to sell the Socially Owned Enterprise "Sharr Cem", dated 14 December 2010.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicant

1. The applicant is Mr. Rufki Suma, president of the Municipality of Hani i Elezit, represented by Mr. Bajrush Laçi, chief of the Legal Department of the Municipality of Hani i Elezit.

Challenged decision

2. The Applicant challenges the decision of the Kosovo Privatization Agency (hereinafter: "PAK"), whereby the Socially Owned Enterprise "Sharr Cem" was privatized on 14 December 2010.

Subject matter

3. The Applicant submitted a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 30 March 2011 claiming that its rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity] and 119 [General Principles] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") have been violated.

Legal basis

4. Article 113.4 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 30 March 2011, the Applicant submitted a Referral with the Court.

6. On 19 April 2011, the President, by Order No. GJR. 44/11, appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date the President, by Order, No. KSH. 44/11, appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Gjyljeta Mushkolaj and Iliriana Islami.

7. On 25 May 2011, the Court requested additional clarification and additional documents in respect to:

   a. what the legal basis for the Referral is;

   b. which is the challenged decision;

   c. evidence on exhaustion of legal remedies and on the privatization of Sharr Cem; and

   d. a power of attorney.

8. On 2 June 2011, the Applicant submitted the clarification and the additional documents:

   a. the Referral is made under Article 113.4 of the Constitution;

   b. the challenged decision is the decision of PAK to privatize Sharr Cem

   c. the Applicant has on 8 April 2011 filed a complaint with the Special Chamber of the Supreme Court on the privatization of Sharr Cem;

   d. a power of attorney was also submitted.

9. On 15 June 2011, the Court communicated the Referral to the Special Chamber of the Supreme Court and PAK.

10. On 2 July 2012, the President, by Decision, No. KSH. 44/11, replaced the review panel members Judges Gjyljeta Mushkolaj and Iliriana Islami with Judges Almiro Rodrigues (Presiding) and Enver Hasani since the mandate of Judges Gjyljeta Mushkolaj and Iliriana Islami as Judges of the Constitutional Court expired on 26 June 2012.

11. On 5 December 2012, 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 14 December 2010, "Shar Cem" was privatized by PAK.

13. On 15 December 2010, the Applicant submitted a request to PAK to suspend the privatization of Sharr Cem. The Applicant has not received any reply in this matter.

14. On 27 January 2011, the Municipal Assembly of Hani i Elezit took the decision to file a claim against PAK because of the privatization of Sharr Cem without complying with legal procedures and without advertising at all a privatization tender (Decision no.01/15-2011).

15. On 8 April 2011, the Applicant filed a complaint with the Special Chamber of the Supreme Court of Kosovo claiming that the privatization of Sharr Cem was done without publicly announcing the privatization.

Applicant's allegations

16. The Applicant claims that the privatization of Sharr Cem was done in contradiction with the PAK directions on Generic rules of tender for privatization (Ordinary spin-off) and Generic rules of tender for liquidation, Law (No. 03/L-067) on the Privatization Agency of Kosovo, Law on Protection of Competition and Article 119 [General Principles] of the Constitution, since the privatization occurred without PAK publicly announcing it. Hence, allegedly, this action undertaken by PAK limited the right to free competition by excluding other bidders and selling this enterprise by a "symbolic price" of Euro 30.1 million.

Assessment of admissibility of the Referral

17. The Applicant complains that the privatization of Sharr Cem was done without publicly announcing the privatization and thus its rights guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity] and 119 [General Principles] of the Constitution have been violated.

18. However, in order for a Referral to be admissible, the Applicant must first show that he/she has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

19. The Court notes that the Applicant submitted the Referral under Article 113.4 of the Constitution, which provides:

"A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act."

20. In this respect, the Applicant's allegation that a violation has occurred under Article 113.4, in the instant case, is incompatible with the Constitution because the competences of the Municipality under abovementioned article in order to submit a Referral to this Court are limited to the following: the laws or acts of the government infringing upon the responsibilities or diminishing the revenues of the municipality that otherwise is provided by Law on Local Self-Government and the European Charter on Local Self-Government.

21. In these circumstances, the Applicant lacks *locus standi* to refer this case to the Court. Therefore, the Court declares the referral inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.4 of the Constitution, Article 20 of the Law and Rule 56 (2) of the Rules of Procedure, on 5 December 2012, 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
Ivan Čukalović

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 69/12, Association of Second World War Civilian Invalids, 25 February 2013- Constitutional Review of the Decision of the Supreme Court of Kosovo KRJA, No. 6/2011 dated 8 May 2012

KI 69/12, Resolution on Inadmissibility, of 6 February 2013

Keywords: individual referral, manifestly ill-founded, association of Second World War invalids.

The Applicant alleges that the Decision of the Supreme Court of Kosovo, KRJA No. 6/2011, of 8 May 2012, violated its rights guaranteed by the Constitution, namely Article 3, paragraph 2, Article 22 and Article 24 of the Constitution.

The Applicant claims that the rights of the Applicant and their family members guaranteed by the Law on Protection of Civilian War Invalids were violated. According to the Applicant, this Law remains to be in force. In this regard, the Applicant refers to the provisions of UNMIK Regulation No. 1999/24 on the Law applicable in Kosovo, stipulating that the "*The Law applicable in Kosovo [...] shall be the Law in Force in Kosovo on 22 March 1989.*"

The Applicant further argues that the Law on Disability Pensions does not include this category of persons, which is included in the Law of 1976 and therefore "*the Law of 1976 is still in force and as such should be further applied.*"

The Constitutional Court concluded that the Referral is manifestly ill-founded because the Applicant did not sufficiently substantiate his claim on violation of rights guaranteed by the Constitution.

RESOLUTION ON INADMISSIBILITY
In
Case No. KI 69/12
Applicant
Association of Second World War Civilian Invalids
Constitutional Review
of the Decision of the Supreme Court of Kosovo KRJA, No. 6/2011
dated 8 May 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is the Association of Second World War Civilian Invalids.

Challenged Decision

2. The Applicant challenges the Decision of the Supreme Court KRJA, No. 6/2011 dated 8 May 2012, submitted to the Applicant on 18 May 2012.

Subject Matter

3. The Applicant alleges that the aforementioned Decisionviolated its rights guaranteed by the Constitution, namely Article 3, paragraph 2 [Equality before the Law], Article 22 [Direct Applicability of International Agreements and Instruments], and Article 24 [Equality before the Law].

Legal Basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, in conjunction with Article 22 of the Law No. 03/L-121 on Constitutional Court (hereinafter: the Law) and Rule 56 (2) of Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 13 July 2012, the Applicant submitted the Referral to the Court.

6. On 4 September 2012, the President appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (presiding), Altay Surroy and Ivan Čukalović.

7. On 10 December 2012, the Referral was communicated to the Supreme Court.

Summary of the Facts

8. The Applicant, namely the Association of Civilian Invalids of War, was registered under UNMIK Regulation 1999/22 as an NGO with Public Benefit Status on 6 March 2000.

9. The Civilian War Invalids enjoyed the rights and protections under the provisions of the Law on Protection of Civil War Invalids (published in Official Gazette of Kosovo No.32), and adopted by the Assembly of Kosovo on 26 July 1976 (hereinafter: the Law of 1976).

10. On the occasion of promulgation of the UNMIK Regulation 2000/66 on benefits for the war invalids of Kosovo and for the next of kin of those who died as a result of the armed conflict in Kosovo [UNMIK/REG/2000/66], this category of invalids was not included.

11. After the Judgment of the Municipal Court of Prishtina, C.No. 595/05, dated 7 March 2006, rejecting the claim of the Applicant and declaring itself as not competent, reasoning that in this case the applicable administrative procedures should be followed, on 3 May 2006, the Applicant requested from the Center for Social Work in Podujeva (Request No. 33422, dated 3 May 2006), the determination of discrimination, compensation due to discrimination, and recognition of the right to protection and care in the future, namely equal treatment with other war invalids' categories. The Centre did not reply to the request of the Applicant.

12. On 17 October 2006, the Applicant filed a claim in the Supreme Court of Kosovo, requesting the determination of discrimination and the amount of financial compensation of the caused damage due to discrimination and recognition of the right to protection and care in the future to the Applicant, namely equal treatment with other categories of war invalids.

13. On 31 March 2009, the Supreme Court of Kosovo in its Decision A. no. 2630/2006 rejected the claim as ungrounded due to the lack of legal framework supporting the Applicant.

14. On 30 November 2011, the Applicant submitted a request for review of the Decision of the Supreme Court A. no. 2630/2006, alleging that Second World War Civilian Invalids are discriminated since the Law on War Civilian Invalids of 1976 was not being applied towards them and further proposing to recognize their rights as Second World War Invalids, which they claim they have under the Law against Discrimination No. 2004/3.

15. The Supreme Court of Kosovo, by its Decision KRJA No. 6/2011, dated 31 March 2009, dismissed the request as inadmissible, reasoning that the Law of 1976 is not in force and given the lack of a special law for this category of invalids, their request cannot be approved.

16. The Supreme Court in its Decision KRJA No. 6/2011 further argues that" the civil invalids of World War II enjoy the rights of financial protection according to the conditions and criteria prescribed by the Law on Disability Pensions (Law No. 2003/23 – UNMIK Regulation 2003/40), so it cannot be said that their rights have been violated in this regard".

Allegations of the Applicant

17. As stated above, the Applicant alleges that the Decision of the Supreme Court of Kosovo KRJA No. 6/2011, dated 8 May 2012 violated its rights guaranteed by the Constitution, namely Article 3, paragraph 2 [Equality before the Law], Article 22 [Direct Applicability of International Agreements and Instruments]and Article 24 [Equality before the Law]of the Constitution.

18. The Applicant argues that the rights of the Applicant and their family members guaranteed by the Law on Protection of Civilian War Invalids were violated. According to the Applicant, this Law remains to be in force. In this regard, the Applicant refers to the provisions of UNMIK Regulation No. 1999/24 on the Law applicable in Kosovo, stipulating that the "The Law applicable in Kosovo [...] shall be the Law in Force in Kosovo on 22 March 1989."

19. The Applicant further argues that the Law on Disability Pensions does not include this category of persons, which is included in the Law of

1976 and therefore "the Law of 1976 is still in force and as such should be further applied."

20. The Applicant considers that there has been a continuous violation against the category of Second World War Civilian Invalids as prescribed in the provisions of the Law against Discrimination No. 2003/4.

21. The Applicant requests the Constitutional Court to determine that there has been a violation of Article 3, paragraph 2, Articles 22 and 24, and to annul the Decisions of the Supreme Court KRJA No. 6/2011 dated 8 May 2012, and Decision A. No. 2630/2006 dated 31 March 2009.

Admissibility of the Referral

22. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

23. The Court should first examine if the Applicant is an authorized party to submit a Referral with the Court, pursuant to the requirements of Article 113.7 of the Constitution. As to the present Referral, the Court notes that the Applicant is a legal person. Article 21 (4) of the Constitution provides that

"*fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.*"

The Applicant is, therefore, entitled to submit a constitutional complaint (See, Resolution in Case No. KI 41/09, AAB – Riinvest University L.L.C., Pristina v. Government of the Republic of Kosovo, paragraph 14).

24. The Court has also to determine whether the Applicant has met the requirements of Article 113 (7) of the Constitution and Article 47 (2) of the Law.

Article 113, paragraph 7 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 final decision on the Applicant's case is the Decision of the Supreme Court KRJA, No. 6/2011 dated 8 May 2012. As a result, the Applicant

has shown that it has exhausted all legal remedies available under the applicable laws.

25. The Applicant must also prove to have met the requirements of Article 49 of the Law concerning the submission of the Referral within the legal time limit. It can be seen from the case file that the final decision on the Applicant's case is the Decision of the Supreme Court KRJA, No. 6/2011 dated 8 May 2012, whereas the Applicant submitted the Referral with the Court on 13 July 2012, meaning that the Referral has been submitted within the four month deadline prescribed by the Law and Rules of Procedure.

26. Meanwhile, the Court emphasizes that, under the Constitution, it is not up to it 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,* Garcia v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).

27. The Court can only consider 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 among other authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

28. As a matter of fact, the Applicant has not substantiated a claim on constitutional grounds and has not provided evidence that its rights and freedoms have been violated by the regular courts (see *mutatis mutandis*, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

29. Rule 36. 2 (d) of the Rules foresees that "*the Court shall reject a Referral as being manifestly ill-founded when it is satisfied that (…) the Applicant does not sufficiently substantiate his claim*."

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of Law, and Rule 36.2 (b) and (d) of the Rules of Procedure, on 17 January 2013, by majority of votes:

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
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 157/11, Union of Pensioners and Labor Disabled Persons of the Republic of Kosovo, represented by Mr. Azem Ejupi, lawyer., date 25 February 2013- Request for regulation of status of pensioners and of labor disabled persons and improvement of welfare of pensioners of the Republic of Kosovo by state Authorities

Case KI157/11, Resolution on Inadmissibility of 17 January 2013

Keywords: individual referral, legal person, regulation of status of pensioners, unauthorized party

In this case, the Applicant claimed that by denying the rights obtained according to the Law on Pension and Disability Insurance, were violated the rights of pensioners contribution payers, guaranteed by Article 22, Article 23, Article 51 paragraph 1 of the Constitution, Article 17 paragraph 2 of Universal Declaration on Human Rights, Article 26 of the International Covenant on Civil and Political Rights and its protocols and Article 9 of European Convention on Protection of Human Rights and Fundamental Freedoms.

The Court in this case analyzed and carefully assessed the requests of the Applicant and concluded that the Applicant, as legal person in specific case, cannot be considered as an authorized party that may refer constitutional matters *in abstracto* regarding the regulation of status of pensioners and labor disabled persons as well as on the improvement of their social welfare, based on the pension contributions paid over the years. In this regard, the Court emphasized that the Constitution of the Republic of Kosovo does not provide *actio popularis* which is a modality of individual appeals, which enable each individual who attempts to protect public interest and constitutional order to address the Constitutional Court with certain questions and requests, indicating a violation of the constitutional rights of a certain individual or group.

Therefore, the Court concluded that the Applicant is not an authorized party to refer a constitutional matter *in abstracto* regarding the regulation of status of pensioners and of labor disabled persons. For this reason, pursuant to Article 113.1 of the Constitution, this Referral is declared inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI157/11
Applicant
Union of Pensioners and Labor Disabled Persons of the Republic of Kosovo, represented by Mr. Azem Ejupi, lawyer
Request for regulation of status of pensioners and of labor disabled persons and improvement of welfare of pensioners of the Republic of Kosovo by state authorities

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, Presdient
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almira Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. Union of Pensioners and of Labor Disabled Persons of the Republic of Kosovo (Applicant), represented by Mr. Azem Ejupi, lawyer.

Subject matter

2. The substance of the case filed with the Constitutional Court of the Republic of Kosovo (hereinafter: the Constitution) has to do with the request of the Union of Pensioners and Labor Disabled Persons of the Republic of Kosovo regarding the recognition of the statutory and social right for pension and disability insurance.

3. The Applicant, among others, requests from the Court to influence on state authorities to implement the Law on Pension and Disability Insurance of former SAP of Kosovo, where according to the Applicant, the abovementioned law has not been yet repealed by any other act. By this Law, the pensioners and labour disabled persons claim that the status of pensioners was regulated and they enjoyed the rights, provided by this law.

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (hereinafter: the "Law"), and Rule 28 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 2 December 2011, the Applicant submitted the Referral to the Court.

6. On 30 November 2012, the Court informed the Applicant about the registration of the Referral KI157/11.

7. On 5 January 2012, the President, with Decision GJR. KI157/11 appointed Judge Iliriana Islami as Judge Rapporteur. On the same date, the President of the Court, with Decision KSH. KI157/11 appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Altay Suroy (member) and Gjyljeta Mushkolaj (member).

8. On 26 November 2012, the President, by Decision GHR. 157/11, appointed JudgeKadri Kryeziu as Judge Rapporteur, who is replacing Judge Iliriana Islami, whose mandate as a Judge of the Court had ended on 26 June 2012 and appointed the members of new Review Panel composed of Judges:Robert Carolan (Presiding), Altay Suroy (member) and Arta Rama-Harizi (member) replacing Judge Gjyljeta Mushkolaj whose mandate as a Judge of the Court had also ended on 26 June 2012.

9. On 17 January 2013, 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. The Applicant states that since 1998 and until today the pensioners in Kosovo have not received the pension they deserve and they are still without health and social insurance, their status is not solved and they are in an inconvenient financial situation. The Applicant claims that the most vulnerable are pensioners who paid their contributions for pension and disability insurance, including the family pensioners.

11. The Applicant alleges that the pensioners were initially discriminated by the regime of Serbia, whereas after 1999 by UNMIK and lately by the governmental authorities of the Republic of Kosovo. The Applicant states among others:

> *"Since the end of 1998 until August 2002, pensioners have not been paid any amount of pension. After the approval of UNMIK Regulation Nr.2001/35, dated December 21, 2001, on Pensions in Kosovo, as amended by Regulation Nr.2005/20, and the Law Nr.2002/1 on the Methodology of determining the level of basic pension in Kosovo and setting the date for the provision of basic pension, from July 1, 2002, has started a certain payment of basic pension, of 28 German Marks per month, for all persons aged over 65."*

12. The Applicant mentions the fact that a lot of pensioners contribution payers, have acquired the right to pension pursuant to the Law on Pension and Disability Insurance of former SAP of Kosovo (Official Gazette of SAPK, No. 26/83, 26/86 and 11/88). According to the Applicant, the abovementioned law has not been repealed yet by any act and according to the provisions of that law, the pensioner according to the acquired legal status was entitled not only to receive pension, calculated based on work experience and the amount of paid contributions, but had a range of other privileges and rights.

13. The Applicant alleges that the pensioners today do not enjoy any of the rights obtained according to the Law at the time when they retired. They only receive a certain amount of 45+35 euro 80 euro in total and nothing more, regardless of duration of work experience or the amount of the paid contributions.

Applicant's allegations

14. The Applicant alleges that by denying the rights obtained according to the Law on Pension and Disability Insurance, were violated the rights of pensioners contribution payers, guaranteed by Article 22, Article 23, Article 51 paragraph 1 of the Constitution, Article 17 paragraph 2 of Universal Declaration on Human Rights, Article 26 of the International Covenant on Civil and Political Rights and its protocols and Article 9 of European Convention on Protection of Human Rights and Fundamental Freedoms.

Assessment of admissibility of the Referral

15. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution, as further specified in the Law and the Rules of Procedure of the Court.

16. The Applicant seems to be unsatisfied with the governmental authorities that are competent to foresee and regulate issues that have to do with social policies, respectively the regulation of the status of pensioners and of labor disabled persons.

17. The Court observed that the Applicant did not specify any act of public authority *(see , Article 48 of the Law on Constitutional Court),* by which he alleges that his rights guaranteed by the Constitution and International Conventions that are directly applied in the Republic of Kosovo were violated. He only raised the issues that have to do with the regulation of social policies, respectively the improvement of welfare of pensioners and labor disabled persons, requesting from the Court to clarify why the requests of the Applicant, regarding the rights of pensioners and of labor disabled persons were not taken into account by the state authorities.

18. The Court is referred to Article 113.1 and 7 of the Constitution, which provides:

> Article 113 [Jurisdiction and Authorized Parties]
>
> *1. "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties."*

19. In specific case, the Applicant requested from the Court to call on governmental authorities, respectively on respective ministries to draft the law on pensioners and labor disabled persons, as well as to adopt the Law on Health Insurance.

20. In this regard, the Court refers to Article 4 of the Constitution which clearly establishes the form of government and the separation of powers:

> *"Article 4 [Form of Government and Separation of Power]*
> *[…]*
> *2. The Assembly of the Republic of Kosovo exercises the legislative power.*
> *[…]*
> *4. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentarian control."*

21. Article 65 of the Constitution clearly sets forth the competencies of the Assembly of the Republic of Kosovo:

> *Article 65 [Competencies of the Assembly]*
>
> *[…]*
>
> *(1) adopts laws, resolutions and other general acts;*

22. Further, Article 93 of the Constitution clearly sets forth the competencies of the Government:

> *Article 93 [Competencies of the Government]*
>
> *The Government has the following competencies:*
>
> *(1) proposes and implements the internal and foreign policies of the country;*
>
> *[…]*
>
> *(3) proposes draft laws and other acts to the Assembly;*
>
> *(4) makes decisions and issues legal acts or regulations necessary for the implementation of laws;*

23. However, Article 113 of the Constitution has clearly provided who may be considered as authorized party to refer constitutional matters regarding the constitutional review of an act of a public authority and the constitutional review of a law.

24. In fact, the Applicant in this specific case acts as a legal person and refers to Article 113.7 of the Constitution as a legal basis for the filing of his Referral.

25. The Court analyzed and carefully assessed the requests of the Applicant and concluded that the Applicant as legal person in specific case cannot be considered as an authorized party that may refer constitutional matters *in abstracto* regarding the regulation of status of pensioners and labor disabled persons as well as on the improvement of their social welfare, based on the pension contributions paid over the years.

26. Apart from this, the Constitution of the Republic of Kosovo does not provide *actio popularis* which is a modality of individual appeals, which

enable each individual who attempts to protect public interest and constitutional order to address the Constitutional Court with certain questions and requests, indicating a violation of the constitutional rights of a certain individual or group.

27. Therefore, the Court considers that the Applicant is not an authorized party to refer a constitutional matter *in abstracto*regarding the regulation of status of pensioners and of labor disabled persons, for this reason pursuant to Article 113.1 of the Constitution this Referral is considered as inadmissible.

28. Consequently, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 56.2 of Rules of Procedure, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 of the Constitution and Rule 56.2 of the Rules of Procedure, on 17 January 2013, unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible;

II. This Decision shall be notified to the Parties and it 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
Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

KO 09/13, President of the Assembly, Mr. Jakup Krasniqi, date 25 Fabruary 2013 - Confirmation of the proposed constitutional amendment, submitted by the President of the Assembly of the Republic of Kosovo on 18 January 2013 by letter No. 04-DO-1357.

Case KO 09/13, Judgment of 29 January 2013

Keywords: amnesty, confirmation of proposed constitutional amendment, President of the Assembly

The applicant, Mr. Jakup Krasniqi, President of the Assembly of the Republic of Kosovo, filed a Referral pursuant to Article 113.9 of the Constitution of Kosovo. The Applicant submitted to the Court "the amendment proposed by the Government of Kosovo in the Constitution of the Republic of Kosovo (...) to confirm whether the proposed amendment would diminish human rights and freedoms set forth in Chapter II of the Constitution".

On the issue of the admissibility of the Referral, the Court held, that the Referral was admissible because the Applicant submitted the referral for a prior assessment of the proposed amendment of the Constitution in accordance with Article 113.9 of the Constitution. As to the Constitutionality of the proposed constitutional amendment, the Court held that the proposed amendment is in compliance with the Judgment of the Constitutional Court Case No. KO 61/12 and the Court confirmed that the new proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of the Constitution.

JUDGMENT
in
Case KO09/13
Confirmation of the proposed constitutional amendment, submitted by the President of the Assembly of the Republic of Kosovo on 18 January 2013 by letter No. 04-DO-1357

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Introduction

1. On 22 June 2012, the President of the Assembly of Kosovo submitted the first Referral (Case No. KO 61/12) to the Constitutional Court of Kosovo regarding the proposal of the Government for constitutional amendments, requesting the confirmation whether the amendments proposed by the Government diminish any of the rights and freedoms, as provided by Chapter II of the Constitution.

2. On 31 October 2012, the Constitutional Court decided:

> ***"...***
>
> - *By unanimity*
>
> *I. The Referral submitted by the President of the Assembly on 22 June 2012 containing proposed amendments to the Constitution of the Republic of Kosovo is admissible;*
>
> - *By majority*
>
> *II. The new proposed Amendment 1 -Amnesty, first paragraph in respect to* ***"persons designated by name"****, diminishes*

human rights and freedoms set forth in Chapter II of the Constitution;

- *By unanimity*

III. The new proposed Amendment 1 -Amnesty, second and third paragraphs, does not diminish human rights and freedoms set forth in Chapter II of the Constitution;

IV. The proposed Amendment 2 –Article 108 [Kosovo Judicial Council] of the Constitution does not diminish human rights and freedoms set forth in Chapter II of the Constitution;

…"

3. On 17 December 2012, the Presidency of the Assembly (Decision No. 04-P-124/k), pursuant to Article 67.6 [Election of President and Deputy Presidents] of the Constitution which provides that "*The President and the Deputy Presidents form the Presidency of the Assembly. The Presidency is responsible for the administrative operation of the Assembly as provided in the Rules of Procedure of the Assembly."*and Article 82 [Procedures for amending the Constitution] of the Rules of the Assembly which provides that "*the Government, the President or one-fourth (1/4) of the members of the Assembly, may propose the amendment of the Constitution, 2. Any amendment shall require the approval of two thirds (2/3) of all members of the Assembly, including two thirds (2/3) of all members of the Assembly who hold reserved or set-aside seats for the representatives of non-majority communities in the Republic of Kosovo"* as well as the Judgment of the Constitutional Court in case KO-61/12, issued the conclusion to request from the Government of the Republic of Kosovo that, in the capacity of the proposer, it reformulate the proposal of Amendment 1 to the Constitution of the Republic of Kosovo, which has to do with amnesty, in compliance with the Judgment of the Constitutional Court no. KO-61/12.

4. On 11 January 2013, Deputy Prime Minister and Minister of Justice forwarded to the Prime Minister, Mr. Hashim Thaçi, the proposal for constitutional amendment introducing Amnesty as a competence of the Assembly of the Republic of Kosovo, in compliance with the instructions of the Constitutional Court as per the Judgment AGJ303/12 on the proposal for introducing Amnesty as a constitutional category. Furthermore, Deputy Prime Minister and Minister of Justice informed the Prime Minister, Mr. Hashim Thaçi, that the Ministry of Justice will

also prepare a general Law on Amnesty, where the procedures on approving respective laws for granting amnesty, exceptions, as well as the manner of its subsequent implementation will be clarified.

5. On 16 January 2013, the Government of the Republic of Kosovo, "pursuant to Article 92.4, of the Constitution which provides: "*The Government makes decisions in accordance with this Constitution and the laws, proposes draft laws, proposes amendments to existing laws or other acts and may give its opinion on draft laws that are not proposed by it"* and Article 93.4 of the Constitution which provides that the Government "*makes decisions and issues legal acts or regulations necessary for the implementation of laws* as well as Article 144.1 of the Constitution which provides that *The Government, the President or one fourth (1/4) of the deputies of the Assembly of Kosovo as set forth in the Rules of Procedure of the Assembly may propose changes and amendments to this Constitution*", adopted Decision No. 01/113 approving the proposal of the Ministry of Justice for amending the Constitution of the Republic of Kosovo (hereinafter: Proposals of the Government for amendment of the Constitution).

6. On 18 January 2013, the President of the Kosovo Assembly submitted to the Court "the amendment proposed by the Government of Kosovo to the Constitution of the Republic of Kosovo (...) to confirm whether the proposed amendment would diminish human rights and freedoms set forth in Chapter II of the Constitution".

Legal basis

7. The Referral is based on Articles 113.9 and 144.3 of the Constitution, Articles 20 and 54 of the Law No. 03/ L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter, the "Law"), and Rule 56 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 18 January 2013, the President of the Assembly of Kosovo referred to the Constitutional Court the Government's proposal of constitutional amendment requesting it to confirm whether the amendment proposed by the Government would diminish any of the rights and freedoms as provided by Chapter II of the Constitution.

9. On 25 January 2013, the President appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (presiding), Snezhana Botusharova and Ivan Čukalović.

10. On 25 January 2013, the President of the Assembly was informed that the Court registered the Referral.

11. On the same day, a copy of the Referral was delivered to the President of the Republic of Kosovo, the Prime Minister of the Republic of Kosovo and the Ombudsperson.

12. On 29 January 2013, after having considered the report of Judge Altay Suroy, the Review Panel made a recommendation to the Court on the admissibility of the Referral.

Assessment of the admissibility of the Referral

13. The Court must first examine whether the admissibility requirements are met as laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

14. Article 113.9 of the Constitution stipulates that:

"The President of the Assembly of Kosovo refers proposed constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights andfreedoms guaranteed by Chapter II of the Constitution".

15. The President of the Assembly submitted the referral for a prior assessment of the proposed amendment to the Constitution. Therefore, pursuant to Article 113.9 of the Constitution, the President of the Assembly is an authorized party to refer this case to the Court.

Scope of the constitutional review

16. The President of the Assembly submitted one (1) amendment proposed by the Government of the Republic of Kosovo.

17. The confirmation of the constitutionality of the proposed amendment by this Court will be made not only by taking into account the human rights and freedoms contained in Chapter II, but also the entire letter and spirit of the constitutional order of the Republic of Kosovo, as further explained under paragraphs 56 to 71 of the Judgment delivered in Cases K.O. 29/12 and K.O. 48/12 (Proposed Amendments of the Constitution

submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, respectively), on 20 July 2012.

Constitutionality of the proposed constitutional amendment
Proposed Amendment 1: Amnesty

18. Amendment 1 proposes adding a new paragraph 15 to Article 65 of the Constitution of the Republic of Kosovo, which reads as follows:

> *"(15) grants amnesty in accordance with respective law, which shall be approved by two-thirds (2/3) of the votes of all the members of the Assembly."*

19. Thus, the proposed amendment suggests adding to the existing competencies of the Assembly a new competence, namely, the competence to grant amnesty in accordance with respective law which shall be approved by two-thirds (2/3) of the votes of all members of the Assembly.

20. The Court considers that the proposed amendment is in compliance with the Judgment of the Constitutional Court Case No. KO 61/12. The Court confirms that the new proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.9 and Article 144.3 of the Constitution, Article 20 of the Law on the Constitutional Court and in accordance with the Rule 56(1) of the Rules of Procedure, in the session held on 29 January 2013, unanimously

DECIDES

I. The Referral filed by the President of the Assembly on 18 January 2013 containing the proposed amendment to the Constitution of the Republic of Kosovo is admissible;

II. The new proposed amendment 1 – Amnesty, Article 65 paragraph 15 of the Constitution does not diminish human rights and freedoms set forth in Chapter II of the Constitution;

III. This Decision shall be notified to the parties and it 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
Altay Suroy

President of the Constitutional Court
Prof. dr. Enver Hasani

KI 51/09, KI 31/10, KI 68/11, KI 99/11, KI 112/11, KI 126/11 KI 07/12, KI 64/12, Vahide Hasani, Alltane Krasniqi, Fetije Berisha, Fahrije Ibrahimi, Sadije Pranaj, Raza Gashi, Nazmije Salihu, Shpresa LLadrovci, date 26 February 2013- Constitutional Review of 8 (eight) individual Judgments delivered by the Supreme Court of the Republic of Kosovo

Cases KI51/09, KI31/10, KI68/11, KI99/11, KI112/11, KI126/11 KI07/12, KI64/12, Resolution on Inadmissibility of 22 January 2013

Keywords: individual referral, inadmissible referral, manifestly ill-founded referral, pensions and invalidity insurance fund, provisional compensation, subjective rights

The referral is based on Article 113.7 of the Constitution, Article 20 of the Law and Rule 56 of Rules of Procedure. The Applicants, among other, stated that the decisions of the Supreme Court of the Republic of Kosovo approving the decision of Kosovo Energy Corporation to terminate their payments as heirs of their deceased husbands, were unfair and violated their rights guaranteed by the Constitution.

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 regular courts. Further, the Court, also reiterated that agreements for temporary compensation cannot be transferred to the Applicants because those agreements had been established by their deceased husbands and not them. Due to the above mentioned reasons, the Court pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 36 of the Rules of Procedure decided to reject as inadmissible the Applicants' referral.

RESOLUTION ON INADMISSIBILITY
in
Case No.
KI51/09, KI31/10, KI68/11, KI99/11, KI112/11, KI126/11 KI07/12, KI64/12,
Applicants
Vahide Hasani, Alltane Krasniqi, Shpresa Lladrovci, Fetije Berisha,Fahrije Ibrahimi, Sadije Pranaj, Raza Gashi, Nazmije Salihu
Constitutional Review of 8 Individual Judgments of the Supreme Court of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Introduction

1. This report concerns Referrals made by Applicants listed below which were lodged with the Constitutional Court by eight (8) **widows** of former employees of the Kosovo Energy Corporation (KEK) between 2009 and 2012.

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, "Isuf Mërlaku and 25 other former employees of Kosovo Energy Corporation" and "Ilaz Halili and 20 other former employees of Kosovo Energy Corporation".

Applicants in the present case are as follows:

3. In this Judgment for ease reference Applicants may be referred to collectively as "Vahide Hasani and others.

1. Vahide Hasani,
2. Alltane Krasniqi,
3. Shpresa Lladrovci
4. Fetije Berisha,
5. Sadije Pranaj,
6. Fahrije Ibrahimi,
7. Raza Gashi
8. Nazife Xhafolli,

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 eight (8) individual cases of 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," 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 Applicants' late husband in this Referral, as with Applicants in the said Judgments, 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 Applicants', KEK terminated the payment stipulated by the Agreements following the death of their spouses without any notification. Applicants claim that such an action is in contradiction to the Agreements signed by their husbands.

14. Applicants' also claim that it is well known that the Kosovo Pension Invalidity Fund has not been established yet.

15. 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.

16. The Municipal Court in Prishtina approved Applicants "claims and ordered monetary compensation. The Municipal Court of Prishtina found (*e.g. the Judgment C. Nr. 2267/2006 of 20 April 2007 in the case of the first Applicant Vahide Hasani*) that the conditions provided by Article 3 of the Agreements have not been met. Article 3 of the Agreements provides for salary compensation until the establishment of the pension invalidity fund. "Which means an entitlement to a retirement scheme, would not have been possible for her husband if he were still alive, because he would have still not reached the age of 65 and that the applicant inherits the rights of her husband to continue to receive these payments".

17. 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 Applicants because of the invalidity of Applicants and that they cannot claim continuation after the death of their husbands.

18. 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 Applicants were entitled to an invalidity pension.

19. The District Court in Prishtina rejected the appeals of KEK and found their submissions ungrounded.

20. 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 Applicants were entitled to the pension provided by the 2003/40 Law and that because of humanitarian reasons it continued to pay monthly compensation for 60 months.

21. 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 Applicants claim.

22. 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.

23. The Supreme Court rejected Applicants request stating that "the fact that the Pension-Invalidity fund is not functional does not affect Applicants case as the Agreement was signed between the Applicant's late husband and thus according to Article 359 of the Law on Obligation Relationships (LMD),KEK has no further obligations.

24. The Supreme Court stated that KEK had no further obligation to Applicants. Furthermore, Applicants continued to get payments from KEK for 60 months according to the Statute which was entered into force in 2002.

25. Some of Applicants have requested from the Supreme Court to the reopen the procedures based on the letter of the Ministry of Social Welfare confirming that the Invalidity Pension fund is not functional to this date.

26. 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)*".

27. The Supreme Court rejected Applicants request to reopen the procedure stating that the issue that the Kosovo Pension Invalidity Fund in not yet functional does not affect Applicants' case because the temporary agreement was signed by their late husbands.

28. The Supreme Court reiterated that "the right for Temporary Compensation cannot be transferred to other persons since it is a subjective right linked closely with the employer and employee"

29. The Supreme Court held that KEK fulfilled its obligations by continuing to pay Applicants' 105 Euros for 60 months.

Complaints

30. Applicants complain that their rights have been violated because KEK discontinues the payments following the death of their husbands who were the signatories of these agreements although the condition prescribed in article 3, the establishment of the Kosovo Pension-Invalidity Insurance Fund) had not been fulfilled.

Summary of the proceedings before the Court

31. Between 2009 and June 2012, Applicants individually, filed the Referrals to the Constitutional Court.

32. Between 2010 and 2012, the Constitutional Court informed the Supreme Court of Kosovo regarding Applicants' referrals.

33. On 17 February 2012, 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.

34. On 15 October 2012, the President by Decision (No. KSH.KI-KEK/VI) appointed Judge Ivan Čukalović as member of the Review Panel after the term of office of Judge Iliriana Islami as Judge of the Court had ended.

35. On 17 October 2012 the Review Panel reviewed the report of the Judge Rapporteur and recommended to the full court the inadmissibility of the referrals.

Admissibility

36. 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.

37. 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 [GC], no.30544/96, § 28, European Court on Human Rights [ECHR] 1999-I).

38. The Court recalls the admissibility criterion provided by article 34 of the Convention, according to which any application has to be lodged by an applicant who could claim to be the victim of a violation of the Convention. A link should also be established between the applicant and the damage that he or she suffered because of the alleged violation.

39. The Supreme Court in its operative part of the decision stated that "The right cannot be transferred to other persons since it is a subjective right linked closely with the employer and employee and that this issue relates to a temporary compensation for termination of employment and not legal pension and thus the fact that the Pension-Invalidity fund is not functional does not affect Applicants case as the Agreement was signed between Applicants' husband (deceased) and thus according to Article 359 of the Law on Obligations, KEK has no further obligations".

40. Furthermore, Article 51 of the Constitution [Health and Social Protection] which is referred to by some of the above mentioned Applicants relating to pensions, merely states that, " Basic social

insurance related to unemployment, disease, disability and old age shall be regulated by law." It does not mandate that a citizen have a pension or dictate how a person may qualify for a pension.

41. With regards to the reasoning of the Constitutional Court in its previous Judgments related to former employees of KEK, the latter cannot be applied to the present Applicants' for the reason that they are were not signatories of the agreement signed with KEK and as such is of non-transferable nature.

42. Furthermore, Applicants' do not directly specify either any constitutional provision that could have been violated by the decision that they are 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.

43. Having examined both administrative 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 as to the Admissibility of Application no.17064/06 of 30 June 2009).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 114(7) of the Constitution, Article 20 of the Law on the Constitutional Court and Rule 36 of the Rules of Procedure, on 17 October 2012 unanimously

DECIDES

I. To Join the Referrals;

II. TO REJECT the Referrals as Inadmissible;

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

IV. This Decision is effective immediately.

Judge Rapporteur
Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 85/12 and KI 86/12, Adriatik Gashi and Burim Miftari, date 26 February 2013- Constitutional Review of the Judgment of the Supreme Court, Pkl. No. 45/12 dated 18 June 2012, together with the request for application of interim measure

Case KI85/12 and KI86/12, Resolution on Inadmissibility of 22 January 2013

Keywords: individual referral, request for interim measure, right to a fair and impartial trial, criminal procedure, 'beneficium cohaesionis' principle

The Applicants filed their Referrals separately, based on Article 113.7 of the Constitution of Kosovo, alleging that the Judgment of the Supreme Court, Pkl. No. 45/12 violated their rights guaranteed by Article 31 [Right to a Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights] of the Constitution, because, according to the Applicants, the appeal courts of the case, according to the principle *beneficium cohaesions (benefit of cohesion)*, should have treated the appeals of Mr. Burim Miftari and Mr. Adriatik Gashi as timely, because they were sentenced by the same judgment and as the co-perpetrators of the criminal offences with the convict Mr. H.G., whose defense, *ex-officio,* filed an appeal within the legal time limit and that it was reviewed according to merits. The Applicants also requested that the Constitutional Court imposes interim measure, ordering the release of the Applicant from further serving of sentence, because by this, according to him, the irreparable damage would be avoided.

The Court reiterated that it is not the fact-finding court, and on this occasion it emphasized that the correct and complete determination of factual situation is a full jurisdiction of the regular courts, as it is in this particular case of the Supreme Court, by rejecting the request for protection of legality of the convicts Mr. Adriatik Gashi and Mr. Burim Miftari, and that its role (the role of the Constitutional Court) is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and, therefore, it cannot act as a "fourth instance court".

In addition, the Court found that the Applicants, apart from stating that by interim measure the irreparable damage for the Applicants would be avoided; they did not substantiate this referral by any facts to justify the necessity of the imposition of this measure. They did not explain why the damage would be irreparable and why by non-application of the interim measure public interest would be violated.

Therefore, the Court decided that the Applicant did not sufficiently substantiate his allegation and it cannot be concluded that the referral was grounded, and thus found the same inadmissible in entirety.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI85/12 and KI86/12
Adriatik Gashi and Burim Miftari
Constitutional Review of Judgment of Supreme Court in Pkl.no. 45/12 dated 18.06. 2012, together with request for application of interim measure

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
Kadri Kryeziu,
Judge
Arta Rama – Hajrizi, Judge

Applicants

1. Applicants are Mr. Adriatik Gashi and Mr. Burim Miftari from Gjakova, currently serving the sentence in Dubrava prison in Istog, who by power of attorney are represented by Mr. Teki Bokshi, lawyer from Gjakova (hereinafter: the Applicant).

Challenged decision

2. The challenged decision of public authority by which are alleged violations of rights guaranteed by the Constitution of Kosovo is the Judgment of the Supreme Court in Prishtina Pkl.no 45/12 dated 18. 06. 2012, by which was rejected the Applicant's request for protection of legality, which according to personal claim was served on Applicants on 18 September 2012.

Subject matter

3. The subject matter submitted to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) on 24 September 2012 is the constitutional review of the Judgment of Supreme Court in Prishtina Pkl. no. 45/12 dated 18.06. 2012, by which the Supreme Court rejected as ungrounded the request of the Applicants Burim Miftari and Adriatik

Gashi for protection of legality filed against the judgment of Municipal Court in Gjakova P.no. *258/2002* dated 27.10.2011, and the judgment of the District Court in Peja Ap.no. *9/2012* dated07.02.2012.

Legal basis

4. Article 113.7 of the Constitution, Articles 22 and 27 of the Law Nr.03/L-121 on Constitutional Court of the Republic of Kosovo, dated 15 January 2009, and the Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

5. On 24 September 2012, the Constitutional Court received by mail the Referral with the request for imposition of interim measure, filed by the lawyer Teki Bokshi, who represents the Applicant Mr. Adrijatik Gashi from Gjakova and this Referral was registered in the Court with no. KI 85/12.

6. On the same date, the Constitutional Court received the Referral with the request for imposition of interim measure, filed by the lawyer Teki Bokshi, who represents the Applicant Mr. Burim Miftari from Gjakova and this Referral was registered in the Court with no. KI 86/12.

7. On 13 November 2012, the Constitutional Court sent a letter to the Applicants' representative, by which he requested additional documentation necessary for further processing of the requests.

8. On 05 December 2012, the Court received by mail the additional documentation from the representative of the Applicant when were attached to the Referral, the Judgment of Municipal Court in Gjakova P.nr. 258/2002 dated, 27.10.2011, Appeal of co-defendant Hajrullah Guta, against Judgment of Municipal Court in Gjakova and the Judgment of District Court in Peja Ap.no. 9/2012 dated 7.02.2012.

9. On 29 November 2012, the President of the Court issued an order urdh. Ki 85/12 by which ordered the joining of referrals Ki 85/12 and Ki86/12 by appointing the judge Kadri Kryeziu as Judge Rapporteur, while by decision, appointed the Review Panel Composed of judges: Robert Carolan, Altay Suroy and Prof.dr. Enver Hasani.

10. On 21 January 2013, 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 27 October 2011, the Municipal Court in Gjakova, deciding on the criminal matter against the accused Adriatik Gashi, H.G., Burim Miftari and Sh.H., all from Gjakova, because as co-perpetrators they have committed criminal offence of Aggravated Theft, from Article 253 par. 1 item 1 in conjunction with Article 23 of PCCK and for criminal offences, of the attempted aggravated theft, from Article 253 par. 1 item 1 in conjunction with articles 20-23 of PCCK, according to Indictment PP. no. *211/2002* dated 27.06.2002 rendered Judgment P.no. 258/2002, by which found guilty the accused and sentenced them to following imprisonments:

> *"The accused Adriatik Gashi, to an aggregate punishment of imprisonment for a period of sixteen (16) months, a period which shall take account the time spent in detention from 12.04.2002 and until 09.05.2002.*
>
> *The accused Burim Miftari, to an aggregate punishment of imprisonment for a period of ten (10) months, a period which shall take account the time spent in detention from 12.04.2002 and until 09.05.2002.*
>
> *The accused Hajrullah Guta, to an aggregate punishment of imprisonment for a period of eight (8) months, on condition that he will not commit a criminal offence within a period of two (2) years.*
>
> *The accused Sherif Hoti, to an aggregate punishment of imprisonment for a period of two (2) months, on condition that within a period of one (1) year, he does not commit any other criminal offence."*

12. Against this Judgment, the lawyer Teki Bokshi, in capacity of the defence counsel of the accused Mr. H.G, ex-officio filed appeal due to serious violations of the provisions of criminal procedure, erroneous and incomplete determination of factual situation, erroneous application of the criminal law, the decision on criminal sanction, while the accused, now the convict, Mr. Adriatik Gashi and Mr. Burim Miftari have personally filed appeal.

13. On 7 February 2012, the District Court in Peja, deciding upon these appeals, rendered the Judgment Ap.no 9/12, by which rejected the

appeal Mr. H.G. as ungrounded, while the appeals of Mr. Adriatik Gashi and Mr. Burim Miftari rejected as out of time.

14. In the reasoning of the decision, the District Court in Peja stated that the Municipal Court in Gjakova in case of Mr. H.G., has determined the factual situation in correct and complete manner and that administration of evidence, including the pictures of the crime scene, where the criminal offences were committed, partial **admission of guilt** of the accused, the minutes of investigation etc. were correctly determined, while the punitive measures is proportional to the committed criminal offences. The Municipal Court took into account all mitigating circumstances for the accused, especially for the accused Mr. H.G.

15. The District Court had also held that *"The case files show that the accused Adriatik Gashi has been delivered the first instance judgment personally, since from the delivery slip, it may be viewed that he signed personally the delivery on 27.12.2011, while the appeal was only filed on 23.01.2012, which means 12 days after the expiry of legal deadline, while the accused Burim Miftari received the judgment on 23.12.2011, while his appeal was filed on 23.01.2012, also 16 days after the expiry of legal deadline,"* therefore rejected it as out of time.

16. Against this judgment of the convict, Mr. Adriatik Gashi and Mr. Burim Miftari have submitted the request for protection of legality, alleging that in the criminal offences for which they have been convicted, there was a relative and absolute statute of limitation, which in these circumstances makes illegal the criminal prosecution and the pronounced sentence against them.

17. On 18.06.2012, the Supreme Court of Kosovo rendered Judgment Pkl no/45/2012 by which "*Are rejected as unfounded the requests of the convict Adriatik Gashi and Burim Miftari for the protection of the lawfulness, presented against the judgment of the Municipality Court in Gjakovë P.nr 258/2002 dated 27.10.2011, and Judgment of the District Court in Peje Ap.nr 9/2012 dated 07.02.2012*."

18. The Supreme Court reasoned its judgment by complete and correct determination of factual situation by the court of lower instance, while in regard to the relative and absolute statute of limitation, the court held that this allegation of the appellant does not stand due to the fact that the flow of time limits has been interrupted several times by the procedural actions of the court and that "*while for none of the criminal offences the double prescribed period of time by law was not lapsed."*

Applicant's allegations for constitutional violations

19. The Applicant alleges that by the Judgment were violated: Article 21, par. 2., which states that " The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution", Artilce 31 - **[**Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies]Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights]

20. The Applicant also alleges that the appeal courts of the case according to the principle *beneficium cohaesionis (benefit of cohesion),* should have treated the appeals of Mr. Burim Miftari and Mr.Adriatik Gashi as on time, since they were sentenced by the same judgment and as co-perpetrators of the criminal offences with the convict Mr. H.G., the defence of whom *ex-officio* filed appeal within legal time limit and it was reviewed according to merits.

21. Applicant alleges that the courts of this trial should have applied Article 419 of PCCCK, which provides that "*If upon an appeal the court of second instance finds that the reasons which governed its decision in favour of the accused, and which are not of a purely personal nature, are also to the advantage of a co-accused who has not filed an appeal or has not filed an appeal along the same lines, the court shall proceed ex officio as if such appeal was also filed by the co-accused*."

22. The Applicant further alleges that the Constitutional Court should impose interim measure, ordering the release of the Applicant for further serving of sentence, since, according to him, by this the irreparable damage would be avoided.

Preliminary assessment of admissibility of the Referral and of the request for interim measure

23. In order to be able to adjudicate the Applicant's Referral, 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.

24. Regarding this is referred to Article 113.7 of the Constitution states:

> *"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 also takes into account the Rule 36 of the Rule of Procedures of the Constitutional Court where is stipulated:

"1. The CourtmayonlydealwithReferralsif:

c) the Referral is not manifestly ill-founded.

26. Referring to the Referral of the Applicant and to alleged violations of the constitutional rights, the Constitutional Court states that: the Constitutional Court is not the fact-finding court, and on this occasion it wants to emphasize that the correct and complete determination of factual situation is a full jurisdiction of the regular courts, such as in particular case is the role of the Supreme Court, by rejecting the request for protection of legality of the convicts Mr. Adriatik Gashi and Mr. Burim Miftari, and that its role (the role of the Constitutional Court) is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and, 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).

27. Taking into account the above, according to general rule, the Court will not oppose the findings and conclusions that derive from regular court instances such as the implementation of the specific law and of the internal law, assessment of evidence in the process, the fairness of result in a civil dispute or the guilt or not of an accused in a criminal matter.

28. In extraordinary cases, the Court may put into question these findings and conclusions, if they are tainted by a flagrant and evident arbitrariness, in contradiction with justice and fair trial, and which cause violations of the Constitution or the European Convention for Human Rights (hereinafter: ECHR) (*Syssoyeva and others against Lithuania* (de-registration) [DHM], § 89).

29. In this regard, the Constitutional Court notes that whether the courts which have decided regarding the appeals of Mr. Miftari and Mr. Gashi should have applied Article 419 of PCPCK or not, is the matter of the application of the legality and determination of facts regarding the case they have reviewed and these procedural actions have not caused consequences of violations of the rights, guaranteed by the Constitution, which are alleged by the Applicants.

30. If Article 419 of PCPCK, by basing on the legal principle *beneficium cohaesionis* (benefit of cohesion),should have been applied automatically or according to the court assessment, is the matter of the correct application of law and this is the competence of regular courts, furthermore when the law has foreseen that it is the court that: "*finds that the reasons which governed its decision in favour of the accused, and which are not of a purely personal nature, are also to the advantage of a co-accused...*" and in the specific case the District Court, evaluating among the other, mitigating circumstances for the convicts in the case of Mr. H.G. stated that these **circumstances have particularly** been applied (because he was blind and were too personal, so they would not be applied on other convicts and probably would not be to the advantage of the co-accused).

31. Constitutional Court also stresses that it is not the regular court that made impossible "access to justice" and/or it made "denial of legal remedy" to applicants, but it is the unjustifiable delay of the parties in exercising the guaranteed right to legal remedy (appeal within the foreseen deadline) what caused the consequences and in this regard the Constitutional Court does not find that the court in entirety was arbitrary and that at the end would result in violation of the human rights, as laid down in the Constitution or ECHR.

Regarding the interim measure

32. The Constitution of Kosovo is referred to the issue of interim measure in Article 116 [Legal Effect of Decisions] where in item 2 is stipulated: *"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."*

33. A legal definition on interim measures has also the Law on Constitutional Court (No. 2008/03-L-121), which in Article 27 item 1 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*."

34. From the constitutional and legal definition of the "legal institution" of interim measure, it is concluded that for its application is necessary the fulfillment of two basic criteria a) possible irreparable damage that would be caused to the Applicant, if the Court does not apply interim

measure and b) in case that the application of interim measure would protect public interest.

35. The representative of the Applicant, apart from stating that by interim measure would be avoided the irreparable damage for the Applicants; he did not substantiate by any fact this referral, reasoning the necessity of the imposition of this measure. He did not explain why the damage would be irreparable and why by non-application of the interim measure would be violated public interest.

36. Under these circumstances, the Applicant did not "sufficiently substantiate his allegation" and it cannot be concluded that the referral was grounded, therefore the Court should reject the request for interim measure. Pursuant to Rule 36 paragraph 2, item c and d, the Court finds that it should reject the Referral in entirety as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 27 and 46 of the Law, and Rules 36, 55 and 56 (2) of the Rules of Procedure, on 21 January 2013, 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 Constitutiona Court**
Kadri Kryeziu	Prof. Dr. Enver Hasani

KI 41/12, Gezim and Makfire Kastrati, date 26 February 2013- Against Municipal Court in Prishtina and Kosovo Judicial Council

Case KI 41/12, Judgement of 25 January 2013

*Keywords:*Municipal Court in Prishtina, Kosovo Judicial Council, Individual Referral, judgment, right to life, right to legal remedies, judicial protection of human rights.

The Applicants are the parents of the deceased D.K., who after some misunderstandings followed by threats to life from here former partner, had requested emergency protection order from the Municipal Court in Prishtina. The Municipal Court in Prishtina did not respond to D.K. neither for approval or disapproval of her request. After a few days, D.K tragically lost her life as a result of the wounds received by gunshots from her former partner.

The Applicants filed the Referral based on Article 117.3 of the Constitution of Kosovo, alleging that the Municipal Court did not act according to the Law No. 03/L-182 on Protection against Domestic Violence. According to the Applicants, the violation is not a consequence of a court decision, but of inaction of the Municipal Court in Prishtina, consequently by its inaction it violated Articles 25 [Right to Life], 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo. The Applicants also allege that Kosovo Judicial Council, not only does not address the issue of D.K. and the violation of her rights, but it does not even offer legal remedies for the future cases of domestic violence when the victims request actions from municipal courts, but they do not act at all.

The Court found that the Referral of the Applicants is admissible since it meets all the requirements of admissibility which are foreseen by the Rules of Procedure. In assessing the merits of the Applicants' Referral, the Court concluded that the Municipal Court in Prishtina was responsible for taking actions foreseen by the Law on Protection against Domestic Violence and that its inaction represents violations of constitutional obligations that derive from Article 25 of the Constitution and Article 2 of ECHR. Further, the Court concluded that the inaction of the Municipal Court in Prishtina regarding the request of the deceased D.K. for issuing an emergency protection order, as well as the practice developed by KJC in not addressing the inaction of regular courts, when they should, has obstructed the victim and the Applicants in exercising their rights to effective legal remedies, as foreseen by Articles 32

and 54 ofthe Constitution and Article 13 of ECHR.

JUDGMENT
in
Case No. KI 41/12
Applicants
Gëzim and Makfire Kastrati
against
Municipal Court in Prishtina and Kosovo Judicial Council

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicants

1. The Applicants are the parents of the deceased D. K., Mr. Gëzim Kastrati and Mrs. Makfire Kastrati with residence in Prishtina, represented by the Law Firm "Sejdiu & Qerkini" l.l.c. based in Prishtina.

Subject matter

2. The Applicants allege that the Municipal Court in Prishtina did not act according to the Law No. 03/L-182 on Protection against Domestic Violence. Consequently, the violation is not a consequence of a court decision, but of inaction of the Municipal Court in Prishtina.

Legal basis

3. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 21 of the 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, Rules of Procedure).

Proceedings before the Court

4. On 17 September 2012, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court"), alleging that the Municipal Court in Prishtina by its inaction violated Articles 25, 31, 32 and 54 of the Constitution of the Republic of Kosovo.

5. On 23 April 2012, the President appointed Judge Iliriana Islami asJudge Rapporteur and the review Panel composed of Judges: Almiro Rodrigues (Presiding), Kadri Kryeziu and Enver Hasani.

6. On 4 May 2012, the Constitutional Court requested to the Applicant additional information and documents.

7. On 7 May 2012, the Constitutional Court informed the Municipal Court in Prishtina and the Kosovo Judicial Council (hereinafter, KJC) about the submitted Referral and invited them to submit their comments regarding the filed allegations.

8. On 8 May 2012, the Applicant submitted to the Constitutional Court a submission for expansion of the initial Referral, requesting the review of allegation for violation of right to life, provided by Article 25 of the Constitution, Article 3 of Universal Declaration of Human Rights and Article 2 of the European Convention of Human Rights (hereinafter, ECHR).

9. On 11 May 2012, the Applicant submitted additional information and documents, requested by the Constitutional Court on 4 May 2012.

10. On 31 May 2012, the Constitutional Court informed the Municipal Court in Prishtina and KJC on the expansion of the initial Referral by the Applicant, and requesting from the Municipal Court in Prishtina to offer comments regarding the allegations filed by the Applicant.

11. On the same date, the Constitutional Court requested from the Municipal Court in Prishtina, to submit complete documentation of the case of the deceased and to the KJC to provide taken information regarding the case of the deceased. So far, no response was received from the Municipal Court in Prishtina.

12. On 7 June 2012, the Court received a response from KJC, informing about the steps taken by KJC regarding the above-mentioned case.

13. On 2 July 2012, the President replaced Judge Iliriana Islami as Judge Rapporteur, due to her mandate expiring, with Judge Altay Suroy.

14. On 25 January 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the admissibility of the Referral.

Summary of facts

15. The Applicants are the parents of D. K., born on 18 February 1984 in Prishtina, who was deprived of life on 18 May 2011. D. K. lived with her family until 10 February 2000.

16. During secondary school, D. K. met A.J., with whom she established a personal relationship and on 2 February 2000 they decided to establish an extra marital union.

17. On 2 August 2003, a girl was born to D.K. and A.J.

18. On 17 January 2011, D. K. filed a Claim for Dissolution of the Extramarital Union with A.J., because of deterioration of their relationship.

19. After filing the claim, D. K. took their daughter and they went to live to her parents.

20. On 26 April 2011, D. K. submitted a request to Municipality Court in Prishtina, specifying changes to the original claim of 17 January 2011, requesting that the subject of review to be only the matter of custody of their daughter to care, food and education.

21. On 26 April 2011, as a consequence of continuous threats made by A.J. against D.K. and their daughter, D.K. submitted a request to the Municipal Court in Prishtina for issuance of an emergency protection order against Domestic Violence, based on Article 15 of the Law No. 03/L-182.

22. On 18 May 2011, D. K. passed away after receiving wounds to her neck from the gunshot fired by A.J. Their daughter A. was sent to the parents of A. J. in their residence “AS” Hotel.

23. On 30 May 2011, the parents of D. K. (the Applicants) submitted a request for Specification of Claim, submitted to the Municipal Court in

Prishtina by D. K. on 17 January 2011, where they requested that the respondent is S. J. (the father of A. J.).

24. On 29 July 2011, the non-governmental organization CLARD (Centre for Legal Aid and Regional Development), according to the power of attorney submitted (letter 01/031-1031) to KJC a "request for efficacy in implementation of the Law against Domestic Violence", focusing on the case of D.K.

25. On 29 September 2011, the non-governmental organization CLARD submitted a letter before the KJC (01/031-1031), insisting to receive information or response from KJC on the beforehand submitted request.

26. On 07 November 2011, the non-governmental organization CLARD received a response to the letter 01/031-1031 from KJC, stating that the request will be treated in one of the coming meetings of the Council. It is also suggested, for certain cases where CLARD considers that the appointed judges failed to implement the law, to initiate investigations in the Office of the Disciplinary Counsel (Law on Kosovo Judicial Council, Chapter VII, Article 43, 44 and 45).

Applicant's allegations

27. The Applicants allege that the Municipal Court of Prishtina, by its inaction in compliance with its constitutional and legal obligation to deal with the request for the emergency protection order, has violated the individual rights of D.K. and indirectly, of the Applicants, guaranteed by Articles 25, 31, 32 and 54 of the Constitution of the Republic of Kosovo and Articles 2, 6 and 13 of the European Convention for human Rights (hereinafter, ECHR).

28. Moreover, the Applicants allege that the Constitutional Court addresses this issue with an aim of prevention of similar tragic cases in the future as well as to increase public awareness about the urgency of functionality of the regular courts.

29. The Applicants further state that "The Municipal Court of Prishtina, had an obligation to act within twenty four (24) hours from the moment, D.K. submitted the request for an emergency protection order. That court did not act at all in this case. The review of the respective legislation shows that concerning legal remedies in cases of inaction of the Municipal Court of Prishtina, when it should act, as obliged by Article 19 of the Law No. 03/L-182 on Protection against Domestic

Violence, it can be concluded that there are no legal remedies which may be used by the victim in the case of inaction by the Municipal Court."

30. The Applicants further state that "Article 19 of the Law No. 03/L-182 on Protection against Domestic Violence provides only appeal procedures against the court decisions for a protection order, but it does not provide legal remedies to the applicants for the requests for protection in cases when the court does not act at all."

31. Furthermore, according to the Applicants, "In the same way, the Law No. 03/L-006 on Contentious Procedure provides a series of legal remedies-including the appeal, revision, repetition of procedure and protection of legality but all these legal remedies do not address the case when the alleged constitutional violations are a consequence of the inaction of the public authority (non-existence of the court decision). At the same time, the Law No. 03/L-223 on Kosovo Judicial Council, in the Articles 33-49, provides only the initiation of disciplinary procedure and the sanctions against the judges or the lay judges for inappropriate behavior. But, this law does not provide legal remedies for the current circumstances, when the Court does not act in the protection of the rights guaranteed by the Constitution and international conventions".

32. The Applicants insist that "in this case, not only that the exhaustion of legal remedies is not effective, in fact it is impossible, since legal remedies do not exist at all."

33. The Applicants further state that, through the NGO CLARD, they addressed KJC, requesting the implementation of the Law on Protection against Domestic Violence, with a purpose to prevent the negligence of regular courts, which results in the violation of individual rights of other victims. But, according to the Applicant, this addressing was not fruitful too, since initially, the KJC has not answered to the letters sent through CLARD, and later made a response that the issue will be addressed in the next meeting of the Judicial Council, but in fact, the Applicants have not received any response until 26 March 2012.

34. The Applicants state that, on 26 March 2012, through the NGO CLARD, they have received a letter from KJC, by which they were informed that the KJC sent to the Municipal Courts its decision, which instructs those courts to implement the Law No. 03/L-182 on Protection against Domestic Violence. By this, according to the Applicants, "The KJC, not only, does not address the issue of D. K. and the violation of her rights, but it does not even offer legal remedies for the future cases of domestic

violence when the victims request actions from municipal courts, but they do not act at all."

35. Furthermore, the Applicants allege that "thelack oflegal remedies, theoretical and practical, in thiscasecan bequalifiedas a violationof individual rights. Article13ofthe ECHRandArticle32of the Constitutionguarantee the right to legal remedies. The LawNo.03/L-182 onProtectionagainst Domestic Violencedoes not provide legal remediesatall tothe Applicants for the requestsfor a protection orderfrom violencein the eventthe courtdoes not actat all.Therefore, the impossibilityof accessto legal remediesin the abovementioned case in itselfimplies aviolation ofrightsguaranteed by theConstitutionand conventions."

36. In the elaboration of their allegation for violation of Article 25 of the Constitution and Article 2 of ECHR, the Applicants refer to the case law of the European Court for Human Rights (hereinafter, the ECtHR) stating that "This Court, in the case *Osman v. The United Kingdom* has assessed that the person, who alleged that his right to life has been violated should prove that (1) the authority knew or ought to have known about the real and immediate risk to life of identified individual or individuals from the criminal offences of a third party and (2) failed to take measures within the scope of its competence, which judged reasonably, might have been expected to avoid this risk. Therefore, the state has an obligation to act when the abovementioned requirements are proved by the individual,in contrary it is qualified that it violated the person's right to life.

37. Moreover, the Applicants claim that "ECtHR goes a step further and rules that an individual, in order to keep the state responsible for violation of the right to life, should only prove that the authority did not do all that could reasonably be expected of them to avoid a real and immediate risk to life for which they knew or ought to have known."

38. The Applicants further state that "There are a series of cases where the ECtHR has adjudicated that the public authority has violated the right to life in circumstances when it failed to act in protecting the person, therefore in circumstances very close to those of D. K. In the case *Kontrova v. Slovakia,* the police convinced a woman to withdraw the criminal report against her spouse, when he beat her up with an electrical cable. After the withdrawal of the criminal report, the spouse killed his son, his daughter and his wife, was not granted compensation. The ECtHR ruled and found violation of the right to life, specifically of Article 2 of the European Convention, because the police failed to

protect the children's life. At the same time, the court found also a violation of Article 13 (the right to effective remedies), due to non-compensation of the mother. Similar positions on violation of the right to life (Article 2), the ECtHR are shown also in other cases such as *Branko Tomašić and Others v Croatia* and *Opuz v Turkey*."

Response of Kosovo Judicial Council

39. In the response received from KJC, dated 7 June 2012 *inter alia* it is stated:

"The Disciplinary Committee of the Kosovo Judicial Council received on 21 July 2011 the proposal ZPD/11/kb/0556 for initiation of the procedure for suspension of the judge E.Sh., the judge on the Municipal Court in Prishtina for misconduct: Failure to perform judicial functions from Article 34, par. 1, item 1.2 of the Law on Kosovo Judicial Council; b) Violation of Applicable Code of Ethics, Article 34, par. 1, item 1.4 of the Law and that is: I. General principles item 1 (the judge acts at any time in a way that he promotes confidence of public with dignity, integrity and independence of judicial power; b) Respects and complies with the law; c) performs duties in a careful manner; e) performs duties in compliance with international standards on human rights; and II Specific Rules A. Adjudicatory Activities, I. During the procedure, it is the duty of a judge to protect the rights and freedoms of all persons. The Disciplinary Committee of KJC held a session to review the request for suspension on 31.08.2011 and has rejected the request for paid suspension as ungrounded and as such is rejected due to the reason that a long time has passed from the time the proposal was delivered from the day the tragic event took place, respectively the proposal was submitted on 21 July 2011, so approximately 2 months have passed and the imposition of this measure would not have any effect.

Pursuant to Article 36, par. 1 of the Law on Kosovo Judicial Council, the Disciplinary Committee made a decision that against E Sh., the judge in the Municipal Court in Prishtina is initiated a procedure and disciplinary investigation and this session should be held within the time limit when the Office of the Disciplinary Counsel sends the final report.

Against this decision was filed an appeal by ODC and the Kosovo Judicial Council held a meeting and reviewed this appeal on 31 October 2011, dismissed the appeal of the Office of Disciplinary Counsel as non-substantive, after the committee held a session and made a decision on this case. The Disciplinary Committee in the session held on 18.10.2011 with the decision no. KD.no. 40/2011, imposed the disciplinary

measure of Reduction of salary for 50% for two months from the monthly salary. With this decision with number KD.no. 40/2011 the procedure was concluded, and the dissatisfied party has the right of appeal, which the Council will review, but no party filed an appeal against this decision."

Applicable law

40. Relevant legal provisions regarding the alleged violations of the Applicant are defined in the following instruments:

Law No. 03/L-182 on Protection from Domestic Violence

Article 1 [Purpose of the Law]

1. *This Law aims to prevent domestic violence, in all its forms, through appropriate legal measures, of the family members, that are victims of the domestic violence, by paying special attention to the children, elders and disabled persons.*
2. *This Law, also aims, treatment for perpetrators of domestic violence and mitigation of consequences.*

[...]

Article 13 [Petitions for Protection Orders or Emergency Protection Orders]

1. A petition for protection order may be submitted by:

1.1. the protected party;

1.2. an authorized representative of the protected party;

1.3. a victim advocate, upon consent of the protected party;

1.4. representative social welfare centre in the municipality where the protected party permanently or temporary resides in cases where the victim is minor.

2. A petition for emergency protection orders may be submitted by:

2.1. the protected party;

2.2. an authorized representative of the protected party;

2.3. the victim advocate, upon consent of the protected party;

2.4. a person with whom the protected party has a domestic relationship;

2.5. a representative from the Center for Social Work in the municipality where the protected party permanently or temporarily resides in cases where the victim is minor;

2.6. a person with direct knowledge of an act or acts of domestic violence against the protected party.

3. A petition for protection order or emergency protection order may be submitted by NGOs that are familiar with problem of the victim and are well informed for their treatment.

[...]

Article 16 [Review of Petition for Emergency Protection Order]

1. *The court shall decide on a petition for an emergency protection order within twenty-four (24) hours after the submission of the petition.*
2. *In reviewing a petition for an emergency protection order, the court shall hold a hearing so that the following persons may be heard:*
   2.1. the protected party, the authorized representative, or the victims advocate;
   2.2. the perpetrator or an authorized representative;
   2.3. the petitioner; and
   2.4. any witness, who knows about the domestic violence.
3. *The court may hold a hearing and issuance of the protection order in the absence of the perpetrator, where appropriate, by applying also other alternative measures including electronic ones.*

Law No. 03/L-223 on the Kosovo Judicial Council

Article 34 [Misconduct]

1. For purposes of this law, misconduct of a judge or lay judge shall consist of the following:

1.1. upon conviction for a criminal offense, with the exception of a minor offense as defined by law.

1.2. negligence in performing, a failure to perform, or abuse of judicial functions.

1.3. failure to perform judicial functions independently and impartially. 22

1.4. violation of the applicable code of ethics.

2. Disciplinary Committee may suspend judge or lay-judge with pay during any period of investigation or during the disciplinary proceedings.

3. The Judicial Council shall issue rules that define the misconducts.

[...]

Article 37 [Disciplinary Measures]

1. The Disciplinary Committee may impose the following disciplinary measures:

1.1.reprimand;

1.2. reprimand with a directive to take corrective actions;

1.3. temporary reduction of salary by up to fifty percent (50%) taking into account the nature of misconduct; or

1.4. propose the removal of a judge or lay judge from office.

2. The Disciplinary Committee shall impose a disciplinary measure that is consistent with the circumstances, level of responsibility, and consequences of the misconduct.

3. The Committee shall submit a written recommendation for the dismissal of a judge or lay judge from office to the Council, as provided in this law.

4. If the judge or lay judge is released from the charges at the completion of the disciplinary procedure, he or she shall return to his or her previous office upon the decision of the Council.

Article 38 [Dismissal of Judges and Lay Judges]

1. *The Council shall determine, based on disciplinary proceedings, whether the misconduct of a judge or lay judge justifies the dismissal. Every recommendation from the Council for the dismissal of a judge or lay judge shall include the written reasons for such recommendation and the basic conclusions of the Committee.*

2. *The recommendation of the Council for dismissal, as foreseen in paragraph (1) of this article, shall, within fifteen (15) days, be submitted to the President and the judge or lay judge concerned.*

3. *The President, in accordance with the Constitution and this law, shall decide on the recommendation of the Council for dismissal.*

4. *Judges and lay judges shall formally be notified by the Council regarding the decision of the President for the approval or disapproval of dismissal from office before such a decision is enforced.*

[…]

Article 45 Responsibilities of the Office of Disciplinary Counsel

1. *The Office of Disciplinary Counsel is responsible for investigating judges or lay judges when there is a reasonable basis to believe that misconduct may have occurred, and for making recommendations and presenting the evidence supporting disciplinary action to the Disciplinary Committee.*

2. *The Office of Disciplinary Counsel shall initiate investigations in cases when:*

2.1. there is a complaint filed at the Office of Disciplinary Counsel by any natural or legal person;

2.2. on its own initiative, when there is a reasonable basis to believe that a judge or lay judge may have engaged in misconduct.

3. *All complaints, regardless of their origin, shall be submitted to the Office of Disciplinary Counsel for investigation.*

4. *The Office of Disciplinary Counsel shall investigate thoroughly all matters referred to it, shall determine whether recommendations of disciplinary action should be presented to the Disciplinary Committee, and shall notify in writing the Disciplinary Committee and the suspected judge or lay judge regarding the results of the investigation.*

5. *The Office of Disciplinary Counsel shall have the right to summon witnesses and documents as necessary to investigate and determine whether recommendations of disciplinary action should be presented to the Disciplinary Committee.*

6. *The Office of Disciplinary Counsel shall present recommendations of disciplinary action and the evidence supporting disciplinary action for misconduct to the Disciplinary Committee.*

Assessment of the admissibility of the Referral

41. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

42. In this respect, the Court refers to Article 113.7 of the Constitution, which establishes:

"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 refers to Article 47 of the Law, which provides that:

"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."

and that

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

43. The Court first reviews whether the Applicants meet all requirements to be an authorized party, in compliance with respective constitutional and legal provisions.

44. For this purpose, the Court refers to the case law of ECtHR, which in similar cases has received individual requests from the individuals that are considered as indirect victims, where there is a personal and specific connection between the victim and the Applicant. In this regard, the ECtHR has recognized as an authorized party the spouse of the deceased (see McCann and Others against United Kingdom, no. 18984/91, Judgment dated 27 September 1995), while in another case the nephew of deceased was recognized the status of an authorized party (see Yaşa against Turkey, no. 63/1997/847/1054, Judgment dated 2 September 1998).

45. Consequently, taking into account that the Applicants are the parents of the deceased, the Court concludes that the Applicants may be considered as authorized party pursuant to Article 113.7 of the Constitution and Article 47 of the Law.

46. In addition, the Court should conclude whether the Applicants have exhausted all existing legal remedies within the justice system in the Republic of Kosovo.

47. The Constitutional Court, in the Judgment AGJ63/10 in the case KI 06/10 Valon Bislimi against Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice, stated that, according to the settled case-law of the European Court of Human Rights, the Applicants should exhaust available effective domestic legal remedies. Furthermore, this rule should be applied with flexibility and without exaggerated formalism. The ECtHR further stated that the rule for the exhaustion of legal remedies is neither absolute, nor is able to be applied in an automatic manner; in event of review if it was applied, it is important to take into account the specific requests of each individual case. This means amongst others, that he should consider not only the existence of official legal remedies in the system of the country in question, but also the general legal and political context where they act (see the Judgment of ECtHR, in the case Akdivar v. Turkey).

48. The Constitutional Court notes that, on 26 April 2010, the deceased D. K. has submitted to the Municipal Court in Prishtina a request for issuance of an emergency protection order.

49. The deceased D. K. did not have any other legal remedy, since she has not received any decision from the Municipal Court in Prishtina, accepting or rejecting the request.

50. On the other hand, the Applicants insist that they did not have available and effective remedies they may have used either.

51. In this respect, the Court notes that according to the legislation in force and the written response by KJC, where the disciplinary procedure conducted is described regarding this case, all what the Applicants could do is to complain to the Office of Disciplinary Counsel, while in further stages in the KJC respective committee they could not be a party in the procedure.

52. Therefore, the Court considers that the Applicants did not have any effective legal remedy at their disposal to safeguard their rights.

53. The Court concludes that the Applicant has met the admissibility requirements, since the Applicants are an authorized party, they did not have an available legal remedy that would be effective and clearly specified the alleged violations of human rights and freedoms.

Assessment of constitutionality of Referral

I. Regarding the right to life

54. The Applicants complain that, as a result of the inaction of the Municipal Court in Prishtina, the right to life as provided by Article 25.1 of the Constitution was violated.

55. Article 25.1 of the Constitution establishes that:

"*Every individual enjoys the right to life"*.

56. On the other side, Article 2 of ECHR states:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

57. The Court emphasizes that the right to life is the most important right of human beings. It is the right from were all other rights derive.

58. The Court recalls that, in accordance with Article 53 of the Constitution, it is its constitutional obligation to conduct an interpretation of human rights and fundamental freedoms in accordance with the case-law of ECtHR.

59. In this regard, the ECtHR stresses that it is the duty of state authorities not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*, judgment of 28 October 1998, cited also in the *Kontrova versus Slovakia, 24 September 2007 and Opus v. Turkey, 9 June 2009*).

60. In addition, to extend to a positive obligation, it should be confirmed that the authorities, who knew or ought to have known at the time of existence of a real and immediate risk to the life of an identified individual from the criminal offence by a third party, failed to take measures within the scope of its competence, which judged reasonably, might have been expected to avoid this risk (ibid., paragraph 116).

61. In this context, the Court notes that from the documentation submitted to the Court, it can be concluded that the responsible authority, in this case the Municipal Court in Prishtina, ought to have known about the real risk that had existed when the request for issuance of an emergency protection order was submitted, since D.K. had explained in a chronological order the deterioration of relations between them, by specifying also the death threats by her former partner and by offering evidence for previous reports to the police authorities about these received threats.

62. Furthermore, the Municipal Court in Prishtina, previously treated a case initiated by D.K. for dissolution of extra marital union and for the issue of

entrustment of the child's custody and with her ex-partner, when the serious problems started to appear between them and which later resulted in different threats.

63. In such circumstances, the Constitutional Court concludes that the Municipal Court in Prishtina was responsible for taking actions foreseen by the Law on Protection against Domestic Violence and that its inaction presents violations of constitutional obligations that derive from Article 25 of the Constitution and Article 2 of ECHR.

II. Regarding the Right to Effective Legal Remedies

64. The Applicants also complain that the right to an effective legal remedy, guaranteed by Articles 32 and 54 of the Constitution is violated.

65. Article 32 [Right to Legal Remedies] establishes that:

> *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.*

66. Also Article 54 [Judicial Protection of Rights] establishes that:

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

67. In addition, Article 13 of ECHR-states that:

"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."

68. The Court, in the Judgment of 30 October 2010 in the case KI 06/10, Valon Bislimi against the Ministry of Internal Affairs, Kosovo Judicial Council and the Ministry of Justice, has dealt with the issue of Effective Legal Remedies, where it stated:

"...The Court recalls that according to the case-law of the European Court of Human Rights, Article 13 of the Convention guarantees the availability at (national level of) a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in

the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable claim" under the Convention and to grant appropriate relief. (see Judgment 63 10, dated 30 October 2010, § 91)"

69. Furthermore, in the same Judgment, the Court stated that: *"The scope of obligation under Article 13 of the Convention varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, European Court on Human Rights judgment in the case Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 42, para 113)* (ibid. § 92)."

70. It also must be recalled that in the same Judgment it is explained that *"The rule on exhaustion of remedies is based on the assumption reflected in Article 13 (with which it has a close affinity) that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see the European Court on Human Rights judgment in the case Kudla v. Poland, 26 October 2000).*

71. In this case, the Court observes that the legislation in force: the Law on Protection against Domestic Violence and the Law on Kosovo Judicial Council do not offer effective legal remedies for the protection of rights of the Applicants.

72. In fact, on one side, the Law for Protection against Domestic Violence does not foresee measures for addressing the inaction of respective institutions in those cases when they are obliged to act. On the other hand, as it may be seen from the Law on Kosovo Judicial Council and also from the response of KJC, the Applicants do not have any other possibility, apart from the appeal in the Office of the Disciplinary Prosecutor, but not further in other stages of the procedure. According to Article 45.5 of this Law, it is the right, but not the obligation of the Office of Disciplinary Prosecutor "*to summon witnesses and documents as necessary to investigate and determine whether recommendations of disciplinary action should be presented to the Disciplinary Committee.*"

73. The Court recalls that the main responsible institution, the Municipal Court in Prishtina, failed to provide responses to the questions raised by the Court and did not submit documentation which it possesses regarding this case.

74. Therefore, the Court concludes that the inaction of the Municipal Court in Prishtina regarding the request of the deceased D.K. for issuing an emergency protection order, as well as the practice developed by KJC in not addressing the inaction of regular courts, when they should, has obstructed the victim and the Applicants in exercising their rights to effective legal remedies, as foreseen by Articles 32 and 54 of the Constitution and Article 13 of ECHR.

III. Regarding Article 31 of the Constitution and Article 6 of ECHR

75. The Court does not consider it is necessary to deal with the allegations of a violation of Article 31 of the Constitution and Article 6 of the Convention, given that the Court has found violations of the Articles 25, 32 and 54 of the Constitution and Articles 2 and 13 of ECHR and there was no hearing or a court session about the abovementioned case.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rule 56 (1) of the Rules of Procedure, on 25 January 2012, unanimously

DECIDES

I. To declare the Referral admissible;

II. To hold that there has been violation of the right to life, as provided by Article 25 of the Constitution and Article 2 of ECHR;

III. To hold that there has been violations of the right to legal remedies as provided by Articles 32 and 54 of the Constitution and Article 13 of ECHR;

IV. To consider unnecessary to deal with allegation of a violation of the right to fair and impartial trial, provided by Article 31 of the Constitution and Article 6 of the ECHR;

V. To notify this Decision to the Parties;

VI. To publish this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

VII. This Decision is effective immediately.

Judge Rapporteur
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

CONCURRING AND DISSENTING OPINION
In
Case No. KI 41/12
Applicants
Gëzim and Makfire Kastrati
against
Municipal Court in Prishtina, Kosovo Judicial Council

In this case, D. K., the daughter of the Applicants, submitted a request to the Municipal Court of Prishtina for an emergency protection order on 26 April 2011. The Municipal Court in Prishtina never acted upon D. K.'s request to receive an order for protection. Tragically, 22 days later, on 18 May 2011, D. K. was murdered by the person who she was asking the municipal court to restrain from hurting her or her child. Her surviving parents, and the Applicants in this case, now ask this Court to declare that the municipal court's failure to act upon their daughter's request violated their daughter's rights pursuant to the Constitution.

In this case the Applicant's daughter made the following specific request to the Municipal Court of Prishtina:

Request: D. K., "...." Str. No. ../B P.

Tel. ...

Counter-request: A.J. "....." no... P.

Tel. ...
Tel. ...

Pursuant to Law no. 03/L-182 on Domestic Family submit:

Request for issuing EMERGENCY protection order

I, D. K. and A. J. were in the extramarital union since 02.02.2000 until 26.11.2010. From this extramarital union we have a daughter A. J.2, born on 2 August 2003 in Prishtina. During all the time of the extramarital union I have suffered pressure and violence against me and I have endured only for the sake and for the good of our daughter A., in order she does not remain without parents and in order she does not suffer other traumas. Also after giving birth of our daughter A., he started to put pressure and use different kinds of violence starting from physical harm, insults of different kinds, not only against me, but also against my family. Later he started to make debts and escaped for

some time from Kosovo, not knowing where he was. I did not have any telephone contact. During the time he was outside Kosovo, I was threatened in different ways by the people whom he owed debts, which I do not even know where he invested. After his return to Kosovo, he continued again with violence and irresponsibility towards our daughter and being under the influence of alcohol almost all the time and always avoiding responsibilities towards his family and by escaping from time to time. His violence against me was even bigger when he insisted to receive a loan at the amount of €1500. I was forced to sign the contract on loan. I have initiated a case in the municipal court (e-75/11) and since 26 November I do not live with A.J. due to fear that the worse may come. On 19 April 2011 I met with A.J. and his parents, while I was with my father and grandfather to talk and try to solve the problem. He did not accept our break in any way and in presence of all started to insult and threaten me in the lowest ways, by being supported also by his father S.J., and by threatening me with murder and by blaming me that I have affairs. Due to the fear and physical violence against me I have reported the case to police (unreadable text).

Such behaviors of my ex-partner and ex-husband are making my life more difficult and also are endangering my life. This is also worsening emotional situation of our daughter. Therefore, according to what I have stated above, and pursuant to Article no. 03/L-182, I also request that pursuant to Articles 1, 5, 6 and 9 of this law that the Municipal Court in Prishtina to review this emergent request and I propose to hold a hearing where it would render this

D E C I S I O N

Protection ORDER is ISSUED, by which the responsible person A.J. with his address in "…" Str. No… in P….(unreadable text) for threatening that he will commit a violent deed against the protected party D. K. with the address in "…" Str. No. … in P. At the same time, A.J. is ORDERED to allow the protected party D. K. to continue with her life without any obstacle together with their daughter A. and consistent to the Law No. 03/L-182 on Domestic Violence, respectively of the Article 1, 6, 7 and 9 of this law.

As it is provided by law, the appeal does not stop the execution of this ruling.

Prishtina, 22.04. 2011

A P P L I C A N T
Diana Kastrati

The applicable law, No. 03/L-182, Protection Against Domestic Violence, requires the court to hold a hearing within 24 hours of receiving a petition for protection to decide whether there is sufficient evidence to issue a court order ordering the person who is alleged to have committed threatening behavioral acts and who may be an immediate threat to the petitioner or family members of the petitioner to be restrained from contacting the petitioner and to be restrained from visiting the petitioner's residence and other places, such as place of employment, that the petitioner frequently visits. A violation of the court order, if issued, is a crime. Under the law, the court order is an additional tool to help the police prevent certain persons from committing a crime against the petitioner by simply making it a crime for that person to have contact with the petitioner. It makes criminal behavior that which would otherwise not be a crime but for the court making a finding that under the evidence now received there is a justifiable fear that the person to be restrained will harm the petitioner if further measures to help the police to protect the petitioner are not implemented. Indeed, the law allows the police to also make such an immediate order for up to 24 hours if they receive such a request at a time when the court is not in session.
In this case, although she did not specifically state what type of an order she wanted the municipal court to issue, she did inform the court of the behavior that was reasonably causing her to have an immediate fear for herself and her daughter and asked that she be given some protection pursuant to the law. Is the court's failure to act upon her request within the 24 hours required by the law, or even within the following 22 days, a violation of her rights under the Constitution?

Article 54 of the Constitution provides:
Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

In this case, D.K. had a lawful right to have her petition heard by the municipal court. If the municipal court had held the hearing and had found sufficient evidence to issue a protection order for her, the police would have had an additional legal tool to help them protect her from possible future harm. She never got that order much less even a hearing on her lawful request of the municipal court. She never received a reasoned explanation why her request was not granted. She never received a legal remedy which she may have been entitled to receive under the Constitution. Therefore, I agree with the majority that D.K.'s Constitutional right to an effective legal remedy was violated.

The Applicants also allege that D.K.'s rights pursuant to Article 25 of the Constitution were violated. They further allege that the courts and state institutions violated D.K.'s rights under Article 25. Article 25 provides:

1. *Every individual enjoys the right to life.*

2. *Capital punishment is forbidden.*

There is no question that D.K. was denied her right to life. Did the courts and state institutions deny her life as that term is used in the Constitution?
It is clear that Article 25 of the Constitution prohibits the State from inflicting the death penalty upon anybody convicted of any type of crime. Article 25 does not prohibit the State or its officers and employees from using deadly force to protect the peace and security of the population as well as the security of the State. Chapter XI of the Constitution is replete with many articles that clearly authorize State officials to use force, even deadly force in extreme but reasonably appropriate situations. Indeed, it is not disputed that the police, if necessary, may use deadly force to protect the citizens against imminent and immediate deadly force being inflicted upon other citizens.

In this case, the Applicants concede that no State official did anything to cause the death of D.K. The Applicants' impliedly claim that if the municipal court judge had acted upon D.K.'s request for a protection order she would not have been murdered, and that this inaction by the municipal court caused her to be murdered. This is an erroneous conclusion. A protection order would have given the police an added tool to help keep D.K.'s killer away from her. But it could not guarantee that he would not execute the crime, which he tragically did. Just as the threat of the severe punishment under the law that could or will be imposed if D.K.'s killer is caught and convicted of this murder did not deter him from murdering D.K., it is speculative to assume that a court order for protection in this case would have been enough to deter him from committing the murder or that the police would have been able to catch him in forbidden contact with D.K. before he committed the murder.

Because there is no claim, much less evidence, that the failure of the municipal court judge as a state official, was a proximate cause of D.K.'s death or aided in the commission of her murder, her rights pursuant to Article 25 of the Constitution were not violated by the state or any state official.

The Applicants are attempting to invoke the authority of this Court to act on behalf of D.K.'s Constitutional rights pursuant to Article 113.7 of the Constitution. Article 113.7 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.

There is no question that the Applicants have personally suffered and will continue to suffer for the rest of their lives an indescribable loss with the untimely and tragic death of their daughter. They have not, however, suffered a violation of their individual Constitutional rights. The Constitution does not allow them to assert the individual Constitutional rights of another person. In contrast, the Constitution specifically allows other public officials to submit questions about the interpretation of the Constitution to the Court. Therefore, the Applicants' referral cannot be considered by the Court pursuant to Article 113.7.

The Applicants argue that Article 53 of the Constitution allows any individual who claims a human right has been violated to file a referral with the Court even though Article113.7 restricts such a referral to only those cases where the right of the individual has allegedly been violated. Article 53 provides:

> *Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*

The provisions of the Constitution addressing fundamental freedoms and human rights are contained in Chapter II (Articles 21 through 56) of the Constitution. Article 53 expressly provides that this Court, in interpreting those Articles of the Constitution, shall look for guidance from decisions of the European Court of Human Rights. It does not require this Court to follow decisions of the European Court of Human Rights with respect to other articles of the Constitution such as those relating to the form of government, security and the specific jurisdiction of this Court as set forth in Article 113 of the Constitution. Article 53 recognizes that this Court is a state court while the European Court of Human Rights is an international court charged specifically with adjudicating the European Convention on Human Rights. Because the roles of the two courts are different, Article 53 limits its application to interpreting those human rights and freedoms in the Constitution that could be similar to those established in the European Convention on Human Rights. It does not apply to an interpretation of Article 113 of the Constitution. Therefore, the Applicants do not have the authority to file their referral with this Court.

Respectully submitted,
Robert Carolan
Judge

KI 65/11, Holding Corporation "EMIN DURAKU", date 28 February 2013- Constitutional Review of Order SCC- 0041 issued on 27 April 2011 by the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency

Case KI65/11, Resolution on Inadmissibility, of 21 November 2012

Keywords: individual referral, non-exhaustion of legal remedies

The Applicant alleges that Section 25.7 of the UNMIK AD 2008/6 is in violation of Articles 5 [Languages], Article 7 [Values; non-discrimination], 21 [General Principles], Article 23 [Human Dignity], Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], Article 102 [General Principles of the Judicial System] of the Constitution, and Article 6 [Right to a fair trial] in conjunction with Article 14 [Prohibition of discrimination] of ECHR.

Moreover, the Applicant alleges that he does not know any case in the world tat obliges the party to address the court in an unofficial language. The fact that pleadings brought before a court have to be translated into English on the expenses of the party bringing in the pleadings, despite and beside the official languages, is a fundamental injustice.

Furthermore, pursuant to Article 53 of the Constitution, in conjunction with Article 41 of the ECHR, the Applicant requests from the Republic of Kosovo to be paid the amount of 20,000 Euro as compensation for damages the Applicant allegedly suffered,

In the present case, the Court finds the Applicant's case is still pending before the Special Chamber and that the hearing in the case was scheduled for 12 October 2012.

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, thus, the Referral is declared inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI65/11
Applicant
Holding Corporation "EMIN DURAKU"
Constitutional Review of Order SCC- 0041 issued on 27 April 2011 by the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is the Holding Corporation "EMIN DURAKU" from Gjakova, represented by Mr. Myrteza Duli, residing in Gjakova.

Challenged decision

2. The Applicant challenges the Order SCC- 0041 of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (hereinafter: the "Special Chamber"), dated 27 April 2011 pursuant to which the Applicant was requested to provide the English translation of all documents.

3. Subsequently, the Applicant challenges the constitutionality of Section 25.7 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 on Kosovo Trust Agency Related Matters (hereinafter: UNMIK AD 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 Order SCC- 0041 of the Special Chamber dated 27 April 2011 that was issued pursuant to Section 25.7 of UNMIK Administrative Direction No. 2008/6.

5. The Applicant also requests to be compensated in the amount of 20,000 Euro pursuant to Article 53 of the Constitution in conjunction with Article 41 of the ECHR.

Legal basis

6. Article 113.7 of the Constitution, Articles 47 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 9 May 2011, the Applicant submitted the Referral to the Court.

8. On 17 August 2011, the President, appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President, appointed the Review Panel composed of Judges Almiro Rodrgiues (Presiding), Ivan Čukalović and Enver Hasani.

9. Also on 17 August 2011, the Secretariat of the Constitutional Court notified Special Chamber with the Applicant's referral.

10. On 24 September 2012, the Secretariat of the Court asked both the Applicant and the Special Chamber about status of the Applicant's case before the Special Chamber.

11. On 29 September 2012, the Applicant's representative informed the Court that the Applicant case is still pending before the Special Chamber.

12. The Special Chamber informed the Court by its letter of 2 October 2012 that the hearing in the Applicant's case has been scheduled for 12 October 2012.

13. On 21 November 2012, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral

Summary of facts

14. The facts of the case as presented by the Applicant and supported by the documents may be summarized as follows.

15. On unspecified date the Applicant filed a claim against the Privatization Agency of Kosovo (PAK) before the Special Chamber.
16. On 27 April 2011, the Trial Panel of the Special Chamber issued Order SCC- 0041 dated 27 April 2011, pursuant to Article 28.4 UNMIK AD 2008/6 in conjunction with Article 25.7, requesting the Applicant to provide the English translation of all documents within 7 days with the written pleadings and the supporting documents into English.

17. On 4 May 2011 the Applicant's representative submitted request for extension of 7 days time-limit arguing that due to economic and logistic shortages the Applicant is experiencing difficulties in organizing translation of the documents.

18. The Applicant's representative also argued that the request from the challenged Order *" is incomprehensible and unclear because the Albanian language is official language in Kosovo according to the Constitution, ... and that an act called Administrative Direction cannot be above the Constitution..."*

19. However, the Applicant's representative confirmed their intention to follow the request from the challenged Order and provide the Special Chamber with the translated documents.

Applicant's allegations

20. The Applicant alleges that Section 25.7 of the UNMIK AD 2008/6 is in violation of Articles 5 [Languages], 7 [Values; non-discrimination], 21 [General Principles], 23 [Human Dignity], 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 102 [General Principles of the Judicial System] of the Constitution and Article 6 [Right to fair trial] in conjunction with Article 14 [Prohibition of discrimination] of the ECHR.

21. Moreover, the Applicant alleges that it does not know any case in the world that obliges the party to address the court in an unofficial language. The fact that pleadings brought before a court have to be

translated into English on the expenses of the party bringing in the pleadings, despite and beside the official languages, is a fundamental injustice.

22. Furthermore, pursuant to Article 53 of the Constitution in conjunction with Article 41 of the ECHR, the Applicant requests from the Republic of Kosovo to be paid the amount of 20,000 Euro as compensation for damages the Applicant allegedly suffered.

Assessment of the Admissibility of the Referral

23. At the outset, the Court would like to reiterate that it can only decide on the admissibility of a Referral, if the Applicant shows that it 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."*
> *" 47.2of the Law: The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the 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 the Applicant's case still pending before the Special Chamber and that the hearing in the case was scheduled for 12 October 2012.

26. 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.

27. As to the request of the Applicant to review the constitutionality of UNMIK AD No. 2008/6, he 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 (see Resolution on Inadmissibility Sami Burnjaku, 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..., Case no. KI34/11, of 8 December 2011).

FOR THESE REASONS

Pursuant to Article 113.7 of the Constitution and Rule 36 of the Rules of Procedure of the Constitutional Court the Constitutional Court, unanimously:

DECIDES

I. TO DECLARE the Referral 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
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 91/12, Ali Latifi, date 28 February 2013- Constitutional Review of the Decision issued by EULEX Prosecution Office in Prizren appointing the defense counsel ex-officio in case HP-155/12

Case KI 91/12, Resolution on Inadmissibility of 30 January 2013

Keywords: Individual referral, *ratione materia*, Resolution on inadmissibility

The Applicant in his Referral submitted on 10 September 2012, requests " the constitutional review of Decision the issued by EULEX Prosecution Office in Prizren appointing the Applicant as a defense counsel in case HP-155/12." The Applicant requests from the Court to explain whether the Applicant should be the defense counsel of the defendant S. P. who is accused of war crimes.

The Court concludes that the Applicant did not raise any constitutional matter within the legal framework provided by Article 113.7, therefore in compliance with the Rule 36 para. 3 (f), the Referral should be declared as inadmissible due to incompatibility *ratione materiae* with the Constitution.

RESOLUTION ON INADMISSIBILITY
In
Case No. KI91/12
Applicant
Ali Latifi
Constitutional Review of the Decision issued by EULEX Prosecution Office in Prizren appointing the defense counsel ex-officio in case HP-155/12

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mr. Ali Latifi, a lawyer from Prishtina.

Challenged decision

2. The challenged decision of the public authority by which are alleged violations of the rights guaranteed by the Constitution is the Decision issued by EULEX Prosecution Office in Prizren on appointment of the defense counsel ex-officio. The Applicant has not specified the number of the decision, the date of issuance nor the date of receipt. This decision relates to a case HP-155/12.

Subject matter

3. The subject matter of the Referral submitted to the Constitutional Court of the Republic of Kosovo on 10 September 2012 is the constitutional review of the Decision issued by EULEX Prosecution Office in Prizren appointing the Applicant as a defense counsel in case HP-155/12. The Applicant requests from the Court to explain whether the Applicant should be the defense counsel of the defendant S. P. who is accused of war crimes.

Legal basis

4. Article 113.7 of the Constitutionof the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law Nr. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Article 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedures).

Proceedings before the Court

5. On 10 September 2012, the Applicant submitted the Referral to the Constitutional Court.

6. On 31 October 2012, by Decision GJ.R.KI91/12 the President of the Court appointed Judge Ivan Čukalovic as Judge Rapporteur. On the same day, the President of the Court appointed the Review Panel composed of judges: Almiro Rodrigues (Presiding) Snezhana Botusharova and Kadri Kryeziu.

7. On 25 September 2012, the Constitutional Court requested from the Applicant that in compliance with Article 48 of the Law on Constitutional Court and Rule 36 of the Rules, he should fill out the form of the Court and submit court decisions, the necessary evidence and proofs in order for his Referral to be processed and reviewed.

8. The Applicant did not respond to any of the requests submitted by the Court.

9. On 15 November 2012, the Court notified the Applicant that the Referral has been registered.

Summary of the Facts

10. On 10 September 2012, the Applicant submitted only one-page Referral.

11. The Applicant addressed the same request to the following institutions:

Chamber of Advocates of the Republic of Kosovo,
Ministry of Justice of the Government of Kosovo
Kosovo Judicial and Prosecutorial Council,
Chief State Prosecutor of Kosovo and to District Prosecutors

EULEX,
Special Prosecution of Kosovo,
Supreme Court of Kosovo and to Constitutional Court of the Republic of Kosovo

12. The Applicant challenges the Decision issued by EULEX Prosecution Office in Prizren on appointment of the defense counsel in case HP-155/12, where the Applicant was appointed as defense counsel of the defendant S. P.

S.P. is charged with crimes committed against civilian population in Krusha MA Prizren. (This decision is not in the case file)

13. The Applicant states that he has informed EULEX Prosecution Office through Kosovo Chamber of Advocates, requesting from them to know whether he can be appointed as defence counsel, because, as he states "*on 20.08.1998 in the Hague and on 06.09.2003 at the Prosecution of Kosovo I have initiated the procedure on the war crimes towards the civil population that the Serbian state committed against the unprotected population in Kosovo.*"

Applicant's allegations

14. The Applicant did not specify which rights, guaranteed by the Constitution, have been violated.

Assessment of the admissibility of the Referral

15. 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 and further specified in the Law and the Rules of Procedure.

16. In this regard, the Court refers to Article 113.1 and 113.7 of the Constitution, which stipulate:

"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".

17. In the present case, the Applicant has not:

a. Submitted any supporting documentation for the review of his Referral and

b. Provided any evidence that his rights and freedoms were violated by any public authority

18. The Court also takes into account:

> Rule 36 para. 3 of the Rules of Procedure of the Constitutional Court, where is stipulated:
>
> " (3) *A Referral may also be deemed inadmissible in any of the following cases:*
>
> *(f) the Referral is incompatible ratione materiae with the Constitution;*

19. The Court emphasizes that the *ratione materiae* compatibility of a Referral with the Constitution derives from the substantial competence of the Court's jurisdiction, laid down in the Article113 of the Constitution and in particular with Article 113.7 when individual Referrals are concerned.

20. In order for a Referral to be compatible *ratione materiae* with theConstitution, the right which is alleged to have been violated to the Applicant should be guaranteed and protected by the Constitution.

21. In this respect, the European Court on Human Rights reviews only the cases that are referred about the assumed violations of rights guaranteed by the European Convention on Human Rights and its Protocols and not the rights guaranteed by other legal instruments or that are out of the Court's jurisdiction (see Peñafiel Salgado versus Spain, Application no n° 65964/01 dated 16 April 2002 and x against Netherland ECHR Decision dated 4 October 1976)

22. Mr. Latifi has not specified in his Referral which of his rights, guaranteed by the Constitution was violated, whereas from the text of the Referral the Court could not determine that any of the rights, guaranteed by Kosovo Constitution has been a subject of possible violation.

23. The issue of the appointment of the *ex-officio* defense counsel is not by itself a constitutional matter, and it is not determined by any of the rights guaranteed by the Constitution, which the Applicant could invoke.

24. Under these circumstances, the Applicant did not raise any constitutional matter within the legal framework provided by Article 113.7, therefore in compliance with the Rule 36 para. 3 (f), the Referral should be declared as inadmissible due to incompatibility *ratione materiae* with the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution and in accordance with Rule 36.3 item (f) of the Rules of Procedure, in the session held on 29 January 2013, 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
Ivan Čukalović

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 102/12, Bilall Osmani, date 28 February 2013- Constitutional Review of the Judgment of the District Court in Mitrovica, Ac.No.15/10 dated 21 February 2011

Case KI 102/12, Resolution on Inadmissibility of 23 January 2013

Keywords: individual referral, out of time referral, the right to fair and impartial trial, protection of property, principle of legal certainty

The Applicant filed the Referral based on Article 113.7 of the Constitution, claiming that his constitutional rights have been infringed due to diametrically opposite decisions of the District Court in Mitrovica. The Applicant, among others, claimed that the right to fair trial, the property right, and the principle of legal certainty, has been violated.

The Court determined that the Applicant's Referral was out of time, namely it was not submitted to the Court within the time limit as provided by Article 49 of the Law.

Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) b) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI102/12
Applicant
Bilall Osmani
Constitutional Review of the Judgment of District Court in Mitrovica Ac.no.15/10 dated 21 February 2011

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr.Bilall Osmani represented by Mr. Adem Vokshi, lawyer from Mitrovica.

Challenged decision

2. Judgment of District Court in Mitrovica Ac.no.15/10 dated 21 February 2011.

Legal basis

3. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: 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 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).

Subject matter

4. The subject matter of the Referral is the confirmation of property right of a business premise purchased by the Applicant, based on sale-purchase agreement, legalized in the Municipal Court in Vushtrri.

Proceedings before the Constitutional Court

5. On 19 October 2012, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 5 November 2012, the President of the Court, by Decision No. GJR.KI-102/12, appointed the judge Altay Suroy as Judge Rapporteur. On the same date, the President by Decision No.KSH.KI-102/12, appointed the Review Panel composed of Judges: Ivan Čukalović (presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

7. On 5 November 2012, the Applicant was notified about the registration of the Referral. On the same day it was communicated to the District Court in Mitrovica and the Office of the Chief State Prosecutor.

8. On 22 January 2012, the Review Panel considered the report of the Judge Rapporteur and recommended to the full Court the inadmissibility of the Referral. The Review Panel was not in full composition, one of the three judges was absent, such a procedure is not standard and this is an exception, but is permissible as the Review Panel has no decision –making authority.

Summary of fact as submitted by the Applicant

9. On 2 June 2003, the Applicant concluded sale-purchase agreement of the business premise no.1 which is located in Vushtrri on Str. "Bedri Pejani" no.30. The premise has an area of 31.5 m2 in the cadastral parcel 36/1 at the place called "Qytet" that is registered in the possession list no. 1292 MA Vushtrri (Applicant was earlier in possession of the abovementioned premise as tenant).

10. The abovementioned contract was legalized in the Municipal Court in Vushtrri with number Vr.No.749/2003 dated 9 June 2003. The contract *inter alia* stipulated that the seller was entitled to return the sold premise to her ownership under the condition that in 2010 she would pay to Applicant the amount of 20.000 euro (sale-purchase price was 15.000 euro, while the seller in 2010 had to pay additional 5.000 euro, if he wanted to return the ownership over the premise above).

11. The Applicant was denied the confirmation of property right over the business premise by a third party, who alleged to have purchased the abovementioned premise together with the house where it was located.

12. On 23 December 2005, Municipal Court in Vushtrri by Judgment C.no.742/05 decided to: 1) reject the statement of claim of the Applicant to confirm that he is the owner of the business premise, 2) annulled the sale-purchase contract of the business premise, and 3) ordered Applicant to handover in possession the business premise to the third party.

13. On 10 October 2006, after the appeal of the Applicant, the District Court in Mitrovica by Resolution Ac.no.43/2006 quashed in entirety the above-mentioned Judgment of the Municipal Court in Vushtrri and remanded the case to the latter for retrial.

14. On 7 March 2008, Municipal Court in Vushtrri, by Judgment C.no.495/06 decided to: 1) reject the statement of claim of the Applicant to confirm that he is the owner of the business premise, 2) upheld the termination of contract on sale-purchase 3) obliged the seller to pay to Applicant the compensation as determined by the sale-purchase contract of the business premise, and 4) obliged the Applicant to handover the possession of the business premise to the third party.

15. On 21 February 2011, after the appeal of the Applicant, the District Court in Mitrovica by Judgment Ac.no.15/2010 upheld in entirety the judgment of the Municipal Court in Vushtrri C.no.495/06 dated 7 March 2008, and rejected the appeal of the Applicant as unfounded.

16. On 6 March 2011, the Applicant filed submitted request to the State Prosecutor to initiate the procedure for protection of legality.

17. On 15 April 2011, the State Prosecutor by letter KMLC.nr.25/2011 notified the Applicant that after reading the case, did not find legal basis to initiate the request for protection of legality.

Applicant's allegations

18. The Applicant alleges that the District Court in Mitrovica, by its two diametrically opposite decisions, has gravely violated the principle of legal certainty.

19. The Applicant alleges that he has purchased the business premise, paid sale-purchase price, had taken into possession the purchased premise

and legalized the contract in the Municipal Court and poses the question what else could he have done to have legal certainty.

20. The Applicant requests from the Court:

a) To declare his referral as admissible;

b) To conclude that there was a violation of Article 46 [Protection of Property] of the Constitution in conjunction with Article 1, protocol 1 of ECHR;

c) To conclude that there was a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 of ECHR.

d) To declare the Judgment of District Court in Mitrovica Ac.no.15/10 dated 21 February 2011 invalid;

e) To return the case for retrial to the District Court in Mitrovica in accordance with the Judgment rendered by the Constitutional Court.

Preliminary assessment of admissibility of the Referral

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, the Law and the Rules of Procedure

22. Regarding the Applicant's Referral, the Court refers to Article 49 of the Law, which provides:

> *"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."*

23. From the submissions it can be seen that the Referral was submitted on 19 October 2012 and that the decision of the last instance court was served to the Applicant on 24 February 2011, meaning that the Referral

was not submitted within the time limit as provided by the Article 49 of the Law.

24. It follows that the Referral is out of time.

25. Therefore, the Referral should be rejected as inadmissible due to non-compliance with the time limit as stipulated by Article 49 of the Law.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113.7 of the Constitution; pursuant to Article 47 of the Law; and in compliance with the Rule 36.1 (b) of the Rules of Procedure, on 22 January 2013, 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
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 108/12, Hazir Kadriu, date 06 March 2013- Request for constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo A. no. 212/2012 of 24 May 2012

Case KI108/12, Resolution on Inadmissibility of 18 January 2013

Keywords: individual referral, civil dispute, right to work and exercise profession, human rights and fundamental freedoms, manifestly ill-founded

The Applicant filed the Referral based on Article 113.7 of the Constitution, claiming that the Supreme Court by Judgment A. no. 212/2012 of 24 May 2012 by finally not recognizing his status as a disabled person has violated his rights guaranteed by the Constitution.

The Court, in this case also reiterated that it is not a fact finding Court and in this case wishes to emphasize that establishing the correct and complete factual situation is in full jurisdiction of regular courts and in this case of administrative bodies as well. The Court's role is solely to ensure compliance with the rights guaranteed by the Constitution, therefore it cannot act as a fourth instance court, (*see mutatis mutandis, i.a., Akdivar v. Turkey, 16 September 1996, R.J.D, 1996-IV, par. 65*).

The Court concluded that the Applicant has not sufficiently justified his allegation on a violation of any constitutional right, therefore, pursuant to Rule 36 (2) b) and d), the Referral is declared inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI108/12
Applicant
Hazir Kadriu
Request for constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo A. no. 212/2012 of 24 May 2012

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Hazir Kadriu, with permanent residence in Prishtina.

Challenged decision

2. The challenged decision of the public authority which has allegedly violated the rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: "the Constitution") is the Judgment of the Supreme Court of the Republic of Kosovo, A. no. 212/2012 of 24 May 2012 (hereinafter: the Supreme Court), which the Applicant received on 25 August 2012.

Subject matter

3. The subject matter of the Referral filed with the Constitutional Court of the Republic of Kosovo (hereinafter: "the Court") is the constitutional review of the Judgment of the Supreme Court A. no. 212/2012 of 24 May 2012 and relates to the right to disability pension.

Legal Basis

4. Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008, which entered into force on 15 January 2009 (hereinafter: the Law) and Rule 28 of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Applicant's complaint

5. The Applicant complains that the Medical Committees of the Ministry of Labor and Social Welfare (hereinafter: MLSW) have unlawfully rejected his "right to disability pension" even though the Applicant claims that he had met the criteria for such a pension, whereas, the Supreme Court by Judgment A. no. 212/2012 of 24 May 2012, in rejecting his lawsuit in relation to this matter allegedly violated his constitutionally guaranteed rights.

Proceedings before the Court

6. On 31 October 2012, the Court received the Referral submitted by Mr. Hazir Kadriu and registered it under KI 108/12.

7. On 5 November 2012, the President, by decision GJR. 108/12 appointed Judge Arta Rama – Hajrizi as Judge Rapporteur. The same day, the President, by decision KSH. 108/12 appointed the members of the Review Panel composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović (member) and Prof. dr. Enver Hasani (member).

8. On 5 December 2012, the Court notified the Applicant, as well as the Supreme Court of the registration of the Referral.

9. On 18 January 2013, the Review Panel after having considered the report of the Judge Rapporteur made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

10. Ministry of Labor and Social Welfare (hereinafter: MLSW), respectively the Pensions Administration Department of the Republic of Kosovo (hereinafter: PADK) by decision No. dos. 5089422 of 8 June 2011 had rejected the Applicant's right to benefit the disability pension.

11. Against the decision of PADK No. dos. 5089422 of 8 June 2011 the Applicant filed a lawsuit with the Supreme Court of the Republic of Kosovo. The Applicant had stated in his lawsuit that the medical

committees did not take into consideration the fact that his health condition is very grave, because he is not able to work and that the evidence presented by him was not taken into consideration by the administrative bodies, which is why the factual situation was not completely established, as a result, according to the Applicant, the material law was applied to his detriment.

12. On 24 May 2011, the Supreme Court issued Judgment A. no. 212/2012 and rejected the lawsuit filed against the MLSW, respectively PADK with No. dos. 5089422 of 8 June 2011. The Supreme Court had concluded that the administrative bodies had correctly applied the provision of Article 3 of the Law 2003/23 on the Disability Pensions in Kosovo, due to the fact that the committee had determined that the Applicant does not meet the legal criteria for the recognition of the right to benefit the disability pension.

Applicant's allegations

13. The Applicant alleges that the Supreme Court by Judgment A. no. 212/2012 of 24 May 2012 by finally not recognizing his status as a disabled person has committed a constitutional violation of his rights.

Assessment of admissibility of the Referral

14. 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 and further specified in the Law and the Rules of Procedure.

15. In relation to that, the Court refers to rule 36.1 item (c) of the Rules of Procedure which clearly provides:

"(1) The Court may only deal with Referrals if:

c) the referral is not manifestly ill-founded."

16. The Court notes that the Applicant has not specified under which constitutional provision his rights have been violated (see, Article 48 of the Law on the Constitutional Court), but from case file it is clearly understood that the Applicant is complaining about the right to disability pension.

17. The Court finds that in Constitution of the Republic of Kosovo the right to pension is referred to only in Article 105 and 109 of the Constitution,

namely with reference to the mandate and reappointment process of Judges and Prosecutors "until retirement according to law". Those articles do not provide whether a citizen or an official is entitled to pension.

18. The only Constitutional provision which refers to pensions is paragraph 2 of article 51 [Health and Social Protection] of the Constitution, which provides that "Basic social insurance related to unemployment, disease, disability and old age shall be regulated by law." It does not provide that the citizen is entitled to pension or it does not stipulate how a person can qualify for pension.

19. The social insurance related to "disability, unemployment and old age" is regulated by law: In this present case the issue of the disability pension is regulated by Law No. 2003/23 On Disability Pensions in Kosovo adopted by the Assembly of Kosovo on 6 November 2003.

20. The application procedure and the fulfillment of the criteria for benefiting this right is set forth in this Law as is the right to appeal the decision when the parties are not satisfied with the decisions of the public authorities regarding their claims.

21. The Applicant has failed to prove that the Supreme Court issued a decision in violation of his constitutional rights. The Supreme Court in Judgment A. no. 212/2012 of 24 May 2012 found that the decisions of the Administrative Committees in this case were lawful.

22. The Constitutional Court is not a fact finding Court and in this case wishes to emphasize that establishing the correct and complete factual situation is in the full jurisdiction of regular courts and in this case of administrative bodies as well. The Court's role is solely to ensure compliance with the rights guaranteed by the Constitution, therefore it cannot act as a "fourth instance court", *(see mutatis mutandis, i.a., Akdivar versus Turkey, 16 September 1996, R.J.D, 1996-IV, par. 65).*

23. The Court concludes that there is nothing in the Referral that shows that the Supreme Court, respectively the committees of the MLSW in examining the case, lacked impartiality or that the review proceedings in the case were unfair. The mere fact that the Applicants are not satisfied with the outcome of the case, cannot serve them as a right to file an arguable claim on the violation of the constitutionally guaranteed rights *(*see *mutatis mutandis, Judgment ECHR Appl. No. 5503/02, Mezotur-Tiszazugi Tarsulat versus Hungary, Judgment of 26 July 2005).*

24. Based on all the foregoing, the Court considers that the Applicant has not sufficiently justified his allegation on a violation of any constitutional right, therefore, pursuant to Rule 36.2 item (b) and (d) the Referral is considered as manifestly ill-founded.

25. Consequently, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 56.2 of the Rules of Procedure, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant toRule 36.2 (b) and (d), Rule 56.2 of the Rules of Procedure, on 18 January 2013, 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
Arta Rama-Hajrizi

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 115/12, Fadil Salihu, date 06 March 2013- Constitutional review of election procedure for the President of Vetëvendosje Movement branch in Ferizaj, of 4 November 2012

Case KI-115/12, Resolution on Inadmissibility of 25 January 2013.

Keywords; individual referral, ratione materiae, Court competency, statute interpretation.

The Applicant has filed his referral in compliance with Article 113.7 of the Constitution of Kosovo, demanding constitutional review of regularity of election for the President of Vetëvendosje Movement branch in Ferizaj, of 4 November 2012, challenging the interpretation of statute of the Vetëvendosje Movement in relation to election of the president of this Movement in Ferizaj.

The Applicant claimed that the mentioned person (candidate for president) was not present in Kosovo at the moment of election, and had not taken part in the campaign, and was elected to the position by purchase of votes.

The applicant has raised the alleged violation in relation to interpretation of "Statute of the Vetëvendosje Movement". The Court found that the Vetëvendosje Movement is not a state authority (public body). Therefore, the applicant is *ratione materiae* incompatible to the Constitutional provisions, since the competency of the Constitutional Court covers alleged constitutional violations by public authorities. Therefore, the Court found that the referral is *ratione materiae* incompatible to the Constitution, and as such, inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI115/12
Applicant
Fadil Salihu
Assessment of regularity of election of the President of Vetëvendosje Movement in Ferizaj, on 4 November 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Fadil Salihu from Ferizaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the decision on election of the President of the Vetëvendosje Movement in the Ferizaj Centre, of 04 November 2012.

Subject matter

3. Interpretation of the Statute of Vetëvendosje Movement in relation to the election of President of this Movement in Ferizaj.

Legal basis

4. The referral is based upon 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 15 January 2009 (hereinafter: the Law) and Rule 56, paragraph 2 of the Rules of Procedure (hereinafter: Rules of Procedure).

Proceedings before the Court

5. On 3 December 2012 the Applicant filed a referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. By decision of the President (no. GJR. 115/12 of 06 December 2012), Judge Arta Rama Hajriziwas appointed Judge Rapporteur. On the same day, by decision no. KSH. KI 115/12, the President appointed the Review Panel composed of Judges Almiro Rodrigues(Presiding), Ivan Čukalović and Prof. Dr. Enver Hasani..

7. On 25 January 2013 after having considered the report of Judge Arta Rama – Hajrizi the Review Panel composed of Judges Almiro Rodrigues (Presiding), Ivan Čukalović and prof. dr. Enver Hasani made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

8. On 4th of November 2012, elections were held for the President of the Vetëvendosje Movement in Ferizaj Centre.

9. On the same day, the person already exercising the function of President was re-elected for President of the Ferizaj Centre, by majority of votes.

Applicant's allegations

10. According to allegations of the Applicant, the elections for President of the Vetëvendosje Movement in Ferizaj, held on 4th of November 2012, resulted in electing a person who does not meet the criteria pursuant to the Statute of the Vetëvendosje Movement, of July 2012.

11. The Applicant specifically invokes Article 17 of the Vetëvendosje Movement Statute, which provides:

> *"An individual who has taken part in compromising acts, in breach of founding principles and documents of the VETËVENDOSJE! Movement may not be a member of the VETËVENDOSJE Movement. The following shall be considered to be compromising acts:*
>
> *a) Collaboration with foreign intelligent/information services, and military, foreign para-military and police forces, that have or*

continue to exercise physical and psychological violence against citizens."

12. The grounds for his allegations are found by the applicant in the fact that the mentioned person was already elected for the position of President, a position he used to exercise in the previous term, and that during his previous term, financial abuses were found, also identified by the Auditor of the Movement.

13. The Applicant alleges that the person (Candidate for President of Movement Centre) was not present in Kosovo at the time of elections, and had not taken part in the campaign, and that he was elected President by vote-buying.

14. The Applicant, in his referral, states that "*he is addressing the Constitutional Court, because he wants to combat totalitarianism in practice, against the vote-buying for positions, misuses and for the justice to prevail. "*

Assessment of the admissibility of the Referral

15. 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. In this respect, 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."

16. The Applicant, in his Referral, does not state what rights, provided for by the Constitution or the law, have been infringed by the election of the mentioned person for President of the Movement, although Article 48 of the Law on the Constitutional Court of the Republic of Kosovo requires 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"

17. In relation to the concrete Referral of the Applicant, the Court refers to the Rule 36, paragraph 3 item (f) of Rules of Procedure of the Constitutional Court, which provides the following:

> *"A Referral may also be deemed inadmissible in any of the following cases: f) the Referral is incompatible ratione materiae with the Constitution";*

18. The Court is bound to assess whether it has *ratione materiae* competence at all stages of proceedings. Compatibility *ratione materiae* of a Referral with the Constitution and international acts which are integral parts of the Constitution, in accordance with the Article 53 of the Constitution, derives from the substantial competence of the Court. For a Referral to be compatible *ratione materiae* with the Constitution, the right claimed by the Applicant must be protected by the Constitution.

19. The Applicant points out to an alleged violation related to the interpretation of the "Vetëvendosje Movement Statute". The Vetëvendosje Movement is not a public authority. Therefore, the Referral is incompatible *ratione materiae* with the Constitution, because the competence of the Constitutional Court covers disputes which are related to alleged violation of the Constitution *by public authorities*. Therefore, the Referral is incompatible *ratione materiae* with the provisions of the Constitution and, as such, is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 36(3f) of the Rules of Procedure, in the session held on 25 January 2013, 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**
Arta Rama Hajrizi	Prof. Dr. Enver Hasani

KI 89/12, Brahim Delijaj, date 07 March 2013- Constitutional Review of the Judgment of the Supreme Court of Kosovo Rev.No. 374/2009 of 2 May 2012

KI89/12, Resolution on Inadmissibility of 29 January 2013

Keywords: Individual Referral, manifestly ill-founded.

The Applicant alleges that the Judgment of the Supreme Court of Kosovo Rev. No. 374/2009 of 2 May 2012, by which is rejected the filed revision, has violated his rights guaranteed by the Constitution, more precisely Article 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 121 [Property] of the Constitution and Article 6.1 [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter: ECHR).

The Applicant addresses the Constitutional Court with the request to annul the Judgment of the Supreme Court Rev. No. 374/2009 of 2 May 2012 and to uphold the Judgment of the District Court in Peja Ac. No. 83/2008 of 22 April 2009.

According to the facts, presented by the Applicant, the Applicant has not submitted any *prima facie* evidence that would indicate violation of his rights, guaranteed by the Constitution.

The Referral is manifestly ill founded pursuant to Rule 36. 2 (b) and (d) of Rules of Procedure.

RESOLUTION ON INADMISSIBILITY
In
Case no. KI 89/12
Applicant
Brahim Delijaj
Constitutional Review of the Judgment of the Supreme Court of Kosovo Rev. No. 374/2009 of 2 May 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The applicant is Brahim Delijaj, residing in the village of Lower Ratish, Municipality of Deçan.

Challenged Decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo, Rev. No. 374/2009, dated 2 May 2012, served on the Applicant on 18 June 2012.

Subject Matter

3. The subject matter is the referral of the Applicant on the annulment of the Judgment of the Supreme Court of Kosovo, Rev. No. 374/2009, dated 2 May 2012, and upholding of the Judgment of the District Court in Peja, Ac. No. 83/2008, dated 22 April 2009, related to the right of permanent servitude.

Legal Basis

4. The Referral is based on Articles 21.4 and 113.7 of the Constitution, in conjunction with Article 22 of the Law No. 03/L-121 on Constitutional

Court (hereinafter: the Law) and Rule 56 (2) of Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 4 October 2012, the Applicant filed a referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. By decision of the President No. GJR. KI 89/12 of 31 October 2012, Judge Arta Rama-Hajrizi was appointed as Judge Rapporteur. On the same date, by decision of the President No. KSH. 15/12, the Review Panel was appointed, composed of Judges: Almiro Rodrigues (presiding), Kadri Kryeziu (member), and Prof. Dr. Enver Hasani (member).

7. On 19 November 2012, the Constitutional Court notified the Applicant and the Supreme Court of Kosovo on the registration of the Referral.

Summary of the Facts

8. In his Referral, the Applicant claims to be the owner of the cadastral parcel No. 114, total surface area 0.08,24 hectares, in the village of Lower Ratish, Municipality of Deçan. According to the documents attached to the Referral, on its eastern side, this parcel borders on cadastral parcel No. 111, registered in the name of the late Sejd Hasan Delijaj, father of Isuf, Përparim and Hasan Delijaj, who are users and possessors thereof, and also cousins of the Applicant. on the north-eastern angle of the parcel, there is a yard door belonging to the Applicant, connected to the public road, and passing through the cadastral parcel No. 111 of 8 meters length and 4 meters width, also located in the village of Lower Ratish, Municipality of Deçan.

9. On 18 August 2004, the Applicant filed a claim with the Municipal Court in Deçan demanding recognition of the right to permanent servitude on parcel no. 111. The Applicant, on 5 July 2007, based on cadastral records, clarified his submission thereby claiming that he is the owner of parcel No. 114/2, surface area of 0.04.12 hectares.

10. The Municipal Court in Deçan, by judgment C. No. 130/06, of 19 December 2007, pursuant to Article 59 of the Law on Property Relations, rejected the claim of the Applicant as ungrounded, thereby finding that the Applicant was not isolated, and had normal communication and connection with the public road of the village. The Municipal Court in Deçan reasoned further that the Applicant, in the

case of the division of property between him and his brother, had not exercised the servitude right of passage for 35 years, and also failed to secure the passage way.

11. The Applicant filed a complaint against the Judgment of the Municipal Court with the District Court in Peja. By Judgment Ac. No. 83/08, of 22 April 2009, the District Court approved the claim of the Applicant, only as to the part regarding the recognition of the existence of a permanent servitude right of passage through the western side of the cadastral parcel No. 111.

12. The District Court in Peja, by judgment AC. No. 83/08, of 22 April 2009, reasoned that "it does not approve as legitimate and proper the legal stance of the court of first instance". The District Court further found that [...] "*in this legal case, the decisive fact was ascertained that the extent and magnitude of exercise of servitude rights by the claimant were changed, nevertheless, this does not lead to the finding that the claimant has not used the contested passage", and in conclusion, it found that [...] "in this legal case, substantive law was erroneously applied [...]."*

13. The opposing party filed a revision against the Judgment of the District Court in Peja with the Supreme Court of Kosovo, claiming essential violations of the provisions of contested procedure, and erroneous application of substantive law.

14. The Supreme Court, by judgment Rev. No. 374/2009, of 2 May 2012, served on the Applicant on 18 June 2012, accepted the revision filed by the respondents as grounded, thereby amending the judgment of District Court in Peja, and upholding the judgment of the Municipal Court, reasoning that the District Court erroneously applied the substantive law. The Supreme Court, in its reference to Article 49, paragraph 1, Law on Property Relations further reasoned that [...] "*the real servitude is the right of an owner of an immoveable property (dominant estate) to undertake certain actions, for the needs of such property, into the immoveable property of the other owner (servient estate), or to require from the serving property owner to refrain from actions which otherwise would be entitlement of that owner in his immoveable property, which ultimately implies that persons who are not owners of the served property are not entitled to claim judicial protection."* The Supreme Court, in its judgment, concludes that *"the possessor of the parcel who is not an owner is not entitled to claim ascertainment of the existence of rights to real servitude of passage against the owner of the servient estate*."

15. On 7 July 2012, the Applicant filed a proposal with the State Prosecutor to initiate the request for protection of legality against the Supreme Court Judgment.

16. The State Prosecutor, on 30 July 2012, upon review of the case, rejected the initiation of a request for the protection of legality. In its notice, the State Prosecutor considered that [...] "*in this civil case, the Supreme Court rendered a judgment acting upon the revision of the respondents, and a Request for Protection of Legality is not allowed against such judgment.*"

Applicable law applied by the Supreme Court

17. The Law on Contested Procedure (Law no. 03/L-006), Article 182, paragraphs 1 and 2, and Article 224, paragraph 1, provide the following:

"182.1 Essential violation of contested procedures provisions shall exist in cases in which the court, during procedure, fails to apply or erroneously applies the provisions of this law, thereby affecting a rightful legal decision.

182.2 Essential violation of contested procedures provisions shall always exist;

n) if the decision contains flaws due to which it cannot be examined, especially if the enacting clause of the decision is incomprehensive or contradictory in itself with the reasoning of the ruling, or the ruling fails to reason or to provide reasoning on decisive facts, or such reasoning is unclear, contradictory, or in ascertaining decisive facts, there are contradictions between what is said in the verdict, the main document or the procedural records and of the document or the minutes of proceeding;

224.1 If the court of revisions ascertains that the material good right was applied wrongfully, through a decision it approves the revision presented or changes the decision attacked."

18. The Law on Basic Property Relations, of 30 January 1980 (published in the Official Gazette no. 6/80), Article 49, paragraph 1, and Article 59, provides:

Article 49, Paragraph 1

"The real servitude is the right of an owner of an immoveable property (served property) to undertake certain actions, for the needs of such property, upon the immoveable property of the other owner (serving property), or to require from the serving property owner to refrain from actions which otherwise would be the entitlement of that owner upon his immoveable property, which ultimately implies that persons who are not owners of the served property are not entitled to claim judicial protection."

Article 59

"In case of division of served property, the real servitude shall remain on all its divisions.
The owner of the serving party may require ceasing of the real servitude of owner of any part of the served property divided, if such real servitude does not serve such division of property.
In case the serving property is divided, real servitude shall remain only on parts upon which it is exercised."

Allegations of the Applicant

19. As stated above, the Applicant claims that the Judgment of the Supreme Court of Kosovo, Rev. No. 374/2009, dated 2 May 2012, rejecting the revision filed, has violated his constitutionally guaranteed rights, specifically Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 121 [Property] of the Constitution, and Article 6.1 [Right to fair and impartial trial] of the European Convention on Human Rights (hereinafter: ECHR).

20. The Applicant requests the Constitutional Court to annul the judgment of the Supreme Court Rev. No. 374/2009, of 2 May 2012, thereby upholding the Judgment of the District Court in Peja, Ac. No. 83/2008 of 22 April 2009.

Admissibility of the Referral

21. In order to be able to adjudicate the Applicant's Referral, the Court has first to examine whether the Applicant has met the admissibility criteria, which are foreseen by the Constitution as further specified by the Law and the Rules of Procedure.

22. The Court must first examine whether the Applicant is an authorized party to submit a referral with the Court, in accordance with the requirements of Article 113.7 of the Constitution.

Article 113, paragraph 7 of the Constitution 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."

In relation to this Referral, the Court notes that the Applicant is a natural person, and is an authorized party in accordance with Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution.

23. The Court must also determine whether the Applicant, in accordance with the requirements of Article 113 (7) of the Constitution, and Article 47 (2) of the Law, has exhausted all legal remedies available to him under Kosovo law. In the present case, the Court notes that the complaints and revision have been filed by the Applicant according to the procedure stipulated by Law, namely with the Municipal Court in Deçan, the District Court in Peja, and the Supreme Court of Kosovo, thereby exhausting all legal remedies, in compliance with Article 113.7 of the Constitution.

24. The Applicant must also prove that he has fulfilled the requirements of Article 49 of the Law in relation to the submission of the Referral within the legal time limit. It can be seen from the case filethat the Decision of the Supreme Court was served on the Applicant on 18 June 2012, while the Applicant filed the Referral with the Court on 4 October 2012, meaning that the Referral was submitted within the four month time limit, as prescribed by the Law and the Rules of Procedure.

25. In relation to the Referral, the Court also takes into account Rule 36 of the Rules of Procedure, which provides:

"(1) The Court may review referrals only if: c) The referral is not manifestly ill- founded."

26. Based on the Applicant's submissions, the Court notes that the reasoning provided in the decision of the Supreme Court is clear, and that, after having reviewed the entire procedure, the regular court proceedings have not been unfair or arbitrary (See, *mutatis mutandis, Shub v. Lithuania,* Decision of the European Court of Human Rights on admissibility of referral, no. 17064/06, of 30 June 2009).

27. The Court recalls that the Constitutional Court is not a fact-finding court and, in this case, it states that the full and fair ascertainment of the factual situation is in the jurisdiction of regular courts, and that its role is only to ensure compliance with the rights guaranteed by the Constitution and other legal instruments *(*See, *mutatis mutandis,* i.a., *Akdivar v. Turkey*, 16 September 1996, R. J. D, 1996-IV, para. 65*)*.

28. The Court further recalls that the Constitutional Court is not a court of fourth instance, when considering decisions taken by regular courts. It is the mandate of regular courts to interpret and apply rules of procedural and substantive law (See, *mutatis mutandis*, *García Ruiz v. Spain [DHM], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I*. See also, *Resolution on Inadmissibility in the case No. 70/11, Applicants Faik Hima, Magbule Himaand Besart Hima, Constitutional review of the Supreme Court Judgment, A. No. 983/08, of 7 February 2011*).

29. The fact that the Applicant is not content with the outcome of the Supreme Court decision does not entitle him to raise an arguable claim as to the violation of Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions], 121 [Property] of the Constitution, and Article 6.1 [Right to Fair and Impartial Trial] of the ECHR(See, *mutatis mutandis ECHR Judgment Appl. No. 5503/02, Mezotur-Tiszazugi Tarsulat v. Hungary,* Judgment of 26 July 2005).

30. In conclusion, based on the facts provided by the Applicant, the Court notes that the Applicant has not submitted any *prima facie* evidence demonstrating a violation of his rights guaranteed by the Constitution (See, *mutatis mutandis, Vanek v. Republic of Slovakia,* EHCR decision on admissibility of referral, no. 53363/99, on 31 May *2005*).

31. Consequently, the Referral is manifestly ill-founded, in compliance with Rule 36.2 (b) and (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of Law and Rule 36.2 (b) and (d) of the Rules of Procedure, on 29 January 2013, 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
Arta Rama-Hajrizi

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 35/12, Agron Prenaj, date 07 March 2013- Constitutional Review of the Supreme Court Judgment PKL. 11/2012, of 6 February 2012

Case KI 35/12, Resolution on Inadmissibility of 17 January 2013

Keywords: Individual Referral, manifestly ill-founded, resolution on inadmissibility, right to fair and impartial trial, human dignity, criminal procedure.

The Municipal Court in Gjakova found the Applicant guilty of abusing the right to vote pursuant to pertinent provisions of the Criminal Code of Kosovo. The Applicant appealed this decision in the District Court in Peja, and later also in the Supreme Court of Kosovo.

The Applicant filed the Referral based on Article 113.7 of the Constitution of Kosovo, claiming that by decision of the Supreme Court PKL. 11/2012, his dignity was violated pursuant to Article 23 of the Constitution in conjunction with Article 31 (4) of the same, since, as he puts forward, he was sentenced on account of an alleged joke.

In this case the Court noted that it is not its task under the Constitution to act as a court of appeal, or court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law and that it 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.

Therefore, having reviewed the documents submitted by the Applicant, the Constitutional Court did not find that the relevant proceedings were in any way unfair or tainted by arbitrariness and declared the Referral manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY
in
ase No. KI 35/12
Applicant
Agron Prenaj
Constitutional Review of the Supreme Court JudgmentPKL. 11/2012, dated 6 February 2012.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama – Hajrizi, Judge

Applicant

1 The Applicant is Agron Prenaj, residing in village of Novesellë-Municipality of Gjakova, represented by Mustafë Kastrati, a practicing lawyer from Peja.

Challenged decision

2 The challenged decision is the Judgment of the Supreme Court of Kosovo PKL. 11/2012, adopted on the 6th of February, 2012.

Subject matter

3 The Applicant has been convicted of abusing the right to vote pursuant to Article 178 (1) of the Criminal Code of Kosovo (CCK).

Legal Basis

4 The Referral is based on Article 113.7 of the Constitution 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

5 On the 2nd of April 2012, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: "the Court").

6 By the Decision of the President (No. GJR. 35/12 of the 11th of April 2012) Robert Carolan was appointed as Judge Rapporteur.

7 On the same day, by decision No. KSH. 35/12, the President appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Gjyljeta Mushkolaj and Iliriana Islami.

8 On the 7th of June 2012, the Constitutional Court through a letter informed the Applicant's Lawyer that the Referral had been registered.

9 On 8th of June 2012, the Constitutional Court, through a letter, informed the Supreme Court that the Applicant had applied to take a review of the decision Pkl. 11/2012, of 6 February 2011 and enclosed a copy of the Referral.

10 On 2 July 2012, the President, by Decision GJR. 35/12 reappointed the new Review Panel composed of judges: Altay Suroy (presiding), Mr.Sc. Kadri Kryeziu, is appointed to replace Judge Gjyljeta Mushkolaj, since her terms of office as judge of the Constitutional Court had expired on 26 June 2012, and Ivan Čukalović, is appointed to replace Judge Iliriana Islami because her term of office on the Court had expired on 26 June 2012.

11 On 17 January 2013, 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 12.12.2010, the Applicant was tasked to be food supplier and registered Observer for the political entity, the Alliance for the Future of Kosovo (AAK) in Polling Centre no. 0210 C, in the polling station 04 D, in the Primary School "Shtjefën Kurti" in the village of "Novesellë e Epërme", the Municipality of Gjakova.

13 At about 13:00 he aided his mother to vote and about 15:00 he also voted .

14 After this, he left to get lunch in a neighboring town and returned between 17:30 and 18:00.

15 Whereupon, he entered the balloting room and is reported to have attempted to vote for a second time. He told observers and commissioners "I will vote and you cannot stop me" but was stopped by them. The applicant claimed this was a joke, which the Municipal Court rejected.

16 The chairperson of the polling station, MM, stated that in line with his duties, he notified him that he could only vote once to which the Applicant asserted that he was only an escort.

17 The possibility that the Applicant had a knife in his hand when advancing towards the balloting box was put to the court in the statement of P.Q., which the Applicant defended as in fact being a set of car keys.

18 The Municipal Court in Gjakova in its judgment P. no. 7/2011 of the 13th of April, 2011, found the Applicant guilty of abusing the right to vote under Article 178(1) of the CCK. His conviction entailed a fine of 250 Euros.

19 The District Public Prosecutor in Peja appealed this judgment on grounds that the punishment was too lenient. The District Court of Peja (AP. No. 52/11 of the 31st of December, 2011) approved the prosecutor's appeal that the social danger and the consequences of the criminal offence committed did not correspond to the punishment.

20 The District Court of Peja found that the Municipal Court had only considered the mitigating circumstances and not the aggravating ones, such as the fact that as an observer the Applicant should have had more responsibility to avoid the abuse of the vote, not less. In addition to the fine, the Applicant received a three month prison sentence.

21 The Applicant, represented by defense counsel, appealed to the Supreme Court, against the District Court Judgment AP. No. 52/11 of the 31 December 2012.

22 The defense counsel filed a request for the protection of the legality due to the proposed violations of the provisions of the CCK (Article 1 (3), Article 7 and Article 14), the CCPK (Article 404 (1.2), Article 157 (1) and Article 322(3)) and provisions of the Law on Elections (Article 51.1 and Article 84.2).

23 The State Prosecutor's submission, KMLP. 11. 9/2012 of 24.01.2012, proposed the request for the protection of legality be rejected as unfounded.

24 Concerning Articles 1 (3), 7 and 14 of the CCK, in conjunction with Article 404 (1.2) of the CCPK, the defense counsel claimed that the District Court did not prove the subjective element of premeditation of the act as they assert that his intention was to joke with those at the polling station, not to commit the criminal act, and especially that his act was not so severe as to fall under the criminal offense envisaged by Article 7.

25 The Supreme Court Judgment Pkl. No. 11/2012, in declaring the allegations unfounded, reasoned that the defense counsel did not understand these legal provisions and invoked a wrong legal basis, because paragraph 3 of Article 1 of the CCK concerns the preventing of analogy and the present case deals with a criminal offence, set forth pursuant to the principle of legality in a clear manner. Article 14 of the CCK concerns the casual link between the action and the consequences, in the present there was no doubt as to the correlation (Article 178 of the CCK dictates that the action is considered committed in the mere attempt to vote).

26 The defense counsel claimed the court violated Articles 157(1) and 322 (3) of the CCPK as they sentenced the accused based solely on the testimony of P.Q., an observer of the NGO BIRN (Balkan Investigation Reporting Network) and did not compel two other witnesses who ignored the court's invitation to testify. But the Applicant made no showing of what critical evidence was not received by the regular court so that his constitutional right to a fair trial was violated.

27 They also alleged that Article 51.1 of the Law on Election was violated as the complaint should have been addressed to the Election Complaint and Appeal Commission (ECAC) and the court did not provide this evidence. A similar violation of Article 84.2 is alleged as the Poll Book was not introduced as evidence and the immediate assistance of the Police was not requested.

28 The Supreme Court deemed that the CCK (Article 451) specifically determines the legal bases for the protection of legality and a violation of the Law on Elections is not one that qualifies.

29 The Supreme Court stressed that it is not a fact finding court and that the defense counsel's probes to readdress -for example- the witness availability and weight put in their statements was not (re)examinable by the court.

30 The Supreme Court reviewed the case file pursuant to Article 454 (1) in conjunction with Article 355 (1) of the CCPK and declared the request for the protection of legality to be unfounded.

Applicant's Allegations

31 The Applicant puts forward that in sentencing the accused on account of the alleged joke, his dignity was violated pursuant to Article 23 of the Constitution in conjunction with Article 31 (4) of same.

32 In addition, the Applicant contends that certain facts and situations were not clarified by the courts, such as whether keys or a knife were in fact in his hands, whether he in fact voted with his mother the first time and exactly what capacity he participated in, as a food supplier or an observer. As such, he argues that the conviction was made from mere presumptions, not evidence.

33 In filing the referral to this Court, the applicant wishes to achieve a fair and impartial trial.

34 The Applicant claims that he has been sentenced based solely on the testimony of the witness to the incident, P.Q., an observer of the NGO BIRN.

Preliminary assessment of admissibility of the Referral

35 Although the Applicant has exhausted all legal remedies in order to exercise his alleged right to a fair trial, as provided in Article 113.7 of the Constitution, he has not presented any evidence or relevant facts to support his conclusion that "Administrative or judicial authorities have made any violation of his rights guaranteed by the Constitution" (see Vanek against the Slovak Republic, the ECHR's Decision on admissibility in case no. 53363 of 31 May 2005).

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

procedural and substantive law (see, mutatis mutandis, Garcia Ruiz v. Spain (GC) no. 30544/96, para. 28 ECHR 1999-I).

37 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, Report of the European Commission on Human Rights in the case Edwards v. United Kingdom App. No 13071/87 adopted on 10 July 1991).

38 However, having reviewing the documents submitted by the Applicant, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, referral no. 53363/99, Vanek v. Slovak Republic, ECHR Decision of 31 May 2005).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 46 of the Law, and Rule 56 (2) of the Rules of Procedure, on 17 January 2013, 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 Constitutiona Court**
Robert Carolan	Prof. Dr. Enver Hasani

KI 103/11, Gani Morina, date 07 March 2013- Constitutional Review of the Judgment of the District Court in Peja, AP. No. 90/10, dated 8 April 2011.

Case KI 103/11, Resolution on Inadmissibility of 23 January 2013

Keywords: individual referral, *ratione temporis*, unlawful search, the right to fair and impartial trial, the right to have the private and family life respected

The Applicant filed the Referral based on Article 113.7 of the Constitution of Kosovo, claiming that his constitutional rights have been violated by wrongful actions of the Kosovo Police and by the Decision of the District Court in Peja. The Applicant, among others, claimed violation of the right to the private and family life and the right to fair and impartial trial.

Concerning the allegations raised by the Applicant, the Court first established its temporal jurisdiction and then found that the allegations raised by the Applicant were related to a period of time when the Court had no temporal jurisdiction, namely the Applicant's alleged violations had happened before the Constitution of Kosovo entered into force. Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution and Rule 36 (3) h) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI103/11
Applicant
Gani Morina
Constitutional Review of the Judgment of the District Court in Peja, AP. Nr. 90/10, dated 8 April 2011

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Gani Morina, a lawyer, from the Municipality of Klina.

Challenged decision

2. The Challenged decision is the Judgment of the District Court in Peja, AP.Nr.90/10, dated 8 April 2011 which was served on the Applicant on 25 April 2011.

Subject matter

3. The subject matter of the Referral is the complaint of the Applicant in relation to the wrongful execution of a search warrant on his dwelling house on 17 April 2007, he having being arrested and handcuffed and the trauma to himself and his wife in relation to the violation of their dwelling house and their privacy.

4. Moreover, the Applicant has asked the Constitutional Court not to divulge his identity.

Legal basis

5. The Referral is based on Article 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: 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).

Procedure before the Court

6. On 25 July 2011 the Applicant submitted a referral to the Constitutional Court of Kosovo (hereinafter: the Court).

7. On 17 August 2011 the President appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur and a Review Panel composed of Judges Altay Suroy, presiding, Almiro Rodrigues and Iliriana Islami.

8. The Court requested information from the Public Prosecutor of Kosovo on 22 September 2011 and October 2011. A reply was received from the Public prosecutor dated 11 November 2011.

9. Supplementary documentation from the Applicant was received by the Court in a letter dated 26 July 2011 but received by the Court on 14 October 2011.

10. The Court requested further information from the Applicant in relation to the referral on 8 December 2011. A reply, dated 15 December 2011, was received from the Applicant on 23 December 2011.

11. On 26 November 2012, the President by Decision (No. GJR.KI103/11) appointed Judge Robert Carolan as Judge Rapporteur after the term of office of Judge Gjyljeta Mushkolaj as Judge of the Court had ended. On the same date, the President by Decision (No.KSH.KI103/11), appointed the new Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Ivan Čukalović, after the term of office of Judge Iliriana Islami as Judge of the Court had ended.

12. On 17 January 2013, 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 as evidenced by the documents furnished by the Applicant

13. A search warrant was issued by an International Judge from the District Court of Prizren on 16 April 2007 authorizing a search of three different

premises in connection with an investigation into drug dealing. One of the premises was alleged to be owned by SS and HS, a three storey house in Bajram Curri Street, Klina. The time within which the search was to be conducted was between 0600 hours and 2200 hours.

14. This warrant was executed 17 April 2007 by certain Police Officers in Klina. The police Report prepared on 2 May 2007 indicated that according to the information available to the Police the house in Bajram Curri Street had two separate entrances in the front side. It was suspected that the two suspects SS and HS lived there and that if the entrance at the back side, in which two elderly people lived, had no connection to the first entrance the back part should not be searched. The search commenced at 0550 hours at a house that had no number on it. The writer of the Police report noted that the two entrances were a joint one, which meant that one could move from the first entrance to the second one. The Applicant, a lawyer, Gani Morina was arrested there, handcuffed for 2-3 minutes but then these were removed.

15. There was also a female person there, the wife of the Applicant, since deceased. A female Police Officer was assigned to her and she was not handcuffed. The Applicant was handcuffed for 2-3 minutes. The search warrant was read to him in English. During the search, the commanding field operator was contacted who confirmed that the search was being conducted at the right location. The search continued and eventually terminated at 0706 hours.

16. On 20 April 2007 the Applicant addressed a complaint to the District Prosecutor's Office in Prizren, regarding the implementation of a search warrant issued by the District court of Prizren dated 16 April 2007; however, he did not receive any response.

17. On 21 April 2007 the Applicant addressed the Municipal Prosecutor's Office in Peja raising charges under; Article 166 (1) and (3) (the criminal offence of violation of the integrity of residences), Article 167 (criminal offence of illegal search), and Article 304 (1) and (2) (Criminal offence of not reporting criminal offence, or not reporting the perpetrators of a criminal offence) of the Provisional Criminal Code of Kosovo (hereinafter: PCCK). The Applicant brought these charges because he claimed that F.H., R.F., S,H, and D.V. violated the provisions of Article 240 (5), Article 242 (1), (2), (3) and (4), and Article 245 (5) of the Provisional Criminal Procedure Code of Kosovo (hereinafter: the PCPCK).

18. On 11 June 2007 the Municipal public Prosecutor in Peja heard the witnesses to the contested search. He reached the conclusion that there was room for procedure and accountability of those who conducted the search. This conclusion was given protocol sign PPN.nr.64/02 dated 16 July 2007.

19. On 24 August 2007 the Applicant wrote to the Municipal Public Prosecutor in Peja complaining about the reduction of the charge, however he received no response.

20. On 15 November 2007 the Municipal Public Prosecutor in Peja presented proposed charges with a punitive warrant PP.nr.1853/2007 against the defendants R.F., S.H. and D.V., but not against F.H. who was the main person responsible for issuing the order to search nor E.I., who despite being part of the search team, was only heard in the capacity of a witness. The charges against R.F., S.H., and D.V. were reduced to the criminal offence of unlawful search under Article 167 of the PCCK.

21. On the 22 November 2007, the Applicant wrote to the Municipal Public Prosecutor requesting the changing and expansion of the proposed charges as to include the repeated search, which the applicant alleges took place without witnesses, without the owner and without being reported. The Applicant claims that this was in violation of the provisions of Article 243 (7) of the PCPCK. The Applicant received no response to this submission.

22. On 14 December 2007 the Municipal Court in Klina issued its Judgment P.nr.162/2007 and held that R.F., S.H. and D.V were guilty of committing the criminal offence of unlawful search under Article 167 (1) in conjunction with Article 23 of the PCCK and punished them with a fine amounting to € 250 each and expenses.

23. The Municipal Court stated in its reasoning that it reached this decision based on the evidence attached to the proposal for issuing a punitive order such as the criminal charge brought by the Applicant, the search warrant, dated 16 April 2007, the search report, the article the Applicant published in Epoka e Re newspaper, the doctor's reports for the Applicant's wife, and other case files.

24. On 10 January 2008 R.F., S.H and D.V appealed the Decision P.nr.162/07. They claimed the punitive order was issued based on erroneous evidence. They requested that the proposal of the prosecutor for the issuing of the order be rejected and that the Municipal Court schedule a main hearing regarding the case.

25. On 18 February 2010 in his final speech after rendering evidence the Public Prosecutor in Peja withdrew from the proposed charges against R.F., S.H and D.V. due to lack of witnesses. The Applicant however continued the case as a subsidiary plaintiff.

26. On 22 February 2010 the Municipal Court in Klina by its Judgment P.nr.162/07 released R.F., S.H and D.V from the proposed charges.

27. The Municipal Court held, that based on the confirmed evidence from the main hearings and based on the testimonies of the witnesses, the search warrant and the hearing of the R.F., S.H and D.V. The Municipal Court came to the conclusion that in the behavior of the R.F., S.H and D.V. there were neither elements nor features of the criminal offence of unlawful search. Therefore, the Municipal court released R.F., S.H and D.V. from the proposed charges, since even the Municipal Prosecutor from Peja, in his final speech withdrew from the criminal prosecution of R.F., S.H and D.V. because of the absence of evidence.

28. On 25 may 2010 the applicant appealed the Judgment P.nr.162/07. The Applicant claimed that in the judgment there were essential violations of the provisions of criminal procedure, erroneous and incomplete acknowledgment of the state of facts, and violations and wrongful interpretation of the material rights.

29. On 8 April 2011 the District Court in Peja issued a Judgment Ap.nr.90/10 affirming the Decision of the Municipal Court in Klina P.nr. 162/07.

30. On 6 May 2011 the Applicant made a request for protection of legality to the Office of the Chief State Prosecutor of Kosovo.

31. On 12 May 2011 the State prosecutor of Kosovo rejected the Applicant's request. They stated that after the reviewing of the Applicant's proposal in detail, no founded reasons were found from Article 451 and 452 of the PCPCK, for the presentation of a request for protection of legality.

Applicant's allegations

32. The Applicant claims a violation of Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 54 [Judicial Protection of Rights], Article 55.5 [Limitations on Fundamental Rights and Freedoms] of the Constitution. The Applicant also claims the violations of Articles 1 – Obligation to respect human rights and 8 –

Right to respect for private and family life of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

33. The Applicant maintains, inter alia,

- that the search warrant was in a language that he did not understand,
- that it did not contain his name or the name of any member of his family,
- that the police report states that the house was two and not three storeys,
- that his house had the number 13 on the outside,
- that no drugs were found in his yard or bunker,
- that the search was repeated after 0900 hours with trained dogs without the presence of witnesses or the owner and no report of this was prepared.

34. The Applicant maintains that many provisions of the PCCK, PCPCK, Law on the Police and the Law on the State Prosecutor's Office were violated at the time of the making of the search and during the Court procedures that followed.

Preliminary assessment of admissibility

35. 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.

36. 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."*

37. 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 8march 2006, para. 82).

38. The Court notes that the Applicant complains of a wrongful execution of a search warrant on his dwelling house on 17 April 2007 by the Kosovo Police.

39. 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 entry into force of the Constitution and from which date the Court has temporal jurisdiction.

40. The Court, similarly decided in the case KI100/10 Resolution on Inadmissibility, the 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.

41. Furthermore, the Court rejects the Applicant's request not to disclose his identity on the grounds that he did not justify the granting of such request.

42. 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 and Article 20 of the Law and in compliance with the Rule 36 (3) h of the Rules of Procedure, on 17 January 2013, 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
Robert Carolan

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 90/12, Ramadan Kastrati, date 07 March 2013- Constitutional Review of the order SCC-04-0100 of the Special Chamber of the Supreme Court of Kosovo, dated 18 august 2004

Case KI 90/12, Resolution on Inadmissibility of 23 January 2013

Keywords: individual referral, *ratione temporis*, the right to fair and impartial trial, the right to property, possession list

The Applicant filed his Referral based on Article 113.7 of the Constitution of Kosovo, claiming that his constitutional rights have been violated by the decision of the Special Chamber of the Supreme Court of Kosovo. The Applicant, among others, claimed that the Special Chamber of the Supreme Court did not inform him regarding the rendered decision.

Concerning the allegations raised by the Applicant, the Court first established its temporal jurisdiction and then found that the allegations raised by the Applicant were related to a period of time when the Court had no temporal jurisdiction, namely the Applicant's alleged violations had happened before the Constitution of Kosovo entered into force. Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution and Rule 36 (3) h) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI90/12
Applicant
Ramadan Kastrati
Constitutional Review of the order SCC-04-0100 of the Special Chamber of the Supreme Court of Kosovo, dated 18 august 2004

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Ramadan Kastrati (legal representative of his deceased father Q.K.), represented by Isak Islami, a practicing lawyer in Prishtina.

Challenged decision

2. The Applicant asks for review of the order SCC-04-0100 of the Special Chamber of the Supreme Court of Kosovo (hereinafter: the SCSC), dated 18 August 2004.

Subject matter

3. The subject matter of the Referral is the request of the Applicant to stop the sale of a business premise by the Kosovo Privatization Agency (hereinafter: the PAK) which the Applicant claims is his property.

4. The Referral is based on Article 113.7 of the Constitution; Articles 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Rule 36 (3) (h) of the Rules of Procedure of the Constitutional Court of Kosovo (hereinafter: the Rules of Procedure).

Procedure before the Court

5. On 10 September 2012, the Applicant submitted a referral to the Constitutional Court of Kosovo (hereinafter: the Court).

6. On 13 of September 2012, the Court asked the Applicant to clarify several aspects of his Referral.

7. On 31 October 2012, the Court notified the Applicant about the registration of the Referral and once more asked the Applicant to clarify his Referral.

8. On 2 November 2012, the President appointed Judge Robert Carolan as Judge Rapporteur and a Review Panel composed of Judges Altay Suroy, presiding, Almiro Rodrigues and Arta Rama-Hajrizi.

9. On 27 November 2012, the Applicant filed additional documents with the Court.

10. On 17 January 2013, 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 as evidenced by the documents furnished by the Applicant

11. On 27 June 1984, the Municipality of Gjilan issued certificate No.04-431/31 by which it certified that Q.K (the deceased father of the Applicant), since 1966, is the owner of a business premise situated in Gjilan.

12. On 8 May 1985, Q.K. reached a written agreement on compensation with the Secretariat for municipal-residential and property-legal affairs in Gjilan, by which the Secretariat was obliged that as a compensation for expropriated land and buildings to give to Q.K. a business premise of 30 square meters.

13. According to the above-mentioned agreement, the obligation to give the business premise to Q.K should have been carried out by the Battery Factory in Gjilan, which in the expropriated land had built, for its own needs, residential buildings which also included business premises.

14. On 7 March 1988, Q.K filed a claim with the Municipal Court in Gjilan, thereby asking the said court to force the respondents (Municipality of Gjilan and Battery Factory in Gjilan), to confer to Q.K the business premise as per written agreement on compensation dated 8 May 1985. The outcome of this claim is unknown due to lack of documentation and/or due to the fact that several documents in this referral are illegible.

15. On 14 March 1988, Q.K filed a submission with the Executive Council MA Gjilan, thereby explaining that he was damaged in a drastic way by the battery Factory in Gjilan because the business premises conferred to him "was not at all appropriate for work, but for a warehouse".

16. On 9 October 2003, the Municipal Court in Gjilan by Decision C.nr.529/03 following the proposal to impose interim measures by the plaintiff Q.K. (the deceased father of the Applicant), in relation to expropriation of immovable property(business premise), determined: 1) to impose interim measures, and 2) to prohibit the respondents, the Municipality of Gjilan and Battery Factory in Gjilan, to sell the business premise with a surface of 40 m2 until there was a definitive settlement of the ownership dispute.

17. On 28 June 2004, the Applicant filed a lawsuit with the SCSC against the Municipality of Gjilan and the Battery Factory in Gjilan, thereby asking not to put up for sale the above-mentioned business premises.

18. On 18 August 2004, the SCSC issued a binding order in case SCC 04-0100, thereby stating:

> *"This claim requests the compensation which comes from expropriation order and a request for the annulment of the same expropriation order if expropriation request will not be approved.Pursuant to the Articles 52 and 53 of the Law on Expropriation in conjunction with Article 139 of the Law on Out of Contentious Procedure this Chamber sends the decision on the quantity and compensation right to Municipal Court. Therefore pursuant to Article 17.2 of UNMIK Administrative Order 2003/13, this court follows this case to respective local court. If any appeal should be filed then it should be filed to Special Chamber".*
>
> *"This order is obligatory for the parties and the court to which was followed the case".*

19. On 28 May 2012, The Municipal Court in Gjilan following the lawsuit of the plaintiff Q.K. against respondents Municipality of Gjilan and the Battery Factory in Gjilan pertinent to the verification of property declared: (1) itself incompetent to rule in the said contested procedure; and,(2) the case-file will be sent to SCSC to proceed further as a competent court.

20. On 27 August 2012, the Applicant requested the PAK for non-inclusion of the business premise in the privatization wave.

21. On 11 September 2012, the Applicant filed a submission with the SCSC against the PAK in relation to his request for non-inclusion of the business premises in the privatization wave.

Applicant's allegations

22. The Applicant alleges that PAK did not consider possession list and copy of the plan of the business premise registered under the Name of Q.K (Applicant's deceased father).

23. The Applicant alleges that PAK did not consider the ruling of the SCSC (order SCC 04-0100), nor the ruling of the Municipal Court in Gjilan (Decision C.nr.529/03, dated 9 October 2003).

24. The Applicant claims that he has submitted the Referral with the Court for protection of legality with respect to the case No. SCC-04-0100 dated 28 June 2004, SCSC and PAK regarding the ban and non-inclusion of the business premises in the wave of privatization.

25. Furthermore, the Applicant alleges violation of Article 7 [Values] of the Constitution, because the SCSC has issued a ruling without informing neither the owner nor his authorized representative by letter. Furthermore, the Applicant considers the said action by the SCSC as a violation of human rights and freedoms concerning the rule of law.

Assessment of admissibility

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 8march 2006, para. 82).*

29. The Court notes that the Applicant complains that his property right guaranteed by the Constitution of the Republic of Kosovo has been violated. In that respect the Applicant requires a review of the SCSC order no.04-0100 which is dated 18 August 2004.

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 entry into force of the Constitution and from which date the Court has temporal jurisdiction.

31. The Court, similarly decided in the case KI-100/10 Resolution on Inadmissibility, the 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.

32. 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 and Article 20 of the Law and in compliance with the Rule 36 (3) h of the Rules of Procedure, on 17 January 2013, 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
Robert Carolan

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 82/12, Milorad Rajović, date 12 March 2013- Constitutional review and lawfulness of the application of UNMIK Regulation No. 2000/4 and Law of the Republic of Kosovo no. 2008/03 – L033

Case KI-82/12, Resolution on Inadmissibility of 25 January 2013.

Keywords; individual referral, abstract review of constitutionality of law, right to legal remedies, immunity, protection of property, authorized party.

The Applicant has filed his referral in compliance with Article 113.7 of the Constitution of Kosovo, demanding review of constitutionality and lawfulness of application of UNMIK Regulation no. 2000/4 "On the Status, Privileges and Immunities of KFOR, UNMIK and their personnel", and Law of the Republic of Kosovo no. 2008/03 – L033 "On the Status, Immunity and Privileges of Diplomatic and Consular Missions and Personnel in Kosovo, and presence of international military corps and personnel".

The Applicant challenges the manner in which the Organization for Security and Cooperation in Europe (hereinafter: OSCE) interprets and applies the UNMIK Regulation no. 2000/4, and the Law no. 2008/03 – L033, considering that by misinterpretation, it is abusing with benefits deriving from the status, immunities and privileges held by diplomatic and consular missions and personnel in Kosovo.

The Applicant claims that such laws have violated his property rights as guaranteed by Article 46 (Protection of Property) of the Constitution of the Republic of Kosovo, and rights and freedoms as provided by Article 1 (Protection of Property) of Protocol 1 to the European Convention on Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR").

Deciding upon the referral of applicant Milorad Rajović, the Constitutional Court, upon review of proceedings, found that individuals may initiate proceedings in case of violation by public authorities of their rights and freedoms as guaranteed by the Constitution, nevertheless, the Applicant is not an authorized party to request interpretation of UNMIK Regulation no. 2000 /47, and Law 2008/03-033, in an abstract manner. Therefore, the Court found the referral inadmissible, as initiated by an unauthorized party.

RESOLUTION ON INADMISSIBILITY
in
Case No.KI82/12
Applicant
Milorad Rajović
Request for review of constitutionality and legality of implementation of UNMIK Regulation no.2000/4 and of the Law of Republic of Kosovo no. 2008/03 – L033

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mr.Milorad Rajović, the owner of "P.E. Udarnik Komerc" in Mitrovica, who is represented by the lawyer Avni Q Vula from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The constitutionality of the implementation of UNMIK Regulation no.2000/4 "on status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo"(hereinafter: UNMIK Regulation no.2000/4) is challenged as well as the Law no. 2008/03 – L033 "on Status, Immunities, and Privileges of Diplomatic and Consular Missions and Personnel in Kosovo and of the International Military Presence and its Personnel" (hereinafter: Law no. 2008/03 – L033).

Subject matter

3. The Applicant challenges the way the Organization for Security and Cooperation in Europe (hereinafter: the OSCE) interprets and implements UNMIK Regulation No. 2000/4 as well as the Law no. 2008/03 – L033. He alleges that those laws violated his property rights

guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo, as well as the rights and freedoms provided by Article 1 (Protection of Property) of the Protocol 1 of European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 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 15 January 2009(hereinafter: „the Law“) and the Rule 56 paragraph 2 of Rules of Procedure (hereinafter: the Rules).

Proceedings before the Court

5. The Applicant submitted Referral to the Constitutional Court (hereinafter, “Court”) on 07 September 2012.

6. By the decision of the President (no. GJR. KI-82/12 dated 5 October 2012), JudgeRobert Carolan was appointed asJudge Rapporteur. On the same day, by decision No. KSH KI-82/12, the President appointed the Review Panel composed of judges:Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama Hajziri.

7. On25 January 2013 after having considered the report of Judge Robert Carolan the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama – Hajrizi made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

8. Mr. Milorad Rajović,the owner of P.E. Udamik Komerc, now with the office in Mitrovica, claims that he is the indisputable owner of the business premises located in Peja, at the address: „Residential Building „Tarolit II“ with total area of 1.078 m².

9. This enterprise gained property rights over the above-mentioned business premises based on the sale-purchase agreement, certified in the Municipal Court in Peja C. no. 224 / 94 dated 13 March 1994, which was confirmed by the Judgment of the Municipal Court in Peja, as C. no. 224 / 94 dated 13 April 1994.

10. In the mid-1999s, this business premises was occupied by the OSCE Mission without previous agreement or knowledge of the owner of business premises.

11. After he realized that the Regional Center of the OSCE Mission in Kosovo was settled in his premises, Mr. Milorad Rajović addressed in 1999 the OSCE Mission, requesting to conclude the contract for the use of his premises and for payment of the appropriate rent. But his requests were not considered or accepted.

12. Between 1999 – 2007 the Applicant sent to the OSCE Mission many letters, requesting that his property rights be respected, and to reach a rental agreeement on lease of the above-mentioned premises. However, apart from the written response to the Applicant, the OSCE Mission did not take any specific actions in solving this problem.

13. On 28 December 2007 the Applicant appealed to the Ombudsperson Institution.

14. On 3 March 2008, the Ombudsperson issued decision no. 2355/07, declaring the appeal of the Applicant inadmissible, since it was not in compliance with *ratione personae* based on the Rules of Procedure.

15. On 15 January 2008, there was a meeting between the Applicant and the representative of the OSCE Mission. In that meeting, the Applicant received for the first time the specific offer for payment of rent from the OSCE Mission. The offer made by the representative of the OSCE Mission, covered only the period after 1 July 2007, with theduration ofone yearwithan option for extension.

16. The Applicantstated thatafter several hours ofnegotiations"under pressure and blackmail" by representatives of theOSCE Mission, he acceptedthe offerandconcluded thelease agreementwith theverbal agreementthatthe resolution ofthe debton leasefor the period1999 - 01November 2007, wouldcontinueafterthe signingof the offered contract.

17. The Applicant, on 20February 2008,sentthe firstletter to the representativeof the OSCE MissionMr. JohnFennessy, with a requestto start with the resolution of the outstanding debt for the period1999 - 01November2007.

18. On 25February2008, the Department of Administrationofthe OSCE Mission(John Fennessy) informed the Applicantthat his requestfor

payment ofrentfor the period1999 -01November 2007 wasforwarded to theheadquartersof the OSCE Missionin Vienna, that the Mission headquarters discussedthis issueandthat it is waited for their stance on this issue.

19. The Applicant sent three (3) other letters to the OSCE Mission in the period from 2009 until 2011.

20. The OSCE Missionsent responses with similar contenttoall the lettersof the Applicant, "that the case of the Applicantis inthe OSCEheadquartersin Viennaandthat theOSCE missionwill informthe Applicanton the decision and position of the headquarters, as soon as theirpositionis known."

Applicant's allegations

21. The Applicant alleges that the OSCE Mission deliberately avoided its obligation towards him, being aware of its position as provided by UNMIK Regulation no. 2000 /47.

22. In support ofhis allegation,the Applicantcites the case of the CreditBankof Prishtinaagainstthe OSCE Mission in 2011, where theMunicipal Court in Prishtina by rulingEDA. no.2553/2011dated 30December 2011,allowed theexecution againstthe OSCE Mission, for unpaid rent for theuseof the business premisesof theBank.

23. On 30April 2012, by its submission HOM/ 54/12, the OSCE Missionchallengedthe execution, by referring to itsimmunityprovided underUNMIK Regulationno.2000/47.

24. Based on the submission of the OSCE Mission HOM / 54/ 12, the Municipal Court in Prishtina then annuled the resolution EDA. no. 2553 / 2011.

25. The Municipal Courtstated thata creditorcan resolvethis issue byaddressingthe Claims Commission which was establishedbyKFOR andUNMIK,pursuant to Article 7 of UNMIK/REG2000/47 dated18August 2000.

26. The Applicantstates that by theletterof 10September 2009, he addressed "theHumanRights Advisory Panel," respectively, to theClaims Commissionandthat from this Commission herereceived onlyoneletter, which was registered underno.308/09, by whichtheyinformedhimthat

hisrequest was receivedandthat the personwhowilltakethe case was appointed.

27. In addition, the Applicant states that, *"for several years he has not receivedany letterfrom theHumanRights Advisory Panel."*

28. The Applicantin his Referralclaims thathe wasdeniedthe right to a legalremedy, to protecthis property rights. The groundfor the allegationof the Applicantis UNMIKRegulation no. 2000/47and the Law2008 /03-033. Article 2.1of this Law provides that: "UNMIK (in this case the OSCE), its property, funds and assets,are exemptedfrom anylegal process."

29. The Applicant addressed the Constitutional Court with the following requests:

> "*That this Court initiates and conducts respective court procedure pursuant to provisions of Article 46 of the Law no. 03/L-121 "on Constitutional Court of Republic of Kosovo" and during this procedure makes legal evaluation of presented facts and arguments, to make examination of evidences and in accordance with the constitutional provisions and respective legal provisions, local and international, to make review of legality and constitutionality of abovementioned provisions of UNMIK Regulation 2000/47 "On status, privileges, and immunity of KFOR, UNMIK and their personnel" and of the Law no. from the aspect of protection of inviolable rights and fundamental freedoms of Kosovo citizens and later, according to respective constitutional provisions, legal acts, local and international, especially stated by Article 22/31 in conjunction with Article 46 of this Constitution, Article 6.1 of the European Convention on human rights and fundamental freedoms."*
>
> *""To declare as wrong, ungrounded, unfair, unconstitutional and illegal the interpretations of provisions on immunity determined by UNMIK Regulation 2000/47 "On status, privileges, and immunity of KFOR, UNMIK and their personnel" and the Law no. 2008/03-L-033 "on the status, immunities, and privileges of diplomatic and consular missions and personnel in Kosovo and of the international military presence and its personnel" for cases of infringement and violations of property rights of Kosovo citizens as inviolable, inalienable and fundamental human rights, respectively of Kosovo citizens and for cases of material-financial claims of Kosovo citizens, debts and civil indemnities regarding the use of services and of private property of Kosovo citizens or of their indemnity."*

"To appoint as competent Commercial Court in Prishtina or Supreme Court of Kosovo-Special Chamber in Prishtina to decide about the Requests of the Private Enterprise "UDARNIK KOMERC" in the name of unpaid rent for the use of its business premises by the OSCE Mission-Regional Centre in Peja in the period July 1999-01.11.2007."

Assessment of the admissibility of the Referral

30. In order to be able to adjudicate the Applicant's Referral, the Court has to assess whether the Applicant has met the admissibility requirements , which are laid down in the Constitution, the Law and the Rules of Procedure.

31. In this respect, the Court refers to Article 113 paragraphs 1 and7 of the Constitution:

" *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."

32. In the present case, the Applicant requests „constitutional review of UNMIK Regulation no. 2000 /47 "On status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo", as well as the Law 2008 / 03-033 of the Republic of Kosovo „ L033 "On Status, Immunities, and Privileges of Diplomatic and Consular Missions and Personnel in Kosovo and of the International Military Presence and its Personnel," thereby the Constitution clearly defines in Article 113, who may request the review of constitutionality of the law.

33. Such a request „for constitutional review of UNMIK Regulation no. 2000 /47, and the Law 2008 / 03-033 ", is an abstract challenge to the abovementioned Regulation and the Law. If this is the intention of the Applicant as an individual, he cannot be considered as an authorized party.

34. The Articles 113.2, 113.6 and 113.8 of the Constitution explicitly provide which are the authorized parties to address the Court about the issue of the abstract review of the constitutionality of the law.

35. The Court notes that in this case the Applicant lacks “standing” or authority in the Court, because the Applicant did not meet the procedural requirements of Article 113.1 of the Constitution. Moreover, Kosovo's constitutional-legal system does not provide *"actio popularis*", what is the modality of individual complaints that provides any individual, who wants to protect the public interest and constitutional order, the possibility to address the Constitutional Court regarding such violation, even when he/she does not have the status of the victim.

36. Therefore, the Court considers that the Applicant is not an authorized party to request the interpretation of UNMIK Regulation no. 2000 /47 and the Law 2008 / 03-033. Therefore, this Referral should be declared inadmissible because it was made by an unauthorized party.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 and 113.7 of the Constitution, Articles 46, 47 and 48 of the Law and the Rules 36(1a) and 36(3c) of the Rules of Procedure, in the session held on 25 January 2013, 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**
Robert Carolan	Prof. Dr. Enver Hasani

KI 97/11, Mon Nushi, date 14 March 2013- Constitutional Review of the Judgment of Supreme Court in Prishtina, Rev.No.87/12, dated 21 March 2011.

Case KI 97/11, Resolution on Inadmissibility of 17 January 2013.

Keywords: Individual Referral, manifestly ill-founded.

The Applicant alleges that by the Judgment were violated Article 31 of the Constitution [Right to Fair and Impartial Trial] Article 6.1 ECHR together with its protocols. The Applicant further states that the Articles 7, 21, 22, 31, 46, 53 and 121 of the Constitution were violated.

Constitutional Court in the Judgment of Supreme Court Rev. no. 87/12 dated 21 March 2011, did not find elements of arbitrariness or alleged violation of human rights as the Applicant alleged.

Under these circumstances, the Applicant did not "substantiate sufficiently his allegation" and it cannot be concluded that the Referral was grounded, therefore the Court, pursuant to the Rule 36, paragraph 2, item c and d, finds that it should reject the Referral as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY
In
Case No. KI97/11
Mon Nushi
Constitutional Review of the Judgment of Supreme Court in Prishtina Rev.no.87/12 dated 21 03, 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Mon Nushi from the village Vraniq, Municipality of Gjakova, who is represented by the lawyer Rexhep Gjikolli from Gjakova (hereinafter: the Applicant).

Challenged decision

2. The challenged decision of the public authority is the Judgment of Supreme Court in Prishtina Rev.no.87/12, dated 21 March 2011, which, according to personal claim, the Applicant received on 7 April 2011.

Subject matter

3. The subject matter submitted to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) on 19 July 2011 is the constitutional review of the Judgment of the Supreme Court in Prishtina Rev.no.87/12, dated 21 March 2011, by which the Supreme Court rejected as ungrounded the revision of the authorized representatives of the Applicant and of the Applicant himself Mr. Mon Nushi filed against Judgment of the District Court in Peja Ac.no.404/2003, dated 15 November 2006.

Legal basis

4. 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 15 January 2009 , and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

5. On 19 July 2011, the Constitutional Court received by mail the Referral submitted by the lawyer Rexhep Gjikolli, who is representing the Applicant Mr. Mon Nushi from Gjakova and this Referral was registered in the Court with no. KI 97/11.

6. On 14 November 2011, the Constitutional Court sent a letter to the Applicant's representative, requesting necessary additional documentation for further processing of the Referral.

7. On 22 November 2011, the Court received via mail the additional documentation from the Applicant's representative and attached to the Referral the Judgment of District Court in Peja C.no.57/83 dated 20 May 1987 and the Judgment of District Court in Peja Ac .no 4040/03 dated 15 November 2006.

8. On 17 August 2011, the President of the Court, by Decision No. GJ.R.KI 97/11 appointed the judge Altay Suroy as Judge Rapporteur, while by decision KSH 97/11, appointed the Review Panel composed of judges: Almiro Rodrigues, Ivan Čukalović, and Gjyljeta Mushkolaj,

9. On 26 November 2012, the President of the Court by a new decision replaced the decision KSH 97/11, so that in the item one appointed in the Review Panel the Judge Kadri Kryeziu instead the judge Gjyljeta Mushkolaj, due to the end of her mandate.

10. On 17 January 2012, the Review Panel reviewed the report of Judge Rapporteur and recommended to the full Court the inadmissibility of the referral.

Summary of facts

11. On 18 September 1981, according to Applicant's claims, Mr. Mon Nushi in capacity of buyer reached the sale-purchase agreement with Mr. Mušović Arif from Gjakova in capacity of seller with the subject of the agreement the sale-purchase of immovable property–house and yard, which was located in Gjakova, street Miloš Gilić no. 139

12. This alleged contract was not submitted together with the Referral and its existence was not either confirmed by regular courts in the later court decisions.

13. In fact, the District Court in Peja, by Judgment P.no.57/83 had concluded that such a contract, claimed by the Applicant does not have legal value, because it was signed in contradiction with legal provisions in force at that time. However, confirming the fact that Mr. Mon Nushi had paid a certain amount of money to Mr. Mušović, the court had concluded that he was damaged, therefore by Judgment it ordered his compensation at the amount of 1.950.000 of then dinars with 7.5% interest rate starting from 18 January 1983.

14. On 19 February 2002, the Municipal Court in Gjakova issued Judgment C.nr.3004/2000, by which rejects as ungrounded the claim of the claimant Mon(Nue)Nushi from village of Vraniq, Municipality of Gjakova , by which he requested that the Court OBLIGES the claimant Arif (Amri) Mušović to concludeand confirm thesale-purchase agreement of the immovable property by which the respondent sells to claimant the immovable property, which is registered in the cadastral plot no. 305/4 , with culture house with yard with area 0,01.15 ha and with culture yard with area 0.02.14 ha, according to the possession list no.1133 MA-Gjakovë-city.

15. In the reasoning of the Judgment, the Municipal Court in Gjakova held that from the case file is confirmed as indisputable the fact that the immovable property, which is the subject of the contest in the cadastral documentation of Gjakova, is registered as a property of the respondent Mušović. The Court also concluded that there was never a formal contract, signed and certified in the court according to the legislation in force, between the parties that are now in dispute and according to the Judgment of the District Court in Peja Civ.57/83 is confirmed that the respondent, respectively Mr. Mušović was obliged to return to the Clamant Mr. Mon Nushi the amount of 1.950.000 dinars of that time.

16. In the same judgment, the Municipal Court in Gjakova emphasized the fact that the claimant has never entered into possession of the property, which he alleges that he bought.

17. Mr. Mon Nushi through his representative, the lawyer Teki Bokshi, filed appeal in the District Court in Peja against this Judgment.

18. On 15 November 2006, the District Court in Peja rejected the appeal of the claimant Mr. Mon Nushi and the appeal of his representative, the

lawyer Teki Bokshi, by confirming the Judgment of the Municipal Court in Gjakova C.no.3004/2000, dated 19 February 2002.

19. In the reasoning of this Judgment, the District Court stated that reviewing the appeals filed by claimant and his representative found that the court of first instance "with the necessary evidences has determined in correct and complete manner the factual situation and with the rightful assessment of the evidences, has rightfully applied the substantial law when finding that the statement of claim is ungrounded and in the reasoning gave sufficient legal and factual reasons for relevant facts important to the rightful solution of this matter, which this court accepts as well."

20. Against this Judgment, the Applicant Mr. Mon Nushi filed revision in the Supreme Court of Kosovo.

21. On 21 March 2011, Supreme Court of Kosovo rendered Judgment Rev. no 87/2008 by which rejected as ungrounded the revisions of two authorized representatives of Mr. Mon Nushi as well as of the claimant himself Mr. Nushi, filed against Judgment of District Court in Peja Ac.no.404/2003 dated 15 November 2006.

22. In the reasoning of this Judgment is said that, "the Supreme Court found that the courts of lower instances, by determining in a correct and complete manner factual situation have rightfully applied the provisions of contested procedure and of substantive law when they found that the statement of claim of the claimant is ungrounded.

Applicant's allegations for constitutional violations

23. The Applicant alleges that by the Judgment were violated Article 31 of the Constitution (Right to Fair and Impartial Trial) Article 6.1 ECHR together with its protocols. The Applicant further states that the Articles 7.21,22,31 46.53 and 121 of the Constitution were violated.

Assessment of the admissibility of the Referral

24. In order to be able to adjudicate the Applicant's Referral, 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.

25. In this respect, the Court refers to Article 113.7 of the Constitution where is provided:

"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 is also referred to the Rule 36 of the Rules of Procedure of the Constitutional Court, which provides:

(1) The CourtmayonlydealwithReferralsif:
c) theReferralisnotmanifestly ill-founded

27. Referring to the Applicant's referral and of the alleged violations of the constitutional rights, the Constitutional Court states that:

28. Constitutional Court is not the Court of verification of facts and on this occasion it wants to emphasize that the determination of complete and correct factual situation is a full jurisdiction of regular courts, such as this specific case the Supreme Court, by rejecting the revision of the claimant and of his representatives and by leaving in force the Judgment of the District Court in Peja, and that its role (of the Constitutional Court) is to provide the compliance with the rights, guaranteed by the Constitution and other legal instruments and therefore it cannot act as a" court of fourth instance ", *(see, mutatis mutandis, i.a., Akdivar against Turkey, 16 September 1996, R.J.D, 1996-IV, para*. 65)

29. Taking into account the above , according to general rule, the Court will not oppose the findings of the regular courts, such as the application of the internal law, the assessment of evidence in the trial, the justice of a result in a civil dispute or the guilt or not of an accused in a criminal matter.

30. In extraordinary circumstances, the Court may put into question these findings, whether they are tainted by a flagrant and evident arbitrariness, contrary to the justice and fair trial, causing violation of the Constitution or ECHR. (*Syssoyeva and others against Latvia (sing out) [DHM], § 89)* what while reviewing Mr. Nushi's Referral, the Court could not find elements of arbitrariness in the challenged decisions.

31. The fact that the Applicant is unsatisfied with the outcome of the case, cannot serve as the right to file an arguable Referral for violation of the Article 31 of Constitution (see *mutatis mutandis* Judgment ECHR Appl. No. *5503/02, MezoturTiszazugi Tarsulat against Hungary, Judgment*

dated 26 July 2005 or , Tengerakisv.Cyprus,no.35698/03, decision dated 9 November 2006, §74).

32. Constitutional Court in the Judgment of Supreme Court Rev.no.87/12 dated 21 March 2011, did not find elements of arbitrariness or alleged violation of human rights as the Applicant alleged.

33. Under these circumstances, the Applicant did not "substantiate sufficiently his allegation" and that it cannot be concluded that the Referral was grounded, therefore the Court, pursuant to the Rule 36 paragraph 2 item c and d, finds that it should reject the Referral as manifestly ill-founded and consequently

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 of the Constitution and Rule 36 paragraph 2 items (c) and (d) of the Rules of the Procedure, in its session held on 17 January 2013, 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**
Altay Suroy	Prof. Dr. Enver Hasani

KI 49/11, Ibrahim Sokoli, date 14 March 2013- Constitutional Review of the Judgment of the Supreme Court, Rev. no. 362/2009, dated 4 February 2011

Case KI 49/11, Resolution on Inadmissibility of 15 January 2013

Keywords: individual referral, manifestly ill-founded, right to work and exercise profession

The Applicant filed his Referral based on Article 113.7 of the Constitution of Kosovo, claiming that his constitutional rights have been violated by the decision of the Supreme Court of the Republic of Kosovo. The Applicant, among others, claimed that his employer unfairly and without legal basis ordered an unpaid leave for the Applicant, whereas the Supreme Court decided in favor of the employer and to the detriment of the Applicant.

The Court found that the Applicant did not substantiate his allegations, and that the Supreme Court sufficiently justified its decision by elaborating among others the relationship between the Applicant and his employer. Constitutional Court emphasized that the issues of facts and laws are under the jurisdiction of regular courts and that the Constitutional court cannot act as an appellate court or a court of fourth instance. Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution and Rule 36 (1) c) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI49/11
Applicant
Ibrahim Sokoli
Constitutional Review of the Judgment of the Supreme Court, Rev. no. 362/2009 dated 4 February 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Ibrahim Sokoli with residence in Kaçanik

Challenged decision

2. Judgment of Supreme Court of Kosovo rev.no.362/2009 dated 4 February 2011

Legal basis

3. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: 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 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").

Subject matter

4. The subject matter has to do with the change of the job position of the Applicant by his Employer, orally without any written decision and

offering of the new job position, which does not match with experience and professional qualification of the Applicant.

Proceedings before the Court

5. On 14 April 2011, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 19 April 2011, the President, by Decision No. GJR.KI-49/11, appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President, by Decision No.KSH.KI-49/11, appointed the Review Panel composed of judges Robert Carolan (Presiding), Almiro Rodrigues and Mr.sc. Kadri Kryeziu.

7. On 25 January 2012, the Applicant was notified about the registration of the Referral. On the same date, the Referral was communicated to the Municipality of Kaçanik, Municipal Court in Kaçanik and to the Supreme Court of the Republic of Kosovo.

8. On 5 December 2012, the Review Panel reviewed the report of the Judge Rapporteur and recommended to the full court the inadmissibility of the Referral.

Summary of facts as submitted by the Applicant

9. The Applicant was in employment relationship in the Main Centre for Family Medicine as dental technician (hereinafter: CFM) in Kaçanik since 1977.

10. Since January 2007, due to new systematization, CFM in Kaçanik, notified orally, without any written decision that his job position will be changed. The Applicant filed appeal to the Steering Board of the CFM in Kaçanik.

11. On 20 February 2007, the Steering Board of the CFM in Kaçanik by Decision no.180 rejected the request of the Applicant and offered him to choose one of these job positions: 1) dentist's assistant; 2) worker in the information operation system; and 3) driver.

12. On 1 April 2007, personal income was terminated to the Applicant as well as in the registers' lists, where his name should have been was marked with capital letters UL that implies unpaid leave. The Applicant appealed to the Appeals Committee in MA of Kacanik against these actions.

13. The Appeals Committee of MA of Kacanik did not respond to the Applicant within legal time limits. The Applicant filed appeal to the Independent Oversight Board of Kosovo (hereinafter: IOBK).

14. On 18 September 2007, IOBK by Decision 2081/07/07 *inter alia* determined:1) partial approval of the Applicant's appeal, 2) return of case for review to the Appeals Committee of MA of Kaçanik, and 3) obligation for Chief of Executive of MA Kaçanik for authorization of the Appeals Committee for deciding in the case of Applicant.

15. On 9 November 2007, Municipal Appeals Committee by decision no.566/07 approved the Applicant's request and systematized him in the new position as the maintenance technician of the dental devices which corresponded to the Applicant's professional background, but the abovementioned decision was not executed by the competent body of the MA Kacanik.

16. On 8 February 2008, the Applicant filed claim in the Municipal Court Kaçanik, which (Judgment C.no.32/08 dated 30 May 2008) *inter alia*determined: 1) the approval in entirety the statement of claim of the Applicant, 2) obligation for MA Kaçanik to return the Applicant to his work place according to professional background, and 3)the obligation for MA Kaçanik to pay to Applicant the personal income starting from 1 April 2007.

17. Municipality of Kaçanikut filed appeal in the District Court in Prishtina against the abovementioned judgment. District Court in Prishtina (Judgment Ac.no.1014/2008 dated 12 March 2009) rejected as ungrounded the appeal of MA Kaçanik, and confirmed the judgment of Municipal Court in Kaçanik.

18. Against the judgment of the District Court, Municipality of Kaçanik filed revision in the Supreme Court of Kosovo, which (Judgment Rev.no.362/2009 dated 4 February 2011) received the revision of MA Kaçanik and modified the judgment of the District Court in Prishtina, respectively of the Municipal Court in Kaçanik.

19. Supreme Court *inter alia* reasoned:

> *"...From the case files it is obvious that plaintiff (the Applicant) was employed since 1973 and since January 2007, due to new systematization, he was orally instructed to change his post without any written decision.... the plaintiff was offered the post of dentist*

assistant, worker in the operational information system or driver, so that the CFM Director made a decision and changed the post of the plaintiff as the dentist technician taking into account budgetary possibilities in relation with covering of personal income."

"...Given this state of affairs, Supreme Court evaluated that lower-instance courts completely confirmed factual situation, but erroneously implemented material law when decided that plaintiff's request was founded. This is due to a fact that change of the plaintiff's post was made in accordance with budgetary possibilities in relation with covering of personal income. In addition to this, proofs in case files indicate that for the post of dentist assistant or worker in the operational information system, which were offered to the plaintiff, salary level was the same as for his original post and it was in accordance with Article 11.1 of Administrative Instruction No. 2003/2 on implementation of UNMIK Regulation No. 2001/36 on Civil Service."

"*...In addition to these facts, plaintiff was employed with limited duration up to 31 December 2006, and he received his personal income until 1 April 2007. Also, he was offered abovementioned posts but he refused those posts and refused to sign new three-year contract for continuation of the employment after expiration of the first contract, with the same salary and in accordance with his professional capabilities."*

Applicant's allegations

20. The Applicant alleges that the Supreme Court of Kosovo deciding upon the revision of the respondent (MA Kaçanik) modified the decisions of the courts of lower instances and in this way has violated his rights guaranteed by Article 49 [Right to Work and Exercise Profession] of the Constitution.

21. The Applicant alleges that in an arbitrary manner without any written decision and without legal support his personal income was terminated and in the workers' list under the column with the Applicant's name was marked UL with capital letters, which means unpaid leave.

22. Furthermore, the Applicant alleges that alternative job positions, which were offered to him by the Employing Authority do not match his professional background.

Assessment of the admissibility of the Referral

23. In order to be able to adjudicate the Applicant's Referral, 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.

24. The Court is referred to the 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 legalremedies provided by law."*

25. The Court is also referred to the Rule 36 of the Rules of Procedure, which provides:

> (1) The Court may only deal with Referrals if:
>
> c) the Referral is not manifestly ill-founded.

26. In the specific case, the Court notes that the Applicant has exhausted all legal remedies pursuant to Article 113.7 of the Constitution.

27. The Court also notes that the Applicant has initiated administrative procedure and that the IOBK has partly approved his request while the Appeals Committee of the Municipality of Kaçanik has also approved the Applicant's request, but the decision of the Appeals Committee was not executed by the Municipality of Kacanik.

28. The Court notes that the Applicant has initiated contested procedure by filing claim in the Municipal Court of Kaçanik, which issued favorable decision for the Applicant. The decision of the Municipal Court in Kaçanik was confirmed by the District Court in Prishtina, after the appeal of the respondent, respectively of MA of Kaçanik.

29. The Court also notes that the Supreme Court of Kosovo, modified the judgments of the lower instance courts, on which occasion it concluded that the courts of lower instances had erroneously applied the substantive law, because the change of the job position of the Applicant was done according to budgetary possibilities and that the latter was offered new job positions at the same level and with previous salary, but the Applicant did not accept to sign a new contract.

30. In the specific case, from submitted documents, the Court concludes that the Supreme Court of Kosovo has evaluated the case from the aspect of the substantive law and elaborated the relationship between the employer and the employee as well as it gave its interpretation of legal provisions that regulate the relationship between the employer and the employee.

31. In this regard, the Applicant did not substantiate his allegations, by explaining how and why any violation has been made, or by offering evidence to confirm that any right guaranteed by the Constitution was violated to them.

32. In a similar way with the case KI-127/11, the Applicant Ardian Hasani – Constitutional Review of the Judgment of Supreme Court, Rev.no.219/2009, dated 10 June 2011, issued by the Court on 24 May 2012.

33. Constitutional Court is not the Court of verification of facts. Constitutional Court emphasizes in that the determination of complete and right factual situation is a full jurisdiction of regular courts that that its role is to provide the compliance with the rights, guaranteed by the Constitution and other legal instruments and therefore it cannot act as a "court of fourth instance ", *(see, mutatis mutandis, i.a., Akdivar against Turkey, 16 September 1996, R.J.D, 1996-IV, para.65).*

34. Furthermore, the Referral does not indicate that the Supreme Court has acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to replace its determination of facts with those of the regular courts, as a general rule, it is the task of these courts to assess the evidence before them. The task of the Constitutional Court is to verify whether the procedures in the regular courts were fair in their entirety, including the way this evidence was taken, *(see ECtHR Judgment App. No 13071/87* Edwards *against United Kingdom, paragraph 3, dated 10 July 1991).*

35. The fact that the Applicants are unsatisfied with the outcome of the case, cannot serve them as the right to file an arguable Referral for violation of the Article 49 [Right to Work and Exercise Profession] of the Constitution *(see mutatis mutandis ECtHR Judgment Appl. no. 5503/02, MezoturTiszazugi Tarsulat against Hungary, Judgment dated 26 July 2005).*

36. Under these circumstances, the Applicant did not substantiate with evidence his allegations and the violation of Article 49 [Right to Work

and Exercise Profession] of the Constitution, because the presented facts do not in any way show that the Supreme Court denied him the rights guaranteed by the Constitution.

37. Consequently, the Referral is manifestly ill-founded and should be rejected as inadmissible pursuant to the Rule 36 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 20 of the Law and in compliance with the Rule 36 (1) c) of the Rules of Procedure, on 5 December 2012, 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
Altay Suroy

President of the Constitutional Court
Prof. dr. Enver Hasani

KI 113/12, Haki Gjocaj, date 18 March 2013- Constitutional Review of the Supreme Court Decision P.No.791/2012 dated 5 October 2012, and the Judgment of Supreme Court Pkl.No.17S/12 dated 6 November 2012

Case KI 113/12, Resolution on Inadmissibility of 25 January 2013

Keywords: individual referral, premature referral, interim measure, non-exhaustion of legal remedies, public prosecutor, mandatory psychiatric treatment, right to liberty and security, right to fair and impartial trial, health and social protection, limitations on fundamental rights and freedoms

The Applicant filed the Referral based on Article 113.7 of the Constitution and Article 27 of the Law on the Constitutional Court, claiming that his constitutional rights have been violated by the decisions of the Supreme Court of the Republic of Kosovo. The Applicant among others requested to be released from the psychiatric ward of detention and to be placed in a civil health care institution due to his health condition. The Supreme Court held that the Applicant remains in detention until the matter is resolved by the lower instance court.

The Court noted that the Applicant's referral is premature because the Supreme Court had referred the Applicant's case back to the lower courts for retrial. The Court further elaborated on the principle of subsidiarity and the exhaustion of legal remedies and rejected the Applicant's request to impose interim measures. The Court also reiterated that the issues of facts and laws are under the jurisdiction of the regular courts and that they are independent in interpretation of such matters.

Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution, Article 27 of the Law, and Rule 36 (1) a) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI113/12
Applicant
Haki Gjocaj
Constitutional Review of the Supreme Court Decision P.no.791/2012 dated 5 October 2012, Supreme Court Judgment Pkl.no.175/12 dated 6 November 2012

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Haki Gjocaj represented by Hilmi Zhitija, a practicing lawyer in Prishtina.

Challenged decisions

2. The Applicant challenges the Supreme Court decision P.no.791/2012 dated 5 October 2012, and Supreme Court Judgment Pkl.no.175/12 dated 6 November 2012.

Subject matter

3. The subject matter of the Referral is the request of the Applicant to be released from the psychiatric ward of detention institution and to be placed in a civil health care institution.

4. The Applicant also proposes imposition of interim measures for his release from the psychiatric ward of detention institution and to be placed in a civil health care institution where he can be cured in accordance with the provisions of the Law on Health, as provided for by Article 9.4 of the UNMIK Regulation 34/2004.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution; Articles 20 and 27 of the 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 Kosovo (hereinafter: the Rules of Procedure).

Procedure before the Court

6. On 8 November 2012, the Applicant submitted a referral to the Constitutional Court of Kosovo (hereinafter: the Court).

7. On 5 December 2012, the Applicant attached additional documents to the Referral.

8. On 6 December 2012, the President appointed Judge Snezhana Botusharova as Judge Rapporteur and a Review Panel composed of Judges Robert Carolan, presiding, Altay Suroy and Ivan Čukalović.

9. On 28 December 2012, the Court notified the Applicant and the Supreme Court of Kosovo about the registration of the Referral.

10. On 18 and 25 January 2013, 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 as evidenced by the documents furnished by the Applicant

11. On 16 February 2011, the Public Prosecutor in Peja filed indictment PP.no.283/10, against the Applicant, to the District Court in Peja, thereby proposing pronunciation of mandatory psychiatric treatment in a health care institution based on suspicion of the criminal act – murder from article 147 item 4 in conjunction with article 24 and unauthorized ownership, control, possession or use of weapons of the Provisional Criminal Code of Kosovo (hereinafter: the PCCK).

12. On 21 November 2011, the Prosecutor, before the beginning of the trial, changed the indictment against the Applicant, accusing him for the criminal act – murder from article 147 item 4 in conjunction with article 24 and unauthorized ownership, control, possession or use of weapons of the PCCK, thereby proposing that the Applicant is found guilty and

sentenced in accordance with the law. The change of the indictment was allegedly made after psychiatric expertise made in the regional hospital in Peja dated 14 October 2011.

13. On 9 July 2012, the District Court in Peja issues Decision P.no.137/11, thereby dismissing the criminal proceedings.

14. The District Court in Peja held:

> *"That the accused Haki Gjocaj is not able to be subject to court hearing in the criminal case P.no.137/11"*
>
> *"In compliance with Article 9 paragraph 1 of Regulation 34/2004 dated 24.08.2004 on criminal procedure whereby are involved perpetrators with mental disorders due to inability of the accused to be subject to trial due to his permanent disease IS CEASED THE CRIMINAL PROCEDURE against the accused Haki Gjocaj"*
>
> *"The procedure against the same reopens with the request of authorized claimant as long as the reasons to make this ruling are ceased"*

15. The District Court in Peja in Decision P.no.137/11, further reasoned:

> *"District Public Prosecutor in Peja, in this court has filed an indictment PP no.283/10 dated 16.02.2011 against the accused FD due to criminal offence: Inducement to commit criminal offence of grave murder pursuant to Article 147 item 4 in conjunction with Article 24 of CCK, FD and FGJ, since as co-perpetrators have committed the criminal offence : Attempted murder pursuant to Article 146 in conjunction with Article 20 and 23 of CCK, and against the accused Haki Gjocaj due to criminal offences: Grave murder pursuant to Article 147 item 4 of CCK and criminal offence of unauthorized ownership, control, possession or use of weapons pursuant to Article 328 paragraph 2 of CCK".*
>
> *"By order of this court DPP no.86/10 dated 11.10.2011 pursuant to Article 6 paragraph 1, item a and b of UNMIK Regulation 2004/34 dated 24.08.2004 and which has to do with criminal procedure whereby are included perpetrators with mental disorders, was ordered by KUCC in the Clinic of Psychiatry the Forensic Ward to be made the clinical and psychiatric examination and observation of the accused Haki Gjocaj".*

16. Following the proposal of the District Prosecutor in Peja, on 28 September 2012, the District Court in Peja, by Decision P. no. 297/12, extended the detention of the Applicant in the psychiatric ward of the detention institution.

17. The District Court in Peja in Decision P.no.297/12, further reasoned:

> *"District Court in Peja, by the ruling P.no.297/2012 dated 28.09.2012, the accused Haki Gjocaj, due to criminal offence of grave murder pursuant to Article 147, item 4 of CCK as well as criminal offence of unauthorized ownership, control, possession or use of weapons pursuant to Article 328, paragraph 2 of CCK, in compliance with Article 286, paragraph 3 in conjunction with Article 7, paragraph 7.1, item a,b,c, paragraph 7,2, 7,3, 7,4, 7,5 and 7,6 of Regulation no.34/2004 dated 24.08.2004 on criminal procedure whereby perpetrators with mental disorders are involved, it was extended the detention to the accused Haki Gjocaj for two (2) more months, so that according to this ruling the detention will be extended up to 28.11.2012, and since the accused currently is in condition with mental disorder, was ordered that the detention is served in the Institution of Health Care".*
>
> **The Law**
>
> *The invoked provisions of UNMIK Regulation 34/2004 (District Court Decision P.no.297/12 dated 28 September 2012)*
>
> *Section 7*
> *Detention on remand of persons with a mental disorder*
> *7.1 Apart from cases in Article 281 of the Provisional Criminal Procedure Code where detention on remand may be ordered, the court may order detention on remand against a person if:*
>
> *(a) There is a grounded suspicion that such person has committed a criminal offence;*
>
> *(b) According to a psychiatric examination ordered under section 6.1, the person was in a state of mental incompetence or diminished mental capacity at the time of the commission of the criminal offence; and*
>
> *(c) The person currently has a mental disorder and as a result, there are grounds to believe that he or she will endanger the life or health of another person.*

7.2 Detention on remand pursuant to paragraph 1 of the present section may be ordered only if the public prosecutor has submitted a motion referred to in section 10 of the present Regulation. Such detention on remand shall be served in a heath care institution and may last for as long as the defendant is dangerous but shall not exceed the prescribed periods of time for detention on remand set forth in Article 284 of the Provisional Criminal Procedure Code.

7.3 If the defendant is already in detention on remand and is subsequently determined to have been in a state of mental incompetence at the time of the commission of the criminal offence, the court shall order the defendant to serve the detention on remand in a health care institution if he or she currently has a mental disorder.

7.4 The court shall render a ruling pursuant to paragraph 1 or 3 of the present section only after hearing the public prosecutor, the defense counsel and the defendant, if his or her condition permits, and after reviewing the opinion of an expert. Such ruling shall be served on the public prosecutor, defendant and his or her defense counsel, the health care institution and the detention facility. The appeal shall not stay the execution of the order.

7.5 The health care institution shall decide upon measures to ensure public safety and security and the security and safety of the defendant after consultation with the competent detaining authority, taking into account both security and therapeutic needs.

7.6 Provisions under the Provisional Criminal Procedure Code on detention on remand shall apply mutatis mutandis to detention on remand served in a health care institution.

The invoked provisions of UNMIK Regulation 34/2004 (District Court in Peja in Decision P.no.137/11, dated 9 July 2012) Section 9 Dismissal or suspension of proceedings due to ruling on incompetence to stand trial

9.1 If the court rules that a defendant is incompetent to stand trial during the course of proceedings due to a permanent mental disorder, it shall issue a decision to dismiss the proceedings.

9.4 If the court rules that a defendant is incompetent to stand trial pursuant to the present section, it may request the initiation of

proceedings for his or her committal to a health care institution pursuant to the applicable Law on Non-Contentious Proceedings. In such case, the court may rule that the defendant be detained in a health care institution for a maximum period of 72 hours pending the initiation of proceedings for committal to a health care institution under the applicable Law on Non-Contentious Proceedings, if as a result of the person's mental disorder there are grounds to believe that he or she will endanger the life or health of another person.

18. The Applicant appealed against the decision of the District Court, and on 5 October 2012, the Supreme Court of Kosovo issued decision P.no. 791/2012, thereby ruling:

"It is rejected as ungrounded the appeal of the defense counsel of the accused Haki Gjocaj, filed against the ruling of District Court in Peja, P.no.297/2012 dated 28.09.2012".

19. The Applicant filed a request for protection of legality, and on 6 November 2012, the Supreme Court of Kosovo by Judgment Pkl.no.175/12 partially approved the Applicant's request , thereby ruling:

"By the approval of the request for protection of legality of the defense of the defendant Haki Gjocaj are annulled the ruling of the District Court in Peja P.no. 297/2012 dated 28.09.2012 and the ruling of the Supreme Court of Kosovo in Prishtina P.n. no. 791/2012 and the matter is returned to the first instance court for reconsideration".

"The defendant remains in detention until new decision is made".

20. The Supreme Court further reasoned:

"...Public Prosecutor presented the proposal for the measure of obligatory psychiatric treatment, even though the expert had declared that the defendant Haki Gjocaj at the time of commission of the criminal offense was considered ACCOUNTABLE, but with reduced mental ability. After the remarks of the Supreme Court that towards accountable person cannot be imposed the measure of obligatory psychiatric treatment, the public prosecutor amends the charge from the proposal into indictment and goes on with the proceedings against defendant Haki Gjocaj based on the provisions of PCPCK, until the moment when the psychiatrist declares that the

defendant is not able to follow the trial. Afterwards, the trial panel of the District Court in Peja on 09.07.2012 issued the ruling with number P. no. 137/2011, by which has decided to stay the procedure towards the defendant Haki Gjocaj, pursuant to Article 7 of the Regulation 2004/34 on the criminal procedure where are included perpetrators with mental disorder, which will begin again when the reasons for making such a decision stop to exist".

...to get out of this situation the first instance court must order a psychiatric examination of the defendant (Applicant) in order to ascertain his liability or lack of it during the time the criminal act was committed and his current state in order to clarify the type of procedure to be applied...the regular procedure or the special one as provided by the Regulation 2004/34". It should be stressed that for the time being, the defendant is treated as a mentally incapable person without an opinion from a competent expert because the conclusion that the defendant is not in condition to follow the trial has not solved the matter whether he was accountable at the moment of committing the criminal offence and there is no answer whether this incapability is temporary or permanent.

21. The medical reports are only mentioned in the reasoning of decisions of the regular courts; the Applicant did not attach them with the Referral. There is a mention of several contradictory medical reports in relation to the Applicant's mental condition.

Applicant's allegations

22. The Applicant alleges violation of Articles 29 [Right to Liberty and Security], 31 paragraph 1 [Right to Fair and Impartial Trial], 51 paragraph 2 [Health and Social Protection], and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution.

23. The Applicant also considers that there is a violation of the Universal Declaration of Human Rights and of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.

24. The Applicant claims that the afore-mentioned violations have occurred because there is a final court decision to dismiss the criminal proceedings due to his permanent mental illness, and yet he still is in the psychiatric ward of the detention institution.

25. The Applicant claims that based on article 4 paragraph 1 of the Provisional Criminal Procedure Code of Kosovo when proceedings are dismissed by a final judicial decision there can be no criminal prosecution. The Applicant also claims a violation of several other PCCK articles by the regular courts.

26. The Applicant maintains that the regular courts should have applied article 9.4 of the Regulation 34/2004 which envisages that the court initiates a procedure to send a person with mental disorder to a health care institution based on provisions on non-contested procedure in order for him to be treated in accordance with the Law on Health. The Applicant also claims that he has been in the psychiatric ward of the detention institution since 23 August 2010 and that his mental health will only deteriorate while he is there.

27. Furthermore, the Applicant requests the Court to conclude the abovementioned violations of provisions of the Constitution and to annul the ruling of first instance P.no.297/12 dated 28 September 2012, and ruling of the Supreme Court of Kosovo Pn.no.791 dated 05 October 2012 and to release him from the detention, so that the Court initiates non-contested procedure in order to place him in a health care institution as is provided by Article 9.4 of UNMIK Regulation 34/2004.

Assessment of admissibility

28. 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.

29. 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 remedies provided by law"*

30. In the instant case, the Court notes that the Supreme Court of Kosovo (Judgment Pkl.no.175/12, dated 6 November 2012), following the Applicant's request for protection of legality, ordered that the courts of lower instances must act in accordance with the instructions of the Supreme Court and determine whether the PCCK or UNMIK Regulation 34/2004 is applicable in the Applicant's case.

31. The Court notes, that the Supreme Court of Kosovo, reviewed the Applicant's request for protection of legality and determined that there has been a situation of legal vagueness and it referred the case back to the lower court for retrial, thereby also holding that the Applicant's remains in the psychiatric ward of the detention institution until there is a decision on the matter.

32. The Court notes, that the Applicant's referral is premature because the Supreme Court of Kosovo has referred the case back for retrial which means that the Applicant's case is still ongoing in a regular judicial procedure.

33. Furthermore, the Court reiterates that the Supreme Court of Kosovo as well as other regular courts are independent in exercise of their judicial power and it is their constitutional duty and prerogative to construe questions of fact and questions of law pertinent to the cases brought before them.

34. 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: AABRIINVEST 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).*

35. Furthermore, the Court notes that the Applicant has not brought any *prima facie* evidence nor has he substantiated his request to impose interim measures in accordance with Article 27 of the Law. The Applicant did not show *how* and *why* the imposition of interim measures would prevent a situation of unrecoverable damage nor did he in any way show that it is in the public interest to do so.

36. Bearing all the foregoing in mind, the Court rejects the Applicant's request to impose interim measures.

37. It follows that the Referral does not meet the requirements laid down in Article 113.7 of the Constitution and Articles 27 and 47 of the Law on Constitutional Court and must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, Pursuant to Article 113.7 of the Constitution; Articles 20 and 27 of the Law and in compliance with the Rule 36 (1) a) of the Rules of Procedure, on 25 January 2013, unanimously:

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; and

IV. This Decision is effective immediately.

Judge Rapporteur
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 124/11, Ljubiša Živić,date 18 March 2013- Request for review of the appellate proceedings in the District Court Mitrovica regarding the judgment of the Municipal Court in Vushtrri, K 66/09, dated 25 May 2010 (delay of proceedings)

Case KI124/11, Resolution on Inadmissibility, of 21 November 2012

Keywords: individual referral, manifestly ill-found.

Subject matter of the Referral filed with the Constitutional Court by the Applicant is the alleged unreasonable length of appellate criminal proceedings against judgment of the Municipal Court in Vushtrri, K 66/2009, of 25 May 2010. That criminal proceeding has been instituted against accused DD. The Applicant is interested party in the proceedings.

The Applicant considers that his rights guaranteed by Articles 3 and 24 [Equality before the Law], Article 54 [Judicial Protection of Rights] and Article 56 [Fundamental Rights and Freedoms during a State of Emergency] of the Constitution have been violated.

The Court notes that in this case the Applicant does not prove “the status of the victim caused by a public authority", as it is required by Article 113.7 of the Constitution in conjunction with Article 34 of the European Convention for Protection of Human Rights.

The Court recalls that a victim is a natural or legal person. A person who is not affected in this manner does not have standing as a victim since the Constitution does not provide for *actio popularis*.

Thus, the Court, in accordance with Rule 36 (2) c) of the Rules of Procedure shall reject a Referral as being manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY
Case No. KI124/11
Applicant
Ljubiša Živić
Request for review of the appellate proceedings in the District Court Mitrovica regarding the judgment of the Municipal Court in Vučitrn K 66/09 dated 25 May 2010 (delay of proceedings)

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Živić Ljubiša residing in Gračanica.

Subject matter

2. Subject matter of the Referral filed with the Constitutional Court by the Applicant is the alleged unreasonable length of appellate criminal proceedings against judgment of the Municipal Court in Vučitrn K 66/2009 of 25 May 2010. That criminal proceeding has been instituted against accused DD. The Applicant is interested party in the proceedings.

3. The Applicant considers that his rights guaranteed by Articles 3 and 24 [Equality before the Law], Article 54 [Judicial Protection of Rights] and Article 56 [Fundamental Rights and Freedoms during a State of Emergency] of the Constitution have been violated**.**

Legal Basis

4. The Referral is based on Art. 113.7 of the Constitution; Articles 46, 47, 48 and 49 of 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 19 September 2011, the Applicant submitted a referral with the Constitutional Court.

6. On 7 February 2012, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and a Review Panel composed of Judges Almiro Rodrigues (Presiding), Enver Hasani and Gjyljeta Mushkolaj.

7. On 18 January 2012, the Court notified the Applicant and the District Court in Mitrovica and the Municipal Court in Vučitrn with the referral.

8. On 12 November 2012, the President appointed Judge Kadri Kryeziu , replacing JudgeGjyljeta Mushkolaj.

9. On 21 November 2012, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Applicant's Allegations

10. In his referral the Applicant alleges as follows "even thought that 16 months elapsed the District Court in Mitrovica did not schedule the hearing in the case number K 66/09, by which it violated our constitutional rights and the right to a fair trial."

11. The Applicant requests from the Constitutional Court "to schedule the proceedings before the District Court in Mitrovica and ensure bringing the final decision in the case."

Summary of Facts

12. The Applicant did not specify any facts of the case other than allegations that are specified above.

13. From the documents submitted in support of the referral the following facts can be noted.

14. On 25 May 2010, the Municipal Court in Vučitrn issued Judgement K 66/09 in the criminal proceedings against accused DD who was found

guilty for criminal offence false representation pursuant to Article 325 of the Criminal Code of Kosovo (CCK), criminal offence special cases of falsifying documents pursuant to Article 333(4) of the CCK and criminal offence election fraud pursuant to Article 180 of the CCK.

15. It appears from the judgement that the accused DD has been sentenced to imprisonment for 12 (twelve) months and fined at the amount of 1300 (one thousand and three hundred) Euro.

16. It also appears from the judgment K 66/09 of the Municipal Court in Vučitrn that Applicant was listed as injured party in the criminal proceedings.

17. On unspecified date the defence counsel of the accused DD submitted an appeal to the District Court of Mitrovica alleging violation of criminal material and procedural law.

18. It further appears from the documents submitted by the Applicant that he has not submitted any written or oral submission regarding the criminal procedure against accused DD.

Applicable law

19. Article 151 of the Kosovo Provisional Code of Criminal Procedure ("PCCPK ", Law No 2003/26) in Chapter XVIII describes the meaning of legal expression of the term "injured party" as follows: *"For the purposes of the present Code:The term "injured party" means a person whose personal or property rights are violated."*

Assessment of the Admissibility of the Referral

20. In order able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled admissibility requirements laid down in the Constitution that is further specified in the Law and in the rules of procedure.

21. In this regard, the Court refers 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*".

22. The Court also takes into consideration:

> Rule 36 of the Rules of Procedure of the Constitutional Court which stipulates that:
> *"(1) The Court may only deal with Referrals if:*
> *c) the Referral is not manifestly ill-founded."*

23. As it was mentioned earlier, the Applicant's main argument is that his rights right to a fair trial have been violated because 16 months elapsed and the District Court in Mitrovica did not schedule the hearing in the criminal case number K 66/09 against DD.

24. The Court notes that in this case the Applicant does not prove "the status of the victim caused by a public authority", as it is required by Article 113.7 of the Constitution in conjunction with 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; see also Resolution on Inadmissibility in the case KO 43/10, Applicants LDK-AAK-LDD Constitutional Review of the Legal Acts issued by the Mayor of Prizren of 25 October 2011).

25. The Court recalls that a victim is a natural or legal person (see case of AB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case No. KI. 41 /09) whose human rights are personally or directly affected by a measure or act of a public authority. A person who is not affected in this manner does not have standing as a victim since the Constitution does not provide for *actio popularis*.

26. Thus, the Court, in accordance with Rule 36.2 (c) of the Rules of Procedure shall reject a Referral as being manifestly ill-founded "*when 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 pursuant to Article 113 (7) of the Constitution and Rule 36.2 (c) of the Rules of the Procedure unanimously:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur
Prof. Dr. Ivan Čukalović

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 24/11, Ali Buzhala, date 18 March 2013- Constitutional Review of the Judgment of District Court of Prizren, Ac. no. 593/2010, dated 20 January 2011

Case KI24/11, Resolution on Inadmissibility, of 12 July 2012

Keywords: individual referral, non-exhaustion of legal remedies

The Applicant challenges the Judgment of the District Court of Prizren Ac. no. 593/2010, of 20 January 2011, by which his appeal in the legal executive matter regarding the execution of a decision of the Independent Oversight Board (lOB) was rejected as ungrounded.

The Applicant claims that there has been a violation of Article 49 item 1 [Right to Work] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 in conjunction with Article 13 of the European Convention on Human Rights.

The Court finds that the Referral does not fulfill the requirements of Article 113.7 of the Constitution, Article 47 (2) of the Law and Rule 36 (1) a) of the Rules of Procedure, and as such is inadmissible.

RESOLUTION ON INADMISSIBILITY
Case No. KI24/11
Applicant
Ali Buzhala
Constitutional Review of the Judgment of District Court of Prizren Ac.nr. 593/2010, dated 20 January 2011

composed of

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge

The Referral

1. The Referral was submitted by Ali Buzhala from the village of Budakova in the Municipality of Suhareka (the Applicant). In the proceedings before the Court, the Applicant is represented by Gafurr Elshani, a practising lawyer from Pristina.

2. The Applicant challenges the Judgment of the District Court of Prizren Ac.nr. 593/2010, dated 20 January 2011, by which his appeal in the legal executive matter regarding the execution of a decision of the Independent Oversight Board (IOB) was rejected as ungrounded.

3. The Applicant claims that there has been a violation of Article 49 item 1 [Right to Work] of the Constitution of the Republic of Kosovo (hereinafter the "Constitution"), Article 31 [Right to a fair and unbiased trial] of the Constitution and Article 6 in conjunction with Article 13 of the European Convention on Human Rights.

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").

Proceedings before the Court

5. On 24 February 2011, the Applicant filed a referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court").

6. On 02 March 2011, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Altay Suroy (presiding), Enver Hasani andGjyljeta Mushkolaj.

7. On 24 August 2011, the District Court in Prizren replied furnishing the Court with some documents, all of them already attached to the Referral.

8. On 9 November 2011, the Court notified the IOB with the referral.

9. On 23 November 2011, the IOB responded to the Court, pointing out the procedural and background facts, and furnishing the Court with some documents which were also already attached to the Referral.

10. On 9 December 2011, the Court requested additional information from the Applicant's representative on a "lawsuit filed at the Supreme Court of Kosovo no. 193/7, dated 08.06.2010". On 1 February 2012, the Court requested the Applicant to "provide the Constitutional Court with a copy of the petition and any other court documentation in relation to the Supreme Court proceedings".

11. On 11 May 2012, the Court requested the Supreme Court to inform on the status of the Supreme Court proceedings in the case No. 193/07.

12. On 30 May 2012, the Supreme Court informed that "according to the records of this Court it doesn't indicate that Mr. Buzhala has a case in this Court with the number no.139/07".

13. On 4 July 2012, IOB responded for the second time to the Court and provided the Court with documents which were already attached in its first response.

14. On 4 July 2012, Ministry of Agriculture, Forestry and Rural Development – Kosovo Forest Agency, sent to the Constitutional Court the entire case file concerning Mr. Ali Buzhala dispute.

15. On 15 July 2012, the President appointed Judge Snezhana Botusharova as a member of Review Panel, replacing Judge Gjyljeta Mushkolaj.

16. On 12 July 2012, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts
The employment contract

17. On 19 November 2008, the Applicant commenced a working relationship at the Ministry of Agriculture, Forestry and Rural Development (hereafter, the "MAFRD") as the Director of the Coordination Directorate Prizren. His employment contract was valid for one year, i.e. until 19 November 2009.

18. On 11 June 2009, the MAFRD (decision KE-344/09) due to "severe violation of duties and legal provisions" suspended the Applicant "with pay, (...) until a further decision is reached by the Ministry of Agriculture, Forestry and Rural Development".

19. On 18 June 2009, the Applicant appealed that decision (KE-344/09, dated 11.06. 2009) to the Chief Executive Officer of MAFR, arguing "the incomplete and wrongful establishment of the actual situation and facts and violation of material provisions" and proposing to "annul the Decision appealed against".

20. On 21 August 2009, the Applicant filled an appeal (no 02 178/2009) with IOB opposing the decision on suspension and claiming that the decision is arbitrary, drastic and taken contrary to the law.

Administrative proceedings decisions

21. On 8 September 2009, the IOB issued a decision (A 02/178/2009) obliging the MAFRD to start disciplinary proceedings against the Applicant as stated in the Decision on Suspension KE-344/09, of 11 June 2009.

22. On 13 October 2009, the Applicant submitted a new appeal (no.02 216/09) to IOB against the Decision (no. ref.KE-344/09, dated 11.06.2009) on suspension from work.

23. On 4 December 2009, the IOB approved (decision A.02(216)2009) the Applicant's appeal "annulling the Decision of the Employing Agency nr. KE-344/09, dated 11.06.2009" and "obliging the Employing Agency to enable the return of the complainant to his job and his ability to enjoy all

rights derived from such working relations, within 15 days starting from the date when the decision was received".

24. Meanwhile, on 30 November 2009, the Disciplinary Committee of the MAFRD issued a decision (No 1541/09) declaring the Applicant guilty and imposing the disciplinary measure of termination of employment on the Applicant.

25. On 22 December 2009, the Applicant appealed the decision of the Disciplinary Committee to the Appeals Committee of MAFRD.

26. On 28 April 2010 and again on 04 November 2010, the Applicant further appealed to the IOB, since the MAFRD did not execute the IOB decision on return to his job.

27. On 30 April 2010, the IOB informed the Applicant that they had notified the Assembly of the Republic of Kosovo about the IOB decision not being executed and instructed the Applicant to refer to court procedures for the execution of its decision.

Proceedings in the Municipal Court of Prizren

28. On 06 May 2010, the Applicant filed a request to the Municipal Court of Prizren for the execution of the IOB decision.

29. On 21 May 2010, the Municipal Court of Prizren took a decision allowing the requested execution.

30. On 16 July 2010, the MAFRD made opposition "against Court Resolution E.nr.942/10 of the Municipal Court of Prizren, dated 21 May 2010".

31. On 27 July 2010, the Applicant replied to the opposition of MAFRD, proposing that "the Court reject the defendant's opposition as ungrounded and leave the executive decision."

32. On 02 September 2010, the Municipal Court of Prizren (E.nr.942/2010) made a decision "approving as grounded the opposition made by the defendant, the Ministry of Agriculture, Forestry and Rural Development, the Kosovo Forest Agency in Pristina, the Coordinating Directorate in Prizren, against this court's Resolution allowing the execution of Resolution E.nr.942/10, dated 21 May 2010" and "suspending the procedure regarding this legal matter and the Court's Resolution granting the execution of Resolution E.nr.942/10, dated 21 May 2010, as

well as all other procedural measures undertaken in this legal matter so far".

Proceedings in the District Court of Prizren

33. On 18 October 2010, the Applicant appealed the decision of the Municipal Court to the District Court of Prizren, "because of the wrongful establishment of the factual situation and because of the wrong application of material law".

34. On 20 January 2011, the District Court of Prizren delivered a decision "rejecting as ungrounded the appeal made by the complainant, Ali Buzhala (...) and verifying the Resolution issued by the Municipal Court of Prizren E.nr.492/2010, dated 02 September 2010".

35. On 04 February 2011, the Applicant made a request to the Public Prosecutor of Kosovo for the protection of legality against the executive resolutions of the Municipal Court of Prizren E.nr.942/10, dated 02 September 2010 and the second-degree executive resolution issued by the District Court of Prizren Ac.nr.593/2010, dated 20.01.2011.

36. On 09 February 2001, the Prosecutor's Office "confirmed the inability to find the legal grounds for requesting the protection of legality (...)".

Pending case in the Supreme Court

37. On 15 December 2011, the Applicant's representative informed the Court that "the Supreme Court of Kosovo has not yet decided on the case no. 193/07".
38. On 14 February 2012, the Applicant's representative replied that "the case in the Supreme Court with the above mentioned number deals with issues and decisions that arose after the executive title".
39. On 7 July 2012, the Forest Agency of Kosovo submittedto the Court a copy of its response to the case No. 193/7 dated 08 June 2010, where the Applicant is the plaintiff in the proceedings before the Supreme Court.

40. The submitted documentation indicate that the proceedings initiated by the Applicant before the Supreme Court are still pending.

Preliminary Assessment of Admissibility

41. The admissibility requirements are laid down in the Constitution and further specified in the Law and the Rules of Procedure.

42. In that 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."*

43. On the other side, Article 47 (2) of the Law also establishes that:

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

44. Furthermore, Rule 36 (1) a) foresees that:

> *The Court may only deal with Referrals if all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted.*

45. It appears in the case that the Applicant had failed to exhaust all legal remedies available to him, since the proceedings before the Supreme Court are still pending.

46. In fact, as mentioned above, the Applicant's lawyer on 15 December 2011 informed the Court that there is a Supreme Court proceeding still pending in relation to the Applicant's right to work matter.

47. Therefore, in the circumstances of a pending matter in the Supreme Court, the Constitutional Court is unable to proceed further to assess the admissibility of the Referral. It appears that his Referral is premature.

Conclusion

48. Having said that, the Court finds that the Referral does not fulfill the requirements of Article 113 (7) of the Constitution, Article 47(2) of the Law and Rule 36 (1) (a) of the Rules, and as such is inadmissible.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 (7) of the Constitution, Article 47 (2) of the Law and Rule 36 36 (1) (a) of the Rules of the Procedure unanimously:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 162/11, Behxhet Makolli, date 18 March 2013- Constitutional review of decision of the Supreme Court of Kosovo Mlc. no. 13/2010, of 09 November 2011.

Case KI-162/11, Resolution on Inadmissibility of 17 January 2013.

Keywords: Individual referral, right to fair trial, manifestly ill-founded, interim measure

The Applicant has filed his referral in compliance with Article 113.7 of the Constitution of Kosovo, challenging the decision of the Supreme Court of Kosovo Mlc. no. 13/2010 of 09 November 2011, which concluded the immoveable property dispute occurring upon claim for validation of ownership over disputed property between the Applicant and third parties.

The Applicant considers that this infringed the constitutional rights as per Article 31 of the Constitution of the Republic of Kosovo, and Article 6 of the Convention on Human Rights, because he was not summoned to the proceedings, thereby violating his right to fair trial. He has simultaneously demanded imposing interim measure, since the execution and removal from the property (shop) scheduled for 28 December 2011. He has simultaneously demanded urgent procedure review of request.

The Applicant alleges he has been violated his rights as per Article 31 (Right to fair and impartial trial), and Article 6 (Right to Fair Trial) of Protocol 1 of ECHR.

Deciding upon the referral of applicant Behxhet Makolli, the Constitutional Court, upon review of proceedings, has not found that relevant proceedings were in any way unjust or arbitrary, and that rulings of regular courts were entirely reasoned. Therefore, the Court found that the referral is manifestly ill-founded, since the facts presented fail to corroborate the allegations of violation of constitutional rights.

Simultaneously, the Court rejected the request of Applicant for the interim measure, thereby reasoning that he has failed to provide any convincing proof to justify interim measure to prevent any irreparable damage, or proof that such measure is of public interest.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI-162/11
Applicant
Behxhet Makolli
Constitutional Review of the Resolution of the Supreme Court of Kosovo
Mlc.no. 13/2010 dated 09 November 2011.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Behxhet Makolli from Prishtina, who is represented before the Constitutional Court by Jehona Makolli from Prishtina.

Challenged decision

2. The challenged decision is the resolution of the Supreme Court of Kosovo, Mlc.no. 13/2010, dated 09 November 2011, by which the request for protection of legality was rejected as ungrounded, which was submitted by the State Prosecutor of Kosovo against the Decision of the District Court of Prishtina, Ac.no. 625/2010, dated 30 August 2010, and the Decision of the Municipal Court of Prishtina, E.no. 994/2009, dated 04 May 2010.

Subject matter

3. The subject matter is the legal-property dispute between the Applicant and third parties regarding the ownership of the immovable property (the "premises"), which is located in former street."M.Tito" no.43, now str. "Nëna Terezë" no.43, constructed on cadastral parcel no. 7122/3 CZ

Prishtina, possession list no. 4093, with a surface area of 203 m² and a basement with surface area of 51 m², total area of 254 m².

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 Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009(hereinafter: "the Law") and Rule 56, paragraph 2, of the Rules of Procedure (hereinafter: the "Rules").

Proceedings before the Court

5. On 20 December 2011, the Applicant submitted a Referral the Constitutional Court of the Republic of Kosovo (hereinafter: "the Court"). At the same time, the Applicant requested the Constitutional Court to impose an interim measure, because the date of execution of the regular court decisions to vacate the premises was scheduled for 28 December 2011.

6. By the Decision of the President (no. GJR.162/11, dated 17 January 2012), Judge Snezhana Botusharova was appointed as Judge Rapporteur. On the same day, by decision of the President No.KSH.162/11,the Review Panel was appointed composed of Judges Almiro Rodrigues (Presiding Judge), Kadri Kryeziu and Dr. Prof. Enver Hasani.

7. On 17 January 2012, the Applicant submitted additional documents.

8. On 17 January 2013, after the review of report of Judge Snezhana Botusharova, the Review Panel, composed of judges Almiro Rodrigues (Presiding), Kadri Kryeziu and Dr. Prof. Enver Hasani, recommended that the full Court declare the Referral inadmissible.

9. On the same date, the Review Panel proposed to the full Court to reject the Applicant's request for an interim measure, with the reasoning that the latter has not submitted any convincing evidence, which would justify the imposition of an interim measure, in order to avoid any irreparable damage, nor provided any evidence that such a measure would be in the public interest.

Summary of the facts

10. According to the Applicant's allegations, on an unspecified date, a sale-purchase agreement of the immovable property was concluded between SOE "JUGOPLASTIKA" from Belgrade and the Applicant.

11. The subject of this agreement was the immovable property (business premises), which is located in Prishtina, former str. Marshala Tita no.43, with a surface area of 203 m², plus a basement with a surface area of 51 m², together with all goods and assets located in this business premises.

12. In signing the agreement, the seller, SOE "JUGOPLASTIKA" from Belgrade, handed over into possession and placed at the free disposal the business premises, goods and fixed assets.

13. On 27 September 1999, the seller and the buyer signed the annex contract by which they determined the sale-purchase price at the amount of 540.000 DM (270.000 euro), and provided that the buyer is obligated to pay to the seller one half of the amount of the contracted price of 540.000 DM, while the seller is obligated, within 30 days from the day of signing the annex contract, to comply with all requirements for the certification of the contract and the transfer of the ownership rights over the property.

14. Since the seller was unable to comply with the legal requirements for the certification of the contract dated 27 September 1999, because the seller did not have necessary documentation, the transfer of ownership rights between the buyer and the seller did not takeplace.

15. Shortly thereafter, on 16 November 1999, a sale-purchase agreement No. 11236/99 was concluded and certified by a notary-public in Split, Croatia, between J.S.C. "D." from Split as seller and Z.Al., Z.A and S.R. as buyers, for the immovable property (business premises), located in Prishtina, former str. Marshall Tito no.43, with a surface area of 203 m2, plus a basement with a surface area of 51 m². The premises became the joint property of the aforementioned buyers.

16. The Municipal Court of Prishtina, by judgment C.no. 182/2002, dated 10 March 2008, approved the statement of claim of the claimants: Z. Al. and Z. A. , both from the village of Rečica, Municipality of Tetovo and S. R. from Shtipska-Tetovo, by which the court confirmed that , based on the sale-purchase agreement concluded on 16 November 1999 with the respondent J.S.C. "D." from Split as a seller and the claimant as the buyer, the contract notarized in Split on 16 November 1999 with no. 11236/99, the claimants obtained the right of ownership, respectively co-ownership, of the immovable property, which is located in str.

"M.Tito" no. 43, now str."Nëna Terezë" no. 43, business premises with a surface area of 203 m² and a basement surface area of 51 m², total area of 254 m², constructed on cadastral parcel no. 7122/3 CZ in Prishtina, Possession list no. 4093.

17. The respondentJ.S.C. "D." from Split did not file an appeal against this judgment and the judgment became final on 11 March 2008.

18. On 23 November 2009, claimants, in their capacity as creditors, submitted a proposal for execution of this final judgment of the Municipal Court on Prishtina, C.no. 182/2002, dated 10 March 2008, against the debtor J.S.C. "D." from Split.

19. On 02 January 2010, the Municipal Court of Prishtina issued its Decision on execution, E.no. 334/09, authorizing the execution and ordering the debtor to surrender to the creditors the possession of the business premises as described above.

20. On 27 January 2010, the Municipal Court brought a further decision in respect of the execution ordering the debtor to vacate the premises of all people and assets, as well as third parties.

21. J.S.C. "D." from Split did not file any objection against this execution order.

22. On 15 February 2010, a third party, named Bedrije Makolli, appeared and challenged the execution order, with the reasoning that the execution order is impermissible and unsuitable, because she is in possession of these premises.

23. On 15 February 2010, two more third parties appear, J.S.C. "Jugoplastika" from Belgrade and Behxhet Makolli from Prishtina, represented by the lawyer M. R., who object to the execution order.

24. On 04 May 2010, the Municipal Court of Prishtina rendered a Decision, E.no. 994/09, rejecting the objection of the third party Bedrije Makolli from Prishtina as inadmissible, and rejecting the objection of "Jugoplastika" and of Behxhet Makolli as ungrounded .

25. The District Court of Prishtina, deciding on the objections of third parties Bedrije Makolli, "Jugoplastika" from Belgrade and Behxhet Makolli from Prishtina, rejected their appeals as ungrounded and upheld the Decision of the Municipal Court of Prishtina.

26. On 30 November 2010, the third parties J.S.C. "Jugoplastika" from Belgrade and Behxhet Makolli from Prishtina, not satisfied with the executive decisions against them, addressed the Public Prosecution Office of Kosovo requesting the Prosecutor to file a request for protection of legality with the Supreme Court.

27. On 15 December 2010, Public Prosecution Office of Kosovo, by submission KMLC.no. 63/2010, submmited a request for protection of legality against the final resolution of the Municipal Court of Prishtina, E.no. 994/09, dated 08 January 2010, arguing the erroneous application of substantive law. The submission of the Public Prosecution Office claimed, *inter alia*, that:

"The final executive decision of the Municipal Court in Prishtina, E. no. 994/09, dated 08.01.2010 is inappropriate for execution, because the court of the first instance has wrongfully applied the substantive law, and having in mind that the court of the second instance has supported this decision, it results that the court of the second instance as well has wrongfully applied the substantive law.

The decision, which allows the execution, has nothing to do with the final judgment of the Municipal Court in Prishtina C. no. 182/2002, because with this judgment it is not decided that the commercial premises should be handed over to the creditors.

The factual situation on the ground is different because the debtor, j.s.c. "D." from Split against which the execution is requested, does not possess and hold the commercial premises, but other physical persons possess and hold the commercial premises, in the concrete case Bedrije Makolli since 1999 has entered illegally and held possession of the premises, and later she rented the commercial premises to the third person with the name Behxhet Makolli. Now since 1999, the premises continue to be in the possession of these persons, who really do not have a legal basis to hold on to the commercial premises, for which they claim they have rights.

However, having in mind that against them there has not been conducted any contested procedure to remove them from possession, against them does not exist any final decision, in order for them to release the premise by force and we believe that the civil court has made a mistake when it judged the civil matter, C. no. 182/2002, and it did not include them in the capacity of the unique co-litigants pursuant to the Article 261.1, in which procedure they would have been involved in the capacity of respondents.

Since the final judgment, C. No. 182/2002 produces legal effect only towards the parties involved in the contest and not towards third persons, then the executive decision of the Municipal Court in Prishtina, E. No. 994/09 is inappropriate for execution.

The Municipal Court in Prishtina has made a mistake when it decided the case in the executive procedure and it did not decide it with a special conclusion, in order to instruct the third person, which claims to have any rights, in the contested procedure."

The execution decision of the Municipal Court in Prishtina, E. no. 994/09, cannot be executed against the third person because there was never reached any final decision for their removal and the removal of the objects from the commercial premises and for the hand-over of the commercial premises to the creditors. The final judgment does not contain such obligation."

28. On 09 November 2011, the Supreme Court of Kosovo, by Judgment Mlc.no. 13/2010, rejected as ungrounded the request for protection of legality of the State Prosecutor of Kosovo against the Decision of the District Court of Prishtina, Ac.no. 625/2010, dated 30 August 2010, and the Decision of the Municipal Court of Prishtina, E.no. 994/2009, dated 04 May 2010. The Supreme Court justified its decision with the following reasoning:

"The Supreme Court of Kosovo assessed as unfounded the statements in the request for the protection of the legality, according to which the final judgment C. no. 182/2002 produces a legal effect only against the parties that were involved in the contest and not against the third persons, and that the decision is inappropriate, because in the concrete case we are dealing with a judgment for the confirmation of the ownership based on the sale-purchase contract, with which it was confirmed that the creditors are the owners of the premises, which judgment is final and there exists the execution title, through which it requests the hand-over as the owner of the premises, whereas the third persons without any legal basis possess and use the premises, therefore towards the third persons it is not requested the execution but the hand-over of the object from the debtor. Also the statements of the request for the protection of the legality in conjunction with the Article 39.1 of the Law on Executive Procedure (LEP) that the proposal on execution contains "something else", whereas in this Article is specifically foreseen the execution of the proposal, are unfounded because in the concrete case the proposal contains all the executive

elements based on which it is allowed the execution pursuant to the Article 39 of the Law on Executive Procedure (LEP) and the legal conditions for the allowance of the execution based of the executive title have been fulfilled."

Applicant's allegations

29. The Applicant alleges that Article 31 of Constitution of Kosovo and Article 6 of the European Convention on Human Rights were violated by the judgment of the Supreme Court. The Applicant argues that:

"It is known that the rights of the citizens are guaranteed by law and constitution, therefore by assessing that in this case of the constitutional provisions, firstly the Article where it is foreseen the right for a fair trial, pursuant to the Article 31 of the Constitution and Article 6 of the Convention, it is evident that in this case there has been a violation of the rights, because we have not been invited in procedure and we have been denied the right for a fair trial."

30. The Applicants addresses the Constitutional Court with following referral:

"Through this referral we request the review of this issue, which is very important for us, and to decide in a fair and unbiased manner as it was decided until now, where we have been deprived from the right for a fair trial, which is guaranteed by the Constitution of the Republic of Kosovo and by the International Instruments such as the Declaration and the Convention on Human Rights, where one of the issues is the right for a fair and unbiased trial.

Given that 28.12.2011 has been set as the date for the execution of the removal from the premises, we consider that you will review our referral as soon as possible."

Preliminary assessment of admissibility of the Referral

31. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and the Rules of Procedure.
32. Article 48 of the Law on the Constitutional Court of Kosovo 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 a public authority is subject to challenge."

33. Under the Constitution, the Constitutional Court is not a court of appeal, when reviewing 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 [GC], no. 30544/96, § 28, European Court of Human Rights [ECHR] 1999-1).

34. The Applicant has not provided any *prima facie*evidence which would point to a violation of their constitutional rights (see Vanek vs. Slovak Republic, ECHR Court on admissibility, Application no. 53363/99 of 31 May 2005). The Applicant does not state in which way Article 31 of the Constitution and Article 6 of the Convention on Human Rights support his Referral as it is required by Article 113.7 of the Constitution and Article 48 of the Law.

35. In the present case, the Applicant was provided numerous opportunities to present his case and challenge the interpretation of the law on contested procedure, and at the same time to prove that he is the owner of the subject immovable property. In this specific case the alleged owner is Bedrije Makolli, who from 1999 has entered and held in possession the immovable property in an illegal way and who later rented the immovable property to the Applicant. Therefore, the Applicant cannot be considered as a party. After having examined the proceedings in their entirety, the Constitutional Court did not find that the pertinent 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).

36. In conclusion, the admissibility requirements have not been met in this Referral. The Applicant has failed to indicate and to substantiate the allegations that his constitutional rights and freedoms have been violated by the challenged decision.

37. It follows that the Referral is manifestly ill-founded in accordance with 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, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (2b) of the Rules of Procedure, in the session held on 17 January 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the request for imposition of 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 on Constitutional Court; and

IV. This Decision is effective immediately.

Judge Rapporteur
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 17/13, Bujar Bukoshi, date 20 March 2013- Constitutional Review of the District Court in Prishtina Ka, No. 562/12 of 8 October 2012

Case KI 17/13, Decision on the request for interim measures of 4 March 2013

Keywords: Individual Referral, request for interim measure, immunity of the members of the Government, human dignity.

The Applicant filed the Referral based on Article 113.7 of the Constitution of the Republic of Kosovo, claiming that he had functional immunity for all actions and decisions that he took as Minister of Health in the Government of the Republic of Kosovo and they were in accordance with the applicable law in Kosovo. Therefore he cannot be criminally prosecuted. The applicant also claims that the confirmation of the indictment was made public and this damaged his reputation, thus violating his human dignity. Furthermore, the Applicant requests from the Court to impose interim measures suspending the criminal proceedings against him in the regular courts, until the final adjudication of the referral.

The Court in this case found that, at this stage, it is within the regular courts' competencies to collect and assess the evidences, and to decide whether the acts and decisions taken by the Applicant fall within the scope of the Minister of Health, which is protected by functional immunity and to adjudicate accordingly. Therefore, without prejudice to any further decision to be made by the Court on admissibility or on the merits in the future, it decided to reject the request for Interim Measures.

DECISION ON THE REQUEST FOR INTERIM MEASURES
in
Case No. KI 17/13
Applicant
Bujar Bukoshi
Constitutional Review of the Decision of the District Court in Prishtina,
Ka,No.562/12 of 8 October 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Bujar Bukoshi, former Minister of Health, residing in Prishtina, represented by Besnik R. Berisha, a lawyer from Prishtina.

Challenged Decision

2. The Applicant request the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to review the Decision, Ka. No. 265/12, of the District Court in Prishtina, adopted on 8 October 2012, which was served on the Applicant on 10 October 2012.

Subject matter

3. The subject matter of the Referral is the assessment of the Constitutionality of the Decision, Ka. No. 265/12, of the District Court in Prishtina, which confirmed the indictment against the Applicant. The Applicant claims that the allegations against him in the indictment are unconstitutional, since the actions and decision that he has taken fall within the scope of competences as a Minister of Health.

4. The Applicant further request the Court to impose interim measures suspending the criminal investigations against him until this Court takes the final decision.

Legal basis

5. Article 113.7 of the Constitution, Articles 22, 48 and 49 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rules 54, 55 and 56 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 11 February 2013, the Applicant submitted the Referral to the Court.

7. On 13 February 2013, the Applicant submitted additional documents to the Court.

8. On 25 February 2013, the President of the Court, with Decision No. GJR. KI. 17/13, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court, with Decision No. KSH. KI. 17/13, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Ivan Čukalović and Kadri Kryeziu.

9. On 8 March 2013, the Constitutional Court through a letter informed the Applicant that the Referral had been registered.

10. On the same date, the Referral was communicated to the Appellate Court in Prishtina as a successor of the District Court in Prishtina.

Summary of facts according to the Applicant

11. On 16 July 2012, the EULEX Special Prosecutor submitted to District Court in Prishtina the amended Indictment, PPS No: 64/11, 465/09 and 424/09, which accused the Applicant for the criminal offence of misuse of official duty or authorizations, punishable by Article 339, paragraphs 1 and 3, in conjunction with Article 23 of the Criminal Code of Kosovo, for which it is foreseen a sentence with imprisonment from 1 to 8 years.

12. The District Court in Prishtina, on 3 and 5 September 2012 held sessions for confirmation of the indictment. During the hearing of 3 September, the defence council of the Applicant raised the issue of functional immunity during Applicant's tenure as Minister of Health.

13. On 11 September 2012, the Judge responsible for confirmation of the indictment, by Decision Ka.No.562/12, rejected the request of the defence council to take into consideration the safeguard provided for in Article 98 of the Constitution. The Judge reasoned that the accusation for the misuse of the official duty did not fall within the scope of responsibility as Minister of Health.

14. On 14 September 2012, the Defence Counsel of the Applicant filed an appeal against the above Decision with the Criminal Panel of three Judges. The Applicant argued that the acts and decisions he took, for which later he was charged criminally, were in his capacity as the Minister of Health.

15. On 18 September 2012, the Panel of District Court, by the Decision Ka.No.562/12, rejected the Appeal as ungrounded regarding the immunity of the Applicant as the former Minister of Health.

16. On 8 October 2012, Judge responsible for the confirmation of indictment issued Decision KA. Nr. 265/12, which confirmed the indictment of Special Prosecutor and the trial started.

Applicants' arguments

17. The Applicant in his Referral claims that Article 98 and Article 23 of the Constitution are violated.

18. Article 98 [Immunity] of the Constitution provides that:

"Members of the Government shall be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of responsibilities as members of the Government."

19. In this respect, the Applicant claims that he had functional immunity for all actions and decisions that he took as Minister of Health in the Government of the Republic of Kosovo and they were in accordance with the applicable law in Kosovo. Hence he cannot be criminally prosecuted.

20. Article 23 [Human Dignity] of the Constitution offers protection of human dignity of the person, by stipulating that:

"Human Dignity is inviolable and is basis of all human rights and fundamental freedoms."

21. In this respect, the Applicant claims that the confirmation of the indictment was made public and this damaged his reputation, thus violating his human dignity

Request for Interim Measures

22. In the present case, the Applicant requests from the Court to impose interim measure suspending the criminal proceedings against him in the regular courts, until the final adjudication of the referral.

23. In this respect, the Court takes into account that, in accordance with Rule 55 (1) of the Rules, *"A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals."* and also Rule 55 (6) *"[...] The recommendation of the Review Panel on the application for interim measures shall become the decision of the Court unless one or more Judges submit an objection to the Secretary within three (3) days. [...]".*

24. Article 116.2 [Legal Effect of Decisions] of the Constitution establishes:

> *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*

25. Article 27 of the Law also 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."*

26. In addition, in order for the Court to grant interim measure pursuant to Rule 55 (4) of the Rules of Procedure, it must find that:

> *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*

(..)

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."

27. The Court notes that the case is under consideration by the regular court, where the Applicant will be able to raise his complaints about the alleged violation of his rights.

28. The Constitutional Court reiterates that it is not a court of facts, and it is within the regular courts' competences, at this stage, to collect and assess the evidences, and to decide whether the acts and decisions taken by the Applicant fall within the scope of the Minister of Health, which is protected by functional immunity and to adjudicate accordingly.

29. The Constitutional Court therefore, without prejudice to any further decision to be made by the Court on admissibility or on the merits in the future, on 14 March 2013, by majority of votes

DECIDES

I. TO REJCT the request for Interim Measures;

II. This Decision shall be notified to the Parties; and

III. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

Judge Rapporteur
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 120/10, Zyma Berisha, date 27 March 2013- Constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo, Rev.No. 308/2007, dated 10 June 2010

Case KI120/10, Judgement of 29 January 2013

Keywords: individual referral, civil dispute, right to fair trial, equality before law, admissible referral, manifestly founded, violation of Article 6.1 of ECHR

The Applicant claims that the Supreme Court, by Judgment Rev. 308/2007, dated 10 June 2010, placed her in an unequal position *vis-a-vis* her former colleagues who were in the same situation, i.e. had permanent employment status within the same company and won their cases before the Supreme Court, whereafter they were reinstated into their previous workplaces.

The Applicant argues that only her case was decided differently by the Supreme Court and that, therefore, she became a victim of injustice and discrimination. Initially, she attached to her Referral two judgments of the Supreme Court, both issued on 17 January 2008 (under Rev. no. 126/2007 and Rev. no. 177/2007) which related to two of her former colleagues, while, in her written submission of 26 September 2011, she listed the names of 6 former colleagues who had won their cases before the Supreme Court (including the names of the two colleagues whose judgments she already had submitted).

However, in this Court's opinion, the Supreme Court's judgment, by neglecting the proper assessment of the Applicant's arguments regarding her permanent employment status, even though they were specific, relevant and important, fell short of the Supreme Court's obligations under Article 6.1 of the ECHR to fulfill the obligation of stating the reasons (see *mutatis mutandis*, ECtHR Judgment of 18 July 2006 in the case Pronina v. Ukraine, Application no. 63566/00; *see also the Court's Judgment in Case No. 40/09 - Imer Ibrahimi and 48 other employees of the KEK, i.e. "KEK I judgment).*

Moreover, the Court notes that the Supreme Court, in its Judgment Rev. no. 154/2008, of 7 February 2011, i.e. 7 months after its judgment in the Applicant's case, did not repeat its findings in the Applicant's case, but again ruled in the same way as it had done in the four cases prior to the Applicant's case, considering the confirmation of the permanent employment status as the subject matter of the disputes and using similar extensive and thorough reasoning to reject the revision submitted by "Kosova e Re".

In these circumstances, the Court finds that the Supreme Court has dealt with the Applicant's case in an evidently arbitrary manner, contrary to the principles elaborated by the ECtHR in its above mentioned judgment, in

Nejdet Sahin and Perihan Sahin v. Turkey [GC], no. 13279/05, 20 October 2011.

Therefore, the Court concludes that there has been a violation of Article 31 of the Constitution, in compliance with Article 6.1 of ECHR.

JUDGMENT
in
Case No. KI 120/10
Applicant
Zyma Berisha
Constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo, Rev. 308/2007, dated 10 June 2010

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mrs. Zyma Berisha (hereinafter: the Applicant), residing in Peja.

Challenged decision

2. The challenged decision of a public authority is the Judgment of the Supreme Court of the Republic of Kosovo, Rev. 308/2007, dated 10 June 2010, which the Applicant received on 13 September 2010.

Subject matter

3. The Applicant's Referral relates to the alleged violation of her human rights under Articles 3.2 [Equality before the Law] and 24.1 [Equality before the Law] of the Constitution by Judgment Rev. 308/2007 of the Supreme Court of 10 June 2012. By which the decisions of the lower instance courts in favour of the Applicant, wwere quashed and the revision submitted by "Kosova e Re" [New Kosova] Insurance Company (hereinafter "Kosova e Re") was upheld. The subject of these civil proceedings was to obtain confirmation of the Applicant's permanent employment status at "Kosova e Re", and her consequent reinstatement into her earlier workplace. The proceedings were terminated on 10 June

2012 when the Supreme Court issued the challenged judgment Rev. 308/2007.

Legal basis

4. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Article 22 of the Law on Constitutional Court of Kosovo (hereinafter: the Law) and Rule 56 (1) of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 3 December 2010, the Applicant submitted the Referral to the Court.

6. On 27 January 2011, the Court notified the Applicant and the Supreme Court of Kosovo of the registration of the Referral.

7. On 2 June 2011, the President appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President, appointed the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Enver Hasani and Iliriana Islami.

8. On 21 September 2011, the Court requested from the Applicant additional documents regarding her case.

9. On 26 September 2011, the Applicant submitted to the Court additional documents that were requested and further clarified the referral.

10. On 24 May 2012 the Applicant submitted additional written submissions to the Court.

11. On 19 June 2012, the Review Penal deliberated on the report of Judge Report.

12. On 2 July 2012, the President appointed Judge Altay Suroy as a new member of the Review Panel, replacing Judge Iliriana Islami, because her mandate as a judge of the Court had expired on 26 June 2012, and replacing Judge Snezhana Botusharova as Presiding Judge.

13. On 13 September 2012, the Applicant submitted further written materials to the Court.

14. On 6 December 2012, the Review Panel deliberated further on the Preliminary Report of the Judge Rapporteur.

15. On 7 December 2012 the Court received additional documents.

16. The full Court deliberated in private on the Referral on 29 January 2013.

Summary of the facts

17. The Applicant has been an employee of "Kosova" Property and Insurance Company in Prishtina since 1986, on the basis of an "employment relationship for an indefinite period of time", i.e. permanent employment. She occupied the position of translator in the Business Unit for Common Services in "Kosova" Insurance Company, which later on was alienated and transformed into "Kosova e Re" [New Kosova] Insurance Company (hereinafter "Kosova e Re"). In connection with this transformation, a Collective Agreement was concluded between the General Manager of "Kosova e Re"and the President of the Trade Union, providing, inter alia, that the employees of the transformed company would remain in the same employment relationship in the new entity.

18. On 13 September 2000, "Kosova e Re", by Decision no. 345, moved the Applicant to the position of proofreader archivist and media monitor, in which position she had already been working until she was transferred, pursuant to the Agreement for the transfer of the profile between Kosova Insurance Company and Kurum Commerce Group known as "Kurum".

19. Thereafter, "Kosova e Re", through a new contract, changed the Applicant's status, from employment for an indefinite period of time to employment for a definite period of time, and extended the new contract several times during the period 2001 to 2004.

20. On 25 October 2002, the Applicant was served with a decision of temporary dismissal from work.

21. On 18 September 2003, the Applicant received a one-month employment contract No. 1523/08. 09. 2003, for a definite period of time, valid from 1 September 2003 to 31 September 2003, about which she complained on the same date stressing that "*I am accepting the contract but contrary to my will because I am being imposed such a thing to provide for my subsistence*".

22. On 1 January 2004, the Applicant received once more a fixed time contract, valid for one month, from 1 January 2004 to 31 January 2004.

23. On 9 January 2004, the Applicant addressed an appeal to the General Manager of "Kosova e Re", objecting to the one-month contract, and requested the Collective Agreement to be respected. The Applicant claimed to have signed the contract under pressure and against her will, out of fear that she would remain jobless.

24. On 3 February 2004, the Applicant was notified, by Notification No. 9, that as off 4 February 2004, she would no longer be obliged to report to work due to the termination of her fixed term contract. In the notification no reasons were given for the termination of her labour relationship with the company.

25. On the same date, the Applicant, together with two colleagues (S.B. and R.B.) who were in an identical situation, submitted an appeal against the Notification.

26. On 5 February 2004, the Applicant presented her case to the Labour Inspectorate in Pristina, a body of the Ministry of Labour and Social Welfare, and requested it to undertake legal action to protect her rights derived from her employment.

27. On 23 February 2004, the Labour Inspectorate replied to the Applicant and her two colleagues, S.B. and R.B, as follows:

> *"Article 16 of the Collective Agreement of Company 'Kosova e Re' [...] clearly foresees that the employment relationship for a fixed-term can be established in the following cases: replacing the employee who is absent; temporary increase of workload; hiring internees for a definite period of time; and in other cases foreseen in the collective Agreement. It is not disputable that the complainants were in an indefinite employment relationship with the former "Kosova" Insurance Company, therefore, in compliance with the respective provisions stated above, the employment relationships concerned were established for an INDEFINITE term[...]. In these circumstances, the employer was obliged to sign an employment contract for an indefinite term with the employees ..."*

28. In March 2004, the Applicant and her two colleagues requested the Management Board of "Kosova e Re" to enforce the conclusions of the Labour Inspectorate and to reinstate them into their workplace.

29. Since the above mentioned request was not successful, the Applicant filed a lawsuit with the Municipal Court in Pristina against "Kosova e Re".

30. In her lawsuit the Applicant requested the Court to confirm her permanent employment status and to order her reinstatement into the workplace of the respondent "Kosova e Re".

31. On 20 September 2004, the Municipal Court in Pristina, by Judgment C1. nr. 31/04, approved the Applicant's lawsuit as grounded and confirmed that the Applicant enjoyed the status of employee for an undefinite period of time at the respondent, "Kosova e Re" in Pristina, i.e. permanent employment status, with all the rights and duties deriving from that status. Moreover, the Court ordered the respondent to restore the Applicant into duties and tasks corresponding with her qualifications and skills, within a deadline of 8 days from the date of the judgment, under liability of forced execution.

32. In its reasoning the Municipal Court held, inter alia, that:

"After the assessment of the evidence filed under Article 8 of the LCP and on the basis of the facts assessed, the Court finds the claim of the plaintiff grounded.

[…].

In the concrete case, from the beginning of her employment, the plaintiff had a contract for an undefinite period of time and, without her consent, this contract could not be transformed into a fixed term employment contract, and it can be proven that the plaintiff has filed many objections in relation to her status with the respondent.

The conclusion of the Labour Inspectorate of 15 October 2003 speaks for the finding of the Court above, including conditions of the BPK tender of 7 February 2002, which provide that existing staff of the former Insurance Company shall be transferred to the new Insurance Company "Kosova e Re".

[…] On the basis of the evidence examined, the Court finds that the respondent "Kosova e Re" has violated the procedure as provided by

Law, and for this reason, the plaintiff must be recognized the Status of Employee for an Undefinite Term, since the duties she carried out are not of temporary nature, be that by Law or by acts of the respondent, while the volume of the work has neither diminished nor been removed, and furthermore, the job which was initially done by the plaintiff is now carried out by a new employee, on which grounds the respondent is found to violate the Article 12 of the Regulation on Essential Labour 2001/27. The Court also finds that the Collective Agreement which is applicable to all staff of the Insurance Company does not provide for the possibility of terminating the employment relationship as used by the respondent in this case."

33. On 29 March 2007, following the submission of an appeal by "Kosova e Re", the District Court in Pristina, by Judgment Ac. nr. 234/2005, decided to reject the appeal as unsubstantiated and confirmed the Judgment of the Municipal Court in Pristina, C1.nr.31/2001, dated 29 September 2004.

34. The District Court in Pristina, by Judgment Ac. nr. 234/2005, reasoned, inter alia, that:

"According to the opinion of the Panel, the appeal allegations of the respondent [Insurance Company "Kosova e Re"] that the first instance court has erroneously applied material law are found ungrounded, because the provisions of Article 16 of the Collective Agreement [...] provide explicitly for cases in which employment relations with the respondent can be established for a fixed term. The same regulation does not provide for the establishment of such employment relations with the transferred staff, and the amendment of the legal status of the transferred employees, as was done by the respondent. The Panel maintains that the plaintiff, as an employee transferred to the respondent on the basis of the Agreement mentioned, enjoys the same legal status as other employees of the respondent, and that the change of status from an undefinite period to a fixed term employment in the concrete case was unlawful, therefore, the first instance court has fairly found that the plaintiff enjoys all rights deriving from the employment relations with the respondent, starting from 4 February 2004, and until the reinstatement into work and duties as before".

35. On 10 June 2010, following the revision submitted by "Kosova e Re" Insurance Company, the Supreme Court, by Judgment nr. Rev. 308/2007, upheld the revision as grounded and amended Judgment

Ac. nr. 234/2005, of the District Court in Pristina, dated 29 March 2007, and Judgment C1. n3. 31/2004 of the Municipal Court in Pristina, dated 29 September 2004.

36. The Supreme Court held, inter alia, that:

"The Supreme Court of Kosovo finds that the lower instance courts have fairly and fully ascertained the factual situation related to the decisive facts for a fair adjudication of this case, but pursuant to such a situation, according to the view of this Court, they have erroneously applied material law when finding that the claim suit of plaintiff is grounded. This due to the fact that the plaintiff, with the last contract she personally signed, was extended her employment relations for a fixed term from 01.01.2004 until 31.01.2004, which expired on the expiry date, according to Article 11.1 (d) of the Essential Labour Law in Kosovo. The respondent, pursuant to Article 11.5 (a) of the Law, has notified in written, no. 9, dated 03.02.2004, the plaintiff on the termination of the contract, and, therefore, the finding of the lower instance courts that the fixed term contract for the period from 01.01. to 31.01.2004 is unlawful, according to the view of this Court, is ungrounded.

The legal stance of the lower instance courts that the plaintiff's contract should have been extended, because her working position exists in normative acts of the respondent, in the view of this Court, is in violation of provisions of the Law, considering that the contract extending the employment relationship may be signed with the consent of the employer and the employee, if it is not in contradiction with the law and normative acts, and therefore, the plaintiff's working contract was terminated with the expiry of the duration of the contract."

37. On 8 November 2010, the Applicant submitted an open letter to the President of the Supreme Court and the European Union Rule of Law Mission (hereinafter: "EULEX"), claiming a violation of the Constitution, in particular, the right to equal treatment.

38. The Applicant stated as follows: *"[…] I have three judgments before me: Rev.no 126/2007, Rev. no 177/2007, and Rev no 308/2007, the latter being my case. Two other revisions, and 3-4 other cases of my former colleagues, were adjudicated by the Supreme Court of Kosovo to the benefit of my colleagues, and the Insurance Company was ordered to restore them into their previous positions, and compensated them for the material damage incurred. The reasoning*

in both judgments on revision mentioned above is full, and confirming the justice of the lower instance courts' judgments. Only the opposite happened in adjudicating the revision in my case, which is exclusive, partial and lacking relevant element. […]"

39. The Applicant continued that*: "Provisions of Articles 11 and 12 of the Essential Labor Law, and Articles 89-95 of the Collective agreement on employment relations of the respondent, provide the legal basis of the termination of employment, but none of the case files prove that any of the legal grounds has been met for termination, and, therefore, the notice to the plaintiff notifying [him/her] that the contract shall not be extended, cannot have legal effect on the termination of the employment relations with the plaintiff [the Applicant]. This is missing in the reasoning of the judgment on the revision in my case.*"

Applicant's allegations

40. The Applicant claims that the Supreme Court, by Judgment Rev. 308/2007, dated 10 June 2010, placed her in an unequal position vis-a-vis her former colleagues who were in the same situation, i.e. had permanent employment status within the same company and won their cases before the Supreme Court, whereafter they were reinstated into their previous workplaces.

41. The Applicant argues that only her case was decided differently by the Supreme Court and that, therefore, she became the victim of injustice and discrimination. Initially, she attached to her referral two judgments of the Supreme Court both issued on 17 January 2008 (under Rev. nr. 126/2007 and Rev. nr. 177/2007) which related to two of her former colleagues, while, in her written submission of 26 September 2011, she listed the names of 6 former colleagues who had won their cases before the Supreme Court, including the names of the two colleagues whose judgments she already had submitted.

42. The Applicant alleges a violation of Article 3.2 [Equality before the Law] and Article 24.1 [Equality before the Law] of the Constitution.

Relevant legal background

Relevant provisions of UNMIK Regulation No. 2001/27, on Essential Labour Law in Kosovo

Article 10. Labour Contract

10.1 A labour contract may be concluded for:

(a) an indefinite period of time; or

(b) a definite period of time.

Article 11. Termination of a labour contract

11.1 A labour contract shall terminate:
(a) upon the death of the employee;
(b) by a written agreement between the employee and employer;
(c) on the grounds of serious misconduct by the employee;
(d) on the grounds of unsatisfactory performance by the employee;
(e) following the expiration of the term of employment; and
(f) by operation of law.

11.2 A labour contract shall be terminated by the employer on the grounds of serious misconduct or unsatisfactory performance by the employee.
[…]

11.5 Where Article 11.2 applies:

(a) the employer shall notify the employee in writing that it intends to terminate the labour contract. Such notice shall include the grounds for termination; and

(b) a meeting shall be held between the employer and the employee, and at such meeting the employer shall provide the employee with an oral explanation of the grounds for termination. If the employee is a member of a union, the employee shall be entitled to have a union representative present at such meeting.

Article 12. Termination of a Labour Contract due to Economic, Technological or Structural changes to the Enterprise:

12.1 A labour contract may be terminated by an employer due to economic, technological, or structural changes to the enterprise. Such changes occur where the employer introduces major changes in production, programming, organization, structure and technology that require a reduction in the number of its employees.

Where a minimum of 50 employees are discharged within a 6 month period, it shall be considered a large-scale lay off.

Relevant provisions of the Collective Agreement with the IC "Kosova e Re" no. 686, dated 7 October 2002

Article 1

This Agreement defines the rights and obligations between the Insurance Company "Kosova e Re" based in Pristina, hereinafter the employer, and the employees of this Company, pursuant to the law, collective agreement at national level, sector level and other legal acts.

Article 2:

The other rights and obligations, which are not included in this Agreement, shall be implemented on the basis of Law and other collective agreements.

[...]

Article 15:

Employment relationship may be established for an indefinite and definite period of time.

Article 16:

Employment relationship for a definite period of time can be established when:
- *replacing the employee, who is absent;*
- *there is a temporary increase of workload;*
- *hiring internees for a definite period of time;*

[...]

Article 103:

This contract will be in force for three years.
Article 104:

This Agreement enters into force, 8 days after its publication.

[…]

Relevant provision of the BPK Tender

"IV. BPK provides that the successful bidding company will make the transfer of all employees of the company in the new Company "Kosova e Re".

Admissibility

43. 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, as further specified in the Law and the Rules of Procedure of the Court.

44. The Court has first to determine whether the Applicant is an authorized party to submit a Referral to the Court, pursuant to the requirements of Article 113.7 of the Constitution. As to the present Referral, the Court notes that the Applicant is a natural person and an authorized party, pursuant to the requirements of Article 113.7 [Individual Referrals] of the Constitution.

45. The Court also has to determine whether the Applicant has met the exhaustion of domestic remedies requirement, prescribed by Article 113.7 of the Constitution and Article 47.2 of the Law, stipulating: "*The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law*".

46. In this connection, the Court refers to its Case KI. 41 /09, where it stated:

"The Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human of 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. This is an important aspect of the subsidiary character of the Constitution. (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 of28 April 200")."
In this connection, the Court would like to stress that 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).
Where an applicant has tried a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the four-month time limit (Art."9 "Deadli"es" of the Law), which may lead to the complaint being rejected as out of time (see, mutatis mutandis, ECHR, Prystavka, Rezgui v. France, no 49859/99, decision of 7 November 2000)."

47. As to the present case, the Court notes that the Applicant challenges the judgment of the Supreme Court, whereby the latter granted the revision filed by "Kosova e Re" against the decision of the District Court in Pristina and amended the judgments of the lower instance courts. In the absence of any further available legal remedy in the circumstances of the case, the Court concludes that the Applicant has met the exhaustion requirement.

48. Since the referral is also not manifestly-ill-founded, the Constitutional Court rules that the Applicant's referral is admissible.

Merits

49. The Applicant alleges that Judgment Rev. nr. 308/2007 of 10 June 2010 of the Supreme Court violated her rights guaranteed by Articles 3.2 [Equality before the Law] and 24.1 [Equality before the Law] of the Constitution.

50. In respect of the rights invoked by the Applicant, the Court recalls that it "*is master of characterization to be given in law to the facts of the case and is not bound by the characterization given by an applicant or a government. A complaint is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on*" (see, ECtHR judgment in case of Ştefanica and others v. Romania of 2 November 2010, para 23).

51. Therefore, the Court will examine the Applicant complaints rather under Article 31 [Right to Fair and Impartial trial] of the Constitution taken in conjunction with Article 6.1 ECHR [Right to a fair trial] and Article 24 Equality before the Law] of the Constitution taken in

conjunction with Articles 14 [Prohibition of discrimination] and 6.1 ECHR.

Judgments of the Supreme Court related to the Applicant's former colleagues

52. The Applicant argues that all her former colleagues who were in an identical position as she was, won their cases before the Supreme Court and that, as a consequence, she has been the victim of discrimination.

53. In this connection, the Court obtained, on 7 December 2012, certified copies of six judgments of the Supreme Court, the first three having been issued on 17 January 2008 (Rev. nr. 126/2007, Rev. nr. 177/2007 and Rev. nr. 183/2007), while one judgment was issued on 28 January 2008 (Rev 180/2006. The fifth one was the one issued in the Applicant's case on 10 June 2010 (Rev 308/2007), while the sixth one was issued on 7 February 2011(Rev 154/2008), i.e. 7 months after the judgment in the Applicant's case.

54. The Court notes that in all cases before the Supreme Court the respondent was the same, namely "Kosova e Re", but that the Supreme Court considered the subject matter in the Applicant's case different from the one in the case of her colleagues.

55. Thus, while in the cases of the Applicant's former colleagues the Supreme Court qualified the subject matter as the confirmation of their permanent employment status and their subsequent reinstatement into their workplaces within "Kosova e Re", in the Applicant's case the Supreme Court considered the subject matter to be an issue relating to the extension of her contract with "Kosova e Re".

56. The Court also notes that the operative part in the Supreme Court judgments in the case of the Applicant's colleagues reads:

"The revision of the defendant filed against the judgment of the District Court in Pristine is refused as unfounded".

57. The Court further notes that the reasoning given by the Supreme Court in these cases is substantially the same and considers it relevant to quote, as an example, the pertinent part of the Supreme Court's judgment issued on 7 February 2011 (Rev 54/2008), i.e. 7 months after the judgment in the Applicant's case:

"*As to the fact that the works the plaintiff carried out in the positions he was assigned to are not of a temporary or occasional nature, but of a permanent nature, it results that the plaintiff has established employment for an indefinite period of time. This type of employment is established pursuant to Article 10.1, item (a) of UNMIK Regulation nr.2001/27 On Essential Labour Law in Kosovoand Article 15 of the defendant's Collective Agreement on Employment Relationship, because, pursuant to Article 16 of this Agreement, the employment relationship can be established in the following cases: the replacement of the worker who is absent from work; the temporary increase of the work volume; internship; and in other cases provided by the law and the Collective Agreement. Despite the fact that the defendant, through the above contracts, has extended plaintiff's employment relationship for a definite period of time, the lower instance courts have duly concluded that such contracts are in violation of the above mentioned legal provisions, because the duties of the job have been of a permanent nature and that such a contract is not only contrary to the legal provisions mentioned, but also contrary to the principle of consciousness and fairness - bona fide, since the plaintiff was held in a state of legal uncertainty, therefore, the lower instance courts have duly concluded that the plaintiff has the status of employment relationship for an indefinite period of time.*

The provisions of Articles 11 and 12 of the mentioned Labour Law and Article 89 – 95 of the defendant's Collective Agreement on the Employment Relationship have established the legal basis for the termination of the employment relationship, but from the case file it does not appear that any of the legal requirements have been fulfilled for the termination of the employment relationship; therefore, the defendant's announcement informing the plaintiff about the non extension of the contract cannot have legal influence on the termination of the employment relationship of the plaintiff."

As to Article 31 of the Constitution in conjunction with Article 6 ECHR:

58. The Applicant's expresses her complaints under the Constitution and the ECHR as follows: "*The reasoning in both judgments on revision mentioned above is full, and confirms the justice of the lower instance courts' judgments. However, the opposite happened in the adjudication of the revision of my case, which is exclusive, partial and lacking relevant elements*."

59. The Applicant asserts that the Supreme Court violated her rights since in her case it issued a judgment which is different from the judgments that were issued by the same Court in the cases of her former colleagues who sued the same respondent ("Kosova e Re") and that the subject matter of their petitions was the same, i.e. the confirmation of their permanent employment status).

60. In this respect, the Court refers to the following legal provisions:

Article 53 [Interpretation of Human Rights Provisions] of the Constitution, providing 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."

Article 31 [Right to Fair and Impartial Trial] of the Constitution, providing that

"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

Article 6 ECHR, providing that
"In the determination of his civil rights and obligations [...] everyone is entitled to a fair [...] hearing [...] by an independent and impartial tribunal [...]".

61. 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 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, para. 28, European Court on Human Rights [ECHR] 1999-I).

General principles as to conflicting court decisions

62. For a better understanding of these general principles, the Court refers to the recent Grand Chamber judgment in the case *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, 20 October

2011), where the ECtHR reiterated the main principles applicable in cases concerning conflicting court decisions. These can be summarized as follows:

"(i) It is not the Court's function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see García Ruiz v. Spain [GC], no. 30544/96, § 28, ECHR 1999-I). Likewise, it is not its function, save in the event of evident arbitrariness, to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence of those courts must be respected (see Ādamsons v. Latvia, no. 3669/03, § 118, 24 June 2008);
(ii) The possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see Santos Pinto v. Portugal, no. 39005/04, § 41, 20 May 2008, and Tudor Tudor, cited above, § 29);
(iii) The criteria that guide the Court's assessment of the conditions in which conflicting decisions of different domestic courts' ruling at last instance are in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing whether "profound and long-standing differences" exist in the case-law of the domestic courts, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see Iordan Iordanov and Others, cited above, §§ 49-50; see also Beian (no. 1), cited above, §§ 34-40; Ştefan and Ştef v. Romania, nos. 24428/03 and 26977/03, §§ 33-36, 27 January 2009; Schwarzkopf and Taussik, cited above, 2 December 2008; Tudor Tudor, cited above, § 31; and Ştefănică and Others, cited above, § 36);
(iv) The Court's assessment has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see, amongst other authorities, Beian (no. 1), cited above, § 39; Iordan Iordanov and Others, cited above, § 47; and Ştefănică and Others, cited above, § 31);
(v) The principle of legal certainty, guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is

clearly one of the essential components of a State based on the rule of law (see Paduraru v. Romania, § 98, no. 63252/00, ECHR 2005-XII (extracts); Vinčić and Others v. Serbia, nos. 44698/06 and others, § 56, 1 December 2009; and Ştefănică and Others, cited above, § 38);
(vi)However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see Unédic v. France, no. 20153/04, § 74, 18 December 2008). Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see Atanasovski v. "the Former Yugoslav Republic of Macedonia", no. 36815/03, § 38, 14 January 2010)."

Applying the general principles to the case at issue

63. In order to apply the test derived from the above judgment of the ECtHR to the decision of the Supreme Court in the Applicant's case and the ones issued in the other five cases which are identical to the Applicant's case, the Court needs to examine whether in the Applicant's case the Supreme Court had given sufficient reasons for the rejection of the Applicant's arguments or whether its judgment showed "evident arbitrariness".

64. In this respect, the Court's refers to its well-established case law regarding the obligation of ordinary courts to give reasons for their judgments, for instance in its "KEK I judgment" as well as in its recent judgment adopted on 7 December 2012 in Case KI 72/12, Veton Berisha and Ifete Haziri, Constitutional review of the Supreme Court Judgment A.nr. 1053/2008 dated 31 May 2012, where the Court found a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6.1 ECHR.

65. In its KEK I judgment the Court recalled the jurisprudence of the European Court of Human Rights as follows:

"Article 6.1 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 Ruiz Torija v. Spain, judgment of 9 December 1994, Series A no. 303-A, § 29).

66. In Case KI 72/12, Veton Berisha and Ifete Haziri, the Court further stated "*theECtHR has held that, while authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6(1) of the Convention, their courts must 'indicate with sufficient clarity the grounds on which they based their decision'. (See Hadjianastassiou v. Greece, EcHR Judgment of 16 December 1992, paragraph 33). In a recent judgment, the ECtHR reiterated that 'judgments of courts and tribunals should adequately state the reasons on which they are based' (See Tatishvili v Russia, ECtHR Judgment of 22 February 2007, paragraph 58).*"

67. Consequently if a submission is fundamental to the outcome of the case, as it is this case the permanent employment status of the Applicant, the court must then specifically deal with it in its judgment.

68. In the case KI 72/12, Veton Berisha and Ifete Haziri the Court also stated that in "*In Hiro Balani v. Spain, 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) of the Convention. Consequently, the statement of reasons 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. Thus, the justification of the decision must state the relationship between the merit findings and reflections when considering the proposed 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.*"

69. In the instant case, the Court notes that the Applicant requested the ordinary courts to confirm her permanent employment status in the

same way as they had done in the case of her former colleagues. She referred, in particular, to the provisions of the Collective Agreement applicable to her employment status as well as to the relevant provisions of the UNMIK Regulation on Essential Labour Law in Kosovo and also presented the evidence that she was entitled to enjoy all rights from the permanent employment status, as the findings of the Labour Inspectorate had also confirmed. In view of the previous judgments of the Supreme Court in the identical cases of her former colleagues based on similar facts as the Applicant's case, the Applicant could legitimately expect that the revision initiated by "Kosova e Re" would be rejected.

70. However, although the Supreme Court, as the text of the contested judgment shows, found that the lower instance courts had fairly and fully ascertained the factual situation related to the decisive facts for a fair adjudication of the case, it apparently did not analyze the Applicants' claim in a similar way as it had done in the cases of her former colleagues and as the lower instance court had done in the Applicant's case. Instead the Supreme Court viewed that, contrary to the Applicant's submissions, the subject matter of her case concerned the extension of the fixed term contract and did not at all consider the Applicant's arguments and evidence related to her claim to be entitled to permanent employment status and reinstatement into her working place.

71. Thus, while the Applicant had clearly raised the issue of her permanent employment status in the same way as her former colleagues had done before the Supreme Court, the Supreme Court considered her claim only as a matter of extension of her contract.

72. As a consequence, the Supreme Court, in its judgment in the Applicant's case, ruled differently than in the identical cases of the Applicant's former colleagues. Instead of finding in those cases that the lower instance courts had "*fairly applied provisions of contested procedure and material law when finding that the claim suit of plaintiff is grounded*", the Supreme Court found in the Applicant's case that the lower instance courts had "*erroneously applied material law when finding that the claim suit of the plaintiff is grounded*".

The Supreme Court further held that "*The legal stance of the lower instance courts that the plaintiff [Applicant]'s contract should have been extended, because her working position exists in normative acts of the respondent ["Kosova e Re"], to the view of this Court, is in*

violation of provisions of the Law, considering that the contract extending the employment relationship may be signed with the consent of employer and employee, if not in contradiction with the law and normative acts, and, therefore, the plaintiff's working contract was terminated with the expiry of the duration of the contract".

73. It is not the task of the Constitutional Court to decide what would have been the most appropriate way for the Supreme Court to deal with the Applicant's arguments regarding the status of her permanent employment based on the above mentioned Collective Agreement and applicable law.

74. However, in this Court's opinion, the Supreme Court's judgment, by neglecting the proper assessment of the Applicant's arguments regarding her permanent employment status, even though they were specific, pertinent and important, fell short of the Supreme Court's obligations under Article 6.1 of the ECHR to fulfil the obligation to state reasons (see *mutatis mutandis*, ECtHR Judgment of 18 July 2006 in the case *Pronina v. Ukraine*, Application no. 63566/00; see also the Court's Judgment in Case No. 40/09 Imer Ibrahimi and 48 other employees of the KEK i.e. "KEK I judgment).

75. Moreover, the Court notes that the Supreme Court, in its Judgment Rev.nr.154/2008, dated 7 February 2011 i.e. 7 months after its judgment in the Applicant's case, did not repeat its findings in the Applicant's case, but again ruled in the same way as it had done in the four cases prior to the Applicant's case, considering the confirmation of the permanent employment status as the subject matter of the disputes and using similar extensive and thorough reasoning to reject the revision submitted by "Kosova e Re".

76. In these circumstances, the Court finds that the Supreme Court has dealt with the Applicant's case in an evidently arbitrary manner, contrary to the principles elaborated by the ECtHR in its above mentioned judgment in *Nejdet Sahin and Perihan Sahin v. Turkey* [GC], no. 13279/05, 20 October 2011.

77. The Court, therefore, concludes that there has been a violation of Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR.

As to the alleged violation of Articles 3.2 and 24.1 of the Constitution

78. The Court notes that the Applicant also argued that the Supreme Court, by Judgment Rev. 308/2007, dated 10 June 2010, placed her in an unequal position vis-a-vis her former colleagues and claimed a violation of Articles 3.2 [Equality before the Law] and 24.1 [Equality before the Law] of the Constitution**.**

79. In view of the above finding with respect to Article 31 of the Constitution in conjunction with Article 6 ECHR, the Court considers it not necessary to pursue the examination of this complaint.

FOR THESE REASONS

The Constitutional Court, in its session of 29 January 2013 by majority:

I. DECLARES the Referral admissible.

II. HOLDS that there has been a breach of Article 31 [Right to Fair and Impartial Trial] in conjunction with paragraph 1 of Article 6 [Right to a Fair Trial] of the European Convention on Human Rights.

III. DECLARES invalid the Judgment of the Supreme Court of KosovoRev. 308/2007, dated 10 June 2010.

IV. REMANDS the Judgment of 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 Judgment is effective immediately.

Deputy-President
Prof. Dr. Ivan Čukalović

President of the Constitutional Court
Prof. Dr. Enver Hasani

Case No. KI 120/10
Applicant
Zyma Berisha
Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo, Rev. 308/2007, dated 10 June 2010
Dissenting Opinion
of
Judge Robert Carolan

The Claim

The Applicant, in her referral, claims that the Supreme Court of the Republic of Kosovo, in its Judgment Rev. No. 308/2007 of 10 June 2010, violated the principle of equality before the law as protected by Article 24, para. 1, of the Constitution.

In support of her claim, the Applicant notes that the Judgment of the Supreme Court in her case differs from the Judgments of the Supreme Court in five other cases (Judgment Rev. No. 126/2007 of 17 January 2008, and Judgment Rev. No. 177/2007 of 17 January 2008 and there others). The Applicant claims that her situation is identical to that of the claimants in those other cases.

The Facts

The facts of this case concern the applicant, who was employed since 1986 in the insurance company "Kosova" with an employment contract of indefinite duration. In the year 2000, this company was reorganized, or otherwise its assets and liabilities were transferred, to an insurance company named "Kosova e Re". Included in that transfer were all of the staff members employed by the former company, as had been stipulated in the transfer agreement between the two companies.

The Applicant continued to work with the new insurance company, but on the basis of a series of contracts of definite duration. Her functions within the company also changed from that of a translator to other functions. Initially, she had an employment contract with "Kosova e Re" of unspecified duration. Subsequently, she received a series of fixed-duration contracts. This situation continued until the Applicant received notice of a termination of her employment on 4 February 2004.

The Applicant points out that there existed a Collective Agreement (No. 686 of 7 October 2002) between her original employer and the staff members of insurance company "Kosova" which stipulated which types of work would be considered exclusively as 'employment of unlimited duration'. Allegedly, this Collective Agreement had formed part of the transfer of assets and liablities

from the original company to the new company "Kosova e Re". The Applicant alleges that she had only accepted to sign the series of fixed-duration employment contracts under duress, given that she wished to continue her employment and was in need of an income. She claims that she fully expected the company "Kosova e Re" to acknowledge that she was entitled to an employment contract of unlimited duration, under the terms of the Collective Agreement.

Following her ultimate dismissal in 2004, the Applicant brought contested proceedings before the Municipal Court of Pristina, requesting that the court order the company "Kosova e Re" to reinstate her as an employee with a contract of indefinite duration. This court, by judgment C1. No. 31/03, of 20 September 2004, determined that that the Collective Agreement was binding on "Kosova e Re", and that under the applicable labour law, this company was bound to reinstate the Applicant. The respondent company "Kosova e Re" appealed to the District Court of Pristina, which by judgment Ac. No. 234/2005, of 29 March 2007, upheld the findings and determination of the Municipal Court.

Judgment of the Supreme Court

Subsequently the respondent company "Kosova e Re" requested a revision at the Supreme Court, claiming that the District Court had erroneously applied the material law. The Supreme Court, in its judgment Rev. No. 308/2007, of 10 June 2010, found the revision grounded. The Supreme Court found that *"the lower instance courts had fairly and fully ascertained the factual situation related to decisive facts for a fair adjudication of the case, but pursuant to such a situation, [...] they had erroneously applied the material law when finding that the claim suit is grounded."* Specifically, the Supreme Court reasoned that:

> *"The legal stance of the lower instance courts that the plaintiff should have been extended her contract, because her working position exists in normative acts of the respondent, in the view of this court, is in violation of provisions of the Law, considering that the contract extending the employment relationship may be signed by the consent of employer and employee, if not in contradiction with the law and normative acts, and therefore, the working contract of the plaintiff was terminated with the expiry of the duraction of the contract."*

From the aforementioned proceedings it may be concluded that the lower instance courts had fairly and fully ascertained the facts of the Applicant's

claim, as had the Supreme Court in its revision. The crucial difference lay in the legal interpretation given to the status of the Collective Agreement regarding employment in the respective insurance companies "Kosova" and, following transfer, "Kosova e Re". Whereas, the lower instance courts had determined that this Collective Agreement was binding on "Kosova e Re" and was in accordance with the material law, the Supreme Court found that parties had benefitted from the lawful freedom of contract, and, apparently, determined that the Collective Agreement was in violation of the material law. We note that the phrase, *"because her working position exists in normative acts of the respondent"* is not entirely clear in whether or not it refers to the Collective Agreement. Alternatively, it may simply refer to the job title and functions which the Applicant was exercising.

However, in whichever interpretation one makes of the Supreme Court's determination, it is clear that it was making a finding on the applicable material law, which is fully within its competencies. Indeed, it is not within the competencies of the Constitutional Court to make findings on the material law. In accordance with the clear case-law of the Constitutional Court, it is not a fourth instance court. As such, it is not up to the Constitutional Court to question the evaluation of the material law made by the Supreme Court in its judgment on the applicant's case.

Previous Judgments of the Supreme Court

The Applicant refers to five other decisions of the Supreme Court where co-employees received a different judgment than she received, and concludes that she was, therefore, not treated equally with her co-employees. Two of those judgments of the Supreme Court were decided 17 months earlier, on 17 January 2008, by a substantially different panel of judges of the Supreme Court[1]. In those judgments that panel of the Supreme Court concluded:

> *"By evidence examined, the court of first instance has ascertained that the plaintiff, by contract no. 240, dated 27.06.2002, entered into employment relations with the defendant, which did not set a term of employment. Due to the fact that the duties carried by the plaintiff, in the working position she kept, bear not a temporary or sporadic nature, but are permanent, it derives that the plaintiff had entered into employment relations for an undefined period of time. This type of employment relations is established in compliance with Article 10.1, item (a) of the UNMIK*

Regulation No. 2001/27 on Essential Labour Law in Kosovo, and Article 15 of the Collective Agreement of the respondent on employment relations, because according to Article 16 of this Agreement, a fixed term employment relationship may be established only in the following cases: substitution of an absent employee, temporary increase of activity intensity, internship, and other cases as provided by law and collective agreement. Despite the fact that the respondent had extended employment relations with the respondent by contracts mentioned above, for fixed terms,lower instance courts have fairly found that such contracts are in contradiction with provisions mentioned above, because the duties of the working position were of a permanent nature, and such a contract is not only in violation of legal provisions, but also in violation of principles of consciousness and honour – bona fide, in which the plaintiff was kept in a situation of legal uncertainty, and instead of her, another employee was employed, and therefore, the lower instance courts have fairly concluded that the plaintiff enjoyed the status of employee for an undefined period of time."

The Supreme Court of Kosovo, in its two other judgments issued on 17 January 2008, where the aggrieved employees were also females like the Applicant, concluded that the law required that the contracts be for an indefinite period of time because of the nature of the work performed by the respective employees. The Supreme Court in those cases never addressed the issue of whether the employees and their employer could mutually agree to change such an employment contract for this type of employment from an indefinite contract of employment to a definite contract of employment. 17 months later a substantially different panel of the Supreme Court, in the Applicant's case, addressed this issue and clarified, for the first time in Kosovo, that an employee with a permanent status employment position could lawfully agree to change her employment status to an appointment for a specific period of time.[2]

Right to a Fair Trial

[2]One of the judges who served on the five member panel of judges with the Supreme Court in Applicant's case also served on a different five member panel of judges of the Supreme Court in the cases referred to by the Applicant.

The majority infers that the Applicant alleges a violation of the right to a fair trial, as guarateed by Artricle 31, para. 1, of the Constitution. This provision status:

> 1. *Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public office.*

In accordance with Article 53 of the Constitution, this article shall be interpreted consistent with the court decisions of the European Court of Human Rights. The equivalent article in the European Convention on Human Rights (ECHR) is Article 6, para. 1, which provides:

> 1. *In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]*

It is not contested that disputes regarding relations between employers and employees come within the scope of *"civil rights and obligations"* (*See e.g.* Buchholz v. Germany, No. 7759/77, para. 46). It is also not contested that the various court proceedings concerned a dispute regarding these civil rights, given that at issue was the termination of an employment relationship, which had implications for the Applicant which are "genuine and serious" (*Seee.g.* Benthem v. the Netherlands, No. 8848/80, para. 32-33).

To the extent that the sequence of judgments by the ordinary courts in the Applicant's case were in fact, and in law, "directly decisive for the civil rights concerned", it can be concluded that the various court proceedings concerned a "determination" of the Applicant's civil rights and obligations (*See e.g.* Le Comte, Van Leuven and De Meyere, Nos. 6878/75 and 7238/75, para. 47).

It is not in dispute that the regular courts at Municipal, District and Supreme Court levels are duly established by Law and constitute 'tribunals" within the meaning of Article 6 ECHR. Also not in dispute is the duration of the proceedings at issue in this referral, which began with the introduction of the claim before the Municipal Court at some point in the first half of 2004, and which concluded with the judgment of the Supreme Court as served on the parties on 13 September 2010. In addition, the Applicant does not allege that the various courts were not independent and impartial.

It remains to be considered to what extent the Applicant benefitted from the procedural guaratees of a fair hearing. The Applicant had effective access to three levels of jurisdiction within the Kosovo court system. The Applicant

benefitted from representation by a qualified attorney at all three levels of court. As such, the Applicant's "access to court" cannot be questioned (*See e.g.* Golder v. United Kingdom, No. 4451/70, para. 36). In addition, given that there do not appear to have been any aspects of the evidence presented which have not been taken into account by the courts (see *inter alia* below), coupled with the Applicant's assistance at all stages by a qualified attorney, it can be concluded that the applicant has fully benefitted from "equality of arms" with the respondent party in the proceedings.

What remains to be considered are the manner in which the regular courts have examined the Applicant's case and to what extent they have provided adequate reasoning to justify their decisions. In their judgments, both the first and second instance courts provided a comprehensive description of the facts in the applicant's case. In addition, both the lower courts clearly set out the applicable material Law, as well as expressly stating the continued validity of the Collective Agreement. The Municipal Court included a reference to an assessment of the validity of the Collective Agreement conducted by the Labour Inspectorate, apparently produced in a report dated 15 October 2003.

As such, the proceedings before both the Municipal Court and the District Court on appeal, can be considered to have addressed all of the salient facts of the case and to have properly examined the applicant's arguments (*See e.g.*Tatishvili v. Russia, No. 1509/02, paras. 58-63). Consequently, there does not appear to be any ground to question the fairness of the proceedings in the first and second instance courts. At any rate, the Applicant has not made any claim as to the fairness of this stage of the proceeding.

What remains to be considered is the fairness of the proceeding at the Supreme Court, and to take into account its impact on the fairness of the proceedings as a whole. In particular, all other elements of a fair trial being satisfied, it remains to be seen to what extent the Supreme Court had properly examined all elements of the case and that this was reflected in a properly reasoned judgment.

The determination of the Applicant's civil rights in this case hinges on the Collective Agreement of 2002 and its application to the Applicant's employment following the transfer from insurance company "Kosova" to insurance company "Kosova e Re". It cannot be the case that the Supreme Court was not sufficiently made aware of the existence of this Collective Agreement as it is mentioned by name and date in both the decision of the Municipal Court and the decision on appeal by the District Court. The revision against the District Court's decision was made by the respondent company "Kosova e Re", and whether or not the Applicant's legal representative raised

again the issue of the Collective Agreement, it can be considered to form part of the case file before the Supreme Court.

In its judgment on the revision, the Supreme Court does not mention the Collective Agreement by name. However, reference to it can be inferred from the phrase, *"because her working position exists in normative acts of the respondent"*, and the Supreme Court's finding that, *"The legal stance of the lower instance courts [on the basis of these normative acts] is in violation of provisions of the Law, [...]",* that the Supreme Court was aware of the Collective Agreement and made general reference to it with the term 'normative acts of the respondent'.

The Supreme Court's ultimate reasoning that, *"[...] the contract extending the employment relationship may be signed by the consent of employer and employee, if not in contradiction with the law and normative acts, and therefore, the working contract of the plaintiff was terminated with the expiry of the duraction of the contract."* indicates that the Supreme Court's intention was sufficiently clear to exclude the validity of the Collective Agreement to the Applicant's employment relationship with the respondent company "Kosova e Re", even if it did not mention the Collective Agreement by name.

In these circumstances, the Supreme Court has adequately fulfilled its obligations to fully examine all the arguments in the Applicant's case, and to provide an adequately reasoned judgment. Consequently, there has not been any violation of the Applicant's right to a fair hearing under Article 31, para. 1, of the Constitution and Article 6, para.1, of the European Convention on Human Rights.

Constitutional Question Before the Court

Is this simple clarification by the Supreme Court of the applicable law a Constitutional violation?

In reaching its conclusion, the majority of the Constitutional Court has relied on the interpretation provided of the facts and the law in the judgments of the Supreme Court in the cases of five other persons where the situation is alleged to be identical to that of the applicant (Rev. No. 126/2007 and Rev. No. 177/2007, both of 17 January 2008 and three other judgments). The majority considered that this difference in the judgment in the applicant's case, *versus* in the judgments in those five other cases, amounted to unequal treatment before the law in violation of Article 24, para. 1, of the Constitution.

In accordance with the consistent case-law of the European Court of Human Rights it is incumbent upon the applicant to demonstrate in what way she has been treated differently, and on what grounds this difference in treatment has allegedly occured (*e.g*. Fredin v. Sweden (No. 1), No. 12033/86, 18 February 1991, paras. 60-61) . Only once the difference in treatment has been established and the nature of the grounds for this difference in treatment has been found can the justification for this differential treatment be tested for its reasonableness and objectivity.

The majority has based its decision on the alleged apparent inconsistency in the judgments of the Supreme Court in six cases. In arriving at this conclusion, the majority has relied on the judgment of the European Court of Human Rights in the case of Beian v. Romania (No. 1) (No. 30658/05, 6 December 2007).

Judgments of the European Court of Human Rights

We note that the European Court of Human Rights has had on a variety of occasions decided on the implications of inconsistent judicial decisions on the right to a fair trial. In the some of those cases the conflicting judicial decisions concerned different courts or jurisdictions, while in others it concerned divergent decisions issued by the same court given in apparently similar proceedings. A number of cases have concerned conflicting decisions of domestic Supreme Courts, as is the situation we are concerned with in this application.

In the case of Nejdat Şahin and Perihan Şahin v. Turkey, No. 13279/05 of 20 October 2011, the Grand Chamber of the Court set out the general principles to be applied in such cases (paras. 49-58). The ECtHR has stated, *inter alia*,:

> *"50. [...] save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of the domestic law by the national courts (see, for example, Ādamsons v. Latvia, no. 3669/03, para. 118, 10 May 2007). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see Engel and Others v. The Netherlands, 8 June 1976, para. 103, Series A no. 22; Gregório de Andrade v. Portugal, no. 41537/02, para. 36, 14 November 2006; and Ādamsons, cited above, para. 118).*
>
> *52. The Court has been called upon a number of times to examine cases concerning conflicting court decisions [...] and*

has thus had an opportunity to pronounce judgment on the conditions in which conflicting decisions of domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6. Para. 1, of the Convention (see Perez Arias v. Spain, no. 32978/03, Para. 25, 28 June 2007; Beian v. Romania (no. 1), 30658/05, paras. 34-40, 6 December 2007; Ştefan and Ştef v. Romania, nos. 24428/03 and 26977/03, paras. 33-36, 27 January 2009; Iordan Iordanov and Others v. Bulgaria, no. 23530/02, paras. 48-49, 2 July 2009; and Schwarzkopf and Taussik v. Czech Republic (dec.), no. 42162/02, 2 December 2008).

53. In so doing it has explained the criteria that guided its assessment, which consists in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see Iordan Iordanov and Others, cited above, paras. 49-50).

56. Its assessment of the circumstances brought before it for examination has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law [...]

57. In this regard the Court also reiterates that the right to a fair trial must be interpreted in the light of the Preamble of the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the fundamental aspects of the rule of law is the principle of legal certainty (see Brumărescu v. Romania [GC], n. 28342/95, para. 61, 28 October 1999), which, inter alia, guarantees a certain stability in legal situations and contributes to public confidence in the courts [...]. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law [...].

58. The Court points out, however, that the requirements of legal certainty and the protection of the legitimate confidence

> *of the public do not confer an acquired right to consistency of case-law (see Unédic v. France, no. 20153/04, para. 74, 18 December 2008). […]"*

The key principle to be applied in cases of divergence of decisions of the Supreme Court in apparently similar cases or circumstances is whether or not "profound and long-standing differences exist" in the case-law of the Supreme Court (*see*Nejdat Şahin and Perihan Şahin, quoted above, para. 53). In the applicant's case, the Supreme Court decision on her Revision is contrasted with only five other decisions of the Supreme Court in five other cases concerning apparently similar facts and law. It is difficult to see how, based on only six decisions of the Supreme Court, one could conclude that there are "profound and long-standing differences" in the case-law of the Supreme Court which threaten the principle of legal certainty and , thereby, undermine the rule of law.

In contrast, the case of Beian v. Romania concerns the determination of entitlements to special social benefits provided under a new law for persons who had been compelled to undergo compulsory non-military public service in the 1950s. The law specified that beneficiaries were persons who had been engaged in compulsory service under the authority of a particular agency called the DGT. The applicant in that case had performed compulsory service, but not under the authority of the DGT. Over the period 2003-2006 the supreme court of Romania had been called upon to rule whether persons having performed compulsory service not subject to the DGT were nevertheless eligible for the benefits specified in the law. During this time-frame the supreme court of Romania ruled 18 times in favour of persons not subject to the DGT, and 17 times against such persons. Sometimes, contradictory rulings were even made on the exact same day. The ECTHR was particularly concerned that the supreme court itself was the source of legal uncertainty, given the importance of a supreme court's role to resolve contradictions in judicial interpretation.

The case of Beian v. Romania involves a substantial series of contradictory decisions given by the Romanian supreme court over a period of more than three years, which alternate indiscriminately between one interpretation and another. The multitude of cases over a significant period of time lacking in all consistency is what leads to the conclusion of manifest arbitrariness in that case. It is this finding of manifest arbitrainess which leads to a conclusion of a violation of Article 6, para. 1, of the Convention.

The contrast with the current case under consideration by the Constitutional Court is significant. Only six cases of the Supreme Court have been presented of which two cases were decided on 17 January 2008, and Applicant's case was

decided on 10 June 2010. The Supreme Court's interpretation of the material law was different in the first two cases than it was in the third case. Neither the numbers of allegedly inconsistent judgments, nor the time-frame wherein these judgments occured, reach the level of severity or legal uncertainty which would warrant a conclusion of manifest arbitrariness.

Conclusion

Consequently, the divergence of legal interpretation evident in the Supreme Court decision in the Applicant's case *vis-à-vis* those five other cases does not demonstrate a "profound and long-lasting difference" in the case-law of the Supreme Court.

The Supreme Court of Kosovo is the final interpreter of the correct application of the law in the Republic of Kosovo. Although pursuant to Article 102, paragraph 3 of the Constitution all courts in Kosovo are required to apply the Constitution in their decisions and judgments, the Constitutional Court is the final interpreter of the Constitution. The Constitutional Court does not have the authority to serve as the final interpreter of the correct application of the law in Kosovo even if the Constitutional Court disagrees with a legal interpretation by the Supreme Court unless such interpretation is a violation of the Constitution. Therefore, this Court must decide whether the judgment of the Supreme Court in the Applicant's case violated the Constitution regardless of whether the Court believes the Supreme Court applied the correct law in Applicant's case.

In this case the Applicant claims that the Supreme Court of Kosovo treated her differently than five other employees with different jobs with an identical employer in terms of deciding whether her employment status was permanent or for a fixed period of time. The decisions of the Supreme Court that she relies upon involve other employees of the same employer but with different job duties. Some of those decisions were decided 17 months earlier by substantially different judges of the Supreme Court who interpreted the labor law of Kosovo but did not specifically address the legal issue of whether an employee could lawfully agree to no longer be treated as a permanent employee. 17 months later the Supreme Court in Applicant's case addressed that legal question and concluded that it was lawful for a permanent employee like the Applicant to agree to be an employee for a definite term. The Supreme Court merely addressed that issue in a rational and objective manner in the Applicant's case. There is no evidence in the record or before this Court that the Applicant was treated differently for any other reason. There is no evidence that the Applicant was treated differently because of her gender or her ethnic background.

The Constitution of Kosovo requires that everybody receive equal protection of the law. It does not require that everybody be treated absolutely the same. Otherwise, everybody, from the President of the Republic to the highway maintenance officer, would have to receive equal compensation and other absolutely equal benefits regardless of their different job skills and duties. It does not require that every court decision where judges, whether they be judges of the Constitutional Court or of the regular courts, have to have the same interpretation of the applicable law. It merely prohibits unequal treatment of people if the treatment is solely because of their gender or ethnicity or other protected grounds described in paragraph 2 of Article 24. In this case, there is absolutely no evidence that the Supreme Court's judgment with respect to the Applicant was for any reason other than the Court's clarification of the applicable law, not the Applicant's gender or ethnic background. There has been no violation of Applicant's rights to equal protection of the law as defined by Article24 of the Constitution or a fair trial as defined by Article 31 of the Constitution and Article 6of the European Convention on Human Rights. Therefore, Applicant's referral should be rejected.

Respectfully submitted,
Robert Carolan
Judge

Case No. KI 120/10
Applicant
Zyma Berisha
Constitutional Review of the
Judgment of the Supreme Court of the Republic of Kosovo,
Rev. 308/2007, dated 10 June 2010
Joint Dissenting Opinion
of
Judges Almiro Rodrigues and Snezhana Botusharova

We note the judgment of the Majority of the judges of the Constitutional Court (hereinafter, "the Majority"). However, we cannot agree with it for the reasons that follow.

The Applicant claimed that the Supreme Court of the Republic of Kosovo, in its Judgment Rev. No. 308/2007 of 10 June 2010, had violated the principle of equality before the law as protected by Article 24, para. 1, of the Constitution.

In support of her claim, the Applicant notes that the Judgment of the Supreme Court in her case differs from the Judgments of the Supreme Court in two earlier cases (Judgment Rev. No. 126/2007 of 17 January 2008, and Judgment Rev. No. 177/2007 of 17 January 2008). The Applicant also made reference to an additional 4 other cases where judgments by the Supreme Court followed the reasoning in the mentioned two cases. The Applicant claims that her situation is identical to that of the claimants in all 6 of these other cases.

We concurr with the interpretation given by the Majority of judges of the Constitutional Court that "*A complaint is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on*" (see, ECtHR judgment in case of Ştefanica and others v. Romania of 2 November 2010, para 23). As such, we accept the view that the Applicant's complaints are to be examined under Article 31 of the Constitution taken in conjunction with Article 6.1 of the Convention and Article 24 of the Constitution taken in conjunction with Article 14 and Article 6.1 of the Convention.

The facts of this case concern an Applicant who was employed since 1986 in the insurance company "Kosova" with an employment contract of indefinite duration. In the year 2000, this company was reorganized, or otherwise its assets and liabilities were transferred, to an insurance company named "Kosova e Re". Included in that transfer were all of the staff members employed by the former company, as had been stipulated in the transfer agreement between the two companies.

The Applicant continued to work with the new insurance company, however, on the basis of a series of contracts of definite duration. Her functions within the company also changed from that of a translator to other functions. Initially, she had an employment contract with "Kosova e Re" of unspecified duration. Subsequently, she received a series of fixed-duration contracts. This situation continued until the Applicant received notice of a termination of her employment, apparently as of 4 February 2004.

The Applicant points out that there existed a Collective Agreement (No. 686 of 7 October 2002) between her original employer and the staff members of insurance company "Kosova" which stipulated which types of work would be considered exclusively as 'employment of unlimited duration'. Allegedly, this Collective Agreement had formed part of the transfer of assets and liablities from the original company to the new company "Kosova e Re". The Applicant alleges that she had only accepted to sign the series of fixed-duration employment contracts under duress, given that she wished to continue her employment and was in need of an income. She claims that she fully expected the company "Kosova e Re" to acknowledge that she was entitled to an employment contract of unlimited duration, under the terms of the Collective Agreement.

Following her ultimate dismissal in 2004, the Applicant brought contested proceedings before the Municipal Court of Pristina, requesting that the court order the company "Kosova e Re" to reinstate her as an employee with a contract of indefinite duration. This court, by judgment C1. No. 31/03, of 20 September 2004, determined that that the Collective Agreement was binding on "Kosova e Re", and that under the applicable labour law, this company was bound to reinstate the Applicant. The respondent company "Kosova e Re" appealed to the District Court of Pristina, which by judgment Ac. No. 234/2005, of 29 March 2007, upheld the findings and determination of the Municipal Court.

Subsequently, the respondent company "Kosova e Re" requested a revision at the Supreme Court, claiming that the District Court had erroneously applied the material law. The Supreme Court, in its judgment Rev. No. 308/2007, of 10 June 2010, found the revision grounded. The Supreme Court found that *"the lower instance courts had fairly and fully ascertained the factual situation related to decisive facts for a fair adjudication of the case, but pursuant to such a situation, [...] they had erroneously applied the material law when finding that the claim suit is grounded."* Specifically, the Supreme Court reasoned that:

> *"The legal stance of the lower instance courts that the plaintiff should have been extended her contract, because her working position exists*

> *in normative acts of the respondent, in the view of this court, is in violation of provisions of the Law, considering that the contract extending the employment relationship may be signed by the consent of employer and employee, if not in contradiction with the law and normative acts, and therefore, the working contract of the plaintiff was terminated with the expiry of the duraction of the contract."*

From the aforementioned proceedings it may be concluded that the lower instance courts had fairly and fully ascertained the facts of the Applicant's claim, as had the Supreme Court in its revision. The crucial difference lay in the legal interpretation given to the status of the Collective Agreement regarding employment in the respective insurance companies "Kosova" and, following transfer, "Kosova e Re". Whereas the lower instance courts had determined that this Collective Agreement was binding on "Kosova e Re" and was in accordance with the material law, in the Applicant's case the Supreme Court found that parties had benefitted from the lawful freedom of contract, and, apparently, determined that the Collective Agreement was in violation of the material law. We note that the phrase, *"because her working position exists in normative acts of the respondent"* is not entirely clear in whether or not it refers to the Collective Agreement. Alternatively, it may simply refer to the job title and functions which the Applicant was exercising.

However, in whichever interpretation one makes of the Supreme Court's determination, it is clear that it was making a finding on the applicable material law, which is fully within its competencies. Indeed, it is not within the competencies of the Constitutional Court to make findings on the material law. In accordance with the clear case-law of the Constitutional Court, it is not a fourth instance and does not replace its own evaluation of the facts and the interpretation of the material law with that of the regular courts. As such, it is not up to the Constitutional Court to question the evaluation of the material law made by the Supreme Court in its judgment on the Applicant's case.

To the extent that the Applicant's claim raises issues relating to a violation of the right to a fair trial, as guarateed by Artricle 31, para.1, of the Constitution. This provision states that

1 *Everyone shall be guaranteed equal protection of rights in the proceedings before courts,*
other state authorities and holders of public office.

In accordance with Article 53 of the Constitution, this article shall be interpreted consistent with the court decisions of the European Court of Human Rights. The equivalent article in the European Convention on Human Rights (ECHR) is Article 6, para. 1, which provides

1 In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]

It is not contested that disputes regarding relations between employers and employees come within the scope of *"civil rights and obligations"* (See e.g. Buchholz v. Germany, No. 7759/77, para. 46). It is also not contested that the various court proceedings concerned a dispute regarding these civil rights, given that at issue was the termination of an employment relationship, which had implications for the Applicant which are "genuine and serious" (See e.g. Benthem v. the Netherlands, No. 8848/80, para. 32-33).

To the extent that the sequence of judgments by the regular courts in the Applicant's case were in fact, and in law, "directly decisive for the civil rights concerned", we can conclude that the various court proceedings concerned a "determination" of the Applicant's civil rights and obligations (See e.g. Le Comte, Van Leuven and De Meyere, Nos. 6878/75 and 7238/75, para. 47).

Therefore, we conclude that the Applicant's case falls within the scope of Article 6, para. 1, of the ECHR and of Article 31, para.1, of the Constitution. As such, the Applicant had a right to benefit from the guarantee of "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

It is not in dispute that the regular courts at Municipal, District and Supreme Court levels are duly established by Law and constitute 'tribunals" within the meaning of Article 6 ECHR. Also not in dispute is the duration of the proceedings at issue in this referral, which began with the introduction of the claim before the Municipal Court at some point in the first half of 2004, and which concluded with the judgment of the Supreme Court as served on the parties on 13 September 2010. In addition, the Applicant does not allege that the various courts were not independent and impartial.

It remains to be considered to what extent the Applicant benefitted from the procedural guarantees of a fair hearing. We note that the Applicant had effective access to three levels of jurisdiction within the Kosovo court system. We note further, that the Applicant benefitted from representation by a qualified attorney at all three levels of court. As such, the Applicant's "access to court" cannot be questioned (See e.g. Golder v. United Kingdom, No. 4451/70, para. 36). In addition, given that there do not appear to have been any aspects of the evidence presented which have not been taken into account by the courts (see *inter alia* below), coupled with the Applicant's assistance at all stages by a qualified attorney, we are satisfied that the Applicant has fully

benefitted from "equality of arms" with the respondent party in the proceedings.

What remains to be considered are the manner in which the regular courts have examined the Applicant's case and to what extent they have provided adequate reasoning to justify their decisions. We note that, in their judgments, both the first and second instance courts provided a comprehensive description of the facts in the Applicant's case. In addition, both the lower courts clearly set out the applicable material Law, as well as expressly stating the continued validity of the Collective Agreement. The Municipal Court includes a reference to an assessment of the validity of the Collective Agreement conducted by the Labour Inspectorate, apparently produced in a report dated 15 October 2003. Both courts found that the respondent company "Kosova e Re", in its dismissal proceedings against the Applicant, had violated procedures contained in the Law, given the conditions attached to the tender issued by the Banking and Payments Authority of Kosovo regarding the transfer of existing staff members of the former company "Kosova", as well as the provisions of the Collective Agreement.

As such, the proceedings before both the Municipal Court and the District Court on appeal, can be considered to have addressed all of the salient facts of the case and to have properly examined the Applicant's arguments (See e.g. Tatishvili v. Russia, No. 1509/02, paras. 58-63). Consequently, there does not appear to be any ground to question the fairness of the proceedings at first and second instance. At any rate, the Applicant has not made any claim as to the fairness or not of this stage of the proceedings.

What remains to be further considered is the fairness of the proceedings at the Supreme Court, and to take into account their impact on the fairness of the proceedings as a whole. In particular, all other elements of a fair trial being satisfied, it remains to be seen to what extent the Supreme Court had properly examined all elements of the case and that this was reflected in a properly reasoned judgment.

The determination of the Applicant's civil rights in this case hinges on the Collective Agreement of 2002 and its application to the Applicant's employment following the transfer from insurance company "Kosova" to insurance company "Kosova e Re". It cannot be the case that the Supreme Court was not sufficiently made aware of the existence of this Collective Agreement as it is mentioned by name and date in both the decision of the Municipal Court and the decision on appeal by the District Court. The revision against the District Court's decision was made by the respondent company "Kosova e Re", and whether or not the Applicant's legal representative raised

again the issue of the Collective Agreement, it can be considered to form part of the case file before the Supreme Court.

We note that, in its judgment on the revision, the Supreme Court does not mention the Collective Agreement by name. However, we can infer from the phrase, *"because her working position exists in normative acts of the respondent"*, and the Supreme Court's finding that *"The legal stance of the lower instance courts [on the basis of these normative acts] is in violation of provisions of the Law, [...]",* that the Supreme Court was aware of the Collective Agreement and made general reference to it with the term 'normative acts of the respondent'.

The Supreme Court's ultimate reasoning that *"[...] the contract extending the employment relationship may be signed by the consent of employer and employee, if not in contradiction with the law and normative acts, and therefore, the working contract of the plaintiff was terminated with the expiry of the duraction of the contract."* indicates that the Supreme Court's intention was sufficiently clear to exclude the validity of the Collective Agreement to the Applicant's employment relationship with the respondent company "Kosova e Re", even if it did not mention the Collective Agreement by name.

In these circumstances, we find that the Supreme Court has adequately fulfilled its obligations to fully examine all the arguments in the Applicant's case, and to provide an adequately reasoned judgment. Consequently, we cannot find that there has been any violation of the Applicant's right to a fair hearing under Article 31, para. 1, of the Constitution and Article 6, para.1, of the European Convention on Human Rights.

In reaching its conclusion, the majority of the Constitutional Court has relied on the interpretation provided of the facts and the law in the judgments of the Supreme Court in the cases of six other persons whereof the situation is alleged to be identical to that of the Applicant.

The text of the judgment of the Majority lists five other Supreme Court judgments: three judgments issued on 17 January 2008 (Rev 126/2007, Rev 177/2007, Rev 183/2007), a fourth one issued on 28 January 2008 (Rev. 180/2006), and a fifth one issued on 7 February 2011 (Rev 154/2008). Together with the Supreme Court judgment in the Applicant's case (Rev 308/2007 of 10 June 2010), that makes a total of six judgments of the Supreme Court in allegedly identical circumstances.

The majority considered that this difference in the judgment in the Applicant's case, versus in the judgments those five other cases, amounted to unequal treatment before the law in violation of Article 24, para. 1, of the Constitution.

In accordance with the consistent case-law of the European Court of Human Rights it is incumbent upon the Applicant to demonstrate in what way she has been treated differently, and on what grounds this difference in treatment has allegedly occured (e.g. Fredin v. Sweden (No. 1), No. 12033/86, 18 February 1991, paras. 60-61) . Only once the difference in treatment has been established and the nature of the grounds for this difference in treatment has been found can the justification for this differential treatment be tested for its reasonableness and objectivity.

However, we understand that the majority has based its decision on the alleged inconsistency in the judgments of the Supreme Court in these six cases. The majority has justified its decision with reference to the judgment of the European Court of Human Rights in the case of Beian v. Romania (No. 1) (No. 30658/05, 6 December 2007).

We note that the European Court of Human Rights has had on a variety of occasions to decide on the implications of inconsistent judicial decisions on the right to a fair trial. In the some of those cases the conflicting judicial decisions concerned different courts or jurisdictions, while in others it concerned divergent decisions issued by the same court given in apparently similar proceedings. A number of cases have concerned conflicting decisions of domestic Supreme Courts, as is the situation we are concerned with in this application.

In the case of Nejdat Şahin and Perihan Şahin v. Turkey, No. 13279/05 of 20 October 2011, the Grand Chamber of the Court set out the general principles to be applied in such cases (paras. 49-58). The ECtHR has stated, *inter alia*,:

> *"50. [...] save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of the domestic law by the national courts (see, for example, Ādamsons v. Latvia, no. 3669/03, para. 118, 10 May 2007). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (see Engel and Others v. The Netherlands, 8 June 1976, para. 103, Series A no. 22; Gregório de Andrade v. Portugal, no. 41537/02, para. 36, 14 November 2006; and Ādamsons, cited above, para. 118).*

52. The Court has been called upon a number of times to examine cases concerning conflicting court decisions [...] and has thus had an opportunity to pronounce judgment on the conditions in which conflicting decisions of domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6. Para. 1, of the Convention (see Perez Arias v. Spain, no. 32978/03, Para. 25, 28 June 2007; Beian v. Romania (no. 1), 30658/05, paras. 34-40, 6 December 2007; Ştefan and Ştef v. Romania, nos. 24428/03 and 26977/03, paras. 33-36, 27 January 2009; Iordan Iordanov and Others v. Bulgaria, no. 23530/02, paras. 48-49, 2 July 2009; and Schwarzkopf and Taussik v. Czech Republic (dec.), no. 42162/02, 2 December 2008).

53. In so doing it has explained the criteria that guided its assessment, which consists in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (see Iordan Iordanov and Others, cited above, paras. 49-50).

56. Its assessment of the circumstances brought before it for examination has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law [...]

57. In this regard the Court also reiterates that the right to a fair trial must be interpreted in the light of the Preamble of the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the fundamental aspects of the rule of law is the principle of legal certainty (see Brumărescu v. Romania [GC], n. 28342/95, para. 61, 28 October 1999), which, inter alia, guarantees a certain stability in legal situations and contributes to public confidence in the courts [...]. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law [...].

58. The Court points out, however, that the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see Unédic v. France, no. 20153/04, para. 74, 18 December 2008). [...]"

We note that the key principle to be applied in cases of divergence of decisions of the Supreme Court in apparently similar cases or circumstances is whether or not "profound and long-standing differences exist" in the case-law of the Supreme Court (see Nejdat Şahin and Perihan Şahin, quoted above, para. 53). In the Applicant's case, the Supreme Court decision on her Revision is contrasted with only five other decisions of the Supreme Court in five other cases concerning apparently similar facts and law. It is difficult to see how, based on only six decisions of the Supreme Court, we are to conclude that there are "profound and long-standing differences" in the case-law of the Supreme Court which threaten the principle of legal certainty and , thereby, undermine the rule of law.

In contrast, we note that the case of Beian v. Romania concerns the determination of entitlements to special social benefits provided under a new law for persons who had been compelled to undergo compulsory non-military public service in the 1950s. The law specified that beneficiaries were persons who had been engaged in compulsory service under the authority of a particular agency called the DGT. The Applicant in that case had performed compulsory service, but not under the authority of the DGT. Over the period 2003-2006 the supreme court of Romania had been called upon to rule whether persons having performed compulsory service not subject to the DGT were nevertheless eligible for the benefits specified in the law. During this time-frame the supreme court of Romania ruled 18 times in favour of persons not subject to the DGT, and 17 times against such persons. Sometimes, contradictory rulings were even made on the exact same day. The ECTHR was particularly concerned that the supreme court itself was the source of legal uncertainty, given the importance of a supreme court's role to resolve contradictions in judicial interpretation.

The case of Beian v. Romania involves a substantial series of contradictory decisions given by the Romanian supreme court over a period of more than three years, which alternate indiscriminately between one interpretation and another. The multitude of cases over a significant period of time lacking in all consistency is what leads to the conclusion of manifest arbitrariness in that case. It is this finding of manifest arbitrainess which leads to a conclusion of a violation of Article 6, para. 1, of the Convention.

The contrast with the current case under consideration by the Constitutional Court is significant. Only six cases of the Supreme Court have been presented, of which three cases were decided on 17 January 2008, a fourth case was decided on 28 January 2008, a fifth case was decided on 10 June 2010, and the sixth case was decided on 7 February 2011. The time-frame during which these allegedly inconsistent Supreme Court judgments were made comprises a period of some 3 years.

The Supreme Court's interpretation of the material law was allegedly different in the fifth case than it was in the five other cases. Neither the numbers of allegedly inconsistent judgments, nor the time-frame wherein these judgments occured, reach the level of severity or legal uncertainty which would warrant a conclusion of manifest arbitrariness.

Consequently, we find that we cannot agree that the divergence of legal interpretation evident in the Supreme Court decision in the Applicant's case vis-à-vis those five other cases demonstrates a "profound and long-lasting difference" in the case-law of the Supreme Court.

Therefore, we find that we cannot agree with the Majority finding of a violation of the right to a fair trial due to unequal treatment, and we conclude that there has been no violation of the 'right to equality before the law' as contained in Article 24, para. 1, of the Constitution.

Respectfully submitted,
Judge Almiro Rodrigues Judge Snezhana Botusharova

KI 19/13, Mark Duhanaj, date 27 March 2013- Constitutional review of the Judgment of the District Court in Peja P.no.274/2008, of 2 May 2012, Resolutions of the Supreme Court of Republic of Kosovo, AP. no. 316/2012, of 23 August 2012, and Pkl. no. 184/2012, of 17 December 2012

Case KI19/13, decision of 12 March 2013

Keywords: individual referral, request for interim measure, civil dispute, right to fair and impartial trial, right to a fair trial, manifestly ill-founded

The Applicant claims that Judgments of the regular courts have violated Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 and Article 13 of the ECHR.

In this case, the Court noted that the Judgment of the District Court in Peja, P. no. 278/2008, of 2 May 2012 was reasoned, and that this Court has not observed that during the trial there was any procedural violation that would result in violation of fundamental rights of the Applicant, guaranteed by the Constitution and European Convention on Human Rights and Fundamental Freedoms. The Applicant's request for witness hearing was approved, his authorized representative was heard, and he was given all the opportunities for defense throughout the case trial.

Therefore, the Court concludes that the Applicant has neither built nor shown a *prima facie* case either on the merits or on the admissibility of the Referral. In all, the Court concludes that the Referral is inadmissible as manifestly ill-founded.

The Court further concludes that, the referral being inadmissible, the request for interim measure is moot and thus it is rejected.

DECISION ON THE INTERIM MEASURES AND THE RESOLUTION ON INADMISSIBILITY
in
Case No. KI19/13
Applicant
Mark Duhanaj
Constitutional review of the Judgment of the District Court in Peja P.no.274/2008, of 2 May 2012, Resolutions of the Supreme Court of Republic of Kosovo, AP. no. 316/2012, of 23 August 2012, and Pkl.no.184/2012, of 17 December 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

The Applicant

1. The Applicant is Mr. Mark Duhanaj, residing in Radulloc, Klina Municipality, represented by Mr. Gjergj Skeli and Zeqir Berdynaj, lawyers.

Challenged decisions

2. The challenged court decisions are: Judgment of the District Court in Peja P.no.274/2008, of 2 May 2012, and resolutions of the Supreme Court of Republic of Kosovo, AP. no. 316/2012, of 23 August 2012, and Pkl.no.184/2012, of 17 December 2012.

The subject matter

3. The subject matter of the Referral is the constitutional review of the above-mentioned Judgments, by which the Applicant alleges that his right to a fair and impartial trial has been violated.

4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure, postponing the serving of the sentence, until the Court makes decision on the merits of the issue.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo, dated 15 January 2009 (hereinafter: the Law) and Rule 28 and 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules).

Proceedings before the Court

6. On 21 February 2013, the Applicant submitted his Referral to the Court.

7. On 26 February 2013, the President appointed Judge Ivan Čukalovićas Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 22 February 2013, the Court notified the representative of the Applicant and informed the Supreme Court and the Court of Appeal in Prishtina on registration of the Referral under number KI19/13.

9. On 12 March 2013, the Review Panel after having considered the report of Judge Rapporteur recommended to the full Court the inadmissibility of the Referral.

Summary of facts

10. On 30 January 2006, the Carabinieri searched the house of the Applicant's father (Zef Duhanaj), whereby they seized five (5) different weapons in rooms of the house.

11. On 3 February 2006, the District Public Prosecution in Peja, filed indictment against the Applicant for possessing and holding unlicensed weapons, seized by Carabinieri.
12. On 29 January 2007, the District Court in Peja rendered the Judgment P.no.111/2006, whereby the Applicant and his father were found guilty of a criminal offence which they were charged with, since the same pleaded guilty in all phases of the criminal proceedings. Based on the

evidence supporting the indictment, the mentioned court found that guilty plea was made in accordance with the law.

13. The Applicant used his right to appeal this Judgment P.no.111/2006, due to essential violations of provisions of the criminal procedure and the decision on conviction.

14. On 5 August 2007, the Supreme Court rejected Applicant's appeal as ungrounded and upheld the Judgment of the District Court in Peja.

15. On 25 February 2008, the Applicant filed a request for reopening of the criminal procedure due to the emergence of the new facts.

16. On 12 June 2008, the District Court in Peja by Resolution P.no.116/2006 approved Applicant's request on reopening of the criminal proceedings regarding the final Judgment P.no.111/2006, due to the fact that Applicant's brothers had stated that the seized weapons in their joint home, except from a pistol, the rest belonged to them and not to the Applicant, as established in the final Judgment. With statements of these witnesses the District Court in Peja, concluded that all the requirements for a reopening of the criminal procedure were met. This court had postponed the decision on execution of the sentence, until the reopened criminal procedure was finalized.

17. On 2 May 2012, the District Court in Peja rendered the Judgment P.no.278/2008 and found the Applicant guilty, for unauthorized possession, control, or use of weapon from Article 328 paragraph 2 PCK and sentenced him with a year of imprisonment, a sentence that would be served after the Judgment would become final. Among others in the reasoning of the Judgment is said:

> *"Based on the evidence the court has established undoubtedly that the defense of the accused that weapons were his brothers', except pistol "TT", is only a delayed effort to avoid criminal responsibility, since during the entire procedure he had the opportunity to propose the hearing of these witnesses, who are his brothers and from the first moment could have stated that weapons were theirs, if it was so as the accused and witnesses Jozë and Mihill Duhani claim. He even told the place and the way of purchasing some of these weapons. The reasons presented by the accused that he has plead guilty in order to protect his sisters in law (wives of his brothers) from potential arrest and then not to incriminate his brothers, since they lived and worked abroad and criminal prosecution of them would have resulted with deportation of them*

from countries where they were living and working, are illogical and do not stand."
[...]
"Based on the above-mentioned reasons, the court held beyond any reasonable doubt that the accused had unauthorized ownership, possession and control of all the weapons described in the enacting clause of the judgment and in this way realized all objective and subjective elements of criminal offence pursuant to Article 328 paragraph 2 of CCPK"

18. The Applicant filed an appeal to the Supreme Court against the Judgment P.no.278/2008 of 2 May 2012.

19. On 23 August 2012, the Supreme Court of Kosovo (Judgment Ap. no. 316/2012) rejected as ungrounded Applicant's appeal. The Supreme Court after having heard allegations of the Applicant's authorized representative and Applicant's statement, and after having reviewed the whole documentation of this criminal-legal matter held that the appeal was ungrounded due to the fact that the appealed Judgment did not contain any essential violation of the provisions of criminal procedure, as alleged in the appeal.

20. On 8 March 2012, the Applicant filed a request for protection of legality to the Supreme Court, due to substantial violations of provisions of the CPCK and erroneous application of the provisions of the PCC, with the proposal that the request for protection of legality is approved as grounded, that the challenged judgments (PKL. no. 184/2012 of 17 December 2012 and Ap. no. 316/2012 of 23 August 2012) are annulled and the case is remanded for retrial.

21. On 17 December 2012, the Supreme Court (Judgment PKL. no. 184/2012) rejected as ungrounded the request for protection of legality, filed by the Applicant against the Judgment of the District Court in Peja P.no.278/2008 of 2 May 2012, and Judgment of the Supreme Court Ap. no. 316/2012i of 23 August 2012. The Supreme Court concluded that the raised issues in the request for protection of legality by the authorized representative of the Applicant for violation of the law to the detriment of the convict were not grounded.

Applicant's allegations

22. The Applicant alleges that Judgments of the regular courts have violated Article 31 (The right to a fair and impartial trial) of the Constitution, as well as Article 6 and Article 13 of the ECHR.

The request for interim measure

23. The Applicant also requests from the Court to impose interim measure suspending the execution of the sentence, by Judgment of the District Court in Peja (P. no. 278/2008 of 2 May 2012) upheld by the Supreme Court of Kosovo (Ap. no. 316/2012, of 21 August 2012), until this matter is finalized before the Constitutional Court of Kosovo.

24. In this respect, the Court refers to Article 116 (2) [Legal Effect of Decisions] of the Constitution that establishes:

> *"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*."

25. The Court also takes into account Article 27 of the Law that 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".*

26. In addition, Rule 54 (1) of the Rules of Procedure foresees 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.*"*

27. Finally, Rule 55 (1) of the Rules of Procedure foresees that:

> *"A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals".*

28. Furthermore, in order to the Court impose interim measure it should, pursuant to Rule 55 (4) of the Rules of Procedure, find that:

> *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not*

yet been determined, a prima facie case on the admissibility of the referral;

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and

(c) the interim measures are in the public interest.

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application".

Admissibility of the Referral

29. In this case, the Court refers to Article 113 [Jurisdiction and Authorized Parties] which establishes that

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.

30. Article 47 (2) of the Law on Court also establishes that:

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

31. The Court also refers to the 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."

32. In addition, Rule 36 (1) a), b) and c) of the Rules provides that

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.

33. The Court considers that the Applicant has met the four months deadline requirement, counting from the day the Supreme Court Judgment was served on him; that he has supported his request with relevant facts and clear reference of alleged offences; the Applicant in particular challenges the Judgment of the District Court in Peja and the Judgments of the Supreme Court as acts of the public authority; that he has clearly stated the requested legal protection and that he has attached various decisions, and supporting information and documents.

34. The Applicant mainly alleges that the Judgment of the first instance and the Judgments of the second instance violated his rights guaranteed by Article 31 of the Constitution (The right to a fair and impartial trial) as well as the rights guaranteed by the European Convention on Human Rights and Freedoms, respectively Article 6 and Article 13 of the ECHR.

35. The Applicant appealed the Judgment of the District Court in Peja to the Supreme Court *"due to substantial violation of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction with the proposal that the appealed judgment is annulled and remand the case to the first instance court for retrial, or modify so that the accused is imposed a suspended sentence".*

36. The Supreme Court after thoroughly having analyzed the grounds of appeal found that *"the above appeal's allegations are ungrounded".*

37. The Applicant submitted the request for protection of legality against the judgment of the Supreme Court, *"due to substantial violations of provisions of the CPCK and erroneous application of the provisions of the PCC, with the proposal that the request for protection of legality is approved as grounded, that the challenged judgments are annulled and the case is remanded for retrial.* The Supreme Court(PKL. no. 184/2012 of 17 December 2012) after reviewing the request for protection of legality, found the request as ungrounded.

38. The Court notes that the Judgment of the District Court in Peja(P.no.278/2008 of 2 May 2012) was reasoned, and that this Court has not observed that during the trial was any procedural violation that

would result in violation of fundamental rights of the Applicant, guaranteed by the Constitution and European Convention on Human Rights and Freedoms. The Applicant's request for witness hearing was approved, his authorized representative was heard, and he was given all the opportunities for defense throughout the case trial.

39. The Constitutional Court notes that the grounds of appeal to the District and Supreme Courts, consist of allegations related with substantial violation of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction.

40. The Constitutional Court considers that those allegations may be of the domain of legality

41. The Constitutional Court further notes that before the District and Supreme Courts no allegation were made by the Applicant on the basis of constitutionality, either implicitly or in substance raising an alleged violation of his fundamental freedoms and human rights guaranteed by the Constitution.

42. In that respect, the European Court (see Case of *Fressoz and Roire vs. France (Application no. 29183/95), Judgment of 21 January 1999*) reiterated, *mutatis mutandis*, that "the purpose of the rule [rule on exhaustion] referred to above is to afford the Contracting States the opportunity of preventing or putting right – usually through the courts – the violations alleged against them before those allegations are submitted to the Court. This rule must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the complaints intended to be made subsequently in Strasbourg should have been raised, "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law", before the national authorities (*see the Castells vs. Spain judgment of 23 April 1992, Series A no. 236, p. 19, § 27, and the Akdivar and Others vs. Turkey judgment of 16 September 1996, Reports 1996-IV, pp. 1210-11, §§ 65-69)".*

43. In accordance with the principle of subsidiarity, the Applicant is under the obligation to exhaust all the legal remedies provided by law, as stipulated by Article 113 (7) and other legal provisions, as mentioned above.

44. In fact, the purpose of the exhaustion rule is, in this case, allowing to the District and Supreme Courts the opportunity of settling an alleged

violation of the Constitution. The exhaustion rule is operatively intertwined with the subsidiary character of the constitutional justice procedural frame work. (*See, mutatis mutandis, Selmouni vs. France [GC], § 74; Kudła vs. Poland [GC], § 152; Andrášik and Others vs. Slovakia (dec.).*

45. Thus, the principle of subsidiarity requires that the Applicant exhausts all procedural opportunities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. Otherwise, the Applicant is liable to have his/her case declared inadmissible by the Constitutional Court, when failing to avail him/herself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a giving up of the right to further object the violation and complain. (See *Resolution, in Case No. KI. 07/09, Demë KURBOGAJ and Besnik KURBOGAJ, Review of Supreme Court Judgment Pkl.nr. 61/07 of 24 November 2008, paragraph 18*).

46. Whenever a judicial decision is challenged on the basis of some legal position that is unacceptable from the viewpoint of human rights and fundamental freedoms, the regular courts that delivered the decision must be afforded with the opportunity to reconsider the challenged decision. That means that, every time a human rights violation is alleged, such an allegation cannot as a rule arrive to the Constitutional court without being considered firstly by the regular courts.

47. In the instant case, the Applicant should have implicitly or in substance complained before the District and Supreme Courts against the alleged violation of its right to fair trial, as those Courts also "*shall adjudicate based on the Constitution and the law*" (Article 102 (3) of the Constitution).

48. In practice, nothing prevented the Applicant of having complained before the District and Supreme Courts about the alleged violation of his right to fair trial. If those courts would consider the violation and would fix it, it would be over; if they either did not fix the violation or did not consider it, the Applicant would have met the requirement of having exhausted all remedies, in the sense that those Courts were allowed the opportunity of settling the alleged violation.

49. In fact, that analysis are in conformity with the European Court jurisprudence which establishes that Applicants are only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time, that is to say, that are accessible, capable of providing

redress in respect of their complaints and offering reasonable prospects of success (*Sejdoviæ vs. Italy* [GC], no. 56581/00, ECHR 2006-II § 46).It must be examined whether, in all the circumstances of the case, the Applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (*D.H. and Others v. the Czech Republic* [GC], §§ 116-22).

50. The Constitutional Court also applied this same reasoning when it issued the Resolutions on inadmissibility on the grounds of non exhaustion of legal remedies, on 4 December 2012, in Case No. KI 120/11, Ministry of Health - Constitutional Review of the Decision of the Supreme Court A.No.551; on 27 January 2010, in Case No. KI41/09, AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo; and on 23 March 2010, Decision in Case No. KI. 73/09, Mimoza Kusari Lila vs. the Central Election Commission).

51. As a matter of principle and of fact, the Applicant cannot as a rule complain directly before the Constitutional Court about an alleged violation of his human rights and fundamental freedoms violation, without having raised implicitly or in substance such an alleged violation before the regular courts.

52. However, the Constitutional Court considers that the facts of the case do not allow a compelling conclusion on that the grounds of appeal *"substantial violation of the of the provisions of the criminal procedure, erroneous and incomplete determination of factual situation, violation of criminal law and the decision on criminal sanction"*, alleged before the Supreme Court, meet the test of the European Court. Therefore, there is no need to further consider the matter in the circumstances of the case.

53. Moreover, the Court considers that the Applicant has not substantiated and supported with evidence the alleged violation of his rights by the District Court and the Supreme Court.

54. In fact, the Applicant's allegation for violation of constitutional rights do not present *prima facie* sufficient ground for filing a case with the Court; the Applicant's unsatisfaction with decisions of the regular courts cannot be a constitutional ground to complain before the Constitutional Court.

55. Furthermore, the Court notes that, for a *prima facie* case on meeting of requirements for admissibility of the Referral, the Applicant must show that the proceedings in the District Court and the Supreme Court, viewed in their entirety, have not been conducted in such a way that the

Applicant has had a fair trial or other violations of the constitutional rights might have been committed by the regular courts during the trial.

56. In this respect, the Court recalls 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"*.

57. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

58. Thus, the Court is not to act as a court of third instance, in the present case, 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 of Human Rights [ECHR] 1999-I).

59. However, the Applicant does not explain why and how his rights were violated, he does not substantiate a *prima facie* claim on constitutional grounds and did not provide evidence showing that his rights and freedoms have been violated by regular courts and so his right guaranteed by Article 31 of Constitution and Article 6 in conjunction with Article 13 of the ECHR has been violated.

60. Thus, the Constitutional Court cannot consider that the relevant proceedings in the District Court and the Supreme Court were in any way unfair or arbitrary (see mutatis mutandis, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).

61. In fact, the Applicant did not show *prima facie* why and how the District Court and the Supreme Court violated his rights as guaranteed by Articles 31 [Right to Fair and Impartial Trial] and Article 6 in conjunction with Article 13 of ECHR.

62. Therefore, the Court concludes that the Applicant has neither built nor shown a *prima facie* case either on the merits or on the admissibility of the Referral.

63. In all, the Court concludes that the Referral is inadmissible as manifestly ill-founded.

64. The Court further concludes that, the referral being inadmissible, the request for interim measure is moot and thus must be rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 116 (2) of the Constitution, Articles 27 and 48 of the Law, and in accordance with Rules 36 (1.c), 55 and 56 (2) of the Rules, on 12 March 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the request for interim measures;

III. TO NOTIFY this Decision to the Parties; and

IV. TO PUBLISH this Decision in accordance with Article 20(4) of the Law.

V. This Decision is effective immediately.

Judge Rapporteur
Ivan Čukalović

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 19/10, SHPK "Syri", date 27 March 2013- Constitutional Review of the Order issued by the Special Chamber of the Supreme Court of the Republic of Kosovo, SCA -09-0041, of 9 February 2010.

Case KI19/10, Resolution on Inadmissibility, of 27 November2012.

Keywords: individual referral, non-exhaustion of legal remedies

The Applicant challenges the constitutionality of the Order issued by the Special Chamber of the Supreme Court of the Republic of Kosovo (Special Chamber), SCA -09-0041 of 9 February 2010 (Order of 9 February 2010), according to which the Applicant, as the claimant in the civil proceedings before the Special Chamber, was requested to submit translation of all submissions and relevant documents in the English language on its own cost.

The Applicant requests the Constitutional Court to find a violation of human rights and to require the Special Chamber to translate documentation at its own expense.

The Court finds that the Referral does not fulfill the requirements of Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 36 (1) a) of the Rules, and as such is inadmissible.

RESOLUTION ON INADMISSIBILITY
Case No. KI19/10
Applicant
Sh.P.K. "Syri"
Concerning the constitutionality of the Order issued by the Special Chamber of the Supreme Court of the Republic of Kosovo, SCA -09-0041 of 9 February 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Sh.P.K. "Syri" of Gjakova, represented by its Mr. Enver Mulliqi from Gjakova.

Subject Matter

2. The Applicant challenges the constitutionality of the Order issued by the Special Chamber of the Supreme Court of the Republic of Kosovo (Special Chamber), SCA -09-0041 of 9 February 2010 (Order of 9 February 2010), according to which the Applicant, as the Plaintiff in the civil proceedings before the Special Chamber, was requested to submit translation of all submissions and relevant documents in the English language on its own cost.

3. Subsequently, the Applicant challenges the constitutionality of Section 25.7 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 on Kosovo Trust Agency Related Matters (hereinafter: UNMIK AD 2008/6).

4. The Applicant argues that the challenged order of 9 February 2010 that was issued in accordance with Article 25.7 of UNMIK Administrative Direction No. 2008/6 contravenes Article 5 [Languages], Article 23 [Human Dignity], Article 24 [Equality before the Law] and Article 31 [Right to Fair and Impartial Trial and Articles 6, 14 and 1 to the Protocol 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The Applicant further argues "that EULEX judges should not apply any provision that violates basic human rights, especially in the provision called the Administrative Order, which is in fact a sublegal act."

5. The challenged Section of Administrative Direction No. 2008/6 is Section 25.7 and it provides for the language in which cases submitted to the Special Chamber 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.*

6. The Applicant requests the Constitutional Court to find a violation of human rights and to require the Special Chamber to translate documentation at its own expense.

Legal Basis

7. Article 113.1. and 7 of the Constitution of Kosovo (hereinafter: "the Constitution"); (hereinafter: "the Law"); Article 20 of the Law and Rule 36 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 1 March 2010, the Applicant submitted his Referral to the Court.

9. On 17 March 2010 the President of the Curt appointed Deputy President Kadri Kryeziu as the judge Rapporteur and the Review Panel composed of Judges Ivan Čukalović (Presiding), Enver Hasani and Iliriana Islami.

10. On 24 August 2010 the Court sent the Referral to the Special Chamber and requested their comments and/or observations on the Referral.

11. The Special Chamber replied on 10 November 2010. Their reply is dealt with below.

12. On 10 March 2011, the Secretariat of the Constitutional Court forwarded the reply of the Special Chamber to the Applicant and requested its comments. The Court also asked for copies of additional documents concerning the case of the Applicant in the District Court Commercial Court.

13. On 23 March 2011, the Applicant replied to the Court. It informed it that since "the non-implementation, pursuant to the Order of the Special Chamber of the Supreme Court of Kosovo on KTA Related Matters, risked the rejection of the appeal, the plaintiff paid for the translation of the judgment and sent the translated judgment, appeal and supporting evidence. It should be mentioned that translation services are relatively high, one page costs 10 Euros."

14. The Applicant further added that "the concerned Administrative Direction is in contradiction to Article 6 – Right to a fair trial, Article 14 – Prohibition of discrimination, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 1, Protocol 1 to the Convention, in relation to Article 53 of the Constitution of the Republic of Kosovo and constitutional provisions and guarantees with Articles 5, 23, 24, 31 of the Constitution of the Republic of Kosovo. EULEX judges should not apply any provision that violates basic human rights, especially in the provision called the Administrative Order, which is in fact a sublegal according act". The Applicant also attached the Appeal against the judgment of the District Commercial Court which was the subject matter of the issue before the Special Chamber.

15. On 2 July 2012, the President appointed the members of the new Review Panel, consisting of judges: Robert Carolan (Presiding), replacing Judge Iliriana Islami because her mandate on the Court had expired on 26 June 2012, Snezhana Botusharova and Enver Hasani (members).

16. Also, on 2 July 2012, the Review Penal deliberated on the report of Judge Report and postponed it for further consideration.

17. On 24 September 2012, the Secretariat of the Court asked both the Applicant and the Special Chamber about status of the Applicant's case before the Special Chamber.

18. The Applicant has passed the Court has not received any reply to the letter of 24 September 2012.

19. The Special Chamber has not submitted reply to the Court's letter of 24 September 2012, either.

20. On 27 November 2012, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral

Summary of the facts

21. The following fact can be summarized from the documents submitted by the parties in the proceedings.

22. The District Commercial Court in Pristina on 19 June 2008 rejected the Applicant's complaint against the respondent Kosovo Energy Corporation-Network Division, Gjakova District, for an alleged debt in the amount of 28.689,85 Euro.

23. On 6 April 2009 the Applicant filed an appeal to the Special Chamber against a Judgment of the Commercial District Court I.C.no. 198/2007, dated 19 June 2008.

24. The appeal and supporting documentation, i.e. the text of the challenged Judgment was in the Albanian language and it was not submitted to the Special Chamber with an English translation.

25. On 9 February 2010 the Special Chamber of the Supreme Court issued an Order which requested that the Applicant in this Referral to deliver to the Special Chamber within a time limit of 14 (fourteen) days of receiving the Order in the following terms:

Order

"We request from the Plaintiff/Complainant to deliver the following within a time limit of 14 (fourteen) days of receiving this Order:

1. Pursuant to Articles 58.2 and 25.4 (b) of the Administrative Direction (UA) of UNMIK 2008/6 the statement of authorization, which gives authority to represent the plaintiff in the proceedings at the Special Chamber (including the name, surname and the address of the lawyers together with the English Translation):

2. Pursuant to Article 60.2 of UA of UNMIK 2008/6, a copy of the Judgment of the Economic District Court I.c. no.198/2007, against which the complaint has been made to, together with the English translation:

3. Pursuant to Article 58.2 and 25.7 of the Administrative Direction of UNMIK 2008/6, the English translation of the complaint, as well as other supporting documents.

4. Pursuant to Article 25.7 of the Administrative Direction of UNMIK 2008/6: "Submissions and attached documents can be presented in the Albanian language, Serbian or English, However, if they are presented in the Albanian or Serbian language, they must have the relevant translation in English of all the submissions and relevant documents. The party will bear responsibility for the translation fees". Pursuant to Article 58.2 of the Administrative Direction of UNMIK 2008/6 is applicable in the complaints procedures.

5. If the plaintiffs or the complainants do not present the completed complaint or a rectified one which fulfils all the foreseen requirements as in Article 28.2 of the UD of UNMIK within 14 days from the admission date of this Order or does not deliver the above documentation within 14 days, then the Special Chamber will refuse the Complaint/lawsuit in the basis of inadmissibility.

26. This Order of the Special Chamber of the Supreme Court was signed by an EULEX Judge. Following the issuing of this order on 9 February 2010 the Referral was made to the Constitutional Court on 1 March 2010.

27. Notwithstanding the lodging of the Referral with the Constitutional Court the Applicant complied with the Order within the time limit of 14 days and provided translations of the required documents on 29 March 2010.

Comments of the Special Chamber

28. On 10 November 2010 the Special Chamber replied to the Constitutional Court notification received by them on 25 August 2010.

29. In their reply the Special Chamber stated as follows: “The Claimant SH.P.Syry, in Gjakovë/Djakovica, on 6 July 2009, flied an appeal before the Special Chamber against the Judgment of the Commercial

District Court I.C. ni.198/2007 dated 19 June 2008. Since the appeal filed by the Claimant …was only submitted in Albanian language, the judge in charge issued an order to the Claimant/Appellant SH.P.K. Syri requesting from the Claimant to submit the judgment against which appeal was brought and the English translation of the appeal and supporting documents as well in accordance with Section 25.7 of UNMIK Administrative Direction (UNMIK AD) 2008/6 in conjunction with Section 58.2 of UNMIK AD. …Section 58.2 of the UNMIK Administrative Direction 2008/6 envisages that the rules of procedure and evidence that govern proceedings in the Trial Panel shall apply *mutatis mutandis* to proceedings in the Appellate Panel. On the other hand, Section 60.2. of the UNMIK Administrative Direction 2008/6 requires that the decision of the Trail panel or the Court against the decision of which the appeal is brought shall be attached to the appeal. As the Claimant did not provide the decision and the translation into English of the appeal and decision against which the appeal was brought, the Claimant was ordered to provide the Court with them. This was a part of general practice of the Court in accordance with the Administrative Direction 2008/6 which is applied to all claims/appeals submitted with the Special Chamber since the Court's working language is English. It is worth to mention that if the claimant/appellant is natural party, (s)he is reminded of the possibility of that (s)he may ask for assistance in translation. On 29 March 2010, the Claimant/Applicant complied with the abovementioned order and submitted to the Special Chamber the requested documents and translation."

Assessment of Admissibility

30. The admissibility requirements are laid down in the Constitution and further specified in the Law and the Rules of Procedure.

31. In that 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."*

32. On the other side, Article 47 (2) of the Law also establishes that:

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

33. Furthermore, Rule 36 (1) a) foresees that:

> *The Court may only deal with Referrals if all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted.*

34. As it mentioned above, the Court has not received reply to its letter requesting information about the status of the case pending before the Special Chamber neither from the Applicant nor from the Special Chamber.

35. It appears therefore, in this case that the Applicant had failed to exhaust all legal remedies available to him, since the proceedings before the Special Chamber are still pending.

36. Therefore, in the circumstances of a pending matter in the Special Court, the Constitutional Court is unable to proceed further to assess the admissibility of the Referral. It appears that his Referral is premature.

Conclusion

37. Having said that, the Court finds that the Referral does not fulfill the requirements of Article 113 (7) of the Constitution, Article 47(2) of the Law and Rule 36 (1) (a) of the Rules, and as such is inadmissible.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 (7) of the Constitution, Article 47 (2) of the Law and Rule 36 (1) (a) of the Rules of the Procedure by majority:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. This Decision is effective immediately.

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

KI 10/13, Enver Zeneli, date 27 March 2013- Constitutional Review of the Supreme Court Judgment Pkl.nr.12S/2012, of 30 November 2012

Case KI 10/13, Resolution on Inadmissibility of 12 March 2013

Keywords: Individual Referral, request for interim measure, manifestly ill-founded, right to fair and impartial trial

The Applicant filed the Referral based on Article 113.7 of the Constitution of Kosovo, claiming that his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, was violated. The Applicant further requests, even though not explicitly, the Constitutional Court to impose interim measure in his case, by requesting to order the stopping of the execution of the judgment of the first instance court in Prishtina, identified in the file.

The Court concluded that the Referral of the Applicant is inadmissible based on Rule 56.2 of the Rules of Procedure because the Court is not to act as a court of fourth instance, when considering the decisions taken by regular courts. It is rather the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. Furthermore, taking into account that the Referral was found inadmissible, the Court decided to reject the request for interim measure, since the Applicant merely requests from the Court to impose interim measures, without providing any further argument or relevant documents grounding his request.

RESOLUTION ON INADMISSIBILITY
In
Case No. KI 10/13
Applicant
Enver Zeneli
Constitutional Review of the Supreme Court Judgment
Pkl.nr.125/2012,
of 30 November 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama – Hajrizi, Judge

The Referral

1. The Referral was filed by Enver Zeneli, residing in village Malishevë, Municipality of Gjilan (hereinafter, the Applicant), represented by Mr. Shemsedin Piraj.

2. The Applicant challenges the Supreme Court Judgment Pkl.nr.125/2012, dated of 30 November 2012 (hereafter, the Judgment).

3. The Referral is based on Article 113.7 of the Constitution, Article 22 of the Law and Rule 30 and 75 of the Rules.

Proceedings before the Court

4. On 25 January 2013, the Applicant filed the Referral with the Court.

5. On 3 February 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

6. On 27 February 2013, the Court informed the Supreme Court of Kosovo on the Referral.

7. On 27 February 2013, the Court sent a letter to the Applicant requesting from him to complete the official referral form and to include the authorization for his attorney.

8. On 4 March 2013, the Applicant's lawyer submitted the requested additional documents.

9. On 12 March 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the Inadmissibility of the Referral and on the rejection of the request for interim measure.

Summary of the facts

10. On 6 April 2006, the Municipal Court in Prishtina found (P.nr.210/2005)the Applicant guilty of charges of aggravated theft [Article 253 of the CCK] and falsifying documents [Article 332 of the CCK] and sentenced him with 6 months imprisonment and a fine of 1000 € (one thousand Euro).

11. On 17 June 2006, the Applicant filed an appeal with the District Court in Prishtina against that Judgment, challenging it, proposing the annulment of the judgment and sending it for a retrial.

12. On 21 November 2008, the District Court partially approved (AP.nr.452/06) the appeal of the Applicant and changed the Judgment of the Municipal Court, by confirming the imprisonment for 6 (six) months and changing the amount of fine from 1000 € (one thousand Euro) to 800 (eight hundred Euro).

13. On 13 July 2012, the Applicant submitted to the Supreme Court a request for protection of legality, because "I as the accused could not state my defense claim thus my right to be defended at this stage of the procedure has been violated, and it was important for making a fair and legal judgment".

14. On 22 March 2010, the Supreme Court declared(Pkl.nr.15/2010) the request founded and annulled District Court's Judgment and sent the case back for retrial, since the District Court in Prishtina breached the provisions of the Criminal Procedure Code regulating the participation of the parties in court sessions.

15. On 6 May 2010, the District Court rejected (Ap.nr.152/2010) the Applicant's appeal and confirmed the judgment (P.nr.210/2005) of the Municipal Court.

16. On 13 July 2012, the Applicant once again requested to the Supreme Court protection of legality.

17. On 30 November 2012, the Supreme Court rejected(Pkl.no.125/2012), the request as ungrounded, stating that:

> *"...the essential violations of the criminal procedure clauses which are alleged are not grounded as it is emphasized in the reasoning of this judgment their enacting clauses are understandable, clear and have no contradictions with themselves or their reasoning*".

Allegations of the Applicant

18. The Applicant alleges that "*the first instance court for reasons unknown to me, deprived itself of the possibility that in this case, it exactly finds the factual situation as from the possible comparison of the data of these two vehicles it would easily come to the conclusion that we are dealing with two vehicles which are totally different concerning their technical data...".*

19. In addition, the Applicant claims that *"in lack of providing the proposed material evidence by the expert of the corresponding field – machinery, an expertise which was proposed by the defense counsel, the factual situation was not clarified".*

20. In sum, the Applicant complains that the Judgmentof the Supreme Court violated his constitutional right to a fair and an impartial trial, guaranteed by Article 31 of the Constitution, was violated.

21. The Applicant concludes requesting from the Constitutional Court to adopt a judgment which will:

> *"DECLARE as admissible the applicant's referral, Enver Zeneli from village Malishevo, Gjilani Municipality.*
>
> *ANNUL all court decisions and return the matter to court of the first instance for retrial.*
>
> *RECOMMEND the first instance court to get the necessary material evidence the expertise from an expert of the respective field –*

machinery, which was proposed by the defense counsel and the applicant of this referral".

22. The Applicant further requests, even though not explicitly, the Constitutional Court to impose interim measure in his case, by requesting to:

" ORDERthe stopping of the execution of the judgment of the first instance court in Prishtina, identified in the file".

Preliminary assessment of the admissibility of the Referral

23. First of all, the Court examines whether the Applicant have fulfilled the admissibility requirements laid down by the Constitution, the Law and the Rules of Procedure.

24. The Court notes that the Applicant justified the referral with the facts he considers relevantand implicitly makes reference to an alleged violation; expressly challenges theJudgment as being the concrete act of public authority subject to the review; points out the relief sought; and attaches the different decisions and other supporting information and documents.

25. However, the Court notes that Rule 36 (1).c) of the Rules of Procedure provides:

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

26. The Court also refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution that establishes:

"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".

27. The main claim of the Applicant has to do with an alleged erroneous and incomplete evaluation of the material evidence by the regular courts.

28. The Court recalls that 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 Constitution (constitutionality).

29. Thus, the Court is not to act as a court of fourth instance, when considering the decisions taken by regular courts. It is rather 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. In sum, the Court can only consider whether the evidence has been presented in such a manner that the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see among other authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

31. Moreover, the Applicant merely disputes whether the Supreme Court entirely applied the applicable law and disagrees with the courts' factual findings with respect to its case.

32. As a matter of fact, the Applicant did not substantiate an allegation on constitutional grounds and did not provide evidence that its rights and freedoms have been violated by the Supreme Court.

33. Consequently, the Constitutional Court cannot conclude 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).

34. Moreover, the Court notes that the judgments of the Supreme Court and the District Court were well argued and thoroughly reasoned and recalls again that it is not under the jurisdiction of the constitutional review to check the assessment of the evidence made by the regular courts.

35. It follows that, pursuant to Article 113 (1) of the Constitution and Rule 36 (1.c) of the Rules, the Referral is inadmissible as manifestly ill-founded.

Request for Interim Measures

36. Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, provide that "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.

37. However, taking into account that the Referral was found inadmissible, the Applicant is not entitled to request interim measures under Rule 54 (1) of the Rules of Procedure.

38. Furthermore, the Applicant merely requests the Court to impose interim measures, without providing any further argument or relevant documents grounding his request.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 27 of the Law, and Rules 52, 55 and 56 (2) of the Rules of Procedure, on 12 March 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the request for interim measure;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

V. This Decision is effective immediately

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 81/10, date on 27 March 2013- Decision on the correction of technical errors in the Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo, for Case KI 81/10 of 15 September 2012.

Case KI 81/10, Decision, of 4 March 2013.

Keywords: Decision on correction of technical errors

The Constitutional Court, for the purpose that the text of the Resolution on Inadmissibility in Case KI81/10 of 15 September 2012 reflects the overall verdict of the Court in respect to the submitted Referral of the authorized Applicant and to avoid possible ambiguities that may emerge as a result of these technical errors published in the Resolution on Inadmissibility in Case KI81/10 of 15 September 2012, in accordance with Article 113 of the Constitution and in accordance with Rule 61 (1.1) of the Rules of Procedure, at its session held on 4 March 2013, unanimously decided to approve EX OFFICIO the corrections in Resolution on Inadmissibility in Case KI81/10, of 15 September 2012.

Pursuant to Article 11.1 (1.4) of the Law (No. 03/L-121) on the Constitutional Court of the Republic of Kosovo of 15 January 2009, Rule 61 (1.1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (Official Gazette of the Republic of Kosovo of 14 December 2012), for the purpose of correcting technical errors of the inadmissibility decision in case KI81/10 of 15 September 2012), the Constitutional Court, *ex officio*, on 4 March 2013 renders:

DECISION

ON the CORRECTION of technical errors in the Resolution on inadmissibility of the Constitutional Court of the Republic of Kosovo, Case KI 81/10 of 15 September 2012.

I. Resolution on Inadmissibility in Case KI81/10 of 15 September 2012 is corrected in respect to paragraph 1 so that the Applicant's name is written Mr. NAZIF REKA instead of the name Ramadan Rrahmani.

II. Resolution on Inadmissibility in Case KI81/10 of 15 September 2012 is corrected in respect to paragraph 13 so that the third sentence after the text "Municipal Court and the District Court in Pristina" the text "appeal" is deleted.

III. The Corrections made with this decision applies to all the three language versions of the Resolution on Inadmissibility in Case KI81/10 of 15 September 2012, while the remainder of the text of the Resolution on Inadmissibility in Case KI81/10 of 15 September 2012 remain unchanged and in force.

IV. This decision is an integral part of the Resolution on Inadmissibility in Case KI81/10 of 15 September 2012 and shall be made public and communicated to the parties in the same manner as in the Resolution on Inadmissibility in Case KI81/10 of 15 September 2012.

FOR THESE REASONS

The Constitutional Court, for the purpose that the text of the Resolution on Inadmissibility in Case KI81/10 of 15 September 2012 reflects the overall verdict of the Court in respect to the submitted Referral of the authorized Applicant and to avoid possible ambiguities that may emerge as a result of these technical errors published in the Resolution on Inadmissibility in Case KI81/10 of 15 September 2012, in accordance with Article 113 of the

Constitution and in accordance with Rule 61 (1.1) of the Rules of Procedure, at its session held on 4 March 2013, unanimously

DECIDED

I. TO APPROVE EX OFFICIO the corrections in Resolution on Inadmissibility in Case KI81/10 of 15 September 2012;

II. This decision will be communicated 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 shall enter into force immediately.

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 37/12, Murtez Gashi and Shehide Gashi, date 28 March 2013- Constitutional challenge to the Decision of the Kosovo Judicial Council, dated 29 November 2011

Case KI 37/12, Decision, dated 19 September 2013

Keywords: Decision to strike out the referral

The Applicants maintain that their right to free drugs, included in the essential drug list, pursuant to Law on Health, has been violated, and this is a discrimination because they are members of an endangered community and marginalized group, i.e. Ashkali community.

Furthermore, the applicants claim that the National Backlog Reduction Strategy does not comply with the policy of priorities and the jurisprudence of the European Court of Human Rights, which is a violation of Article 53 of the Constitution and, as such, it must be declared unconstitutional by the Constitutional Court of the Republic of Kosovo.

In order to decide on further steps to be undertaken after the communication with the representative of the applicants, the Court refers to Rule 32 of the Rules of Procedure of the Court, which sets out the Withdrawal of Referrals and Replies.

The Constitutional Court, pursuant to Article 20 of the Law, and Rule 32 of the Rules of Procedure unanimously decides to strike out the referral.

DECISION TO STRIKE OUT THE REFERRAL
Case No. KI37/12
Applicants
Murtez Gashi and Shehide Gashi
Constitutional challenge to the Decision of the Kosovo Judicial Council, dated 29 November 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicants are Murtez and Shehide Gashi, of Fushë Kosova, Prishtina, represented by Bahtir Troshupa for the European Centre for Minority Issues, Kosovo.

Subject matter

2. The Applicants maintain that their right to free medicaments included in the free list under the Law on Health was not provided to them and that this amounted to discrimination as they were members of a vulnerable community and marginalized group, i.e. the Ashkali Community.

3. Moreover, the Applicants maintain that the National Strategy to Reduce the Number of Pending Cases is inconsistent with the priority policy and the jurisprudence of the European Court for Human Rights, which gives rise to the violation of Article 53 of the Constitution, and as such must be declared unconstitutional by the Constitutional Court of the Republic of Kosovo.

Legal basis

4. The Referral is based on 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 Section 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Rules of Procedure).

Summary of facts based on the documents furnished by the Applicants

5. On 16 September 2009 the Applicants submitted a written request to the Municipal Health Department of Fushë Kosova. In the mentioned request the local authorities were reminded of the Applicants' rights under the Article 22.1 of the Health Law pertinent to the essential medicaments included in the free list and the responsibility of the Republic of Kosovo to provide to the vulnerable communities and marginalized groups equal access to health care services without discrimination in consistency with the Law on the Protection and Promotion of the Rights of Communities

6. On 4 November 2009, the request of the Applicants was brought to the attention of the Unit on Human Rights within the Ministry of Health. The Head of the Unit, responsible for monitoring of discriminatory cases in the health sector did not undertake any inquiry to confirm any potential discrimination as initially promised.

7. On 12 March 2010 the Applicants filed a lawsuit against the Government of Kosovo, designated as the case with number No. 565/2010.

8. On 29 July 2011, the Applicants wrote to the President of the Municipal Court in Prishtina asking to give priority to their case. They did not get any reply.

9. On 28 October 2011 the Applicants wrote to the President of the Kosovo Judicial Council, asking to prioritize their case because the delay in hearing the case was harmful for the health of the Applicants.

10. On 29 November 2011, Applicants received a reply from the Legal Department of the Kosovo Judicial Council, whereby they were informed that the subject of the case that the claimants had filed was not included among the categories of cases given priority based on National Strategy to Reduce the Number of Pending Cases.

Procedure before the Court

11. On 29 March 2012 the Applicants filed a Referral with the Constitutional Court, through the European Centre for Minority Issues, Kosovo.

12. On 20 April 2012 the Court requested clarification as to the Authorisation of the European Centre for Minority Issues, Kosovo, to bring the Referral on the Applicants' behalf.

13. The Applicants' representatives replied stating that due to the illness of one of the Applicants they were unable to furnish the Authorisation at that time.

14. On 22 May 2012 the President of the Constitutional Court appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date the President appointed a Review Panel composed of Judges Robert Carolan (presiding), Altay Suroy and Gjyljeta Mushkolaj

15. On 25 May 2012 the Applicants' representative informed the Court that new facts had emerged that indicated that the Applicants were not in a position to proceed with the Referral.

16. On 2 July 2012, the President by Decision (No. K.SH KI-37/12) appointed Judge Ivan Čukalović as member of the Review Panel after the term of office of Judge Gjyljeta Mushkolaj as Judge of the Court had ended.

The Court's Assessment

17. In order to be able to decide what further steps to take following the communication from the Applicants" representatives the Court refers to Rule 32 of the Rules of Procedure of the Court.

18. Rule 32 of the Rules of Procedure reads as follows:

"Rule 32

Withdrawal of Referrals and Replies

(1) A party may withdraw a filed referral or a reply at any time before the beginning of a hearing on the referral or at any time before the Court decision is made without a hearing.

(2) Notwithstanding a withdrawal of a referral, the Court may determine to decide the Referral.

(3) The Court shall decide such a referral without a hearing and solely on the basis of the Referral, any replies, and the documents attached to the filings.

(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".

19. On 19 September 2012, in the light of the above developments, the Judge Rapporteur, Snezhana Botusharova, recommended to the Review Panel, composed of Judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalović, to discontinue further examination of the Referral. After having heard the Judge Rapporteur, the Review Panel agreed that there are no special circumstances concerning the protection of the human rights of the Applicants which would require further examination of the Referral and forwarded its recommendation to the Court on the same date.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law and Section 32 of the Rules of Procedure, unanimously,

DECIDES

I. TO STRIKE OUT the Referral.

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

KI 141/11, Ramadan Rrahmani, 04 April 2013- Constitutional Review of the Decision No. 5017415 of the Pensions Administration of the Republic of Kosovo, dated 26 February 2009

Case KI 141/11, Resolution on Inadmissibilty of 19 March 2013

Keywords: individual referral, out of time referral, supremacy of the constitution, judicial protection of rights, disability pension

The Applicant filed the Referral based on Article 113.7 of the Constitution, claiming that his constitutional rights have been violated because his right to pension was denied by Pension Administration of the Republic of Kosovo. Among others, the Applicant claimed that the right to judicial protection of rights was violated.

The Court determined that the Applicant's Referral was out of time, namely it was not submitted to the Court within the time limit as provided by Article 49 of the Law.

Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36 (1) b) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI141/11
Applicant
Ramadan Rrahmani
Constitutional Review of the Decision No.5017415 of Pensions Administration of the Republic of Kosovo, dated 26 February 2009

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Ramadan Rrahmani with residence in Fushë Kosovë.

Challenged decision

2. Decision No. 5017415 of the Department of Pension Administration of the Republic of Kosovo in the Ministry of Labor and Social Welfare (hereinafter: DPAK-MLSW), dated 26 February 2009.

Legal basis

3. Article 113.7 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 15 January 2009 (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure (hereinafter: the "Rules of Procedure").

Subject matter

4. The subject matter has to do with Applicant's rights to disability pension as well as to compensation of body injuries that the Applicant suffered during the working hours.

Proceedings before the Court

5. On 31 October 2011, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 17 January 2012, the President of the Constitutional Court, by Decision No.GJR.KI-141/11, appointed Judge Iliriana Islami as Judge Rapporteur. On the same date, the President by Decision No.KSH.KI-141/11, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Gjyljeta Mushkolaj.

7. On 18 April 2012, the Court notified Applicant about registration of Referral and requested from him to specify the Referral.

8. On 16 May 2012, the Applicant responded to the Referral of the Court.

9. On 5 November 2012, the President of the Constitutional Court, by Decision No.GJR.KI-141/11, appointed the Judge Arta Rama-Hajrizi as Judge Rapporteur after the end of the mandate of the Judge Iliriana Islami as the Court Judge. On the same date, the President by Decision No.KSH.KI-141/11, appointed the new Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Kadri Kryeziu, after the end of the mandate of the Judge Gjyljeta Mushkolaj as the Judge Court.

10. On 12 November 2012, the Court requested from the Applicant to clarify several aspects of his Referral. The Applicant did not respond.

11. On 5 December 2012, the Review Panel reviewed the report of Judge Rapporteur and proposed to the full Court the inadmissibility of the Referral.

Summary of facts as submitted by the Applicant

12. On 5 May 1984, Self-Governing Community of Interest (SCI) of Pension Disability Insurance of Kosovo by Decision P.no.20714, established that the Applicant, who is ranked in the first category of disability, is recognized the right to disability pension, starting from the day of termination of receipt of personal income. Besides the pension, he is also recognized the right to compensatory supplement.

13. On 24 December 1986, the Court of Joint Labour in Prishtina by Decision Np-no. 903/82, provided that SOE "Ramiz Sadiku "the company of transport and machinery in Prishtina, is obliged to pay to Applicant compensation for reduced working capacity due to injury at work, within 15 days from the day the decision became final. At the same time, SOE "Ramiz Sadiku" is obliged to pay to Applicant supplementary benefit (RENTA) every month on behalf of compensation for reduced working capacity as well as to pay the costs of proceedings.

14. On 1 September 2004, the Applicant filed a request, regarding the pension for disability persons, with the Ministry of Labor and Social Welfare.

15. On 26 February 2009, Ministry of Labor and Social Welfare notified the Applicant that the Doctor's Commission had evaluated that the Applicant meets the requirements provided by the Law 2003/23 on selection for disability pension, and that the right of the Applicant to pension is extended from 1 January 2009. The monthly amount that the Applicant will receive was 45 euro. The Applicant was also notified that he may challenge the abovementioned decision in DPAK -MLSW.

16. From the submitted documents, there is no evidence that the Applicant has complained against the abovementioned decision of the DPAK – MLSW.

Applicant's allegations

17. The Applicant alleges violations to his detriment of Articles 16[Supremacy of the Constitution] paragraph 3 "The Republic of Kosovo shall respect international law" and 54 [Judicial Protection of Rights] of the Constitution.

18. The Applicant alleges that the Pension Center of Persons with Disabilities did not respect previous decisions of the courts, based on which he should enjoy the right to difference of salary (supplementary benefit/renta) up to the retirement age, which implies the right to obtain pension at the amount of €80 (and not the conferred amount of €45), since the beginning of receiving pension from 1 May 2004.

19. The Applicant alleges that his right to obtain supplementary benefit (renta) was denied, respectively the difference between the worker's salary and disability pension as of the beginning of the receipt of pension from 1 May 2004, as it was decided by different previous court decisions and submitted as evidence.

20. The Applicant alleges that his right to orthopedic devices, rehabilitation in health spas, and continuation of recovery in the institutions abroad was denied.

21. Finally, the Applicant, in order to support his claims provide the following evidence:

    a) Judgment of Supreme Court of Kosovo A.no.1120/83 dated 19 January 1984;

    b) Decision of Municipal Court in Prishtina P.no.2202/92 dated 28 January 1993;

    c) Decision of Court of Joint Labour in Prishtina Np.no.903/82, dated 24 December 1986.

Assessment of the admissibility of the Referral

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

23. As far as the Referral of the Applicant is concerned, the Court is referred to Article 49 of the Law, which provides:

> *"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."*

24. From the submissions it can be seen that the Referral was filed on 31 October 2011 and that the decision of the DPAK-MLSW was served to the Applicant on 26 February 2009, which means that the Referral was not submitted within legal time limit provided by the Article 49 of the Law.

25. Consequently the Referral is out of time.

26. Therefore, the Referral should be rejected as inadmissible due to failure to meet the legal time limit, provided by Article 49 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 49 of the Law and Rule 36 (1.b) of the Rules of Procedure, on 5 December 2012, 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**
Arta Rama-Hajrizi	Prof. Dr. Enver Hasani

KI 14/13, Municipality of Podujeva, date 04 April 2013 - Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo, Rev. no. 50/2011, dated 22 November 2012.

Case KI 14/13, Resolution on Inadmissibility of 12 March 2013

Keywords: individual referral, interim measures, manifestly ill-founded, protection of property, violation of individual rights and freedoms

The applicant, the Municipality of Podujeva, filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging the Supreme Court Judgment, Rev. no. 50/2011, of 22 November 2012, as being taken in violation of its rights guaranteed by Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol 1 [Protection of Property] of ECHR, because "pursuant to [...] Ruling no. 04-466-765/3 of 28 July 1980 the property was expropriated and the claimants' predecessor was compensated, and the same Ruling became final on 22.12.1982 and the Cultural Centre was constructed in the abovementioned property." Furthermore, the Applicant requested the Court to impose interim measure stopping the execution of the Supreme Court Judgment.

On the issue of the admissibility of the Referral, the Court held, that the Referral was inadmissible because the Applicant failed to submit evidence that the relevant proceedings were in any way unfair or tainted by arbitrariness. Hence, the Court held that the Referral was manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure. Furthermore, as to the request for interim measures, the Court held, that 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.

RESOLUTION ON INADMISSIBLITY
in
Case No. KI14/13
Applicant
Municipality of Podujeva
Constitutional Review of the Judgment of the Supreme Court of the Republic of Kosovo, Rev. no. 50/2011, dated 22 November 2012.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Referral is submitted by the Municipality of Podujeva (hereinafter: the "Applicant"), represented by Mr. Faik Rama.

Challenged decision

2. The Applicant challenges the Supreme Court Judgment, Rev. no. 50/2011, of 22 November 2012, which was served on the Applicant on 26 December 2012.

Subject matter

3. The Applicant alleges that the abovementioned Judgment violated its rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), namely Article 46 [Protection of Property], and the European Convention on Human Rights and Fundamental Freedoms (hereinafter: "ECHR"), namely Article 1 of Protocol 1 (Protection of property).

4. Furthermore, the Applicant requested to impose interim measures *"stopping the execution of Judgment Rev. no. 50/2011 of the Supreme Court because there is the risk that the claimant might request the*

compulsory execution of Judgment Rev. no. 50/2011 and this way cause irreparable damages to the respondent and infringe the public interest."

Legal basis

5. The Referral is based on 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 15 January 2009 (hereinafter: the "Law") and Rule 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 5 February 2013, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

7. On 25 February 2013, the President of the Constitutional Court, with Decision No.GJR.KI-14/13, appointed Judge Arta Rama-Hajrizi as Judge Rapporteur. On the same date, the President of the Constitutional Court, with Decision No.KSH.KI-14/13, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu.

8. On 26 February 2013, the Court requested Mr. Faik Rama to submit an authorization, which he submitted to the Court.

9. On 27 February 2013, the Referral was communicated to the Supreme Court.

10. On 12 March 2013, 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 28 July 1980, the Legal Property Section of the Municipal Assembly of Podujeva took the Decision, No. 04-466-765/3, on expropriating the immovable property of private owners for the needs and interests of Self-governing Community of Interest (Bashkësia Vetëqeverisëse e Interesit – BVI) to construct a Cultural Centre in Podujeva. One of the expropriated properties belonged to Z. (Xh.) A.

12. On 11 August 1980, Z. (Xh.) A. complained to the Provincial Directorate for Legal Property Issues in Prishtina against the decision on expropriation.

13. On 27 October 1980, the Secretariat for Economy of the Municipal Assembly of Podujeva (Decision No. 04-360-547) allocates to Z. (Xh.) A. a two-room apartment.

14. On 27 October 1980, the General Bank in Prishtina issues a guarantee in which the Municipal Assembly of Podujeva guarantees that it has obtained the means for the expropriation of the land for the construction of the Cultural Centre.

15. On 31 October 1980, an agreement was reached between Z. (Xh.) A. and the Legal Property Section of the Municipal Assembly of Podujeva for releasing the expropriated building, allocation of a plot and premise for private activity whereas no agreement was reached on the price of the compensation.

16. On 5 November 1980, the Legal Property Section of the Municipal Assembly of Podujeva issued a conclusion on allowing the execution of the final Decision, No. 04-466-765/3, of 28 July 1980.

17. On 6 November 1980, the Legal Property Section of the Municipal Assembly of Podujeva took a decision (Decision No. 04-4784) to allow the execution of the Decision, No. 04-466-765/3, of 28 July 1980.

18. On 25 November 1980, the Legal Property Section of the Municipal Assembly of Podujeva held an oral hearing to ascertain the compensation price.

19. On 9 January 1981, the Secretariat for Economy of the Municipal Assembly of Podujeva (Decision no. 04-351-4919) approved the request of the Self-governing Community of Interest (Bashkësia Vetëqeverisëse e Interesit – BVI) to start building the Cultural Centre.

20. On 9 May 1981, the Self-governing Community of Interest (Bashkësia Vetëqeverisëse e Interesit – BVI) issued a guarantee in which it guarantees that it has the means for the investment.

21. On 21 May 1981, the Legal Property Section of the Municipal Assembly of Podujeva (Decision no. 04-466-765/3) issued a conclusion ordering Z. (Xh.) A. to release the expropriated property and move to the two-room apartment that was allocated to him. Z. (Xh.) A. complained

against this decision to the Provincial Directorate for Legal Property Issues in Prishtina.

22. On 22 May 1981, the Legal Property Section of the Municipal Assembly of Podujeva (Decision no. 04-360-204) allocated a one room apartment to Z. (Xh.) A.

23. On 22 December 1982, the Provincial Directorate for Legal Property Issues in Prishtina (Decision no. 03-466-576/82) rejected as unfounded the complaint of Z. (Xh.) A. because Z. (Xh.) A. has been allocated a living place and an agreement on compensation has been reached.

24. On 4 May 1983, the Municipal Assembly of Podujeva and Z. (Xh.) A. reached an agreement whereby the Municipal Assembly of Podujeva was obliged to secure a premise for Z. (Xh.) A. for conducting business.

25. On 21 July 1995, the Municipal Assembly of Podujeva issued a decision on determining the content of the Final Rulings on the Execution, Expropriation and Taking ownership of Immovable Properties and confirmed that plots 554, 555 and 556 were carried over under ownership of the Municipality as Social Property.

26. In April 2001, the contested plots 554, 555 and 556 were registered in the name of the Self-governing Community of Interest (Bashkësia Vetëqeverisëse e Interesit – BVI) pursuant to the final decision of the Legal Property Section of the Municipal Assembly of Podujeva, Decision, No. 04-466-765/3 of 28 July 1980.

27. In 2003, the contested plots 554, 555 and 556 were registered under the ownership of the Municipality of Podujeva.

28. On 15 March 2006, the heirs of Z. (Xh.) A. filed to the Municipal Court in Podujeva a claim against the Municipality of Podujeva for confirmation of ownership over plots 554, 555 and 556 who was owner of these plots in accordance with the possession list of 2001. The heirs claimed that these plots are in an area where there is an unfinished building and the Municipality of Pudjeva is hindering their possession and use.

29. On 2 July 2007, the Municipal Court of Podujeva (Judgment C. no. 122/2006) rejected the claim of the heirs as unfounded. The Municipal Court held that:

- On 28 July 1980, the Legal Property Section of the Municipal Assembly of Podujeva took the Decision, No. 04-466-765/3, on expropriation;

- In 2001, the expropriated plots were registered in the name of the Self-governing Community of Interest (Bashkësia Vetëqeverisëse e Interesit – BVI) and in 2003 the Municipality of Podujeva was registered as owner.

Hence, the Municipal Court ruled that the claim of the heirs was unfounded. The heirs complained against this Judgment to the District Court in Prishtina.

30. On 22 October 2008, the District Court in Pristina (Decision Ac. no. 821/2007) annulled the judgment of the Municipal Court in Podujeva and sent it back for retrial. The District Court held that the Municipal Court need to confirm the following:

- Pursuant to which legal grounds was the contested immovable property in 2001 registered in under the ownership of Xh. (A) Z.

- On what legal grounds was then this immovable property registered under the ownership of the Municipality of Podujeva.

- Was the contested immovable property carried over under the ownership and use of the beneficiary of the expropriated property after the final ruling on the expropriation pursuant to the purpose of the expropriation.

31. On 24 February 2010, the Municipal Court in Podujeva (Judgment C. no. 879/2008) approved the claim of the heirs and confirmed that they were owners to the contested plots. The Municipal Court held that *"It was confirmed the fact that the purpose of the expropriation was not achieved as the construction of the House of Culture has started but it was never finished and this building has not served to the respondent for the purpose of the expropriation until now."* The Municipal Court also held that based on the testimonies of the witnesses the predecessor of the heirs was never compensated for the expropriation. The Applicant complained against this Judgment to the District Court in Prishtina.

32. On 31 January 2011, the District Court in Prishtina (Judgment Ac. no. 490/2010) approved the complaint of the Applicant and changed the Judgment of the Municipal Court giving right to the Applicant as owner of the contested plots. The District Court held that *"[…] the first*

instance court in conjugation to this contested matter took an erroneous stance in conjunction to the reviewing of the presented facts and thus its challenged judgment was rendered with erroneous application of the material right." The District Court furthermore held that pursuant to *"[...] Ruling no. 04-466-765/3 of 28 July 1980 the property was expropriated and the claimants' predecessor was compensated, and the same Ruling became final on 22.12.1982 and the Cultural Centre was constructed in the abovementioned property."* The District Court also determined that the heirs had not submitted a request for de-expropriation nor annulment of the decision on expropriation. The heirs filed a request for revision to the Supreme Court against this Judgment.

33. On 22 November 2012, the Supreme Court approved the request for revision and changed the judgment of the District Court and upheld the Judgment of the Municipal Court of 24 February 2010. The Supreme Court held that *"[...] the legal stance of the first instance court was correct, because the expropriation ruling was rendered in 1980, whereas the decision on determining the final expropriation judgment was rendered on 21 July 1995, which means that the second instance court erroneously finds that the expropriation judgment became final on 22.12.1982. This court evaluates that the first instance court correctly determined the fact by administering the evidence - hearing the witnesses that the claimants' predecessor was not paid any compensation for the expropriated plots, because after 23 years these plots were registered as public property. In this case the relevant fact is that the respondent did not present and did not prove with any evidence that the claimants' predecessor was compensated for the expropriated property."* Furthermore, the Supreme Court held that the Applicant did not submit any evidence that the expropriated property was used for the purposes that it was expropriated for.

Applicant's allegations

34. The Applicant alleges that the Supreme Court judgment and the Municipal Court judgment were taken in violation of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol 1 (Protection of property) of ECHR.

Admissibility of the Referral

35. The Court observes that, in order to be able to adjudicate the Applicant's complaint, 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.

36. In this respect, the Court refers 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."*

37. The Court emphasizes that 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 Constitution (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).

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

39. Moreover, the Applicant merely disputes whether the Supreme Court entirely applied the applicable law and disagrees with the courts' factual findings with respect to its case.

40. As a matter of fact, the Applicant did not substantiate a claim on constitutional grounds and did not provide evidence that its rights and freedoms have been violated by that public authority. Therefore, the Constitutional Court cannot conclude 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).

41. Therefore, the Applicant did not show why and how the Supreme Court violated its rights as guaranteed by the Constitution. The Court notes that the judgments of the Supreme Court and the Municipal Court of 24 February 2010 were well argued and reasoned.

42. It follows that the Referral is inadmissible because it is manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure.

Request for Interim Measures

43. Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, provide that "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.

44. 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 and Rule 56 (2) of the Rules of Procedure, on 12 March 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT his 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
Arta Rama-Hajrizi

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 103/12, INTEGRAL L.L.C., date 04 April 2013- Constitutional Review of the Special Chamber of the Supreme Court of Kosovo Judgment ASC-ll-0056-A0001, of 7 June 2012

Case KI103/12, Resolution on Inadmissibility, of 13 March 2012

Keywords: individual referral, manifestly ill-founded

The Applicant claims that its property rights as guaranteed by Article 46 of the Constitution and Article 1 Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: the European Convention on Human Rights or ECHR) have been violated by the challenged judgment of the Special Chamber.

The Applicant requests from the Constitutional Court to annul the challenged judgment and return the matter to the Special Chamber for reconsideration.

The Court, in accordance with Rule 36 (2) c) of the Rules of Procedure, declared the Referral manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI103/12
Applicant
INTEGRAL L.L.C.
Constitutional Review of the Special Chamber of the Supreme Court of Kosovo Judgment ASC-11-0056-A0001 of 7 June 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is "Integral", Private Company from Pristina, represented by Agim Aliu, Director.

Challenged decision

2. The challenged decision is the Judgment of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters (hereinafter "the Special Chamber")issued under ASC-11-0056-A0001, on 7 June 2012 that was served to the Applicant on 5 July 2012.

Subject matter

3. The Applicant claims that its property rights as guaranteed by Article 46 of the Constitution and Article 1 Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the European Convention on Human Rights" or "ECHR") have been violated by challenged judgment of the Special Chamber.

4. The Applicant requests the Constitutional Court to annul the challenged judgment and return the matter for the reconsideration to the Special Chamber.

Legal Basis

5. The Referral is based on Article 113. 7 of the Constitution, Articles 46, 47, 48 and 49 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: 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

6. On 19 October 2012, the Applicant filed the Referral with the Constitutional Court of Kosovo (hereinafter: the Court).

7. On 31 October 2012, by Decision No. GJR.103/12, the President of the Court appointed Judge Arta Rama-Hajrizi as a Judge Rapporteur and by Decision No. KSH.103/12 from the same date a Review Panel composed of Judges: Almiro Rodrigues(Presiding), Kadri Kryeziuand Enver Hasani.

8. On 13 March 2013, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the Facts

9. On 7 September 2006, the Applicant filed a claim with the Special Chamber against Kosovo Trust Agency (hereinafter "KTA") and Privatization Agency Kosovo (hereinafter "PAK"), requiring the verification of the ownership for the immovable property, business premise located in Pristina, UÇK Street No.2 (former AP) Street, then Kralja Milutina Street, in total surface of 814.00 m2. The Applicant based his claim on the Sales Contract concluded between the Applicant and "Investbank SHA" (in bankruptcy) in Belgrade. The Sales Contract was verified it in the First Municipal Court in Belgrade under No 900/61, dated 19 April 2006.

10. On 15 March 2007, KTA submitted the response to the Applicant's claim stating, *inter alia*, that the contesting property belongs to the Bank of Kosovo known as Bankos Basic Bank of Pristina, which is part of Bank of Kosovo JSC (hereinafter "the Bank"). KTA also declared that they carried investigations and verified that the Bank was established by the

Socially Owned Enterprise (SOE) and that its assets are socially owned property.

11. On 13 April 2011, the Trail Panel issued a Judgment SCC-06-0394 and rejected the Applicant's claim as ungrounded.

12. The Trial Panel stated in the reasoning as follows: *"[S]ince the Court found that the Claimant [i.e. "the Applicant"] does not possess the evidence of a legal title, the property dispute remains between Investbank and Bankos (as administrated or not by KTA), no determinations being made in this file. This is why the title exhibited by the Claimant cannot constitute a valid reason for the claim*."

13. On 23 May 2011, the Applicant submitted an Appeal to the judgment of the Trial Panel of the Special Chamber before the Appellate Panel of the same court, due to violations of the provisions on contested procedure, incomplete and erroneous determination of the facts and erroneous application of material law.

14. The Appellate Panel of the Special Chamber issued the contested Judgment no. ASC -11-0056-10001 on 7 June 2012, and rejected the Applicant's appeal as ungrounded and uphold the Judgment SCC- 06-0394 of the Trial Panel of the Special Chamber, dated 13 April 2011,.

15. In the legal reasoning the Appellate Panel of the Special Chamber stated that "*the Trial Panel of the SCSC has emphasized very clearly in the justification…that the 'claimant does not possess any legal title evidence*.'"

16. Furthermore, the Appellate Panel confirmed view of the Trial Panel that "*transfer of the ownership right to the claimant through 'the ownership title 'that he possessed was not conducted in a legal manner."* The Appellate Panel also confirmed that the contested assets "*are socially owned property".*

17. In addition, the Appellate Panel of the Special Chamber stated that "*the transfer of the property right for the contested assets was done based on a contract concluded in Belgrade, which did not meet the legal requirement of the applicable law in Kosovo. Therefore, this contract does not present any lawful legal action of the applicable law in Kosovo, and it is not evidence of the legal title as to allow the claimant to transfer and registered without any interruption his property right for purchased assets*."

18. Moreover, the Appellate Panel of the Special Chamber noted that since the assets purchased by the Applicant are located in Pristina, and that the Sales Contract verified at the Court in Belgrade that "*the form of this legal action is without any legal effect, as this important element is not fulfilled in this case.* ".

19. Finally, the Appellate Panel of the Special Chamber found that the "*the legal action was in violation also with Article 4 of the law on transaction of the Immovable Property… a provision which prohibits alienation of the socially owned real estates to private persons*."

Applicant's Allegations

20. In his referral to the Constitutional Court, the Applicant alleges that its human rights guaranteed by the Constitution have been violated since the Special Chamber *"unjustly alleges that the claimant does not possess any evidence related to the legal title in order to prove his right over business premise*". The Applicant alleges that "*bank as a financial institution cannot be treated as a socially owned enterprise or publicly owned enterprise*" The Applicant noted that *"Investbanka JSC, in accordance with the law, has implemented the bankruptcy procedure, the decision on sale of property not only in Kosovo but also in other countries of the former Yugoslavia…*" The Applicant considers that the Sales Contract was concluded and verified before the competent court in Belgrade in accordance with applicable law.

21. Consequently the Applicant requests that "*any claim, either by the court or any other institution for denying its property rights to Integral L.L.C., regarding the premise purchased, while challenging legal title for the transfer of property rights, is illegal and is a violation of constitutional provisions, namely Article 22 and 46 of the Constitution of the Republic of Kosovo*."

Assessment of the Admissibility of the Referral

22. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirement laid down in the Constitution, the law and Rules of Procedure.

23. In that respect, the Court notes that, in accordance with Article 113.7 of the Constitution and Article 47.2 of the Law, the Applicant has exhausted all legal remedies provided by the Law.

24. The Court further notes that the Applicant submitted the Referral in the time-limit prescribed by Article 49 of the Law.

25. The Court has also to consider if the Applicant's referral satisfy further admissibility requirement as prescribed by Rule 36.2 of the Rules of Procedure, that reads as follows:

> *"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;"*

26. The Constitutional Court recalls that 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*, Garcia Ruiz v. Spain [GC], no.30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

27. The Constitutional Court notes from the facts submitted in the Referral that the Applicant at various stages of the proceedings was able to submit the arguments it considered relevant to the case. The factual and legal reasons for the first-instance decision dismissing the Applicant's claim were set out at length. In the judgment at the appeal stage the Appellate Panel endorsed the statement of the facts and the legal reasoning set out in the judgment of the Trial panel, and in so far as they did not conflict with its own findings. Consequently, both Trial Panel and Appellate Panel of the Special Chamber took into account and indeed answered the Applicant's appeals on the points of law.

28. The Court reiterates that it has only limited power to deal with alleged errors of fact or law committed by the regular courts and it cannot substitute its view for that of those courts on the Applicant's ownership of business premises (see the ECtHR, Jantner v. Slovakia,no. 39050/97, para 32, judgment 4 March 2003).

29. Accordingly, even assuming that the judgments of the Special Chamber interfered with the Applicant's right to property, they were based on the law and proportionate to the public interest of protecting the rights of the real owners (*mutatis mutandis* ECtHR, Case of Čadek and others v. The Czech Republic, para. 51, judgment of 21 November 2012). These complaints are thus manifestly ill-founded.

30. Thus, the Court, in accordance with Rule 36.2 (c) of the Rules of Procedure shall reject a Referral as being manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 (7) of the Constitution and Rule 36.2 of the Rules of the Procedure unanimously:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur
Arta Rama- Hajrizi

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 77/12, Rifat Hamiti, date 11 April 2013- Constitutional review of decision of the Supreme Court of Kosovo, Rev. I No. 89/2011 of 05 March 2012

Case KI-77/12, Resolution on Inadmissibility of 06 March 2013.

Keywords: Individual referral, right to fair trial, right to legal remedies, right to judicial protection, manifestly ungrounded, Ne bis in idem.

The Applicant has filed his referral in compliance with Article 113.7 of the Constitution of Kosovo, challenging the decision of the Supreme Court of Kosovo rev I no. 89/2011 of 05 March 2012, which concluded the immoveable property dispute between the Applicant and third parties in relation to the right of use of apartment.

The applicant has alleged violation of basic principle of litigation procedure, "no two trials on the same matter" *(Ne bis in idem)*since the claimant has initiated procedure in the same court by case C. no. 146/2001, against the Applicant as the respondent, and by decision of the same court, C. no. 146/2001 of 08 May 2002, the claim was rejected as inadmissible.

Due to the above, the Applicant alleged that the Municipal Court in Suhareka violated his right to fair and impartial trial, and use of legal remedies, due to the fact that the Municipal Court in Suhareka decided upon a matter which was earlier concluded by judgment and decision. According to the statements of the Applicant, the Court violated the principle Ne bis in idem, and further, by assigning a temporary representative to the Applicant, and failing to meet legal conditions of the LCP, denied access of the Applicant to the trial.

Due to the above, the Applicant claimed violation of Articles 21 (General Principles), 31 (Right to Fair and Impartial Trial), 32 (Right to Legal Remedies) and 54 (Right to Judicial Protection) of the Constitution of the Republic of Kosovo, and Article 6 of the European Convention on Human Rights.

Deciding upon the referral of applicant Rifat Hamiti, the Constitutional Court, upon review of proceedings, has not found that relevant proceedings were in any way unjust or arbitrary, and that rulings of regular courts were entirely reasoned. Therefore, the Court found that the referral is manifestly ungrounded, since the facts presented fail to corroborate the allegations of violation of constitutional rights.

RESOLUTION ON INADMISSIBLITY
in
Case No. KI77/12
Applicant
Rifat Hamiti
Constitutional Review of the Resolution of the Supreme Court of Kosovo
Rev. I no. 89/2011 dated 5 March 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Rifat Hamiti from Mushetisht village, Municipality of Suhareka, represented before the Constitutional Court by Ekrem Agushi, a practicing lawyer from Prishtina.

Challenged decision

2. The challenged decision is the Resolution of the Supreme Court of Kosovo Rev. I no. 89/2011 of 5 March 2012, served on the Applicant on 26 April 2012, by which was rejected the revision against the Judgment of the Municipal Court in Suhareka C. no. 211/02, of 17 December 2007, and the Judgment of the District Court in Prizren AC. no. 48/08, of 20 January 2011.

Subject matter

3. Subject matter is the legal property dispute between the Applicant and the third parties, regarding the right to use the apartment, which is concluded by the Resolution of the Supreme Court of Kosovo Rev. no. I. 89/2011, of 5 March 2012, served on the Applicant on 26 April 2012,

which according to the claims of the Applicant violated a number of Articles of the Constitution of the Republic of Kosovo.

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 of 15 January 2009 (hereinafter: the Law) and Rule 56.2 of the Rules of Procedures (hereinafter: Rules of Procedures).

Proceedings before the Constitutional Court

5. On 17 August 2012, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. The President by Decision (br. GJR.77/12 of 04 September 2012), appointed Judge Snezhana Botusharovaas Judge Rapporteur. On the same date, by Decision no. KSH. 77/12 the President appointed the Review Panel composed of Judges: Robert Carolan(presiding), Altay Suroyand Ivan Čukalović.

7. On 24 September 2012, the Constitutional Court requested from the Applicant to submit additional documentation in order for the Court to decide on the merits of the Applicant's Referral. The Court requested the following documents:

   - ✓ Resolution of the Supreme Court of Kosovo rev. I. no. 89/2011, of 5 March 2012,
   - ✓ The power of attorney that authorizes Ilaz Kadolli, lawyer, to represent you before the Court
   - ✓ Judgment of the Municipal Court in Suhareke no. 164/01 of 1 August 2002.

8. On 4 October 2012, the Court was informed by the Post and Telecommunication of Kosovo that the letter addressed by the Court was notserved onthe Applicant because the Applicant lives abroad.

9. On 23 October 2012, the Constitutional Court again requested from the Applicant and from his lawyer to provide additional documentation, in order for the Court to decide on the merits of the Applicant's Referral.

10. On 9 November 2012, the Applicant submitted the documents which the Court requested from the Applicant, and the authorization by which he changed the lawyer representing him before the Constitutional Court.

11. On 23 January 2013, the Constitutional Court of Kosovo requested from the Municipal Court in Suhareka and the District Court in Prizren to furnish it with the following documents:

- ✓ The entire case files with no. C.br.94/2004, of 20 March 2006, of the Municipal Court in Suhareka;
- ✓ The entire case files of the Resolution of the Supreme Court of Kosovo no. Rev.I.br.89/2011, of 5 March 2012, by which was rejected the Revision against the Judgment of Municipal Court in Suhareka C.br.211/02, of 17 December 2007, and the Judgment of the District Court in Prizren AC.br.48/08 of 20 January 2011.
- ✓ The entire case files no. C.no.146/2001, of 8 May 2002 of the Municipal Court in Suhareka.

12. On 4 February 2013, both the Municipal Court in Suhareka and the District Court in Prizren submitted the entire case files as requested by the Constitutional Court.

13. On 6 March 2013, after having considered the Report of Judge Snezhana Botusharova, the Review Panel composed of Judges Robert Carolan(presiding), Altay Suroyand Ivan Čukalović, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

14. Based on the contract of the construction of the apartments, A.SH. from Mushetisht, with the consent of the provider of the apartment, Municipality of Suhareka and the Kosovo Assembly, has acquired tenancy right over the apartment at “M. Tito” Str. now “Martyrs” , namely apartment no.1., entry no.1., first floor, consisting of two rooms, one kitchen, one bathroom and a toilet, which is signed by the provider of the apartment under number no. 04.no. 360-84 in the name of Municipality of Suhareka, while in Prishtina is under no. 05.no. 360-120/82 of 24 April 1982 .

15. On 13 April 1984, the Applicant and A.SH. signed a contract on leaseof the socially owned apartment Vr.br. 319/84 which has been certified by the court.

16. On 23 April 1984 the same persons concluded another contract on sales and purchase of the said immovable property which has not been certified by the court.

17. According to the allegations of the Applicant, this written contract, uncertified by the court, has been fully implemented by the contractors since the seller A. Sh., handed over in possession the sold apartment to the buyer.

18. The Applicant alleges that between him, as the buyer and A.SH. as seller, there is an additional agreement prepared on 3 January 1988 in the presence of witnesses S. H., S. A., S. A., Sh. Sh. and A. J., all from village Mushetisht, based on which the Applicant and the seller A.SH. have agreed to fulfill their contractual obligations in the agreementtoward each other, and that the seller A.SH. is obliged to withdraw the previously submitted claim with the Municipal Court in Suhareka against the Applicant.

Proceedings before the court upon request for eviction (to vacate the apartment)

A. The first claim

19. The holder of tenancy right (plaintiff) A.SH. filed a lawsuit with the Municipal Court in Suhareka requesting that "*the respondent R. A. be obliged to vacate the apartment located in "M.Tito", now "Martyrs", specifically apartment no.1, entrance 1, first floor, within 15 days and the said apartment be handed over to the plaintiff*". However, during the proceedings the plaintiff A.SH. withdrew the claim.

20. Due to this created factual situation, the Municipal Court in Suhareka issuedthe resolution C.No. 419/87 of 6 January 1988, stating in the enacting clause that:" *The claim and the lawsuit of the plaintiff A. R. Sh., from Mushetisht village against the respondent Rifat Hamiti ….is considered to be withdrawn*" with the reasoning that "*as they agreed on this issue with the respondent to this manner of using the apartment*".

B. The second claim

21. On 9 May 2004, the holder of tenancy right (the plaintiff) A.SH. submitted a new claim with the same content to the Municipal Court in Suha Reka, thereby requesting that "*the respondent R. A. be obliged to vacate the apartment located in "M.Tito", now "Martyrs"str., specifically apartment no.1, entrance 1, first floor, within 15 days and the said apartment be handed over to the plaintiff*".

22. This contested procedure against the Applicant as the respondent, was concluded by the Judgment of the Supreme Court in Suhareka C.BR. 94/2004 of 20 March 2006, by which the court rejected the lawsuit as being inadmissible with the reasoning:

> ***„It is rejected the lawsuit and the statement of claim of the plaintiff as the plaintiff on 06.01.1988 waived the lawsuit and the statement of claim for the same issue"***
>
> *"According to the case C.nr. 490/87, and the view in the civil case file it appears that the plaintiff on 17.04.1987 filed with this Court a lawsuit for the vacation of the apartment against the same respondent Rifat Hamiti from Suhareka. In the minutes dated 06.01.1988 it appears that the plaintiff stated that he waived from the lawsuit and the claim so that the Court issued the decision C.nr. 490/87 considering that the lawsuit and the statement of claim of the plaintiff were withdrawn and that resolution is effective since 01.03.1988"*

Proceedings before the court upon request for confirmation of the tenancy right

C. Third claim

23. The holder of the tenancy right (plaintiff) A.SH. filed a new claim with the Municipal Court in Suhareka requesting "*CONFIRMATION that the plaintiff is holder of the tenancy right over the apartment located in "M. Tita" str. 1/1 in Suhareka with area 50,28 m2 on the basis of apartment exchange contract of 20 April 1984…"*

24. Deciding upon the lawsuit of the holder of the tenancy right (plaintiff) A.SH. Municipal Court in Suhareka rendered Resolution C.br. 146/2001 dated 8 May 2002, rejecting the lawsuit as inadmissible with the following reasoning:

> *"In the preliminary review of the lawsuit based on the attached document of this case the Court found that according to the*

effective decision C.nr. 419/87 between the same parties in the procedure and for the same judicial case it was considered that the lawsuit and the statement of claim of the plaintiff were withdrawn.

As Article 193 of LCP which is applicable according to UNMIK regulation no. 24/99 provides that when the plaintiff withdraws the claim he cannot file a claim again for the same case therefore the court pursuant to this regulation and applying Article 288 par. 1 of LCP rejected the lawsuit of the plaintiff as inadmissible and decided as in the enacting clause of this decision".

25. Against the Resolution of the Municipal Court in Suhareka C.br.146/2001, of 8 May 2002, the tenancy right holder (plaintiff) A.SH. filed an appeal with the District Court in Prizren on 22 May 2002.

26. The District Court in Prizren by Resolution Ac.br. 167/02, of 21 October 2002, approved the appeal of the plaintiff and quashed the Resolution of the Municipal Court in Suhareka C.br.146/2001, of 8 May 2002, and ordered that the case be remanded for retrial, thereby giving the following reasoning:

"*In fact the court rejected the lawsuit considering that it has been previously decided in the same matter and that the plaintiff waived lawsuit in case C.br.419/87 but this court cannot accept this conclusion as being correct because in case C.br.419/97 it was requested that the apartment be vacated, whereas in the present lawsuit he is requesting the confirmation of the tenancy right, in this court's assessment a new legal basis is in question completely different from the previous…"*

27. In the repeated procedure, the Municipal Court in Suhareka by Resolution C.br. 211/02,of 21 March 2007, in accordance with Article 84 paragraph 4 and Article 287 paragraph 1 of LCP appointed a temporary representative B. N., a lawyer from Prizren for the Applicant, because the Applicant could not be reached in the address specified in the lawsuit.

28. The temporary representative of the Applicant, lawyer B. N. from Prizren, in principle challenged the claim and the lawsuit, adding that the respondent based on the contract of sale and purchase of the state-owned apartment of 13. 04. 1984 is the owner of the disputed apartment, where according to this contract, the contract on sale purchase of the apartment was preceded by another contract on sale and purchase of a vehicle.

29. In the sense of Article 8 of CPA/ZPP, the court has administeredall the registered evidence, including the contract on exchange of apartment no. 360- 84 of 20.04.1982, the contract on sale and purchase of apartment established on 13.04.1984 which is a photocopy and is not certified in the court, then, the contract, of 12.04.1984, on sale and purchase of the vehicle, which is a photocopy but is evident that it is certified by the Court under no. V. no. 336/84. Following the assessment of each of them separately and jointly, the Municipal Court in Suhareka in the Judgment C. no. 211/02 of 17 December 2007, decided that: "**The claim and the statement of claim of the plaintiff are approved as grounded**" for the following reasons:

> *"The applicable Law on Housing Relations does not recognize the category purchase of the right to use as legal category, and on the grounds of this law the plaintiff is the user of the apartment, and that this is an inalienable right. The alienation of the socially owned apartment is acknowledged only to the owner of the apartment- the provider of the apartment for use,in this specific case the plaintiff does not have the right to alienate the apartment as the same is the user of it and it is forbidden to sell it respectively to buy it, or in other way to transfer respectively to obtain the right of the ownership of the apartment in contradiction with the provisions of this law.*
>
> *"The Court assessed in all aspects the argument of the temporary authorized representative of the Applicant, but as such it was rejected as unfounded as the contract on the sale-purchase of the apartment dated 13.04.84 does not produce legal effect as the same it has not been validated in the court while the contract on the sale-purchase of the vehicle drafted on 12.04.1984 is not subject matter of the claim in the lawsuit".*

30. The Judgment of the Municipal Court in Suhareka C. no. 211/02, of 17 December 2007, was confirmed by the Judgment of District Court in Prizren Ac. no. 48/08, of 20 January 2011, with the following reasoning:

> *"The Court of the first instance duly acted when approved the claim statement as in the enacting clause of the challenged judgment. Such a conclusion results from the administered evidence by the Court of the first instance and that of the contract on the exchange of the apartments 04. nr. 360-84 dated 20.04.82, the contract on the sale of the socially owned apartment dated 13.04.1984, not certified in the Court, the contract on the sale and purchase of the*

vehicle V.no.336/84. From the administered evidence it doubtlessly results that the plaintiff, according to the contract on exchange, is holder of the occupancy right of the mentioned apartment, as in the enacting clause of the challenged judgment and according to the provisions of the Law on the Housing Relations the user of the apartment is not permitted to sell the apartment as the plaintiff is only the user but not the owner".

31. The revision against the Judgment of the District Court in Prizren AC. no. 48/08, of 20 January 2011, was rejected as inadmissible by the Resolution of the Supreme Court of Kosovo rev.I. No. 89/2011, of 5 March 2012, on the grounds that the parties in the proceedings have stated that the value of the dispute is 200 German marks (DM).

Applicant's allegations

32. The Applicant alleges the following:

"The seller - plaintiff A.SH. for the apartment that was subject of the contract and of the mentioned agreement in the Municipal Court in Suhareka, had filed a claim thus establishing the civil case C.nr.419/87, and in the course of proceedings the plaintiff A.SH. withdrew the claim. The withdrawal of the lawsuit is confirmed by the resolution of the Municipal Court in Suhareka C.nr.419/87 dated 06.01.1988"

"In reference to the same case the seller A.SH.as plaintiff, in the same Court according to the case C.nr.146/2011 has initiated the contested procedure against the applicant as respondent, which by decision of the same Court C.nr.146/2011 dated 08.02.2002, the lawsuit was rejected as inadmissible (we are dealing with a res judicata/ adjudicated case)".

"The Applicant considers that the basic principle of the contested procedure "not twice for the same case" has been violated (ne bis in idem)since the plaintiff in the same Court according to the case C. no. 146/2001 initiated a contested procedure against the applicant as respondent. By the resolution of the same court C. no. 146/2001 of 8 May 2002, the claim was rejected as inadmissible (enclosed the resolution C/no/146/2001 of 8 May 2002)".

33. The Applicant further considers that:

"...that the Municipal Court in Suhareka violated his rights for a fair and impartial trial and the use of remedy, this is because the Municipal Court in Suhareka has decided on a case that has been previously adjudicated by the judgment and the decision referred in the item II of the referral, hence the Court has violated the prohibition -"not twice for the same case" (ne bis in idem), then the Court assignment of the temporary representative to the applicant without complying with the legal criteria of the LCP prevented the applicant to participate in the review. For all this serious violations of proceedings, were introduced reasons in the revision of the applicant.

"...that during the proceedings in the Municipal Court in Suhareke were violated his rights provided by the provisions of the article 21 (General Principles) article 31 (Right to Fair and Impartial Trial) article 32 (Right to Legal Remedies) article 54 (Right to Judicial Protection of the Constitution of the Republic of Kosovo) and article 6 (of the European Convention on Human Rights)".

34. The Applicant addresseswith the Constitutional Court with the following request*:*

"...the Judgment of the Municipal Court in Suhareke C. no. 211/02 of 17 December 2007 and the Judgment of the District Court in Prizren AC. no. 48/08 of 20 January 2011, to be QUASHED.

Assessment of the admissibility of the Referral

35. The Applicant states that Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 54 [Right to Judicial Protection] of the Constitution of the Republic of Kosovo and Article 6 of the European Convention on Human Rights are the basis for his Referral.

36. Article 48 of the Law on Constitutional Court of the Republic of Kosovo 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."

37. Under the Constitution, the Constitutional Court is not a court of appeal when it reviews decisions taken by regular 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 [GC), no. 30544/96, § 28, European Court on Human Rights [ECHRJ1999-1).

38. The Applicant has not provided any *prima facie* evidence which would point to a violation of his constitutional rights (see Vanek vs. Slovak Republic, ECHR decision on admissibility, Application no. 53363/99 of 31 May 2005). The Applicant does not specify in what way Articles 21, 31, 32, and 54 of the Constitution as well as the Article 6 of EHCR support his Referral, as it is stipulated in Article 113.7 of the Constitution and Article 48 of the Law.

39. The Applicant alleges that his rights have been violated due to the erroneous establishment of the facts by the regular courts, stating that "*the court has violated the prohibition -"not twice for the same matter" (ne bis in idem), and by resolution of the same Court C.nr.146/2011 dated 08.02.2002, the lawsuit was rejected as inadmissible (we are dealing with a res judicata/ adjudicated case).*

40. From the case file it can be clearly seen that the Resolution of the Municipal Court in Suhareka C.br. 146/2001, of 8 May 2002, for which the Applicant claims that is *res judicata*, has been quashed by the District Court in Prizren through Resolution Ac.br.167/02, of 21.10.2002, where in the reasoning of the Resolution it is explained in details that it was not a new adjudication in the same matter *Ne bis in idem* which the Applicant stated as a basis for filing a Referral with Constitutional Court.

41. In the present case, the Applicant has been provided numerous opportunities to present his case and to challenge the interpretation of the law, which he considers as being incorrect, before the Municipal Court in Suhareka, the District Court in Prizren and the Supreme Court. After having examined the proceedings in their entirety, the Constitutional Court did not find that the pertinent 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).

42. Finally, admissibility requirements have not been met in this Referral. The Applicant has failed to substantiate the allegation that his constitutional rights and freedoms have been violated by the challenged decision.

43. Therefore, the Referral is manifestly ill-founded in accordance with Rule 36 (2b) of the Rules of Procedure which provides "*The Court shall reject*

a Referral as being manifestly ill-founded when it is satisfied thatb) 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 48 of the Law and Rule 36 (2b) of the Rules of Procedure, in its session held on 6 March 2013, 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

KI 20/13, Rifat Osmani, date 11 April 2013- Constitutional Review of the Judgment of the Supreme Court of Kosovo PkJ. No. 10/2013 dated, 22 January 2013.

KI20/13, Resolution on Inadmissibility, of 12 March 2013

Keywords: individual referral, request for interim measure, detention, right to fair and impartial trial, right to liberty and security, manifestly ill-founded

Apart from the request for constitutional review of the Judgment of the Supreme Court, Pkl. No. 10/2013 of 22 January 2013, which confirms the decisions of the District Court and the Basic Court in Prishtina on extension of detention, the Applicant also requests from the Constitutional Court of the Republic of Kosovo to impose an interim measure, namely Applicant's release from detention.

The Applicant alleges that [...] "*the District and the Supreme Court in Prishtina, as public authorities, by ignoring and delaying the investigative and court procedure"* have violated his individual rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, Articles 5.3 and 5.4 [Right to Liberty and Security] and Article 6.1 [Right to a Fair Trial] of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.

In the present Referral, the justifications of the prosecution and the courts for continued detention refer to the seriousness of the crime, the circumstances of its commission, the cold-bloodedness of the accused and, therefore, the defendant's risk of fleeing and of repeating the offence or committing a similar offence. These circumstances appear to be essentially attributable to the complexity of the case, which make the Court unable to determine that the length of proceedings is unjustified.

The Court concluded that the facts presented by the Applicant did not in any way justify the allegation of a violation of the constitutional rights and the Applicant did not provide evidence that its rights and freedoms guaranteed by the Constitution have been violated by the regular courts.

The Court also noted that the Applicant has not shown that if the interim relief is not granted how his interests would suffer unrecoverable damages, and, therefore, it did not approve the request for imposition of interim measure.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 20/13
Applicant
Rifat Osmani
Constitutional Review
of the Judgment of the Supreme Court of Kosovo Pkl. No. 10/2013
dated 22 January 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Applicant

1. The Referral is submitted by Rifat Osmani (hereinafter: the Applicant), represented by the Law Firm "Sejdiu & Qerkini" LLC.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court Pkl. No. 10/2013 dated 22 January 2013, submitted to the Applicant on 20 February 2013.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment Pkl. No. 10/2013 dated 22 January 2013.

4. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely Applicant's release from detention.

Legal basis

5. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 22 and 27 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009(hereinafter: the Law), and Rules 54, 55 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 22 February 2013, the Applicant submitted the Referral to the Court.

7. On 25 February 2013, the President appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (presiding), Altay Surroy (member) and Ivan Čukalović (member).

8. On 26 February 2013, the Court notified the representative of the Applicant on the registration of the Referral and requested copies of the Decisions issued by the regular courts, which were referred to by the Applicant in the Referral. On the same date, the Court also informed the Supreme Court that the Referral was registered under No. KI 20/13.

9. On 27 February 2013, the legal representative of the Applicant submitted to the Constitutional Court, the requested Decisions on extension of detention on remand, issued by District Court and Basic Court in Prishtina, including the following Decisions of the Supreme Court: Pn. Nr. 228/2010 (7 May 2010); Pn. Nr. 737/2010 (28 December 2010); Pn. Nr. 730/2011 (29 December 2011); Pn. Nr. 475/2012 (26 June 2012); Pn. Nr. 659/2012 (22 August 2012); and Pn. Nr. 854/2012 (22 October 2012).

The facts of the case

10. On 24 May 2009, the Police of Kosovo filed Criminal Charge to the District Prosecution Office in Prishtina due to the existence of a grounded suspicion that the Applicant has committed the criminal offence of the assistance in aggravated murder pursuant to Article 147, paragraph 1, item 9, in conjunction with Article 25 of the old Criminal Code of Kosovo.

11. On the same date, the pre-trial judge based on the decision GJPP. No 136/2009 dated 24 May 2009, assigned detention on remand against the Applicant for a duration of one (1) month, respectively until 22 June 2009.

12. On 13 August 2009, the District Public Prosecution Office in Prishtina filed the Indictment PP. No. 465-6/2009 for the grounded suspicion that the Applicant has committed the criminal offence of the assistance in aggravated murder provided by Article 147, paragraph 1, item 9 in conjunction with Article 25 of the old Criminal Code of Kosovo.

13. On 5 October 2009, the District Court of Prishtina by its Decision KA. No. 348/09 confirmed the indictment PP. No 465-6/2009 against the Applicant for the criminal offence of assistance in aggravated murder. In the aforementioned Decision, the Judge competent to confirm the Indictment found that the Indictment was filed in accordance with the law, and that the criminal offence with which the Applicant was charged did contain elements of the criminal offence provided by Article 147, paragraph 1, item 9, in conjunction with Article 25 of the old Criminal Code of Kosovo and concluded that [...]"*there are no circumstances excluding the criminal liability of the defendants, and preventing their criminal prosecution*."

14. According to the documents submitted by the Applicant, based on the obligation of the court to issue a decision regarding the extension or termination of detention on remand every two months, since June 2009 until February 2013, eighteen (18) decisions on extension of detention on remand by the District Court of Prishtina have been issued. The last decision, namely Decision P. No. 383/09 on extension of detention has been issued by the Basic Court of Prishtina on 13 February 2013. Six decisions of the District Court have been challenged by the Applicant in the Supreme Court. The Supreme Court has confirmed five of these decisions.

15. Based on the documents submitted with the Referral, namely minutes of the hearings in the Court, several hearings have been held in the District Court of Prishtina. Similarly, there have been a number of witnesses, including witness experts, called to appear before the Court. However, the documentation submitted by the Applicant contains references to the proceedings of this Court for only the year 2011.

16. Against the Decisions of the panel of the District Court in Prishtina P. No. 383/2009 dated 12 October 2012, and Decisions of the Supreme Court, Pn. No. 854/2012 dated 22 October 2012, due to substantial violations of criminal procedure, the representatives of the Applicant filed a request for protection of legality with the Supreme Court, proposing to the Supreme Court to [...]"*amend the challenged decision, thereby terminating detention on remand of the accused, or impose another alternative measure*."

17. On 22 January 2013, the Supreme Court of Kosovo with its Judgment Pkl. No. 10/2013 rejected the request for protection of legality as ungrounded, stating that the decisions challenged by the request for the protection of legality were no longer in force, for the reason that based on the Decision of the first instance court, detention was extended until 17 December 2012 and the request for the protection of legality was received on 18 January 2013.

18. The Supreme Court in its Judgment also noted that [...]" *according to the finding of this Court, the court of first instance provided sufficient reasoning on decisive facts on the legal basis of extension of detention, and that it acted properly when extending the detention of the accused, according to Article 281, paragraph 1, sub-paragraphs 1 and 2, item (i) of the CPCK, for the reason that the accused may flee or avoid criminal liability, due to the seriousness of the criminal offence, and the eventual sentence that may be imposed on him if found guilty, and therefore, his freedom may pose a risk of fleeing, and obstructing his presence in further criminal procedure".*

19. In the same Judgment Pkl. No. 10/2013, the Supreme Court noted further that [...]*"according to the findings of this court, the first instance court acted properly when extending detention for the accused, in accordance with Article 281, paragraph 1, sub-paragraphs 1 and 2, item (iii) of the CPCK, in due consideration of the gravity of the criminal offence, and the rather cruel manner of commission – he waited in the car for the other accused, who killed his father-in-law within the bounds of the mosque, and therefore, the cold bloodedness of the accused, planning and perpetration of the criminal offence, and the circumstances of committing such criminal offence, are facts pointing to the risk that in case of finding himself in freedom, he may repeat the offence or commit a similar criminal offence".*

Applicant's Allegation

20. In his Referral, the Applicant specifically challenges the last Judgment of the Supreme Court Pkl. No. 10/2013 of 22 January 2013 regarding the rejection of the request for the protection of legality, challenging it in each of its parts due to unlawfulness and lack of arguments.

21. The Applicant further alleges that [...] " *the District Court and the Supreme Court in Prishtina, as public authorities, by ignoring and delaying the investigative and court procedure"* have violated his individual rights guaranteed by Article 31 [Right to Fair and Impartial

Trial] of the Constitution, Articles 5.3 and 5.4 [Right to Liberty and Security] and Article 6.1 [Right to a Fair Trial] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and its Protocols.

22. The Applicant requests the Constitutional Court to determine if constitutional rights guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments] and Article 53 [Interpretation of Human Rights Provisions] of the Constitution and Article 5.3 and 5.4 [Right to Liberty and Security] of the ECHR and its Protocols have been violated as a result of the unconstitutionality and unlawfulness of the extended detention on remand.

23. The Applicant further requests the Constitutional Court to determine if the "*constitutional right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR and its Protocols has been violated as a result of failure to respect the abovementioned Articles.*"

24. In addition to the above-mentioned requests by the Applicant, a request for interim measures has also been filed. In his request for interim measures, the Applicant requests to release the Applicant from detention on remand.

Assessment of the admissibility of the Referral

25. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

26. The Court should first examine whether the Applicant is an authorized party to submit a referral with the Court, in accordance with requirements of Article 113.7 of the Constitution.

Article 113, paragraph 7 of the Constitution 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."

In relation to this Referral, the Court notes that the Applicant is a natural person, and is an authorized party in accordance with Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution.

27. The Court must also determine whether the Applicant, in accordance with requirements of Article 113 (7) of the Constitution, and Article 47 (2) of the Law, has exhausted all legal remedies. In the present case, the final decision on the Applicant's case is the Judgment of the Supreme Court Pkl. No. 10/2013 dated 22 January 2013. As a result, the Applicant has shown that it has exhausted all legal remedies available under the applicable laws.

28. The Applicant must also prove that he has fulfilled the requirements of Article 49 of the Law in relation to submission of Referral within the legal time limit. It can be seen from the case filethat the Judgment of the Supreme Court Pkl. No. 10/2013 was served on the Applicant on 20 February 2013, while the Applicant filed the Referral to the Court on 22 February 2013, meaning that the Referral was submitted within the four month time limit, as prescribed by the Law and the Rules of Procedure.

29. In relation to the Referral, the Court also takes into account Rule 36 of the Rules of Procedure, which provides:

> *"(1) The Court may review referrals only if: c) The referral is not manifestly ill- founded."*

30. In the instant case, with regard to the proceedings in the regular courts, the Court refers to the Confirmation of Indictment of 5 October 2009 and to the Decisions issued by the District Court since 2009, including the final Decision of the Basic Court of 13 February 2013 on the extension of the detention on remand. In all of its Decisions on extension of detention on remand, the District Court found that based on the circumstances under which the crime was committed and the seriousness of the crime, there is legal basis for extension of the detention on remand. This reasoning has been confirmed by the Supreme Court in its Decisions, when rejecting the appeals of the Applicant as ungrounded.

31. The Court further notes that the Supreme Court of Kosovo in its Judgment Pkl. No. 10/2013 rejected the request for protection of legality as ungrounded, thereby confirming that the court of first instance provided sufficient reasoning on decisive facts on the legal basis of extension of detention, and that it acted properly when extending the detention of the Applicant.

32. In this context, this leaves it up to the courts to determine whether, given the circumstances of the case, the length of detention has exceeded

a reasonable limit. In other words, courts have the discretionary power to decide what is reasonable under specific circumstances (See, *mutatis mutandisWemhoffv. Federal Republic of Germany*, 7 E.Ct.H.R. (ser. A) at 23, 1968). In the present Referral, the justifications of the prosecution and the courts for continued detention refer to the seriousness of the crime, the circumstances of its commission, the cold bloodedness of the accused and, therefore, the defendant's risk of fleeing and of repeating the offence or committing a similar offence. These circumstances appear to be essentially attributable to the complexity of the case, which make this Court unable to determine that the length of proceedings is unjustified (see *mutatis mutandis,Boddaert v. Belgium*, App. No. 12919/87, adopted on 12 October 1992).

33. Moreover, with regard to the conduct of the prosecution and the first instance court, there is no such evidence that the detention on remand was unnecessarily prolonged, or that that court was completely inactive or inactive for a longer period of time (see *mutatis mutandis,Arsov v. The former Yugoslav Republic of Macedonia,* App. No. 44208/02, adopted on 19 October 2006).

34. All in all, the Courtcan only consider 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 among other authorities, Report of the Eur. Commission of Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87, adopted on 10 July 1991).

35. Furthermore, the Court reiterates that the Supreme Court of Kosovo as well as
other regular courts are independent when exercising their judicial power.

36. For all the aforementioned reasons, the Court is satisfied that the facts presented by the Applicant did not in any way justify the allegation of a violation of the constitutional rights and the Applicant did not provide evidence that its rights and freedoms guaranteed by the Constitution have been violated by the regular courts.

Request for Interim Measures

37. Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, provide that *"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."*

38. 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.

39. Furthermore, the Court notes that the Applicant has not shown that if the interim relief is not granted how his interests would suffer unrecoverable damages. In fact, with regard to the Applicant's request for his release of detention on remand, this Court cannot consider it to fall within its competence to provide the Applicant with this protection.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 and 27 of the Law, and Rules 36.2, 54, 55 and 56 of the Rules of Procedure, on 12 March 2013, unanimously:

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; and

IV. This Decision is effective immediately.

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

KI 114/12, Kastriot Hasi, date 16 April 2013- Request for constitutional Review of the Conclusion of the Directorate for Urbanism and Environmental Protection of the Municipality of Gjakova, no. 07/351-8460, of 24 January 2011

Case KI 114/12, Resolution on Inadmissibility of 6 March 2013.

Keywords: Individual referral, premature referral

The Applicant alleges that by Conclusions of the Municipality of Gjakova and the notification of the Municipal Court in Gjakova, he was denied the right to construction in his property, although he has not directly specified what constitutional right has been violated to him.

In these circumstances, Applicant has not demonstrated that he has exhausted all legal remedies available by provided by law, and therefore, in compliance with Rule 36 paragraph 1 item a, the Court concludes that it must reject the Referral as premature.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI114/12
Applicant
Kastriot Hasi
Request for constitutional review of the Conclusion of the Directorate for Urbanism and Environmental Protection of the Municipality of Gjakova, no. 07/351-8460, of 24 January 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge, and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mr. Kastriot Hasi from Gjakova, residing in Gjakova, "Aleksander Mojsiu" Street, no number.

Challenged decision

2. The challenged decision of the public authority is the Conclusion of the Directorate for Urbanism and Environmental Protection of the Municipality of Gjakova, no. 07/351-8460, of 24 January 2011, which the Applicant received in an unspecified date.

Subject matter

3. The subject matter of the Applicant's Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), filed on 8 November 2011, is constitutional review of the Conclusion of the Directorate for Urbanism and Environmental Protection of the Municipality of Gjakova, no. 07/351-8460, of 24.01.2011, by which the Applicant was notified that this Directorate had terminated the procedure of issuing a permit for construction of a multi-storey collective housing building in the cadastral parcels no. 382/2 and 382/4,

in the Cadastral Zone Gjakova-City, which was initiated by the request of Mr. Hasi.

Legal basis

4. 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 15 January 2009 and Rules 54, 55 and 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Procedure before the Court

5. On 8 November 2012, the Applicant filed his Referral with the Court. The Referral was registered in the Court's respective register under no. KI 114/12.

6. On 11 December 2012, by decision GJ.R.KI114/12, the President of the Court appointed Judge Kadri Kryeziu as Judge Rapporteur , and by decision KSH114/12, the President appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Prof. Dr. Enver Hasani (members).

7. On 11 December 2012, the Court notified the Applicant of the registration of the Referral with the relevant Court register

8. On 20 December 2012, the Constitutional Court received by mail additional documentation filed by the Applicant, which consists of a copy of a plan, and sketches of parcels in which construction was to take place and of the object the Applicant had intended to develop.

9. On 6 March 2013, 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. On 29 May 2008, the Directorate for Urbanism and Environmental Protection of the Municipality of Gjakova, upon review of the application filed by Mr. Kastriot Hasi for urban permit and multi-storey housing building permit in the city of Gjakova, issued a notification no. 07-351-1956, by which Mr. Hasi was notified that for the cadastral zone for which he had applied to obtain a multi-storey building permit, there is a design plan of the Municipality, approved on 29 August 2001, which allows "construction of existing buildings, plus one floor" in the

cadastral parcels which he owned. Nevertheless, as Mr. Hasi had applied for a multi-storey building permit, the Municipality requested from Mr. Hasi to supplement the application – namely to obtain the consent from the neighbors for constructing his building.

11. The Municipality requested from Mr. Hasi to obtain and submit to the Municipality the consent of four neighbours, namely: 1) Consent of the Municipal Court in Gjakova, owner of parcels 382/1 and 383/1, cadastral zone Gjakova-City, that bordered on the parcel in which Mr. Hasi was planning to build his multi-storey building; 2) Consent from the neighboring owner of cadastral parcel 382/3; 3) Consent of the western neighbor; and 4) Consent of the northern neighbor, Mr. Selim Tolaj.

12. The Municipality emphasized that obtaining and submission of such "consents in written is a primary condition for review and analysis of the case, for further procedure in issuing the urban and building permits". Further, the Municipality noted that failure to submit such consents would result in the required permits not being issued.

13. On 29 May 2008, Mr. Hasi requested in writing the consent from the neighboring Municipal Court in Gjakova, but failed to obtain a positive reply, since the reply of the Court was that the design plan of the city did not allow for multi-storey buildings in those parcels.

14. On 30 June 2008, the Municipality of Gjakova – Directorate for Urbanism and Environmental Protection issued a Conclusion no. 07/351-1956, thereby terminating the Procedure initiated by application of Mr. Kastriot Hasi from Gjakova, on issuance of multi-storey housing construction permit in Gjakova, since pursuant to the request of the Municipality on supplementing the application, the Applicant had failed to submit written consents of the neighbors: Municipal Court in Gjakova, western and northern neighbors, as per conditions set forth in the Municipality's request for supplementing the case file.

15. The Conclusion also noted that in case of eventual compliance with the conditions set forth by the Municipality, Mr. Hasi would be able to reapply for construction permit.

16. On 6 December 2010, the Directorate for Urbanism and Environmental Protection of the Municipality of Gjakova, upon review of a new application by Mr. Kastriot Hasi for urban permit and multi-storey construction permit in the City of Gjakova, issued a notification no. 07-351-8460, by which it required from the Applicant to supplement the

application – namely obtain consents of neighbors for construction of his building, the same requirements as mentioned in paragraph 11 of this Resolution.

17. On 8 December 2010, Mr. Hasi filed a written request to the Municipal Court in Gjakova, thereby requiring a written consent for constructing a multi-storey building, as per requirements of the Municipality of Gjakova, and again received a negative reply, with the same reasoning that multi-storey construction is not allowed in the parcels in which he was planning to build.

18. On 24.01.2011, as a result of failure to submit consent of the Municipal Court (since in the meantime Mr. Hasi had obtained written consents of other neighbors), the Municipality of Gjakova – Directorate for Urbanism and Environmental Protection issued a **Conclusion** no. 07/351-8460, thereby terminating procedure initiated by Mr. Kastriot Hasi from Gjakova, for issuing a building permit for a multi-storey building in Gjakova, since the Applicant had not complied with the Municipality's request for supplementing the case file, namely he failed to produce the written consent of the neighboring Municipal Court in Gjakova.

19. In the legal advice of this Conclusion, it is provided that the discontented party is entitled to appeal against the conclusion, within a time limit of 30 days of its receipt, to the Ministry of Environment and Spatial Planning in Prishtina.

20. On 15 November 2012, Mr. Hasi received a reply from the Secretariat of the Judicial Council, in which it was stated that the Municipal Court in Gjakova and the Judicial Council on its behalf, cannot issue a positive consent for the development of the multi-storey building that Mr. Hasi is requesting as long as the Municipality of Gjakova does not have a detailed urban plan, whereas the design plan of the Municipality which is currently in force does not allow high-rise buildings, and therefore, neither the Municipal Court nor the Judicial Council can go beyond the law.

Applicant's allegations of constitutional violations

21. The Applicant claims that by conclusions of the Municipality and notifications of the Municipal Court, he has been denied his right to construct in his own property, although he has not specified clearly which constitutional right has been violated.

22. The Applicant further states that he feels he is victim of disagreements between the Municipal Court in Gjakova and the Municipality of Gjakova, because due to the bodies laying responsibility on each other, he cannot develop the building as planned.

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 as further specified in the Law and the Rules of Procedure.

24. In relation to the above, 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."*

25. In this respect, the Court finds that Mr. Hasi is a citizen of Kosovo, he is an individual, and he claims that Municipality's conclusions and notifications of the Municipal Court have violated his rights guaranteed by the Constitution, and therefore, it will review the Referral within the legal bounds of Article 113.7 (Individual Referrals) of the Constitution of Kosovo.

26. Consequently, in accordance with the foregoing paragraph, before addressing the Constitutional Court, Mr. Hasi should have exhausted all legal remedies available under the law.

27. Always in due account of the case files presented by the Applicant, the Court notes that the consents required by the Municipal Court in Gjakova are "documents required with a view of meeting conditions for obtaining a construction permit", therefore, it is clear that the essential request of the Applicant is related to the "CONSTRUCTION PERMIT", which in accordance with the applicable law is issued by the Municipality.

28. In determining whether the Applicant has exhausted legal remedies available, in relation to the subject matter of the issue raised before the Constitutional Court, the Court takes into consideration the applicable legislation, more specifically:

The Law on Local Self-Government (2008/03-L040)

Article 17. Own Competencies

17.1 Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in the applicable legislation in the following areas:

(.....)
d) implementation of building regulations and building control standards;

Article 74. Objectives of the Administrative Review

The administrative review of the municipalities has the following objectives:

b) to ensure the lawfulness of the activities of local self-government bodies;

Article 76

Supervisory Authorities

76.1. The ministry responsible for the local government is the supervisory authority unless; the responsibility for the review of municipalities is assigned by law to the responsible ministry or institution with respect to a specific field.

Statute of the Municipality of Gjakova

29. The Statute of the Municipality of Gjakova also contains relevant provisions on this issue, specifically the following provisions:

Article 1

Statute of the Municipality of Gjakova (hereinafter: the Statute) shall be the highest legal act of the Municipality, approved by the Municipal Assembly, in accordance with the Article 12 item 3 of the Law on Local Self-Government.

Article 55

Directorate for Urbanism and Environmental Protection

This Directorate shall be responsible for:

(.....)

i) Proceeding applications for issuance of construction permits, and determination of urban conditions for the implementation of MDP, UDP, Regulatory Plans and other plans approved by the Assembly;

j) provide records on sizes and land use of given construction parcels, or development complex and other features of construction – issuance of urban consent and urban permit,

k) Issuance of construction and use permits

30. Based on the legal provisions quoted above, the Court concludes that:

a) Construction permits are issued by the Municipality (Directorate for Urbanism and Environmental Protection)

b) Construction permits are an administrative act issued by a competent body, in administrative procedure;

c) In case of rejection of permit, or termination of procedure by conclusion, as is the situation in the present case, there is a legal remedy of appeal

d) That the legal remedy, according to the Law on Local Self-Government, is filed with the relevant Ministry, which in the present case, according to the legal advice of the Municipality, given with the Conclusion no. 07/351-8460, of date 24.01.2011, is the Ministry of Environment and Spatial Planning (hereinafter: MESP).

31. Furthermore, in case of a negative reply from the MESP, the discontented party is entitled to initiate an administrative conflict proceeding with the competent court, where the legality of administrative acts would be reviewed.

32. Based on the case files presented by the Applicant, the Court does not question the fact that the legal remedies available and provided by law were not used by Mr. Hasi, instead, he filed requests and complaints with the court, and then with the Judicial Council, persisting to obtain a

consent for construction of a building from the Municipal Court, as requested by the Municipality of Gjakova.

33. The Court notes that the purpose of the rule on the exhaustion of legal remedies provided by law is not only a constitutional obligation, deriving from the legal definition of Article 113.7, but it is also intended to afford the possibility to the national authorities, and more importantly to the courts and administrative bodies, to prevent and put right the alleged violations of the Constitution. This is also the position of the European Court of Human Rights and it is based on the assumption reflected in Article 13 of the European Convention for Protection of Human Rights, according to which the national legal order will provide for effective legal remedy for the violation of the rights that are guaranteed by the Convention (Selmouni v. France [GC], § 74; Kudła v. Poland [GC], § 152; Andrášik and others v. Slovakia [Judg.]).

34. The Constitutional Court has a subsidiary role in comparison to regular national judicial or administrative systems, and it is desirable that domestic courts or competent administrative bodies with effective decision making competence have initially a possibility to decide on issues of compliance of domestic law with the Constitution (see Decision of ECHR *A, B and C v. Ireland* [GC], § 142).

35. In these circumstances, the Applicant has not demonstrated that he has exhausted all legal remedies available and provided by law, and therefore, in compliance with Rule 36 paragraph 1 item a, the Court concludes that it must reject the Referral as premature, and

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, on 6 March 2013, 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
Dr. sc. Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 130/12, Xhymshit Xhymshiti, date 16 April 2013- Constitutional review of the Notification of the Office for Prosecutorial Assessment and Verification ZZVP/12/213, dated 23 November 2012.

Case KI 130/12, Resolution on Inadmissibility of 18 March 2013

Keywords: individual referral, inadmissible referral, administrative conflict, non-exhaustion of legal remedies, right to work

The Applicant filed the Referral based on Article 113.7 of the Constitution of Kosovo, claiming that his constitutional rights have been violated by the decision of Evaluation Panel of the Kosovo Prosecutorial Council. The Applicant among others claimed that by not being recommended for the position of the Prosecutor in Gjilan and Ferizaj, the right to work and representation in public institutions employment have been violated.

The Court found that the Applicant has not exhausted all legal remedies as provided by Article 113.7 of the Constitution. The Court further reasoned that the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violations of the Constitution. Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law, and Rule 36 (1) a) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI130/12
Applicant
Xhymshit Xhymshiti
Constitutional review of the Notification of the Office for Prosecutorial Assessment and Verification ZZVP/12/213 of 23 November 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Xhymshit Xhymshiti, a practicing lawyer from Gjilan.

Challenged decisions

2. The Applicant challenges the notification ZZVP/12/13 of the Evaluation Panel of the Office for Prosecutorial Assessment and Verification of 23 November 2012, served on the Applicant on 24 November 2012, and the decision of the Panel for Reconsideration of Kosovo Prosecutorial Council, KPK/82, of 30 November 2012.

Subject matter

3. The subject matter of the Referral is the alleged violation of the right to work by the Evaluation Panel of the Office for Prosecutorial Assessment and Verification, and the constitutional interpretation of 25 years of experience of the Applicant in Kosovo judiciary.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution; Articles 20 and 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Rule 36 (1) a) of the Rules of Procedure of the Constitutional Court of Kosovo (hereinafter: the Rules of Procedure).

Procedure before the Court

5. On 18 December 2012, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 10 January 2013, the President by Decision No. GJR.KI130/12 appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same date, the President by Decision no.KSH.KI130/12, appointed the Review Panel composed of Judges Robert Carolan (presiding), Altay Suroy and Enver Hasani.

7. On 1 February 2013, the Applicant submitted additional documents to the Court.

8. On 28 February 2013, the Constitutional Court informed the Applicant, the Office for Prosecutorial Assessment and Verification and the Kosovo Prosecutorial Council, of the registration of the Referral in the Court's respective register.

9. On 13 March 2013, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the inadmissibility of the Referral.

Proceedings before the Court

10. On 2 May 2012, the Kosovo Prosecutorial Council announced vacancies for prosecutors in entire territory of the Republic of Kosovo including also the municipal prosecution offices in Gjilan and Ferizaj.

11. The Applicant applied for the position of prosecutor in the municipal prosecution office in Gilan and Ferizaj, and on 24 November 2012 he was informed by the Evaluation Panel of the Office for Prosecutorial Assessment and Verification that he was not recommended for the position he had applied for and that other candidates proved to be more successful.

12. The Applicant filed a request to the Panel for Reconsideration of the Kosovo Prosecutorial Council, and on 4 December 2012 the said Panel

rejected the Applicant's request for reconsideration reasoning that it was proven that Applicant had fewer points than the other candidates, who were recommended by the Evaluation Panel.

Applicant's allegations

13. The Applicant alleges that the Evaluation Panel and the Panel for Re-consideration of the Kosovo Prosecutorial Council, through their notifications respectively their decisions, by not recommending the Applicant for the position of Prosecutor in Gjilan and Ferizaj, have violated his right to work as well as the Article 61 [Representation inPublicInstitutionsEmployment] of the Constitution,

14. The Applicant alleges that his Referral has constitutional basis because when applying for the position of prosecutor he had provided evidence and certified facts related to his 25 years of experience in Kosovo judiciary.

15. The Applicant requests from the Court the interpretation of his 25 years of experience in Kosovo judiciary, and to ascertain violation of his rights by the Evaluation Panel and by the Panel for Reconsideration, when they assessed that the Applicant has not reached the required number of points in order to be recommended for the position of municipal prosecutor in the municipal prosecution office in Gjilan or Ferizaj.

16. The Applicant in his Referral to this Court has provided evidence of his experience as a lawyer in the Kosovo judiciary, including his experience as prosecutor and judge.

17. Moreover, the Applicant alleges that "*it is very true that the proposed candidates do not have even one year of work experience in prosecution.*"

Assessment of 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, and further specified by the Law on Constitutional Court and the Rules of Procedure.

19. 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 remedies provided by law"

20. The Court also refers to Articles 10.1 and 11 of the Law No. 03/L-202 on Administrative Conflicts which provide:

"Based on the Law, a natural and legal person has the right to start an administrative conflict, if he/she considers that by the final administrative act in administrative procedure, his/her rights or legal interests has been violated."

"Administrative conflict, according to the lawsuit[3], shall be solved by the Supreme Court of the Republic of Kosovo."

21. From the documents submitted, it is clear that the Applicant has not initiated an administrative conflict based on the legislationin forcein Kosovo, and consequently has not exhausted all legal remedies in accordance with Article113.7oftheConstitution.

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 violati2on 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: AABRIINVEST 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. The Court similarly decided, on 18 May 2011, in the Resolution on Inadmissibility in case No. 114/10, Applicant Vahide Badivuku - Constitutional Review of the Kosovo Judicial Council Notification on the reappointment of judges and prosecutors, No 01/118-713, of 27 October 2010.

24. It follows that the Referral is inadmissible due to the non-exhaustion of all legal remedies in compliance with Article 113.7 of the Constitution.

FOR THESE REASONS

[3]The Law No.03/L-202 on Administrative Conflict uses the term "indictment".

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law and in compliance with Rule 36.1 (a) of the Rules of the Procedure, on 13 March 2013, unanimously:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. This Decision is effective immediately.

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

KO 131/12, Dr.Shaip Muja and 11 Deputies of the Assembly of the Republic of Kosovo, date 18 April 2013- Constitutional Review of Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, adopted by the Assembly, dated 13 December 2012

Case KO 131/12, Judgment of 6 March 2013

Keywords: Institutional request, interim measure, holding the hearing session, Right to Work and Exercise Profession

The Applicants challenge the constitutionality of Articles 18, 19, 41 and 60 of the Law on Health, Nr. 04/L-125, adopted by the Assembly of the Republic of Kosovo on 13 December 2012.

In their referral, the Applicants challenge Article 41 of the Law on Health, which in paragraph 1 prohibits every health professional, employed in any institution of the public health, including those working part time, to work in private institution.

The Applicant has requested imposition of interim measure of the suspension of the implementation of the Law, until the final decision of the Court on this Referral.

On 24 December 2012, the Court approved the Applicant's request for interim measure and SUSPENDED the implementation of Articles 18, 19, 41 and 60 of the Law on Health until 31 January 2013.

On 7 March 2013, the Court held the hearing session, where were invited the Applicant and the parties in the proceedings.

Taking into account the arguments presented by the parties during the proceedings and after reviewing the challenged provisions of Articles 18 and 19 of the Law on Health in light of these arguments, the Court finds that the Applicants did not substantiate their claim as to the alleged incompatibility of Articles 18 and 19 with the Constitution. The Court concludes that there is nothing in the Articles to imply that there is a breach of the Constitution.

With regard to Article 60 of the Law on Health, the Court notes, as became evident during the public hearing, that the allegations raised by the Applicants are based on the text of Article 60 of the Draft Law that consequently changed. The Court, therefore, finds that the Applicants' arguments in respect of the alleged incompatibility of Article 60 with the Constitution are not relevant.

In view of the above considerations, the Court finds that Articles 18, 19, and 60

of the Law on Health adopted by the Assembly on 13 December 2012 are compatible with the Constitution.

The Court, on 15 March 2013, decided to declare that Articles 18, 19 and 60 of the Law on Health, No. 04/L-125, of 13 December 2012, are compatible with the Constitution of the Republic of Kosovo; Article 41 paragraphs 1, 5 and 6 of the Law on Health, No. 04/L-125, of 13 December 2012, are incompatible with Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo; Article 41 paragraphs 1, 5 and 6 of the Law on Health, No. 04/L-125, of 13 December 2012 is invalid;

Holds that the Court's Decision Extending the Interim Measures of 24 January 2013, suspending the implementation of Articles 18, 19,41 and 60 of the Law on Health, No. 04/L-125, of 13 December 2012, is terminated upon the entry into force of this Judgment;

JUDGMENT
in
Case No. KO131/12
Applicant
Dr. Shaip Muja and 11 Deputies of the Assembly of the Republic of Kosovo
Constitutional Review of Articles 18, 19, 41 and 60 of the Law on Health, No.04/L-125, adopted by the Assembly on 13 December 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicants are the Deputies of the Assembly of the Republic of Kosovo: Dr. Shaip Muja, Nait Hasani, Ramiz Lladrovci, Petar Miletic, Azem Syla, Time Kadrijaj, Xhevdet Neziraj, Kymete Bajraktari, Kurtan Kajtazi, Hydajet Hyseni, Sasa Milosavlevic and Sala Berisha.

Challenged law

2. The Applicants challenge the constitutionality of Articles 18, 19, 41 and 60 of the Law on Health, adopted by the Assembly of the Republic of Kosovo on 13 December 2012.

Subject matter

3. The subject matter of the Referral is the assessment by the Court of the constitutionality of Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, of 13 December 2012 (hereinafter: the “Law on Health”).

4. The Applicant further requested the Court to impose interim measures suspending the implementation of the Law on Health until the final adjudication of the Referral.

Legal basis

5. Article 113.5 of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution"), Articles 22, 27 and 42 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 15 January 2009 (hereinafter: the Law) and Rules 54, 55 and 56, 62, 64 and 65 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 20 December 2012, the Applicants submitted the Referral to the Constitutional Court. In support of the Referral, the Applicants attached copies of the Law on Labor (No. 03/L-212), Law on Prevention of the Conflict of Interest in Exercising Public Function (No. 02/L-133), and Law against Discrimination, which according to the Applicants are relevant for the constitutional review.

7. On 20 December 2012, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur, and on the same day appointed the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

8. On 21 December 2012, the Court communicated the Referral to the Assembly of the Republic of Kosovo.

9. On 21 December 2012, the Court received a copy of the Law on Health, adopted by the Assembly of Kosovo.

10. On 24 December 2012, the Court granted the Applicants' Request for Interim Measures and suspended the implementation of Articles 18, 19, 41 and 60 of the Law on Health until 31 January 2013.

11. On 26 December 2012, the President of the Assembly of the Republic of Kosovo submitted to the Court the following documents:

    a. the Law on Health that was adopted by the Assembly;

b. the Report with the recommendation of the Functional Committee for Health, Labour and Social Welfare on the Draft Law on Health;

c. other recommendations submitted by other Committees of the Assembly.

12. On 10 January 2013, the Minister of Health sent a letter to the Court requesting:

a. To be granted status of an interested party in the proceedings; and

b. In case that the above request was rejected, to be given the opportunity to submit in writing an *amicus curiae* brief.

13. On 11 January 2013, the Court informed the Ministry of Health that its request will be reviewed by the Court.

14. On 14 January 2013, the Court received comments on the Law on Health by the Association for Deaf Persons of Kosovo, at their self-initiative. In these comments, the Association described the position of deaf persons in Kosovo and emphasized the fact that they have been an active part in the process of drafting the proposed law, since by their initiative in the Draft law has been included a special provision enabling deaf persons to have complete medical access to the medical institutions through the sign language. Later this provision was removed by the Functional Parliamentary Committee. The Association requests to reincorporate this provision in the Law, otherwise deaf persons would be discriminated against regarding their right of access to health institutions. Moreover, the Association notes the fact that by Decision of the Government, no. 06/146 of 29 September 2010, signed by the Prime Minister of Kosovo, sign language was made an official language.

15. On 24 January 2013, the representative of the Applicants submitted to the Court copies of their identification cards and a copy of the duly signed authorization.

16. On the same day, the Court received an *amicus curiae* brief from the Ministry of Health and the Health Trade Union Federation of Kosovo.

17. Still on the same date, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the:

a. Decision to extend the time limit of the interim measure imposed by the Court in its initial Decision of 24 December 2012 by a further period of three months until 30 April 2013;

b. Decision on the request for leave to file an *Amicus Curiae* brief;

c. Decision to hold a public hearing on 7 March 2013.

18. On 24 January 2013, the full Court unanimously endorsed the recommendations of the Review Panel.

19. On 7 March 2013, the Court held a public hearing whereby the following were invited, present and heard:
    a. the representative of the Applicants, Dr. Shaip Muja;

    b. the representative of the Assembly of the Republic of Kosovo, Mr. Xheladin Hoxha;

    c. the Ministry of Health, represented by Minister Ferid Agani;

    d. the Health Trade Union Federation of Kosovo, represented by its head Mr. Blerim Syla; and

    e. the Ombudsperson, represented by Mr. Isa Hasani.

20. The representative of the Assembly, during the public hearing, provided the Court with the following documents:
    a. the Decision on the adoption of the Law on Health of 13 December 2012,

    b. the Report on the Recommendation of the Committee for Health, Work and Social Welfare to the Assembly to adopt the Draft Law on Health of 13 December 2012; and

    c. the Law on Health.

21. The representative of the Ministry of Health, during the public hearing, provided the Court with the World Bank comments on the revised Draft Health Law of 28 September 2011.

22. The representative of the Health Trade Union Federation of Kosovo, during the public hearing provided the Court with the following documents:

a. The Proposal on amendments for the Draft Law on Health; and

b. A letter of support for the Federation sent by the European Federation of Public Service Unions (hereinafter: "EPSU").

23. The representative of the Ombudsperson, during the public hearing, provided the Court in writing with their opinion as to the challenged articles of the Law on Health.

24. On 8 March 2013, the Assembly submitted to the Court a transcript of the plenary session where the Law on Health was approved.

25. On 15 March 2013, the Court deliberated and voted on the case.

Summary of facts

26. The Draft Law on Health was sponsored by the Ministry of Health (MoH) and proposed by the Government of Kosovo to the Assembly of Kosovo. It was approved by the Assembly of Kosovo in first reading on 28 June 2012.

27. On 9 July 2012, a public hearing on the Draft Law was organized in Pristina.

28. On 6 November 2012, the Committee on the Rights and Interests of Communities submitted to the Functional Committee on Health, Labor and Social Welfare of the Assembly a recommendation that the Draft Law does not affect the rights and interest of communities.

29. Furthermore, on 12 November 2012, the European Integration Committee found that the Draft Law is in line with the *Acquis Communautaire*. Also, the Committee for Budget and Finance presented the budgetary costs of the Draft Law for 2013 and 2014.

30. On 27 November 2012, the Legislation Committee of the Assembly sent Recommendation (04/3239/L-125) and stated its position that the Draft Law on Health cannot be proceeded with further review and consequently suggested to the Functional Committee on Health, Labor and Social Welfare to review amendments 1, 3, 12, 34, 48, 49, 50, 51 and 52.

31. On 3 December 2012, the Committee on Health, Labor and Social Welfare reviewed the comments of the Legislation Committee and "by majority vote approved the final Report on the Draft Law on Health."

32. On 7 December 2012, the Committee on Health, Labor and Social Welfare submitted its Report on the Draft Law on Health with a recommendation to the Assembly.

33. On 13 December 2012, the Assembly debated in second reading the Draft Law on Health and approved the following amendments to the Draft Law: 2, 3A, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30A, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50A, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60.

34. Consequently, the Draft Law was adopted with 43 (forty-three) votes "in favor", 18 (eighteen) votes "against" and 3 (three) "abstentions".

35. On 17 December 2012, the Health Trade Union Federation of Kosovo submitted to the Ombudsperson a request to initiate proceedings for the constitutional review of Article 41 of the Law on Health adopted on 13 December 2012, alleging that Article 41 is in contradiction with the Constitution, in particular with Article 49 [Right to Work and Exercise Profession] of the Constitution.

36. On 21 December 2012, the President of the Assembly submitted to the President of the Republic the approved Law on Health for promulgation.

Applicants' allegations

a) Written submissions

37. In their referral the Applicants challenge Article 41 of the Law on Health which, in its paragraph 1, prohibits any health professional who is employed in any public health institution, including those with part time employment, to work in private practice.

38. Article 41 of the Law on Health, entitled *"Preventing the conflict of interest",* reads as follows*:*

"Article 41

1. Health professionals employed in the public sector on full time or part time basis don't have the right to work in private healthcare institutions.

2. It is strictly prohibited to refer patients from a secondary and tertiary public healthcare institution to a private healthcare institution, for reasons that cannot be justified with medical arguments, regardless of the waiting list.

3. Any informal or formal financial or other type of award to the health professional employed in the public health sector including referral of the citizen or resident from public to private healthcare institution, and profitable relationship with the pharmaceutical industry, is strictly prohibited.

4. Violators of the provisions of this article will be subject to penalties or legal action as defined in this law and a separate sub-legal act issued by the Ministry.

5. Public health institutions have the right to allow their health professional employees to exercise their private healthcare activities within the public health institution.

6. The private health activity from paragraph 5 of this Article shall be implemented on the basis of the special sub-legal act issued by the Ministry."

39. With regard to the challenged Article 41, the Applicants allege the following "*Article 41 of the Draft Law on Health [...], is in full contradiction with international conventions on human rights applied directly in Kosovo (Article 22 of Constitution)*. However, the Court notes that the Applicants did not specify which conventions.

40. The Applicants further argue that, at the same time, Article 41 of the Law on Health violates Article 49 of the Constitution that reads:

"Article 49 [Right to Work and Exercise Profession]
1. The right to work is guaranteed.
2. Every person is free to choose his/her profession and occupation."

41. In addition, the Applicants also challenge Articles 18 and 19 of the Law on Health arguing that those provisions are in contradiction with the

mere text of that Law, but also with the Law on Public and Private Partnerships.

42. Article 18 of the Law on Health entitled "*Primary healthcare"* reads as follows:

1. Primary healthcare shall be provided in compliance with the policies, plans and standards set by the sub-legal act issued by the Ministry.

2. Primary healthcare includes:

2.1. Health promotion, prevention, early detection and diagnosing, treatment, and rehabilitation related to diseases, disorders and injuries, including small surgical interventions;
2.2. Specific prevention of children and youth, in particular in primary, secondary and high schools in the territory of the municipality;

2.3. Protection and advancement of public health, including seroprophilaxy, vaxio-prophilaxy, and chemo-prophilaxy in compliance with law, as well as systematic health education of the population;

2.4. Promotion of oral health and dental healthcare;

2.5. Early diagnosing and treatment of tuberculosis;

2.6. Organization of emergency medical services as part of the unique system of emergency medical services.;

2.7. Child and mother health care services and family planning.

2.8. Mental health services.

3. Municipalities are responsible for public primary healthcare and for assessment of the health status of population in their territory.

4. The municipalities are obliged to implement priority health promotive and health preventive measures of healthcare.

5. Primary healthcare services are provided and implemented within the framework of family medicine services, in compliance with the sub-legal act issued by the Ministry.

6. Constitution of a Family Medicine Team is set by the sub-legal act from paragraph 1 of this Article.

7. Every citizen and resident with health difficulties is obliged to initially visit the family doctor, except in urgent cases.

8. Every citizen and resident should choose one family doctor.

9. Every citizen and resident has the right to choose and change the family doctor within his municipality.

10. Primary healthcare professionals collaborate with health professionals in secondary and tertiary healthcare in compliance with this Law;

11. In order to increase the quality of healthcare services, primary level healthcare institutions shall ensure inter-sector cooperation with social welfare and education services, public security authorities and specific professional organizations, as well as with governmental and non-governmental humanitarian organizations.
12. Standards for organizing and functioning of the family medicine service shall be set by the sub-legal act from paragraph 1 of this Article.

13. In order to support the family medicine services, the Ministry shall supervise and regulate the integrated services of primary healthcare, in compliance with this Law."

43. Article 19 of the Law on Health entitled "*Secondary healthcare*", reads:

> *"1. Secondary healthcare includes hospital, outpatient healthcare: diagnostic, therapeutic, rehabilitation, emergency transportation, and public healthcare.*
>
> *2. Organization and activities of healthcare institutions from paragraph 1 of this Article are defined by sub-legal acts issued by the Ministry."*

44. Finally, the Applicants challenge Article 60 of the Law on Health, which according to them contravenes with the Law on Public Enterprises, since it defines healthcare institutions as non-profit institutions.

45. Article 60 of the Law on Health entitled *"Financing healthcare institutions"* reads as follows:

> "*1. Healthcare institutions, physical and juridical persons exercising healthcare activities are obliged, for each patient, to document the cost as well as the type, the volume, the quality and the price of health services.*
>
> *2. Healthcare institutions and organizations receiving public funds for implementation of healthcare are obliged to keep accounts and records based on the law, and to provide the necessary information to the authorized bodies."*

46. The Applicants further claim that the Law on Health contains provisions that put healthcare employees in unequal positions to employees of other public institutions.

b) Applicants' allegations given at the public hearing

47. The representative of the Applicants raised an issue at the hearing that the procedure for adoption of the Law on Health was not followed during the second reading of the Draft Law. The Applicants' representative claims that the Committee for Legislation had made several amendments to the Draft Law on Health that allegedly were not taken into account.

48. The Applicants' representative further argued that the adopted Law on Health will ruin the public health system. He argued that the practice that the Law on Health introduces does not exist anywhere in the region or beyond.

49. He considers that the issue of abuse by some health professionals employed in the public sector who referred patients to private health care institutions in order to gain personal benefit should be addressed with more restrictive measures taken by the management.

50. The Applicants' representative added that not all the health employees abused their position neither can they be responsible for problems in the public health system.

51. According to him there is a need for development of an appropriate monitoring and evaluation procedure. The Applicants' representative considers that a new health strategy that will introduce a health information system by 2015 will remedy abuse by other measures.

52. Furthermore, the representative of the Applicants also stated that paragraph 5 of Article 41 of the Law on Health is in itself contradictory because it allows the health employees employed in the public sector to exercise private supplementary work within the public health care institution but at the same time they are not allowed to exercise private medical practice outside the public hospitals. He further argued that paragraph 5 of Article 41 is not possible to implement because the nature of the work of the public health institutions which are open 24 hours a day.

53. The Applicants' representative did not provide a clear answer to the Court as to what they are challenging with regard to paragraphs 2, 3 and 4 of Article 41 of the Law on Health.

54. Instead he argued that Article 41 of the Law on Health as a whole is incompatible with Article 49 of the Constitution. In addition, the representative of the Applicants stated that the Labor Law does not prohibit employees to do supplementary work.

55. As to why the Applicants consider articles 18, 19 and 60 to be unconstitutional, the representative of the Applicants did not provide the Court with a clear answer. He referred to the issues related to these Articles that were in the Draft Law on Health.

Response from the Ministry of Health

a) Written submission

56. In their written submission of 24 January 2013, the MoH recommended the Court to reject the Applicants' referral as unfounded for the reasons summarized as follows.

57. Concerning the Applicants' argument that Article 41 of the Law on Health violates Article 49 of the Constitution, the MoH stated that "*the rights guaranteed by the Constitution are not absolute rights, and can be restricted in accordance with conditions laid down in Article 55 of the Constitution*." (Article 55 is quoted below in the text of this Judgment).

58. The MoH further considered that Article 41 of the Law on Health does not interfere with the rights guaranteed by Article 49 of the Constitution because it does not prohibit any doctor from exercising his profession.

59. Even assuming that there has been interference with rights guaranteed by Article 49 of the Constitution, the MoH considered that such interference is justified under Article 55 of the Constitution.

60. In elaborating the proportionality test the MoH stated that "*the legitimate aim of prohibiting simultaneous employment of health care professionals in the public and private sectors is the enjoyment of rights of citizens to health care, as provided by Article 51.1 of the Constitution […]*".

61. The MoH further argued that "*the simultaneous employment of health care professionals in public and private has been proven to be harmful to the interest of citizens*." Thus, according to the MoH, the "aim of the obligation of choosing employment between the public and private sector is to eliminate this type of abuse of the working position in the public sector for personal benefit, by referring patients from the public to the private sector, which per se is in contradiction with the patients' rights to chose between the public and private health care services."

62. As regards to the necessity of the provision, the MoH *inter alia* argued that the "citizen cannot wait until a physician ends his/her working hours in the public sector and only then uses his/her services as a physician in the private sector." The MoH added that, since the health care service is principally in the public interest, health care for citizens, as a normative value at the constitutional level, normatively enjoys supremacy over the freedom of a health care professional to acquire material benefit and exercise his/her profession.

63. The MoH also added that the limitation at issue is not absolute, since Article 41.5 of the Law on Health shall allow health care professionals employed by public health institutions to exercise private health care within those public health institutions. The MoH argued that "this is aimed at eliminating the occurrence of deviating patients to private clinics with a view of obtaining material benefit."

64. Therefore the MoH considerd that, if the Court rules that Article 41 of the Law on Health interferes with Article 49 of the Constitution, this interference is justified in accordance with Article 55 of the Constitution.

65. The MoH objected to the Applicants' argument that the Law on Health contains provisions that put health care professionals in an unequal position vis-à-vis employee in other public institutions.

66. In addition, the MoH objected to the Applicants' arguments that Articles 18, 19 and 60 of the Law are in collision with other legislation in force. The MoH, in particular, emphasized that the task of the Court is to review the constitutionality of any law, but not the conflict of the laws that are in force.

b) Response given at the hearing

67. With regard to the Applicants' allegations related to Articles 18, 19 and 60 of the Law on Health, the Minister of Health (hereinafter: the "Minister") stated that the Applicants' objections relate to the earlier text of these Articles that existed in the Draft Law, but that the content of those articles were amended by the Functional Committee and that the Assembly had approved the amended version of Articles 18, 19 and 60. Contrary to the Applicants' allegations, nowhere in the adopted text of the Law on Health notions such as Public Non-Profitable Organizations or Management Board are used.

68. As to Article 41 of the Law on Health, the Minister argued that, while the prohibition of dual medical practice may look harsh, there was no other possibility to prevent a possible conflict of interest in the exercise of the medical profession.

69. In reply to a question of the Court whether other measures to prevent possible conflict of interest had been considered, the Minister stated that due to the limited budget and lack of an appropriate monitoring mechanism the prevention of dual medical practice prescribed in Article 41.1 of the Law was the only option in order to avoid financial loss by the citizens. He added that other measures such as disciplinary measures for those that abuse the profession are inadequate due to the lack of medical inspectors since there are only 12 inspectors for the entire country.

70. The Minister reiterated that Article 41 of the Law on Health does not violate the Constitution, because it does not limit a person's right to work, but it only intends to regulate the labor relations within the public health care sector. Even if this Article could be seen as a limitation of the right to work, this limitation is in accordance with Article 55 of the Constitution.

71. As to paragraph 5 of Article 41 of the Law on Health, the Minister stated that the same practice is used by the United Kingdom and the Ministry of Health has assessed that it is much easier to control the health

employees working within the public health care sector, even if they would work privately within it.

72. With regard to the Applicants' allegations that the procedure for adoption of the law was not followed, the Minister argued that the Applicants did not raise that issue in the Referral. Notwithstanding that, he emphasized that all recommendations of the Legislation Committee had been reviewed and approved by the Committee for Health, Work and Social Welfare prior to the second reading by the Assembly.

The Trade Union of Health Federation of Kosovo

a) Written submissions

73. In their written submissions of 24 January 2013, the Trade Union of Health Federation of Kosovo (hereinafter: "TUHF") stated, *inter ali*a, that the process that preceded the adoption of the Law on Health was not transparent.

74. The TUHF further stated that the adoption of the Law on Health Insurance was more important than the Law on Health, since Kosovo has the Law on Health from 2004.

75. The TUHF also stated that they considered the experience from the Region related to dual medical practice and that they made several proposals for amendments to the Draft Law on Health (including the challenged Articles 18, 19, 41 and 60).

76. The TUFH submitted a petition with 6,000 signatures against the Draft Law on Health to the President and the Ombudsperson. The TUFH also submitted letters to 120 deputies of the Kosovo Assembly informing them about their objections to the Draft Law.

77. The TUFH also mentioned that the Law on Health opens the possibility of privatization of public health institutions.

78. According to the TUFH, the Law on Health opens the possibility for the introduction of corruption within public health institutions. At the same time it harms the state health polices, causing a potential flee of experts from the public health institutions to private care institutions. They also argued that the Law violates the rights of health workers implying that they caused the failure of the public health system.

b)Arguments given during the hearing:

79. During the hearing, the TUFH representative stated that countries in the region do not prohibit supplementary work in the private sector and that the Kosovo Law on Labor does not provide for such prohibition.

80. The TUFH representative also stated that the Law on Health will create more expenses for the population and will hinder access to the public health care sector.

81. As to whether the TUFH was included in the procedure for adopting the Law on Health, its representative stated that they were only once invited publicly to be consulted in the Assembly and that they had also expressed their concerns through protests and written submissions to various institutions.

The Assembly of the Republic of Kosovo

82. The representative of the Assembly stated that the Law on Health was adopted in accordance with the required procedures by the Constitution and the Rules of Procedure of the Assembly.

83. However, the representative of the Assembly did not provide the Court with an answer as to whether the Assembly had considered any other measure that would prevent the alleged conflict of interest in exercising the medical practice nor whether the Assembly had considered how the states in the region had regulated this issue.

84. The representative of the Assembly stated that he was authorized by the Assembly to answer question as to the procedure followed by the Assembly and with regard to the content of the Law. In any event, since 90% of the provisions proposed by the Government (i.e. MoH) had been approved without any changes, the questions related to alternative measures for addressing the conflict of interest and/or issue of regional practices should be answered by MoH and the Government and not by the Assembly.

The Ombudsperson

85. During the hearing, the representative of the Ombudsperson stated that the Ombudsperson had not found violations of the Constitution with regard to the challenged articles of the Law on Health. The reason for this was that they had received several complaints from citizens in respect of the misuse, when health employees referred citizens from a public health care institution to a private health care sector institution

and, therefore, the Ombudsperson welcomed the Law regulating the current misuses.

86. As to whether the Ombudsperson had received any request for challenging the Law on Health, the representative of the Ombudsperson stated that they had received a request from the TUFH to challenge the Law on Health before the Constitutional Court, however, the Ombudsperson did not consider that the Law in questionwas in violation of the Constitution.

Relevant Background

87. In Kosovo, prior to the adoption of the Law on Health in December 2012, the Kosovo Health Law No. 2004/4 was in force.

88. Section 96 of the Kosovo Health Law provided that Health workers may work independently in licensed Health Care Institutions if they were members of the General Health Council, and if they were licensed for a particular health activity.

89. Moreover, it is also worth to recall Section 98 of Chapter XIV [Private Health Care] of the Kosovo Health Law reading as follows:"

"Section *98*

98.1. A health worker from Section 96 can be founder of only one Private Health Care Institution.

98.2. A health worker from Section 96, full time employed in a Public Health Care Institution, can exercise a private health care activity, after regular working hours.

98.3. A Public Health Care Institution may rent its facilities and equipment, for use after regular working hours, for private health care activities, in accordance with the sub-legal act issued by the Ministry of Health. "

90. During the proceedings before the Court, the practice of the countries in the region was mentioned on several occasions.

91. The Court notes that, for instance, in the Federation of Bosnia and Herzegovina, one of the two Entities of Bosnia and Herzegovina, the Minister of Health was authorized under the Law on Health (Official Gazette 46/10) to issue a "Regulation on the method, procedures and conditions of organizing additional work of healthcare employees in the

healthcare institution or private practice". This Regulation was published in the Official Gazette of the Federation of Bosnia and Herzegovina on 13 July 2012 under no. 60.

92. Article 2 of this Regulation provides that the healthcare worker may perform additional work in the case that he has the title of "specialist" and at least 10 years experience as specialist in his particular field. The healthcare workers, specified in Article 2 of the Regulation, may perform additional work in the healthcare institution where they are employed, in another healthcare institution in any form of ownership, or with another healthcare employee of the same specialization, who performs a registered private healthcare activity.

93. In the Republic of Croatiabased on the Law on Health Protection of Croatia (Official Gazette 150/08, 71/10 139/10), the Minister of Health and Social Welfare issued a Regulation on terms for issuing permits to health workers to exercise supplementary work."

94. According to Article 2 of this Regulation, this permit may be issued only to those employees who have the title of specialist and only to those healthcare institutions which have contracts with health insurance institutions. This permit may be issued to a maximum of half of the healthcare professionals of the same activity.

95. The Constitutional Court of the Republic of Croatia by Decisions no: U-II-787/1994, U-II-290/1995 and U-II-120/1998, dated 17 March 2000, addressed the issue of unequal treatment of health professionals of the same specializations by basing it on the level of education in the exercise of the right to perform additional work in private health care institutions. The Court found a violation of Article 54 of the Constitution of Croatia that guarantees the right to work and the freedom of employment.

96. The Law on Health of the Republic of Macedonia (Former Yugoslav Republic of Macedonia Official Gazette No. 43/12, dated 23 March 2012), in its Article 222, specifies the conditions and criteria for the performance of additional work by healthcare employees as follows: "*Healthcare employees – specialists – employed in the healthcare institution to perform health consultations and specialist activity, may offer health services as additional work for a maximum of 8 hours per week, after the end of regular working hours in accordance with the work license of the institution where he is employed or in another healthcare institution that is registered for the same activity*."

97. As to the above examples of the practice in countries in the region, it is not for the Court to consider the adequacy of any particular practice or regulatory mechanism to address the issue of dual practice in the health sector in Kosovo. While a simple research shows that there are many examples of practices to regulate the issue of dual medical practice in these countries, this issue is outside the scope of the Court's jurisdiction.

Admissibility of the Referral

98. 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.

99. In this respect the Court refers to Article 113.1 [Jurisdiction and Interested Parties] of the Constitution which provides that: *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".*

100. Furthermore, the Court refers to Article 113.5 of the Constitution which provides 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".*

101. In the present case, the Court notes that the Referral has been submitted by 12 Deputies of the Assembly requesting the assessment of the compatibility of the Law on Health with the Constitution as to its substance only.

102. The Court notes that in their referral the Applicants did not raise any arguments as regards the alleged violation of the procedure of the adoption of the Law. Likewise, the representative of the Applicants failed to substantiate their arguments with regard to an alleged violation of the procedure during the public hearing held by the Court.

103. The Court further notes, based on the documents submitted, that the Law on Health was adopted by the Assembly on 13 December 2012, and the Referral was submitted with the Court on 20 December 2012. Therefore the Referral is within the legal time limit of eight (8) days, provided by Article 113.5 of the Constitution.

104. 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 law of the Assembly, the Court concludes that the Applicant has complied with the admissibility requirements.

105. This means that the Court is able to consider the merits of the complaint set out in the Referral. The scope of the merits will be limited to Article 113.5 of the Constitution i.e. to decide whether the challenged Articles of the Law on Health, adopted by the Assembly of Kosovo, are constitutional.

Constitutional assessment of the Referral

106. When assessing the Referral, the Court must take into account that, in general, the entire legislation is assumed to be constitutional, until the opposite is proven. The mandate of the Court is only to review the constitutionality of a decision or of a legislative act and not to review its legality or whether it is supported by good public policy.

107. To assess whether a law or one or more of its provisions violate the Constitution, the Court should take into account the following provisions of the Constitution:

a. Article 16 [Supremacy of the Constitution] of the Constitution

"1. The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.

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."

b. Article 4.2 [Form of Government and Separation of Power] of the Constitution

"*The Assembly of the Republic of Kosovo exercises the legislative power."*

c. Article 65 [Competencies of the Assembly] of the Constitution

"The Assembly of the Republic of Kosovo: (1) adopts laws, resolutions and other general acts;"

d. Article 74 [Exercise of Function] of the Constitution

"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."

I. As to Articles 18, 19 and 60 of the Law on Health

108. The Applicants argue that the contested Articles 18 and 19 are in conflict with the mere text of the Law on Health and with the Law on Public and Private Partnership.

109. The MoH objected to the Applicants' arguments, and, in particular, emphasized that the task of the Court is to review the constitutionality of any law, but not a conflict of the laws that are in force.

110. The Court notes that the Applicants did not elaborate as to why they consider that these provisions are not compatible with the Constitution.

111. Moreover, the Applicants, in their written and oral submissions, did not mention or imply which Constitutional provisions are not respected as a result of the adoption of Articles 18 and 19 of the Law on Health.

112. With regard to the alleged incompatibility of Article 60 of the Law on Health with the Constitution, the Court notes that the Applicants' main argument was that this provision is in conflict with the Law on Publicly Owned Enterprises.

113. The MoH objected to the Applicants' arguments on Article 60 of the Law, while the Minister argued at the hearing that it is true that the Applicants' objections relate to the earlier text of the contested Articles of the Draft Law, but that the content of those Articles were amended by the Functional Committee and that the Assembly had approved the amended version of Articles 18, 19 and 60. The Minster also stated that nowhere in the adopted text of the Law on Health notions such as "Public Non-Profitable Organizations" or "Management Board" are used.

114. In sum, taking into account the arguments presented by the parties during the proceedings and after reviewing the challenged provisions of

Articles 18 and 19 of the Law on Health in light of these arguments, the Court finds that the Applicants did not substantiate their claim as to the alleged incompatibility of Articles 18 and 19 with the Constitution.

115. Thus, after having analyzed Articles 18 and 19 of the Law on Health, the Court concludes that there is nothing in the Articles to imply that there is a breach of the Constitution.

116. With regard to Article 60 of the Law on Health, the Court notes, as became evident during the public hearing, that the allegations raised by the Applicants are based on the text of Article 60 of the Draft Law that consequently changed. The Court, therefore, finds that the Applicants' arguments in respect of the alleged incompatibility of Article 60 with the Constitution are not relevant.

117. In view of the above considerations, the Court finds that Articles 18, 19, and 60 of the Law on Health adopted by the Assembly on 13 December 2012 are compatible with the Constitution.

II. As to Article 41 of the Law on Health

In general

118. At the outset, the Court notes that the Applicants' representative argues in general that Article 41 of the Law on Health is in violation of the international legal instruments that are, pursuant to Article 22 of the Constitution, directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over the provisions of laws and other general acts of public institutions.

119. While the Applicants did not refer to any particular agreement or instrument, the Court refers to Article 23 of Universal Declaration of Human Rights reading as follows:

"Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests."

120. In the Court's view, while the right to work is guaranteed by international law, it should not be understood as an absolute and unconditional right to obtain employment. However, there is a strong presumption that retroactive measures taken in relation to the right to work are not permissible.

121. Furthermore, while the European Convention on Human Rights (hereinafter; "ECHR") does not explicitly protect the right to work, according to the case law of the European Court of Human Rights, certain aspects of this right are indeed protected by the ECHR, including, in specific cases, the right to property as guaranteed by Article 1 of Protocol 1 to the ECHR.

122. Furthermore, the Court will take into account the provisions of the relevant international instruments for the assessment of the compatibility of the challenged Article 41 of the Law on Health with the Constitution.

123. As mentioned earlier, the Applicants further argued that Article 41 of the Law on Health is incompatible with Article 49 of the Constitution.

124. The MoH argued that Article 49 of the Constitution is not an absolute right, but can be limited in accordance with the limitations prescribed by Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution.

125. The Court agrees with this argument of the MOH.

126. In this respect, the Court deems it necessary to consider the alleged violation of Article 49 of the Constitution in light of these limitations.

Assessment of the alleged violation of Article 49 of the Constitution in light of Article 55 of the Constitution:

127. The Court notes that when a law, like in this case the Law on Health, limits constitutional rights, as in this case, the right guaranteed by Article 49 of the Constitution, such a limitation is constitutional if it is

proportional. The proportionality test is prescribed by Article 55 of the Constitution.

128. Article 55 of the Constitution is two-fold: it provides a justification for the limitation of constitutional rights, and, at the same time, it determines the boundaries of such a limitation.

129. Article 55 of the Constitution reads as follows:

'Article 55 [Limitations on Fundamental Rights and Freedoms]

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.

2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.

3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.

4. In cases of limitations of human rights or the interpretation of those limitations, all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.

5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.'

130. Turning to the case at hand, the Court notes that the alleged limitation of the right to work is contained in a law adopted by the Assembly of Kosovo, which is the state institution vested by the Constitution with legislative power. As such, the limitation complies with the requirement that the limitation is provided by law, as contained in paragraph 1 of Article 55.

131. According to paragraph 2 of Article 55, limitations may be imposed upon the right laid down in Article 49 of the Constitution, but only "[...]

to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society."

132. The notion of the terms "necessary [...] in an open and democratic society" should be read in conjunction with the specific requirements laid down in paragraphs 3, 4 and 5 of Article 55. These requirements should each be reviewed in turn and are listed as follows:

a. The essence of the constitutional right;

b. The importance of the purpose of the limitation;

c. The nature and extent of the limitation;

d. The relation between the limitation and the purpose to be achieved; and

e. The possibility of achieving the purpose with a lesser limitation.

As to the essence of the constitutional right

133. The Court recalls that Article 49 of the Constitution reads as follows:

"Article 49 [Right to Work and Exercise Profession]

1. The right to work is guaranteed.
2. Every person is free to choose his/her profession and occupation."

134. This provision must be read in conjunction with international instruments directly applicable in Kosovo as mentioned above.

135. It is clear from the text of Article 49.2 that the Constitution guarantees both the freedom to choose a profession and the freedom to choose an occupation.

136. When applied in the present case, the Court considers that Article 41.1 of the Law on Health does not impose any restrictions on public health care professionals to choose their profession.

137. Those who became health care professionals made that choice at the moment when they enrolled in Universities and other educational institutions.

138. However, since the legislature decided to prohibit health care professionals employed in the public sector on full time or part time bases to work in the private health care sector, the Court deems it necessary to consider whether there has been an interference with their freedom to choose and exercise their profession and occupation as guaranteed by Article 49 of the Constitution.

139. This is even more relevant if, as in the concrete case, such a limitation was not prescribed in earlier legislation that was in force for more than eight years.

As to the purpose of the limitation

140. Article 41 of the Law is specifically labeled in the Law as being necessary for the purpose of "Preventing conflicts of interest". The purpose of the Law on Health as a whole is defined in its Article 1, which states:

> *"This law has the aim of establishing legal grounds for the protection and the improvement of the health of the citizens of the Republic of Kosovo through health promotion, preventive activities and provision of comprehensive and quality healthcare services."*

141. As mentioned earlier, according to the MoH *"the simultaneous employment of health care professionals in public and private health institutions has been* proven *to be harmful to the interest of citizens.*" Thus, according to the MoH, the *"aim of the obligation of choosing employment between the public and private sector is to eliminate this type of abuse of a working position in the public sector for personal benefits, by referring patients from the public to the private sector, which per se is in contradiction with the patients rights to chose between the public and private health care services."*

142. The Court notes that the representative of the Applicants did not challenge the legitimacy of the limitation, but argued that its aim could have been achieved with lesser strict measures.

143. Consequently, the Court holds that while the purpose of the limitation prescribed by Article 41 of the Law is the prohibition of conflict of interest in the health care protection, this limitation serves to the overall purpose of the legislation aimed at protecting an important public interest, i.e. ensuring comprehensive and quality health care in the public sector.

As to the nature and extent of the limitation

144. Article 41 of the Law on Health is entitled "Preventing a Conflict of Interest". Its paragraphs 1, 5 and 6 of the Article state:

"1. Health professional employed in the public health sector on full time or part time bases don't have the right to work in private healthcare institutions.
[...]
5. Public health institutions have the right to allow their health professional employees to exercise their private healthcare activities within the public health institution.
6. The private health activity under paragraph 5 of this Article shall be implemented on the basis of the special sub-legal act issued by the Ministry."

145. In short, Article 41.1 prohibits all health care professionals employed in the public health care sector to work in any private health care institution. This applies to health care professionals employed full-time or part-time in the public health care sector.

146. On the other hand, Article 41.5 allows health care professionals working in the public health care sector to exercise private health care activities within the public health care institution, subject to prior authorization by the management of the public institution. The regulation of when and how such authorizations may be granted is to be further regulated by a special sub-legal act to be issued by the Ministry of Health.

147. The Court further notes that the prohibitions contained in Article 41.1 severely curtail the opportunities for health care professionals working in the public health care sector to supplement their incomes through employment or association with any private health care institutions or businesses.

148. While they may be authorized to conduct private health care activities within the public health care sector, the manner and extent to which this may be authorized is not defined by the Law.

149. The Court recalls that, while the earlier provision of Article 98.3 of the 2004 Health Law allowed for the possibility that the public health care institution rents out its facilities and equipment for use after regular working hours for private health care activities, this is not anymore the case.

150. In view thereof, the Court considers that the nature and extent of the limitation established by Article 41 is fundamentally different in that it restricts the exercise of the work or occupation of health care professionals to either the public sector or the private sector.

151. In the Court's opinion, there can be no doubt that this restriction severely curtails the rights which health care professionals used to have.

152. The possibility created by Article 41 for public health care professionals to be authorized to exercise their private health care activities within their public health care institution is as yet undefined, but does not appear to significantly alter the nature and extent of this restriction.

As to the relation between the limitation and the purpose to be achieved

153. The limitations to fundamental rights and freedoms as defined in Article 55 of the Constitution are comparable to the limitations to the rights guaranteed by Articles 8-11 ECHR [as referred to by this Court in Case No. KI. 06/10, Valon Bislimi vs. Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice, Judgment of 30 October 2010].

154. In respect of the limitations of these ECHR rights, the European Court has stated that "[…] inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" (see Soering v. United Kingdom, App. No. 14038/88, 7 July 1989, para. 89).

155. Although the right to work is not a protected right under the ECHR, the test of the European Court to strike a fair balance between the limitation of the rights under Articles 8-11 ECHR and the protection of these rights could be performed by analogy in the present case. The European Court thereby considers whether the limitation is 'necessary in a democratic society'. The general principles to be applied to the notion of 'necessary in a democratic society', and the nature of the 'fair balance' to be struck between the general interest and individual rights, is stated in the European Court Judgment in Silver and others v United Kingdom (App. Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, dated 25 March 1983, para. 97):

"97. On a number of occasions, the Court has stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the

manner in which it will perform those functions. It suffices here to summarise certain principles:
(a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, § 48);
(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (ibid., p. 23, § 49);
(c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" (ibid., pp. 22-23, §§ 48-49);
(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted (see the above-mentioned Klass and others judgment, Series A no. 28, p. 21, § 42).”

156. With regard to the limitation being necessary in a democratic society, the Court notes that the MoH argued in their written submissions that “the citizen cannot wait until a physician ends his/her working hours in the public health care sector and only then to use his/her services as a physician in the private health care sector.”

157. The principles to be applied in interpreting the meaning of ‘necessary in a democratic society’ are that the limitation of a fundamental right must correspond to a ‘pressing social need’ and that the limitation must be ‘proportionate to the legitimate aim pursued’.

158. In applying these principles to the Referral, the Court must identify whether a fair balance exists between the interests of public health care professionals in enjoying their right to work and freedom to choose their occupation and the legitimate interest of society in securing the provision of comprehensive and quality public health care services. The Court must ensure that the nature of the limitation envisaged by the Law on Health in Article 41 is proportionate to achieving the legitimate aim of comprehensive and quality health care.

159. The Court notes that the prohibition for health care professionals employed in the public health sector to work in private health care institutions is not aimed at preventing them from having two or more different jobs in the public health sector. Indeed, such a prohibition already exists as part of the contractual obligations of health care

professionals, unless expressly excluded. Instead, the provisions of Article 41 of the Law prohibit health care professionals employed in the public health sector to work outside working hours in public health care institutions.

160. The Court finds that it has not been demonstrated how such a prohibition would contribute to the aim to secure comprehensive and quality health care in the public sector. As mentioned above, the purpose of the prohibition is clearly not to prevent health care professionals employed in the public health sector from having two or more jobs. The relationship between this prohibition and the stated purpose is all the more unclear where Article 41 allows for such health care professionals to engage in private health care activities within the public health care institutions where they are employed.

161. Is the purpose of the restrictions for public health sector professionals and the prohibition of unjustified referrals of patients to private health care institutions designed to prevent public health sector professionals from profiting from the public health care system by denying medical services to public health sector patients and by offering these same patients medical services at significantly higher costs in private health sector institutions? If that is the case, it would appear to be rather a matter of firm and appropriate management of public health sector professionals and of firm and appropriate maintenance of professional discipline within the sector.

162. In these circumstances, the Court finds that the general prohibition for public health sector professionals to work in both public and private health care institutions is an inappropriate tool for achieving the desired purpose of the Law on Health.

163. In this regard, the Court refers to a Decision of the Constitutional Court of Hungary (Decision 21/1994, 16 April 1994) on the freedom of enterprise and the licensing of taxis. In this Decision, the Hungarian Constitutional Court declared unconstitutional a provision of a statute enabling local governments to limit the number of taxi licenses. The Constitutional Court held that:

"This regulation is unconstitutional on a number of grounds. (a) The Constitutional Court failed to uncover such constitutional right or interest which could have made the objective restriction on the choice of occupation necessary and proportionate in the taxi industry. The justifications offered by the legislature are especially inadequate to satisfy the requirement of constitutional restriction of a fundamental

right. "The undesired expansion of its supply, the deterioration of the quality of the service, the creation of a higher level price for the service, the lack of liquidity and bankruptcy of the majority of entrepreneurs, the non-payment of taxes and service charges"; their "elimination and consumer protection – given the absence of self-regulating mechanism in the taxi market -- requires firm intervention" -- wrote the Minister for Transport, Communication and Water. But this "intervention" cannot amount to the violation of the essential content of a constitutional fundamental right. The restriction on the right of enterprise by numerus clausus is not a constitutional instrument of competition regulation, it may not be used to raise the quality of the service, not to mention its use as a substitute for tax collection. The anomaly of the taxi market -- the squeezing out of competitors, etc. -- can and must be attacked and solved by using other administrative means. (For instance, payment of common charges and fees should be regulated instead by the prescription of mandatory issue of receipts and the installation of taxi meters, and not by restricting entry into the occupation, as has been the case.) Public administration may not lighten its burdens at the expense of such a restriction of fundamental rights. (b) The statutory regulation authorizing local governments to limit by decree the number of taxis is also unconstitutional because this authorization does not contain any criterion for issuing the restrictions. (This situation is the logical consequence of the fact that the restriction does not even have any constitutional basis -- see Paragraph (a) above.) A direct and significant restriction of a fundamental right may only be provided by law (Dec. 64 of 1991 (XII.17) AB (MK 1991/139)). To give a carte blanche authorization to local governments for such a restriction is constitutionally precluded. For this reason, the Constitutional Court nullified s. 1(2) of Act LXXVIII of 1992, amending s. 19 of Act I of 1988."

As to the possibility of achieving the purpose with a lesser restriction

164. The Court recalls that at the hearing the representative of the Assembly did not provide the Court with an answer whether the Assembly during the procedure of the adoption of the Law reviewed the possibility of achieving the purpose of the legislation i.e. ensuring comprehensive and quality health care in the public sector with the imposition of a lesser restriction than the one prescribed by Article 41.1 of the Law on Health.

165. In answering the same question to the Court, the MoH representative stated that due to the limited budget and lack of appropriate monitoring mechanism the prohibition of a dual medical practice prescribed in

Article 41.1 of the Law was the only option in order to avoid financial loss by the citizens.

166. As mentioned earlier, the Minister considered that other measures such as disciplinary measures for those that abuse the profession are inadequate due to the insufficient number of medical inspectors, there being only 12 inspectors for the entire country.

167. On the other hand, the Applicants' representative considered that stricter measures should be employed against those who abuse their public health profession instead of a blank prohibition of the dual practice.

168. Both the Applicants' representative and the Minister agreed that a new health strategy introducing appropriate monitoring of the work of health care professionals would be beneficial, since it would avoid any potential abuse by the health care professionals.

169. While it is not for the Court to advise which measure should be employed to provide a lesser restriction, the Court notes that other measures were not considered at all.

170. In this regard, the Court refers to Article 85 of the Law on Labor which provides for disciplinary measures in case of violations of labor duties. Article 86 of the same Law provides for the imposition of such measures.

171. The Court has not been convinced by the MoH argument that due to the lack of funds and a sufficient number of health care inspectors the already existing legislation, which could be applied to prevent a conflict of interest, is inadequate.

172. It seems to the Court that the provisions of the Law on Labor may achieve the desired aim without the need to specifically prohibit health care professionals employed in the public health sector from engaging in private health care activities in their free time.

173. This alternative means could well be equal in efficiency to the means chosen by the legislator to achieve the intended purpose.

174. In conclusion, the Court finds that Article 41 does not strike a fair balance between the interests of individuals in their freedom to choose their occupation and the public interest to secure comprehensive and quality health care. In particular, the Court finds that the prohibition on

employment in private health care institutions is a disproportionate means to achieving the aim of securing the provision of comprehensive and quality health care services towards the goal of the protection and improvement of the health of the citizens of Kosovo.

175. The Court concludes that the provisions of Article 41 of the Law on Health limit the enjoyment of the right to work as provided in Article 49 of the Constitution, and that these limitations are not compatible with the nature of the limitations authorized under Article 55 of the Constitution. Therefore, Article 41 of the Law on Health is incompatible with the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.5 of the Constitution, Articles 20 and 27 of the Law and Rules 54, 55 and 56 of the Rules of Procedure, on 15 March 2013,

DECIDES

I. Unanimously, DECLARES the Referral admissible;

II. Unanimously, DECLARES that Articles 18, 19 and 60 of the Law on Health, No. 04/L-125, of 13 December 2012, are compatible with the Constitution of the Republic of Kosovo;

III. By majority, DECLARES that Article 41 paragraphs 1, 5 and 6 of the Law on Health, No. 04/L-125, of 13 December 2012, are incompatible with Article 49 [Right to Work and Exercise Profession] of the Constitution of the Republic of Kosovo;

IV. Holds that Article 41 paragraphs 1, 5 and 6 of the Law on Health, No. 04/L-125, of 13 December 2012, is null and void;

V. Holds that the Court's Decision Extending the Interim Measures of 24 January 2013, suspending the implementation of Articles 18, 19, 41 and 60 of the Law on Health, No. 04/L-125, of 13 December 2012, is terminated upon the entry into force of this Judgment;

VI. 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,

VII. Declares that this Judgment is effective immediately.

Judge Rapporteur
Ivan Čukalović

President of the Constitutional Court
Prof. dr. Enver Hasani

Joint Dissenting Opinion
of
Judges Robert Carolan and Almiro Rodrigues
In
Case No. KO131/12
Applicant
Dr. Shaip Muja and 11 Deputies of the Assembly of the Republic of Kosovo
Constitutional Review of Articles 18, 19, 41 and 60 of the Law on Health,
No. 04/L-125, adopted by the Assembly on 13 December 2012

In this case the Applicants allege that Articles 18, 19, 41 and 60 of the Law onHealth, No. 04/L-125, adopted by the Assembly of the Republic of Kosovo on 13 December 2012, is incompatible with the Constitution of the Republic of Kosovo. The majority of this Court found that Articles 18, 19 and 60 of this law were compatible with the Constitution but found that Article 41 was not compatible with the Constitution. The majority concluded that Article 41 of the law violated Article 49 of the Constitution. This conclusion is based upon an erroneous interpretation of the Constitution.

Article 41 of the contested law provides:

1. *Health professional employed in the public sector on full time or part time bases don't have the right to work in private healthcare institutions.*

2. *It is strictly prohibited to refer patients from a secondary and tertiary public healthcare institution to a private healthcare institution, for reasons that cannot be justified with medical arguments, regardless of the waiting list.*

3. *Any informal or formal financial or other type of award to the health professional employed in the public health sector including referral of the citizen or resident from public to private healthcare institution, and profitable relationship with pharmaceutical industry, is strictly prohibited.*

4. *Violators of the provisions of this article will be subject to penalties or legal action as defined in this law and a separate sub-legal act issued by the Ministry.*

5. *Public health institutions have the right to allow their health professional employees to exercise their private healthcare activities within the public health institution.*

6. *The private health activity from paragraph 5 of this Article shall be implemented on basis of the special sub-legal act issued by the Ministry.*

Although Article 41 does place some restrictions on healthcare professionals who work in a public institution, it specifically allows those healthcare professionals to perform private healthcare activities at a public institution.

Article 41 places three restrictions on public health care professionals:

(1.) If you are a health care professional employed in the public sector, you are not allowed to work in a private health care institution.

(2.) If you wish to refer patients from a secondary or tertiary pubic healthcare institution to a private healthcare institution, you must articulate justifiable medical reasons for the referral.

(3.) You cannot receive a financial award for referring a patient to a private health care facility.

The Applicants claim that this Article violates Article 49 of the Constitution with respect to the right to work and exercise a profession. Article 49 provides:

"1. The right to work is guaranteed.

2. Every person is free to choose his/her profession and occupation."

The issue before this Court is whether Article 41 denies any citizen the "right to work" or the right "to choose his or her profession and occupation." It does not deny anybody the right to work or to freely choose his or her profession or occupation.

Article 41 does not prevent anybody who is duly qualified by education, training and testing to serve as a health care professional in either the public or the private sector. Indeed, consistent with Article 51 of the Constitution this law fulfills the mandate of the Constitution that healthcare

shall be regulated by law. This law does that by attempting to prohibit simultaneous employment in both sectors so that there is neither a conflict of interest nor the appearance of a conflict of interest on the part of the healthcare professionals and so that the quality of health care delivered in both the public and private sectors can be relatively equal.

Every employer has the right to place restrictions on how its employees perform their duties for the employer and whether they may simultaneously have additional employment. For example, public police officers can be prevented from also serving as private security officers because those joint roles may be in conflict. Judges are prohibited from engaging in many other types of employment while serving as judges. Indeed, the Constitution itself prohibits candidates for membership in the Assembly from holding various other occupations. Article 73 provides:

> *"1. The following cannot be candidates or be elected as deputies of the Assembly without prior resignation from their duty:*
>
> *(1) judges and prosecutors;*
>
> *(2) members of the Kosovo Security Force;*
>
> *(3) members of the Kosovo Police;*
>
> *(4) members of the Customs Service of Kosovo;*
>
> *(5) members of the Kosovo Intelligence Agency;*
>
> *(6) heads of independent agencies;*
>
> *(7) diplomatic representatives;*
>
> *(8) chairpersons and members of the Central Election Commission.*
>
> *2. Persons deprived of legal capacity by a final court decision are not eligible to become candidates for deputies of the Assembly.*
>
> *3. Mayors and other officials holding executive responsibilities at the municipal level of municipalities cannot be elected as deputies of the Assembly without prior resignation from their duty."*

None of these restrictions deny one the right to work or to choose an occupation. They simply establish some of the qualifications to perform the

work. Article 41 simply attempts to minimize in a proportional manner any conflict of interest or the appearance of a conflict of interest of a health care professional who chooses to work in the public sector. It also attempts to make more equal the quality of health care services delivered by both the public and the private sector. Whether Article 41 will meet those objectives is not for this Court to decide.

That function is the sole responsibility of the members of the Assembly who are duly elected by the citizens of Kosovo. What this Court has to decide is whether Article 41 violates Article 49 of the Constitution. It does not.

Respectfully submitted

Judge Robert Carolan Judge Almiro Rodrigues

KO 97/12, The Ombudsperson, date 18 April 2013- Constitutional Review of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012.

Case KO 97/12, Judgment of 12 April 2013

Keywords: economy, interim measures, freedom of association, law incompatible with the constitution, protection of property

The applicant filed a Referral pursuant to Article 113.2 (1) of the Constitution of Kosovo challenging the Constitutionality of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, because "[...] that the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions, mainly in its Chapter II, allows the NGO Micro-financial Institutions to transform into joint stock companies, namely private entities in contradiction to the purpose of their establishment. As such, this law violates constitutional principles, it breaches the international principles of non-profit law, and is in contradiction with applicable legislation in Kosovo regulating the freedom of association in NGOs, and endangers the future of civil society sector in general."

Since the Applicant was an authorized party, had met the necessary deadline to file a referral with the Court and accurately described the alleged violation of the Constitution, including the challenged law of the Assembly, the Court went on assessing the merits of the Referral.

In this respect, the Court held that Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, are not compatible with Articles 10 [Economy], 44 [Freedom of Association] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo because the transformation of NGOs into Joint Stock Companies would deviate from the initial purpose of existence of the NGOs and may seriously damage one of the core elements of democracy.

JUDGMENT
in
Case No. KO 97/12
Applicant
The Ombudsperson
Constitutional Review of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the "Applicant").

Challenged law

2. The Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") to annul Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012.

Subject matter

3. The subject matter of the Referral is the assessment, by the Court, of the constitutionality of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012.

4. The Applicant further requested the Court to impose interim measures suspending the implementation of the Law on Banks, Microfinance

Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012.

Legal basis

5. Article 113.2 (1) of the Constitution, Articles 22, 27, 29 and 30 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rules 54, 55, 56, 62, 64 and 65 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 11 October 2012, the Applicant submitted the Referral to the Court.

7. On 31 October 2012, the President of the Court, with Decision No. GJR. KO. 97/12, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Court, with Decision No. KSH. KO. 97/12, appointed the Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Arta Rama-Hajrizi.

8. On 14 December 2012, the Referral was communicated to the President of the Republic of Kosovo, President of the Assembly, the Government, and the Applicant.

9. On the same date that Referral was communicated and the Court requested comments from the Parliamentary Committee for Legislation (hereinafter: Committee for Legislation), the Central Bank of the Republic of Kosovo (hereinafter: the "CBK"), Ministry of Finance (hereinafter: "MF"), Ministry of Public Administration, Department of Registration and Liaison with NGOs. So far, only the Committee for Legislation has not replied.

10. On 24 December 2012, the Court granted the Applicant's request for an interim measure, until 31 January 2012.

11. On 10 January 2013, the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina, representing the Association of Microfinance Institutions of Kosovo, submitted a request for information and the case file of Case KO 97/12 in order to prepare a: (i.) Request for Permission to File an Amicus Curiae Brief; and (ii.) Submission of the Amicus Curiae Brief.

12. On 14 January 2013, the Court replied to the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina providing:

> *"Considering Rule 53 of the Rules of Procedure of the Constitutional Court, which provides "The Court may, if it considers it necessary for the proper analysis and determination of the case, invite or grant leave to an organization or person to appear before it and make oral or written submissions on any issue specified by the Court", and by considering items 1, 6 and 7 of the Practice Direction, NO.01/2012, on "Guidelines and Procedure for submission of Amicus Curiae Briefs", we inform you that your request has been received and registered, whereas, in compliance with the legal provisions mentioned above, the same has been forwarded to the full Court, which within the deadlines provided by the law, shall take a decision regarding your request and you will be notified as soon as the decision is taken. Considering your interest in relation to the request, as well as the applicable constitutional and legal provisions, the Court will timely inform you also for all the subsequent actions to be taken, which may be related to your request."*

13. On 18 January 2013, the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina, representing the Association of Microfinance Institutions of Kosovo, submitted the request the leave to file *Amicus curiae* brief. Furthermore, the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina asked the Court not to take into consideration its letter to this Court of 10 January 2013 *"since the receipt of the abovementioned documents does not require a response to the submission"*.

14. On 24 January 2013, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the full Court on the:
    a. Decision to extend the time limit of the interim measure imposed by the Court in its initial Decision of 24 December 2012 by a further period of three months until 30 April 2013;

    b. Decision on the request for leave to file an *Amicus Curiae* brief;

    c. Decision to hold a public hearing on 5 March 2013.

15. On the same date, the full Court unanimously endorsed the recommendations of the Review Panel.

16. On 25 January 2013, the Court asked the President of the Assembly of the Republic of Kosovo the following additional information:

a. *Can you please submit to the Court, the transcript of the session when the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions was adopted, including the electronic voting register?*

b. *Can you please clarify and confirm whether there was a required quorum during that session, as provided by Articles 69 and 80 of the Constitution?*

c. *Can you please submit to the Court, information about the entry into force of this law, including the date of promulgation by the President of the Republic and the date of publication in the Official Gazette of the Republic of Kosovo?*

17. On 30 January 2013, the President of the Assembly of the Republic of Kosovo replied to the Court as follows:

a. *The Assembly of the Republic of Kosovo in its plenary session on 12 April 2012 adopted the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093.*

b. *The Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093 was sent for promulgation to the President of the Republic of Kosovo on 18 April 2012.*

c. *The President of the Republic of Kosovo has not within eight (8) days taken a decision to either promulgate or return the law. Hence, based on Article 80.5 of the Constitution of the Republic of Kosovo a law is considered promulgated without the President's signature and was published in the Official Gazette on 30 April 2012.*

d. *Article 118 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09, foresees that this law enters into force on 12 April 2012 (see page 21 of the transcript).*

e. *The President of the Assembly of the Republic of Kosovo furthermore provided this Court also with the following documentation: 1.) The transcript and the minutes of held plenary session on 12 April 2012; 2.) The Decision of the Assembly of the Republic of Kosovo no. 04-V-333, of 12 April 2012, for adopting the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09,; and 3.) the*

electronic voting register for the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09.

18. On 31 January 2013, the Court, pursuant to Rule 53 of the Rules of Procedure, sent an invitation to Pallaska & Associates L.L.C., Mr. Dastid Pallaska, attorney, to file a written *Amicus Curia* briefwith the Court containing his legal stance in respect to the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09.

19. On 5 March 2013, the Court held a public hearing.

20. On 6 March 2013, the Secretary General of the Assembly of the Republic of Kosovo requested the Court a copy of the transcript from the public hearing.

21. On 7 March 2013, Mr. Dastid Pallaska submitted to the Court his *amicus curiae* brief in writing.

22. On 14 March 2013, the Court deliberated and voted on the case.

Summary of facts

23. On 12 April 2012, the Assembly of the Republic of Kosovo (hereinafter: the "Assembly"), adopted the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, with 55 (fifty-five) votes "for", 0 (zero) votes "against", and 4 (four) "abstentions".

24. The Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, entered into force on 12 April 2012, pursuant to its Article 118.

25. On 19 April 2012, the non-governmental organizations: the Kosovo Civil Society Fund (KCSF), FOL Movement, Kosovo Democratic Institute (KDI) and 55 other supporting NGO's addressed a letter to the President of the Republic of Kosovo, requesting her not to promulgate the law, and to return to the Assembly for review.

26. On 11 May 2012, the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, was published in the Official Gazette of the Republic of Kosovo, pursuant to Article 80 (5) of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

27. On 11 May 2012, the Ombudsperson received a submission from the above NGO's: the Kosovo Civil Society Fund (KCSF), FOL Movement,

Kosovo Democratic Institute (KDI) and 55 other supporting NGOs, asking him in a joint request to address the Constitutional Court, pursuant to the duties and responsibilities vested in him by Law, to assess the constitutionality of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093.

28. The NGO's considered that these Articles constituted a violation of the Constitution and requested to suspend the implementation of the contested Law until the Court would render a decision on the merits of the issue.

29. The NGO's further considered that Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, violate Article 44 [Freedom of Association], Article 46 [Protection of Property], and Article 10 [Economy] of the Constitution, international principles on non-profitable NGO's and applicable legislation in Kosovo regulating the field of freedom of association of NGO's.

Applicant's arguments

30. The Applicant in its Referral refers to the following applicable legal provisions in respect to the subject matter before the Court:

31. Article 44 [Freedom of Association] of the Constitution provides that the freedom of association is guaranteed and regulated by law:

"1. The freedom of association is guaranteed. The freedom of association includes the right of everyone to establish an organization without obtaining any permission, to be or not to be a member of any organization and to participate in the activities of an organization.

2. The freedom to establish trade unions and to organize with the intent to protect interests is guaranteed. […]"

32. Article 46 [Protection of Property] of the Constitution specifically guarantees protection of property:

"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. […].”

33. Article 10 [Economy] of the Constitution concerns the economic order of the Republic of Kosovo:

"A market economy with free competition is the basis of the economic order of the Republic of Kosovo."

34. Article 1 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, provides that:

"This Law sets out the establishment, registration, internal management, activity, dissolution and removal from the register of legal persons organized as NGOs in Kosovo."

35. Article 4 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, stipulates that:

“1. NGO shall not distribute any net earnings or profits as such to any person.

2. The assets, earnings and profits of an NGO shall be used to support the non-profit purposes assigned for the organization.

3. The assets, earnings and profits of an NGO shall not be used to provide benefits, directly or indirectly, to any founder, director, officer, member, employee, or donor of the NGO, except the payment or reasonable compensation to such persons for work performed for the organization."

36. Article 5 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, clearly defines the notion and purpose of the establishment of an NGO in Kosovo:

"1. Domestic NGO is association or foundation established in Kosovo to accomplish the purpose based on the law, either for public benefit or mutual interest.[…]”

37. Article 11.1 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, provides:

“1. A domestic NGO shall have the status of a legal person in Kosovo upon registration pursuant to this Law.”

38. Article 20 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, defines the conditions for terminating an NGO:

"1. An NGO may be terminated when:

1.1. a voluntary decision to terminate the organization is made by the highest governing body in accordance with the NGO's statute;

1.2. the NGO becomes insolvent as defined by applicable law;

1.3. the stated time limit expires, if such time limit is defined in the establishment act;

1.4. based on the valid court decision."

39. Article 21 of the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, provides for the manners and competent bodies for deregistration, and the manner NGO asset management:

"3. In the event of the termination or removal from the register of an NGO that received tax or fiscal benefits, public donations, or government grants, all assets remaining after discharge of the NGO's liabilities shall be distributed to another NGO with the same or similar purposes. This NGO shall be identified in the NGO's statute or with a proposal of the NGOs highest governing body. The Ministry shall establish the Committee for Distribution of remained Assets of terminated or removed from register NGOs, with representatives of NGOs too, pursuant to the sub-legal act issued by the Government.

4. In all other cases, any assets remaining after the discharge of liabilities shall be distributed in accordance with the statute or a decision by the highest governing body and in all cases in compliance with Article 4 of this law."

40. In this respect, the Applicant claims that *"[...] that the Law on Banks, Micro-*financial *Institutions and Non-Banking Financial Institutions, mainly in its Chapter II, allows the NGO Micro-financial Institutions to transform into joint stock companies, namely private entities in contradiction to the purpose of their establishment. As such, this law violates constitutional principles, it breaches the international principles of non-profit law, and is in contradiction with applicable legislation in Kosovo regulating the freedom of association in NGOs, and endangers the future of civil society sector in general."*

41. Further, the Applicant alleges that the NGO Micro financial institutions have been established and registered pursuant to the right to association, as guaranteed by Article 44 of the Constitution and the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057. However, allegedly, with the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions, in its changing of legal subjectivity of NGO Micro financial institutions, and allowing their transformation into joint stock companies, distances them from the scope of Article 44 of the Constitution and the Law on Freedom of Association, and impedes their right to operate based on the rights of association.

42. Moreover, allegedly, the "Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions aims to regulate the operations of NGO Micro financial institutions with its regulation of principles and procedures of management. Nevertheless, provisions of the law address the issue of legal subjectivity of NGO Micro financial institutions, thereby allowing their transformation from enjoying NGO status in to the legal status of a Joint Stock Company.

43. The Applicant claims that *"The Law on Freedom of Association in an NGO, in its Article 4, paragraphs 2 and 3, does not allow an NGO to be transformed into another legal entity, much less into a for-profit legal entity. An NGO may cease to exist (namely cancel its legal status as NGO), only by termination, and in no way by transformation. Being established and registered pursuant to this law (and preceding regulations and laws of the current law), the legal status of all NGOs (including NGO Micro financial institutions) is regulated exclusively by the Law on Freedom of Association in NGOs, and any regulation of legal status of such institutions by other laws is unlawful."*

44. Further, the Applicant argues that *"several countries do not allow such transformation (as is the case in Kosovo), while others explicitly prohibit such transformation in relevant laws such as the Law of the Republic of Bulgaria on Not-for-Profit Entities, Article 12 and Article 42; the Law of the Republic of Macedonia for Associations and Foundations, Article 6.2, and the Law of the Republic of Estonia on Foundations, Article 1.3."*

45. According to the Applicant the basic universal principle of not-for-profit sector is that it: *"prohibits distribution of net earnings or profits to any person, and the use of assets, earnings and profits of an NGO to provide benefits, directly or indirectly, to any founder, director, officer,*

member, employee, or donor of the NGO, except the payment or reasonable compensation to such persons for work performed for the organization." Allegedly, "*This principle implies that the NGO does not have an owner, and therefore its properties may not be treated as private property."The assets, earnings and profits of an NGO shall be used to support the non-profit purposes assigned for the organization", while in case of termination of an NGO, "assets of that NGO shall be distributed to another NGO with the same or similar purposes."*

46. Based on the aforementioned, the Applicant alleges that *"These provisions ensure that in no way, be that during their operations, or even after their termination, the assets of an NGO cannot be transferred to for-profit entities. On the contrary, the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions, by allowing NGO Micro financial institutions to transform into joint stock companies, allows the NGO assets to be transformed into private shares/property."*

47. According to Article 46 of the Constitution no one may be deprived arbitrarily of property, including property of legal persons. Consequently, the Applicant claims that *"this Article protects the property of non-governmental organizations. NGOs are legal persons established pursuant to not-for-profit rights, and as such, they are not owned. NGO assets are managed by NGO management bodies, but always on the basis of the universal principle of profit non-distribution. The Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions, by allowing transformation of NGO Microfinance Institutions into joint stock companies, arbitrarily alienates NGO assets, transferring assets from the NGO to other legal or natural persons for shareholding."*

48. According to the Applicant, *"the Law on Banks, Micro-financial Institutions and* Non-*Banking Financial Institutions, by allowing transformation of NGO Microfinance Institutions into joint stock companies, allows for the capital acquired without tax payment to be injected into commercial market competition between banks and other financial institutions, which are bound to pay taxes since their establishment."* This, allegedly, is in contradiction with Article 10 of the Constitution which provides that *"A market economy with free competition is the basis of the economic order of the Republic of Kosovo."*

49. In the Applicant's opinion, *"the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions is also in*

contradiction with the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe, and Law no. 04/L-057 on Freedom of Association in NGOs, a fundamental law providing for establishment, operations and termination of all NGOs in Kosovo."

Response from the Central Bank of Kosovo

50. On 28 December 2012, CBK replied to the Court as follows *"The purpose of the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions is the registration, regulation and supervision of these Institutions by CBK. Hence, this law makes it possible also for NGO's who expresses their desire to exercise financial activities determined in accordance with this Law to be registered, regulated and supervised by the CBK without making any difference between NGO's, notwithstanding their purpose for which they are established."*

51. Furthermore, CBK provides that *"The Applicant's allegations that Article 90, Article 95 (1.6), Article 110, Article 111 and Article 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions are incompatible with the Constitution of the Republic of Kosovo and the applicable law that regulates the freedom of association of NGO's are unfounded […]".*

52. In respect of Article 90, CBK argues that *"All the micro financial institutions from the moment of being registered at CBK as "Micro-financial Institution", be it as an NGO or be it as a Joint Stock Company will be subject to the legal framework and supervisory requests of CBK. Hence, this provision clearly specifies that an NGO is not permitted to sell or transfer its business, merge, or change its structure, nor is it permitted to distribute or in any way pay out profits, surplus capital, dividends, or any of its assets, except in compliance with this Law. It is absolutely undisputable that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions does not encourage or force existing NGO's to transform into Joint Stock Company. It is their autonomous decision whether they desire to continue their activity as they are or transform into a Joint Stock Company."*

53. Moreover, as to Article 95 (1.6), CBK argues that *"As mentioned above, all the micro financial institutions and non-banks without taking into consideration their legal status be it as a NGO or a Joint Stock Company, from the moment of their registration with CBK for the*

exercise of financial activities (activities regarding credits or other financial activities) will be regulated and supervised by CBK. The Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions has as object to regulate financial institutions which exercise financial activities and the only regulator of institutions which exercise financial activities in Kosovo is CBK and in no way do these provisions of this Law require or encourage any NGO or Microfinance Institution to quench or create a Microfinance Institution Joint Stock Company. Any NGO Microfinance Institution that decides to end their activities must comply with the Law on Banks, Microfinance Institution and Non-Bank Financial Institutions and other applicable laws. This Law in an explicit manner determines that the profit and means cannot be distributed and transferred besides for charity purposes in accordance with the Law on NGO's. All the financial institutions, be micro-financial institutions, banks or non-bank financial institutions, as well as then as when the micro-financial institution is an NGO, Limited Liability Company or Joint Stock Company must apply the regulative and supervision of CBK for intermediary financial issues."

54. Furthermore, as to Article 110, CBK argues that *"It is important to specify that paragraph 1 of this Article in a clear manner determines that "the donated capital and the surplus capital must be distributed for charitable purposes according to applicable Laws", which clearly means application of applicable laws, which includes also the Law on NGO's and the purpose of this paragraph is that the Law on NGO will be applied in such cases. Furthermore, this paragraph states "and the plan approved by CBK", but since the NGO Microfinance Institution is a financial institution and that CBK supervise all the financial institutions, then it is completely clear that CBK in this way only ensures the stability of the financial sector, as one of its main objectives, and makes sure that the solution of the financial institution is done as it is supposed to be and with a minimal interference in the sector, clientele and public. Paragraph 2 of this Article makes it clear the fact that CBK cannot in any manner benefit from the solution of NGO Microfinance Institution and the distribution of the donated capital and surplus capital."*

55. In respect to Article 111, CBK argues that *"In accordance with this Article and as determined with this Law, it is clear that the donated capital cannot be used for any other purpose then for charity purposes because the donor has offered this for charitable purpose. This Article determines that if an NGO Microfinance Institution decides to register as a Joint Stock Company then this institution must apply the*

provision of Articles 110 and 112 only as to the donated capital meaning that donated capital must be returned to the original donor or distributed for charitable purposes as determined with the provisions of these Articles, respectively in accordance with the Law on NGO as determined with Article 110 which clearly points out that the "donated capital and the surplus capital will be distributed for charitable purposes in accordance with applicable laws [...]". All this means that donated capital and surplus capital must be used for charitable purposes and that in accordance with the Law on NGO and if it would have another use then it will be subject to taxation, however, in no way does the Law on Banks, Microfinance Institution and Non-Banks Financial Institutions encourage or forces any other mean to use the donated capital and surplus capital. So, the NGO Microfinance Institution that is registered as a Joint Stock Company then that Institution will have their exempted tax status as an NGO taken away by the sole fact that their charitable activity is ended.

56. As to Article 116, CBK argues that *"[...] this Article does not have anything to do with the registration of NGO's that continues to be registered and supervised by the Ministry of Public Administration but only with those NGO Microfinance Institution that develops financial activities."*

57. Furthermore, CBK considers that *"This law adds value as to the development of the market economy with free competition."*

Response from the Ministry of Finance

58. On 28 December 2012, the Ministry of Finance replied to the Court submitting that the Applicant's allegations that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions is incompatible with the Constitution and in contradiction with the Law on Freedom of Association in Non-Governmental Organizations, do not stand and outlined several reasons to support their arguments.

59. In this regard, the Ministry of Finance argues that "*The Law no. 04/L-057 on Freedom of Association in Non-Governmental Organizations does not regulate the right of the NGO-s to act (be registered) as micro-financial institutions. This Law no. 04/L-057 on Freedom of Association in Non-Governmental Organizations regulates establishing, registration, internal governance, activities, termination and removal of NGO's from register, but there is no provision on activities of the NGO Micro Finance Institutions."*

60. In addition, the Ministry of Finance claims that "*[…] the Applicant has forgotten* the *legal principles "Principles Lex Temporise and Lex Specialis, the Law on Freedom of Association in NGO's is a general law for all NGO's, while the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, and its part on NGO Micro-Finance Institutions is specific, therefore has priority in applicability. "*

61. As to Article 90, the Ministry of Finances argues that it regulates only the definitions and "*in logical order regulates the term Micro-finance NGO and it provides what are obligations, rights and responsibilities of the Micro-finance institutions, pursuant to the Law No. 04/L-093 on Banks, Microfinance Institutions and Non-Bank Financial Institutions. Therefore there is no legal basis to allege that Article 90 of this Law ins in contradiction with the Law on Freedom of Assembly in NGOs".*

62. Furthermore, as to Article 95, the Ministry of Finance argues that "*This provision has two parts. The first part aims, not to allow from selling or transferring of activities, joining, separating of structure, or the mission to grant benefits to the founders, director, officials, members etc. This part is in compliance with Article 4 of the Law on Freedom of Association in NGOs […] The second part of the provision is exclusionary to the limitations set up in the first part, meaning except when they are subject to voluntary or mandatory liquidation, or official administration pursuant to the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions. An identical provision can be found also in the Law of Freedom of Association in NGO-s, Article 20 which states: an NGO may be terminated by a voluntary decision, by a final court decision, when an NGO becomes insolvent as defined by the applicable law. Therefore, as it can be seen by these provisions, there is no incompatibility […]".*

63. In respect of Article 110, the Ministry of Finance argues that "*The aim of this provision is that in case of voluntary or mandatory liquidation of an NGO Microfinance Institution, the donated capital from donors for establishing the NGO Microfinance Institution, in compliance with the abovementioned laws, the original donor shall be informed and given the possibility to return the donated capital with the aim to use it for charitable purposes, if the original donor does not take (return) the donated capital, then the original capital and surplus shall be distributed for charity according to applicable laws, including the Law on Freedom of Association in NGOs, based on the plan adopted by the CBK. The role of the CBK is only to supervise the financial stability."*

64. As to Article 111, the Ministry of Finance argues that "*The aim of this Article is that the donated capital cannot be used for any other purpose, apart from charitable purposes. If an NGO Microfinance Institution decides voluntarily, but in no mandatory manner, only based on the will of the NGOs, to be registered as a Joint Stock Company, then this institution must apply the provisions of Article 110 and 112 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions. The donated capital and the surplus capital must be used only for charitable purposes and according to the Law on NGOs and if it would have another use then it would become subject to taxes, but the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions does not, in any manner, oblige or encourage the use of the donated capital and the surplus capital, as it can be noted here we only have the change of the statute from Microfinance NGO to Joint Stock Company. The Law only provides an additional legal possibility.*"

65. With regard to Article 116, the Ministry of Finance argues that this Article only regulates the obligations of micro-financial institutions to act in compliance with the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, and it has nothing to do with NGOs which are regulated by the Law on Freedom of Association in NGOs.

Response from the Ministry of Public Administration, Department of Registration and Liaison with NGOs

66. On 31 December 2012, the Ministry of Public Administration, Department of Registration and Liaison with NGOs replied to the Court providing that:

"...

a. *Since the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions touches on the issue of Microfinance Institutions registered as NGO's, we consider that we should have been consulted when the law was drafted based on our mandate that we have in accordance with applicable law.*

b. *As to the allegations in the submitted referral it is a fact that the challenged provisions are in collusion with the Law on Freedom of Association of NGO's in the Republic of Kosovo and as such makes their implementation difficult.*

..."

Public hearing

67. On 5 March 2013, the Court held a public hearing whereby the following were present and heard:

    a. the Applicant represented by Mrs. Shqipe Malaj, Deputy-Ombudsperson;

    b. the Committee for Legislation represented by Mr. Arben Gashi, the head of the Committee for Legislation;

    c. the Ministry of Finance, represented by Mr. Lulzim Rafuna;

    d. the Central Bank represented by Mr. Skender Kllokoqi; and

    e. the Ministry of Public Administration, Department of Registration and Liaison with NGOs, represented by Mr. Muhamet Dabiçaj.

68. The Committee for Legislation, during the Public Hearing provided the Court with the following documents:

    a. the Minutes from the meeting of the Committee for Budget and Finance of 18 January 2012 (No. 44/12);

    b. the Minutes from the meeting of the Committee for Budget and Finance of 22 March 2012 (No. 53/11);

    c. the Minutes from the meeting of the Committee for Budget and Finance of 4 April 2012 (No. 57/12); and

    d. the Minutes from the meeting of the Committee for legislation of 5 April 2012 (No. 42).

69. The Ministry of Finance, during the Public Hearing provided the Court with the following documents:

    a. the Transcript of the Public Hearing of the Committee for Budget and Finance of 8 February 2012; and

    b. the Transcript of the Plenary Session of the Assembly of the Republic of Kosovo of 12 April 2012.

    Furthermore, the Court, during the hearing, upon the request of the representative of MF, also heard Mr. Jacques Boribond as an expert witness.

70. In addition, the Court also heard Mr. Dastid Pallaska in his capacity of *amicus curiae*.

The Applicant

71. The Applicant, in addition to the Referral, during the hearing orally alleged that *"the Law on Banks, Micro-financial Institutions and Non-Banking Financial Institutions is also in contradiction with the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe because also Article 9 of this Recommendation provides that NGOs should not distribute any profits which might arise from their activities to their members or founders but can use them for the pursuit of their objectives."*

72. Furthermore, the Applicant during the hearing orally alleged that *"Article 9 of this Recommendation clearly provides that NGOs with legal personality can designate a successor to receive their property in the event of their termination, but only after their liabilities have been cleared and any rights of donors to repayment have been honoured. However, in the event of no successor being designated or the NGO concerned having recently benefited from public funding or other form of support, it can be required that the property either be transferred to another NGO or legal person that most nearly conforms to its objectives or be applied towards them by the state. Moreover the state can be the successor where either the objectives or the means used by the NGO to achieve those objectives have been found to be inadmissible."*

73. The Applicant, during the hearing stated orally that *"The purpose of a number of NGO Microfinance Institutions to transform into businesses, mainly in the form of joint stock companies, is an early attempt and documented at least since 2004, initially through UNMIK regulations. Efforts to transform microfinance NGOs into a joint stock company by different actors were not prohibited and they were evident during the process of amendment of the Law on Freedom of Association in Non-Governmental Organizations in 2010. The report of the Ombudsperson in 2010 had recommended that during the review process of amendment of the Law on Freedom of Association in NGO, the Parliamentary Committees should take into account comments and suggestions emerging from the civil society so that additions and changes made in the law to be transparent and as a conclusion of law to be in line with European standards. Despite the fact that the process of drafting the law had gone through many challenges the civil society*

with an intense commitment and cooperation with the international community in Kosovo had succeeded to stop the introduction of elements that undermine the credibility of civil society in the Law on Freedom of Association of NGOs , which was approved by the Assembly in August 2011."

74. Moreover, the Applicant, during the hearing stated orally that *"Although the Ombudsperson challenges the aforementioned articles in respect to its content, it is also important to note that the process of adoption of this law was done in contradiction with the Rules of Procedure of the Assembly and Article 69.3 of the Constitution. Namely, article 57 of the Rules of Procedure of the Assembly determines that after the adoption of the draft law in the first reading, the Assembly obliges that, beside the Functional Committee, four other permanent Committees should review the draft law. However, this draft law was never reviewed and approved by the Parliamentary Committee for Legislation of the Assembly of the Republic of Kosovo. Instead after the review and approval of the Committee for Budget and Finance, it went to the Assembly directly for adoption. Furthermore, as to Article 69.3 of the Constitution which determines the quorum for the Assembly, the Ombudsperson, allegedly, notes based on the official documents from the Assembly that 58 deputies were present whereby out of these 58 deputies, 54 deputies voted pro, 4 deputies abstained and 0 against. Besides this, allegedly, a deputy had informed that he could not vote electronically which brings the number of deputies present to 59 deputies. This, allegedly, is in contradiction with the required quorum of 61 deputies present."* The Court notes that this issue was not raised by the Applicant in the original Referral.

75. The Applicant stated orally also during the hearing that *"The income of the civil societies, in order for them to carry out their activities, comes mainly from donors. In Kosovo, about 80% of the non-governmental sector funding is from international donors. All these donors give funds to NGOs based on legal guarantees that their donations cannot be used for private gains. Allowing transformation of NGO Microfinance Institutions will present an unparalleled precedent, and will directly threaten the continuation of donor support for NGOs in Kosovo, because of the risk that each NGO based on this precedent can transform and change ownership of the donor funds by transforming NGOs to private companies."*

76. The Court notes that, from the presentations of the parties, the perception is that there are two types of NGOs, NGOs and NGOs Microfinance Institutions. However, the Applicant during the hearing

orally stated that the Law on Freedom of Association on NGOs recognizes only one type of NGOs, but the scope of activities of the NGOs differs. The scope of activities of these different NGOs is regulated with special laws.

77. As to whether the Assembly had a quorum when the challenged law was adopted, the Applicant during the hearing repeated orally that 54 deputies voted pro, 4 deputies abstained, none of the deputies voted against and one deputy could not vote electronically, hence, allegedly, there were 59 deputies present. Furthermore, the Applicant continued by stating orally that the main substance of their Referral concerns the constitutionality of the challenged articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions.

The Committee for Legislation

78. The Committee for Legislation was summoned to participate at the public hearing in order to explain to the Court the procedures that were followed to adopt the challenged articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions.

79. According to the submitted Minutes from the meeting of the Committee for Budget and Finance of 18 January 2012 (No. 44/12), the Court notes that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions was reviewed by this Committee and the recommendation was given to the Assembly to in principle adopt this law.

80. The Chairperson of the Committee for Budget and Finance according to the abovementioned minutes further pointed out that the draft law in question intends to regulate the legal infrastructure of bank institutions, microfinance institutions and non-banking financial institutions in respect to licensing, supervision and other issues.

81. According to these minutes, the Minister of Finance at that time also pointed out that this Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions had been harmonized with the International Monetary Fund and the World Bank and was in compliance with the international practice and the directives of the European Union. It was further pointed out in the minutes that this Law had as a purpose to repeal the UNMIK Regulations regulating this area and would strengthen the institutional framework, sustainability and stability of the financial sector. Furthermore, according to the minutes, this Law intended also to improve the standards for governance and limit the

possibility for credits to banks and private persons by giving the Central Bank of Kosovo the possibility to fine or to take measures if they were in violation.

82. From the Minutes of the meeting of the Committee for Budget and Finance of 22 March 2012 (No. 53/11), the Court notes that the amendments to the draft Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions were approved by this Committee and that the recommendation was given to the Assembly to review and approve it in the further procedures.

83. The Court notes that, according to these Minutes, the amendments were of a technical nature.

84. From these Minutes from the meeting of the Committee for Budget and Finance of 4 April 2012 (No. 57/12), the Court further notes that the NGO BIRN had proposed an amendment to the draft Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, stating that this Law would not apply to NGOs that do not have financial activities because it was concerned that donors would not donate money if NGO's could transform into a Joint Stock Company. Other voices were also heard at the meeting of the Committee for Budget and Finance whereby questions were raised: a) as to who would be shareholder when an NGO transforms into a Joint Stock Company; b) if the money of the donors and the suffice capital would be distributed for charity, then where would the rest of the capital come from in order to buy 25 % of the shares of the bank. Hence, the claim was that NGO Microfinance Institutions should not be able to be transformed into a Joint Stock Company, that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions was, therefore, in collusion with the Law on Freedom of Association of NGO's and that the NGO Microfinance should be regulated with a special law. However, according to the Minutes these amendments were not taken into consideration.

85. As to whether the Assembly had its quorum when the challenged Law was adopted, the representative of the Committee for Legislation stated orally during the hearing that he did not know because he left the plenary session on that day.

86. As to the following circumstances: 1) which procedures were followed for the entry into force of this law, 2) what was the date of promulgation of this law by the President of the Republic of Kosovo, and 3) what was the date of publication of this law in the Official Gazette of the Republic of Kosovo, the representative of the Committee for Legislation stated

orally during the hearing that the regular procedures were not followed but did not provide any further supporting documents and that as far as points 2 and 3 were concerned, he did not know.

The Ministry of Finance

87. The representative of the Ministry of Finance, in addition to the written response submitted to the Court on 28 December 2012, claimed orally during the hearing that *"[...] the Law on Banks does not regulate the right of association for persons in Kosovo and it does not abrogate any the provision in the Law on Freedom of Association for NGOs."*

88. Furthermore, the representative of the Ministry of Finance claimed orally during the hearing that *"Article 111 of the Law on Banks requires that every Microfinance NGO Institution must first register at the Ministry of Trade and Industry and the Central Bank of Kosovo as a JSC and then the NGO Microfinance Institution must treat Surplus and Donated Capital as provided in Articles 110 and 112 of this Law. This requires that Surplus Capital must be subject to taxation and Donated Capital being returned to the Donor, before the JSC is formed. This clearly means that this is not a transfer of authority, but it is an entirely new registration of a new legal entity as JSC. Therefore, the Applicants' statement that a NGOs competence transferred is not consistent with the provisions of the Law on Banking. There is no provision within the Law on Banks that takes away any right of property and no provision of this Law that is in violation of Article 46 of the Constitution. In fact Article 110 on the Law on Banks specifically acknowledges the right of the owner to his property at all times. It is only when there is no owner, no donor and no corporate governance that the CBK will step in and develop a plan to distribute assets. Further even if the NGO Microfinance Institution decides to create a JSC, the Law on Banks does not require the NGO Microfinance Institution to be terminated, but expressly allows it to remain in existence and to keep its Donated Capital and Surplus Capital so long as it continue to comply with registration and regulation by CBK. This decision to continue is made only by the NGO Microfinance management/owner. It must be concluded that Article 110 of the Law on Banks does not violate any right to property or freedom of association. In point of fact, it actually provides more latitude for the fair and equitable distribution of assets to other types of general purpose charitable NGOs."*

89. In addition, the representative of the Ministry of Finance claimed orally during the hearing that *"Microfinance NGOs have consistently been*

regulated by UNMIK since 1999. Since 1999 there have always been specific laws and regulations for Microfinance Institutions even though they were also NGOs. UNMIK Regulation 1999/13 which was amended and supplemented with Regulation 20008/28 in June, 2008. This Regulation has now been abrogated with the Law on Banks."

90. As to whether the Assembly had its quorum when the challenged Law was adopted, the representative of the Ministry of Finance orally during the hearing stated that 61 deputies were present at the session and 59 of these deputies voted.

91. As to what the legal basis for NGOs Microfinance Institutions was before the challenged Law was adopted, the representative of MF stated orally during the hearing that it was UNMIK Regulation No. 1999/13 on the Licensing of Non-Bank Micro-Finance Institutions in Kosovo, UNMIK Regulation No. 2008/28 amending UNMIK Regulation No. 1999/13 on the Registration, Licensing, Supervision and Regulation of Microfinance Institutions and now the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions. Furthermore, the representative of MF also stated orally during the hearing that *"the Law on amending the law on business organization provides that an NGO cannot be registered as a Limited Liability Company but this Law does not prohibit an NGO to be registered as a Joint Stock Company."* However, the Court notes that the Law No. 04/L-006 on amending and supplementing of the Law N0.02/L-123 on Business Organizations in its Article 22 only provides that *"Article 84 of basic the law is reformulated with the following text: The limited liability company may have as a founder and shareholder one or more natural or legal person, excluding the NGOs."* Nowhere, in the law it is provided that an NGO can be registered as a Joint Stock Company.

92. As to what happens with an NGO Microfinance Institution when it is transformed into a Joint Stock Company, the representative of the Ministry of Finance stated orally during the hearing that there are three possibilities:
    a. It can continue to exist as an NGO;

    b. It can be dissolved; and

    c. It can become part of a Bank with up to 25 % of the shares.

The Central Bank

93. The representative of the Central Bank confirmed orally during the hearing that the CBK confirms what was submitted in writting and

stated orally during the hearing by the representative of the Ministry of Finance.

The Ministry of Public Administration, Department of Registration and Liaison with NGOs

94. The Ministry of Public Administration, Department of Registration and Liaison with NGOs once again stated orally during the hearing that they were never consulted during the preparation of this law and as consequence the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions collides with the Law on Freedom of Association of NGOs.

Amicus Curiae brief

95. As to the *amicus curiae* brief, the Court reiterates that pursuant to Rule 53 of the Rules of Procedure *"The Court may, if it considers it necessary for the proper analysis and determination of the case, invite or grant leave to an organization or person to appear before it and make oral or written submissions on any issue specified by the Court."* However, the Court notes also that the *amicus curiae* brief must be in compliance with the Court's Practice Direction No. 01/2012 on Guidelines and Procedure for the Submission of Amicus Curiae Briefs, issued on 5 March 2012.

96. In this respect, the Court notes that on 18 January 2013, the Lawyers' Association "Sejdiu & Qerkini", LLC Prishtina, representing the Association of Microfinance Institutions of Kosovo (hereinafter: "AMIK"), on its own initiative submitted a written *amicus curiae* brief (*see* paragraph 13 of this Judgment). However, the Court considers that this *amicus curiae* brief is not necessary for the proper analysis and determination of the pending case before this Court and, therefore, in accordance with Rule 53 of the Rules of Procedure and the Practice Direction No. 01/2012 on Guidelines and Procedure for the Submission of Amicus Curiae Briefs, will not grant leave.

97. On 31 January 2013, the Court, pursuant to Rule 53 of the Rules of Procedure, sent an invitation to Pallaska & Associates L.L.C., Mr. Dastid Pallaska, attorney, to file a written *amicus curia* to the Court containing his legal stance in respect of the issues raised in the Referral about the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-09.

98. On 7 March 2013, Mr. Dastid Pallaska submitted his *amicus curiae* brief in writing with respect to the question whether Articles 90, 95, paragraph 1.6, 110, 111 and 116 of the Contested Law are compatible with the Constitution.

99. In this respect, *"According to the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe "NGOs are voluntary self-governing bodies or organizations established to pursue the essentially non-profit-making objectives of their founders or members. They do not include political parties." Furthermore, under Section 1(9) of the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe "NGOs should not distribute any profits that might arise from their activities to their members or founders but can use them for the pursuit of their objectives. This prohibition is also repeated and strengthened in Section B (54) of the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe, which stipulates that "NGOs with legal personality should not utilize property acquired on tax-exempt basis for a non-tax-exempt purpose." The aforementioned principles of the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe are also enshrined in the NGO Law."*

100. The brief further explains that *"In addition to the above, it should be noted that the NGO Law in its Article 16.3 also provides that "an NGO may own and manage property and assets for the accomplishment of its non-profit purposes." The principles defined above show clearly that, unless otherwise specified by law, NGOs have the right to own movable and immovable property as well as other assets but, under no circumstances, can the assets and profits of an NGO be used to provide benefits, "directly or indirectly, to any founder, director, officer, member, employee, or donor of the NGO, except the payment or reasonable compensation to such persons for work performed for the organization."*

101. In addition, the brief stated that *"The NGO Law is the one and only law in Kosovo that governs the establishment of the NGOs, its governance, legal rights and obligations as well as voluntary dissolution of NGOs. In this respect, the NGO Law represents the only law with respect to this subject-matter. Having said this, it should be noted that the*

regulator of the financial sector and the exercise of the financial activities is the Central Bank of Kosovo, hereinafter referred to as the "CBK", which is responsible for the supervision and regulation of the financial sector." "However, while the CBK under the Contested Law remains the regulator of the licensed financial activity that may be exercised by an NGO and is responsible for overseeing, managing and regulating the forced administration and liquidation of such an NGO, CBK does not replace in any way form or shape the authority of the Department for the Registration of NGOs within the Ministry of Public Administration. Therefore, these two functions should not be mixed and the fact that an NGO possesses a license to exercise a financial activity by the CBK does not mean in any way, form or shape that this has impacted or changed the legal status of such an NGO."

102. According to the written brief *"Article 111 collides with the non-profit nature and purpose of NGOs provided for by the NGO Law as well as the other provisions of the Contested Law, including its Articles 90, 95, paragraph 1.6, and Articles 110 and as a result of this violates Articles 44 and 46 of the Constitution." "Namely, Article 111 provides that for an NGO Microfinance Institution to be registered as a joint stock company with the Ministry of Trade and Industry and the CBK, such an NGO Microfinance Institution must respect the requirements foreseen under Articles 110 and 112 of the Contested Law with respect to donated capital According to Article 111, "any use of the donated capital or surplus capital shall be subject to the tax of Tax Administration of Kosovo."*

103. As the written brief explains, *"The second sentence of Article 111 of the Contested Law, which provides that "any use of the donated capital and surplus capital is subjected to taxation by the Tax Administration of Kosovo", is in clear contradiction with Articles 90, 95, paragraph 1.6, and 110 of the Contested Law. Namely, this sentence implies that the donated capital can be used for an activity that is not within the realm of non-for-profit nature of the NGO, which is strictly prohibited by Articles 90, 95, paragraph 1.6, and 110 of the Contested Law."*

104. Furthermore, according to the written brief *"[...] the transformation of an NGO Microfinance Institution into a joint stock company represents a grave violation of Articles 90, 95, paragraph 1.6, and 110 of the Contested Law and Article 4 of the NGO Law as well as Articles 44 and 46 of the Constitution, because the property and assets generated from tax-exempt activities of an NGO are being transferred to profitable private companies."*

105. Moreover, according to the written brief *"[…] Article 111 of the Contested Law does not specify who are or would be the owners of the property rights in the newly created joint stock companies that would receive the funds from NGO Microfinance Institutions. This means that the funds from an NGO Microfinance Institution, after taxation, can be used for any purpose and shall be transferred in the ownership of profitable companies whose owners are unknown."*

106. In this respect, the written brief further states that *"In addition to the above, the application of Article 111 of the Contested Law by allowing the transfer of earnings and assets of an NGO Microfinance Institution to a profitable business organizations, it deprives of the right to property the NGOs that would benefit from the distribution of surplus remaining after the voluntary or involuntary dissolution of NGO Microfinance Institutions."*

Admissibility of the Referral

107. As to the Applicant's allegation that Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012 are unconstitutional, the Court observes that, in order to be able to adjudicate the Applicant's 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.

108. The Court needs first to determine whether the Applicant can be considered as an authorized party, pursuant to Article 113.2 of the Constitution, stating that:

"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:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;

and Article 135.4 of the Constitution which stipulates that:

"The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution."

109. In the present Referral, the Ombudsperson contest the constitutionality of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012. Therefore, the Applicant is an authorized party, entitled to refer this case to the Court, by virtue of Article 113.2 and Article 135.4 of the Constitution.

110. In this respect, the Court notes that the Constitution gives the Ombudsperson authorization to initiate claims before the Constitutional Court "with respect to the compliance of the laws, decrees of the President and Prime Minister and regulations of the Government with the Constitution." Likewise, sub-paragraph (b) of Article 113.2 provides that the Ombudsperson is also authorized to initiate claims with respect to the "compliance of the Statute of the Municipality with the Constitution." In this regard, the Court considers that the language of Article 113.2 of the Constitution is clear and unequivocal meaning that the authorization of the Ombudsperson to initiate claims before the Constitutional Court is not limited to Chapter II of the Constitution.

111. Furthermore, as to the further requirement of Article 30 of the Law that the Applicant must have submitted the Referral “within a period of six (6) months from the day upon which the contested act enters into force”, the Court determines that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, entered into force on 12 April 2012, whereas the Applicant submitted the Referral to the Court on 11 October 2012. The Applicant, therefore, has met the deadline for filing a referral with the Court, provided by Article 30 of the Constitution.

112. Since the Applicant is an authorized party, has met the necessary deadline to file a referral with the Court and accurately described the alleged violation of the Constitution, including the challenged law of the Assembly, the Court concludes that the Applicant has complied with the admissibility requirements.

Constitutional assessment of the Referral

113. When assessing this Referral, the Court should have into account that, in general, the entire legislation is assumed to be constitutional, until the opposite is proven. The mandate of the Court is only to review the constitutionality of a decision or of a legislative act and not to review its legality or whether it is supported by good public policy.

I. As to the content of the challenged articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093.

114. In the Republic of Kosovo and other parts of the world, non-governmental organizations make an essential contribution to the development and realization of democracy and human rights, in particular through promotion of public awareness, participation in public life and securing transparency and accountability of public authorities.

115. This importance is also reflected in Article 44 [Freedom of Association] of the Constitution by guaranteeing the right to freedom of association. Article 44 [Freedom of Association] of the Constitution determines that *"The freedom of association includes the right of everyone to establish an organization without obtaining any permission, to be or not to be a member of any organization and to participate in the activities of an organization."* in so far the organizations or activities do not infringe on the constitutional order, violate human rights and freedoms or encourage racial, national, ethnic or religious hatred.

116. Furthermore, the non-governmental organizations are also regulated by the Law on Freedom of Association in Non-Governmental Organizations, No. 04/L-057, setting out the establishment, registration, internal management, activity, dissolution and removal from register of legal persons organized as NGOs in Kosovo.

117. In addition to the Law on Freedom of Association in Non-Governmental Organizations, the Assembly adopted the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, in order to foster and maintain a stable financial system through promoting the sound and prudent management of banks, microfinance institutions and other non bank financial institutions and providing an appropriate level of protection for depositors' interests.

118. With respect to the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, the Applicant challenges the Articles that provide for an NGO Microfinance Institution to transform into a Joint Stock Company.

119. Article 90 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions determines that an NGO Microfinance Institution is a Microfinance Institution that is registered at the Ministry of Public Administration for the purpose of its tax exempt

status as well as at the CBK as a non-governmental organization which has a charitable purpose as its mission. An NGO Microfinance Institution is not permitted to sell or transfer its business, merge, or change its structure, nor is it permitted to distribute or in any way pay out profits, surplus capital, dividends, or any of its assets, except in compliance with this Law.

120. Article 95 (1.6) of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, determines that an NGO Microfinance Institution is not permitted to sell or transfer its business, merge, divest, or otherwise change its structure, mission, or ownership, except in compliance with provisions of voluntary liquidation, receivership, or Official Administration as provided in this Law and with the written approval of the CBK.

121. In addition, Article 110 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, provides that *"In the event of voluntary liquidation, mandatory receivership, or official administration of an NGO Microfinance Institution, any remaining Donated Capital or Surplus Capital must be returned to the original donor(s) or distributed for charitable purposes in Kosovo as may be directed by the original donor (s). If the initial capital of donator is not returned, Donated Capital and the Surplus Capital will be distributed for charitable purposes according to applicable Laws and the plan approved by CBK."* In this respect, *"Neither the CBK itself nor the members of decision- making bodies, or persons related to CBK are permitted to benefit either directly or indirectly from any plan for the charitable disposition of the Donated Capital and Surplus Capital."*

122. Article 111 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions determines the procedures to be followed by an NGO Microfinance Institution in order to be registered in the Ministry of Trade and Industry and in CBK as a Microfinance Institution Joint Stock Company as follows:

"...

Article 111 – Procedures

1. *Any NGO Microfinance Institution in order to be registered in the Ministry of Trade and Industry and in CBK as a Microfinance Institution joint stock company should implement provisions of Article 110 and 112 of this Law on Donated Capital. Any use of Donated capital or surplus capital shall be subject to the tax of Tax*

Administration of Kosovo. Evidence of compliance with the Tax Administration of Kosovo must be submitted to the Ministry of Trade and Industry or its successor as part of the registration as Joint Stock Company and must also be submitted to CBK. Upon registration as a Joint Stock Company at the Ministry of Trade and Industry, the NGO Microfinance Institution registration at the CBK must be terminated and new registration as a Joint Stock Company Microfinance Institution must be completed and delivered to CBK within two (2) weeks.

2. *The registration as an NGO Microfinance Institution remains in effect until terminated, however it shall be the responsibility of the Microfinance Institution to submit an application for registration at CBK as a Joint Stock Company Microfinance Institution.*

3. *The Microfinance Institution is also required to notify the Ministry of Public Administration in order to remove its NGO tax exempt status.*

…"

123. Article 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions provides:

"…

Article 116 – Transitional Provisions for Microfinance Institutions

1. *Any existing Microfinance Institutions must meet the requirements of this Law, together with all applicable CBK Regulations and Orders in all their operations, and are required to apply for a new registration no later than three (3) months after the entry into force of this amending Law.*

2. *After the application is submitted and registration is completed under this Law with CBK, NGO Microfinance Institutions will no longer be regulated by the Ministry of Public Administration.*

…"

124. In the Referral the Applicant complains that the abovementioned Articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions are contrary to Article 44 [Freedom of Association] of the Constitution because by allowing the NGO

Microfinance Institutions to transform into a Microfinance Institution Joint Stock Company they would fall outside the scope of Article 44 of the Constitution and their right to operate based on the right of association would be impeded.

125. The Applicant further alleges that allowing an NGO Microfinance Institution to be transformed into a Microfinance Institution Joint Stock Company is not in accordance with the applicable law in Kosovo and international principles of non-profit law. In this respect, the Applicant argues that the Law on Freedom of Association (entered into force on 24 September 2011), Article 4 paragraph 2 and 3, Article 11 and Article 20 does not allow an NGO to be transformed into another legal entity. The Law on Freedom of Association of NGOs is the one and only law in Kosovo that governs the establishment of the NGOs, its governance, legal rights and obligations as well as the voluntary dissolution of NGOs. In this respect, this Law represents the only law with respect to this subject matter.

126. The Court recalls that the principle of legal certainty is one of the core principles of the constitutional order of the Republic of Kosovo (*see Cases K.O. 29/12 and K.O. 48/12 Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, Judgment of 20 July 2012*).

127. In this respect, the Court held in its Case KO 61/12 that *"[…] pursuant to Article 65 [Competencies of the Assembly] of the Constitution, "The Assembly of the Republic of Kosovo: (l) adopts laws, resolutions and other general acts". The question, therefore, arises whether a Law on Amnesty can prescribe a list of "persons to be designated by name", since a law must possess the quality of a general norm, abstract in nature for the purpose which it intends to regulate and be accessible and foreseeable in its application and consequences for all persons. In this respect, the Court refers to the case law of the ECtHR, where the requirements for the classification as a law have been established in relation to complaints under those Articles of the ECHR and its Protocols which incorporate the "lawfulness" requirements: Articles 5(1), 7, 8, 9, 10 and 11 ECHR, Article 1 of Protocol NO.1, Article 2 of Protocol NO. 4 and Article 1 of Protocol NO.7. These requirements have been restated many times in a formula that, by now, has become standard and was recently repeated in Centro Europa 7 S.R.L. and di Stefano v. Italy ([GC] no. 38433/09, paras. 141-142, 7 June 2012): "[…] a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he*

must be able -if need be with appropriate advice -to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The level of precision required of domestic legislation -which cannot in any case provide for every eventuality -depends on a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. The Court considers that, if a list of "persons to be designated by name" is established by law, such a law will not satisfy the above quoted standard of the ECtHR, since its consequences will not be foreseeable to a degree which is reasonable in the circumstances." (*see Case KO 61/12 Confirmation of proposed constitutional amendments submitted by the President of the Assembly of the Republic of Kosovo on 22 June 2012 by letter Nr. 04-DO-1095, Judgment of 31 October 2012*).

128. The Court is aware of the existence of the principle of *lex specialis,* which means that the special law prevails over the general law and in this respect a new law cannot overrule provisions of an existing law without amending the relevant provisions which set out the general principles, rights and obligations of NGOs, because this would put at stake the principles of legal certainty and rule of law..

129. In this respect, the Court notes that the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions is a general law which regulates the banking and financial sector, while the Law on Freedom of Association in Non-governmental organizations regulates specifically the principles, rights and obligations of NGOs.

130. Furthermore, the Court recalls that the authorities have a constitutional obligation to ensure the uniform application of laws; therefore this constitutional obligation may be impeded by introducing provisions which completely contradict other existing relevant provisions of the law on NGOs, without changing those provisions at the same time (*see also paragraph 126 and 127*).

131. The Applicant continues its argument by referring to Article 46 [Protection of Property] of the Constitution. It complains that the abovementioned Articles of the Law on Banks, Microfinance

Institutions and Non-Bank Financial Institutions are contrary to Article 46 [Protection of Property] of the Constitution because by allowing the NGO Microfinance Institutions to transform into a Joint Stock Company arbitrarily alienates NGO assets, transferring assets from the NGO to other legal or natural persons for shareholding, meaning that the property and assets generated from tax-exempted activities of an NGO are being transferred to profitable private companies.

132. The Court recalls that the assets which are the property of NGOs can be used only to pursue the aims and objectives on which the NGOs are founded, in accordance with the principle of non-profit distribution. Therefore transferring the ownership over NGOs' assets to any physical or legal persons would be against this principle.

133. Furthermore, the Court reiterates that the NGOs are considered to be a very important actor and play a crucial role in the process of development of democratic societies and promotion of human rights. Therefore transformation of NGOs into Joint Stock Companies would deviate from the initial purpose of existence of the NGOs and may seriously damage one of the core elements of democracy.

134. The Applicant complains also that contrary to Article 10 [Economy] of the Constitution, the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions allows for the capital acquired without tax payment to be injected into commercial market competition between banks and other financial institutions, which are bound to pay taxes since their establishment.

135. In this respect, since Micro Financial NGOs raise their funds and increase their assets mainly through receiving grants from donors, be it domestic or from abroad, on which they are not obliged to pay taxes. By the transformation from an NGO into a Joint Stock Company, the other institutions, which regularly pay taxes in accordance with the laws in force, are put into a commercially disadvantageous position.

136. Furthermore, the Applicant argues that the challenged Articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions are contrary to the Recommendation CM/Rec (2007) 14 of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organizations in Europe (adopted on 10 October 2007).

137. The Court notes that this recommendation is not a binding legal instrument but only a recommendation. However it contains universal

democratic principles that the NGOs must adhere to and which are respected and widely implemented in democratic societies.

II. As to the procedure followed in adopting the challenged articles of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093.

138. The Court notes that in the Referral, the Applicant did not raise the procedural aspect of the adoption of this law. However, only at the public hearing the procedural aspect of the adoption of this law was raised by the Applicant, namely, the Applicant alleged that the required quorum for the adoption of this Law by the Assembly was not met.

139. In this respect, the Court refers to Article 69.3 [Schedule of Sessions and Quorum] of the Constitution which provides: *"The Assembly of Kosovo has its quorum when more than one half (1/2) of the Assembly Deputies are present."*

140. Furthermore, 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." The Article provides further that "Laws, decisions and other acts of the Assembly are considered to be adopted, if the majority of the Deputies are present and voting."

141. In this respect, the Court also recalls its own case law, in particular, to Case 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., where it established 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 *"[...] 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, […]" meaning that a deputy is considered to be participating in a session only when he/she meets the abovementioned obligations which includes the casting of his/her vote either in favour, against or by abstaining.

142. Additionally, the Court notes that, regarding the required procedure for the entry into force of a law, the Assembly must adhere to Article 80.6 [Adoption of Laws] of the Constitution.

143. In the present case, the Court notes that Article 118 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions stipulates that this law enters into force on the same date on which it was adopted by the Assembly, i.e. on 12 April 2012.

144. In this connection, the Court refers to Article 80.6 [Adoption of Laws] of the Constitution, which provides *"A law enters into force fifteen (15) days after its publication in the Official Gazette of the Republic of Kosovo, except when otherwise specified by the law itself."* The period of 15 days, as mentioned by the Article, can be shortened if specified by the law itself, but this cannot be a shorter period then the publication as such in the Official Gazette. The objective of the publication of a law is to make the public aware what are the rules to be followed and to adapt their behavior and acts accordingly. This is a basic requirement of the rules of law.

145. Moreover, Article 80.2 of the Constitution provides that the adopted laws by the Assembly shall be promulgated upon signature by the President of the Republic of Kosovo within eight (8) days from receipt. However, the President of the Republic of Kosovo promulgated this Law on 30 April 2012. Thus, in contradiction with the Rule of Law, the principle of legal certainty as well as the aforementioned procedure, the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions entered into force on the day when it had not yet become law, because the law was not promulgated by the President of the Republic of Kosovo until 30 April 2012.

146. Be that as it may, the Court reiterates that under Article 29.3 of the Law, the Applicant has an obligation in the Referral to *"specify the objections put forward against the constitutionality of the contested act."* However, in the Court's opinion, the Applicant has failed to convincingly meet this requirement and has not submitted any supporting documents to make this claim.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.2 of the Constitution, Articles 20 and 27 of the Law and Rules 54, 55 and 56 of the Rules of Procedure, on 14 March 2013,

DECIDES

I. Unanimously, TO DECLARE the Referral admissible;

II. By majority, TO DECLARE that Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, are not compatible with Articles 10 [Economy], 44 [Freedom of Association] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo;

III. Holds that Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, are null and void;

IV. Holds that the Court's Decision Extending the Interim Measures of 24 January 2013, Ref. No.: MP 354/13, suspending the implementation of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012, is terminated upon the entry into force of this Judgment;

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
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

DISSENTING OPINION
In
Case No. KO 97/12
Applicant
The Ombudsperson
Constitutional Review of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions,
No. 04/L-093, of 12 April 2012

The majority has declared that Articles 90, 95 (1.6), 110, 111 and 116 of the Law onBanks, Microfinance Institutions and Non-Bank Financial Institutions is incompatible with the Constitution of the Republic of Kosovo suggesting that those legal articles are incompatible with Articles 10, 44 and 46 of the Constitution. The conclusion of the majority is based upon an erroneous interpretation of the Constitution.

The Applicable Law

Article 90 of the law defines: "Capital;" "Equity;" "Donated Capital;" "Loan;" "Loan Limits;" "Low-income household;" "Low-income individual;" "NGO Microfinance Institution;" "IFRS;" and "Surplus Capital." It also provides:

> *An NGO Microfinance Institution is not permitted to sell or transfer its business, merge, or change its structure, nor is it permitted to distribute or in any way pay out profits, surplus capital, dividends, or any of its assets, except in compliance with this Law.*

Article 95(1.6) of this law provides:

> *(A) NGO Microfinance Institution is not permitted to sell or transfer its business, merge, divest, or otherwise change its structure, mission, or ownership, except in compliance with provisions of voluntary liquidation, receivership, or Official Administration as provided in this Law and with the written approval of the CBK*;

Article 110 of this law provides:

> *1. In the event of voluntary liquidation, mandatory receivership, or official administration of an NGO Microfinance Institution, any remaining Donated Capital or*

> *Surplus Capital must be returned to the original donor(s) or distributed for charitable purposes in Kosovo as may be directed by the original donor (s). If the initial capital of donator is not returned, Donated Capital and the Surplus Capital will be distributed for charitable purposes according to applicable Laws and the plan approved by CBK.*
> *2. Neither the CBK itself nor the members of decision-making bodies, or persons related to CBK are permitted to benefit either directly or indirectly from any plan for the charitable disposition of the Donated Capital and Surplus Capital.*

Article 111 of this law provides:

> *1. Any NGO Microfinance Institution in order to be registered in the Ministry of Trade and Industry and in CBK as a Microfinance Institution joint stock company should implement provisions of Article 110 and 112 of this Law on Donated Capital. Any use of*
> *Donated capital or surplus capital shall be subject to the tax of Tax Administration of Kosovo. Evidence of compliance with the Tax Administration of Kosovo must be submitted to the Ministry of Trade and Industry or its successor as part of the registration as Joint Stock Company and must also be submitted to CBK. Upon registration as a Joint Stock Company at the Ministry of Trade and Industry, the NGO Microfinance Institution registration at the CBK must be terminated and new registration as a Joint Stock Company Microfinance Institution must be completed and delivered to CBK within two (2) weeks.*
> *2. The registration as an NGO Microfinance Institution remains in effect until terminated, however it shall be the responsibility of the Microfinance Institution to submit an application for registration at CBK as a Joint Stock Company Microfinance Institution.*
> *The Microfinance Institution is also required to notify the Ministry of Public Administration in order to remove its NGO tax exempt status.*

Article 116 of this law provides:

> *1. Any existing Microfinance Institutions must meet the requirements of this Law, together with all applicable CBK Regulations and Orders in all their operations, and are*

> *required to apply for a new registration no later than three (3) months after the entry into force of this amending Law.*
>
> *2. After the application is submitted and registration is completed under this Law with CBK, NGO Microfinance Institutions will no longer be regulated by the Ministry of Public Administration.*

Under this law if a micro finance NGO voluntarily liquidates its assets or if it is forced into a receivership pursuant to the application of a law, any remaining capital it may have thereafter must either be: (1) returned to the original donors; or, (2) distributed to appropriate charities as directed by the original donors. In only those situations where the surplus capital is not returned or distributed to an appropriate charity, will the Central Bank of Kosovo make the appropriate charitable distribution to other charities such as other NGOs. This law does not take property from anybody or any legal entity unless they choose to have it so taken from them by failing to designate where its surplus or excess capital shall be transferred.

This law simply regulates any legal entity, including micro financial institutions, that attempt to act like banks or carry out activities similar in many respects to banks. If an NGO voluntarily decides to act in that manner, then this law requires that those NGOs submit to the jurisdiction of the Central Bank of Kosovo and abide by its rules and regulations with respect to how banks and institutions acting like banks must conduct business in Kosovo.

This law does not prevent anybody from establishing an NGO. It does not prevent anybody from participating in or investing in an NGO. It does not prevent anybody in forming an NGO from establishing restrictions on how the assets of the NGO will be used, distributed or returned to the investors if the NGO should re-structure its organization or attempt to change ownership. It does not prevent any entity or person from freely participating in any NGO or with any other person or legal entity.

The Challenge

The Ombudsman claims that this law, by allowing the use of property and assets acquired on a tax-exempt basis by an NGO to subsequently be used for non-tax exempt purposes, deprives somebody of a right to property protected by Article 46 of the Constitution. The Ombudsman claims that other NGOs, who might have been entitled to receive some or all of the property of the NGO that elects to be dissolved and become a joint stock company, are deprived of a right to that property. The Ombudsman then claims that without receipt of that potential property transfer to the NGOs who might be the recipient of

these assets, their right to freedom of association is denied. The flaw in this reasoning is that it assumes that other NGOs have a right to property that has never belonged to them and may never belong to them in the future. Under existing law, it is only possible, not certain, that if an NGO dissolves or changes its legal identity, that another unnamed NGO will receive some or all of the assets of that NGO. The possibility, however remote, of possible ownership of property in the future is not the same as actual ownership of property. The Constitution protects existing property rights, not the mere possibility that one may acquire property in the future.

The Constitution

Article 46 of the Constitution provides:

> *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.*
>
> *4. Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.*
>
> *5. Intellectual property is protected by law.*
>
> This provision of the Constitution specifically: (1) authorizes the Government to regulate the ownership of property in accordance with the public interest; and,

(2) requires that no one shall be arbitrarily deprived of their property. This law regulates the use of certain property if persons or legal entities, such as a micro financial institution, choose to engage in certain banking activities. It does not arbitrarily take property away from anybody. It does require that certain for profit banking activities now be taxed in the same way as those

banking activities of banks and other financial institutions are now taxed so that all entities engaged in similar business activities are treated equally.

Article 44 of the Constitution provides:

> *1. The freedom of association is guaranteed. The freedom of association includes the right of everyone to establish an organization without obtaining any permission, to be or not to be a member of any organization and to participate in the activities of an organization.*
>
> *2. The freedom to establish trade unions and to organize with the intent to protect interests is guaranteed. This right may be limited by law for specific categories of employees.*
>
> *3. Organizations or activities that infringe on the constitutional order, violate human rights and freedoms or encourage racial, national, ethnic or religious hatred may be prohibited by a decision of a competent court.*

Even the freedom of association in the Constitution is not without limitations as can be foreseen by the restrictions on this freedom set forth in paragraphs 2 nd 3 of this Article. The challenged law does not prohibit any one from belonging to any organization. It only regulates, in the "public interest" as mandated by Article 46 of the Constitution, how certain individuals or legal entities must conduct their business if they are going to engage in banking activities.

Article 10 of the Constitution provides:

> *A market economy with free competition is the basis of the economic order of the Republic of Kosovo.*

By requiring that all legal entities, including micro finance NGOs who act like banks in Kosovo, operate under the same equal rules this law enhances and promotes a market economy with free competition. Indeed, this law breaths actual life into this provision of the Constitution by requiring that market competition will be equal and fair.

Conclusion of the Merits

It is for all of these reasons, that the challenged law, Articles 90, 95(1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions is compatible with the Constitution and a legitimate

exercise of the Government's right and obligation, in the public interest, to regulate this type of financial activity.

Were there Procedural Irregularities in the Adoption of the Law?

Although it was not specifically addressed in the operative part of the Court's judgment in the reasons articulated in the majority opinion it is suggested that this law was not properly enacted in compliance with the Constitution. That reasoning is incorrect.

Laws enacted by the Assembly are presumed to be lawfully enacted. Indeed, neither the Applicant nor any other party, who could now lawfully raise this issue with the Court, has questioned whether this law was properly enacted by the Assembly. Therefore, the question of whether this law was properly enacted is not before this Court. Even if there was a challenge to whether this law was properly enacted pursuant to the laws of Kosovo, only the regular courts, not this Court, would have the authority to interpret that issue because this Court is not and cannot serve as a fourth instance court of review of the applicable laws of Kosovo.

Even if the question of whether this law was enacted in a manner that was not compatible with the Constitution was before this Court, the Court would be compelled to find that there was no violation of the Constitution in enacting this law. In analyzing this issue at least three separate articles of the Constitution must be read and interpreted in such a manner as to make all three provisions of the Constitution compatible, if at all possible.

Article 69. 3 of the Constitution provides:

> *The Assembly of Kosovo has its quorum when more than one half (1/2) of all Assembly deputies are present.*

This Article addresses the Constitutional requirements for the Assembly to have a quorum so as to be able to conduct business. It is separate and distinct from Article80 of the Constitution which addresses the required number of votes of members of the Assembly to enact a law.

Article 80.1 of the Constitution provides:

> *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. (Emphasis added.)*

This Article prohibits voting by proxy. A member of the Assembly must be both present in the Assembly and voting to have his or her vote count with respect to the enactment of a specific legislative proposal. It does not preclude a member of the Assembly being "present" for purposes of a quorum but neither officially voting nor officially acknowledging their presence in the Assembly when a specific piece of legislation is being voted upon. The official vote tally of those voting and those listing themselves as "present" is not necessarily the total number of members of the Assembly present for "quorum" purposes because some members of the Assembly may choose to neither vote nor list themselves as being "present" when the vote on a specific piece of legislation is proceeding. Therefore, it could be an erroneous assumption for this Court to conclude that when this law was enacted, it was done without a quorum if it based its conclusion solely on the official vote tallies of those listed as "voting" and those listed as "present."

It has been noted that Article 118 of this Law, although not challenged by any of the parties to this referral, states that the law shall enter into force on 12 April 2012, the day that it was enacted by the Assembly. Article 80 of the Constitution provides that the President of the Republic has 8 days from date of receipt of the law from the President of the Assembly to return that law to the Assembly for further consideration. It is also noted that, under the Constitution, generally laws do not enter into force until 15 days after they have been published in the Official Gazette of the Republic of Kosovo. The Constitution, however, also allows the Assembly, in certain circumstances, to specify a different date for the law to enter into force.

Article 80.6 of the Constitution provides:

> *A law enters into force fifteen (15) days after its publication in the Official Gazette of the Republic of Kosovo, except when otherwise specified by the law itself*. (Emphasis added.)

The fact that the Assembly decided to make this law effective the day it was passed in the Assembly rather than 15 days after publication in the Official Gazette does not render it constitutionally invalid. At worst, its effective date is postponed until 15 days after it was officially published in the Official Gazette.

Conclusion on the Procedure

Therefore, Articles 90, 95(1.6), 110, 111 and 116 of the Law on Banks, Micro Finance Institutions and Non-Bank Financial Institutions, No. 04/L-093 was enacted in a manner that was compatible with the Constitution of the Republic of Kosovo.

Respectfully submitted,
Robert Carolan
Judge

Case No. KO 97/12
Applicant
The Ombudsperson
Constitutional Review
of Articles 90, 95 (1.6), 110, 111 and 116
of the Law No. 04/L-093
on Banks, Microfinance Institutions and Non-Bank Financial Institutions,
of 12 April 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

DISSENTING OPINION
of Judge Almiro Rodrigues

The Majority has declared that Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions (hereinafter, the Law) are incompatible with the Constitution of the Republic of Kosovo in that those articles of the Law are in violation of Articles 10, 44 and 46 of the Constitution.

However, in our view and with all respect, the Majority should have first taken into account an essential preliminary aspect in relation to the legislative process, that is: the organized sequence of steps established by the Constitution and designed to enact a carefully weighed *and well-considered law.*

In fact, during the oral hearing in Case No. KO 97/12, the Ombudsperson raised procedural questions pertinent to the legislative process of the Law under review.

Firstly, the Ombudsperson mentioned that the Law was reviewed and approved by the Committee on Budget and Finance, as a functional committee of the Assembly, and proceeded with directly at the plenary session, where it was adopted as such without ever having been reviewed and approved by the permanent Committee for Legislation.

Secondly, the Ombudsperson mentioned that the quorum needed to adopt a law was not observed. The Ombudsperson invoked Article 69.3 of the Constitution and Article 51 of the Rules of Procedure of the Assembly. Both Articles stipulate that "the Assembly of Kosovo has its quorum when more than one half (1/2) of all Assembly deputies are present".

The Ombudsperson stated that the official data presented on the website of the Assembly of Kosovo show *that* 54 deputies vote*d* in favor of adopting the Law, 4 abstained, and one deputy reported that, due to technical reasons, he was unable to vote. Thus, the total number of deputies present and voting in the plenary session was 59.

According to Article 64.1 of the Constitution, the *"Assembly has one hundred twenty (120) deputies elected by* secret *ballot on the basis of open lists"*. Therefore, the required number of deputies to form a quorum is 61 or more than one half (1/2) as stipulated in Article 69.3 of the Constitution.

On the other side,Article 80 [Adoption of Laws] of the Constitution establishes:

"1. 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.*
[...]."

Thus, again based on official data of the Assembly of Kosovo, on the day of the adoption of the Law 59 deputies were present and voting, which falls short of the number of deputies required.

The corollary is that the procedure for adopting the Law was not observed nor did it meet the procedural requirements to have a quorum as expressly established by the combined constitutional provisions of Articles 64.1, 69.3 and 80.1 of the Constitution. As a consequence, the Law cannot be considered to have been adopted in accordance with these Articles and, thus, is not valid.

Thirdly, even assuming that the Law was properly adopted, it could not have entered into force on the same date as the date of the adoption, which is 12 April 2012. In this regard, two constitutional provisions come into play: Article 80.2 and 80.6, and Article 84.5 and 84.6 of the Constitution.

Article 80 [Adoption of Laws] of the Constitution

"[...]

2. Laws adopted by the Assembly are signed by the President of the Assembly of Kosovo and promulgated *by the President of the Republic of Kosovo upon her/his signature within eight (8) days from* receipt.

[...]

6. A law enters into force fifteen (15) days after its publication in the Official Gazette of the Republic of Kosovo*,* except *when otherwise specified by the law itself.*"

Article 84 [Competencies of the President] of the Constitution

"The President of the Republic of Kosovo:
[…]
(5) promulgates laws approved by the Assembly of Kosovo;

(6) has the right to return adopted laws *for re-consideration, when he/she considers*
them to be harmful to the legitimate interests of the Republic of Kosovo or one or more Communities. This right can be exercised *only once per law;*
[…]."

This means that the Law entered into force in disregard of the competencies of the President of the Republic established under Article 84 of the Constitution, thus without following the indispensable procedural requirements provided for by the Constitution.

In conclusion, the Law did not meet the quorum requirement as established by the combined constitutional provisions of Articles 64.1, 69.3 and 80. 1 of the Constitution; even assuming that it did, the Law could not have entered into force without being promulgated and considered by the President of the Republic of Kosovo; and the Law could not have entered into force before having been published in the Official Gazette.

Even though the aforementioned failures are of a procedural nature, they produce substantial consequences, because they impact on the principles which are the foundations of the Republic of Kosovo.

In this respect, Article 4 [Form of Government and Separation of Power] stipulates:

"1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balancesamong *them as provided in this Constitution.*

2. The Assembly *of the Republic of Kosovo exercises the legislative power.*

3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally*, and is the guarantor of the democratic*

functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.

[…].

6. The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter *of the Constitution.*

[…]."

In our view, the control of the constitutionality of laws consists of the examination of their compatibility with the Constitution as well as of the checking of their conformity with formal and material requirements. *The* Constitution demands that laws shall be prepared and enacted in a certain way and with a certain content. Thus, there will be unconstitutionality, if a given normative act is produced without the proper procedures of the legislative process as defined in the Constitution having been followed.

Failures in the procedures regarding adoption, promulgation and publication procedures of the Law disturb "the checks and balances among [the powers] as provided in this Constitution" and the competency of the President of the Republic to act as "the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution". Therefore, those failures fall under the jurisdiction of the Court when protecting the constitutionality of normative acts.

Whenever a constitutional question is raised before the Court, regarding the abstract control of the constitutionality of normative acts, the Court must follow a three steps procedure, before embarking on the substantive examination of such acts. This three steps procedure entails the following: the examination of the competence of public authorities to issue a normative act; the examination of the procedure for issuing a normative act; and, finally, the examination of the substantive conformity of the normative act with the Constitution4.

In the case at issue, the competence of the Assembly to exercise "the legislative power" to issue the Law is not disputable.

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4 See European Commission for Democracy through Law (Venice Commission),30 June – 1 July 2005 Vilnius Lithuania, REPORT "Examining of facts in cases involving abstract control of normative acts" by Marek Safjan, President, Constitutional Court, Poland.

However, the followed legislative process for the issuance of the Law under review is indeed disputable, since it was characterized by multiple shortcomings at several levels as set out above. In our view, the Majority should have taken them into account.

In conclusion, by not respecting the procedures defined in the Constitution, democracy, rule of law and human rights were jeopardized. The adoption of the Law without the constitutionally required quorum breaches the democratic principle; the entry into force of the Law on the day of its adoption without the constitutionally required promulgation by the President of the Republic of Kosovo and publication on the Official Gazette, is not only in contravention with the principle of the separation of powers and checks and balances provided by the Constitution but also with the right of citizens to legal certainty and predictability as central aspects of the principle of the rule of law. Publication is an essential requirement for the law to be made known to the people who are to be bound by it.

Bearing in mind all the foregoing, the Constitutional Court as an independent organ in protecting the constitutionality and final interpreter of the Constitution (Article 4. 6 of the Constitution) should have stepped in and reinforce the supremacy of its regular constitutional power.

Thus, the examination of the substantive conformity of the Law with the Constitution should not have been undertaken by the Court, without prior consideration of the challenged procedural failures in the enactment of the Law under review.

Therefore, the Court should not have dwelled on the challenged provisions of the Law, because substantive procedural violations render the rest of the Referral without consequence.

Respectfully submitted
Almiro Rodrigues,
Judge

KI 95/12, Daut Jemin Hoxha, date 02 May 2013- Constitutional Review of the Order C- 111-12-274 of the Special Chamber of the Supreme Court of Kosovo, dated 23 August 2012

Case KI95/12, Resolution on Inadmissibility, of 6 March 2012

Keywords: individual referral, non-exhaustion of legal remedies

The Applicant requests from the Constitutional Court "to interpret whether the Special Chamber of the Supreme Court has the right to reject our lawsuit because we do not have the financial nor material means to perform required translation in English language".

In the present case, irrespective of what constitutional rights may be invoked, the Court considers that the Applicant has not acquired the status of a victim of a violation by a public authority, because the public authority in question has not yet taken any action which could be said to violate the Applicant's rights, therefore the Referral is declared inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 95/12
Applicant
Daut Jemin Hoxha
Constitutional Review of the Order C- III-12-274 of the Special Chamber of the Supreme Court of Kosovo, dated 23 August 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Daut Jemin Hoxha, residing in Prizren.

Challenged decision

2. The Applicant challenges the Order of the Special Chamber of the Supreme Court (hereinafter, the "Special Chamber"), C-III-12-274, of 23 August 2012.

Subject matter

3. The Applicant requests the Constitutional Court "*to interpret whether the Special Chamber of the Supreme Court has the right to reject our lawsuit because we do not have the financial nor material means to perform required translation in English language*".

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 49 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 25 September 2012, the Applicant submitted the Referral to the Court.

6. On 1 October 2012, the Secretariat of the Constitutional Court requested the Applicant to complete his Referral and to inform the Court if he had complied with Article 25.9 and 25.10 of the Annex of the Law on Special Chamber (Law Nr. 04/L-033). The Applicant has not submitted any reply to the Court.

7. On 31 October 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (Presiding), Kadri Kryeziu and Enver Hasani.

8. On 14 November 2012, the Secretariat notified the Applicant that his referral has been registered and informed the Supreme Court of the Applicant's referral.

9. On 6 March 2013, 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

10. On 23 August 2012, the Special Chamber of the Supreme Courtissued the Order C- III-12, which, in the pertinent part, reads as follows:

"The plaintiff(s) is/are ordered that within 15 (fifteen) days from the delivery of this order to submit the following documents:

1. *The English translation of all the documents of the file of Municipal Court in Prizren C.nr.618/11/II.*

2. *A revised and completed lawsuit directed to the Special Chamber pursuant to articles 25, 27 and 28 of the Annex of the Law on Special Chamber (Law Nr.04/L-033) upon notifying the Privatisation Agency of Kosovo on the aim to submit a lawsuit against the respondent pursuant to article 29.1 of the Law on PAK (Law Nr.04/L-034).*

3. *The English translation of the new lawsuit as defined above in paragraph 2 of this order, and its supporting documents.*

4. *Proof that PAK has been notified prior to the submission of the new lawsuit at the Special Chamber as well as its translation into English language.*

5. *List of evidences that the plaintiff(s) intend to present as well as their translation into English language."*

11. The same Order further pointed out the provision of Article 25.9 to the Annex of the Law no.04/l-033 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters, as follows:

> *"9. A natural person may submit an application to the Presiding Judge for assistance in developing the English translation of pleadings and supporting documents. Such application shall be submitted with the pleadings and include a statement of the party's financial means and any supporting evidence that the party wishes the Presiding Judge to take into account."*

Applicant's allegations

12. The Applicant does not present any allegations beyond the basic question, "*whether the Special Chamber of the Supreme Court has the right to reject our lawsuit because we do not have the financial nor material means to perform required translation in English language*".

Admissibility of the Referral

13. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.

14. 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."

15. 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 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).

16. In the present case, the Court finds that the Applicant has failed to indicate what steps, if any, he has taken to seek redress for the alleged violation of the Constitution.

17. The Court notes that the Applicant has apparently not submitted an application to the Presiding Judge of the Special Chamber of the Supreme Court requesting assistance in developing the English translation of pleadings and supporting documents.

18. Furthermore, the Court notes that the Applicant has apparently not filed an appeal against the Order of the Special Chamber. C-III-12, of 23 August 2012, 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.

19. If such a claim before the Appellate Panel would not be successful, then the Applicant would be able to bring a Referral before this Court.

20. 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.

21. In a general sense, the Court 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*".

22. However, even assuming that the Applicant had pursued the available legal remedies regarding his claims, the Court notes that the Applicant requests the Constitutional Court "*to interpret whether the Special Chamber of the Supreme Court has the right to reject our lawsuit because we do not have the financial nor material means to perform required translation in English language".*

23. The Applicant has not alleged that his lawsuit has, in fact, been rejected, whether due to a failure to provide documents in English, or for some other reason. Instead, Court finds that the Applicant is asking for a determination in the abstract as to whether the Special Chamber "has the right to reject" a lawsuit for failure to provide documents in English.

24. The Special Chamber's request that all documents of the file be submitted in English translation is based on the Annex to Law Nr. 04/L-033, as authorised by Article 7, para. 1, of the Law. As such, the request to the Constitutional Court contained in this Referral can be understood as a request to review the constitutionality of the provisions of Law nr. 04/L-033 where persons submitting lawsuits to the Special Chamber are required to provide English language translations of all documents.

25. The Court recalls that Article 113, paragraphs 2(1), 4, 5, and 8 specify which parties are authorized to submit referrals to the Court regarding the compatibility of provisions of legislation with the Constitution. This authority is not granted to individuals.

26. Under 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 […].*"

27. Under Rule 36, para. 2, under c, the Court shall reject a Referral as being manifestly ill-founded, *"when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution."*

28. In the present case, irrespective of what constitutional rights may be invoked, the Court considers that the Applicant has not acquired the status of a victim of a violation by a public authority, because the public authority in question has not yet taken any action which could be said to violate the Applicant's rights.

29. In fact, the Special Chamber has merely informed the Applicant of a procedural request, and, as such, it is not (yet) possible to determine

whether there is, or will be, any adverse effects for the Applicant to the enjoyment of his constitutional rights.

30. Consequently, for the reasons outlined above, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47, para. 2, of the Law and Rule 36.1 (a) of the Rules of Procedure, on 6 March 2013, unanimously:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 111/12, Mit'hat Loxhani, date 02 May 2013 - Constitutional Review of the Decision of the Conditional Release Panel, MD/PLK No. 02/12, dated 29 May 2012

Case KI111/12, Resolution on Inadmissibility, of 13 March 2012

Keywords: individual referral, manifestly ill-founded

The subject matter of the Referral is the assessment by the Constitutional Court of the constitutionality of the Decision of the Conditional Release Panel MD/PLK No. 02/12, of 29 May 2012, by which the Applicant's request for conditional release has been rejected.

In his Referral, the Applicant proposed to the Constitutional Court to amend the ruling of the Conditional Release Panel MD/PLK No. 02/12, of 29 May 2012, and grant his request for conditional release.

In conclusion, the Applicant has neither built a case on a violation of any of her rights guaranteed by the Constitution nor has he submitted any *prima facie* evidence on such a violation.

This Court cannot serve as interpreter of the correct application of the national law.

It follows that the Referral is manifestly ill-founded, 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".

RESOLUTION ON INADMISSIBILITY
in
Case No. KI111/12
Applicant
Mit'hat Lozhani
Constitutional Review of the Decision of the Conditional Release Panel MD/PLK No02/12 dated 29 May 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mit'hat Lozhani, currently serving his prison sentence in the Prison of Gjilan.

Challenged decision

2. The challenged decision is the Decision of the Ministry of Justice Conditional Release Panel MD/PLK No02/12 dated 29 May 2012.

3. In addition, on 26 July 2012, the Applicant was informed by the Supreme Court of Kosovo that "*the Court does not have a competence to review his request, since Conditional Release Panel is independent body and its ruling are final*."

Subject matter

4. The subject matter of the Referral is the assessment by the Constitutional Court of the constitutionality of the Decision of the Conditional Release Panel MD/PLK No02/12 dated 29 May 2012 by which the Applicant's request for conditional release has been rejected.

5. In his Referral the Applicant proposed to the Constitutional Court to amend the ruling of the Conditional Release Panel MD/PLK No02/12 of 29 May 2012 and grant his request for conditional release.

Legal Basis

6. The Referral is based on Art. 113.7 of the Constitution; Articles 46, 47, 48 and 49 of 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

7. On 5 November 2012, the Applicant submitted a referral with the Constitutional Court.

8. On 6 December 2012, the President of the Court appointed Judge Robert Carolan as Judge Rapporteur and a Review Panel composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Arta Rama-Hajrizi.

9. On 10 December 2012, the Court notified the Applicant and the Conditional Release Panel of the registration of the Referral.

10. On 24 December 2012, the Conditional Release Panel sent their reply to the Applicant's referral together with the additional documents related to the Applicant's case.

11. On 13 March 2013, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of Facts

12. From the Parties submissions and attached documents the following facts can be summarized.

13. On 26 January 2004, by the judgment of the District Court in Peja, the Applicant was found guilty for the criminal offence of murder as provided by Article 30 para.1 of the Provisional Criminal Code of Kosovo (PCCK) and was sentenced to 11 years of imprisonment, counting the time spent in detention on remand.

14. The execution of serving the prison sentence by the Applicant has started on 26 July 2003.

15. Following execution of the half of his sentence, recalling Article 80. 2 of PCCK, the Applicant submitted his first request for conditional release.

16. The Applicant's request was reviewed on 17 April 2009, by a Conditional Release Panel of three judges who found that the conditions specified in Article 80 of the PCCK were not met due to the Applicant's behavior. The review of the Applicant's case was scheduled for one year.

17. On 30 April 2010, the Panel reviewed the new request of the Applicant and rejected it, with justification that although the Applicant started to refrain from negative behavior, from the data of the professional team of the correctional center, it was concluded that he has not managed to understand the consequences of the criminal offence.

18. The Conditional Release Panel further rejected the Applicant's request for conditional release on 7 June 2011.

19. On 7 October 2011, the Conditional Release Panel once more reviewed the Applicant's request also acting ex officio and rejected it. In that Decision the Panel admitted that they made technical mistake in the earlier decision of 7 June 2011, arguing that the Applicant managed to escape from the prison. The Panel scheduled new review for three months.

20. The Applicant's request for conditional release was considered again on 21 February 2012 and was consequently rejected. The Panel suggested to the Applicant to make efforts for reconciliation and to improve relationships with the victim's family.

21. On 29 May 2012, the Conditional Release Panel again considered the Applicant request and found that the conditions for his release still were not met based on the Applicant's behavior, since he threatened a correctional officer.

Applicant's Allegations

22. The Applicant's main argument in support of his referral is that Decision of 29 May 2012 issued by the Conditional Release Panel is based on wrong facts and thus unlawful. He argues that the conditions for release, prescribed by Article 80 of the PCCK as well as by relevant provisions of the Law no. 03/02 -191 on Execution of Criminal Sanctions, have been

met and therefore the Constitutional Court should amend the challenged Decision of 29 May 2012.

Response from the Interested Party

23. In their reply to the Referral the Conditional Release Panel gave detailed account of every decisions and documents based on which these decisions were adopted.

24. Finally, it was suggested by the Panel to reject the Applicant's request as ungrounded.

Applicable Law

25. Article 80 of the PCCK (published under UNMIK/REG/2003/25 on 6 July 2003) reads as follows:

> **"Conditional Release**
> **Article 80**
>
> (*1) The convicted person may be granted conditional release if there are reasonable grounds to expect that he or she will not commit a new criminal offence. The conduct of the convicted person while serving his or her punishment shall be taken into consideration when deciding whether or not conditional release may be granted.*
>
> *(2) A convicted person who has served one-half of a sentence of imprisonment may be granted conditional release and released from prison on the condition that he or she does not commit another criminal offence before the expiry of the sentence.*
>
> *(3) A convicted person who has served one-third of a sentence of imprisonment may be granted conditional release on an exceptional basis provided that special circumstances relating to the convicted person indicate that he or she will not commit a new criminal offence.*
>
> *(4) A convicted person who has served three-quarters of a sentence of long-term imprisonment may be granted conditional release.*

(5) Conditional release shall be decided by a panel established by the competent public entity in the field of judicial affairs in accordance with the law.

26. Law on Execution of Penal Sanctions (2010/03-L-191) of 22 July 2010 to the extent relevant provide in Articles 128 and 129 as follows:

"Article 128

Conditional Release

1. A convicted person is eligible for conditional release in accordance with the Criminal Code of Kosovo.

2. A convicted person has the right to submit a request for conditional release through the correctional facility in which he or she is serving his or her sentence to the panel for conditional release established pursuant to the Criminal Code of Kosovo.

3. After submission of appeal for conditional release, the Director of correctional facility shall request from Probation Service to conduct the visit of convinced person and to sign agreement on its supervision after conditional release.

4. The director of the correctional facility may submit a motion for conditional release.

5. Upon the submission of a request or a motion for conditional release, the director of the correctional facility shall immediately submit to the conditional release panel a copy of the personal file of the convicted person and a report on the convicted person by a professional team in the correctional facility through annexed letter signed by General Director of Correctional institution.

6. If the conditional release panel doesn't have enough information, may request from correctional facility additional information.

7. The report under paragraph 5 of the present article shall set forth:

7.1. the nature of the criminal offence committed by the convicted person;

7.2. the attitude of the convicted person to the criminal offence and the victim and the victim's family;

7.3. any previous criminal offences committed by him or her;

7.4. his or her family circumstances and social background;

7.5. his or her physical or psychological state, including evaluation of hazardous state whenever is necessary from a Psychiatrist or Psychologist;

7.6. his or her behavior in the correctional facility and the progress achieved in removing the factors that caused the criminal offence;

7.7. his or her post-release plans;

7.8. the support that would be available to him or her on release; and

7.9. any circumstances indicating that he or she will not commit a new criminal offence.

Article 129

1. The conditional release panel, established by the competent public entity in the field of judicial affairs, shall consist of one judge and two lay judges who shall have knowledge and experience in psychology, criminology, psychiatry, pedagogy, sociology and other social sciences relating to conditional release.

2. The free on parole panel shall decide on all requests and motions for conditional release."

Assessment of the Admissibility of the Referral

27. At the outset, the Court notes that the Applicant makes no claim of a violation of the Constitution, only an alleged violation of a correct application of national law.

28. The Applicant is only asking the Court to determine the legality of the discretionary denial of his request for conditional release from the

balance of his sentence, even though the Conditional Review Panel made extensive findings why it was denying the Applicant's request.

29. In that respect, the Constitutional Court would like to recall that, under the Constitution, it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by Conditional Release Panel, 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 public authorities.

30. In conclusion, the Applicant has neither built a case on a violation of any of her rights guaranteed by the Constitution nor has she 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).

31. This Court cannot serve as interpreted of the correct application of the national law.

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

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 (7) of the Constitution and Rule 36of the Rules of the Procedure unanimously:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur
Robert Carolan

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 18/13, Blerim Uka, date 31 May 2013- Constitutional Review of the Judgment Ac.no. 1314/2012, of the District Court in Prishtina, dated of 07.12.2012

Case 18/13, Resolution on Inadmissibility of 16 April 2013.

Keywords: individual Referral, request to impose an interim measure, constitutional review of the Judgment of the District Court.

The Referral Applicant filed the Referral pursuant to 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 15 January 2009

On 15 February 2013, the Referral Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo and sought from the court the constitutional review of the Judgment of the District Court in Prishtina.

The Applicant alleges that the Judgment violates his rights and freedoms as per Article 21 (General Principles of the Constitution), Article 22 (Direct Application of International Treaties and Instruments), Article 31 (Right to Fair and Impartial Trial), including Article 6 of the European Convention on Protection of Human Rights.

The President with Decision (no.GJR. KI 18/13 of 26 January 2013), appointed Judge Almiro Rodrigues as a Judge Rapporteur, and on the same day the President with Decision KSH 18/13 appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama Hajrizi.

Upon reviewing the case the Court concluded that the Applicant has not sufficiently substantiated and proved his allegations in terms of a constitutional violation of his rights by the Municipal and District Courts. In addition, the Court notes that the judgments and decisions of the Municipal and District Courts are rather argued and reasoned and do not show any arbitrariness.

As to the request to impose an interim measure the Court notes that the Referral Applicant simply sought the imposing of an interim measure, but did not provide any arguments or relevant documents that would explain and show why and how would he suffer irreparable damage.

For all the aforementioned reasons, the Constitutional Court of Kosovo in the session of 16 April 2013, concluded that the Referral is inadmissible as it is manifestly ill-founded, and that the request for interim measure is rejected.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI18/13
Applicant
Blerim Uka
Constitutional Review of the Judgment Ac.no. 1314/2012, of the District Court in Prishtina, dated of 07.12.2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Applicant

1. The applicant is Blerim Uka, born in Mitrovica, currently residing in Prishtina, represented by the practising lawyer Gani Asllani from Prishtina.

Challenged decision

2. The Applicant challenges the Judgment Ac. no. 1314/2012, of the District Court in Prishtina, dated of 07 December 2012 and served on him on 16 January 2013.

Subject matter

3. The Applicant claims that the court have not rendered fair and impartial judgment, thereby violating provisions of the Constitution of the Republic of Kosovo and of the European Convention for Protection of Human Rights and Fundamental Freedoms.

4. The Applicant also requests the Court to impose an interim measure, suspending the execution of the order [E.no.915/12], of 05 Marcha 2013, of the Court in Prishtina.

Legal basis

5. 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, of 15 January 2009 (hereinafter, the Law), and Rule 56, paragraph 2, of the Rules of Procedure.

Proceedings before the Court

6. On 15 February 2013, the Applicant filed the referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 26 February 2013, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama Hajrizi.

8. On 16 April 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral and rejection on the requested interim measure.

Summary of facts

9. On 31 March 2000, the Applicant entered working relationship as an executive director with the Private Company "P.P. DAK INGENIERING", owned by H.S.

10. On the month of November 2001, the owner of the Company H.S., due to financial problems, decided to terminate the activities of the company and ordered the Applicant, exercising his functions as executive director, to inform in writtenall staff of the company that the working relationships had been terminated.

11. On 27 November 2002, the Applicant served in written the employee I.H., with the decision on termination of his contract of 15 August 2001. I. H., refused to accept.

12. On an unknown date in 2006, I. H., filed with the Municipal Court in Prishtina a claim against the Applicant, for compensation of damages and payment of monthly salaries as per working contract. The Applicant claims that he never received the claim from the Court.

13. The Applicant states that I.H., "was very conscious that he did not establish employment relationship with Blerim Uka [the Applicant], but

with the company "N.P.DAK ENGINEERING" owner of which was H.S.".

14. On 15 December 2008, the Municipal Court in Prishtina approved the claim suit, and rendered a judgment [C1.no.139/2006], by which the Court ordered "P.P.DAK INGENIERING", to pay I.H.,for his working contract signed on 15 August 2001.

15. However, the Applicant states that the Judgment of the Municipal Court ordered "P.P.DAK INGENIERING" to pay I.H.,"by obliging me, in the capacity of owner sometimes (and in fact I was employed same as claimant by employment contract) and sometimes in the capacity of legal representative" and, apparently, not knowing "the distinction between owner and executive director of a company" as, in fact, H.S., was the owner of P.P.DAK INGENIERING "who had established the employment relationship" with I.H.

16. On 16 April 2009, the Applicant filed with the District Court in Prishtina an appeal against Judgment [C1.no.139/2006] of 15 December 2008.

17. On 27 April 2012, the District Court in Prishtina rendered a Judgment [Ac.no. 540/2009], thereby rejecting the appeal of the Applicant, and upholding in its entirety the judgment of the Municipal Court [C1.no.139/2006] of 15 December 2008.

18. On 17 May 2012, I.H.,filed a request for execution of judgment of the Municipal Court in Prishtina [C1.br.139/2006] against "DAK-ADK INGENIERING" owned by Blerim Uka.

19. On 10 October 2012, the Municipal Court rendered a Judgment [Ekz.no. 915/2012], thereby approving the request for execution.

20. On 16 October 2012, the Applicant filed an appeal with the District Court against the decision of the Municipal Court in Prishtina, [Ekz.no. 915/2012].

21. On 7 December 2012, the District Court in Prishtina rejected the appeal of the Applicant as ungrounded, while the decision of the Municipal Court in Prishtina [Ekz.no. 915/2012], of 10 October 2012, was upheld.

Applicant's allegations

22. The Applicant claims that he was not the owner of the company "P.P. DAK INGENIERING“and he only had a working relationship as executive director.

23. The Applicant claims that, on 24 November 2004, he established a new company called ‘’ADK“ which, as a different legal entity, has nothing to do with "P.P. DAK INGRNIERIN”, then owned by H.S.

24. The Applicant argues that, on 17 May 2012, there was an error in filing the request for execution, by which it was requested the execution on the company "DAK-ADK”, which is not mentioned in the enacting clause of the final judgment [Cl.no. 139/2006] of 15 December 2008.

25. The Applicant concludes that the regular courts rendered their decisions without ascertaining the full factual situation, in violation of provisions of the Constitution and the European Convention on Human Rights.

26. The Applicant alleges that his rights and freedoms as per Article 21 (General Principles of the Constitution), Article 22 (Direct Application of International Treaties and Instruments), Article 31 (Right to Fair and Impartial Trial), including the Article 6 of the European Convention on Protection of Human Rights, have been violated.

27. *The Applicant, in sum, requested the Constitutional Court :*

> “to review the legality of decisions of regular courts, compliance of these decisions with applicable laws in the Republic of Kosovo, the Constitution of the Republic of Kosovo, and the European Convention on Protection of Human Rights and Fundamental Freedoms, and Protocols to it”.

28. *The Applicant further expects* “the Constitutional Court to give the evaluation for this civil legal matter”.

Admissibility of the Referral

29. The Applicant claims that he has never received the claim filed against him by I. H., with the Municipal Court. The Applicant further alleges that in all instances “the Courts have not determined at all the factual situation on who the respondent is and who in fact was supposed to be the respondent”.

30. The Court needs first to examine whether the Applicant has fulfilled all the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

31. The Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution that establishes:

> *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".*

32. The Court notes that Rule 36 (1).c) of the Rules of Procedure provides:

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

33. *The Court also refers to Rule 36 (2) d) of the Rules of Procedure, which provides:*

> *"The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: (d) the Applicant does not sufficiently substantiate his claim".*

34. The Constitutional Court notes that the Municipal Court in Prishtina, in its judgment [C1.no.139/2006] of 15 December 2008, observed that "the respondent even though was invited regularly about holding the main review what he certified by the acknowledgment on admission of the date 04 December2008, to the invitation of the Court was not responded and he did not justify his absence, thus the Court in compliance with Article 295 of LCP and according to the proposal of the authorized of claimant, the main public session was held in his absence".

35. The Applicant has never complained, during the regular proceedings, about not having received the claim filed with the Municipal Court against him by I.H.; neither he has built and proved a case before the Court on that alleged violation.

36. *On the other side, the District Court, in its judgment of 7 December 2012, reasoned that:*

> "The appealed allegation in the circumstances above that the debtor, the company "ADK" does not have any obligation towards the creditor regarding the compensation of damage, since by final judgment was obliged the company "DAK-Engineering," this court did not approve

as grounded. This is so since it is about the same respondent, now the debtor. The mentioned fact this court confirmed by the evidence in the case file. In other words, the debtor by public act stated that "DAK-Engineering," the owner of which was H.S., and director Blerim Uka, now is run with the name the company "ADK", which owner is Blerim Uka, while the director is H.S. All this leads to the fact that it is about the same company, which only changed its name. The change of the company name and the rotation of the owner and director do not release it from the obligations towards the debtor and which was upheld by the final judgment".

37. The Constitutional Court reminds that it is not a fourth-instance Court, when reviewing the decisions rendered by regular courts on establishing the facts and applying the law.

38. It is the role of regular courts to interpret and apply the procedural and substantive law (see *mutatis mutandis*, García Ruiz v. Spain [GC], no. 30544/96, paragraph 28., European Court for Human Rights [ECHR] 1999-I).

39. The Constitutional Court notes that the Applicant was given numerous possibilities of arguing his case and presenting evidence he deems relevant for his case before the regular courts. Factual and legal reasoning in decisions of regular courts are detailed in all judgments and decisions of the Municipal and District Courts. The District Court has rendered a judgment, answering the arguments of the Applicant, upholding the factual and legal reasoning of the Judgment of the Municipal Court.

40. Therefore, both the Municipal and District Courts have considered and in fact responded to the complaints of the Applicant.

41. The Constitutional Court has only limited authority in assessing alleged errors in facts or in law, as taken by regular courts, and cannot replace such a view of the regular courts with its own (see ECHR, Jantner v. Slovak Republic, no. 39050/97, paragraph 32, judgment of 4 March 2003).

42. Therefore, the Applicant has not sufficiently substantiated and proved his allegations in terms of a constitutional violation of his rights by the Municipal and District Courts. In addition, the Court notes that the judgments and decisions of the Municipal and District Court are rather argued and reasoned and do not show any arbitrariness.

43. Therefore, it follows that the referral is inadmissible, because, pursuant to Rule 36 (2).b) of the Rules of Procedure, it is manifestly ill-founded.

Request for interim measure

44. Article 27 of the Law, and specifically the Rule 54 (1) of the Rules of Procedure, provides 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.* "

45. However, since the Referral is inadmissible, the request on interim measures does not meet the requirements foreseen under Rule 54 (1) of the Rules of Procedure.

46. Therefore, the request on interim measure is rejected as ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 and 27 of the Law, and Rules 36.2, 54, 55 and 56 of the Rules of Procedure, on 17 May 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the Request for interim measures;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

V. This Decision is effective immediately.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 41/13, Sadik Qollopeku, date 31 May 2013- Constitutional Review of the Judgment of the Municipal Court in Prizren, C. no. 61/2008 dated 16 October 2009 and of the Judgment of the District Court in Prizren AC. no. 158/2010, dated 10 October 2011 and Request for imposition of interim measure

Case KI41/13, Resolution on Inadmissibility of 30 April 2013

Keywords: individual referral, civil dispute, request for interim measure, right to fair and impartial trial, protection of property, equality before the law, exhaustion of effective legal remedies

The Applicant alleged that the Judgment of the Municipal Court in Prizren, C. no. 61/08, of 16 October 2009, and the Judgment of the District Court in Prizren, Ac. No. 158/2010, of 10 October 2011, have violated his rights guaranteed by Article 3, paragraph 1 and 2, Article 21, Article 31 and Article 46, paragraph 3 of the Constitution as well as Articles 6 and 14 of ECHR.

In this case, the Court found that the Applicant's Referral was premature, since the property dispute was still pending the decision by the Court of Appeals in Prishtina. Therefore, the Court considered that the Applicant did not exhaust all legal remedies provided by law. Since the Referral did not meet the admissibility procedural criteria, the request for imposition of interim measure was rejected by the Court as inadmissible.

**RESOLUTION ON INADMISSIBILITY
AND DECISION ON THE REQUEST
FOR INTERIM MEASURE
in
Case No. KI41/13
Applicant
Mr. Sadik Qollopeku
Constitutional review of the Judgment of the Municipal Court in Prizren C.no.61/2008 dated 16 October 2009 and of the Judgment of the District Court in Prizren AC.no.158/2010 dated 10 October 2011
and
Request for imposition of interim measure**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. Applicant is Mr. Sadik Qollopeku, from Prizren, represented by Mr. Naim Qelaj, lawyer.

Challenged decision

2. The Applicant challenges the Judgment of the District Court in Prizren AC. no.158/2010 dated 10 October 2011.

3. On 31 October 2012, the Applicant submitted request for protection of legality. The Office of State Prosecutor, by Notification no. KMLC. no.111/2012 dated 23 November 2012, rejected the request for protection of legality. The Notification on rejection of the request was served on the Applicant on 26 November 2012.

Subject matter

4. The subject matter of the case submitted to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) is the constitutional review of the Judgment of the District Court in Prizren AC. no.158/2010 dated 10 October 2011, regarding the recognition of the right to use the apartment.

5. The Applicant also requests that the Court impose interim measure suspending the execution of the decision E.no.1889/12 of the Basic Court –Branch in Prizren, where the executive title is the Judgment C.no.61/2008 dated 16 October 2009.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution); Article 27 and Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo, dated 15 January 2009, (hereinafter: the Law) and on the Rule 28 and Rule 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Court

7. On 20 March 2013, the Applicant submitted Referral to the Constitutional Court and the latter was registered under the no. KI 41/13.

8. On 25 March 2013, the President appointed Judge Dr. sc. Kadri Kryeziu as Judge Rapporteur and the members of Review Panel composed of Judges: Altay Suroy (Presiding, replacing Judge Robert Carolan), Almiro Rodrigues and Ivan Čukalović.

9. On 3 April 2013, the Court notified the Applicant, the Court of Appeals and requested additional documents from the latter. The Office of the State Prosecutor in Prishtina was also notified.

10. On 5 April 2013, the Applicant submitted in the Court the request for imposition of interim measure, until this Court renders a decision on merits.

11. On 17 April 2013, the Court of Appeal submitted response to appeal, by attaching to it: the court decisions, appeals and Applicant's submissions, regarding his case.

12. On 30 April 2013, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral and the rejection of the request for interim measure.

Summary of the facts

13. On22 September 1990, the Applicant states that according to the decision no. 518 dated 22 September 1990, of the Council of primary school "Ortokoll" in Prizren, he acquired the right to use the apartment (Lam. 8, apartment no. 32), which is located in Ortokoll neighborhood, "Xherdapi" str. in Prizren.

14. Xhemshir Reza, Mevlyde Shimshek and Dragan Gadzić filed an appeal with the Basic Labor Court in Gjakova against the Decision of the Council of primary school "Ortokoll" in Prizren on the allocation of the disputed apartment.

15. On 25 October 1990, the Basic Labor Court in Gjakova by decision K.no. 130/90 rejected the appeals filed by the abovementioned persons and left in force the decision of the Council of primary school "Ortokoll" in Prizren.

16. On 15 July 2006, the Applicant addressed the Housing and Property Claims Commission with a request for return of the right to use the disputed apartment.

17. On 15 July 2006, the Housing and Property Claims Commission rendered the decision HPPCC/REC/65/2006 and reviewed the request of the parties, according to the criteria of categorization, among which the request of the Applicant. The Commission verified that the request of the category C. no. DS600770 of Mr. Dragan Gadzić belongs to the same property, same as the request of the category A no. DS201262, which in this case is the Applicant's request. The evaluation of the Commission, regarding the disputed apartment, reads:

> *[...]*
> *"After A category claimant was notified on the Commission's decision, as claiming party, he submitted the claim for reevaluation within the 30 days time limit. The claiming party claimed that it had a valid decision on the allocation and further states the C Claimant was not an employee of the holder of the right of allocating and has entered illegally into the property. In support to*

his claims, the claiming party presented court decisions, showing that C claimant had illegally usurped the claimed property, and had been fined for that. The directorate notified the responding party that A claimant has submitted a reevaluation claim. The responding party stated that it is not true that he was not an employee of the holder of the right of allocation. He further states that the property was legally allocated to him. The Commission carefully evaluated all the claims and provided evidence and finds that as mentioned above, A Claimant did not meet the criteria for A category claim. The Commission carefully evaluated the claims and provided evidence and finds that as mentioned above, the A category claimant did not meet the criteria for A category claim. Further the Commission finds that the provided evidence by the claiming party show that the responding party entered the claimed property illegally and the way he transferred the possession, the subsequent allocation and purchase of the property was clearly illegal. Thus the Commission concludes that the reevaluation claim of the responding party is successful in regard to the failure of the responding party to demonstrate that later it had the right of property over the claimed property on 24 March 1999, pursuant to Article 1.2 (c) of UNMIK Regulation 1999/23 and Article 2.6 of UNMIK Regulation 2000/60. […].

18. On 31 January 2008, Dragan Gadzić (the claimant) filed claim in the Municipal Court in Prizren and requested that the right of ownership to the disputed apartment is recognized to him.

19. On 16 October 2009, the Municipal Court in Prizren, rendered Judgment C.no.61/2008, approved as grounded the claim filed by Mr. Dragan Gadzić and recognized him the right of ownership over the disputed apartment. By the same Judgment, the Municipal Court in Prizren rejected as ungrounded the counterclaim of the Applicant regarding his request for annulment of the sale-purchase contract of the disputed apartment (Leg.no.734/93 dated 18 February 1993) which was legalized by this instance.

20. On 18 January 2010, the Applicant filed appeal against the abovementioned Judgment with the District Court in Prizren, due to substantial violation of the contested procedure, incomplete and erroneous determination of factual situation and erroneous application of the substantive law.

21. On 10 October 2011, the District Court in Prizren, by Judgment Ac.no.158/2010 rejected the appeal, filed by the Applicant's authorized

representative and upheld the Judgment C.no.61/2008 dated 16 October 2009 of the Municipal Court in Prizren. The reasoning of the court decision among others reads:

> *"This court evaluates that there is no ground for the annulment of the contract, the annulment of which is demanded, as the same does not violate the principles and obligatory provisions or the moral. […] The appeal's allegations that the Judgment has no reasons for decisive facts and that the enacting clause contradicts the reasoning according to this court's evaluation is not grounded because the Judgment's enacting clause is clear, it does not contain contradictions and is completely in line with the reasoning and it contains complete and sufficient reasons on all relevant and valid facts for the correct adjudication of this legal matter and pursuant to this the first instance court Judgment cannot be questioned."*

22. On 30 November 2011, the Applicant, through Municipal Court of Prizren, filed revision with the Supreme Court of the Republic of Kosovo against the judgment of the first and second instance due to substantial violations of the provisions of contested procedure and erroneous application of substantive law.

23. On 13 January 2012, the Municipal Court in Prizren, (Ruling C.no.61/2008) rejected as inadmissible the revision filed by the Applicant against the Judgment Ac. no. 158/2010 dated 10 October 2011 of the District Court in Prizren. The revision, according to the Ruling of the Municipal Court in Prizren, was not approved because in property disputes, where the statement of claim does not have to do with a monetary claim, handover of item or the execution of an action, and the value of the dispute, which was mentioned in the claimant's claim does not exceed the value of €3.000,00.

24. On 30 October 2012, the Applicant through his legal authorized representative filed request for Protection of Legality to the State Prosecutor, against the decisions of first and second instance decisions.

25. On 23 November 2012, the State Prosecutor's Office (Case, KMLC.no.111/2012) after reviewing the challenged judgments, notified the Applicant that it had not found sufficient legal basis for filing the request for protection of legality.

26. On 20 Mars 2013, the Applicant submitted additional documents to the Court, respectively a certificate issued by the Court of Appeal in Prishtina, where it is stated: *Pursuant to the request of Mr. Sadik*

Qollopeku, the Court of Appeal issues this: Certificate, by which is certified that the Case Ac.no.3154/12 is in the registers of this Court, is in the process and will be solved by the order of arrival [...].

27. On 17 April 2013, the Court of Appeals (letter A. Gj. No. 130/13) submitted response to the request, by attaching the Applicant's submissions and all court decisions regarding his case. Regarding the Applicant's appeal, filed against the Ruling C. no. 61/2008 dated 13 January 2012, the Court of Appeals, by this letter notified the Constitutional Court that the Case Ac. no. 3145/2012 (property dispute) is in the decision making procedure and the Court of Appeals has to decide on this appeal, by respecting the order of arrival of this case in this court.

Applicant's allegations

28. The Applicant alleges that the Municipal Court in Prizren by Judgment C.no.61/08 dated 16 October 2009 and District Court in Prizren, by Judgment Ac.no.158/2010 dated 10 October 2011 have violated his rights guaranteed by Article 3 paragraph 1 and 2, Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 31 [Right to Fair and Impartial Trial], Article 46 paragraph 3 [Protection of Property] of the Constitution as well as Article 6 and 14 of ECHR.

29. The Applicant alleges that by execution of the decision E.no.1889/12 of Basic Court –Branch in Prizren, where the executive title is the Judgment C.no.61/2008 of the Municipal Court in Prizren dated 16 October 2009, irreparable damage would be caused to him and his family, due to the fact that he and his family should leave the disputed apartment, under the threat of forced execution.

Admissibility of the Referral

30. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

31. With respect to this, the Court is referred to Article 113 paragraph 7 of the Constitution, which 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."

32. Article 47.2 of the Law and the Rule 36.1 (a) provides that:

Article 47.2 [Individual requests]

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

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;

33. The Court observes that the Applicant complains about the Judgment of the Municipal Court in Prizren C.no. 61/2008 dated 16 October 2009, upheld on 10 October 2011 by the District Court in Prizren by the Judgment Ac.no. 158/2010. On 30 November 2011, the Applicant filed revision against this judgment, through Municipal Court of Prizren, to the Supreme Court. The revision was rejected by the Municipal Court in Prizren as inadmissible. The Applicant further filed appeal with the Court of Appeals against the Ruling C.no. 61/2008 dated 13 January 2012, by which the exercise of this legal remedy was not allowed.

34. The Court of Appeals, upon the request of the Constitutional Court, through the letter A.Gj.no.130/13 dated 17 April 2013, informed that the Applicant's appeal, filed against the Ruling C.no. 61/2008 dated 13 January 2012 of the Municipal Court in Prizren is in the decision making phase (Case, Ac.no.3154/2012).

35. From the above, the Court considers that the Applicant's Referral is premature, since the property dispute is still pending the decision by the Court of Appeals in Prishtina. Therefore, in the present case we are dealing with non-exhaustion of all available legal remedies.

36. The Constitutional Court will not decide on the merits of the Referral, as long as the Referral does not meet the procedural requirements of admissibility. The present case concerns a property claim, which has not been finished yet in the Court of Appeals in Prishtina. Therefore, any decision of the Court, as long as a legal matter (the challenged decision) is not finished before the regular judicial authorities, would be

considered as interference with their independence and decision making.

37. In accordance with the principle of subsidiarity, the Court considers that the Applicant is under the obligation to exhaust all the legal remedies provided by law, as stipulated by Article 113 (7) of the Constitution and other legal provisions, as mentioned above.

38. In fact, the purpose of the exhaustion rule is, in this case, allowing to the regular courts the opportunity of settling an alleged violation of the Constitution. The exhaustion rule is operatively intertwined with the subsidiary character of the constitutional justice procedural frame work. (See, *mutatis mutandis, Selmouni vs. France* [GC], *§ 74; Kudla vs. Poland [GC), § 152; Andrasik and Others vs. Slovakia (dec.).*

39. Thus, the principle of subsidiarity requires that the Applicant exhausts all procedural opportunities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. Otherwise, the Applicant is liable to have his/her case declared inadmissible by the Constitutional Court, when failing to avail him/herself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a giving up of the right to further object the violation and complain. *(See Resolution in Case No. KI. 07/09, Deme KURBOGAJ and Besnik KURBOGAJ, Review of Supreme Court Judgment Pkl. no. 61/07 of 24 November 2008, paragraph 18).*

40. Whenever a judicial decision is challenged on the basis of some legal position that is unacceptable from viewpoint of human rights and fundamental freedoms, the regular courts that delivered the decision must be afforded with the opportunity to reconsider the challenged decision. That means that, every time a human rights violation is alleged such an allegation cannot as a rule arrive to the Constitutional Court without being considered firstly by the regular courts.

41. In fact, that analysis is in conformity with the European Court jurisprudence which establishes that Applicants are only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time, that is to say, that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success *(See, Sejdovic v. Italy* [GC], no. 56581/00, ECHR 2006-II § 46). It must be examined whether, in all the circumstances of the case, the Applicant did everything that could reasonably be expected of him or

her to exhaust domestic remedies *(CD.H. and Others v. the Czech Republic* [GC], §§ 116-22).

Request for interim measure

42. The Applicant also requests from the Court to impose interim measure for suspension of the decision E.no.1889/12 of the Basic Court -Branch in Prizren, where executive title is the Judgment C.no.61/2008 dated 16 October 2009, upheld by the District Court in Prizren, by the Judgment Ac.no.158/2010 dated 10 October 2011.

43. In this respect, the Court refers to Article 116.2 [Legal Effect of Decisions] of the Constitution, which provides:

> *"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."*

44. The Court also takes into consideration Article 27 of the Law, 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."*

45. Furthermore, the Rule 54 (1) of the Rules of Procedure provides 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."*

46. Finally, Rule 55 (1) of the Rules of Procedure provides that:

> *"A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals."*

47. In addition, in order that the Court imposes interim measure, in compliance with Rule 55 (4) of the Rule of Procedure, it should find that:

"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and

(c) the interim measures are in the public interest.

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.

48. From the reasons above, it results that the Applicant's Referral is not in compliance with requirements of Article 113.7 and Article 116.2 of the Constitution; Article 27 and Article 47.2 of the Law; and it is not in compliance with Rule 36.1 (a) and Rule 55 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 and Article 116.2 of the Constitution; Article 27 and Article 47.2 of the Law; Rule 55 and 56 (2) of the Rules of Procedure, on 17 May 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the Request for Interim Measure;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

V. This Decision is effective immediately.

Judge Rapporteur
Dr. sc. Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 02/13, Halil Mazreku, date 31 May 2013- Constitutional Review of the Judgment of Municipal Court in Prizren C. no. 691/01, of 11 December 2007, and Judgment of the District Court in Prizren Ac. no. 24/09, of12 May 2011

Case KI02/13, Resolution on Inadmissibility of 30 April 2013

Keywords: individual referral, civil dispute, violation of contested procedure, manifestly ill-founded

The Applicant alleged that regular courts, by their decisions, have violated his rights guaranteed by the Constitution. In his Referral, the Applicant did not specify which constitutional rights have been violated by the authorities, namely the regular courts. He has mentioned only the regular courts, i.e. District Court in Prizren has erroneously applied the provisions of the Law on Contested Procedure and provisions of the Law on amending and supplementing the Law on Transfer of the Immovable Property.

In this case, the Applicant did not provide supporting constitutional grounds for his allegations. He did not specify why and how the Supreme Court has violated his rights guaranteed by the Constitution and European Convention. In this case, the Court found that the Referral does not meet the requirements of Article 48 of the Law and the Rule 36 (2) b) and d) of the Rules of Procedure, and therefore it is declared inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI02/13
Applicant
Mr. Halil Mazreku
Constitutional review of the Judgment of Municipal Court in Prizren C.no.691/01, of 11 December 2007, and Judgment of the District Court in Prizren Ac.no.24/09, of 12 May 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mr. Halil Mazreku, residing in Arbana neighborhood, Municipality of Prizren.

Challenged decision

2. The Applicant challenges the Judgment of the Municipal Court in Prizren C.no.691/01 of 11 December 2007 and Judgment of the District Court in Prizren Ac.no.24/09 of 12 May 2011.

3. In the present case, for the purposes of complying with the four (4) month time limit, the last legal remedy is considered the Notification of the State Prosecutor of Kosovo KMLC no.45/11 of 6 July 2011, which the Applicant received on 25 July 2011.

Subject matter

4. Subject matter of this Referral is the constitutional review of the Judgment of the Municipal Court in Prizren C.no.691/2001, of 11 December 2007, and Judgment of the District Court in Prizren

Ac.no.24/09 of 12 May 2011, concerning the Applicant's right to property.

Legal basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law on Constitutional Court of the Republic of Kosovo, No. 03/L-121, of 15 January 2009 (hereinafter: the Law) and Rule 28 of Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Court

6. On 9 November 2011, the Applicant submitted an incomplete Referral to the Court.

7. On 11 November 2011, the Court requested from the Applicant to submit the necessary documentation, including decisions of the regular courts.

8. On 8 January 2013, the Applicant submitted his Referral to the Court by attaching the requested documentation.

9. On 18 January 2013, the Court notified the Applicant, the Basic Court in Prizren and the Court of Appeals in Prishtina of the registration of the Referral KI 02/13 in the Court's respective registry.

10. On 30 January 2013, the President appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (presiding), which has been replaced by Judge Snezhana Botusharova, Ivan Čukalović (member) and Prof. Dr. Enver Hasani (member).

11. On 5 February 2013, the Court requested additional documentation from the Basic Court in Prizren.

12. On 5 February 2013, the Basic Court in Prizren submitted the requested documentation.

13. On 30 April 2013, 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

14. On 5 December 2001, the Applicant filed a lawsuit with the Municipal Court in Prizren, based on the sale contract (the contract is not verified) concluded on 6 January 1984 between Mr. Halil Mazrekut (buyer) and now late Mr. Bajram Sadik Berisha (seller). The Applicant alleges that, after the purchase he became the owner of the immovable property (cadastral parcel No. 402 CZ Arbana, arable land cat. IV, in location called "by the road in the end of the village", in a surface of 1.17,00 ha, a cadastral parcel which the seller had received as an exchange for parcels 146 and 383 from Agricultural Industrial Combine "Progres-Export" in Prizren). The respondents, namely the family of the former owner, now late Bajram Berisha, through a civil dispute have managed to regain the cadastral parcel No.383 in location called "by the road down the village", arable land cat. IV, with a surface of 0.74,33 ha, based on the ownership certificate No. 254 MA, Arbana, which is recorded in the name of the respondents. The Applicant by filing a lawsuit requested a verification of the sales contract on the immovable property and recognition of the ownership on the purchased immovable property, as well as to be registered as the owner of the parcel.

15. On 11 December 2007, the Municipal Court in Prizren by Judgment C.no.691/01, of 11 December 2007, rejected as ungrounded Applicant's lawsuit on verification of the ownership, as the Applicant alleges to have purchased the property from, now the late Bajram Berisha (seller). By the same Judgment that court refused the appeal filed by the respondents, namely the family of the late Bajram Berisha to regain the parcel No. 146 in location called "hill by the road", infertile land, with a surface of 30 m2, and arable land cat. IV, with a surface of 0.65,03 ha and parcel No. 383 in location called "by the road down the village", arable land cat. IV, with a surface of 0.74,33 ha, altogether in a surface of 1.39,66 ha based on the possession list No. 252 CZ Arbana.

16. On 12 May 2009, the District Court in Prizren by Judgment Ac.no.24/09 rejected the Applicant's appeal and upheld the Judgment of the Municipal Court in Prizren C.no.691/2001, of 11 December 2007. In this concrete case, the District Court held that the first instance decision did not constitute essential violation of the contested procedure, as alleged by the appellants, due to the fact that the first instance has established the factual situation in fair and complete manner and has correctly applied the law in this legal matter.

17. On 23 June 2011, the Applicant's representative exercised his right by filing a proposal with the State Prosecutor of Kosovo to initiate proceedings for filing a request for protection of legality against the final Judgment of the Municipal Court in Prizren C. No. 691/2001, of 11

December 2007, and the Judgment of the District Court in Prizren Ac. No. 24/09, of 12 May 2011.

18. On 6 July 2011, the State Prosecutor of Kosovo by notification KMLC no. 45/11 rejected the Applicant's proposal regarding the request for protection of legality against decisions of the first and second instance, since it did not find sufficient legal basis to file such a request.

Applicant's allegations

19. The Applicant alleges that regular courts by their decisions have violated his rights guaranteed by the Constitution. In his Referral the Applicant did not specify which constitutional rights have been violated by the authorities namely the regular courts. He has mentioned only the regular courts, i.e. District Court in Prizren has erroneously applied the provisions of the Law on Contested Procedure and provisions of the Law on amending and supplementing the Law on Transfer of the Immovable Property.

Admissibility of the Referral

20. The Court first examines whether the Applicant has fulfilled the admissibility requirement laid down in the Constitution, the Law and Rules of Procedure. In the present case, the Court notes that the Applicant is challenging the decision of the first and second instance, as concrete acts of the public authorities. The Applicant in his Referral did not explicitly specify the alleged violation of his constitutional rights. However, the Court notes that this is related to the property rights. The Applicant has also stated what he wants to achieve through this Referral and has attached various decisions, information and supporting documents.

21. In regards to the property rights, Article 46 of the Constitution stipulates:

"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". (See paragraph 3 of Article 46).

22. The Constitutional Court notes that the grounds for Applicant's appeal at the first and second instance as well as for the proposal requesting protection of legality consist of allegations on essential violations of provisions of contested procedure, erroneous and incomplete established factual situation and violation of the law applied in this particular case.

23. The Constitutional Court considers that these allegations maybe in the domain of legality. The Referral should be filed and substantiated on the grounds of a constitutional complaint (constitutionality), by specifying the constitutional provisions and constitutional rights of the Applicant or Applicants which have been allegedly violated.

24. However, the Court examines and assesses whether the Applicant has met the requirements of admissibility by substantiating his allegations on violation of his fundamental rights guaranteed by the Constitution. The Applicant should clarify in his request which are the constitutional rights he alleges to have been violated by the act of the public authority(ies). In this regard, the Court notes that Article 48 of the Law on Constitutional Court clearly establishes: *"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. Furthermore, the Rule 36.2 of the Rules of Procedure provides:

(*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;

26. Finally, Article 46 of the Law provides: "*The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitutional, if it determines that all legal requirements have been met*"

27. In this regard, the Applicant does not indicate why and how the regular courts have violated his rights guaranteed by the Constitution nor provided evidence of alleged violation of the constitutional rights. The Court reiterates that the case must be built on constitutional grounds, in order for this Court to interfere.

28. It is the competence of the regular courts to assess the legality of a document, in this case the legality of the sales contract on the immovable property according to the discretion of those courts, in compliance with the law and based on the facts and evidence provided by the parties involved in regular court proceedings.

29. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution. Thus, the Court cannot act as a court of third instance in this case. It is the duty and obligation of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia 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, 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).

31. In fact, the Applicant did provide supporting constitutional grounds for his allegations, by not specifying why and how the Supreme Court has violated his rights guaranteed by the Constitution and European Convention, as well as by not providing evidence of violated rights and freedoms by the Supreme Court. Therefore, the Constitutional Court did not find that the pertinent proceedings before the Supreme Court were in any way unfair or arbitrary (see *mutatis mutandis*, Shub vs. Lithuania, ECtHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

32. For all the above-mentioned reasons, the Court finds that the Referral does not meet the requirements of Article 48 of the Law and the Rule 36.2 (b) and (d) of the Rules of Procedure, and as such it is manifestly ill-founded.

33. Consequently, pursuant to the Article 113.7 of the Constitution, Article 20 of the Law, and the Rule 56.2 of the Rules of Procedure, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 48 of the Law on Court and Rules 36 (2) (b) and (d) and Rule 56 (2) of the Rules of Procedure, on 31 May 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision, in accordance with Article 20 (4) of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 73/12, Bujar Sahitaj, date 31 May 2013- Constitutional review ofthe Supreme Court Judgment Rev. No. 24/2009, of 7 December 2011

Case KI 73/12, Resolution on Inadmissibility of 15 May 2013

Keywords: Individual Referral, request filed beyond the time limit, Resolution on Inadmissibility, the right to fair and impartial trial, property dispute

The Applicant filed the Referral based on Article 117.3 of the Constitution of Kosovo, claiming that by decision of the Supreme Court of Kosovo Rev. No. 24/2008 affirming the decisions of the lower court instances, which had affirmed the transfer of the property of a portion of the land from public ownership into private, had a negative impact in another part of the land owned by other residents of the village, one of whom is the Applicant. Therefore, it is alleged that it resulted in violation of Article 46 [Protection of Property] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo.

From the Applicant's submission, the Court concluded that the Referral was submitted to the Constitutional Court on 31 July 2012, while the return receipt of the decision of the Supreme Court, allegedly violating Applicant's rights, is dated 15 February 2012. Consequently, it appears that the Referral was submitted to the Constitutional Court 5 months and 16 days after the Supreme Court decision was received.

Therefore, the Court declared the Referral inadmissible, since it was submitted after the time limit provided by Law on Constitutional Court and Rules of Procedure of the Court.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI73/12
Applicant
Bujar Sahitaj
Constitutional review of the Supreme Court Judgment Rev. No. 24/2009, of 7 December 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Applicant

1. The Applicant is Bujar Sahitaj, residing in Sopija village, Suhareka Municipality.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo, Rev. No. 24/2009, of 7 December 2011, served on the Applicant on 15 February 2012.

Subject matter

3. The Applicant complains that, by a decision of the Municipal Court in Suhareka, the public ownership of a portion of the riverbed, in Sopija village, has been transferred to private. Alleging that this had a negative impact in another part of the land owned by other residents of the village, one of whom is the Applicant. Consequently, it has, allegedly, violated Article 46 [Protection of property] and Article 31 [Right to a fair and impartial trial] of the Constitution of the Republic of Kosovo.

Legal basis

4. Article 113.7 of the Constitution, Article 47 of the Law and Rule 56 (2) of the Rules of Procedure.

Proceedings before the Court

5. On 31 July 2012, the Applicant submitted his Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").

6. On 4 September 2012, the President of the Court, by Decision No. GJR. 73/12, appointed Judge Altay Suroy as Judge Rapporteur. On the same day, the President, by Decision No. KSH. 73/12, appointed the Review Panel composed of Judges: Snezhana Botusharova (presiding), Ivan Čukalović and Arta Rama-Hajrizi.

7. On 27 September 2012, the Court notified the Applicant on registration of the Referral. On the same day, the Referral was communicated to the Supreme Court of Kosovo.

8. On 28 September 2012, the Constitutional Court sent a letter to the Municipal Court in Suhareka, requesting submission of the return receipt in order to prove the date when the Applicant had received the Judgment of the Supreme Court of Kosovo, Rev. No. 24/2009, of 7 December 2011.

9. On 3 October 2012, the Court received a letter from the Municipal Court in Suhareka, attached to which was a copy of the return receipt, signed by the spouse of the Applicant, on 15 February 2012.

10. On 15 May 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. By Judgment C. No. 83/89, of 18 May 1989, the Municipal Court in Suhareka granted to the R. family the ownership rights on a riverbed portion of 0.50.60 ha, based on "positive prescription". Earlier on, this land portion was registered in cadastral books as riverbed and public property owned by the Municipality of Suhareka. Such registration was found to be erroneous, as the R. family had purchased this portion of land 35 years ago and since then has continuously used it.

12. The Directorate for Legal Property Matters, by Resolution 10-466/190, of 6 October 2006, decided that the particular portion of the riverbed, 0.11,45 ha, purchased by R. family, was occupied, due to the fact that the initial Judgment, which recognized the ownership rights, hasn't been executed nor the property was registered as private in the cadastral books, and it still considers it as public property.

13. Owners of cadastral parcels 351-354, adjacent to parcel 1528, claimed that the contested property was being damaged, since the owners were tapering it by building a wall. By building the wall, they wanted to alternate the natural flow of the river, what would increase the risk of flooding to neighboring lands and make difficult access to them.

14. By filing the objection, E. No. 266/06, the Municipal Assembly of Suhareka urged the Municipal Court in Suhareka to reject the execution procedure, since the 10-year time limit, for execution of court decision, has expired.

15. On 9 July 2006, on request of the creditor R.A.R. for the verification of his property right, the execution procedure of the final Judgment of the Municipal Court in Suhareka was initiated.

16. On 27 October 2007, the Municipality of Suhareka, proposed suspension of this procedure, reasoning that the request for execution of the Judgment was filed beyond the time limit and that they should wait until the District Public Prosecutor in Prizren decides concerning the request for protection of legality to the Supreme Court of Kosovo.

17. On 24 November 2006, the Chief Executive filed a claim, No. 976, which was rejected as ungrounded and this way the decision of the Directorate for Legal Property Matters, No.466/190, remained in force.

18. In the session of 8 December 2006, upon reviewing the complaint for obstruction of property, the situation described by the owners of the cadastral parcels 351-354 was confirmed through a site inspection conducted by a Municipal Court's expert surveyor. The Municipal Court imposed the interim measure obliging R. R. to suspend his actions and demolish the wall.

19. On 24 July 2007, Bujar Sahitaj and I. S., alleging that they have a status of the intervener in the procedure, proposed reopening of the procedure with the Municipal Court in Suhareka, with reasoning that the Municipality has not received the decision of the first instance. They also submitted a statement of the former Public Attorney of the Municipality

of Suhareka, A. B., alleging that, at the end of her employment, case C. No. 83/89 was still pending and that her signature, endorsing the Judgment, was forged.

20. The Municipal Court in Suhareka, by Decision no. 187/2007, refused proposal for reopening of the procedure, since the interveners were not presented as parties in the previous procedure, thus, they could not enjoy the status of the party.

21. In Applicant's appeal against the Resolution of the Municipal Court in Suhareka, the District Court in Prizren issued the Resolution Ac. No. 55/2008, of 6 October 2008, by which rejected the appeal as ungrounded and upheld the decision of the Municipal Court in Suhareka.

22. The Applicant filed an appeal with the Supreme Court against the decision of the District Court, alleging violation of provisions of the Law on Contested Procedure and incorrect application of the substantive law.

23. The Supreme Court of Kosovo, pursuant to Article 232 of the Law on Contested Procedure, considered that the proposal for revision was ungrounded. The Supreme Court stated that the Judgment of the Municipal Court, C. No. 83/89, in this case was final, and by this was confirmed the ownership of the cadastral parcel No. 1528. Furthermore, in compliance with Chapter IV of the Law on Contested Procedure, regulating the status of the party, refused the appeal filed by the intervener as inadmissible.

Applicant's allegations

24. The Applicant alleges that three witnesses have been manipulated and under pressure, when giving their testimony in the Municipal Court, in 1989.

25. Furthermore, the Applicant considers as erroneous continuation of the procedure in the Municipal Court in Suhareka, even though the plaintiff had withdrawn the request for recognition of ownership right.

26. In this aspect, the Applicant alleges violation of provisions of Contested Procedure from Article 421, paragraph 2, in conjunction with Article 423, paragraph 3, of the Law on Contested Procedure.

27. The Applicant alleges violation of his right to property, guaranteed by Article 46, and his right to fair and impartial trial, guaranteed by Article 31 of the Constitution.

Preliminary assessment of the admissibility of the referral

28. 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, further specified in the Law and Rules of Procedure.

29. Article 49 of the Law on Constitutional Court provides:

"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"

30. From the Applicant's submission may be concluded that the Referral was submitted to the Constitutional Court on 31 July 2012, while the return receipt of the decision of the Supreme Court, allegedly violating Applicant's rights, is dated 15 February 2012. Consequently, it appears that the Referral was submitted to the Constitutional Court 5 months and 16 days after the Supreme Court decision was received.

31. For the foregoing reasons, the Court finds that the Referral does not meet the admissibility requirements, provided by Article 49 of the Law, Rule 36.1 (b) Rules of Procedure, therefore, pursuant to Article 49 of the Law the Referral is inadmissible and cannot be proceeded with.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rules 36.2 and 56 of the Rules of Procedure, on 27 May 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties and

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 03/13 and KO 28/13, Mr. Demë Dashi and others and Ali Lajçi, date 14 June 2013- Constitutional review of the Law on National Park "Bjeshkët e Nemuna", published in the Official Gazette on 21 January 2013.

Case KI 03/13 and KO 28/13, Resolution on Inadmissibility of 15 May 2013.

Keywords; individual Referral, second applicant Municipality of Peja, constitutional review of the Law on National Park "Bjeshket e Nemuna",

The Referral of the First Applicant 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 15 January 2009 (hereinafter, the Law) and Rule 56 (2) of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

The Referral of the second Applicant is based on Article 113.4 of the Constitution.

The Referral Applicants filed the Referrals with the Court on 10 January 2013 and 05 March 2013.
The first Applicant alleges that that Law *"is against the fundamental human rights because it doesn't respect the right on property"*.
The second Applicant alleges that the Law *"diminishes and violates the property of the municipality, it violates its interests (it diminishes the revenues)"*.

The President with Decision (no.GJR. KI 03/13 of 30 January 2013), appointed Judge Almiro Rodrigues as a Judge Rapporteur, and on the same day the President with Decision KSH 03/13 appointed the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama Hajrizi.

Upon reviewing the case the Court notes that:

Firstly, the first Applicant has not specified an act of a state authority*(see Article 48 of the Law on the Constitutional Court)*that has allegedly violated their individual rights and freedoms guaranteed bu the Constitution and international conventions which are directly applicable in the Republic of Kosovo.

Secondly, the Court also notes that the second Applicant states that the Law no. 03/L-121 on National Park "Bjeshket e Nemuna" *diminishes and violates*

the property of the municipality, it violates its interests (it diminishes the revenues)"

As to the first Applicant, the Court considers that the Constitution does not provide for *actio popularis,* which is a modality of individual's complaint enabling them to initiate abstract review regardless of their specific legal interest in the case in question.

As to the second Applicant, the Court considers that the initial and additional clarification and evidence submitted by the second Applicant is not pertinent and relevant to reasonably conclude that the Municipality is affected by the challenged law, by infringing upon its responsibilities or diminishing its revenues.Pursuant to Article 113.4 [Jurisdiction and Authorized Parties] of the Constitution

In conclusion, under Article 113 (1) of the Constitution, the Court cannot decide on a matter that is not referred to it in a legal manner, because, in accordance with the combined legal provisions of Article 113 (4) and (7) of the Constitution, the first and second Applicants are not authorized parties.

Pursuant to this on the session held on 15 May 2013, the Court concluded that both Referrals KI 03/13 and 28/13 are inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Cases no. KI03/13 and KO28/13
Applicants
Demë Dashi and Others
and Ali Lajçi
Constitutional review
of the Law on National Park „Bjeshkët e Nemuna“,
published in the Official Gazette on 21 January 2013

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Applicants

1. The Applicants are Demë Dashi and others from Peja (hereinafter, the first Applicant) and Ali Lajçi as a representative of the Municipality of Peja (hereinafter, the second Applicant).

Challenged decision

2. Both applicants challenge the constitutionality of the Law 2011/04-L-086 on National Park “Bjeshket e Nemuna”, approved by the Assembly on 13 December 2012, promulgated by the Decree No.DL-60-2012 of the President of the Republic of Kosovo, on 26 December 2012, and published in the Official Gazette oon 21 January 2013.

Subject matter

3. The first Applicant alleges that that Law *“is against the fundamental human rights because it doesn’t respect the right on property“*.

4. The second Applicant alleges that that Law “*diminishes and violates the property of the municipality, it violates its interests (it diminishes the revenues)”*.

Legal basis

5. The Referral of the first Applicant 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 15 January 2009 (hereinafter, the Law), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

6. The Referral of the second Applicant is based on Article 113.4 of the Constitution.

Proceedings before the Court

7. On 10 January 2013, the first Applicant filed a Referral with the Constitutional Court (hereinafter, the Court).

8. On 14 January 2013, the Court requested from the first Applicant to submit the Referral in the form as prescribed by the Rules.

9. On 21 January 2013, the first Applicants submitted the Referral as requested by the Court.

10. On 30 January 2013, the President appointed Judge Almiro Rodrigues as a Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama Hajrizi.

11. On 5 March 2013, the second Applicant filed a Referral with the Court.

12. On 21 March 2013, the Court sent a letter to the second Applicant, requesting additional information related to the case.

13. On 25 March 2013, the President, pursuant to Rule 37.1 of the Rules of Procedure ordered the joinder of the referrals KI03/13 and KO28/13.

14. On 26 March 2013, the Court notified the Kosovo Assembly that Law 2011/04-L-086 on National Park “Bjeshket e Nemuna” is subject matter of the Referrals submitted by the two Applicants.

15. On 8 April 2013, the second Applicant submitted the additional information requested by the Court on 21 March 2013.

16. On 29 April 2013, the first Applicant requested the Court to separate the cases and to treat them individually.

17. On 14 May 2013 the President, upon the proposal of the Judge Rapporteur, maintained the decision for joining the cases KI03/13 and KO28/13.

18. On 15 May 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referrals.

Summary of the facts

19. The Law no. 03/L-121 on National Park „Bjeshkët e Nemuna“ was approved by the Assembly of Kosovo on 13 December 2012, promulgated by the Decree No.DL-60-2012 of the President of the Republic on 26 December 2012 and published in the Official Gazette on 21 January 2013.

20. Article 1 of that Law states that *“part of the territory of Bjeshkët e Nemuna as a spatial integrity which is distinguished with natural values and rarity, with a large number of important forest ecosystems and other ecosystems preserved, with big number of endemic and relict species, with rich characteristics of geomorphologic features, hydrological and landscape that have scientific importance, educational, cultural-historical, recreational-tourist, and activities that contribute in economic development according to the environmental criteria, shall be declared National Park named: National Park "Bjeshket e Nemuna"”*.

21. Article 3 of the Law provides that *“in the National Park “Bjeshkët e Nemuna” territory shall be established protection regimes according areas”*. Four areas are further specified by the Law.

22. In addition, Article 5 of the Law foresees that *“property rights and denationalization shall be regulated with special laws and are not object of this Law”*.

23. On an unspecified date, the first Applicant, inhabitants of the area of Rugova, initiated a procedure for contesting the approved Law, namely signing a petition against it.

24. On 30 March 2012 a group of 31 (thirty one) Municipal Assembly members of Peja submitted a Proposal to Municipal Assembly of Peja

*"To declare the province of Rugova an area of special national interest for tourism and culture with the tendency of developing an ecological municipality in the frame of the national developments for the protection of the environment".*The proposal in its reasoning part stated that *" The Government of Kosovo has authorized the Parliamentary Committee for Spatial Planning and Economic Development to prepare a law on national parks which stems also from the progress report that a part of the territory should be declared national park. Based on the proposals the national park would include some parts of Dukagjini region in 5 municipalities – Gjakova, Junik, Decan, Peja and Istog."*

25. On the same date, the Municipal Assembly of Peja adopted a Conclusion *"Endorsing the proposed – request of the members of Municipal Assembly in Peja "for declaring the province – area of Rugova with an area of 32.492 ha an area of special national interest for the tourism and culture with the tendency for the development of an ecological municipality in the frame of national developments for environment protection" and it is recommended to the Ministry of Environment and Spatial Planning, respectively the Parliamentary Committee for Spatial Planning and Economic Development for the preparation of the Law on National Parks so that it would include such wording in the text of the Draft Law on Spatial Planning as the right and adequate formulation which is also in the interest of the said area, its inhabitants and in the national interest of Kosovo in general."*

26. On 11 April 2012, the Municipality of Peja sent the adopted Conclusion to the Ministry of Environment and Spatial Planning and to the Parliamentary Committee for Spatial Planning.

Applicant's allegations

27. The first Applicant alleges that the signatories to the petition have not been consulted by the legislators about the drafting of the law.

28. The first Applicant further alleges that in 1946 the private property of the signatories to the petition had been confiscated and, based on a Decision of the Municipal Assembly, the said property was given for use to the agriculture cooperatives.

29. The first Applicant argues that the surface covered by the new law is considered disputable property and it should be returned to the former owners.

30. The first Applicant finally alleges that a large number of lawsuits have already been filed with the Municipal Court by the signatories to the petition for the return of the property.

31. The first Applicant request from the Court:

> *"to annul the Law on the National Park "Bjeshket e Nemuna" adopted on 13 December 2012 and to draft a new law that excludes Rugovë area from the park area until the property legal issues are solved".*

32. The second Applicant alleges that the Law no. 03/L-121 on National Park „Bjeshkët e Nemuna" "diminishes and violates the property of the municipality, it violates its interests (it diminishes the revenues), because "- It has not been guaranteed that the private property will not be alienated and it has not been guaranteed that it will be compensated - The owners do not want the national park".

Admissibility of the Referral

33. Before entering in the assessment of admissibility of the referrals, the Court recalls that, pursuant to Rule 37.1 of the Rules of Procedure, the joinder of the two Referrals was ordered.

34. Rule 37.1 of the Rules of Procedure foresees that, when "a referral may be related in subject matter to another referral before the Court and directed against the same act of a public authority", the President may order the joinder of those separate referrals". The Rules further foresee that "if a party disagrees with the Court's decision to join, it shall request reconsideration of the decision, together with any factual or legal arguments, within fifteen (15) days of the date of the President's Order to join (...) referrals".

35. The first Applicant requested the Court to separate the cases and to treat them individually.

36. However, the first Applicant did not substantiate and prove any factual or legal arguments which would lead to a reconsideration of the decision.

37. Therefore, the President, upon proposal of the Judge Rapporteur, maintained the decision on joining the cases KI03/13 and KO28/13, due to the absence of sufficient basis for separating again the referrals.

38. Following that preliminary consideration, the Court will examine whether the Applicants have fulfilled all admissibility requirements as laid down in the Constitution and further specified in the Rules.

39. The Court refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides as follows:

> *1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *2. 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:*
> *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;*
>
> *(...)*
> *4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.*
>
> *5. 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.*
>
> *(...)*
> *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.*

40. The Court also refers to Rule 36 (3) c) of the Rules of Procedure that foresees:

> *A Referral may also be deemed inadmissible in any of the following cases:*
>
> *c) the Referral was lodged by an unauthorised person.*

41. As a matter of fact, Article 113 (2) of the Constitution stipulates that only the Assembly, the President of the Republic, the Government, and the Ombudsperson are authorized parties to refer to the Constitutional Court the question of the compatibility of lawswith the Constitution.

42. In addition, Article 113 (5) of the Constitution establishes that ten (10) or more deputies of the Assembly have the right to contest the constitutionality of any law or decision adopted by the Assembly.

43. Thus, individuals referred in Article 113 (7) of the Constitution are not authorized parties to refer to the Constitutional Court the question of the compatibility of lawswith the Constitution. On the contrary, 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.

44. Firstly, the Court notes that the first Applicant has not specified an act of a state authority *(see Article 48 of the Law on the Constitutional Court)* that has allegedly violated their individual rights and freedoms guaranteed by the Constitution and the international conventions which are directly applicable in the Republic of Kosovo.

45. Secondly, the Court also notes that the second Applicant states that the Law no. 03/L-121 on National Park „Bjeshkët e Nemuna "*diminishes and violates the property of the municipality, it violates its interests (it diminishes the revenues)".*

46. In fact, in the present case, the first Applicant refers to Article 113.7 of the Constitution as being the legal basis for filing the Referral 03/13; while the second Applicant refers to Article 113 (4) of the Constitution as being the legal basis for filing the Referral 28/13. However, both references are without any substantive foundation.

47. As to the first Applicant, the Court considers that the Constitution does not provide for *actio popularis,* which is a modality of individual's complaint enabling them to initiate abstract review regardless of their specific legal interest in the case in question.

48. In fact, Article 113 7 presupposes particular and direct grievances to approach the Constitutional Court as an instance of last resort for an alleged violation by public authorities of individual rights and freedoms guaranteed by the Constitution.

49. Therefore, the Court concludes that the first Applicant cannot be considered an authorized party that may refer constitutional matters *in abstracto* regarding the constitutional review of the Law, seeking to obtain a remedy in the name of the collective interest.

50. As to the second Applicant, the Court recalls that, on 21 March 2013, the Municipality of Peja was requested to submit additional clarifications and evidence that would support the legal basis of its Referral, namely how and why the challenged law infringes upon the responsibilities of the Municipality or diminishes its revenues.

51. The Court notes that, on 8 April 2013, the second Applicant replied, stating as follows:

> *" - The mentioned law violates the rights and interests of property of listed owners (existing owners) based on the Cadastral Book, as well as owners of properties which were expropriated by the ex-regime in different forms, like confiscation, agrarian reforms, etc., which were discriminating ways and the intention was to cleanse that area from residents of Albanian nationality. Therefore, such law would present legal obstacles for these owners to realize their rights endangered by the discriminating laws, such as confiscation – agrarian reforms, etc.*
>
> *- The challenged Law was not harmonized with respective Ministries and same time no prior consent was secured from the residents of Rugova area, who presented many verbal and written remarks for the flaws of this law, but were never taken into consideration by the drafter of this law, despite the fact that in democratic countries the word of the citizen, especially the one who is vulnerable to a law, must be understood and taken into consideration, therefore, deriving from what was said above and the evidence presented previously with the application, we attach to this letter additional evidence which we consider to be relevant to the Court's revision on this matter."*

52. The second Applicant attached the following documents to the additional clarification: Cadastral statements for 14 Zones of village Rugova, and Signatures of citizens for the petition.

53. The Court considers that the initial and additional clarification and evidence submitted by the second Applicant is not pertinent and relevant to reasonably conclude that the Municipality is affected by the

challenged law, by infringing upon its responsibilities or diminishing its revenues.

54. Apparently, the second Applicant is acting, as clarified, on the defense of "*the rights and interests of property of listed owners (existing owners) based on the Cadastral Book, as well as owners of properties which were expropriated by the ex-regime in different forms, like confiscation, agrarian reforms, etc., which were discriminating ways and the intention was to cleanse that area from residents of Albanian nationality*.

55. However, for the purpose of interpreting Article 113 (4) of the Constitution, the Municipality must be considered a distinct legal entity of the interested *existing owners,* whom allegedly the second Applicant appears to represent.

56. Even if the second Applicant would be regularly allowed to represent the so called *existing owners*, the logical and compelling outcome would be exactly the same as for the first Applicant.

57. Furthermore, for the second Applicant to refer the matter on its own, it should be alleged and proved that the Municipality is affected by the challenged law by infringing upon its responsibilities or diminishing its revenues.

58. The Court considers that no allegation was substantiated and no evidence was presented by the second Applicant in order to reasonably argue and conclude that the requirements established by Article 113 (4) of the Constitution are met. Thus, the Municipality of Peja cannot be an Authorized Party to refer the subject matter to the Constitutional Court, either representing the *existing owners* or on its own.

59. In conclusion, under Article 113 (1) of the Constitution, the Court cannot decide on a matter that is not referred to it in a legal manner, because, in accordance with the combined legal provisions of Article 113 (4) and (7) of the Constitution, the first and second Applicants are not authorized parties.

60. Consequently, pursuant to Rule 36 (3) of the Rules of Procedure, boththe Referrals KI 03/13 and 28/13 are inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 and 27 of the Law, and Rules 36.2, 54, 55 and 56 of the Rules of Procedure, on 7 June 2013, unanimously,

DECIDES

I. TO REJECT the Referrals as Inadmissible;

II. TO NOTIFY this Decision to the Parties and

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. TO DECLARE this Decision immediately effective.

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

KI 01/13, Betim Ramadani, date 14 June 2013-Constitutional Review of the Notification of the State Prosecutor, KMLC.no. 106/2012, dated 23 October 2012.

Case KI 01/13, Resolution on Inadmissibility of 30 April 2013

Keywords: equality before the law, individual referral, judicial protection of rights, manifestly ill-founded, right to fair and impartial trial, violation of individual rights and freedoms

The applicant, Mr. Betim Ramadani, filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging the Notification of the State Prosecutor, KMLC.no. 106/2012, dated 23 October 2012. The Applicant considered that he "[...] was removed with force by the executive authorities, the Municipal Court of Gjilan, from the business premise, which he used based on the contract of 4 February 2009, and without any court procedure." Furthermore, he requested the Court "[...] to annul all decisions of execution procedure of Municipal Court in Gjilan and of District Court in Gjilan and order the Municipal Court in Gjilan to allow the use of the rented business premise based on the rights and obligations derived from the contract of 4 February 2009."

On the issue of the admissibility of the Referral, the Court held, that the Referral was inadmissible because the Applicant failed to submit evidence that the relevant proceedings were in any way unfair or tainted by arbitrariness. Hence, the Court held that the Referral was manifestly ill-founded pursuant to Rule 36 (1.c) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI01/13
Applicant
Betim Ramadani
Constitutional Review of the Notification of the State Prosecutor, KMLC.no. 106/2012, dated 23 October 2012.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Referral is submitted by Mr. Betim Ramadani (hereinafter, the "Applicant"), represented by Mr. Shevqet Xhelili, a practicing lawyer from Gjilan.

Challenged decision

2. The Applicant challenges the Notification of the State Prosecutor, KMLC. no. 106/2012, of 23 October 2012, which was served on him on 27 October 2012.

Subject matter

3. The Applicant alleges that the abovementioned notification violated his rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter, the "Constitution"), namely Article 3 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights].

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the 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 3 January 2013, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the "Court").

6. On 30 January 2013, the President of the Constitutional Court appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

7. On 27 February 2013, the Referral was communicated to the State Prosecutor.

8. On 15 April 2013, the President of the Constitutional Court replaced Judge Robert Carolan with Judge Almiro Rodrigues as Judge Rapporteur and Judge Arta Rama-Hajrizi with Judge Enver Hasani as Review Panel member.

9. On 30 April 2013, 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

10. In 2009, the Applicant entered into an agreement with Xh. K. to rent a business premises for ten years, which he did, and in addition, he made some investments. However, in respect to these premises there was an ongoing court proceeding as to the confirmation of the ownership between Xh. K. and Z. Y.

11. On 15 March 2011, the Municipal Court in Gjilan (Decision C. no. 420/2005) declared that Xh. K. had withdrawn his claim for confirmation of ownership. Consequently, Z. Y. filed a requested to execute that decision and to remove the Applicant from the business premise which he had rented from Xh. K.

12. The Applicant alleges that, on 27 December 2011, the Municipal Court in Gjilan (Decision E. no. 2907/2011) allowed the execution of its Decision C. no. 420/2005 of 15 March 2011.

13. Meanwhile, on 1 February 2012, Z. Y. once again filed a request to execute the Decision C. no. 420/2005 of 15 March 2011, and requested to remove the Applicant from the business premise.

14. On 15 February 2012, the Applicant, as a third party, filed an objection to the request for execution. The Municipal Court rejected that objection as unfounded (Decision E. no. 2907/2011 of 5 March 2012).

15. Thus, on 20 March 2012, the Applicant complained against that decision to the District Court in Gjilan, which rejected the Applicant's complaint as unfounded and upheld the decision of the Municipal Court of 5 March 2012 (Decision E. no. 2907/2011).

16. On 4 May 2012, the Municipal Court in Gjilan notified the Applicant that the execution of the decision was in force and would take place on 4 June 2012.

17. On 31 May 2012, the Applicant filed a proposal to the Municipal Court in Gjilan to postpone the execution. The Municipal Court in Gjilan rejected the proposal to postpone as unfounded (Decision E. no. 2907/2011 of 4 June 2012).

18. On 8 June 2012, the Applicant complained against the decision of the Municipal Court to the District Court in Gjilan, which rejected the complaint as unfounded (Decision Ac. no. 222/2012 of 19 September 2012).

19. The Applicant alleges that, on 11 June 2012, the Municipal Court executed the decision of the Municipal Court and removed the Applicant from the business premises which he was renting. No evidence in the case file supports this allegation of the Applicant.

20. On 10 October 2012, the Applicant filed a request for protection of legalitywith the State Prosecutor. The State Prosecutor rejected this request, because it did not find any grounds for the request for protection of legality (Notification KMLC. No. 106/2012 of 23 October 2012).

Applicant's allegations

21. The Applicant alleges that he *"[...] was removed with force by the executive authorities, the Municipal Court of Gjilan, from the business premise, which he used based on the contract of 4 February 2009, and without any court procedure."*

22. In this respect, the Applicant requests the Constitutional Court *"[...] to annul all decisions of execution procedure of Municipal Court in Gjilan and of District Court in Gjilan and order the Municipal Court in Gjilan to allow the use of the rented business premise based on the rights and obligations derived from the contract of 4 February 2009."*

Admissibility of the Referral

23. 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 and as further specified in the Law and the Rules of Procedure.

24. In this respect, the Court refers to Article 113 (1), which establishes that *"the Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties"*.

25. The Court also refers to Article 48 of the Law on Court, 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"*.

26. In addition, the Court also takes into account Rule 36 (1) c) of the Rules of Procedure which foresees that *"The Court may only deal with Referrals if (...) the Referral is not manifestly ill-founded."*

27. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular court, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). Thus, this Court is not to act as a court of fourth instance, when considering the decisions taken by the 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).

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

29. In this respect, the Court notes that the Applicant did not substantiate a claim on constitutional grounds and did not provide evidence that his rights and freedoms have been violated by the regular courts.

30. Therefore, the Constitutional Court cannot conclude 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).

31. The Court further notes that the Applicant did not initiate any proceedings in respect to his contractual rights and obligations against Xh. K. The Municipal and District courts in Gjilan only determined the ownership right between Xh. K. and Z. Y.

32. In sum, the Applicant did not show why and how his rights as guaranteed by the Constitution have been violated. A mere enumeration of certain constitutional provisions cannot be considered as a constitutional complaint. Thus, the matter was not referred to the Court *in a legal manner* by the Applicant because pursuant to Rule 36 (1.c) of the Rules of Procedure, the Referral is manifestly ill-founded and therefore it is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (1) of the Constitution, Article 48 of the Law on Court and Rule 36 (1.c) and Rule 56 (2) of the Rules of Procedure, on 23 May 2013 , unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision immediatelyeffective.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 13/13, Mr. Nexhat Tahiri, date 14 June 2013 - Constitutional review of the Resolution of the Special Chamber of the Supreme Court of Kosovo ASC-09-0042, dated 29 August 2012

Case KI-13/13, Resolution on Inadmissibility of 15 May 2013

*Keywords:*individual referral, out of time, res judicata, equality before the law, right to work and exercise profession, right of access to public documents.

The Applicant submitted Referral pursuant to Article 113.7 of the Constitution of Kosovo, by challenging the Decision of Special Chamber of the Supreme Court of Kosovo ASC-09-0042 of 29 August 2012, by which was terminated the property-legal dispute, between the Applicant and third persons, related to the right to work and other property rights, which the employees have during the privatization process.

The Applicant engaged in litigation concerning the termination of the employment relationship with the Industrial - Agricultural Combine,,AGROKULTURA"from Gjilan, and at the same time he requested to be, included in the list of eligible workers to the share of 20% of the proceeds from the privatization of the enterprise.

The Special Chamber of the Supreme Court of Kosovo by Decision ASC-09-0042 of 29 August 2012 rejected the Applicant's appeal as unfounded with the following reasoning:

"...*The substance of the previous case and that of the case at hand is in principle the same. The appeal regards the same subject matter and seeks the same relief The Appellate Panel concludes that the case has been already previously adjudicated and there is a case of res judicata at hand. The claim must be dismissed ex officio ... ".*

The Applicant alleged that a number of Articles of the Constitution of the Republic of Kosovo have been violated, as well as the Universal Declaration of Human Right, European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.

Deciding on the Referral of the Applicant Nexhat Tahiri, after the review of proceedings in entirety, the Constitutional Court concluded that it is not admissible for review, in accordance with Article 49 (Deadlines) of the Law and Rule 36 (1b) of the Rules of Procedure, because the Referral was filed after the time limit of four months, from the date on which the decision on the last effective remedy was served on the Applicant.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI13/13
Applicant
Nexhat Tahiri
Constitutional review of the Resolution of the Special Chamber of the Supreme Court of Kosovo ASC-09-0042 of 29 August 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Nexhat Tahiri from Gjilan.

Challenged decision

2. The challenged decision is the Resolution of the Special Chamber of the Supreme Court of Kosovo ASC-09-0042 of 29 August 2012, by which the Applicant's appeal against the Resolution of the Special Chamber of the Supreme Court Kosovo ASC-09-0030 of 9 July 2009 was rejected as unfounded.

Subject matter

3. The subject matter is the legal-property dispute between the Applicant and third parties regarding the right to work and other property rights that the workers are entitled to in the privatization procedure which was concluded by the Resolution of the Special Chamber of the Supreme Court of Kosovo ASC-09-0042 of 29 August 2012, which according to Applicant's allegations has violated a number of Articles of the Constitution of the Republic of Kosovo.

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 of 15 January 2009 (hereinafter: the Law) and Rule 56 paragraph 2 of the Rules of Procedure (hereinafter: Rules of Procedure).

Proceedings before the Court

5. On 4 February 2013, the Applicant filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 22 March 2013, the Constitutional Court requested from the Special Chamber of the Supreme Court of Kosovo and Kosovo Privatization Agency to submit additional documents including proof as to when the Applicant received the Resolution of the Special Chamber of the Supreme Court of Kosovo ASC-09-0042 of 29 August 2012.

7. On 26 March 2013, the Special Chamber of the Supreme Court of Kosovo submitted to the Court the return receipt which proves that the Applicant received the Resolution of the Special Chamber of the Supreme Court of Kosovo ASC-09-0042 of 29 August 2012 on 6 September 2012.

8. On 15 May 2013 after having considered the report of Judge Rapporteur Kadri Kryeziu, the Review Panel composed of Judges: Altay Suroy (Presiding), Almiro Rodrigues and Ivan Čukalović made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of the facts

9. The Applicant engaged in litigation concerning the termination of the employment relationship with the Industrial – Agricultural Combine „AGROKULTURA“from Gjilan, and at the same time he requested to be included in the list of eligible workers to the share of 20% of the proceeds from the privatization of the enterprise.

10. This litigation ended with the final Resolution of the Special Chamber of the Supreme Court of Kosovo ASC-09-0042 of 29 August 2012, which was served on the Applicant on 6 September 2012.

11. The Special Chamber of the Supreme Court of Kosovo by Resolution ASC-09-0042 of 29 August 2012 rejected the Applicant's appeal as unfounded with the following reasoning:

> *"...The substance of the previous case and that of the case at hand is in principal the same. The appeal regards the same subject matter and seeks the same relief. The Appellate Panel concludes that the case has been already previously adjudicated and there is a case of res judicata at hand. The claim must be dismissed ex officio..."*.

Applicant's allegations

12. The Applicant alleges that the following Articles have been violated: Article 3 (Equality before the Law), Article 22 (Direct Applicability of International Agreements and Instruments), Article 24 (Equality before the Law), Article 41 (Right of Access to Public Documents), Article 49 (Right to Work and Exercise of Profession), Article 54 (Judicial Protection of Rights) of the Constitution of the Republic of Kosovo, as well as the Universal Declaration of Human Right, European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.

13. The Applicant did not give reasons as to how the abovementioned Articles were violated. Instead he addressed the Constitutional Court alleging the following:

> *"If case files are viewed according to this appeal, the Court has not reviewed my statement of claim according to facts, but it only made approximate interpretation."*

Assessment of the admissibility of the Referral

14. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court needs first to examine whether the Applicant has met the admissibility requirements laid down in the Constitution and the Law.

15. In this regard, the Constitutional Court refers to Article 49 (Deadlines) of the Law which prescribes:

> *"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. The Court notes that in the additional documents that were submitted by the Special Chamber of the Supreme Court of Kosovo it has been established that the Applicant has received the Resolution of the Special Chamber of the Supreme Court of Kosovo ASC-09-0042 of 29 August 2012 on 6 September 2012 when the Applicant signed the return receipt.

17. The final Resolution of the Special Chamber of the Supreme Court of Kosovo was served on the Applicant on 6 September 2012, whereas he submitted the Referral to the Secretariat of the Constitutional Court on 4 February 2013.

18. It follows that the Referral is inadmissible for consideration in accordance with Article 49 (Deadlines) of the Law and Rule 36 (1) (b) of the Rules of Procedure which provides *„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, and Rule 36 (1) b), in its session held on 10 June 2013, 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
Dr. Sc. Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 04/13, Zahir Hasani, date 14 June 2013- Request for Constitutional Review of the Judgment of Supreme Court Pkl.nr.5/2011, of 27 January 2011

Case KI 04/13, Resolution on Inadmissibility of 24 May 2013

Keywords: Individual referral, out of time, Resolution on inadmissibility

The Applicant alleged that the Judgment of the Supreme Court violated his rights guaranteed by the Constitution of Kosovo, which is: the Right to Fair and Impartial Trial (Article 31).

The Applicant also alleged violation of the provision of the Criminal Code of Kosovo.

The Court finds that the Applicant has not fulfilled the admissibility criteria, and the matter was not referred to the Court in a legal manner by the Applicant because pursuant to article 49 of the Law on Constitutional Court the Referral is out of time, therefore, the Referral is declared as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI04/13
Applicant
Zahir Hasani
Request for Constitutional Review of the Judgment of Supreme Court
Pkl.nr.5/2011, of 27 January 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mr. Zahir Hasani, from village Sharban, Municipality of Prishtina, now serving a prison sentence, represented by his brother, Mr. Sabit Hasani, also from village Sharban, Prishtina.

Challenged decision

2. The challenged decision of the public authority is the Judgment of Supreme Court of Kosovo Pkl.nr.5/2011 of 27 January 2011, which, according to Applicant's claim, was served on Applicant on 20 August 2012.

Subject matter

3. The subject matter of the Referral submitted to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), on 14 January 2013 is the constitutional review of the Judgment of the Supreme Court of Kosovo by which was rejected the request of the convict Zahir Hasani for protection of legality, filed against the final Judgment of Municipal Court in Prishtina, P.nr.297/05 of 21 April 2010, and againstthe

Judgment of theDistrict Court in Prishtina AP.nr.260/2010, of 3 December 2010.

Legal basis

4. Article 113.7 in conjunction with the Article 21.4 of the Constitution; Article 22 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009, and Rules 54, 55 and 56.2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo.

Proceedings before the Court

5. On 14 January 2013, the Applicants representative submitted the Referral to the Court. The Referral has been registered in the respective register under Nr.KI04/13.

6. On 30 January 2013, by Decision GJR.KI04/13, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur, and by Decision KSH04/13, the President appointed Review Panel composed of Judges: Robert Carolan (presiding), Prof.dr. Enver Hasani and Almiro Rodrigues (members).

7. On 13 February 2013, the Court informed the Applicant and the Supreme Court on the registration of the Referral.

8. On 30 April 2013, 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

9. On 21 April 2010, the Municipal Court in Prishtina issued Judgment P.no.297/05, by which the accused, Mr. Zahir Hasani, from village Sharban, Municipality of Prishtina, was found guilty for criminal offence of forest theft, pursuant to Article 285.2, of the Criminal Code of Kosovo (hereinafter: CCK), and punished with an imprisonment sentence in duration of 6 (six) months.

10. Against this Judgment, Mr. Hasani filed a complaint to the District Court in Prishtina, by denying his guilt and claiming that he was denied the right of presenting the witnesses who would testify in his favor.

11. On 3 December 2010, the District Court in Prishtina, by deciding on the complaint filed by Mr. Hasani, issued the Judgment Ap.nr.260/10, by which, APPROVED partially the complaint of the accused Zahir Hasani, and the Judgment of the Municipal Court in Prishtina, P.nr.297/05, of 21 April 2010, CHANGED only the sentencing part, therefore the District Court in Prishtina, for the criminal offence forest theft, punishable according to the Article 285 of CCK, found guilty the accused Hasani and imposed a sentence of 3 months imprisonment, while concluded that the Municipal Court in Prishtina has established the complete and correct factual situation and it has administered evidence submitted by the parties in legal and regular manner.

12. Against these two Judgments, now final, Mr. Hasani filed a request for protection of legality to the Supreme Court, with the same allegations as in the first complaint submitted also to the District Court in Prishtina.

13. On 27 January 2011, the Supreme Court issued Judgment Pkl. No.5/2011, by which rejected as unfounded the request for protection of legality, filed against the final Judgments of the Municipal Court in Prishtina, P.no.297/2005, of 21 April 2010, and the District Court in Prishtina, AP.no.260/2010, of 3 December 2010, because it found no essential procedural and legal violations in the Judgments challenged by the Applicant.

14. On 10 January 2013, the Basic Court in Prishtina executed the sentence of imprisonment in compliance with the final Judgment of the Municipal Court in Prishtina, P.no.297/2005, and the Judgment of the District Court in Prishtina, AP. no.260/2010.

Applicant's allegations for constitutional violations

15. The Applicant alleged that the Judgment of the Supreme Court violated his rights guaranteed by the Constitution of Kosovo which is: the Right to Fair and Impartial Trial (Article 31).

16. The Applicant also claimed violation of the provision of the Provisional Criminal Code of Kosovo.

Assessment of 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 all the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.

18. In relation to this, the Court refers to the 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 takes into account:

Article 49 of the Law, which explicitly provides 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.*"

19. In determining whether the Applicant has submitted the Referral within the period of four month deadline, the Court refers to the time upon which the Applicant has been served with the last decision, and it also refers to the date of submission of Referral with the Constitutional Court.

20. From the copy of the standard referral form in the Constitutional Court, the Court found that the Applicant has specified that the Judgment of the Supreme Court Pkl. No. 5/2011, of 27 January 2011, has been served on him on 20 August 2012, whereas the Referral was submitted to the Constitutional Court on 14 January 2013, which means that the Referral was submitted to the Court 24 days after the four month deadline according to the Article 49 of the Law on the Constitutional Court.

21. In these circumstances the Applicant did not fulfill the admissibility criteria concerning the deadlines within which the Referral should be submitted to the Constitutional Court, therefore the Referral shall be declared as inadmissible.

22. The Court consistently emphasizes that the purpose of the four month rule is to promote legal certainty, and to ensure that the cases raised on constitutional matters would be reviewed within a reasonable deadline, in order to protect authorities and other concerned parties from being in

any uncertain situation for a long period of time (see: *mutatis mutandis* PM v United Kingdom, Referral no. 6638/03, 19 July 2005).

23. Before all the foregoing, the Applicant has not fulfilled the admissibility criteria, .and the matter was not referred to the Court *in a legal manner* by the Applicant because pursuant to article 49 of the Law of Court the Referral is out of time, therefore,

FOR THESE REASONS

The Constitutional Court, pursuant to 113 (1) of the Constitution, Article 49 of the Law of Court and the Rule 36.1 (b)) of the Rules of Procedure, on 24 May 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision immediatelyeffective.

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

KI 127/12, Zade Zeqiroviq, date 14 June 2013 – Constitutional Review of the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo related matters ASC-09-0084 dated 12 September 2012.

KI127/12, Resolution on Inadmissibility, of 27 May 2013

Keywords: individual referral, compensation of material damage, annual interest, equality before the law, right to fair and impartial trial, manifestly ill-founded

The Applicant alleges that the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo related matters ASC-09-0084 of 12 September 2012 violated the rights guaranteed by Article 24 [Equality before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in the case of, as alleged by the Applicant, non recognition of the right to annual interest on the amount of the compensation for a damage caused by fire.

For all the aforementioned reasons, the Court is satisfied that the facts presented by the Applicant did not in any way justify the allegation of a violation of the constitutional rights and the Applicant did not provide evidence that her rights and freedoms guaranteed by the Constitution have been violated by the regular courts.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 127/12
Applicant
Zade Zeqiroviq
Constitutional Review
of the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo related matters ASC-09-0084 dated 12 September 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Applicant

1. The Referral is filed by Zade Zeqiroviq (hereinafter: the Applicant), represented by Shemsi Uka.

Challenged decision

2. The Applicant challenges the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court on Privatisation Agency of Kosovo related matters ASC-09-0084 of 12 September 2012, served on the Applicant on 22 September 2012.

Subject matter

3. The Applicant alleges that the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court on Privatisation Agency of Kosovo related matters ASC-09-0084 of 12 September 2012 violated the rights guaranteed by Article 24 [Equality before the Law] and Article 31 [the Right to Fair and Impartial Trial] the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in the case of, as alleged by the

Applicant, non recognition of the right to annual interest on the amount of the compensation for a damage caused by fire.

Legal basis

4. The Referral is based on Articles 113.7 of the Constitution, Article 22 of the 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 Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 7 December 2012, the Applicant submitted the Referral to the Constitutional Court (hereinafter: the Court).

6. On 10 January 2013, the President appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Almiro Rodrigues (member) and Arta Rama-Hajrizi (member).

7. On 5 February 2013, the Court notified the Applicant and the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo related matters on the registration of the Referral.

8. On 29 April 2013, by Decision of the President on the replacement of Judge Rapporteur with No. GJR. KI 127/12, Judge Snezhana Botusharova was appointed as Judge Rapporteur. On the same day, by Decision of the President No. KSH. 127/12, the Review Panel was appointed, composed of judges: Altay Suroy (presiding), Almiro Rodrigues(member), and Enver Hasani (member).

9. On 14 May 2013, the Review Panel considered the report of Judge Rapporteur and made a recommendation to full Court on the inadmissibility of the Referral.

The facts of the case

10. According to the documents attached to the Referral, the Applicant is the owner of the Company “Muki Trade”, who from 26 October 1999 until 25 February 2000 had a lease contract for the use of a warehouse with the Socially Owned Enterprise “Social, Sportive, Cultural and Economic Center” in Prishtina. On 25 February 2000, a fire broke out in the “Social, Sports, Cultural and Economic Center” in Prishtina, which

spread to the other, rented warehouses, including the rented warehouse by the Applicant.

11. On 9 March 2005, the Applicant filed a claim at the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters seeking damage compensation from the "Social, Sportive, Cultural and Economic Centre" in Prishtina. The copy of the claim of 9 March 2005 has not been attached to the Referral by the Applicant. It is the Judgment of the Special Chamber of the Supreme Court dated 18 August 2006, which refers to the claim submitted by the Applicant.

12. The Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters in its Judgment of 18 August 2006, No. SCC-05-80 decided that *"no relief can be awarded in respect of this claim as matter of law"*, and further explaining that the claim was not filed within the 5 (five) year time limit as prescribed by article 376, paragraph 2, of the Law on Obligations. Whereas on the same date, the Special Chamber issued judgments on 12 (twelve) related cases, adjudging the "Social, Sports, Cultural and Economic Center" in Prishtina liable for damages suffered by Claimants and awarding damage compensation in their favor.

13. On 25 March 2008, the Applicant submitted a request to reopen the case. The legal representative of the Applicant submitted evidence to the Special Chamber that on 16 March 2004 a claim had been filed for the same compensation of damage in the Municipal Court of Prishtina. The evidence submitted to the Special Chamber was in the form of a decision of the Municipal Court of Prishtina dated 6 February 2008.

14. Based on the evidence submitted by the Applicant, confirming that a claim had been filed for the same compensation in the Municipal Court, on 20 June 2008, the Special Chamber of the Supreme Court decided to reopen the case.

15. On 10 September 2008, the Special Chamber of the Supreme Court referring to its jurisdiction pursuant to UNMIK Regulation 2002/13 also issued a decision to remove from the Municipal Court of Prishtina the case C. No 254/08 submitted by the Applicant.

16. Special Chamber ordered a general expertise for the assessment of the amount of damage that has been caused by the fire.

17. On 15 October 2009, the Trial Panel of the Special Chamber of the Supreme Court in its Judgment SCC-05-0080 found the Social, Sports,

Cultural and Economic Centre in Prishtina responsible for damage and therefore ordered the Social, Sports, Cultural and Economic Center in Prishtina to pay to the Claimants the compensation of damages. In the case of the Applicant, the Trial Panel ordered to pay 106,650 EUR as damage instead of the alleged amount of 195,000 EUR.

18. On 12 November 2009, the Applicant filed an application with the Special Chamber of the Supreme Court requesting the Special Chamber to correct the Judgment of 15 October 2009 and include an interest of 3.5 % for the Applicant in the enacting clause of the Judgment.

19. On 21 May 2010, the Trial Panel of the Special Chamber of the Supreme Court rejected the application as inadmissible arguing that the Judgment of 15 October 2009 was served on the Applicant on 18 October 2009 and that the Applicant filed her request on 12 November 2009, whereby the application was considered to be out of time pursuant to Section 49.1 of UNMIK Administrative Direction (AD) 2008/6. In fact, the Trial Panel did not consider that the claimed omission was included in the term "*Clerical Errors*". The Trial Panel further argued that the Applicant requested for "supplemental and not for a corrected judgment" and found that the request for complementing the judgment was on time but ungrounded considering that the original judgment implicitly said that the Applicant did not request a legal interest. The Trial Panel noted that "*any objection considering this is to be rectified, if found grounded, only by the second instance decision.*" In this case, the Trial Panel concluded that the request of the Applicant cannot be considered as a new claim since the procedure of registration is a specific one, nor can it be considered as an appeal since it did not satisfy the criteria promulgated by Section 60.1 of the UNMIK Administrative Direction (AD) 2008/6.

20. On 7 July 2010, the Applicant filed an appeal with the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo related matters requesting compensation of delay of payment of legal interest to the same amount as in other cases starting from 25 February 2000 until the definitive payment. The Applicant alleged that several cases have been deliberated in a collective manner obliging the "Social, Sports, Cultural and Economic Centre" in Prishtina to pay the interest and also alleged that in earlier documents it has required compensation for all procedural costs. The Applicant in her appeal also referred to the Judgment of the Special Chamber of Supreme Court of 18 August 2006, in which the Special Chamber of the Supreme Court stated that the "claim consists of a request to oblige the Social, Sports, Cultural and Economic Centre in Prishtina *"to pay interest*

because of the delay in the amount of 5 % per annum starting from the day of the fire until the final payment."

21. The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo related matters with its Decision ASC-10-0045 dated 13 September 2012 rejected the appeal filed by the Applicant as ungrounded and upheld the decision of the Trial Panel SCC -05-0080 dated 21 May 2010.

22. The Appellate Panel in the aforementioned decision notes that:
[...]
"It is correct that the SCSC on 18 August 2006 in its judgment states that the Appellants' claim on 9 March 2005 consists of a request to oblige the 1st Respondent to pay interest because of the delay in the amount of 5 per cent per annum starting from the day of the fire until final payment. However, this request can neither be found in the case file SCC-05-0080, nor in the documents in the appeal to the Appellate Panel. The statement of the SCSC on 18 August 2006 can therefore not be considered as evidence that there was a request for interest before 18 August 2006."

The Appellate Panel further refers to a claim from the Applicant in the Trial Panel file SCC-05-0080 submitted on 15 December 2008 in which the Applicant requested payment of legal interest, but argues that [...] *"pursuant to Article 376.2 of the Law on Obligations the right to file a claim shall expire five years after the occurrence of injury or loss, thus being the request of the Applicant of 15 December 2008 not timely."*

23. The "Social, Sports, Cultural and Economic Centre" in Prishtina, the Privatisation Agency of Kosovo and World Company filed appeals with the Special Chamber of the Supreme Court of Kosovo, respectively on 23 November 2009, 20 November 2009 and 16 November 2009 against the Judgment of the Trial Panel of the Special Chamber of the Supreme Court of 15 October 2009 on the joint cases SCC-05-80, SCC-06-0029, SCC-06-0470, SCC-06-0482 and SCC- 06-0524.

24. The Appellate Panel of the Special Chamber of the Supreme Court in its Judgment of 12 September 2012 decided to consider the appeal of the "Social, Sports, Cultural and Economic Centre" in Prishtina as partly grounded and to modify the Judgment of the Trial Panel of the Special Chamber of the Supreme Court of 15 October 2009 ordering the "Social, Sports, Cultural and Economic Centre" in Prishtina to pay to the Applicant and other claimants the following: 75,000 EUR to the Applicant; 75,000 EUR and 3.5% of annual interest for the damage from

26 February 2000 until the day of payment to the second claimant; 80,000 EUR and 3.5% of annual interest for the damage from 26 February 2000 until the day of payment to the third claimant; 65,000 EUR and 3.5% of annual interest for the damage from 26 February 2000 until the day of payment to the fourth claimant; 180,000 EUR and 3.5% of annual interest for the damage from 26 February 2000 until the day of payment to the fifth claimant.

Applicant's Allegation

25. As stated above, the Applicant alleges that the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatisation Agency of Kosovo related matters ASC-09-0084 dated 12 September 2012 violated the rights guaranteed by the Constitution, namely Article 24 [Equality before the Law] and Article 31 [the Right to Fair and Impartial Trial].

26. The Applicant further alleges that "*According to UNMIK Direction No.6/2008 on implementation of UNMIK Regulation No. 13/2002, Article 70 of the Direction in its final provisions states that in interpreting the present Administrative Direction, or in considering any question which is not answered sufficiently, applicable provisions of the Law on Contested Procedure shall be applied accordingly. Pursuant to Article 190 of the Law on Contested Procedure, as the law in force at that time, it was foreseen that the claimant could have modified the claim until the moment of the closure of the main hearing. Even if the claimant did not request by claim the legal interest, when requesting by submissions and allegations in the hearings before the conclusion of the main hearing, then this allegation should have been considered by the Chamber as being on time.*"

Assessment of the admissibility of the Referral

27. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

28. The Court should first examine whether the Applicant is an authorized party to submit a referral with the Court, in accordance with requirements of Article 113.7 of the Constitution.

Article 113, paragraph 7 of the Constitution 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."

In relation to this Referral, the Court notes that the Applicant is a natural person, and is an authorized party in accordance with Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution.

29. The Court must also determine whether the Applicant, in accordance with requirements of Article 113 (7) of the Constitution, and Article 47 (2) of the Law, has exhausted all legal remedies. In the present case, the final decision on the Applicant's case is the Judgment of the Appellate Panel of the Special Chamber of the Supreme Court on Privatisation Agency of Kosovo related matters ASC -09-0084 of 12 September 2012. As a result, the Applicant has shown that it has exhausted all legal remedies available under the applicable laws.

30. The Applicant must also prove that he has fulfilled the requirements of Article 49 of the Law in relation to submission of Referral within the legal time limit. It can be seen from the case filethat theJudgment of the Appellate Panel of the Special Chamber of the Supreme Court on Privatisation Agency of Kosovo related matters ASC-09-0084 of 12 September 2012 was served on the Applicant on 22 September 2012, while the Applicant filed the Referral to the Court on 7 December 2012, meaning that the Referral was submitted within the four month time limit, as prescribed by the Law and the Rules of Procedure.

31. In relation to the Referral, the Court also takes into account Rule 36 of the Rules of Procedure, which provides:

"(1) The Court may review referrals only if: c) The referral is not manifestly ill- founded."

32. Based on the case files, the Court notes that the reasoning provided in the Judgment of the Appellate Panel of the Supreme Court is clear and, after reviewing the entire procedure, the Court also found that regular court proceedings have not been unfair and arbitrary (See, *mutatis mutandis, Shub v. Lithuania,* Decision of the European Court of Human Rights on admissibility of referral,no. 17064/06, of 30 June 2009).

33. The Court reiterates that according to the Constitution, the Constitutional Court is not a court of fourth instance, when considering decisions taken by regular courts. It is a mandate of regular courts to interpret and apply rules of procedural and substantive law (See,

mutatis mutandis, *García Ruiz v. Spain [DHM],* no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I, See also, *Resolution on Inadmissibility in the case no. 70/11, Applicants Faik Hima, Magbule Himaand Besart Hima, Constitutional Review of the Judgment of the Supreme Court,* A. No. 983/08, of 7 February 2011).

34. The fact that the Applicant is not content with the outcome of the Supreme Court decision cannot be used by him as a right to raise an arguable claim for violation of Articles 24 [Equality before the Law] and 31 [the Right to Fair and Impartial Trial] of the Constitution. (See, *mutatis mutandis ECHR Judgment Appl. No. 5503/02, Mezotur-Tiszazugi Tarsulat v. Hungary,* Judgment of 26 July 2005).

35. For all the aforementioned reasons, the Court is satisfied that the facts presented by the Applicant did not in any way justify the allegation of a violation of the constitutional rights and the Applicant did not provide evidence that its rights and freedoms guaranteed by the Constitution have been violated by the regular courts.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rules 36.2 and 56.2 of the Rules of Procedure, on 27 May 2013, 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
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 105/12 and KI 133/12 , Hunters' Association "Dukagjini" of Klina and Kosovo Hunters' Federation, date 14 June 2013 - Constitutional Review the Decision of Ministry of Internal Affairs, No. 847/2011, of 14 November 2011

KI 105/12 and KI 133/12, Resolution on Inadmissibility, of 24 May 2013

Keywords: individual referral, decision of the ministry of internal affairs, weapon registration cards, out of time

The Applicants request constitutional review of the Decision of the Ministry of Internal Affairs, No. 847/2011, of 14 November 2011, pursuant to which WRCU/WRC cards (or Weapon Registration Cards, known as permits for hunting or recreation weapons), whose validity is extended until 1 November 2012, are changed into cards of Ministry of Internal Affairs (hereinafter: MIA).

From the submissions it appears that the Referrals have been submitted to the Constitutional Court on 22 October 2012 and on 24 December 2012, whereas the MIA Decision No.847/2011 of 14 November 2011 was communicated to the Kosovo Hunters' Federation by electronic mail on 17 November 2011, which means that the Referral has not been submitted within legal deadline stipulated by Article 49 of the Law.

RESOLUTION ON INADMISSIBILITY
in
Cases No.KI105/12 and No. KI133/12
Applicants
Hunters' Association "Dukagjini" of Klina
and
Kosovo Hunters' Federation
Request for constitutional review of the Decision of Ministry of Internal Affairs, No. 847/2011, of 14 November 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Applicant

1. The Applicants are the Hunters' Association "Dukagjini", with office in Klina, and Kosovo Hunters' Federation, represented by Cenë Gashi and Rexhep Shkodra.

Challenged decision

2. Challenged decision of the public authorities which allegedly violated the rights guaranteed by the Constitution of Kosovo is the Decision of the Ministry of Internal Affairs No. 847/2011 of 14 November 2011, which entered into force on the day of its signature, on 14 November 2011.

Subject matter

3. The subject matter of the Referral filed with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) is the constitutional review of the Decision of the Ministry of Internal Affairs, No. 847/2011, of 14 November 2011, pursuant to which WRCU/WRC cards (or Weapon Registration Cards, known as permits for hunting or recreation

weapons), whose validity is extended until 1 November 2012, are changed into cards of Ministry of Internal Affairs (hereinafter: MIA).

Legal basis

4. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo, No. 03/L-121, of 15 January 2009 (hereinafter: the Law) and Rule 37.1 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 22 October 2012, the first Applicant Hunters' Association "Dukagjini", with office in Klina, filed a Referral with the Court.

6. On 5 November 2012, by Decision GJ.R.KI105/12, the President of the Court appointed the Deputy President Ivan Čukalović as a Judge Rapporteur, and by Decision KSH KI105/12 the President appointed the Review Panel composed of Judges: Almiro Rodriguez (Presiding), Snezhana Botusharova (member) and Kadri Kryeziu (member).

7. On 5 November 2012, the Court informed the Applicant and the MIA of the registration of the Referral (KI105/12) in the Court's respective registry.

8. On 22 November 2012, MIA submitted its comments on the Referral. In its letter, Ministry of Internal Affairs stated: *"We have held regular meetings with the Hunters' Federation and we have explained to them that we as MIA can not comply with their request for exemption from the professional examination, because the law on weapons has not provided any exclusionary provision for any category of Kosovo society".*

9. On 24 December 2012, the second Applicant, the Kosovo Hunters' Federation filed a Referral with the Court.

10. On 26 December 2012, in accordance with Rule 37.1 of the Rules of Procedure, the President ordered the joinder of Referrals KI105/12 and KI133/12, because the Referrals were directed against the same act of the public authority. By this order it was decided that the Judge Rapporteur and the composition of the Review Panel be the same as it was decided by the President's Decisions of 5 November 2012 on appointment of the Judge Rapporteur and the Review Panel.

11. On 22 January 2013, the Court informed the second Applicant and MIA of the registration of Referral (KI133/12) in the Court's respective registry.

12. On 31 January 2013, the Court sent a request for additional information to the second Applicant (Kosovo Hunters' Federation) and MIA.

13. In its request for additional information, of 31 January 2013, addressed to Kosovo Hunters' Federation, the Court requested confirmation as to what date the Hunters' Federation had received the Decision of MIA No. 847/2011, of 14 November 2011.

14. In its request for additional information, of 13 January 2013, addressed to MIA, the Court requested confirmation as to the number of the hunters' associations that are authorized to issue certificates on successful passing of the professional exam in the frame of the Decision no. 847/2011, of 14 November 2011, and it requested confirmation as to when and in what manner was the decision communicated to the respective parties.

15. On 6 February 2013, MIA replied to the Court's request of 31 January 2013, explaining:

.....

"*According to the Law on Weapons no. 04/L-143, the only authority which issues certificates for successful passing of the professional exam for weapons is the Ministry of Internal Affairs, respectively the Department for Public Safety. The decision no. 847 dated 14.11.2011 in item 5 left open the possibility for discussion by the groups of interests and this item of the decision is not executive".*

16. On 13 February 2013, Kosovo Hunters' Federation sent a reply to the Court's request of 31 January informing that the Hunters' Federation has received Decision No. 847/2011 by electronic mail on 17 November 2011.

17. On 29 April 2013, the Review Panel considered the report of Judge Rapporteur and made a recommendation to full Court on the inadmissibility of the Referral.

Summary of the facts

18. On 14 November 2011, MIA approved a decision on the basis of which WRCU/WRC cards (or Weapon Registration Cards, known as permits

for hunting or recreation weapons), whose validity is extended until 1 November 2012, are changed into MIA cards. According to the same Decision, Department of Public Safety (hereinafter: DPS) of MIA issues cards with one-year validity to an Applicant who fulfills a number of conditions set forth in Article 2 of the Decision No. 847/2011. Further, according to the Decision, if within the one-year time limit the holders of Weapon Registration Cards (WRC) produce a certificate on successful passing of the professional exam, DPS will issue them a five (5) year validity card.

19. According to the Applicants, a considerable number of the members of Hunters' Association "Dukagjini" and Hunters' Federation have passed the practical and theoretical tests required by the MIA Decision many years ago and therefore have obtained the right to carry hunting weapons.

20. Article 5 of the MIA Decision stipulates: *"The Ministry of Internal Affairs will consider the option of exclusion from the theoretical or practical test for the owners of the mentioned cards in Section 1 and 2 in case that theoretical or practical test may be proved with any relevant certificate issued with regular procedure from the competent authorities"*. The first Applicant (KI105/12) claims that MIA has not accepted the certificates that were issued in regular procedure thereby obliging the hunters to take a test at the Target Shooting Club "Katana" in Obiliq, according to the Applicant the only club in the Republic of Kosovo, and the hunters are obliged to pay a fixed amount of 170 € for the test.

21. According to the documentation submitted with the Referral, respectively in the letter of the second Applicant (KI133/12), addressed to MIA on 1 November 2011, it is made known that in the registries of twenty four (24) hunters' associations are recorded four thousand one hundred eighty eight (4.188) certificates of hunters that were qualified during the period 2001-2007 and in the period before 2001. The Applicant (KI133/12), on behalf of the hunters' associations, has requested from MIA also the exemption of hunters from the theoretical and practical exam for weapons with the reasoning that the hunters possess certificates, issued by competent authorities.

22. The Applicants state that they have not complained against the Decision of MIA, No. 847/2011, of 14 November 2011, alleging that they did not have the right to complain.

Applicants' allegations of constitutional violations

23. The first Applicant (KI105/12) alleges that the MIA Decision, on the basis of which all hunters regardless of age and profession are to take a test is unjust and unlawful for the reason that a considerable number of hunters are experienced and passionate hunters and that they have practiced this sport for more than thirty (30) years and these hunters have completed the regular military service where they were trained to use weapons and they also possess certificates issued by Kosovo Hunters' Federation through a legitimate commission. The first Applicant further explains that the structure of the hunters includes a considerable number of members of the Kosovo Police, Kosovo Security Force, who in the frame of their profession are trained to use weapons, alleging that it is unjust, unjustifiable, unlawful and unconstitutional that these categories of hunters have to take the test that is required pursuant to the MIA Decision, No. 847/2011, of 14 November 2011.

24. The first Applicant (KI105/12) alleges that the Decision of MIA No. 847/2011, of 14 November 2011, has violated the rights guaranteed by the Constitution of the Republic of Kosovo: Article 3 [Equality Before the Law], Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], , Article 32 [Right to Legal Remedies], Article 44 [Freedom of Association], Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights], Article 55 [Limitations on Fundamental Rights and Freedoms].

25. The second Applicant (KI133/12) alleges that the Decision of MIA No. 847/2011, of 14 November 2011, has violated the rights guaranteed by the Constitution of the Republic of Kosovo: Article 3 [Equality Before the Law], Article 16 [Supremacy of the Constitution], Article 17 [International Agreements], Article 18 [Ratification of International Agreements], Article 19 [Applicability of International Law], Article 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 44 [Freedom of Association], Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights] and Article 55 [Limitations on Fundamental Rights and Freedoms].

26. The second Applicant (KI133/12) further alleges that the Decision of MIA, No. 847/2011, of 14 November 2011, is in violation of the provisions of Article 1 of the Law on Vocational Education and Training,

No. 02/L-42; provisions of Article 47 (Law on Hunting, Official Gazette of SAPK, No. 37, of 25 September 1979, KK No. 112-57/79; provisions of Article 63 of the Law on Hunting, No. 02/L-53, of 16 December 2005; and the provisions of Article 7 of the Law on Weapons, No. 03/L-143, of 17 November 2009.

27. In their Referral the Applicants on behalf of all the qualified hunters who are members of the hunters' associations request the review of the legality and constitutionality of the decision of the competent bodies of the MIA which does not recognize the legal qualifications for weapons and hunting that the hunters have obtained until 2007.

Assessment of the admissibility of the Referral

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

29. With respect to the Applicants' Referrals, the Court refers to Article 49 of the Law which prescribes:

"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."

30. In order to verify whether the Applicant has submitted the Referral within the prescribed four month deadline, the Court refers to the date of receipt of the last decision by the Applicant and the date of submitting the Referral to the Constitutional Court.

31. From the submissions it appears that the Referrals have been submitted to the Constitutional Court on 22 October 2012 and on 24 December 2012, whereas the MIA Decision No.847/2011 of 14 November 2011 was communicated to the Kosovo Hunters' Federation by electronic mail on 17 November 2011, which means that the Referral has not been submitted within legal deadline stipulated by Article 49 of the Law.

32. Based on the foregoing, it results that the Referral is out of time.

33. Therefore, the Referral must be rejected as inadmissible due to the failure to comply with the legal deadline stipulated by Article 49 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law, and Rule 36.1 (b) of the Rules of Procedure, on 24 May 2013, 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
Ivan Čukalović

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 34/13, Besart Begu, date 14 June 2013- Constitutional Review of the procedure before the Supreme Court of the Republic of Kosovo in case A. no. 1578/12.

Case KI 34/13, Resolution on Inadmissibility of 15 May 2013

Keywords: individual referral, non-exhaustion, violation of individual rights and freedoms

The applicant, Mr. Besart Begu, filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo complaining that he filed a law suit on 22 December 2012 with the Supreme Court of the Republic of Kosovo and that he has not received any reply from them as to his law suit which is registered under number A. no. 1578/12. Thus, there is yet no final decision to be challenged before this Court.

On the issue of the admissibility of the Referral, the Court held, that the Referral was inadmissible because the case was still pending before the regular court, where the Applicant would still be able to raise his complaints before the Court about the alleged violation of his. Thus, the Court considered that there is no final decision yet to be challenged before the Court.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI34/13
Applicant
Besart Begu
Constitutional Review of the procedure with the Supreme Court of the Republic of Kosovo in case A. no. 1578/12.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Referral is submitted by Mr. Besart Begu (hereinafter: the "Applicant"), residing in Mitrovica.

Challenged decision

2. The Applicant submitted his Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") complaining that he filed a law suit on 22 December 2012 with the Supreme Court of the Republic of Kosovo and that he has not received any reply from them as to his law suit which is registered under number A. no. 1578/12. Thus, there is yet no final decision to be challenged before this Court.

Subject matter

3. The Applicant alleges that his rights as guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") are being violated, without specifying any specific provisions of the Constitution.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the 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 11 March 2013, the Applicant submitted the Referral with the Court.

6. On 25 March 2013, the President of the Constitutional Court, with Decision No.GJR.KI-34/13, appointed Judge Kadri Kryeziu as Judge Rapporteur. On the same date, the President of the Constitutional Court, with Decision No.KSH.KI-34/13, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Ivan Čukalovič and Almiro Rodrigues.

7. On 29 March 2013, the Referral was communicated to the Supreme Court of the Republic of Kosovo.

8. On 29 April 2013, the President of the Constitutional Court replaced Judge Robert Carolan with Judge Enver Hasani as member of the Review Panel. Thus, Judge Almiro Rodrigues is the Presiding Judge of the Review Panel.

9. On 15 May 2013, 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

10. On 29 December 2011, the Independent Commission for Mines and Minerals rejected the request of the Applicant's company "Mani Com" for License pursuant to Article 6 (1.5.2) of the Law No. 03/L-163 on Mines and Minerals which provides the following: *"A Person desiring to receive or maintain a License or Permit, or to extend or receive a transfer of an existing License or Permit, shall be eligible therefore if: the subject matter of the License or Permit for which the applicant has made application: does not materially conflict with the subject matter of a prior application that has been submitted by another applicant having priority;."* The Independent Commission for Mines and Minerals held that there is a material conflict with the subject matter of a prior application of another company. The Applicant complained

against this decision to the Independent Commission for Mines and Minerals – the Appeals Commission.

11. On 14 November 2012, the Appeals Commission of the Independent Commission for Mines and Minerals rejected as unfounded the Applicant's complaint and upheld the decision of the Independent Commission for Mines and Minerals of 29 December 2011.

12. On 21 December 2012, the Applicant initiated an administrative conflict procedure with the Supreme Court. The Applicant complained that the Independent Commission for Mines and Minerals has violated the provisions of the Law on Mines and Minerals and has wrongfully determined the factual situation and has wrongfully applied the material law.

13. The Applicant's law suit with the Supreme Court is registered under number A. no. 1578/12.

Applicant's allegations

14. The Applicant alleges that he "*Complains because he has not received any answer from the Supreme Court in Prishtina in respect to his law suit that he has filed as administrative conflict procedure dated 22.12.2011 with case number A. 1578/12.*"

15. Furthermore, the Applicant alleges that the *"Reason why he has filed a law suit against the Independent Commission for Mines and Minerals in Prishtina is because I have filed a request for license several times and each time they have rejected my request for reasons that I am not aware of and although I have fulfilled all the obligations."*

Admissibility of the Referral

16. 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.

17. In this respect, the Court refers 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 47.2 of the Law which provides that *"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

18. In this respect, the Court notes that 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.

19. 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).

20. In the present case, the Court notes that the case is still pending before the Supreme Court, where the Applicant will still be able to raise his complaints about the alleged violation of his rights. Thus, the Court considers that there is no final decision yet to be challenged before this Court.

21. Therefore, 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.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 47.2 of the Law on Court and Rule 56 (2) of the Rules of Procedure, on 3 June 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur
Dr. Sc. Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 37/13, Faton Sefa, date 14 June 2013 - Requesting for re-examination of the Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo, KI 75/12.

Case KI 37/13, Resolution on Inadmissibility of 15 May 2013

Keywords: follow up case, individual referral, res judicata, violation of individual rights and freedoms

The applicant, Mr. Faton Sefa, filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo. The present Referral is a follow-up of Case No. KI 75/12. The Applicant complains now that "this Court has not reviewed the additional evidence that was submitted to the Court on 21 November 2012."

On the issue of the admissibility of the Referral, the Court held, that the Referral was inadmissible because the Applicant failed to submit evidence and failed to provide new and sufficient grounds for a new Decision. The Court, therefore, held that the Referral is to be rejected as Inadmissible, because the Constitutional Court has already decided the Applicant's case with Case No. KI. 75/12., i.e. the case is res judicata.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI37/13
Applicant
Faton Sefa
Request for re-examination of the Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo, KI75/12, dated 15 January 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Mr. Faton Sefa, residing in Gjakova, who submitted a first Application (Case No. KI 75/12) to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court") on 13 August 2012. The Case was rejected as inadmissible on 27 November 2012.

Challenged decision

2. With the present Referral, the Applicant request this Court to re-examine the Resolution on Inadmissibility of this Court in Case KI 75/12, dated 15 January 2013, by which the Court declared inadmissible the Applicant's Referral for being manifestly ill-founded. The Resolution on Inadmissibility was served on the Applicant on 31 January 2013.

Subject matter

3. In this request for re-examination of the Resolution on Inadmissibility, the Applicant complains that this Court has not reviewed the additional evidence that was submitted to the Court on 21 November 2012.

Legal basis

4. Rule 36 (3.e) 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 March 2013, the Applicant submitted a request to this Court to re-examine the Resolution on Inadmissibility of this Court in Case KI 75/12, dated 15 January 2013.

6. On 25 March 2013, the President of the Constitutional Court, with Decision No.GJR.KI-37/13, appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President of the Constitutional Court, with Decision No.KSH.KI-37/13, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Ivan Čukalović and Enver Hasani.

7. On 7 May 2013, the President of the Constitutional Court replaced Judge Robert Carolan with Judge Almiro Rodrigues as Presiding Judge of the Review Panel.

8. On 15 May 2013, 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. As to the Applicant's previous Case KI75/12, adjudicated on 21 November 2012, this Court found the Referral inadmissible on the ground that the Applicant had not submitted any evidence that shows whether he was invited or not to participate in the disciplinary proceedings and whether the Supreme Court ignored this fact or not. The mere disagreement with the Judgment coupled with the enumeration of some constitutional provisions is not enough to build a case on constitutional violation.

10. On 13 March 2013, the Applicant submitted a letter to this Court alleging that on 21 November 2012 he submitted to the Court additional documents which the Court did not take into consideration. The additional documents that the Applicant submitted on 21 November 2012 were as follows:

a. Email correspondence between the Applicant and a prosecutor from the International Criminal Tribunal of Yugoslavia. The Applicant had written to this prosecutor asking him to confirm that the termination of the employment contract was not done in accordance with applicable law. The prosecutor replied that he/she could not be of assistance.
b. Statement before a prosecutor of the International Criminal Tribunal of Yugoslavia. On 27 November 2006, the Applicant had given a statement in the capacity of witness before the International Criminal Tribunal of Yugoslavia in respect to his work.

11. Furthermore, with this letter of 13 March 2013, the Applicant provided the Court with the additional documents that were not in the initial Referral:

a. On 8 August 2006, the employer had issued an order whereby the bonus system to the employees was cancelled and that the Applicant as head of his sector could give bonus to his employees within that sector if he considers that they have worked well over the average.

b. On an unspecified date the disciplinary commission had reviewed the notification to terminate the Applicant's employment contract and based on the evidence that they possessed upheld the notification to terminate the Applicant's employment contract.

c. On 7 July 2012, an employee of the company where the Applicant worked had written a statement that he/she signed the minutes of the Disciplinary Commission under pressure and threat.

d. His Employment Contract.

e. Target Agreement of the company.

f. Response of the Applicant to the complaint of the Company to the District Court in Gjakova.

Admissibility of the Referral

12. 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.

13. In this respect, the Court refers to Rule 36 (3) (e) which provides: *"A Referral may also be deemed inadmissible in any of the following cases: the Court has already issued a Decision on the matter concerned and the Referral does not provide sufficient grounds for a new Decision;"*

14. The Applicant complains that he had submitted to the Court additional documents, as mentioned in paragraph 10, which the Court had not taken into consideration.

15. In this respect, the Court notes that these additional documents were received by the Court on 3 December 2012, while the Court had already deliberated the Case on 27 November 2012.

16. Furthermore, the Court notes that the Referral of the Applicant had been rejected by this Court in its Resolution on Inadmissibility in Case No. KI 75/12 because based on the submitted documents by the Applicant, the Court considered that the Applicant had failed to build a case on constitutional violation.

17. As to the new submitted documents under paragraph 11, the Court notes that these documents do not confirm the Applicant's allegation that he never had a meeting with the company and the termination of employment relationship never specified what legal provisions were violated by the employee.

18. Thus, the Court considers that the new documents submitted by the Applicant do not provide new and sufficient grounds for a new Decision.

19. In these circumstances, the Court concludes that the Referral, pursuant to Rule 36 (3) (e) of the Rules of Procedure, is inadmissible, because the Court has already decided on the concerned matter.

FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36 (3.e) of the Rules of Procedure and Rule 56 (2) of the Rules of Procedure, on 31 May 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible, because the Constitutional Court has already decided the Applicant's case with Case No. KI. 75/12., i.e. the case is *res judicata*;

II. TO NOTIFY the Parties of this Decision;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 23/13, Melihate Hakiqi, date 18 June 2013- Constitutional review of the Judgment of the Supreme Court of Kosovo A.No.1197/2012, of 27 December 2012

Case KI 23/13, Resolution on Inadmissibility of 14 June 2013

Keywords: Individual referral, manifestly ill-founded, Resolution on inadmissibility

The Applicant in his Referral, submitted on 27 February 2013, requests "the review of the constitutionality of the Judgment of the Supreme Court of Kosovo A. No. 1197/2012, of 27 December 2012, by which the Supreme Court rejected the Applicant's lawsuit for review of legality of the Decision of the Ministry of Labor and Social Welfare (hereinafter: the MLSW) No. 5081032, of 7 September 2012, in administrative conflict procedure.

The Court finds that the Applicant "did not sufficiently substantiate his allegation", therefore, the Court finds that pursuant to the Rule 36 paragraph 2 item (c) and (d), the Referral should be rejected as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI23/13
Applicant
Melihate Hakiqi
Constitutional review of the Judgment of the Supreme Court of Kosovo
A.No.1197/2012, of 27 December 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Applicant is Ms. Melihate Hakiqi from village Llapashticë e Epërme, Municipality of Podujevo.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo, A.No. 1197/2012, of 27 December 2012. The Applicant did not specify the date of receipt.

Subject matter

3. Subject matter of the Referral submitted to the Constitutional Court of the Republic of Kosovo, on 27 February 2013, is the review of the constitutionality of the Judgment of the Supreme Court of KosovoA. No. 1197/2012, of 27 December 2012, by which the Supreme Court rejected the Applicant's lawsuit for review of legality of the Resolution of the Ministry of Labor and Social Welfare No. 5081032, of 7 September 2012, in administrative conflict procedure.

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 Constitutional Court of the Republic of Kosovo, of 15 January 2009 (hereinafter: the Law), and Rule 29 of the Rules of Procedure.

Proceedings before the Constitutional Court

5. On 27 February 2013, the Constitutional Court received the Referral of Ms. Melihate Hakiqi and registered it under No. KI23/13.

6. On 28 February 2013, President of the Court, by decision GJR 23/13, appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (presiding) and Ivan Čukalović and Enver Hasani (members).

7. On 21 March 2013, the Constitutional Court notified the Supreme Court and the Applicant on registration of the Referral.

8. On 15 May 2013, by decision of the President for replacement of a member of the Review Panel, Judge Snezhana Botusharova is appointed as presiding of the Review Panel.

Summary of facts

9. On 20 July 2006, the Department of Pension Administration of Kosovo issued a decision with case file number 5081032, by which, based on Applicant's request filed on 19 July 2005, approved her request for disability pension.

10. No appeal was filed, within the legal time limit, against this decision by any party.

11. On 21 May 2012, the Doctor's Commission for reassessment of the MLSW issued a decision with the same case file number 5081032 concerning Ms. Melihate Hakiqi, thereby REJECTING her right to a disability pension.

12. On 7 September 2012, the Complaint Commission for disability pensions of the MLSW issued the Resolution with case file no. 5081032, by which rejected the Applicant's appeal and at the same time established that the first instance Decision was "fully grounded and in compliance with the Law No. 2003/23"

13. In the reasoning of the Resolution was mentioned that the first instance Doctor's Commission has correctly and completely determined the factual situation, by the fact that the Applicant does not meet the criteria from Article 3 of the Law 2003/23 and the fact that the commission of the second instance, composed of medical experts of relevant fields, has completely analyzed the medical documentation of the Applicant and has determined the same condition as in the enacting clause of the first instance decision.

14. Against this resolution, the Applicant filed a lawsuit with the Supreme Court of Kosovo, requesting the review of its legality.

15. On 27 December 2012, the Supreme Court of Kosovo, deciding upon the lawsuit of the Applicant in the administrative conflict procedure, issued the Judgment A.No. 1197/2012, REJECTING the lawsuit filed by the Applicant.

16. In the reasoning of its Judgment the Supreme Court stated that the respondent has applied correctly the substantive law, when determining that the plaintiff did not meet the criteria from Article 3 of the Law on DP, and also, that the Doctor's Commissions composed of experts of relevant fields have, unequivocally, correctly determined health condition of the Applicant, therefore the Supreme Court from the allegations in the lawsuit could not find evidence that it should have been decided differently or that the MLSW decisions were unlawful.

Applicant's allegations

17. The Applicant claims that the Doctor's Commission of the Ministry of Labor and Social Welfare (hereinafter: the MLSW) in an unlawful manner rejected her "right to a disability pension" even though she met the criteria for such a pension, whereas the Supreme Court by refusing the Applicant's lawsuit in Administrative Conflict procedure, also made the same violation.

18. The Applicant alleges that by challenged Judgment have been violated the following human rights protected by the Constitution:

    a). Article 23 (Human Dignity)

    b). Article 24 (Equality before the Law)

    c) Article 25 (Right to Life)

Assessment of admissibility of the Referral

19. In order to be able to adjudicate the Referral of the Applicant, the Court has to examine whether the Applicant has met all the requirements of admissibility, laid down by the Constitution.

20. Therefore, the Court refers to the 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. The Court also refers to:

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 Referral and the rights guaranteed by the Constitution, allegedly violated, the Court concludes that: Article 51 of the Constitution [Health and Social Protection] paragraph 2 clearly provides:

> *"Basic social insurance related to unemployment, disease, disability and old age shall be regulated by law".*

23. From the legal definition of Article 51 of the Constitution it is clear that the social insurance related to "disability, unemployment and old age" shall be regulated by LAW, and in the present case the issue of the disability pension is regulated by LAW NO. 2003/23 ON DISABILITY PENSIONS IN KOSOVO adopted by Kosovo Assembly on 6 November 2003.

24. The procedure of application, meeting of the requirements to enjoy this right is set out in this Law, as well as the right to appeal against decisions when the parties are not satisfied with the decisions regarding their requests.

25. Administrative Committees of the MLSW by issuing the decision of 21 May 2012 and resolution of 7 September 2012, have acted precisely in accordance with the provisions of this Law. Furthermore, the Supreme Court, reviewing their legality in the Administrative conflict procedure, in its final Judgment A.nr.1197/2012, of 27 December 2012, qualified them as entirely legal and grounded.

26. The Constitutional Court reviewing Applicant's allegations on violation of Article 23 (Human Dignity), Article 24 (Equality before the Law), and Article 25 (Right to Life) of the Constitution, established that the Applicant did not submit facts to this Court that would confirm her allegations, in fact, besides ascertaining that she meets the requirement for pension, she never provided evidence that would prove the alleged violations nor which judicial or administrative organs have treated her unequally.

27. The Constitutional Court is not the fact finding court, and in this caseemphasizes that the fair and complete determination of factual situation is under full jurisdiction of the regular courts, and in this case was the jurisdiction of the administrative organs and its role is only to ensure compliance with the rights guaranteed by the Constitution, therefore it cannot act as the "court of fourth instance", *(see, mutatis mutandis, i.a., Akdivar against Turkey, 16 September 1996, R.J.D, 1996-IV, par. 65*).

28. The Constitutional Court has a subsidiary role, compared to the regular domestic judicial and/or administrative system, and it is desirable that the national courts or competent administrative organs with effective decision-making competences initially have the opportunity to decide on issues concerning the compliance of the internal law with the Constitution *(see Decision of the ECHR -A, B and C against Ireland [DHM], § 142*).

29. The mere fact that the Applicants are unsatisfied with the outcome, cannot serve as the right to file an arguable claim on violation of the Article 31 of the Constitution (*see mutatis mutandis* Judgment ECHR Appl. No. 5503/02, Mezotur-Tiszazugi Tarsulat against Hungary, Judgment dated 26 July 2005*)*.

30. The Constitutional Court, under similar conditions and circumstances, acted in the same way in case KI101/11 when issued the Resolution on inadmissibility, rejecting the Referral as manifestly ill-founded.

31. In these circumstances, the Applicant "did not sufficiently substantiate her allegations", therefore, I propose to the Review Panel that, pursuant to the Rule 36 paragraph 2 items c and d, the Referral should be rejected as manifestly ill-founded, and

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 36.2 item (c) and (d) of the Rules of Procedure, on 14 June 2013, 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
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 31/13, Ramadan Muja, date 18 June 2013 - Request the execution of Judgments of Courts related to his acquired rights. However, he does not mention what constitutional rights were violated.

Case 31/13, Resolution on Inadmissibility of 15 April 2013.

Keywords: individual Referral, execution of Judgments of Courts.

The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law on the Constitutional Court of the Republic of Kosovo no. 03/L-121 of 15 January 2009 (hereinafter, the Law), and Rule 56, of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

On 11 March 2013, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo and requested from the court the execution of Judgments of Courts related to his acquired rights.

The Applicant does not mention in the Referral what constitutional rights were violated.
The President with Decision (no.GJR. KI 31/13, of 22 March 2013), appointed Judge Almiro Rodrigues as Judge Rapporteur. On the same day, the President with Decision no.KSH.KI 31/13 appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama Hajrizi.

The court upon reviewing the case concluded that the Applicant did not exhaust all legal remedies according to Article 113.7 of the Constitution, Article 47 (2) of the Law and Rule 36 (1) a).

For all the aforementioned reasons, the Constitutional Court of Kosovo in the session held on 15 May 2013 rendered the Referral inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI31/13
Applicant
Ramadan Muja
Execution of Judgment of the Municipal Court in Prizren
C.no. 516/07, of 12 November 2007

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The applicant is Ramadan Muja, village of Strazha, Municipality of Prizren

Challenged decision

2. The challenged is the Execution of the Judgment of the Municipal Court in Prizren C.no.516/07, of 12 November 2007.

Subject matter

3. The applicant requests the execution of judgments of Courts related to his acquired rights. However, he does not mention what constitutional rights were violated.

Legal basis

4. The Referral is based on Articles 113.7 and 21.4 of the Constitution of the Republic of Kosovo (hereinafter, 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 15 January 2009 (hereinafter, the Law), and Rule 56,

paragraph 2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules of Procedure).

5. On 16 April 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Proceedings before the Court

6. On 11 March 2013, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

7. On 22 March 2013, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judge Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama Hajrizi.

8. On 2 April 2013, the Constitutional Court through a letter informed the Applicant that the Referral had been registered. On the same date, the Referral was communicated to the Basic Court in Prizren as a successor of the Municipal Court in Prizren.

9. On 15 May 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

10. *On 05 June 1969, the Applicant established employment relationship with the Trading Enterprise "Sredačka Župa" in Prizren and, due to some conflicts, he started judicial proceedings trough the regular courts aiming to ensure his alleged rights.*

11. *After a long way, on 24 July 2006, the Applicant filed a claim with the Special Chamber of the Supreme Court of Kosovo requesting to oblige "Sredacka Zhupa" to pay to the Applicant the amount of 19,568.22 euros.*

12. *On 2 July 2007, the Special Chamber delivered a decision (Case SCC-06-0344) referring* "this matter to the Municipal Court in Prizren thus giving the competence to that court to decide on this matter. In case the decision or Judgment of this court is appealed, the appeal is filed to the Special Chamber of the Supreme Court of Kosovo".

13. *In fact, that decision was taken* "pursuant to Article 4.2 of UNMIK regulation 2002/13 and Article 17 of UNMIK Administrative Direction 2006/17, the Chamber can, regardless of its own competence, refer certain claims or claim's categories to any court that has real judicial competence pursuant to the higher law, pursuant to the request of the party or its own initiative, if it is convinced that conditions of Article 17.(b) are met. The conditions are as follows:

    The Special Chamber is convinced that the court the claim is referred to will render an impartial decision by taking into consideration:

    (i) The nature of parties;

    (ii) Value of the litigated amount; and

    (iii)Other circumstances of the claim".

14. *On 12 November 2007, the Municipal Court in Prizren rendered a judgment [C.no.516/07], ordering "Sredačka Župa" to pay the Applicant the debt for incomes for the period from 04 June 1990 to 02 February 1998, in the amount of 19.568,22 Euros, which included the costs of expertise and court proceedings.*

15. *On 01 April 2010, the Privatization Agency of Kosovo (hereinafter, PAK) informed the Municipal Court in Prizren* "that pursuant to Article 2.1 of the Law no. 03/L-067, it is authorized to manage, sell, transform or liquidate the enterprise and its property, in the manner provided by mentioned law". *In its conclusion, the letter provides:* "that the Agency shall review all demands, including the claim of the applicant for realization of his rights, only for as much that the applicant files a request with the Liquidation Committee, pursuant to the legal provisions".

16. *On 10 January 2011, the PAK informed the Applicant that* "the liquidation of the enterprise "Župa Rečane" started on 31 December 2010, and that all obligations to the applicant shall include all unpaid salaries, which the employer owes as per employment contract, shall be treated according to the Regulation on Liquidation."

17. *On 28 January 2011, the KPA requested the Applicant to* "confirm that your request remains unaltered from the liquidation day (...)" *and* "fill out the enclosed Request Form (...)". The Applicant should return the liquidation request form "on or prior to 20 March 2011".

18. *On 21 February 2011, the Applicant returned to the PAK the Liquidation Request Submission Form.*

Applicant's allegations

19. *The applicant states that, despite the court decisions to his benefit, he has not been able to realize his rights for 23 years.*

20. *The Applicant claims that*, "on 31 December 2010 we, all the workers were notified and receive the decision that our enterprise is being liquidated and that we are all fired from work, and that we should submit to the enterprise all our claims, and within 3 months we would be notified on the evaluation of our requests, 2 years have passed we have not received any notification and neither have we received any valid evidence that they have received the documents (...).

21. *The Applicant also states: "*I do not know the Constitutional clauses I am not a jurist, I have presented myself in this referral as a peasant and I believe you understand me".

22. *The Applicant further claims that, within legal deadline, he has delivered the requested documentation to the PAK, but has been waiting for 2 (two) years for an answer.*

23. *In sum, the Applicant requests that all unpaid salaries be paid, as confirmed with the judgment of the Municipal Court in Prizren [C.no.516/07] of 12 November 2007, including the rights to 20%, which he enjoys pursuant to the Law on Privatization.*

Admissibility of the Referral

24. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

25. *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."*

26. On the other side, Article 47 (2) of the Law also establishes that:

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

27. Furthermore, Rule 36 (1) a) of the Rule of Procedure foresees that:

> *The Court may only deal with Referrals if all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted.*

28. The Applicant claims that, within the legal deadline, he has delivered to PAK all the documentation requested by PAK. However, the Applicant has been waiting for an answer, since 21 February 2011, the date of delivery of the documentation. That means that the matter is still pending in the PAK and exhaustion of legal remedies available under applicable law has not met yet.

29. The Court recalls 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.

30. In fact, the principle of subsidiarity 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.

31. The rationale for the exhaustion rule is to afford the authorities concerned, including the PAK, 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).

32. 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.

33. Therefore, the Referral, according to Article 113.7 of the Constitution, Article 47 (2) of the Law and Rule 36 (1) a) of the Rules of Procedure, is premature and thus inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rules 36.2 and 56 of the Rules of Procedure, on 27 May 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties and

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 110/12, Dara Menkovič, date 18 June 2013- Constitutional review of the Decision to publish the final list of 20 % compiled by Privatization Agency of Kosovo

Case KI 110/12, Resolution on Inadmissibility of 17 June 2013

Keywords: Individual referral, non-exhaustion of legal remedies, Resolution on inadmissibility

The Applicant in his Referral submitted on 1 November 2012, requests "constitutional review of the Decision to publish the final list of 20 % compiled by PrivatizationAgency of Kosovo**,** by alleging that "PAK during the procedure for distribution of 20 % share from the privatization of the enterprise "INTEGJ" with its seat in Gjilan made discrimination with payment of eligible employees to payment pursuant to Article 2 paragraph 1 item a-b, pursuant to Article 3 paragraph 1 in conjunction with Article 4 paragraph a, i, j, k of the Anti-Discrimination Law no. 2004/3 since other employees, who were on the list have received an amount of means from 20 %."

The Court finds that the Applicant has not exhausted legal remedies provided by law, as required, in order to be able to submit the Referral to the Constitutional Court.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI 110/12
Applicant
Dara Menkovič
Constitutional Review of the Decision to publish the final list of 20 % compiled by Privatization Agency of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Referral was submitted by Ms. Dara Menkovič, with residence in Cernicë, village in municipality of Gjilan.

Challenged decision

2. The Applicant challenges the Decision to publish the final list and thenon-payment of 20% share from privatization of the textile enterprise "INTEGJ" with its seat in Gjilan, by the Privatization Agency of Kosovo (hereinafter: "the PAK").

Subject matter

3. The Applicant complains that she was excluded from the payment of 20 % share from privatization of Socially Owned Enterprise "INTEGJ" with seat in Gjilan, despite timely submission of all the necessary documents for payment of this amount.

4. The Applicant does not refer to any provision of the Constitution.

Legal basis

5. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo, dated 15 January 2009, (hereinafter: the Law), and Rule56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceedings before the Constitutional Court

6. On 1 November 2012, the Applicant submitted a Referral to the Constitutional Court of the Republic of Kosovo.

7. On 6 November 2012, the Court requested from the Applicant to fill in the Referral pursuant to the Rule 36.4 of the Rules of Procedure.

8. On 22 November 2012, the Applicant submitted an additional document to the Court "Resolution on determination of the coefficient for payment of salary."

9. On 4 December 2012, the President by Decision No.GJR.KI-110/12 appointed the Judge Altay Suroy as Judge Rapporteur. On the same day, the President by Decision No. KSH. KI-110/12, appointed Review Panel composed of judges: Snezhana Botusharova (Presiding Judge), Ivan Čukalović and Arta Rama-Hajrizi.

10. On 14 December 2012, the Court notified PAK regarding the registration of the Referral.

11. On 5 February 2013, the Court requested from PAK to provide comments within the time limit of 15 days as to why the Applicant has been excluded from the list and why she has not received the amount (20 %) from the sale proceeds of Socially Owned Enterprise "INTEGJ" with seat in Gjilan.

12. On 14 February 2013, PAK responded to the issues raised by the Court.

13. On 29 April 2013, by Decision (No.KSH.KI110/12) of the President is replaced a judge in the Review Panel, thereby President Prof.Dr.Enver Hasani is appointed as member of the Review Panel under No.KSH110/12, instead of Judge Arta Rama-Hajrizi.

Summary of facts

14. The Applicant complains that, against her will, she was excluded from the payment of the 20% share from privatization of Socially Owned

Enterprise "INTEGJ" with its seat in Gjilan, despite submission of all necessary documents for payment of this amount on time.

15. On 14 February 2013, PAK in its response addressed to the Court regarding the issues raised by the Court, stated that the Applicant is on the final list of eligible employees to 20% share from privatization of Socially Owned Enterprise "INTEGJ" from Gjilan. In its response PAK states further that some of complainants have challenged the Applicant's right to receive this amount, therefore the Applicant has not been excluded from the list but her right was challenged by the complainants and PAK is waiting for the decision on merits of Special Chamber of Supreme Court regarding the objection in order to proceed further with the distribution of means.

Applicant's allegations

16. The Applicant alleges that PAK during the procedure for distribution of 20 % share from the privatization of the enterprise "INTEGJ" with its seat in Gjilan made discrimination with payment of eligible employees to payment pursuant to Article 2 paragraph 1 item a-b, pursuant to Article 3 paragraph 1 in conjunction with Article 4 paragraph a, i, j, k of the Anti-Discrimination Law no. 2004/3, since other employees, who were on the list have received an amount of means from 20 %.

17. The Applicant alleges that "she was on this list, but that she did not receive money, respectively she alleges that she was excluded from payment against her will".

Preliminary assessment of admissibility of the Referral

18. In order to be able to adjudicate the Applicant's Referral, the Court first has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

19. With respect to this, the Court is referred 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."*

20. PAK in the letter dated 14 February 2012, addressed to the Court states that the Applicant's right to receive 20% share from privatization of Socially Owned Enterprise "INTEGJ" with seat in Gjilan, was challenged

by the complainants and that PAK is waiting for the decision on merits of the Special Chamber of Supreme Court, regarding the challenge to proceed further with the distribution of means. As long as there is ongoing process and there is no final decision by Special Chamber of Supreme, the Applicant has not exhausted all legal remedies.

21. 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 legal remedy for the protection of the constitutionally guaranteed rights. (see *mutatis mutandis*, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999)

22. This Court applied the same reasoning when rendered Decision on inadmissibility of 27 January 2010, on the grounds of non-exhaustion of legal remedies in case No.KI41/09, AAB-RIINVEST University L.L.C., Prishtina, against the Government of Republic of Kosovo; and the Decision on case no.KI73/09 of 23 March 2010, Mimoza Kusari-Lila against the Central Election Commission.

23. Based on the document sent by PAK on 14 February 2013, it can be understood that the matter raised by the Applicant is still pending before the Special Chamber of the Supreme Court therefore the referral is premature. The Applicant has not exhausted legal remedies provided by law, as required, in order to be able to submit the Referral to the Constitutional Court.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Article 36.1 item (a) of the Rules of Procedure, on 16 June 2013, 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
Altay Suroy

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 119/11, Sadri Mazreku, date 18 June 2013- Review of Decision of the Municipal Court of Malisheve (C. Dr. 90/2004), of 10 June 2005 and Judgment of the Supreme Court PKL No 120/08, dated 01. September 2009.

Case KI119/11, Resolution on Inadmissibility of 4 June 2013

Keywords: individual referral, inadmissible referral, referral out of time, the right to property, previous cases, *ratione temporis*

The referral is based on Article 113.7 of the Constitution, Article 22 of the Law and Rule 56 of Rules of Procedure. Th Applicant, among other, claimed that the decisions of regular courts have violated his rights to property.

The Court notes that one of the decisions contested by the Applicant had been entered before the entry into force of the Constitution of the Republic of Kosovo. Consequently, this referral does not correspond with the Court's temporal jurisdiction. Whereas for the other contested decision, the Court found that the referral had been submitted out of the (4) four month time limit and as such is out of time. Due to the above mentioned reasons, the Court pursuant to Article 113 of the Constitution, Articles 49 and 56 of the Law and Rule 36 (1) b) and (3) h) of the Rules of Procedure decided to reject as inadmissible the Applicant's referral.

RESOLUTION ON INADMISSIBILITY
In
Case 119/11
Sadri Mazreku
Review of
Decision of the Municipal Court of Malisheve (C.nr.90/2004),
of 10 June 2005
and
Judgment of the Supreme Court PKL No 120/08,
of 01. 09. 2009.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Referral

1. The Referral was filed by Sadri Mazreku, from Malisheve (the Applicant).

2. The Applicant indicates the Decision of the Municipal Court of Malisheve (C.nr.90/2004), dated of 10 June 2005 and served on 22 July 2007, as being the final decision.

3. Besides that decision, the Applicant also makes reference to other judgments: the judgment of the Municipal Court in Decan KA. No. 14/2008, of 27 August 2008; the judgment of the Municipal Court in Decan KA. No. 14/2008, of 07 October 2008 and the judgment of the Supreme Court of the Republic of Kosovo PKL. No. 120/08, of 01 September 2009.

4. The applicant indicates those other judgments as evidence in relation to a dispute on property and filed the Referral “because of the injustice in nominating and re-nominating of the judges as SL and HB”.

5. The Applicant requests the Court "that for the intentional law violators SL and HB (...) to be concluded that they are conscious violators of the law with the recommendation for their dismissal due to the penal acts of misuse of the official duty".

6. However, the Applicant does not indicate what the constitutional basis of the Referral is, does not state what the alleged violations of the Constitution are and does not explain why the presented facts violate the constitutional rights.

7. The Referral is apparently based on 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 15 January 2009 (hereinafter, the Law).

Proceedings before the Court

8. On 26 August 2011 , the Applicant submitted the Referral to the Court

9. On 01 September 2011, the President appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (Presiding), Kadri Kryeziu and Iliriana Islami,

10. On 26 November2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and a new Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu, because Judge Gjyljeta Mushkolaj and Iliriana Islami have finished their mandate with the Court.

11. On29 January 2013, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

12. On an unspecified date of 2004, judicial proceedings started in the Municipal Court of Malisheve to ensure an alleged right to property, which went through the Municipal Court of Decan until the Supreme Court.

13. On 01 September2009, the Supreme Court (P.kl.nr.120 / 08)decided on a request for protection of legality of the State prosecutor in Kosovo presented against the final decision of the Municipality Court in Deçan

(KA.nr.14 / 2008), of 07 October 2008, where Sadri Mazreku (the Applicant) has been "the subsidiary accuser".

14. The Supreme Court concluded that "the request for protection of legality is founded". It further concluded that "with the mentioned decision there have been violations of the dispositions of the articles 304 until 316 of KPPK in the favor of the accused Emrush Kastrati".

15. However, the Supreme Court also concluded that "since conform article 457 paragraphs 2 of KPPK, when the Supreme Court values that the request for protection of legality in damage of the accused is based, it only concludes on the violation of the law without impacting on the final decision".

Allegations of Applicant

16. The Applicant alleges that "there was a violation of the Article 113, paragraph 1 point 7 of the Constitution with the judgment of the Municipal Court in Malisheve" (sic).

17. The Applicant also claims: "My property and the property of 18 other inheritors has been enjoyed only by Hamdi Mazreku, in which case there were violation of our rights on property with the final judgment".

Admissibility of the Referral

18. First of all, the Court examines whether the Applicant have fulfilled the admissibility requirements laid down by the Constitution, the Law and the Rules of Procedure.

19. On that subject, the Court refers to Article 113 [Jurisdiction and Authorized Parties] which establishes that

> *1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*

20. In examining the legal deadline requirement, the Court notes that Article 56 (Earlier Cases) of the Law provides:

> *"The deadlines defined in this Law for the initiation of procedures on matters that fall under the jurisdiction of the Constitutional Court and which have arisen before the entry into force of this Law shall begin to be counted on the day upon which this Law enters into force".*

21. On the other side, Article 49 (Deadlines) of the Law states:

> *"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".*

22. In addition, Rule 36 (1) b) and (3) h) of the Rules provides that

> *1. 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,*
>
> *3. A Referral may also be deemed inadmissible in any of the following cases:*
>
> *h) the Referral is incompatible ratione temporis with the Constitution.*

23. Taking into account these legal provisions, it must be concluded that the temporal jurisdiction of the Constitutional Court for earlier cases starts on the date of the Constitution entered into force, which was on 15 June 2008, and goes until 15 May 2009, meaning four months (see Article 49 of the Law) after the entering into force of the Law, which happened on 15 January 2009.

24. The Court notes that, in the case, the indicated final Decision of the Municipal Court of Malisheve (C.nr.90/2004), is dated of 10 June 2005 and was served on the Applicant 22 July 2007.

25. Thus, that Decision was delivered and served before the entry into force of the Constitution on 15 June 2008.

26. Consequently, the Court cannot deal with a Referral relating to events that occurred before the entry into force of the Constitution (see, the Court's Resolutions on Inadmissibility in Case No 18/10, Denic et al of 17 August 2011) and in Case No. KI 152/11: Bekim Murati, Constitutional Review of the Decision of the Kosovo Government, of 20 June 2012).

27. Therefore, the Court concludes that the Referral is incompatible *ratione temporis* with the provisions of the Constitution.

28. Moreover, the Court considers that, even if the judgment of the Supreme Court (PKL. No. 120/08) of 01 September 2009 could be taken as the final decision to be challenged, the Referral would be out of time.

29. In fact, the Court notes that the judgment of the Supreme Court was issued on 01 September 2009.

30. The Court further notes that the Applicant submitted the Referral on 26 August 2011, meaning almost twenty months after the time limit prescribed by Article 49 of Law.

31. Thus, the Referral is out of time, because it was not submitted to the Court in conformity with Article 49 of the Law and thus it was not filed in a legal manner, as prescribed by Art 113 (1) of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 of the Constitution, Articles 49 and 56 of the Law and Rule 36 (1) b) and (3) h) of the Rules, on 4 June 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible,

II. TO NOTIFY this decision to the Parties

III. TO PUBLISH this decision in the Official Gazette, in accordance with Article 20(4) of the Law;

IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur
Almiro Rodrigues

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 129/12 , Nezir Bytyqi, date 20 June 2013- Constitutional Review of the Decision of the Supreme Court of Kosovo Rev. no. 204/2008 of 29 August 2011

Case KI 129/12, Resolution on Inadmissibility of 15 May 2013.

Keywords: Individual referral, out of time, Resolution on inadmissibility

The Applicant alleges that he has not benefitted from a fair and impartial hearing in the determination of his claim. In particular, the Applicant alleges that the presence of the same judge (G.S.) in two Municipal Court proceedings and on the trial panel of the Supreme Court of Kosovo leads to the conclusion that the courts were not impartial.

The Court finds that the Referral has not been submitted within the four months time-limit prescribed by the Law and Rules of Procedure, and must be rejected as out of time.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI129/12
Applicant
Nezir Bytyqi
Constitutional Review of the Decision of the Supreme Court of Kosovo
Rev. no. 204/2008 of 29 August 2011

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge, and
Arta Rama-Hajrizi, Judge.

The Applicant

1. The Applicant is Nezir Bytyqi residing in Pristina. He is represented by Florim Shefqeti, a lawyer based in Pristina.

Challenged decision

2. The Applicant challenges the Decision of the Supreme Court Rev. No. 204/2008 dated 29 August 2011. The Applicant claims that he received this Decision on 24 September 2012.

Subject matter

3. The Applicant alleges that the aforementioned Decisionviolated his rights as guaranteed by the Constitution, in particular his right to a fair and impartial trial under Article 31. The Applicant also alleges violations of Article 21 [General Principles], Article 24 [Equality before the Law], Article 54 [Judicial Protection of Rights], and Article 106.2 [Incompatibility] of the Constitution. In addition, the Applicant alleges violations of Articles 7 and 10 of the Universal Declaration on Human Rights and of Article 6 of the European Convention on Human Rights.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Rule 56, paragraph 2, of the Rules of Procedure (hereinafter: the Rules).

Proceedings before the Constitutional Court

5. On 12 December 2012, the Applicant submitted the Referral to the Court.

6. On 10 January 2013, the President appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (presiding), Altay Suroy and Ivan Čukalović.

7. On 4 March 2013, the Referral was communicated to the Supreme Court.

8. On 4 March 2013, the Basic Court in Pristina was requested to provide a copy of the certificate of service showing the date when the Decision of the Supreme Court Rev. No. 204/2008, dated 29 August 2011, was served on the Applicant.

9. On 7 March 2013, the Basic Court in Pristina provided a copy of the certificate of service, indicating that the Decision of the Supreme Court Rev. No. 204/2008, dated 29 August 2011, was served on the lawyer Naim Haliti on 17 October 2011.

10. On 14 March 2013, the Applicant was requested to clarify the difference between the dates of service of the Decision of the Supreme Court Rev. No. 204/2008, as indicated in the Referral and as provided by the Basic Court in Pristina.

11. On 28 March 2013, the Applicant provided his response.

12. On 15 May 2013, the President appointed Judge Almiro Rodrigues to replace Judge Robert Carolan on the Review Panel. The Review Panel is composed of Judges Altay Suroy (Presiding), Almiro Rodrigues and Ivan Čukalović.

13. On 15 May 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

The facts of the case

14. From 21 May 1992, the Applicant was in an employment relationship of indefinite duration with *SOE Tregu* in Pristina. The Applicant was employed as a debt collector. On 22 March 1999, due to the war in Kosovo, the Applicant fled and was received in a refugee camp in Turkey.

15. In September 1999, the Applicant returned to Pristina and immediately reported to work. It appears that this was not possible at that time. Subsequently, on 22 June 2000, the Applicant submitted a written request to be reinstated in his previous employment. On 28 June 2000, this request was rejected. The Applicant submitted a request to be reinstated in his employment with *SOE Tregu* to the Municipal Court in Pristina.

16. On 8 August 2000, (Cl.no.29/2000) the Municipal Court rejected the Applicant's claim. This decision was made by a panel of one judge, G.S., and two lay judges.

17. On 30 October 2001, (Cl.no. 302/2001) the Municipal Court again rejected the Applicant's claim, this time by the single judge G.S..

18. On 18 October 2004, (Ac.no. 86/2002) the District Court of Pristina ordered a retrial.

19. On 29 June 2005, (Cl.no. 375/2004) the Municipal Court of Pristina rejected the Applicant's claim following the retrial.

20. On 4 February 2008, (Ac.no. 676/2006) the District Court modified the judgment of the Municipal Court and ordered that the Applicant be reinstated in his employment relationship.

21. On 11 June 2009, (Cl.no. 237/2008) the Municipal Court of Pristina in execution proceedings based on the last District Court judgment, ordered *SOE Tregu* to pay to the Applicant his salary in arrears supplemented with the lawful interest.

22. On 29 August 2011, (Rev.No. 204/2008) the Supreme Court declared grounded the Revision that was introduced by *SOE Tregu* against the

District Court judgment AC.no. 676/2006. The Supreme Court confirmed the Municipal Court judgment of 29 June 2005 (Cl.no. 375/2004) wherein *SOE Tregu* was not required to reinstate the Applicant in his employment. One of the three judges on the Supreme Court panel was G.S..

23. On 4 September 2012, (AC,no. 1144/2009) the District Court in Pristina in execution proceedings on appeal confirmed the execution judgment of the Municipal Court of 11 June 2009, ordering *SOE Tregu* to pay the Applicant salary in arrears with lawful interest.

Legal arguments presented by the Applicant

24. In substance, the Applicant alleges that he has not benefitted from a fair and impartial hearing in the determination of his claim. In particular, the Applicant alleges that the presence of the same judge (G.S.) in two Municipal Court proceedings and on the panel of the Supreme Court of Kosovo leads to the conclusion that the courts were not impartial.

Assessment of the admissibility of the Referral

25. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

26. The Court has also to determine whether the Applicant has met the requirements of Article 113 (7) of the Constitution and Article 47 (2) of the Law.

27. Article 113, paragraph 7 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."*

28. The final decision on the Applicant's case in relation to his Referral to the Constitutional Court is the Decision of the Supreme Court (Rev. no. 204/2008), dated 29 August 2011. As a result, the Applicant has shown that he has exhausted all legal remedies available under the applicable laws.

29. The Applicant must also prove to have met the requirements of Article 49 of the Law concerning the submission of the Referral within the legal time limit. As stated above, the final decision on the Applicant's case is the Decision of the Supreme Court (Rev.no. 204/2008), dated 29 August 2011. The Applicant submitted the Referral with the Court on 12 December 2012.

30. The Court notes that the certificate of service indicates that the Decision of the Supreme Court (Rev. No. 204/2008), dated 29 August 20011, was served on the lawyer Naim Haliti on 17 October 2011.

31. On 28 March 2013, the Applicant submitted a communication to the Court claiming that on 17 October 2011 the Decision of the Supreme Court (Rev. No. 204/2008) was served on Naim Haliti, who was not the authorised legal representative of the Applicant in the Supreme Court proceedings, but had merely been engaged for '*drafting the revision*'. The Applicant claims that this Decision of the Supreme Court was, in fact, left at the door to his residence on 23 September 2012. The Applicant requests that the date of 23 September 2012 be considered as the date of service of the final decision in his case, and that therefore the legal time-limit of four months begin to run from this date.

32. The Court notes that the lawyer Naim Haliti was listed in the Supreme Court judgment of 29 August 2011 as the representative of the Applicant. Furthermore, the Court notes that this same lawyer was listed in the District Court judgment of 4 February 2008 as the Applicant's representative, and this lawyer is also listed as the Applicant's representative in the Municipal Court judgment of 29 June 2005.

33. In these circumstances, the Court considers that the service of the Supreme Court judgment (Rev.no. 204/2008) of 29 August 2011, on the lawyer Naim Haliti, is based on the entirely reasonable conclusion that this lawyer is, in fact, the Applicant's authorized representative. Furthermore, beyond the Applicant's statement that Naim Haliti was not his authorized representative, no other evidence is adduced to support this claim.

34. In conclusion, the Court finds that the final decision in the Applicant's case was lawfully served on 17 October 2011. The referral was submitted on 12 December 2012, which is almost 14 months after the date of service of the final decision in the Applicant's case.

35. Therefore, the Court finds that the Referral has not been submitted within the four months time-limit prescribed by the Law and Rules of Procedure, and must be rejected as out of time.

36. Consequently, for the reasons outlined above, the Referral is inadmissible.

FOR THESE REASONS

Pursuant to Article 113.7 of the Constitution, Article 49 of the Law and Rule 36.1 (b) of the Rules of Procedure, on 14 June 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. This Decision is effective immediately.

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

KI 11/13, Izahir Troni, date 20 June 2013 - Constitutional review of the Judgment of the Supreme Court of Kosovo Rev. No. 34/12 of 8 October 2012

Case KI-11/13, Resolution on Inadmissibility of 14 May 2013

Keywords; individual referral, equality before the law,languages, right to fair and impartial trial, judicial protection of rights, manifestly ill-founded.

The Applicant submitted Referral pursuant to Article 113.7 of the Constitution of Kosovo, by challenging the Judgment of the Supreme Court of Kosovo rev no. 34/12 of 8 October 2012, by which was terminated the property-legal dispute, created by the request for confirmation of ownership over the challenged immovable property between the Applicant and third persons.

The Applicant considers that on this occasion were violated his constitutional rights under Article 3 (Equality before the Law), Article 5 (Languages) Article 31 (Right to Fair and Impartial Trial), Article 54 (Judicial Protection of Rights) of the Constitution of the Republic of Kosovo and Article 6 (European Convention on Human Rights), because he was not served with the Judgment in his native language, the Court compiled the Judgment only in Serbian, and not in Albanian, thereby creating difficulties in fully understanding the contents of the Judgment.

Deciding on the Referral of the Applicant Izahir Troni, the Constitutional Court found that the first instance court had instructed the parties to their rights to use their own official language throughout the trial and the entire procedure, but the parties stated that they speak the language in which the procedure is held and therefore they do not need interpretation, which the Applicant presented as ground for filing the Referral before the Constitutional Court.

Therefore, the Applicant waived the right, to which he referred to have been violated to him, so that his Referral is manifestly ill-founded, because the presented facts do not justify in anyway the allegation of a violation of the constitutional rights.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI11/13
Applicant
Izahir Troni
Constitutional Review of the Decision of the Supreme Court of Kosovo,
Rev.no. 34/12, of 8 October 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Izahir Troni from the village of Kovacec, Municipality of Kacanik, represented by Sabri Kryeziu, Lawyer from Lipjan.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo, Rev.no. 34/12 of 8 October 2012, which rejected the revision against the Judgment of the District Court in Prishtina, AC. no. 845 /2010of 27January 2011, and confirmed the Judgment of the Supreme Court in Prishtina, C.no. 1266/2003, of 04 December 2009.

Subject matter

3. The subject matter has to do with property rights over immoveable property in dispute, which was finalized by the Judgment of the Supreme Court of Kosovo Rev.no. 34/12 of 8 October 2012, which, according to allegations of the Applicant, violated a number of Articles of the Constitution of the Republic of Kosovo.

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 of 15 January 2012 (hereinafter, the Law), and Rule 56, paragraph 2 of the Rules of Procedure (hereinafter, the Rules).

Proceedings before the Court

5. On 30 January 2013, the Applicant filed his referral with the Constitutional Court of the Republic of Kosovo (hereinafter, Court).

6. On 14 May 2013, after having considered the report of Judge Snezhana Botusharova, the Review Panel composed of Judges: Altay Suroy (Presiding), Almiro Rodriguesand Enver Hasani, made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts

7. The Applicant had raised a property rights dispute with third parties before the Municipal Court in Prishtina, in relation to property rights over the immoveable property registered as cadastral parcel no. 505/1, no. 505/2 and no. 505/3, in the place called «Village Home Plot», with a surface area of 0.10,70 ha, registered with the possession list no. 22 CZ Fushe-Kosova.

8. On 04. December 2009, the Municipal Court in Prishtina, by Judgment C.no. 1266/2003, found the following factual situation, providing detailed reasoning, on the property case;

   I. ***CONFIRMING THAT*** *the contract on sale of immoveable property signed through representatives, by claimant/counter-respondent Petar Rapajic from Devet Jugovic, as selling party, and Izair Troni, respondent/counter-claimant, as buying party, certified before the Municipal Court in Prishtina, as Ov.no. 712/2001, of 07.01.2001, is hereby* ***null and void,*** *and creates no legal effect.*

   II. ***APPROVING*** *the claim suit of claimant/counter-respondent, thereby* ***certifying*** *that the claimant/counter-respondent Mifail Shaqiri from Prishtina, has acquired property rights, on the basis of written contract on sale of immoveable properties*

of 14.11.1997, on cadastral parcels 505/1 and 505/2, "Country-house parcel", total surface area 0.10.70 ha, registered in possession list no. 22 CZ Fushe-Kosova, and ordering respondent Petar Rapajic to acknowledge such rights, while the respondent/counter-claimant Izair Troni is ordered to acknowledge property rights, allow for registration of rights in the cadastre records of the Directorate for Cadastre, Geodesy and Property of the Municipality of Prishtina, and submit the contested property to claimant/counter-respondent Mifail Shaqiri, within a deadline of 15 days from the final form of the judgment.

III. ***REJECTING*** *the claim suit of respondent/counter-claimant Izair Troni from Fushe-Kosova, as* ***ungrounded,*** *which demanded from the Court to certify that the contract of 28.10.1999, was entered into between Petar Rapajic as selling party, and Nexhmi Begolli from Prishtina, as buying party, on the sale of cadastral parcels 505/1, 505/2 and 505/3 CZ Fushe-Kosova, surface area 0.16.74 ha, for the contracted price of 80.000 DM, as legally effective act.*

IV. ***REJECTING*** *the claim suit of respondent/counter-claimant Izair Troni as* ***ungrounded,*** *by which it was demanded from the Court to certify that the written contract signed on 28.12.2001 in Prishtina, between Nexhmi Begolli from Prishtina, as selling party, and Izair Troni from Kovacevac, Municipality of Kacanik, as buying party, on sale of cadastral parcels 505/1, 505/2 and 505/3, all in Fushe-Kosova, surface area of 0.16.74 ha, for the contracted price of 315.000 DM, and that the contract establishes full legal effect between contracting parties, on the basis of which the respondent/counter-claimant Izair Troni is legal owner of mentioned parcels.*

9. On 27 January 2011, the District Court in Prishtina, by Judgment AC. no. 845/2010, rejected in its entirety the complaint of the respondent/counter-claimant Izahir Troni, and confirmed the mentioned Judgment of the first instance court, thereby upholding as proper all factual and legal findings of the first instance court.

10. The respondent/counter-claimant Izahir Troni filed a revision due to substantial violations of provisions of contested procedure and erroneous application of substantive law, thereby proposing that his revision be confirmed as grounded, and that the Judgments of lower instance courts be amended, thereby confirming his counter-claim as

grounded, or that such judgments are annulled, and the case is reopened for review at the first instance court.

11. The Supreme Court of Kosovo rendered the Judgment Rev.no. 34/12 of 8 October 2012, thereby rejecting the revision as ungrounded, and providing detailed reasoning on each individual finding in the Judgment, and thereby providing the following reasons, amongst others:

> *"... Other revision allegations that lower instance judgments have violated the right of use of official languages, since from the process report on the main hearing of 04.10.2007, it may be ascertained that the first instance court has instructed the parties on their rights to use their own language in hearings and throughout the procedure, but the parties have stated that they speak the language of procedure, and that translation is not required, and in this sense, the Court finds that the judgments rendered do not contain any essential violations of procedure, as per Article 182.2, item (j) of the LCP..."*

Applicant's allegations

12. The Applicant alleges that the Article 3 (Equality Before Law) of the Constitution was violated in the following manner:

> *"By the acts of the Municipal Court in Prishtina, further confirmed by the decision of the District Court in Prishtina, and ultimately by the decision of the Revision Court – the Supreme Court of Kosovo, the Article 3 of the Constitution of the Republic of Kosovo was violated, since the Municipal Court in Prishtina, and the two other court instances have rejected the counter-claim, without any existing reason, thereby negating and infringing upon the main pillars upon which the civil legal relations are built (**respect and conscience),** thereby engaging in a violation of the legal institution of property **possession**, and violating the legal institution of **stronger legal basis** and ultimately, violating **property rights**."*

13. The Applicant further alleges that the Article 5 (Languages) of the Constitution was violated in the following manner:

> *"In procedural actions of first and second instance courts, which were not eliminated or assessed by the Revision Court, the Article 5 of the Constitution was also violated. In the main hearing on 04.12.2009, the hearing was held in the presence of the court interpreter, to provide the possibility to parties to use their own*

languages with a view of free expression, and to avoid any violation of procedural and substantial violation of law, due to lack of knowledge of language."

"In this sense, the Court applied a legal provision, and consequently a constitutional provision. Nevertheless, in compiling the judgment, it failed to act in the same manner, because it compiled the Judgment only in Serbian, and not in Albanian, thereby creating difficulties in fully understanding the contents of the Judgment. Due to this circumstance, the respondent Izahir Troni, in the main hearing held on 04.12.2009 requested that the proceedings be held with the assistance of an interpreter, as already decided by the Court. Nevertheless, the same procedure was not applied when compiling the judgment, and as a result of such omission, and such a violation was also mentioned in the complaint, where the District Court in Prishtina served its judgment to the parties only in Serbian language. "This violation is also mentioned in the revision, in which case the Supreme Court, instead of confirming such a violation of use of language, and correspondence in the native language of the parties, the Court, in its reasoning, in page 4, paragraph 4 of its Decision, reasons that the Court asked the parties in relation to the use of native language, and that the parties had stated that they do not need an interpreter. These are actions which are not analysed, and they are not supported by proof, therefore by such actions, the courts violated the provisions of Article 5 and provisions of Article 24 of the Constitution of the Republic of Kosovo."

14. According to allegations of the Applicant, there were violations of provisions of Article 31 (Right to Fair and Impartial Trial), and Article 54 (Judicial Protection of Rights) of the Constitution of the Republic of Kosovo, and violation of Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms.

"... due to the fact that the respondent/counter-claimant Izahir Troni was not served the judgment in his own native language, by not filing a revision with the State Prosecutor to undertake its action in relation to request for protection of legality, the decision of the Supreme Court without proof-arguments that the revision was submitted to the State Prosecutor, makes this trial unfair, and the decision a violation of principles of equality of parties in proceeding."

15. The Applicant addresses the Constitutional Court with the following demands:

> *"Based on procedural, material and constitutional violations undertaken to the detriment of the respondent/counter-claimant Izahir Troni, we demand from the Constitutional Court to* ***annul*** *the judgment of the Supreme Court of the Republic of Kosovo Rev.no. 34/2012 of 08.10.2012, the Judgment of the District Court in Prishtina Ac. no. 845/2010 of 27.10.2011, and the Judgment of the Municipal Court in Prishtina C. no. 1266/03 of 04.12.2009, and to* ***reopen the matter for trial before the Municipal Court in Prishtina****."*

Preliminary assessment of admissibility of the Referral

16. The Applicant claims that the grounds for his Referral are Article 3 (Equality Before Law), Article 5 (Languages), Article 31 (Right to Fair and Impartial Trial), Article 54 (Judicial Protection of Rights) of the Constitution of the Republic of Kosovo, and Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms.

17. Article 48 of the Law on the Constitutional Court of the Republic of Kosovo 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."*

18. According to the Constitution, the Constitutional Court is not a court of appeal, when reviewing rulings rendered by regular courts. It is the role of regular courts to interpret and apply the procedural and substantial law (see *mutatis mutandis*, García Ruiz v. Spain [GC], no. 30544/96, paragraph 28., European Court for Human Rights [ECHR] 1999-I).

19. The Applicant has not filed any *prima facie* evidence which would prove the violation of his constitutional rights (see, Vanek v. Slovak Republic, ECHR Resolution on Admissibility of Application, no. 53363/99, of 31 May 2005). The Applicant does not clarify in which way the Articles 3, 5, 31 and 54 of the Constitution, and Article 6 of the ECHR corroborate his referral, as provided by Article 113.7 of the Constitution, and Article 48 of the Law.

20. The Applicant alleges that his rights were violated by an erroneous ascertainment of facts and erroneous application of law by regular courts, thereby claiming that the court violated Article 5 (Languages) of the Constitution by *"not serving the judgment in his native language"*.

21. From the case files, it may be clearly ascertained that the Supreme Court of Kosovo, by Judgment Rev.No. 34/12 of 8 October 2012, rejected the revision as ungrounded, thereby reasoning that the Court "*finds that the first instance court had instructed the parties to their rights to use their own official languages throughout the trial and the whole procedure, but the parties stated that they speak the language in which the procedure is held, and therefore, they do not need interpretation",* which is now a circumstance proposed by the Applicant as grounds for filing a Referral before the Constitutional Court .

22. In this case, the Applicant was given numerous possibilities of presenting his case and challenge the interpretation of the law, for which he claims to be erroneous, before the Municipal Court in Prishtina, District Court in Prishtina, and the Supreme Court. Following a review of proceedings in entirety, the Constitutional Court could not find that the respective proceedings were in any way unfair or arbitrary (see, *mutatis mutandis*, Shub v. Lithuania, ECHR Resolution on Admissibility of Application, no. 17064/06 of 30 June 2009).

23. Finally, the admissibility requirements were not fulfilled by the referral. The Applicant has failed to raise and prove by evidence that the challenged rulings have violated constitutional rights and freedoms.

24. It follows that the Referral is manifestly ill-founded, in compliance with Rule 36 (2b) of the Rules of Procedure, which provides that *„The Court shall reject a Referral as being manifestly ill-founded 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 48 of the Law and Rule 36 (2b) of the Rules of Procedure, in the session of 7 June 2013, 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
Snezhana Botusharova

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 98/12, Ruzhdi Shala, date 02 July 2013-- Constitutional referral against excessive length and inefficiency of the investigative proceedings PPN no. 812-1/2008 by the District Prosecution in Prishtina

Case KI 98/12, Resolution on Inadmissibility of 29 April 2013

Keywords: Individual referral, manifestly ill-founded, rejection of holding the public hearing

The Applicant alleges that as the father of the deceased girl is an authorized person to file a Referral before this Court and he cites the case-law of the ECtHR to back up his allegation.

The Applicant claims that four years of investigations have elapsed without any proof of substantial action by the Prosecution, to identify any suspect who committed the homicide, to file an indictment or suspend it, or to close the case altogether.

The Applicant claims that he has received an "informative report" issued by the General Police Directorate for the Prishtina District Prosecutor, from which *"one cannot draw a single explanatory bit of information regarding the death of his daughter."*

The Applicant alleges that the Prosecution has denied his rights to have access, as the next-of-kin of the deceased person, into the investigation dossier of the Prosecution. The Applicant claims that the said rights are afforded to him as an injured party, by Article 143 [Inspection of files] of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK), and Article 40 [Public hearings and access to documents] of the Convention.

The Applicant respectfully requests the Court to order an oral hearing in accordance with Rule 39 of the Rules of Procedure;

The Court considers that, based on the case-law of the ECtHR, the Applicant as the parent of the deceased girl is an indirect victim and therefore is authorized to file a referral before this Court. *(See the case of Gakiyev and Gakiyeva v. Russia Application no. 3179/05, Judgment of 6 November 2009).*

As to the Applicant's allegation of the breach of Article 1 [Obligation to respect human rights], Article 2 [Right to life] in conjunction with Article 13 [Right to an effective remedy] of the Convention, regarding the excessive length of investigation proceedings, by the public authorities of Kosovo, the Court notes that based on the case-law of the ECtHR, the State has both substantive and

procedural obligations to protect the life of all persons under its jurisdiction, meaning that the right to life must be protected by law as a substantive obligation on one hand, and by development of an adequate investigation as a procedural requirement on the other.

The Court notes that, based on the case-law of ECtHR, there are several elements that secure the "essential purpose" of the investigation, namely: i) the obligation of public authorities to initiate an investigation once the matter has come to their attention, independently from a formal complaint lodged by the next-of-kin, ii) independence and impartiality in law and practice of the persons that are responsible for the investigation, iii) the investigation must be adequate in the sense that it must be capable of leading to a decision as to the cause and circumstances of death, [...] and the "identification and punishment of those responsible."

It follows that the referral is manifestly ill-founded and must be rejected as inadmissible as well as the Applicant's request for holding an oral hearing to be rejected as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI98/12
Applicant
Ruzhdi Shala
Constitutional referral against excessive length and inefficiency of the investigative proceedings PPN no. 812-1/2008 by the District Prosecution in Prishtina

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama- Hajrizi, Judge

Applicant

1. The Applicant is Ruzhdi Shala represented by the law firm "Sejdiu & Qerkini" l.l.c with residency in Prishtina.

Challenged decisions

2. The Applicant challenges the excessive length of investigation proceedings PPN no. 812-1/2008by the District Prosecutor in Prishtina.

Subject matter

3. The subject matter of the Referral is the Applicant's complaint that the District Prosecutor in Prishtina has not concluded for four years investigations regarding the homicide of his daughter.

4. The Applicant asks the Court to hold a hearing in accordance with Rule 39 of the Rules of Procedure.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution; Article 20 of the 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 Kosovo (hereinafter: the Rules of Procedure).

Procedure before the Court

6. On 15 October 2012, the Applicant submitted a referral to the Constitutional Court of Kosovo (hereinafter: the Court).

7. On 5 November 2012, the President Appointed Judge Ivan Čukalović as Judge Rapporteur and a Review Panel composed of Judges Almiro Rodrigues (presiding), Snezhana Botusharova and Kadri Kryeziu.

8. On 13 November 2012, the Court notified the Applicant and the District Prosecution in Prishtina as well as the Chief State Prosecutor of Kosovo about the registration of the Referral.

9. On 7 December 2012, the Chief State Prosecutor replied to the Court in relation to the Referral.

10. On 17 December 2012, the District Prosecution in Prishtina replied to the Court in relation to the Referral.

11. On 24 December 2012, the Applicant wrote to the Court inquiring about the status of the Referral and asking the Court to hold an oral hearing in accordance with Rule 39 of the Rules of Procedure.

12. On 28 December 2012, the Court replied to the Applicant's inquiries.

13. On 29 April 2013, 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 as evidenced by the documents furnished by the Applicant

14. On or about midnight of 1 December 2008, the Applicant's daughter MSH was tragically deprived of her life by persons still unknown for the prosecution. The Applicant's daughter was in a vehicle with four other persons, during the time the shots were fired. She got hit but the other four persons, inside the vehicle, were unharmed.

15. The Applicant's daughter was rushed to the Emergency Unit of the Kosovo University Clinic Center where she had passed away. The medical report proved that she was killed by a fire arm.

16. On 2 December 2010, the Applicant appeals with the Kosovo Police Inspectorate, in order to find out about his daughter's death.

17. On 6 January 2011, the Applicant addressed his concern with Center for Legal Advice and Regional Development (hereinafter: CLARD).

18. On 20 January 2011, the Applicant lodged a request with the EULEX Prosecutor in Prishtina to express his doubts about the investigation of his daughter's death as well as to ask EULEX Prosecutor to take over the case.

19. On 28 January 2011, the Applicant lodges a request with the Prishtina District Prosecution, regarding the investigations about his daughter's death.

20. On 17 October 2011, the Applicant informs the Ombudsperson about his case.

21. On 24 November 2011, the Applicant was informed that his daughter's case was devolved to the Prishtina Public Prosecutor.

22. On 19 May 2012 and 9 July 2012, the Applicant together with CLARD ask the Prishtina District Prosecutor for the copies of papers of the case-file based on the rights of the injured party afforded by the Criminal Procedure Code of Kosovo, European Convention on Human Rights (hereinafter: the Convention), as well as other International Legal Instruments applicable in Kosovo.

23. The Applicant has met with the Head of the Prosecutorial Council of Kosovo, the President of the Republic of Kosovo in order to explain his case, and has also tried to establish contact with the Prime-minister of the Republic of Kosovo and the President of the Assembly of the EULEX Judges.

24. On 17 December 2012, the District Prosecutor in Prishtina replied to the Court in relation to the Referral, thereby explaining the measures undertaken by the Prosecution including covert technical measures, lack of evidence and reasonable doubt that the suspected persons have committed the crime, interviewing of witnesses and so on. The Prosecution also informed that they had contacted the Applicant several

times, and that they are awaiting the results of covert technical measures in order to act on the grounds of collected evidence.

Applicant's allegations

25. The Applicant claims that as the father of the deceased girl, he is an authorized person to file a Referral before this Court, and he cites the case-law of the ECtHR to back up his claim.

26. The Applicant claims that 4 years of investigations have elapsed without any proof of substantial action by the Prosecution, to identify any suspect who committed the homicide, to file an indictment or suspend it, or to close the case altogether.

27. The Applicant claims that he has received an "informative report" issued by the General Police Directorate for the Prishtina District Prosecutor, from which: "*one cannot draw a single explanatory bit of information regarding the death of his daughter*".

28. The Applicant claims that the prosecution has denied his rights to have access, as the next-of-kin of the deceased person, into the investigation dossier of the Prosecution. The Applicant claims that the said rights are afforded to him, as an injured party, by Article 143 [Inspection of files] of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK), and Article 40 [Public hearings and access to documents] of the Convention.

29. Furthermore, the Applicant respectfully requests the Court:

- to hold that the Referral is admissible;
- to order an oral hearing in accordance with Rule 39 of the Rules of procedure;
- to hold that there is a violation in relation to inefficiency of the investigating procedure and of the individual rights of the Applicant as guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution, Article 7 [Equality before the law] of the Universal Declaration of Human rights, as well as Article 1 [Obligation to respect human rights], Article 2 [Right to life] and Article 13 [Right to an effective remedy] of the Convention; and

- to determine the rights and responsibilities for the parties mentioned in this referral that this Court deems reasonable and legally grounded.

The Law

PCPCK CRIMINAL CHAPTER XVI: INSPECTION OF FILES

Article 143

(1) The injured party and his or her legal representative or authorized representative shall be entitled to inspect, copy or photograph records and physical evidence available to the court or to the public prosecutor if he or she has a legitimate interest.

(2) The court or public prosecutor may refuse to permit the inspection, copying or photocopying of records or physical evidence if the legitimate interests of the defendant or other persons override the interest of the injured party or if there is a sound probability that the inspection, copying or photocopying may endanger the purpose of the investigation or the lives or health of people or would considerably delay the proceedings or if the injured party has not yet been examined as a witness.

Law No.03/L –225 ON STATE PROSECUTOR

Article 10
Public Relations

1. The State Prosecutor shall regularly provide information about its activities to the public.

2. Notwithstanding paragraph 1 of this Article, the State Prosecutor shall not provide any information directly or indirectly which would disclose official secrets, would jeopardize a pending investigation or criminal proceeding, be harmful to the integrity, dignity, security, and rights to privacy of any persons, or violate the rights of minors.

Assessment of admissibility

30. 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.

31. The Court refers to Article 53 [Interpretation of Human Rights Provisions] 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".*

32. The Court considers that, based on the case-law of the ECtHR, the Applicant as the parent of the deceased girl is an indirect victim and therefore is authorized to file a referral before this Court. *(See the case of Gakiyev and Gakiyeva v Russia Application no.3179/05, Judgment dated 6 November 2009).*

33. As to the Applicant's claim of the breach of Article 1 [Obligation to respect human rights], Article 2 [Right to life] in conjunction with Article 13 [Right to an effective remedy] of the Convention, regarding the excessive length of investigation proceedings, by the public authorities of Kosovo, the Court notes that based on the case-law of the ECtHR, the State has both substantive and procedural obligations to protect the life of all persons under its jurisdiction, meaning that the right to life must be protected by law as a substantive obligation on one hand, and by development of an adequate investigation as a procedural requirement on the other.

34. The Court notes, that based on the case-law of ECtHR, there are several elements that secure the 'essential purpose' of the investigation, namely: i) the obligation of public authorities to initiate an investigation once the matter has come to their attention, independently from a formal complaint lodged by the next-of-kin, ii) independence and impartiality in law and in practice of the persons that are responsible for the investigation, iii) the investigation must be adequate in the sense that it must be capable of leading to a decision as to the cause and circumstances of death, [...] and the 'identification and punishment of those responsible'.

35. In the instant case, the Court notes that, based on the documents contained in the Referral : i)the state authorities had indeed taken

reasonable investigation measures once the matter had come to their attention, ii) there is no proof or indication of a breach of independence nor impartiality of the persons involved in the investigation, iii) the investigation is still underway and yet to be concluded, but that does not mean that the investigation is inadequate because investigation is not an obligation of result but of means.

36. The Court observes, that in the instant case, the Applicant has not laid blame on the public authorities of Kosovo for the actual death of his daughter; nor has it been suggested that the authorities knew or ought to have known that the life of the Applicant's daughter was at risk by the third parties and failed to take appropriate measures to safeguard the Applicant's daughter from that risk. *(See ECtHR, Decision as to the Admissibility of Application no.47916/99, Menson and Others v. the United Kingdom, dated 6 May 2003)*. The Applicant's case is therefore to be distinguished from cases involving the alleged use of lethal force either by agents of the State or by private parties with their collusion.*(see, for example, McCann and Others v. the United Kingdom, judgment of 27 September 1995, Series A no. 324; Hugh Jordan v. the United Kingdom, no. 24746/94, judgment of 4 May 2001, ECHR 2001-III (extracts); Shanaghan v. the United Kingdom, no. 37715/97, judgment of 4 May 2001, ECHR 2001-III (extracts)*

37. The Court refers to the general principles applied by the ECtHR in relation to investigations, which expound, first of all, that the lack of conclusions of any given investigation does not, by itself, mean that it was ineffective: an obligation to investigate "is not an obligation of result, but of means" *(see Paul and Audrey Edwards V. the United Kingdom, no. 46477/99, § 71, ECHR 2002 – II).*

38. In the concrete case, from the documents contained in the referral, the Court notes that the investigations are still underway and that there, for the time being, the Prosecution has yet to gather sufficient evidence in order to file an indictment against any potential suspects.

39. The Court notes that under the applicable law in Kosovo, access to investigation dossier, is discretion of the Prosecutor for the purposes of investigation itself and for the protection of everyone involved in the said process.

40. The Court was informed by the Prosecution that the Applicant has been contacted several times by them, whereby several witnesses were questioned based on his initiative and proposal; and that the Applicant

has also been notified about the measures taken by the Prosecution and the status of investigations.

41. The Court observes that development of the investigation procedure including its conclusion or dismissal, in addition to the protection of the investigation dossier, is a discretion and prerogative of the Prosecutor afforded to it by the applicable law in Kosovo, therefore any interference by the Court in the discretion of the Prosecutor constitutes an infringement to its autonomy.

42. Furthermore, the District Public Prosecution Office has informed the Court about the status of investigation and that the Prosecution will act on the grounds of collected evidence.

43. It follows that the referral is manifestly ill-founded and must be rejected as inadmissible.

44. As to the Applicant's request to hold an oral hearing, the Court refers to Article 20 of the Law:

> *"1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
>
> *"2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files".*

45. The Court considers that the documents contained in the Referral are sufficient to decide this case as per wording of paragraph 2 of Article 20 of the Law.

46. Therefore, the Applicant's request to hold an oral hearing is rejected.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 20 of the Law and in compliance with the Rule 36 (1) c of the Rules of Procedure, on 17 June 2013, unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible;

II. TO REJECT the request to hold oral hearing;

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
Prof. Dr. Ivan Čukalović

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 109/12, Kumrije Maloku and others, date 02 July 2013- Constitutional review of the Judgment of the Supreme Court Rev.nr. 466/2009, dated 07 June 2012

Case KI 109/12, Resolution on Inadmissibility of 13 May 2013

Keywords: Individual Referral, manifestly ill-founded

The Applicants allege that the District Court in the second appeal, and the Supreme Court in the Revision, violated their rights to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6, para. 1, of the European Convention on Human Rights.

As a consequence of the courts' interpretation, the Applicants allege that the civil panel that adjudicated their case was neither independent nor impartial. The Applicants argue that they have a right to compensation for the death of their family member.

The Applicants request the Constitutional Court to make an accurate assessment of the liability of the Municipal Public Company for Sport Marketing, and eliminate the violations of material law allegedly committed by the District and Supreme Courts. The Applicants request recognition of their right to compensation for their moral suffering.

Thus, the Court considers that there is no evidence showing that the regular courts hearing the case lacked impartiality or that the proceedings were otherwise unfair.

Therefore, the Constitutional Court finds that the Applicants' claims have not been substantiated and must be rejected as ungrounded.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 109/12
Applicant
Kumrije Maloku and others
Constitutional review
of the Judgment of the Supreme Court Rev.nr. 466/2009, dated 07 June 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge, and
Arta Rama-Hajrizi, Judge.

Applicants

1. The Applicants are Kumrije Maloku, and Aida, Edina, Idriz, Remzije, Muhamet, Shaip, Ajete and Myrvete Maloku, represented by attorney Vahide Braha.

Challenged decision

2. The Applicants challenge the Judgment of the Supreme Court of Kosovo, Rev.nr. 466/2009, dated 07 June 2012, which was served on them on 02 August 2012.

Subject matter

3. The Applicants allege that that Judgment, rejecting their request for revision against the decision of the District Court of Pristina (AC.nr. 281/2008, of 23 June 2009), violated their rights as guaranteed by the Constitution, namely Article 31 of the Constitution and Article 6.1 of the European Convention on Human Rights (hereinafter, ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 47, 48 and 49 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 28, 29 and 30 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 01 November 2012, the Applicants submitted the Referral to the Court.

6. On 14 December 2012, the Constitutional Court informed the Applicants, the Supreme Court and the Municipal Court of Pristina of the registration of the Referral.

7. On 06 December 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Enver Hasani.

8. On 12 February 2013, the Constitutional Court requested the Applicants to inform the Court of the date on which the Judgment of the Supreme Court, Rev.nr. 466/2009, was served on them.

9. On 20 February 2013, the Applicants informed the Court that the Judgment of the Supreme Court, Rev.nr. 466/2009, dated 07 June 2012, was served on them on 02 August 2012.

10. On 13 May 2013, 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 August 2001, at approximately 18:20 in the evening, Hakif Hoti, his son-in-law Dalip Maloku and a friend, Islam Musliu, were returning to Pristina from a walk in Germija park. Upon passing by the open-air swimming pool 'Germija', Dalip Maloku reportedly expressed an interest in seeing the pool from close up.

12. At this time of day, the swimming pool was closed. The pool was surrounded by a closed fence, which was guarded by personnel of "Balkan International Security LLC". Dalip Maloku recognized one of the security guards and requested to be admitted to the pool area,

allegedly "just to take a look". The guard admitted Dalip Maloku and his companions.

13. Thereupon, without seeking permission, Dalip Maloku removed his clothes, entered the water and began to swim. After swimming for some distance, Dalip Maloku reportedly raised his arms and called for help. Neither his companions nor the Balkan International Security guards apparently knew how to swim. No one entered the water to assist Dalip Maloku.

14. The Kosovo Police and KFOR were alerted and arrived on the scene. At approximately 19:45 hours, a diver was able to recover the body of Dalip Maloku from the bottom of the pool.On 30 August 2001, an autopsy determined that Dalip Maloku had died as a result of drowning.

15. Dalip Maloku was survived by his wife, Kumrije Hoti-Maloku and their two minor children, Aida and Edina Maloku. Dalip was the son of Idriz and Remzije Maloku, and the brother of Muhamet, Shaip, Ajete and Myrvete Maloku. These nine persons are the Applicants in this referral. The Applicants were all dependent on the income of the deceased Dalip Maloku.

16. On 28 January 2003, the Applicants submitted a claim for compensation for material and immaterial damages with the Municipal Court of Pristina, based on the Law on Obligational Relationships (LOR). The respondents in the statement of claim were the Directorate for Sport Marketing of Pristina Municipality, and Balkan International Security LLC. The respondent 'Directorate for Sport Marketing' was later identified in the court judgments to be the 'Municipal Public Company for Sport Marketing'. This Municipal Public Company was the responsible authority of Germija swimming pool and had lawfully contracted with Balkan International to provide security for the premises. The Applicants claimed that the respondents were liable to ensure the safety of the swimming pool and their negligence had caused the death of Dalip Maloku.

17. On 27 September 2005, the Municipal Court of Pristina delivered its judgment (C.no. 67/03). The Municipal Court found that the respondent 'Municipal Public Company for Sport Marketing' was objectively liable for the 'dangerous object', meaning the swimming pool, within the meaning of Article 173 LOR. In awarding compensation, the court took into account the actions of the deceased in entering the water without permission, which the court characterised as 'deception'. The court ordered the respondent 'Municipal Public Company for Sport

Marketing' to pay 600 EUR for funeral expenses, as well as 541 EUR compensation for legal costs. In addition, the court awarded immaterial compensation of 5,000 EUR for mental distress to the wife, their two minor children and the mother of the deceased. The court rejected the further claims to higher amounts, as well as the compensation claims of the other Applicants. It appears that the Applicants had waived their claim against the second respondent 'Balkan International Security'.

18. The Applicants appealed to the District Court of Pristina, seeking approval of the full amount of the original claim, and approval of the claims of the additional Applicants. The respondent 'Municipal Public Company for Sport Marketing' also submitted an appeal, requesting that all claims of the Applicants be rejected as unfounded, or that the case be returned to the Municipal Court for retrial. Both appeals were handled together by the District Court.

19. On 06 June 2006, the District Court of Pristina (Ac.no. 41/2006) quashed the judgment of the Municipal Court and returned the case for retrial. The District Court found that the judgment of the first instance court was not sufficiently clear and lacked adequate reasoning to justify its conclusions. The District Court also found that the first instance judgment was contradictory in its assessment both of the height of claims to be awarded, the number of the claims to be awarded, and the determination of liability of the respondent. The Municipal Court was ordered to evaluate all of the evidence filed by the parties and to:

"[...] make a fair conclusion of the factual situation as regards to the evaluation of liability of the respondent for causing the damage and in compliance with a determination and evaluation of all criteria and the fair application of material provisions [to] adjudicate in relation to the statement of claim of the claimants."

20. On 29 May 2007, the Municipal Court of Pristina (C.no. 1191/06) issued its judgment in the retrial. The Municipal Court found that the respondent 'Municipal Public Company for Sport Marketing' was objectively liable as the possessor of the 'dangerous object' within the meaning of Article 173 LOR. Furthermore, the court ordered the respondent company to pay 900 EUR for the funeral expenses, as well as 793 EUR in legal costs. The court increased the awards for immaterial compensation to the Applicants to 13,000 EUR, including awards for the previously excluded Applicants. The Municipal Court rejected as unsubstantiated the arguments of the respondent that it should be exempted from responsibility.

21. Both the Applicants and the respondent Municipal Public Company for Sport Marketing submitted appeals against this decision with the District Court of Pristina. The Applicants requested the appeal court to increase the awards for compensation to the level contained in their statement of claim, or for the Municipal Court judgment to be quashed and returned for retrial. The respondent requested the appeal court to find the claims for compensation to be unfounded, or to quash the Municipal Court judgment and return the case for retrial.

22. On 23 June 2009, the District Court of Pristina (Ac.nr. 281/2008) delivered its judgment. The District Court refused the appeal of the Applicants and declared the judgment awarding compensation to be unfounded. The District Court approved the appeal of the respondent Municipal Public Company for Sport marketing as founded, and amended the judgment of the Municipal Court. The District Court found that the deceased Dalip Maloku had died as a result of his own actions, and that therefore the respondent was not 'objectively liable' to provide compensation for the damages caused by his death.

23. The Applicants submitted a request for revision to the Supreme Court. The Applicants requested the Supreme Court to find that the District Court had committed errors in the application of the material law.

24. On 07 June 2012, the Supreme Court (Rev.nr. 466/2009) refused the revision as unfounded. The Supreme Court found that the appeal court had correctly applied the material law, given that the death of the deceased was entirely caused by his own actions. The Supreme Court found that the Applicants had failed to prove that the death was attributable to any fault of the respondent Municipal Public Company for Sport Marketing. Furthermore, the Supreme Court found that under Article 177(1) and (2) LOR, the owner of the 'dangerous object' is released from liability where it is proven that the damage occurred from a cause external to the 'object', *in casu* the actions of the deceased.

Legal arguments presented by the Applicants

25. The Applicants allege that the District Court in the second appeal, and the Supreme Court in the Revision, violated their rights to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6, para. 1, of the European Convention on Human Rights.

26. The Applicants contend that, by finding that the death of Dalip Maloku was exclusively caused by his own actions, where the responsible authorities over the swimming pool Germija did nothing to save him

when it became clear that he was in trouble, the courts have incorrectly found that the Applicants were not entitled to compensation for the damage that they suffered. The Applicants consider that the liability of the authorities over the swimming pool was engaged as a consequence of their admitting the deceased to the pool area, knowingly in violation of their own security protocols.

27. The Applicants assert that the courts interpreted the question of liability as if it were a matter of establishing criminal responsibility for the death, whereas their claims only concerned a determination of objective liability in a civil case of death caused by a dangerous object.

28. As a consequence of the courts' interpretation, the Applicants allege that the civil panel that adjudicated their case was neither independent nor impartial. The Applicants argue that they have a right to compensation for the death of their family member.

29. The Applicants request the Constitutional Court to make an accurate assessment of the liability of the Municipal Public Company for Sport Marketing, and eliminate the violations of material law allegedly committed by the District and Supreme Courts. The Applicants request recognition of their right to compensation for their moral suffering.

Admissibility of the Referral

30. The Court first examines whether the Applicants have fulfilled the admissibility requirements set out in the Constitution, and as further specified in the Law and the Rules of Procedure.

31. The Court refers to Article 113 of the Constitution, which establishes that:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."

32. The Court takes into account 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 a public authority is subject to challenge".

33. In addition, the Court takes into consideration Rule 36 (2) of the Rules, which foresees that:

"The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

[...], or

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

[...], or

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

34. In this connection, 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 the regular courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see Avdyli v. Supreme Court of Kosovo, KI 13/09, 18 June 2010; see *mutatis mutandis* García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights 1999-1).

35. In fact, the Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in the entirety, have been conducted in such a way that the Applicants had a fair trial (see, *inter alia*, European Commission of Human Rights, Edwards v. United Kingdom, App. No. 13071/87, 10 July 1991).

36. In the present case the Applicants were afforded ample opportunities to present their case and to contest the interpretation of the law which they considered incorrect, before the District Court and the Supreme Court. Having examined all of the civil 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 App. No. 17064/06, 30 June 2009).

37. Thus, the Court considers that there is no evidence showing that the regular courts hearing the case lacked impartiality or that the proceedings were otherwise unfair. The mere fact that the Applicants are dissatisfied with the outcome of the case cannot raise an arguable claim of a breach of Article 31 of the Constitution (see Memetoviq v. Supreme Court of Kosovo, KI 50/10, 21 March 2011; see *mutatis mutandis* Mezotur-Tiszazugi Tarsulat v. Hungary, ECtHR App. No. 5503/02, 26 July 2005).

38. Therefore, the Constitutional Court finds that the Applicants' claims have not been substantiated and must be dismissed as manifestly ill-founded.

39. Consequently, for the reasons outlined above, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 46 of the Law and Rule 36.2 (b) of the Rules of Procedure, on 24 June 2013, unanimously:

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision effective immediately.

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

KI 122/12, Edison Rinxhi, date 02 July 2013, - Constitutional Review of the Resolution of Municipal Court for Minor Offences, Reg. No. 46854/2012 of 19 October 2012

Case KI 122/12, Resolution on Inadmissibility of 13 April 2013.

Keywords: individual Referral, constitutional review of the Resolution of Municipal Court for Minor Offenses in Prishtina

The Referral is based on Article 113.7 of the Constitution, Article 47 of the Law on the Constitutional Court of the Republic of Kosovo no. 03/L-121 of 15 January 2009 (hereinafter, the Law), and Rule 56, of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

On 04 December 2012, the Referral Applicant filed Referral with the Constitutional Court of the Republic of Kosovo and sought from the court the constitutional review of the Resolution of the Court for Minor Offenses in Prishtina.

The Applicant alleges that the proceedings before regular courts resulted in violation of the provisions of minor offense procedure, erroneous and incomplete determination of the situation and violation of Law.

The President with Decision (no. GJR.122/12 of 10 January 2013), appointed Judge Arta Rama Hajrizi as Judge Rapporteur. On the same day, the President with Decision no.KSH.KI 122/12 appointed the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović i Dr. Prof. Enver Hasani.

The Court notes that the Applicant has not specified what constitutional rights he claims to have been violated by the Resolution of the Minor Offenses Court, even though Article 48 of the Law on Constitutional Court of the Republic of Kosovo 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.

Pursuant to that the Applicant has not substantiated his allegations nor he did provide any evidence on violation of his rights and freedoms by the regular courts.

The Constitutional Court in the session held on 13 May 2013 rejected the Referral as manifestly ill-founded.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI122/12
Applicant
Edison Rinxhi
Constitutional Review of the Resolution of Municipal Court for Minor Offences, Reg. No. 46854/2012 of 19 October 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Edison Rexha, born in the Republic of Albania, with temporary residence in Slivova, Municipality of Pristina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Resolution of the Municipal Court for Minor Offences Reg.No.46854/2012 of 19 October 2012.

Subject matter

3. The subject matter is the constitutional review of Resolution of the Municipal Court for Minor Offences in Pristina Reg.No.46854/2012, annulment of sentence, as well as remanding of the case to the first instance court for retrial.

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 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.

Proceedings before the Court

5. On 04 December 2012, the Applicant filed a Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. By the Decision of the President (no. GJR.122/12, of 10 January 2013), Judge Arta Rama-Hajrizi is appointed as Judge Rapporteur. On the same date, by the Decision no.KSH.KI 122/12, the President appointed the Review Panel composed of Judges: Almiro Rodrigues (presiding), Ivan Čukalović and Prof. Dr. Enver Hasani.

7. On 1 March 2013, the Court notified the Applicant and the Basic Court on the registration of the Referral under nr. KI122/12.

8. On 29April2013, by the decision of the President (Nr.Gj.R.KI 122/12), as Judge Rapporteurwas appointedJudge KadriKryeziureplacing the judgeArtaRamaHarjizi.

9. On 13 May 2013, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

10. *On 8 August 2012, the Department of Border Police of the Republic of Kosovo delivered a request to the Applicant Edison Rinxhi, a citizen of the Republic of Albania (Applicant of the Referral), to leave the territory of the Republic of Kosovo.*

11. *On 15 October 2012, at 22:30 hrs, the Department of Foreigners and Illegal Migration of the Ministry of Internal Affairs, during the inspection of the facility at D.P.H. "Nazi" on the road Pristina-Gjilan, found that the Applicant had not complied according to the request that was served on him on 8 August 2012, but he was working as a musician in the said facility.*

12. *On 19 October 2012, the Department of Foreigners and Illegal Migration, against the Applicant filed a request on initiation of the minor offence proceedings [no. 2012-YR-486] to the Municipal Court of Minor Offences in Pristina regarding violation of Article 33 and in conjunction with Article 32 paragraph 1.1.6 within the meaning of*

Article 88.1.1 and 2 of the Law for Foreigners no. 04/L-069, (see paragraph 14 a and b)

13. *On 19 October 2012, the Municipal Court of Minor Offences in Pristina issued resolution [No. 46854/12], by which imposes a fine on the defendant (the Applicant of the Referral) in the amount of 50 euros according to the Article in accordance to the Article 88.1.1 of the Law on Foreigners No. 04/L-069, (see paragraph 14 c).*

14. *The Court by the same resolution imposed to the Applicant also a protection measure of immediate deportation with no right of entry into the territory of the Republic of Kosovo in a time period of 2 years, in accordance to the Article 88.2 of the Law on Foreigners No. 04/L-069 (see paragraph 14 d).*

15. *The Applicant filed an appeal (the date is not available in the case file) against the resolution of the Municipal Court of Minor Offences [no. 46854/4] of 19 October 2012.*

16. *On 5 November 2012, the High Court of Minor Offences in Prishtina partially approves the Applicant's appeal and issues a resolution [GJ.No.1234/2012], by which confirms a monetary fine to the Applicant, while the measure to prohibit entry into the territory of the Republic of Kosovo in a time period of 2 (two) years, amended to 1 (one) year ban.*

Relevant Law

17. *The Law on Foreigners No. 04/L-069;*

a) Article 33 Time limit for stay without visa;

"The foreigner, to whom is not requested visa for entry into the Republic of Kosovo, may stay in Kosovo not longer than ninety (90) days, in the time period of six (60) moths by counting from the first day of entry, unless by provisions of this law or international agreement is provided otherwise."

b) Article 31 Illegal border crossing;

1.6. 1. "Illegal crossing of state border shall be considered when the foreigner "(...) enters in the Republic of Kosovo while the order for removal with ban for re-entry is not force."

c) Article 88.1.1 "With the fine of fifty (50) up to one thousand five hundred (1.500) *€ shall be sentenced for misdemeanor the*

foreigner if illegally passes the state border, according to the Article 31 of this Law.“

"[...]"

d) Article 88.2 "Unless above-mentioned cases to the foreigner shall also impose the deportation measure.”

Applicant’s allegations

18. The Applicant alleges that the proceedings before Minor Offence Courts resulted in violation of the provisions of the minor offence procedure, erroneous and incomplete determination of the factual situation and violation of Law.

19. The Applicant addresses the Constitutional Court with the following request:

"Requesting from the Court, to release the defendant EdisonRinxhi, (the Applicant of the Referral) from the liability and sentence imposed, because of the erroneous determination of the factual situation, and requesting from the Court to annul the challenged resolution and remand the case to the first instance court for retrial”.

Assessment of admissibility of the Referral

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

21. In this respect, the Court refers to Article 113.7 of the Constitution which 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.”

22. The Court notes that in the case file there is as well the resolution of the High Court of Minor Offences [GJ.br.1234/2012] of 5 November 2012, but it is not a subject of this referral, because the referral of the Applicant is based on the constitutional reviewof the resolution of

Municipal Court for Minor Offences reg.no.46854/2012 of 19 October 2012.

23. The Court notes that the Applicant has not specified what constitutional rights he claims to have been violated by the resolution of the Municipal Court of Minor Offence [No.reg. 46854-12] of 19 October 2012, even though the Article 48 of the Law on Constitutional Court of the Republic of Kosovo 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."*

24. The Court notes that it is the role of the 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, paragraph 28 of the European Court for Human Rights [ECHR] 1999-I).

25. 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, Report of the European Commission on Human Rights, in the case Edwards v. United Kingdom, Application No.13071/87 adopted on 10 July 1991].

26. The Applicant has not substantiated his allegations nor he did provided any evidence on violation of his rights and freedoms by the regular courts (see,*mutatis mutandis*, Shub v. Lithuania, ECHR, Decision on Admissibility of Referral No. 17064/06, of 30 June 2009).

27. Rule 36 (2) b) of the Rules of Procedures stipulates that "The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: (...) the presented facts do not in any way justify the allegation of a violation of the constitutional rights."

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and rules 36.2 and 56 of the Rules of Procedure, on 28 June 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties and

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur
Dr. Sc. Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 22/13, Sokol Mushkolaj, date 02 July 2013- Constitutional review of Supreme Court Judgment Pkl.No.164/2012 dated 5 December 2012, Decision Ap.No.4/12 of District Court of Prishtina dated 28 September 2012, Judgment P.No.601/08 of Municipal Court in Prishtina dated 3 October 2011, and Decision P.No.601/08 of Municipal Court in Prishtina dated 20 December 2011.

Case KI 22/13, Resolution on Inadmissibility of 10 June 2013

Keywords: individual referral, inadmissible referral, manifestly ill-founded, interim measure, non-disclosure of identity, statute of limitation for criminal prosecution, right to fair and impartial trial

The Applicant filed the Referral based on Article 113.7 and 116.2 of the Constitution, claiming that his constitutional rights have been violated by decisions of the regular courts of the Republic of Kosovo. The Applicant, among others, claimed that the right to fair trial and the principle of legality and proportionality have been violated because the criminal prosecution instituted against him should have been terminated due to the statute of limitations as provided by the Provisional Criminal Code of Kosovo and that the regular courts did not serve the decision upon him in person as provided by provisions of the Provisional Criminal Code of Kosovo.

The Court noted that there was no evidence in the Referral suggesting that the regular courts had tried the Applicant beyond the statute of limitation or served the decision upon him in an unlawful manner. As to the Applicant's request for imposition of interim measures and non-disclosure of his identity, the Court considers that the request for interim measures did not meet the requirements established in Article 116.2 of the Constitution and in Article 27 of the Law, whereas the Applicant's request for non-disclosure of his identity was rejected by the Court because it was not reasoned. Due to the abovementioned reasons, the Court, pursuant to Articles 113.7 and 116.2 of the Constitution, Articles 20 and 27 of the Law, and Rules 36 (1) c) and 54 of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI22/13
Applicant
Sokol Mushkolaj
Constitutional review of Supreme Court Judgment Pkl.no.164/2012 dated 5 December 2012, Decision Ap.no. 4/12 of District Court of Prishtina dated 28 September 2012, Judgment P.no.601/08 of Municipal Court in Prishtina dated 3 October 2011, and Decision P.no.601/08 of Municipal Court in Prishtina dated 20 December 2011

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Sokol Mushkolaj a practicing lawyer with residence in Fushë-Kosovë.

Challenged decisions

2. The Applicant challenges Supreme Court Judgment Pkl.no.164/2012 dated 5 December 2012; Decision Ap.no. 4/12 of District Court of Prishtina dated 28 September 2012; Judgment P.no.601/08 of Municipal Court in Prishtina dated 3 October 2011; and Decision P.no.601/08 of Municipal Court in Prishtina dated 20 December 2011.

Legal basis

3. Articles 113.7 and 116.2 of the Constitution, Articles 20, 22.7, 22.8 and 27 of the 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 (hereinafter: the "Rules of Procedure").

Subject matter

4. The subject matter of the Referral is the Applicant's complaint that the regular courts sentenced him to six months of imprisonment by erroneous application of article 90.6 of the Provisional Criminal Code of Kosovo (hereinafter: PCCK) pertinent to absolute prescription of criminal prosecution, as well as articles 124, 125 and 126 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK) pertinent to the service of judicial documents.

5. The Applicant also asks the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), based on Article 116.2 of the Constitution, to impose interim measures and suspend Judgment P.no.601/2008 of the Municipal Court in Prishtina dated 3 October 2011, and to suspend the execution of the prison sentence until final conclusion of this criminal legal matter.

6. Furthermore, the Applicant asks the Court not to disclose his identity.

Procedure before the Court

7. On 25 February 2013, the Applicant submitted a referral with the Court.

8. On 28 February 2013, The President appointed Judge Robert Carolan as Judge Rapporteur and a Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

9. On 12 March 2013, the Court notified the Applicant and the Supreme Court of Kosovo about the registration of the Referral.

10. On 13 March 2013, the Court required additional documents from the Municipal Court in Prishtina and from the Applicant.

11. On 19 and 21 March 2013, the Applicant and the Municipal Court in Prishtina replied.

12. On 29 April 2013, the President appointed Judge Ivan Čukalovič as Judge Rapporteur and a Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Enver Hasani.

13. On 13 May 2013, 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 as evidenced by the documents furnished by the Applicant

14. On 3 October 2011, the Municipal Court in Prishtina by Judgment P.no.601/08 found that the Applicant had committed the criminal act of fraud from article 261 paragraph 1 of the PCCK, thereby pronouncing six months prison sentence which the Applicant will serve once the judgment is final.

15. The enacting clause of Judgment P.no.601/08 of the Municipal Court in Prishtina stipulated:

JUDGMENT

The defendant, Sokol Mushkolaj father's name H, mother's name B of maiden name H, born on 19.12.1952 in Deçan, street "Deshmoret e Kombit" No. 86, where he currently lives, has completed law faculty, profession lawyer in Deçan, married, father of a child, economic status medium, no prior convictions, against him there is no other ongoing proceeding for any other criminal offense.

IS GUILTY

That in order to obtain unlawful material benefits, concealing the facts, the defendant Sokol Mushkolaj on 23.11.2006 in Prishtinë, in his office from the injured NH and NH has received an amount of money from 500 euro, and subsequently on 25.11.2006 from the same has received the amount of 2.000 Euros, where the defendant Sokol Mushkolaj, mistaking them by fact and promising them that he would influence the on the decision of the District Court in Prizren and on Kosovo Supreme Court, a Court that had imposed a 20 years prison term, telling them that he will reduce the sentence to 10 or 13 years of imprisonment, and again in April of 2007 in a restaurant in Pejë from the injured NH and NH, the defendant giving the same promise as aforesaid has received from the injured NH and NH the amount of 3.000 euros, and since that day the above-mentioned injured did not get the money back.

As such he committed the criminal offense of fraud under Article 261 par. 1 of CCK.

Therefore the Court pursuant to Article 3, 34, 38, 64 and Article 261 par. 1 of the CCK, as well as Article 391 of the CCK,

ADJUDICATED

A prison term of 6 (six) months that he will serve after the judgment becomes final.

16. On 20 December 2011, the Municipal Court in Prishtina by Decision P.no.601/08 rejected the complaint of the Applicant against the Judgment P.no.601/08 of the Municipal Court in Prishtina, as out of time.

17. On 28 September 2012, the District Court in Prishtina by Decision Ap.no.4/12 rejected as ungrounded the appeal of the Applicant against the Decision P.no.601/08 of the Municipal Court in Prishtina dated 20 December 2011.

18. On 5 December 2012, the Supreme Court of Kosovo by Judgment Pkl.no.164/2012 rejected as ungrounded the Applicant's request for protection of legality filed against the Municipal Court of Prishtina Decision P.no.601/08 dated 20 December 2011, and the District Court in Prishtina Decision Ap.no. 4/12 dated 28 September 2012.

Applicant's allegations

19. The Applicant alleges that the criminal prosecution instituted against him should have been terminated due to statute of limitations as provided by article 90.6 of the PCCK. The regular courts have allegedly erroneously applied article 90.6 of the PCCK to his detriment.

20. The Applicant alleges that the regular courts did not serve the decision upon him in person, as provided by articles 124, 125 and 126 of the PCCK. The regular courts have allegedly acted in breach of articles 124, 125 and 126 of the PCCK to his detriment.

21. The Applicant claims a violation of articles 31[Right to Fair and Impartial Trial] and 33 [The Principle of Legality and Proportionality in Criminal Cases] of the Constitution in connection with article 6 [Right to a fair trial] of the European Convention on Human Rights.

22. The Applicant proposes imposition of interim measures for the temporary suspension of the execution of Judgment P.no. 601/08 of the Municipal Court in Prishtina dated 3 October 2011, based on article 116.2 of the Constitution.

The Law

Fraud
Article 261

(1) Whoever, with the intent to obtain a material benefit for himself, herself or another person, deceives another person or keeps such person in deception by means of a false representation or by concealing facts and thereby induces such person to do or abstain from doing an act to the detriment of his or her property or another person's property shall be punished by a fine or by imprisonment of up to three years.

Statutory Limitation on Criminal Prosecution
Article 90

(1) Unless otherwise provided for by the present Code, criminal prosecution may not be commenced after the following periods have elapsed:

…;

6) Two years from the commission of a criminal offence punishable by imprisonment for up to one year or punishment of a fine.

Assessment of admissibility

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, the Law and the Rules of Procedure.

24. In the concrete case, the Court notes that the Applicant was found guilty of fraud and sentenced to six months imprisonment by the Municipal Court in Prishtina. The sentence was subsequently upheld by the same court, the District Court in Prishtina and the Supreme Court of the Republic of Kosovo.

25. The Court notes that the regular courts chose to pronounce a lesser penalty on the Applicant, than the one provided by law, because they argued that the Applicant's relatively old age, the fact that he was not sentenced before and other factors served as the mitigating circumstances in his favor.

26. As to the Applicant's allegations that he was tried beyond the statutory limitations, or that he was not served with the decision in person; the Court notes that there is nothing in the Referral suggesting that the regular courts had tried the Applicant or served the decision upon him in an unlawful manner.

27. The Court notes that the Applicant only claims that his right to a fair and impartial trial was violated, without providing any *prima facie* evidence to back up his claims.

28. Furthermore, the Court observes that there is a distinction between a fair trial and a perfect one; the Court is cognizant of the fact that during the course of regular judicial proceedings, be it criminal or civil, procedural errors may occur. However that does not automatically imply that the prospective Applicant's right to a fair and impartial trial was compromised; it merely implies that the prospective Applicants were denied the right to a perfect trial which is not tantamount to a violation of fundamental rights per se.

29. The Constitutional Court is not a fact finding Court. The Constitutional Court reiterates that the determination of complete and right factual situation is a full jurisdiction of regular courts that that its role is to provide the compliance with the rights, guaranteed by the Constitution and other legal instruments and therefore it cannot act as a"court of fourth instance ", *(see, mutatis mutandis, i.a., Akdivar against Turkey, 16 September 1996, R.J.D, 1996-IV, para.65).*

30. The Court considers that the Referral does not indicate *how and why* the regular courts have acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to replace its determination of facts with those of the regular courts, as a general rule, it is the task of these courts to assess the evidence before them. The task of the Constitutional Court is to verify whether the procedures in the regular courts were fair in their entirety, including the way the evidence was taken, *(see ECtHR Judgment App. No 13071/87* Edwards *against United Kingdom, paragraph 3, dated 10 July 1991).*

31. The fact that the Applicants are unsatisfied with the outcome of the case, cannot serve them as a ground to file an arguable Referral for violation of the Article 31 [Right to Fair and Impartial Trial] of the Constitution *(see mutatis mutandis ECtHR Judgment Appl. no. 5503/02, MezoturTiszazugi Tarsulat against Hungary, Judgment dated 26 July 2005).*

32. As to the Applicant's request for imposition of interim measures, the Court considers that such a request does not meet the criteria established in Article 116.2 of the Constitution, Article 27 of the Law and Article 54 of the Rules of Procedure which would prompt the Court to impose interim measures; therefore the request to impose interim measures is rejected.

33. As to the Applicant's request not to disclose his identity, the Court considers that the Applicant has not backed up the granting of such a request by evidence, nor did he reason it; therefore the Court rejects the Applicant's request not to disclose his identity.

34. It follows that the referral is manifestly ill-founded and as such must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Articles 113.7 and 116.2 of the Constitution and Articles 20 and 27 of the Law and in compliance with Rules 36 (1) c and 54 of the Rules of Procedure, on 10 June 2013, unanimously:

DECIDES

I. TO REJECT the Referral as inadmissible;

II. TO REJECT the request for interim measures;

III. TO REJECT the request not to disclose identity;

IV. 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

V. This Decision is effective immediately.

Judge Rapporteur
Ivan Čukalović

President of the Constitutional Court
Prof. dr. Enver Hasani

KI 38/13, Miftar Krasniqi, date 02 July 2013- Constitutional review of the Decision of the Supreme Court Pkl.no. 48/2012, dated 13 April 2012

Case KI 38/13, Resolution on Inadmissibility of 15 May 2013.

Keywords: Individual referral, out of time, Resolution on inadmissibility

The Applicant alleges that the Municipal Court of Gjakova, the District Court of Peja and the Supreme Court violated his rights to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6(1) of the ECHR.

The Applicant contends that the expertise relied upon by the trial courts had failed to determine whether the various drivers involved in the road traffic accident had been driving under the influence of alcohol, and that this flawed expertise had led to a faulty interpretation of the circumstances of the accident. The Applicant alleges that, by denying him a re-trial based on his independently obtained expertise, the courts have violated his right to a fair trial.

The Court finds that the Referral has not been submitted in a legal manner, because it was not filed within the four months time-limit prescribed by the Law and the Rules of Procedure, and thus must be rejected as inadmissible, because it is out of time.

RESOLUTION ON INADMISSIBILITY
Case No. KI 38/13
Applicant
Miftar Krasniqi
Constitutional review
of the Decision of the Supreme Court Pkl.no. 48/2012, dated 13 April 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge, and
Arta Rama-Hajrizi, Judge.

The Applicant

1. The Applicant is Miftar Krasniqi, residing in Gjakova.

Challenged decision

2. The Applicant challenges the Decision of the Supreme Court of Kosovo (Pkl.no. 48/2012), dated 13 April 2012. The Applicant has not indicated any date of service of this Decision.

Subject matter

3. The Applicant alleges that the Decision of the Supreme Court, rejecting the Applicant's request for protection of legality, violated his rights as guaranteed by the Constitution, namely Article 31 of the Constitution and Article 6 (1) of the European Convention on Human Rights (hereinafter, ECHR).

Legal basis

4. The Referral is based on Article 113 (7) of the Constitution, Articles 47, 48 and 49 of Law No. 03/L-121 on the Constitutional Court (hereinafter,

the "Law"), and Rules 28, 29 and 30 of the Rules of Procedure of the Constitutional Court (hereinafter, the "Rules").

Proceedings before the Constitutional Court

5. On 14 March 2013, the Applicant submitted the Referral to the Court.

6. On 25 March 2013, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

7. On 02 April 2013, the Constitutional Court informed the Applicant of the registration of the Referral and requested the Applicant to provide the Court with copies of the relevant court judgments and decisions in his case.

8. On 17 April 2013, the Applicant submitted copies of the relevant court judgments and decisions as requested by the Constitutional Court.

9. On 15 May 2013, the President appointed Judge Enver Hasani to replace Judge Arta Rama-Hajrizi on the Review Panel. Thus, the Review Panel is composed of Judges Altay Suroy (presiding), Kadri Kryeziu and Enver Hasani.

10. On 15 May 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

The facts of the case

11. At some unspecified date and time, the Applicant was involved in a road traffic accident.

12. On 24 September 2010, the Municipal Court of Gjakova (P.nr. 431/2007) convicted the Applicant of the criminal offence of Endangerment of Public Traffic, and sentenced him to 6 months' imprisonment.

13. On 31 October 2011, the District Court of Peja (AP.nr. 126/2010) upheld this conviction and sentence.

14. On an unspecified later date, the Applicant apparently had an independent expertise made of the circumstances of the accident. The

Applicant subsequently submitted a request to the Municipal Court in Gjakova to have his case reviewed and re-tried based on the findings of this independent expert.

15. On 10 January 2012, the Municipal Court of Gjakova (P.nr. 431/2007) rejected this request.

16. On 14 February 2012, the District Court of Peja (P.nr. 12/2012) declared the Applicant's appeal unfounded, and upheld the decision of the Municipal Court.

17. On 13 April 2012, the Supreme Court (Pkl.nr. 48/2012) rejected as unfounded the request for protection of legality submitted on behalf of the Applicant.

The legal arguments presented by the Applicant

18. The Applicant alleges that the Municipal Court of Gjakova, the District Court of Peja, and the Supreme Court violated his rights to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6(1) of the ECHR.

19. The Applicant contends that the expertise relied upon by the trial courts had failed to determine whether the various drivers involved in the road traffic accident had been driving under the influence of alcohol, and that this flawed expertise had led to a faulty interpretation of the circumstances of the accident. The Applicant alleges that, by denying him a re-trial based on his independently obtained expertise, the courts have violated his right to a fair trial.

Admissibility of the Referral

20. The Court first examines whether the Applicant has fulfilled the admissibility requirements set out in the Constitution, and as further specified in the Law and the Rules.

21. In the case, the Court has specifically to determine whether the Applicant has met the requirements of Article 113 (1) of the Constitution and Article 49 of the Law and of Rule 36 (1) (b) of the Rules.

22. The Court refers to Article 113 of the Constitution, which establishes that:

1. *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*

   [...]

2. *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."*

23. The Applicant is an authorized party and apparently has exhausted all legal remedies provided by law.

24. However, the Court also refers to Article 49 of the Law, which provides 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. [...]"

25. In addition, Rule 36 (1) b) of the Rules foresees 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."

26. The Court notes that the final decision on the Applicant's case is the Decision of the Supreme Court (Pkl.nr. 48/2012) dated 13 April 2012.

27. The Applicant filed the Referral with the Court on 14 March 2013. The Applicant has not provided any information regarding the date of service of the Supreme Court decision.

28. In these circumstances, the Court notes that the final decision is dated 13 April 2012, whereas the Applicant submitted his Referral on 14 March 2013, which is more that eleven (11) months after that decision.

29. The Court estimates that it is not reasonable to consider that the Decision of the Supreme Court dealing with a criminal conviction was not served on the Applicant until a date four months before filing the Referral on 14 March 2013, meaning until 14 November 2012.

30. Therefore, the Court finds that the Referral has not been submitted in a legal manner, because it was not filed within the four months time-limit prescribed by the Law and the Rules, and thus must be rejected as inadmissible, because it is out of time.

31. Consequently, for the reasons outlined above, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law and Rule 36.1 (b) of the Rules of Procedure, on 24 June 2013, unanimously,

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision effective immediately.

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

KI 134/11, KI 135/11, KI 136/11, KI 137/11, Enver Gashi, Shefqet Bici, Ibush Gela, Mustafë Emini, date 02 July 2013- Constitutional Review of 4 Judgments of the Supreme Court of Kosovo

Case KI134/11, KI135/11, KI136/11, KI137/11, Resolution on Inadmissibility of 27 June 2013

Keywords: individual referral, inadmissible referral, referral out of time, Kosovo Energy Corporation, the right to work, *ratione temporis*.

The referral is based on Article 113.7 of the Constitution, Article 20 of the Law and Rule 56 of Rules of Procedure. The Applicants, among other, request from the Court to annul the Judgment of the Supreme Court, because the mentioned decision confirmed the decision of the Kosovo Energy Corporation to terminate the employment contract thus violating their right to work.

The Court emphasized that the referrals of several Applicants in this case did not correspond with the Court's temporal jurisdiction and as such were *ratione temporis* incompatible with the Constitution. Whereas for the referrals of the other Applicants, the Court found that they were out of time because they had been submitted out of the (4) four month legal time limit. Due to the above mentioned reasons, the Court pursuant to Article 113.7 of the Constitution, Articles 49 and 56 of the Law and Rule 36 (1) b) and (3) h) and Rule 56 (2) of the Rules of Procedure decided to reject as inadmissible the Applicants' referral.

RESOLUTION ON INADMISSIBILITY
In
Case No.
KI 134/11, KI 135/11, KI 136/11, KI 137/11
Applicants
Enver Gashi, Shefqet Bici, Ibush Gela, Mustafe Emini
Constitutional Review of 4 Judgments of the Supreme Court of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

The Applicants

1. The referrals were filed to the Constitutional Court individually by four (4) former employees of KEK namely Enver Gashi, Shefqet Bici, Ibush Gela and Mustafe Emini.

Challenged Decisions

2. The assessment Constitutionality of the following Judgments of the Supreme Court of Kosovo:

KI 134/11	Rev. I. nr. 158/08, dated 27.01.2009
KI 135/11	Rev I. nr. 192/05, dated 21.03.2006
KI 136/11	Rev.I.nr. 187/07, dated 17.01.2008
KI 137/11	Rev.I.nr. 148/09, dated 01.06.2009

Legal basis

3. The Referrals are 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).

Subject Matter

4. The decision which was taken based on Article 12 of Regulation nr. 27/2001UNMIK Regulation 2003/40 on the Essential Labour Law in Kosovo. The object of review at the Constitutional Court is; the Memorandum for Termination of the employment of the Aplicants taken by the Supervision Board of KEK.

Proceeding before the Court

5. The referrals submitted to the Constitutional Court are identical in its entirety.

6. On 20 October 2011, the applicants', namely Enver Gashi, Shefqet Bici, Ibush Gela, Mustafe Emini submitted their referrals to the Constitutional Court

7. On 17 February 2012, 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.

8. On 15 January 2012, the Referrals were communicated to the Supreme Court.
9. On the same date, the Constitutional Court notified KEK regarding the Applicants' submissions.

10. The Constitutional Court has not received any reply from the Supreme Court nor KEK regarding this matter.
11. On 1 March 2013, the President by Decision (KSH.KI-134/11,135/11, 136/11, 137/11) appointed Judge Ivan Cukalovic as member of the Review Panel after the term of office of Judge Iliriana Islami as Judge of the Court had ended.

12. On 6 March 2013, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the Facts

13. On 28 February 2003, the Supervision Board of KEK terminated the employment relation of the above mentioned Applicants due to "economical, technological or structural changes that resulted in reduction on the number of the employees" effective from 31 May 2003.

14. On 15 August 2003 KEK signed a Memorandum stating that the latter decision has not been in "accordance with the decision of the Supervision Board" and thus notified the applicants' that their employment relations with KEK will definitely be terminated on 31 August 2003, also notifying them that their supplementary salaries will be paid at the end of August of that year.

15. The applicants submitted their claims to the Municipal Court in Prishtina, requested that they be returned to their positions.

16. The Municipal Court through its decision, e.g. in the case of the first applicant, Enver Gashi CI.nr. 323/2003, approved the applicant's claim and annulled the memorandum of the Kosovo Energetic Corporation and obliged that the applicant be returned to his position.

17. KEK submitted their appeal against the above mentioned Judgment and the Judgments of the other applicants.

18. The District Court in Prishtina approved the appeal submitted by KEK and declared as ungrounded the applicants' requests.

19. The Supreme Court of the Republic of Kosovo individually rejected the applicants request for revision as ungrounded.

The Applicants' allegations

20. The Applicants simply request an annulment of the Judgments' of the Supreme Court, without specifically mentioning any constitutional violations or any other information to why they are alleging that these decision may be arbitrary.

Assessment of the Admissibility of the Referrals

21. The Court, in order to be able to adjudicate the Applicants' Referral, 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.

22. As far as the Referrals of Enver Gashi and Mustafë Emini are concerned, the Court is referred to Article 49 of the Law, which provides:

"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."

23. With regards to Applicants' Enver Gashi and Mustafë Emini it can be seen that the Referrals were individually filed on 20 October 2011. The decisions of the Supreme Court of Kosovo Rev. I. nr. 158/08 and Rev.I.nr. 148/09 are dated 27.01.2009 and 01.06.2009. It follows that the Referrals were not submitted within the legal time limit provided by the Article 49 of the Law.

24. It results that the above mentioned referrals are out of time as provided by Article 49 of the Law.

25. As to the Referrals of Shefqet Bici and Ibush Gela, 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."

26. 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 8march 2006, para. 82).

27. With regards to Applicants Shefqet Bici and Ibush Gela, it appears from the Applicant's submissions that the final court decisions regarding their case were the Decisions of the Supreme Court of Kosovo, Rev.I.nr. 192/2005, dated 21.03.2006 and Rev.I.nr. 187/07, dated 17.01.2008 whereas they submitted their Referrals to the Constitutional Court only on 20 October 2011. 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 entry into force of the Constitution and from which date the Court has temporal jurisdiction.

28. It follows that the above mentioned referrals are incompatible "ratione temporis" with the provisions of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 49 and 56 of the Law, and Rules 36 (1) b) and (3) h), and 56 (2) of the Rules of Procedure, on 27 June 2013, 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. Sc. Kadri Kryeziu	Prof. Dr. Enver Hasani

KI 66/13, Milazim Gashi, date 09 July 2013-Against the Mayor of the Municipality of Graçanica, Mr. Bojan Stojanovič.

Case KI 66/13, Resolution on Inadmissibility of 20 June 2013

Keywords:actio popularis, appointment of Deputy Mayor, non-authorized party, right to vote, right to exercise profesion, violations of individual rights and freedoms

The applicant filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo alleging that *"Article 62, 123 and 124 of the Constitution of the Republic of Kosovo have been violated due to the inaction of the Mayor of the Municipality of Graçanica, regarding the proceeding of the appointment of Deputy Mayor of this Municipality."*

On the issue of the admissibility of the Referral, the Court held that the Referral was inadmissible because the Applicant is not an authorized party because he cannot be considered an authorized party to refer to the Court constitutional matters in abstracto regarding the election or non-election of the Deputy Mayor of the Municipality of Graçanica in order to obtain a remedy in the name of the collective interest. The Applicant has not specified an act of a public authority (see Article 48 of the Law) that has allegedly violated his own individual rights and freedoms. Furthermore, the Court held that the Constitution does not provide for *actio popularis*, which is a modality of individual's complaint enabling them to initiate abstract review regardless of their specific legal interest in the case in question. Article 113.7 of the Constitution presupposes individual and direct grievances to approach the Constitutional Court as an instance of last resort for an alleged violation by public authorities of individual rights and freedoms guaranteed by the Constitution.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI66/13
Applicant
Milazim Gashi
against
The Mayor of the Municipality of Graçanica, Mr. Bojan Stojanovič.

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Referral is submitted by Mr. Milazim Gashi (hereinafter, the Applicant), residing in Graçanica.

Opposing party

2. The opposing party is the Mayor of the Municipality of Graçanica (hereinafter, the Opposing party).

Subject matter

3. The Applicant alleges that *"Article 62, 123 and 124 of the Constitution of the Republic of Kosovo* have *been violated due to the inaction of the Mayor of the Municipality of Graçanica, regarding the proceeding of the appointment of Deputy Mayor of this Municipality."*

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the 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 29 April 2013, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).

6. On 29 April 2013, the President of the Constitutional Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

7. On 14 May 2013, the Court requested from the Applicant all relevant documents related to the appointment or non-appointment of the Deputy Mayor of the non-majority community of Gracanica, including:

   a. Minutes of the sessions of the Municipal Assembly of Gracanica, where the issue of the appointment or non-appointment of the Deputy Mayor of the non-majority community of Gracanica was discussed;

   b. Decisions; and

   c. Communication with Ministry of Local Government Administration.

8. On 14 May 2013, the Referral was communicated to the Opposing party.

9. On 22 May 2013, the Applicant submitted the requested additional documents.

10. On 17 June 2013, the President of the Constitutional Court replaced Judge Arta Rama Hajrizi as member of the Review Panel with Judge Enver Hasani.

11. On 20 June 2013, 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 1 March 2010, the political party Democratic League of Dardania informed the Mayor of the Municipality of Graçanica that, "Pursuant to the Law on Local Self Governance, Article 61, the Democratic League of

Dardania (LDD), appoints Mr. Milazim Gashi in the position of the Deputy Mayor for Communities in the Municipality of Graçanica."

13. On 28 May 2010, the Municipal Assembly held a meeting whereby one of the topics was the election of the Deputy Mayor of the Municipality for communities. The minutes of that meeting states what follows.

"Head of the Committee for Communities stated that the Albanian community is not satisfied that for 5 months now the Deputy Mayor of the minority community, and that the Deputy should come from the Albanian community.

I.S. member of the Committee stated that this point of the agenda should state that Roma community submits the request for the election of the deputy Mayor, since the Roma community is the largest minority in Gracanica Municipality with 10.6% whereas the Albanian community 3.6% and Gorani 1.8% and that the Mayor is already in negotiations with the Roma community.

A.K. member of the Committee agrees with I.S. member of the Committee.

The head of the Committee for Communities agrees that the Roma community is larger than the Albanian, but the Albanian community participated in elections and voted their party, whereas the Roma community voted for "SLS" party, and that pursuant to the Law on Local Self Governance Article 61, item 61.3 the deputy Mayor 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, and since he comes from the minority community he will vote for the member of his party.

I.S. member of the Committee stated that pursuant to the Law on Local Self Governance, item 61.1 in municipalities where at least 10% of the residents belong to non majority communities, they will have one chairman for communities, and that this is the Roma community."

14. On 7 June 2010, the Municipal Assembly held a meeting whereby one of the topics was a letter from the political party Democratic League Dardania concerning the election of the Deputy Mayor of the Municipality for communities. The minutes of that meeting states what follows.

"The president stated that on 04.06.2010 he received a document from "LDD" (Democratic League of Dardania) party whom had requested that the new point of the agenda that will be discussed in municipalities. But this is a special session thus this point will not be included in the agenda. They demanded the appointment of the Deputy Mayor of the Municipality for the communities; it is known that A.K. from the same party was elected on 28.01.2010. Therefore it must be a mistake in translation, and it has probably been demanded the election of the deputy Mayor of municipality from the minority communities. The president stated that he has discussed with the Mayor and the later stated that the deputy Mayor cannot be someone who is not a resident of Gracanica Municipality, and the document does not contain the candidate's name, but pursuant to some information he is from Peja and Klina area, and currently resides in Prishtina. It is known that the proposal for the deputy Mayor from the community is given by the Mayor himself, but the proposal has not been submitted yet. Pursuant to the Law on Local Self Governance the number of the minority community should be 10% so that they are entitled to this position, elected every 4 years.

The Mayor has stated that the number of minority communities in Gracanica Municipality is as follows: Roma 10,6%, Albanian 3,6% and Gorane 1,8%, and until now the proposal has been submitted only by the Albanian party "LDK" and probably also the Roma community will come forward, but the Assembly cannot approve the proposal until the Mayor himself does not present his proposal, and the entire background of the person must be known for this position.

Assembly member A.K. from "LDD" party stated that pursuant to the Law the deputy Mayor of the Municipal Assembly is elected by voting, and he agrees that there is a mistake in translation. A deputy Mayor of municipality can be substituted if for three months he has not participated in sessions, or if he has committed a serious mistake, so he cannot be substituted and only the Mayor has this competence, and he is not pleased that the proposed person is not from Gracanica Municipality, but he agrees with his party's proposal and he is aware that the Mayor himself makes the proposal. Then the proposal goes to the Assembly for approval and that is why "LDD" party needed to first present this document to the Mayor and now the Assembly."

15. On 24 June 2010, the Mayor of the Municipality of Graçanica requested to Mr. A.K., President of the Committee for the protection of the rights and interests of communities in the Municipality of Graçanica, *"[…] a*

recommendation for the appointment of the Deputy Mayor of the Municipality who will handle the community matters."

16. On 4 April 2013, the Ministry of Local Government Administration informed the Mayor of the Municipality of Graçanica that *"Pursuant to Article 61 of the Law on Local Self Governance, municipalities where at least 10% of the citizens belong to non majority community will have one Deputy Mayor of the Municipality for communities. The Deputy Mayor for communities is proposed by the Mayor of the Municipality and approved by the Municipal Assembly pursuant to Article 61.3 of the Law on Local Self Governance."*

17. The Ministry of Local Government Administration, also informed that *"During the monitoring of Graçanica Municipality it was found that in this Municipality still the Deputy Mayor of the Municipality for communities has not been appointed as foreseen by the law. The Ministry of Local Government Administration pursuant to the abovementioned findings and pursuant to the Law on Local Self Governance request the Municipal bodies respectively the Mayor of the Municipality to propose to the Municipal Assembly the appointment of the Deputy Mayor of the Municipality for communities pursuant to paragraph 1 of Article 61 of the Law on Local Self Governance."*

Applicant's allegations

18. The Applicant claims that the Mayor of the Municipality of Graçanica *"Continuously, by his inaction and action contrary to the Constitution, Law and the Statute of the Municipality infringes and violates:*

    a. *The rights and freedoms guaranteed by the Constitution of the members of non-majority community in the Municipality of Gracanica for representation as a community*

    b. *The rights and freedoms guaranteed by the Constitution of Mr. Milazim Gashi in individual manner in exercising the vote and profession".*

19. Thus, the Applicant requests the Constitutional Court *"to make final interpretation whether the actions and inactions of the Mayor of the Municipality of Gracanica, are in compliance with the spirit of the Constitution, specifically Articles 62, 123, 124 and for the individual case Articles 45 and 49 of the Constitution."*

20. The Applicant alleges that *"Mayor of Municipality of Gracanica Bojan Stojanovic, directly elected by the people, continuously since he has been exercising his public duty, by intentional inactions and actions violates the Constitution, because, he does not proceed with the appointment of the Deputy-Mayor of the Municipality, in this case of Mr. Milazim Gashi in the position he is entitled to by the Constitution as the representative of non-majority community proposed by the representative of the non-majority community in the Municipal Assembly."*

21. *The Applicant further claims that the "Municipal Assembly has several times raised the issue of non-appointment of the Deputy-Mayor of the Municipality […]".*

Admissibility of the Referral

22. The *Court examines now 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 respect, the Court firstly refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution which establishes that*

24. *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decision of the European Court of Human Rights".*

25. *The Court also refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establishes that*

> *1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *(…)*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*

26. The Court additionally takes into account Article 47 [Individual Requests] of the Law which provides that

> *1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual*

rights and freedoms guaranteed by the Constitution are violated by a public authority.

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

27. Furthermore, the Court also takes into consideration 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".

28. The Court also takes into account Rule 36 (3).c) of the Rules of Procedure, which foresees that

"A Referral may also be deemed inadmissible in any of the following cases: the Referral was lodged by an unauthorised person;".

29. The Court notes that the Applicant has not specified an act of a public authority (see Article 48 of the Law) that has allegedly violated his own individual rights and freedoms guaranteed by the Constitution and the international conventions directly applicable in the Republic of Kosovo.

30. The Court additionally considers that the Constitution does not provide for *actio popularis*, which is a modality of complaint enabling individuals to initiate abstract review regardless of their specific legal interest in the case in question.

31. In fact, Article 113.7 of the Constitution presupposes individual and direct grievances to approach the Constitutional Court as an instance of last resort for an alleged violation by public authorities of individual rights and freedoms guaranteed by the Constitution.

32. That consideration is confirmed by the case-law of the European Court of Human Rights which held that *"the system of individual petition…excludes the 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 Constitution. Such person must be able to show that they were "directly affected" by the measure complained of".* (See e.g. Judgment in case Ilhan v Turkey, Application No. 22277/93, 27 June 2000, paragraph 52).

33. Therefore, the Court concludes that the Applicant is not an authorized party to refer to the Court constitutional matters *in abstracto* regarding the election or non-election of the Deputy Mayor of the Municipality of Graçanica in order to obtain a remedy in the name of the collective interest.

34. Thus, the Referral is inadmissible for the abovementioned ground.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 and Article 48 of the Law and Rule 36 (3.c) and Rule 56 (2) of the Rules of Procedure, on 4 July 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;

IV. TO DECLARE this Decision effective immediately.

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

KI 27/13, Kadri Çitaku, date 09 July 2013 - Constitutional review of the Judgment of the Supreme Court of Kosovo A. no. 556 / 2011 of 28 September 2012

Case KI-27/13, Resolution on Inadmissibility of 14 June 2013

Keywords: individual referral, right to pension, out of time.

The Applicant submitted Referral pursuant to Article 113.7 of the Constitution of Kosovo. Based on submitted documents, the Court assumes that the subject matter is the Judgment of the Supreme Court A.no. 556 / 2011 of 28 September 2012, by which was upheld the Decision of the Ministry of Labor and Social Welfare (hereinafter: MLSW)–Department of Pension Administration (hereinafter: DPA), no. 5097359 of 15 March 2011, by which was rejected the Applicant's request for recognition of the right to disability pension."

The Applicant submitted to the Constitutional Court 49 pages of different documents, the biggest part of it has to do with documents related to exercising of the right to disability pension.

Despite the notification no. ref. 713/13/rl of 4 April 2013 of the Constitutional Court, the Applicant did not complete the form and did not specify which Articles of the Constitution and the rights, guaranteed by the Constitution, were violated to the him.

Deciding on the Referral of the Applicant Kadri Çitaku, after reviewing the proceedings in entirety, the Constitutional Court concluded that the Referral is not admissible for review, in accordance with Article 49 (Deadlines) of the Law and Rule 36 (1b) of the Rules of Procedure, because the Referral was submitted after the time limit of four months, from the day when the decision on the last effective legal remedy was served on the Applicant.

RESOLUTION ON INADMISSIBILITY
in
Case no.KI27/13
Applicant
Kadri Çitaku
Constitutional Review of the Judgment of the Supreme Court of Kosovo
A. no. 556 / 2011 dated 28 September 2012
B.
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Kadri Çitakufrom village Gjurakoc, Municipality of Istog.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo A. no. 556/2011dated 28 September 2012, which was served on the Applicant on 16 October 2012.

Subject matter

3. The Court assumes that according to the submitted documentation the subject matter is the Judgment of the Supreme Court of Kosovo A.No.556/2011 dated 28 September 2012, by which was upheld the Resolution of the Ministry of Labor and Social Welfare (hereinafter: MLSW)– Department of Pension Administration (hereinafter: DPA), no. 5097359 dated 15 March 2011, by which was rejected the Applicant's request for recognition of the right to disability pension.

4. The Applicant neither filled the Referral form which was provided by the Constitutional Court by notification no. ref. 713/13/rl dated 04 April 2013, nor indicated which Articles and rights, guaranteed by the Constitution were violated to the Applicant.

Legal basis

5. 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 of the Law on Constitutional Court of the Republic of Kosovo dated 15 January 2009(hereinafter: the Law) and Rule 56 paragraph 2 of the Rules of Procedure (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 04 March 2013, the Applicant insisted that the Constitutional Court registers and receives the documentation, which the Applicant submitted to the Constitutional Court of the Republic of Kosovo (hereinafter: „the Court“) although he was instructed by legal advisor that he should fill the Referral Form and indicate which constitutional articles and rights were violated to the Applicant.

7. On 04 April 2013, the Constitutional Court notified the Applicant that the Court registered the case, submitted to the Applicant the Referral Form with the request to fill the Referral and to submit it to the Court.

8. On 14 May 2013, the Constitutional Court requested from the Supreme Court to submit additional documentation with evidence when the Judgment of the Supreme Court of Kosovo A.No.556 /2011 dated 28 September 2012 was served on the Applicant.

9. On 17 May 2013, the Supreme Court of Kosovo submitted to the Constitutional Court the return receipt, which shows that the Judgment of the Supreme Court of Kosovo A.No.556/2011 dated 28 September 2012 was served on the Applicant on 16 October 2012.

10. On 14 June 2013, after the review of the report of the Judge Rapporteur Kadri Kryeziu, the Review Panel composed of judges: Robert Carolan (Presiding), Almiro Rodriguesand Prof. Dr.Ivan Čukalović, recommended to the full Court the inadmissibility of the Referral.

Summary of facts

11. On 04 June 2010, the Applicant submitted request to MLSW-DPA in order that the right to disability pension is recognized to the Applicant. MLSW-DPA by decision no. 5097359 dated 04 September 2010, rejected the request of the Applicant, because he did not meet the requirements for recognition of the right to disability pension.

12. On 06 January 2011, the Applicant lodged an appeal against MLSW–DPA decision No. 5097359 of 04 September 2010, to the MLSW-DPA Council of Appeals for Disability Pensions, which deciding on the Applicant's appeal, by Resolution No. 509739 dated 15 March 2011 rejected the appeal of 06 January 2011, on recognition of the right to disability pension, as ungrounded and upheld the decision of the first instance Doctor's Commission, as grounded in entirety, in compliance with the Law No. 2003/23.

13. The Applicant filed a lawsuit with the Supreme Court of Kosovo against the Resolution of MLSW–DPA–Council of Appeals and Disability Pensions No. 5097359 of 15 March 2011.

14. Deciding on the Applicant's lawsuit the Supreme Court of Kosovo by Judgment A.No.556/2011 of 28 September 2012, rejects the Applicant's claim by reasoning;

> *"During the appellate procedure, the respondent body provided the finding and opinion of the respondent's medical committee No.5097359 dated 25.02.2011, and the evaluation of the medical committee for disabled people, the factual body, that is concurrent with the previously given findings and opinions of medical committees and therefore, with the impugned decision it rejected the claimant's appeal as ungrounded and upheld the attacked decision."*
>
> *"Taking into consideration that the legally authorized medical committees have confirmed that the claimant does not manifest disability for work, the Court finds that the administrative bodies have correctly implemented Article 3 of the abovementioned Law, pursuant to which the claimant's request to acknowledge his right to disability pension was rejected."*

Applicant's allegations

15. The Applicant has submitted to the Constitutional Court 49 pages of various documents, where most of them are related to the realization of right to disability pension.

16. The Applicant, despite the written notice by the Constitutional Courtno. ref. 713/13/rl of 04 April 2013, did not fill the form, nor indicated which Articles of the Constitution and which rights guaranteed by the Constitution were violated to the Applicant.

Assessment of admissibility of the Referral

17. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

18. Regarding 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. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force..."*

19. The Court states that from the additional documentation, submitted by the Supreme Court of Kosovo was determined that the Judgment of the Supreme Court of Kosovo A.No.556/2011 dated 28 September 2012, was served on Applicant on 16 October 2012, when the Applicant signed the return receipt.

20. Final judgment of the Supreme Court of Kosovo was served on the Applicant on 16 October 2012, while the Applicant submitted the Referral to the Constitutional Court on 04 March 2013.

21. It results that the Referral is inadmissible for review, pursuant to Article 49 (Deadlines) of the Law and Rule 36. (1b) of the Rules of Procedure, which provides: *"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 of the Constitution, Article 49 of the Law and Rule 36 (1b) of the Rules of Procedure, in the session held on 4 July 2013, 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
Dr. Sc. Kadri Kryeziu

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 29/13, Feriha Hoti, date 09 July 2013- Constitutional review of the Supreme Court Judgment Mlc.No.12/2009 dated 14 May 2012

Case KI 29/13, Resolution on Inadmissibility of 4 July 2013

Keywords: individual referral, out of time referral, inadmissible referral, protection of property, judicial protection of rights.

The Referral is based on Article 113.7 of the Constitution, Articles 20, 22.7 and 22.8 of the Law, and Rule 56 (2) of the Rules of Procedure. The Applicant, among others, claimed that the right to property and the judicial protection of rights have been violated.

The Court concluded that the Applicant's referral was submitted beyond the four months deadline. Due to the abovementioned reasons, the Court, pursuant to Article 113.7 of the Constitution, Article 49 of the Law and Rule 36 (1) b) of the Rules of Procedure, decided to reject the Referral as inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI29/13
Applicant
Feriha Hoti
Constitutional review of the Supreme Court Judgment
Mlc.no.12/2009 dated 14 May 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Feriha Hoti represented by Merita Limani from Prishtina.

Challenged decisions

2. The Applicant challenges Supreme Court Judgment Mlc.no.12/2009 dated 14 May 2012. The date when the decision was served to the Applicant is unknown.

Legal basis

3. Article 113.7 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 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").

Subject matter

4. The subject matter of the Referral is the Applicant's complaint that the Supreme Court of Kosovo based on the request for protection of legality

propounded by the Public Prosecutor made a decision to overrule decisions of lower instance courts which were favorable to the Applicant.

Procedure before the Court

5. On 6 March 2013, the Applicant submitted a referral with the Court.

6. On 22 March 2013, the President appointed Judge Robert Carolan as Judge Rapporteur and a Review panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

7. On 3 April 2013, the Court notified the Applicant and the Supreme Court of Kosovo about the registration of the Referral.

8. On 10 April 2013, the Court asked the Applicant to submit evidence of service of the judgment of the Supreme Court.

9. On 17 April 2013, the Applicant replied to the Court.

10. On 19 April 2013, the Court notified the Municipal Court in Prishtina about the registration of the Referral, and at the same time required from it to submit evidence of service of the Judgment of the Supreme Court on the Applicant.

11. On 19 June 2013, the Review Panel deliberated the report of Judge Rapporteur and recommended to the full court the inadmissibility of the Referral.

Background of the Referral

12. On 21 January 2010, the Applicant entered a gift contract with M.SH, whereby M.SH was the grantor and the Applicant the grantee. Real estate evidenced as cadastral plot P-71813068 – 01396-7 with a surface of 183 m² possession list no. UL – 71813068 – 13487 ZK Prizren was accorded to the Applicant. The gift contract was legalized in the Municipal Court of Prizren.

13. The grantor MSH was, however, involved in a property dispute with third parties pertinent to the real estate which he had accorded to the Applicant. The property dispute was settled in judicial proceedings by the Supreme Court of Kosovo, following the request for protection of legality propounded by the Public Prosecutor.

14. The Applicant as the grantee of the disputed property decided to file a Referral with the Court.

Summary of the facts as evidenced by the documents furnished by the Applicant

15. On 13 May 2008, the Municipal Court in Prizren by Judgment C.no.772/07 ruled that MSH is entitled to use the construction land under dispute and at the same time rejected the claims of counter-claimants and obliged them to admit the terms stipulated in the said judgment.

16. On 13 February 2009, the District Court in Prizren by Judgment Ac.no.438/2008, upheld the Judgment C.no.772/07 of the Municipal Court in Prizren.

17. On 14 May 2012, the Supreme Court of Kosovo by Judgment Mlc.no.12/2009, approved the request for protection of legality filed by the Public Prosecutor therewith overruling the impugned judgments of the municipal and the district courts of Prizren respectively; and concurrently rejected the claim of MSH and approved the claims of counterclaimants over the disputed construction land.

Applicant's allegations

18. The Applicant alleges that the decision of Supreme Court was marked by conflict of interest and influenced by A.S., "*who is part of the judiciary and has caused legal inequality which has influenced the Panel of Supreme Court in its decision"*.

19. The Applicant alleges violation of Articles 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution.

Assessment of admissibility

20. 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.

21. Regarding the Applicant's Referral, the Court refers to Article 49 of the Law, which provides:

> *"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."*

22. From the submissions it can be seen that the Referral was submitted on 6 March 2013, and that the judgment of the Supreme Court was rendered on 14 May 2012. The Referral was submitted beyond the four (4) months deadline prescribed by Article 49 of the Law.

23. The Court asked the Applicant to submit evidence of service of the Supreme Court judgment, to which she replied:

> *"...I inform you that the decision of the Supreme Court of the Republic of Kosovo was served to my brother M.SH., who after a long time served the said decision on me".*

24. Based on the aforementioned reply, the Applicant could not prove before this Court that the Referral was filed within prescribed deadline as stipulated by Article 49 of the Law.

25. It follows that the Referral is out of time.

26. Therefore, the Referral should be rejected as inadmissible due to non-compliance with the prescribed deadline as stipulated 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 49 of the Law and Rule 36 (1) b) of the Rules of Procedure, on 4 July 2013, 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
Robert Carolan

President of the Constitutional Court
Prof. dr. Enver Hasani

KI 45/13, Jasmine Baxhaku, date 09 July 2013- Constitutional Review of Judgment of the Supreme Court, Ac. no. 65/2012, dated 29 October 2012

Case KI45/13, Resolution on Inadmissibility of 19 June 2013

Keywords: individual referral, civil dispute, right to fair trial, manifestly ill-founded

The Applicant claimed that the District Court in Prizren and the Supreme Court, have violated her rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Articles 6 and 14 of ECHR. The Applicant complained on grounds of substantial violation of procedural provisions, incomplete and erroneous determination of factual situation and erroneous application of the substantive law.

The Court in this case noted that the Applicant did not present any argument and evidence on how and why the Supreme Court violated her rights and fundamental freedoms guaranteed by the Constitution. No allegation filed on the ground of constitutionality was made by the Applicant, either implicitly or in substance, which would refer the alleged violation on human rights and fundamental freedoms, guaranteed by the Constitution and International Instruments. In sum, the Court noted that the Applicant's Referral did not meet the required criteria pursuant to Rule 36 (1) c) and (2) a) and d) of the Rules of Procedure, and as such, is found inadmissible.

RESOLUTION ON INADMISSIBILITY
Case No. KI45/13
Applicant
Ms. Jasmine Baxhaku
Constitutional Review of Judgment of Supreme Court
Ac. no. 65/2012 dated 29 October 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Referral was filed by Ms. Jasmine Baxhaku, from Dragash and with residence in Prishtina (the Applicant).

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court Ac. no. 65/2012 dated 29 October 2012 and served on the Applicant on 19 November 2012.

Subject matter

3. The subject matter is the constitutional review of the Judgment of the Supreme Court Ac. no. 65/2012 dated 29 October 2012, which allegedly violated the Applicant's constitutional rights, guaranteed by Article 31 [Right to a Fair and Impartial Trial] of the Constitution and Article 14 [Prohibition of Discrimination] of ECHR.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution); Article 47 and 48 of the Law on Constitutional Court of the Republic of KosovoNr. 03/L-121 dated 15

January 2009(hereinafter, the Law) and on Rule 28 and 56.2 of the Rules of Procedure of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 19 March 2013, the Applicant submitted the Referral to the Constitutional Court.

6. On 25 March 2013, the Constitutional Court requested from the Applicant to complete her Referral.

7. On 16 April 2013, the President appointed the Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of JudgesAltay Suroy (Presiding), Kadri Kryeziu and Arta Rama-Hajrizi.

8. On 8 May 2013, the Court notified the Applicant and informed the Supreme Court about the registration of the Referral.

9. On 17 June 2013, the President replaced Judge Arta Rama-Hajrizi as member of the Review Panel with Judge Enver Hasani.

10. On 19 June 2013, the Review Panel reviewed the report of the Judge Rapporteur and recommended to the Court the inadmissibility of Referral.

Summary of facts

11. On 8 May 2012, the Applicant's husband filed a claim in the District Court in Prishtina against the Applicant for dissolution of the marriage, concluded on 7 July 2010.

12. On 12 July 2012, the Applicant responded to the claim, challenging the claimant's request for dissolution of marriage, due to the fact that they have never discussed about the dissolution of marriage.

13. On 15 May 2012, the Municipal Court in Prishtina (Resolution, C.no.1003/2012) under the Applicant's request (the protected party) issued a "protection order", prohibiting the husband to commit any kind of threat or domestic violence against the Applicant and ordered him to allow the Applicant to take her personal things in the house.

14. On 27 July 2012, the District Court in Prizren (Judgment, C.no. 125/12) rendered the decision on "dissolving by divorce" the marriage between

the litigants and obliged the Applicant to compensate the costs of proceedings. The Court justifies its decision as follows:

> *"Therefore, the Court considers that a marriage can exist only in cases when there is love, mutual respect, living together and the wish to live in a marital community between the spouses, but in the present case these elements do not exist and this justifies that this marriage should be dissolved, since it is not either in the interest of spouses nor of society that the marriage to exists only in the books of the competent bodies, whilst the same does not actually exist. The Court does not accept the proposal of the respondent's representative that the claimant to be heard in capacity of the party, because the claimant works in Austria and it is not proved by any evidence that he has been in Prizren, since, on the question of the court whether the claimant was in Kosovo last week, the respondent answered that he was not and the Court considers that it is sufficient to hear only one litigating party. The fact itself that the respondent in a clear manner clarified the disordered relations in their marriage in the abovementioned resolution of the Municipal Court in Prishtina is sufficient for this Court to conclude that the spouses' relations have seriously become disordered and that they have become of permanent character and that the only purpose of this proposal is to postpone or to extend the dissolution of this marriage and not because the relations between the litigants are not disordered."*

15. On 22 August 2012, the Applicant filed an appeal with the Supreme Court against the Judgment of the District Court in Prizren.

16. On 29 October 2012, the Supreme Court (Judgment, Ac.no. 65/2012), rejected as ungrounded the Applicant's appeal and upheld the Judgment of the District Court in Prizren C.no. 125/2012 dated 27 July 2012. The Supreme Court reasoned that the court of first instance "*has determined correctly the factual situation and examined administered evidence pursuant to Article 8 of the LCP and found that there are no substantial violations of the provisions of the contested procedure. The court of first instance has correctly applied the substantive law, Article 69 item 1 and 2 of the Law on Family, when it dissolved the marriage of the litigants, finding that the marriage between the litigants has lost the purpose of its existence. The marriage should be kept only when there is mutual love between spouses, which is also expressed by a harmonious cohabitation and the desire of one spouse to keep the marriage is not enough.*"

Applicants' allegations

17. The Applicant alleges that the District Court in Prizren and the Supreme Court violated her constitutional rights, guaranteed by Article 31 [Right to Fair and Impartial Trial] and by Article 6 and 14 of ECHR.

18. The Applicant complains before the Constitutional Court "Due to: Substantial violation of procedural provisions, Erroneous and incomplete determination of factual situation and Erroneous application of substantive law".

19. The Applicant requests the Constitutional Court to oblige the husband to pay a compensation at the amount of €15.000, as a compensation for her personal things and of her family, which she was not allowed to take, as well as the compensation for her lost years, interruption of school and psychological trauma, taking into account that the divorce was requested only by the claimant, not by her.

Admissibility of the Referral

20. The Court examines whether the Applicant has met all the requirements of admissibility foreseen by the Constitution and as further specified in the Law and the Rules of Procedure of the Court.

21. In this respect, the Court refers to Article 113 (1) and (7) which establishes that:

> 1. "*The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties*."
>
> *[...]*
>
> *7. "Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

22. The Court also refers to 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."*

23. In addition, Rule 36 (1) c) and (2) a) and d) of the Rules of Procedures foresees that:

(1). The Court may only deal with Referrals if:

[…]

(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

[…]

d) when the Applicant does not sufficiently substantiate his claim

24. The Constitutional Court notes that the Applicant does not present any argument and evidence on how and why the Supreme Court violated her rights and fundamental freedoms guaranteed by Constitution. No allegation filed on the ground of constitutionality was made by Applicant, either implicitly or in substance, which would refer the alleged violation of human rights and fundamental freedoms, guaranteed by Constitution and International Instruments.

25. In fact, the Court notes that the Applicant complains on the grounds of substantial violation of procedural provisions, incomplete and erroneous determination of factual situation and erroneous application of the substantive law.

26. The Court considers that these allegations are of the scope of legality, which falls under the jurisdiction of the regular courts.

27. Moreover, the Constitutional Court recalls that it is not the task of the Constitutional Court to deal with errors of fact or of law (legality) allegedly committed by regular courts, unless they may have infringed rights and freedoms protected by the Constitution (constitutionality).

28. Meanwhile, the Applicant has not explained why and how her constitutional rights were violated; she does not substantiate a *prima facie* allegation on constitutional grounds and does not provide evidence that show that her rights and freedoms guaranteed by Article 31 of Constitution and Article 6 of ECHR have been violated by the District and Supreme Courts. In fact, the Applicant has not substantiated and proved an allegation on a constitutionality ground.

29. Thus, the Court should not act as a court of fourth instance, when considering the decisions rendered by the District and Supreme Courts. It is the task of the regular courts 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).

30. Furthermore, the Constitutional Court cannot consider that the pertinent proceedings of the District Court and Supreme Courts 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).

31. Therefore, the Court finds that the Applicant has neither built, nor shown, a *prima facie* case, either on merits or on the admissibility of the Referral.

32. In sum, the Court concludes that the Applicant's Referral, pursuant to Rule 36 (1) c) and (2) a) and d) of the Rules of Procedure, is manifestly ill-founded and, consequently, inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (1) and (7) of the Constitution, Article 48 of the Law and Rule 36 (1) c) and (2) a) and d) of the Rules of Procedure, on 4 July 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this Decision to the Parties;

III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and

IV. TO DECLARE this Decision immediately effective.

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

KI 56/13, Jashar Avdullahi, date 09 July 2013- Constitutional review of the Judgment of the Supreme Court of Kosovo Pkl.no. 5/2013 of 4 March 2013

Case KI-56/13, Resolution on Inadmissibility of 20 June 2013

Keywords: individual referral, manifestly ill-founded, interim measure, imprisonment sentence, criminal offence

The Applicant submitted Referral pursuant to Article 113.7 of the Constitution of Kosovo, by requesting the constitutional review of the Judgment of the Supreme Court of Kosovo Pkl.no. 5/2013 of4 March 2013. The Applicant considered that *"by Judgment of the Supreme Court of Kosovo, in the procedure for protection of legality as well as by the abovementioned judgments in the legal proceedings, the right to a fair, impartial and ewual trial were violated."*

At the same time, the Applicant requested the imposition of interim measure, "taking into consideration that the Applicant is sentenced to 3 years and 6 months imprisonment and at any time he might be called to serve his sentence, he considers that until the decision on the subject matter, the proposed interim measures can be imposed to delay the serving of the sentence in order that the irreparable damage to be avoided in case the basic request is successful."

Deciding on the Referral of the Applicant Jashar Avdullahit, after reviewing the proceedings in entirety, the Constitutional Court, from the case file found that the District Court in Gjilan by Judgment P.no. 138/2011, of 24 February 2012, explained in details why it accepted some evidence and rejected some others, as well as on the basis of which factual situation it came to conclusion that the Applicant committed criminal offence, by taking into consideration both, aggravating and mitigating circumstances, when pronouncing the sentence.

Based on the above, the Constitutional Court has not found that the respective procedures were in any way unfair or arbitrary. Therefore, the Court concluded that the Referral is manifestly ill-founded, because presented facts do not in any way justify the allegation of violation of any constitutional right.

At the same time, the Court rejected the Applicant's request for interim measure, with a justification that the latter has not submitted any convincing evidence, which would justify the imposition of interim measure as necessary to avoid irreparable damage, or an evidence that such a measure is in public interest.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI-56/13
Applicant
Jashar Avdullahi
Constitutional Review of the Judgment of the Supreme Court of Kosovo
Pkl.no. 5/2013 dated04 March 2013

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Jashar Avdullahifrom Gjilan, who before the Constitutional Court is represented by the lawyer Halim Sylejmani from Prishtina.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo Pkl.no. 5/2013 dated 04 March 2013, by which is rejected as ungrounded the Applicant's request for protection of legality, submitted against the Judgment of the District Court in Gjilan P.no. 138/2011, dated 24 April 2012 and the Judgment of the Supreme Court of Kosovo, Ap.no. 197/2012, dated 07 November 2012.

Subject matter

3. The subject matter is the criminal proceedings, in which the Applicant was found guilty for the criminal offence of endangering public traffic, pursuant to Article 297, paragraph 5, in conjunction with paragraph 3 of the Criminal Code of Kosovo (hereinafter: CCK), and sentenced to 3 (three) years and 6(six) months, which according to Applicant's

allegation*, "put him in an unequal position only because he passed without consequences in the traffic accident of the matter whereas the other participant himself and his companions experienced fatal consequences."*

Legal basis

4. Referral is based on Article 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 of the Law on Constitutional Court of the Republic of Kosovo, No. 03/L-121, dated 15 January 2009 (hereinafter: the Law) and the Rule 56, para.2 of the Rules of Procedure of the Constitutional Court of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 17 April 2013, the Applicant submitted Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: „the Court"), requesting at the same time the imposition of the interim measure with a justification:

> *"Taking into consideration that the Applicant is sentenced to 3 years and 6 months imprisonment and at any time he might be called to serve his sentence, he considers that until the decision on the subject matter, the proposed interim measures can be imposed to delay the serving of the sentence in order that the irreparable damage to be avoided in case the basic request is successful."*

6. On 20 May 2013, the Constitutional Court notified the Applicant and the Supreme Court of Kosovo that the proceedings of the constitutional review of the decision on the case no. KI-56-13 was initiated.

7. On 20 June 2013, after the review of the report of the Judge Rapporteur Robert Carolan, the Review Panel composed of judges: Altay Suroy (Presiding), Snezhana Botusharova and Kadri Kryeziu, recommended to the full Court the inadmissibility of the Referral.

Summary of facts

8. On 08 May 2009, the District Public Prosecution in Gjilan, by indictment PP.no. 49/2009 accused the Applicant Jashar Abdullahi from Gjilan of committing criminal offence of endangering public traffic, under Article 297, paragraph 5 in conjunction with paragraph 3 and 1 of CCK.

9. By Judgment of District Court in Gjilan, P.no. 102/2009, dated 20 January 2010, he was found guilty of committing criminal offence of endangering public traffic, under Article 297, paragraph 5 in conjunction with paragraph 3 and 1 of CCK and was sentenced to imprisonment of 4 (four) years.

10. The Applicant filed appeal against the Judgment of District Court in Gjilan, P.no. 102/2009, dated 20 January 2010, which was partly approved by the Supreme Court of Kosovo, by Resolution Ap.no. 148/2010 dated 05 May 2011, by which the abovementioned judgment was partly annulled and the matter was returned to the District Court for retrial.

11. In the repeated procedure, fully considering the Supreme Court recommendations specified in the Resolution Ap.no. 148/2010, dated 05 May 2011, as well as the detailed reasoning of all challenged matters, the District Court in Gjilan P.no. 138/2011, dated 24 February 2012, found guilty the Applicant Jashar Avdullahi and sentenced him to three (3) years and 6 (six) months of imprisonment.

12. The Applicant and District Public Prosecutor in Gjilan lodged the appeals against the Judgment of the District Court in Gjilan P.no. 138/2011, dated 24 February 2012, which were rejected by the Judgment of the Supreme Court of Kosovo Ap.no. 197/2012, of 07 November 2012 as ungrounded, and the Judgment of the District Court in Gjilan P.no. 138/2011, of 24 February 2012, was upheld.

13. The Applicant filed request for protection of legality against the Judgment of the Supreme Court of Kosovo, Ap. no. 197/2012, dated 07 November 2012.

14. Deciding on the request for protection of legality, the Supreme Court by Judgment Pkl. no. 5/2013, dated 04 May 2013, rejected the request for protection of legality as ungrounded, with justification:

> *"Although the defense counsel challenges the Judgment for violation of the Criminal Code and the Criminal Procedure Code to the detriment of the convicted, in fact he challenges the determined factual situation by claiming that the convicted did not commit the criminal offence for which he was convicted. The defense counsel claims that the Judgment did not consider the actions of the now deceased J. S., who according to allegations of the defense counsel was the one that caused the accident by driving his vehicle at over 104 km per hour whereas the convicted drove his vehicle at 75 km per*

hour, therefore the only responsible for the accident, according to the opinion of the defense counsel, was the now deceased. Furthermore, according to allegations of the defense counsel the respective provisions of the Criminal Procedure Code were violated, since the contradictory evidence have not been evaluated, the opinion of the expert M. H. has not been evaluated at all, thus Article 185 of the Provisional Criminal Procedure Code of Kosovo (PCPCK) has been violated."

"The allegations of the defense counsel of the convicted Jashar Avdullahi are related to the factual situation that cannot be the subject matter with the request for protection of legality as extraordinary legal remedy because in relation to the factual situation there is no doubt on any circumstance. The convicted Jashar Avdullahi engaged in overtaking another vehicle in violation to the respective provisions of the Law on the Safety of the Road Traffic thus causing the forbidden consequence, which ended the life of J. S. and T. S. whereas B. S. and M. T. suffered heavy bodily injuries. The enacting clause of the Judgment contains the factual description of the incriminating actions of the convicted Jashar Avdullahi which he undertook by violating the legal provisions. The reasoning of the challenged judgments contains the necessary factual and legal key facts as well as the necessary and legal evaluation of the evidences. The court reviewed the expertise of expert I. B. and of the group of experts of Technical Faculty who were authorized by the court to carry out the expertise whereas the expertise of M. H. was carried out based on the engagement of the defense counsel of the convicted and as such was not a subject of evaluation."

"In regard to violation of the Criminal Code, the defense counsel of the convicted claims that it has not been confirmed that the convicted has undertaken the incriminating actions, therefore there was no ground to find him guilty but in spite of this with their Judgments the courts without any ground found him guilty and convicted him. According to the correctly and completely determined factual situation this Court finds that the Criminal Code was correctly applied when the accused was found guilty by the first instance court for the criminal offence of endangering the public traffic pursuant to Article 297, paragraph 5 in conjunction with paragraphs 3 and 1 of the Criminal Code of Kosovo (CCK) and this was confirmed by the Supreme Court of Kosovo, thus the Judgments of both courts are challenged without any ground by the request for protection of legality."

Applicant's allegations

15. The Applicant considers that *"by Judgment of the Supreme Court of Kosovo, in the procedure of the protection of legality as well as by the abovementioned Judgments in the legal proceedings the rights to a fair, impartial and equal trial with other participant in the traffic accident of the matter were violated."*

16. According to Applicant's allegations, *"intentionally or accidentally,the Applicant was put in an unequal position only because he passed without consequences from the traffic accident of the matter whereas the other party himself and his companions experienced fatal consequences."*

17. The Applicant considers that "*were violated* the provisions *of the Constitution of the Republic of Kosovo for guaranteeing equality and impartiality of the participants in the implemented legal proceedings, as well as legal provisions in appointment and selections of judges."*

Assessment of admissibility of the Referral

18. The Applicant alleges that "*the violated provisions of the Constitution of the Republic of Kosovo for guaranteeing equality and impartiality of the participants in the implemented legal proceedings, as well as legal provisions of appointment and selections of judges"* are the ground for his Referral.

19. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.

20. Article 48 of the Law on Constitutional Court of the Republic of Kosovo 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."*

21. According to Constitution, the Constitutional Court is not a court of appeal, 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).

22. The Applicant has not submitted any prima facie evidence, which indicates on the violation of his constitutional rights (See, Vanek against Republic of Slovakia, Decision of ECHR on the admissibility of request, no. 53363/99 dated 31 May 2005). The Applicant does not indicate which Articles of the Constitution support his request, as it is provided by Article 113.7 of the Constitution and Article 48 of the Law.

23. The Applicant alleges that*"by Judgment of the Supreme Court of Kosovo, in the procedure for protection of legality, as well as by abovementioned judgments in the court proceedings, the rights on fair, impartial and equal trial were violated ..."*

24. From the case file is clearly seen that the District Court in Gjilan by Judgment P.no. 138/2011, dated 24 February 2012, explained in details why it accepted some evidence and rejected some others, as well as on the basis of which factual situation it came to conclusion that the Applicant committed criminal offence, by taking into consideration both, aggravating and mitigating circumstances when pronouncing the sentence.

25. The Judgment of District Court in Gjilani P.no. 138/2011, dated 24 February 2012, was definitely upheld by the Judgment of the Supreme Court of Kosovo Ap.no. 197/2012, dated 07 November 2012 as well as by Judgment of the Supreme Court of Kosovo Pkl.no. 5/2013, dated 04 May 2013, with detailed reasoning to all appealed allegations of the Applicant.

26. In the present case, the Applicant was afforded many opportunities to present his case before the District Court in Gjilan and the Supreme Court of Kosovo and to challenge the interpretation of the law which he considered incorrect,. 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).

27. In conclusion, the Referral does not meet the admissibility criteria. It failed to provide and substantiate by evidence that the challenged judgment, allegedly, violated his rights and freedoms.

28. It follows 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, pursuant to Article 113 paragraphs 7 of the Constitution, Article 48 of the Law and Rule 36 (2.b) of the Rules of Procedure, on 5 July 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the request for imposition of 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; and

IV. This Decision is effective immediately.

Judge Rapporteur
Robert Carolan

President of the Constitutional Court
Prof. Dr. Enver Hasani

KI 107/12, Jovica Đorđević, date 09 July 2013,- Constitutional Review of the Resolution of the District Court in Prishtina Gž.no.1490-2011, of 26 June 2012

Case 107/12, Resolution on Inadmissibility of 19 June 2013.

Keywords: individual Referral, constitutional review of the Resolution of the District Court

The Referral Applicant filed the Referral pursuant to 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 15 January 2009

On 29 October 2012, the Referral Applicant filed Referral with the Constitutional Court of the Republic of Kosovo and sought from the court the constitutional review of the Resolution of the District Court in Prishtina.

The Applicant claims that the Resolution of District Court violates her property rights as per Article 46 (Protection of Property) and Article 54 (Judicial Protection of Rights) of the Constitution of Kosovo.

The President with Decision (no.GJR. KI 107/12 of 06 December 2012), appointed Kadri Kryeziu as Judge Rapporteur, and on the same day the President with Decision KSH 107/12 appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Altan Suroy and prof. dr Enver Hasani.

The Court upon examining the case concludes that the Applicant has not exhausted all legal remedies, as it is provided by Article 113.7 of the Constitution.

For all the aforementioned reasons, the Constitutional Court of Kosovo in the session held on 19 June 2013 rendered the Referral inadmissible.

RESOLUTION ON INADMISSIBILITY
in
Case no. KI107/12
Applicant
Jovica Đorđević
Constitutional Review of the Resolution of the District Court in Prishtina Gž.no.1490-2011, of 26 June 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is Jovica Đorđević, from the village of Kolevica, Municipality of Prishtina (hereinafter: Applicant), represented by lawyer Živojin Jokanović from Prishtina.

The challenged decision

2. The Applicant challenges the final resolution of the District Court in Prishtina Gž. no. 1490-2011, of 26 June 2012, served on the Applicant on 19 July 2012.

Subject Matter

3. The subject matter of the referral filed with the Constitutional Court of Kosovo (hereinafter: Court), on 29 October 2012, is certification of the ownership on four (4) parcels, which are subject of a contract entered into on 29 December 1998.

Legal basis

4. The referral is grounded upon Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: Constitution), Article 21.4, Articles 20,

22.7 and 22.8 of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 15 January 2009 (hereinafter: Law), and Rule 56, paragraph 2 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: Rules of Procedure).

Proceeding before the Court

5. On 29 October 2012, the Applicant filed a referral with the Constitutional Court of the Republic of Kosovo, registered as case no. KI 107/12.

6. On 6 December 2012, the President of the Court appointed Judge Kadri Kryeziu as judge rapporteur, and the Review Panel, composed of Judge Robert Carolan (Presiding), Altay Suroy and Prof. dr. Enver Hasani.

7. On 1 March 2013, the Constitutional Court notified the Applicant and the Basic Court in Prishtina, that the referral was registered as KI 107/12.

8. On 14 May 2013, after having considered the report of Judge Rapporteur, the Review Panel made a recommendation to the full Court on the inadmissibility of the Referral.

Summary of facts (proceedings before regular courts)

9. On 29 December 1998, presently deceased Ž.Đ., from the Kolevica Village, Municipality of Prishtina, entered into a contract on exchange of land with the Assembly of the City of Prishtina.

10. By such contract, Ž.Đ. gave the Prishtina City four (4) parcels, at a total surface area of 1,58.86 ha, in which case he received from the City of Prishtina and the Agricultural and Industrial Combine in Fushe Kosova (hereinafter: "KBI-Fushe Kosova") four (4) parcels, with a total surface area of 1,52.15 ha.

11. In the meantime, the Municipality of Prishtina and KBI Fushe Kosova, respectively the legal heir the Privatization Agency, have contested the validity of such contract.

12. On 20 November 2006, the Applicant, who is legal heir of the late Ž.Đ., filed a civil claim with the Municipal Court in Prishtina, against the Municipality of Prishtina and KBI Fushe Kosova, thereby demanding verification of property rights over four (4) parcels which are subject of the Contract [Vr. no. 4149], of 29 December 1998.

13. On 1 November 2007, the Municipal Court in Prishtina approved the statement of claim of the Applicant and rendered a Judgment [P. no. 226/06], thereby certifying the property rights of the Applicant.

14. During the proceeding before the Municipal Court, the respondent, the Privatization Agency alienated three (3) parcels (date of such alienation is not found in case files), which are subject of this dispute, in compliance with Article 5.1, UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency. (see paragraph 30)

15. On an unknown date, the claimant filed a complaint against the Judgment of the Municipal Court [P.no. 2264/06] of 1 October 2007.

16. On 21 May 2008, the District Court in Prishtina rendered a Judgment [Gž. (Ac) no. 181/2008], thereby partially upholding the Judgment of the Municipal Court [P.no. 2264/06] of 1 October 2007. With the Judgment, the Court certified the property rights of the Applicant only over one parcel, parcel no. 1811, surface area of 0,62.46 ha, while for the three other parcels, the Judgment was annulled, while the case was returned to the Municipal Court for re-decision.

17. During the appellate proceedingsbefore the District Court, the Privatization Agency, pursuant to the same Article 5.1 of the UNMIK Regulation no. 2002/12 alienated also the parcel no. 1811, which was judged to the claimant (Applicant in this case), by Judgment [Gž.(Ac) no. 181/2008], so that the execution was also impossible to be implemented for the parcel no. 1811.

18. On 4 May 2009, in relation to the objection of the Privatization Agency, by Resolution [P.no. 1144/08] the Municipal Court proclaimed itself incompetent for this legal matter. In its resolution, the Court stated that "only the Special Chamber of the Supreme Court on PAK related matters is competent to resolve this property dispute, and that the procedure of certifying the property rights over four (4) parcels which are subject of the Contract [Vr.no. 4149 of date 29], is transferred to the competence of the Special Chamber of the Supreme Court of Kosovo on PAK related matters, which shall undertake the proceeding with the case no. SCC-09-0225."

Proceeding related to the request for execution of judgment of the District Court [Gž(Ac) No. 181/2008]

19. On an unknown date in 2009, the Applicant filed with the Municipal Court a request for a safeguard measure for execution of judgment of the District Court [Gž.(Ac)no.181/2008], of 21 May 2008, the enacting clause of which only covers the parcel no. 1811.

20. The Applicant requested that pursuant to the law then in force, an interim measure to be imposed on another parcel, parcel no. 1831 CZ Prishtina, which is owned by the claimant, with the surface area of 0.62.46 ha, and that the respondent parties to be prohibited to alienate or lien the mentioned part of the parcels, as a measure of security until the ultimate decision of the Special Chamber of the Supreme Court.

21. On 18 April 2011, the Municipal Court in Prishtina, by resolution [I.No.583/08] rejected the claim of the claimant. In its decision, the Court stated that "*the claim of the claimant is hereby rejected, because pursuant to Article 5.1 of the Law on the Privatization Agency of Kosovo (Law no. 03/1-067), it is provided that the Agency is authorized to manage enterprises in social ownership, independently of them being subject to transformation or not. Pursuant to Article 4.1 of the UNMIK Regulation 2002/13, on the Establishment of the Special Chamber of the Supreme Court of Kosovo on PAK related matters, the exclusive jurisdiction on the claim of the claimant is under the Special Chamber of the Supreme Court of Kosovo".* (see paragraph 31)

22. On 16 October 2011, in relation to the appeal of the Applicant, the District Court, by resolution [Gž.no.461-211] approved the appeal, and quashed the decision of the Municipal Court [I.no.583/2008], of 18 April 2011, and returned the case to the Municipal Court for the renewed proceedings and re-decision.

23. On 16 November 2011, by resolution [no.538/08] the Municipal Court rejected again the claim of the Applicant as ungrounded.

24. On an unknown date, the claimant lodged an appeal against the resolution of the Municipal Court [no. 538/08].

25. On 26 June 2012, the second instance court, the District Court in Prishtina, by a final resolution [GZH.no.1490/2011] rejected the appeal of the Applicant as ungrounded, thereby upholding in its entirety the resolution of the Municipal Court [I.no.583/08], of 18 April 2011.

26. On 30 July 2012, the Applicant filed a request for protection of legality with the State Prosecutor of Kosovo, against the final resolution of the District Court [Gž.no.1490-2011] of 26 June 2011.

27. On 7 August 2011, the State Prosecutor of Kosovo, by letter [ZZZG.no.80-12] notified the Applicant that he found no legal basis for filing the request for protection of legality in this case.

Allegations of the Applicant

28. The Applicant claims that his property rights to have been violated, as per Article 46 (Protection of Property) and Article 54 (Judicial Protection of Rights) of the Constitution of Kosovo.

29. Also, the Applicant claims that Article 22 of the Constitution of Kosovo provides on direct application of international agreements and instruments, thereby emphasizing specifically the Universal Declaration on Human Rights, Articles 8, 10 and 17, which provide on human right for the national courts to protect efficiently the persons from violations of basic rights as guaranteed by Constitution and Laws.

30. The Applicant addresses the Constitutional Court with the following demand:

> ***"****That the Court assess the constitutionality and legality of the challenged decision, and to find that his rights, as guaranteed by the Constitution of the Republic of Kosovo, were violated to the detriment of the Applicant, and that the lower instance courts (Municipal Court and District Court in Prishtina) have violated the law on executive procedure to the detriment of the applicant, and that the decisions are unconstitutional".*

Relevant Law

31. Article 5.1 of the UNMIK Regulation no. 2002/12 on the Establishment of the Kosovo Trust Agency;

> *"The Agency is authorize to govern socially and publicly owned enterprises registered or operating within the territory of Kosovo, and the assets such enterprises have within the Kosovo territory".*

32. Article 4.1 of the UNMIK Regulation 2002/13 on the Special Chamber of the Supreme Court, "The Special Chamber shall have primary jurisdiction for claims or counterclaims in relation to the following";

"[...]"

d) "Claims involving recognition of a right, title or interest in property in the possession or control of an Enterprise or Corporation currently or formerly under the administrative authority of the Agency, where such claims arose during or prior to the time that such Enterprise or Corporation is or was subject to the administrative authority of the Agency".

Assessment of admissibility

33. To be able to adjudicate the referral of the Applicant, the Court must initially verify whether the Applicant has met the admissibility criteria, as provided by Constitution, provided in further detail by the Law on the Constitutional Court and the Rules of Procedure.

34. In this sense, the Court convenes the 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".

35. On the other hand, the Article 47(2) of the Law also provides that:

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

36. Moreover, the Rule 36(1) a) provides that:

"The Court may only deal with Referrals if all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted".

37. The Applicant, in his referral filed with the Constitutional Court, has stated that upon objection by the Privatization Agency, the competence for resolving this property dispute, filed on 4 May 2009, was transferred to the Special Chamber of the Supreme Court, the case was registered as "SCC-09-0225" and that such proceeding is ongoing. The Constitutional Court finds that such allegations of the Applicant are provided in detail with the enacting clause of the Municipal Court decision [P.no.1144/08] of 4 May 2009 (see paragraph 17).

38. The Court notes that on 18 April 2011, the Municipal Court in Prishtina, by decision (I.no.583/08] rejected the request for allowing execution of

judgment of the Municipal Court [Gž.(Ac) no.181/2008] as filed by the Applicant. In its decision, the Court stated that "the request of the Applicant is rejected [...] Pursuant to Article 4.1 of the UNMIK Regulation 2002/13 on the Establishment of the Special Chamber of the Supreme Court of Kosovo on PAK related matters, the Special Chamber of the Supreme Court of Kosovo enjoys exclusive jurisdiction on the request of the Applicant."

39. The Court also notes that during the period between 20 November 2006 and until 4 May 2009, the procedure certifying property rights in this legal matter was undertaken before regular courts, although during that period, the UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency was in force since 13 June 2002, thereby providing the issues of disputes against the Agency. The Article 30.1 of the UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency provides that:

"*The Special Chamber shall have exclusive jurisdiction for all suits against the Agency*".

40. The Court reminds that the principle of subsidiarity requires that the Applicant exhausts all procedural remedies in a regular proceeding, in the manner of preventing constitutional violations, if any, and improve on such a violation of basic human rights. In compliance with this, the exhaustion of available remedies according to applicable law has not been made yet.

41. The reasoning of the exhaustion rule is to provide the authorities a possibility to prevent or improve alleged constitutional violations. The rule is grounded upon the assumption that the state order of Kosovo provides efficient remedies against violations of constitutional rights. This is an important aspect of the subsidiary nature of the Constitution (see Resolution on inadmissibility: AAB-RIINVEST University Prishtina v. Government of the Republic of Kosovo, KI-41/09, of 21 January 2010, and see, *mutatis mutandis,* ECHR, Selmouni v. France no. 25803/94, decision of 28 July 1999).

42. In fact, as a rule, the Constitutional Court shall only intervene when there is a violation of the Constitution, or when the Laws are incompliant with the Constitution, but only after all other remedies available by law.

43. Therefore, the referral, in compliance with Article 113.7 of the Constitution, Article 47(2) of the Law, and Rule 36 (1) a) of the Rules of Procedure, is found to be inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rules 36 (1) a) and 56 (2) of the Rules of Procedure, in the session of 5 July 2013, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO NOTIFY this decision to the Parties

III. TO PUBLISH the decision 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**
Dr. Sc. Kadri Kryeziu	Prof. Dr. Enver Hasani

KI 07/13, Ibish Kastrati, date 09 July 2013 -- Constitutional Review of the Decision of the Municipal Court in Peja, N. no. 137/08, of 17 November 2008.

KI07/13, Resolution on Inadmissibility, of 5 July 2013

*Keywords:*individual referral, protection of property, non-exhaustion of legal remedies, premature referral

The Applicant seeks to enjoy his right to free and fun possession of immoveable property as per sale and purchase contract, thereby demanding enforcement of the Decision of the District Court in Peja, A. 1174/56-57, of 17 October 1957.

The Applicant also requests from the Court to terminate the court proceeding pending before the Basic Court in Peja.

In the concrete case, the Court notes that the Municipal Court in Peja, by its decision no. 137/08 of 17 November 2008, has decided to suspend the non-contested procedure so that the Applicant would file a civil lawsuit with the competent court. As a result of the abovementioned decision, the Applicant has filed a claim with the competent court, where the proceeding is still ongoing.

Setting from the fact that the case of the Applicant is still under review in a regular court proceeding before the Basic Court in Peja, the Court notes that the Applicant's Referral is premature.

RESOLUTION ON INADMISSIBILITY
in
Case No. KI 07/13
Applicant
Ibish Kastrati
Constitutional Review of the Decision of the Municipal Court in Peja, N.no. 137/08, of 17 November 2008

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:
Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

Applicant

1. The Referral was filed by Ibish Kastrati (hereinafter: Applicant), residing in Peja.

Challenged decision

2. The challenged decision is the decision of the Municipal Court in Peja, N. No. 137/08, of 17 November 2008, served on the Applicant on 10 December 2008.

Subject matter

3. The Applicant seeks to enjoy his right to free and full possession of immoveable property as per sale and purchase contract, thereby demanding enforcement of the Decision of the District Court in Peja A. 1174/56-57 of 17 October 1957 and termination of retrial.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: Law), and Rule 56, item 2, of

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

Proceedings before the Court

5. On 23 January 2013, the Applicant filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: Court).

6. The President appointed Judge Altay Surroy as Judge Rapporteur, and the Review Panel composed of Judges, Snezhana Botusharova (Presiding), Ivan Čukalović and Kadri Kryeziu.

7. On 15 February 2013, the Constitutional Court informed the Applicant on the registration of the referral. On the same date, the Court notified the Basic Court in Peja of the registration of the Referral, thereby requiring confirmation whether there is any pending proceeding before that court in connection with the Referral.

8. On 27 February 2013, the Court received a letter from the Basic Court in Peja, which informed that in relation with the case N. No. 137/08, the proceeding was suspended on 17 November 2008, and the party was instructed to a civil suit, also informing that the case is pending before that court.

9. On 1 March 2013, the Court received a letter from the Applicant, which again contained the Decision of the District Court in Peja A. 1174/56-57, of 17 October 1957, and Decision of the Municipal Court in Peja N. Nr. 137/08, of 17 November 2008.

10. On 17 June 2013, the Review Panel considered the report of Judge Rapporteur and made a recommendation to full Court on the inadmissibility of the Referral.

Summary of facts as submitted by the Applicant

11. *According to the documents filed with the Referral, the Applicant acquired his property rights based on a contract on sale/purchase, certified by the Municipal Court in Peja, No. 882/61, of 1 August 1961. In certifying the contract, the number of cadastral parcel and area purchased was not entered, but the immovable property was certified based on Decision of the District Court N. No. 1174/56, of 17 October 1957, on division of immoveable property between the former owner of the property and his brother.*

12. *The Applicant claims to have enjoyed possession of his immoveable property in its proper boundaries until 1999, as was given by the former owner. But, when the corn shed which marked the boundary between his property and the neighboring property was burned during the war, the possessor of the neighboring immovable property placed an iron mesh fence, and according to the claims of the Applicant, entered the property of the Applicant.*

13. *On 17 June 2008, the Applicant filed a proposal with the Municipal Court for the delineation of immoveable property, and determination of boundaries for parcels 475/1 and 475/2.*

14. *The Municipal Court in Peja, in the non-contested procedure, with a view of identifying and delineating boundaries, had ordered geodesy experts to conduct a site inspection. In their report, the experts had found that cadastral surveys had not been made since 1956, and lacking such cadastral records, delineation of the boundaries was not possible according to the proposal of Applicant and the order of the Municipal Court.*

15. *On 17 November 2008, after the statements of the parties, expert reports and site inspection by the Court, the Municipal Court, in its decision N. No.137/08 found that* "there are disputes between the proposing and counter-proposing parties on cadastral boundaries". *As a result of lack of records, and disagreements between parties on the boundaries of the property, the Court decided to suspend the non-contested proceeding, so that the Applicant would file a lawsuit with the competent court.*

16. *According to the information letter of the Basic Court in Peja, received by the Constitutional Court on 27 February 2013, it is confirmed that the Applicant has filed a civil lawsuit with the Municipal Court in Peja, registered with the court as case C. No. 1033/08. In its letter, the Basic Court in Peja also confirms that in relation with case C. No. 1033/08, there is a pending court proceeding, thereby informing that two hearing sessions have already been held, namely on 26 December 2012 and 10 January 2013, and that the next sessions are to be scheduled for the future.*

Applicant's allegations

17. In his referral to the Court, the Applicant seeks to enjoy his right to free and full disposal of immoveable property as per contract of sale, thereby

demanding enforcement of the Decision of the District Court in Peja A. 1174/56-57 of 17 October 1957.

18. The Applicant also demands from the Court to terminate the court proceeding pending before the Basic Court in Peja.

Assessment of admissibility of the Referral

19. In order to adjudicate the Applicant's Referral, the Court must first assess whether the Applicant has met all admissibility requirements set forth in the Constitution, and further specified by the Law and Rules of Procedure.

20. The Court must first assess whether the Applicant is an authorized party to file a Referral with the Court, in compliance with Article 113.7 of the Constitution.

Article 113 paragraph 7 of the Constitution 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."

In relation to the Referral, the Court notes that the Applicant is a natural person, and is an authorized party in compliance with Article 113.7 [Jurisdiction and Authorized Parties] of the Constitution.

21. The Court must also determine whether the Applicant, in compliance with requirements of Article 113.7 of the Constitution, Article 47.2 of the Law, and Rule 36.1 of the Rules of Procedure, has exhausted all legal remedies.

22. Article 47.2 of the Law on the Court provides that:

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

23. Furthermore, Rule 36 1. (a) of Rules of Procedure provides that:

"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".

24. In the concrete case, the Court notes that the Municipal Court in Peja, by its decision no. 137/08 of 17 November 2008, has decided to suspend the non-contested procedure so that the Applicant would file a civil lawsuit with the competent court. As a result of the abovementioned decision, the Applicant has filed a claim with the competent court, where the proceeding is still ongoing.

25. Setting from the fact that the case of the Applicant is still under review in a regular court proceeding before the Basic Court in Peja, the Court notes that the Applicant's Referral is premature.

26. In this case, the Court reiterates that the regular courts are independent in exercising their legal powers and it is their constitutional obligation and prerogative to interpret issues of fact and law which are relevant for the cases raised before them.

27. The purpose of the exhaustion rule is, in this case, to provide regular courts a possibility of putting right any alleged violations of the Constitution. The rule is based on the assumption that the legal order in Kosovo will provide effective legal remedies for the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (See *Resolution on Inadmissibility - AAB-RIINVEST L.L.C., Prishtina versus the Government of the Republic of Kosovo,* KI-41/09 of 21 January 2010, and see also *mutatis mutandis*, ECHR, *Selmouni v. France*, no. 25 803/94, Decision of 28 July 1999).

28. The principle of subsidiarity requires that the Applicant have exhausted all procedural means in a regular proceeding, administrative or judicial, so that constitutional violations are prevented, or in case they happen, to rectify such violation of basic rights. (See*, Resolution in the case KI07/09, Demë Kurbogaj and Besnik Kurbogaj, Review of the Judgment of the Supreme Court Pkl.no. 61/07, of 24 November 2008, paragraph 18*).

29. Consequently, the Constitutional Court cannot assess any alleged constitutional violations, without the regular courts having the possibility to complete the pending procedure and correct the alleged violations.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rules 36.1 (a) and 56.2 of the Rules of Procedure, on 5 July 2013, 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
Altay Surroy

President of the Constitutional Court
Prof. dr. Enver Hasani

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