



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE  
УСТАВНИ СУД  
CONSTITUTIONAL COURT**

Prishtina, on 13 February 2018  
Ref. no.: RK 1200/18

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI118/17**

Applicant

**Şani Kervan and others**

**Constitutional review of Judgment Rev. No. 48/2017 of the Supreme  
Court of Kosovo of 13 April 2017**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy President  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge.

#### **Applicant**

1. The Referral was submitted by Şani Kervan, Mazhar Červani, Didar Kervan, Türan Kervan, Idjret Kirkul, Suna Taduška, Ismailhaki Micalar, Özcan Micalar, Tyrkan Hameli, Severcan Kazaz, Fikriye Kervan, Ergin Kervan, Enis Kervan and Emel Kervan (hereinafter: the Applicants), all from Prizren.

## **Challenged decision**

2. The Applicants challenge the constitutionality of Judgment Rev. No. 48/2017 of the Supreme Court of Kosovo of 13 April 2017, in conjunction with Judgment Ac. No. 4151/14 of the Court of Appeals of 31 October 2016.
3. The Judgment Rev. no. 48/2017 of the Supreme Court of Kosovo of 13 April 2017 was served on the Applicants on 5 June 2017.

## **Subject matter**

4. The subject matter is the constitutional review of the challenged Judgments of the Supreme Court and of the Court of Appeals. The Applicants allege violation of Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: ECHR).

## **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution, Articles 47 and 48 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 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 3 October 2017, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 5 October 2017, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.
8. On 30 October 2017, the Court notified the Applicants about the registration of Referral and requested them to complete the Referral as well as to submit evidence (acknowledgment of receipt) indicating the date of receipt of the challenged decision. On the same date, a copy of the Referral was sent to the Supreme Court and Basic Court in Prizren.
9. On 14 November 2017, the Applicants completed their Referral and submitted the evidence indicating the date of receipt of the challenged decision.
10. On 17 January 2018, 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. In 1959, the then so-called District Council in Prizren, as an expropriating authority, rendered a decision on the expropriation of the parcels of the SC, which based on the submitted documents, was the decedent of the Applicants. The expropriation was implemented in the interest of, then, the Railway Transport Company from Belgrade - the Construction Supervision Section in Prizren, which aimed at building the railway line Prizren-Gjakova and Prizren-Fushë Kosovë.
12. In 1983, the two parcels mentioned above were merged with another parcel and have since been registered on behalf of the Socially Owned Enterprise (hereinafter: SOE) "Kosovo Railways", with seat in Fushë Kosovë.
13. On an unspecified date, the Applicants filed a statement of claim against the Municipality of Prizren and Infrastructure of Kosovo Railways "Infrakos" JSC - the successor of SOE "Kosovo Railways" (hereinafter: "Infrakos") with the purpose of confirmation of ownership and delivery of the immovable property.
14. On 20 December 2013, the Basic Court in Prizren (Judgment P. No. 135/10) approved the statement of claim of the Applicants and held that: (i) the Applicants are co-owners based on the inheritance of immovable property of SC; (ii) obliged the responding parties, the Municipality of Prizren and Infrakos to recognize to the Applicants the inheritance right and to hand over to them the possession and use of the disputed immovable property; and (iii) ordered that the property of the Applicants be registered in immovable property registers within 15 (fifteen) days of the date the Judgment becomes final, under threat of execution.
15. The Basic Court for the abovementioned findings was based on a number of acts, documents and evidence, such as: the law on basic legal-property relations, witness statements, civil status certificates and geodesic sketches.
16. Meanwhile, "Infrakos" filed an appeal against the aforementioned Judgment of the Basic Court, alleging an essential violation of the challenged provisions, erroneous and incomplete determination of factual situation and erroneous application of the substantive law by proposing that the Applicants' statement of claim be rejected as ungrounded or the Judgment be annulled and the case be remanded to the Basic Court for reconsideration and retrial.
17. On 31 October 2016, the Court of Appeals (Judgment Ac. No. 4151/14) decided to: (i) approve the appeal of "Infrakos" as grounded; (ii) modify the Judgment of the Basic Court; (iii) reject the Applicants' statement of claim for confirmation and delivery of the disputed immovable property; and (iv) to reject the obligation of "Infrakos" and the Municipality of Prizren to handover to the Applicants the possession and free use of the disputed immovable property.
18. The Court of Appeals found that the Judgment of the Basic Court was characterized by essential violations of the procedural provisions, erroneous

and incomplete determination of factual situation and erroneous application of the substantive law. The Court of Appeals, among other things, found that the spouse of S. C. (the decedent) was compensated by the Expropriating Authority for expropriation of the immovable property, that in the cadastral records the necessary changes had been made and that the challenged immovable property is registered on behalf of “Infrakos”, and moreover, the expropriation occurred in 1959, while the Applicants submitted their statement of claim in 2004.

19. On 17 December 2016, the Applicants submitted a request for revision to the Supreme Court alleging essential violation of the procedural provisions and erroneous application of the substantive law by proposing that the Judgment of the Court of Appeals be quashed and the case be remanded to the first instance court for retrial. The Applicants mainly requested that their ownership right be confirmed, the immovable property be handed over and the expropriation decision of 1959, which allegedly was not confirmed by the Court of Appeals, be certified.
20. On 13 April 2017, the Supreme Court (Judgment Rev. No. 48/2017) rejected as ungrounded the revision of the Applicants filed against the Judgment of the Court of Appeals. The Supreme Court briefly described the case history since 1959 and the proceedings conducted before the lower instance courts. The Supreme Court reasoned that the Applicants' statement of claim for the confirmation and handover of the disputed immovable property was statute-barred because until 2004 they did not show interest in the immovable property concerned. The Supreme Court also explained that there was no essential violation of the procedural law or erroneous application of the substantive law because the Court of Appeals certified the decision on expropriation.

### **Applicant's allegations**

21. The Applicants allege violation of Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution in conjunction with Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: ECHR).
22. The Applicants allege that *“they are the owners of cadastral parcels subject of this dispute based on inheritance. This right is inviolable and is guaranteed by the Constitution. However, by abovementioned court decisions, by unfair trial, the claimants' statement of claim was rejected and thus, in unlawful manner the claimants were deprived of their property rights over the same immovable property”*.
23. The Applicants allege that the Court of Appeals was partial, because it did not properly analyze all the case files and that this resulted in a violation of a fair trial and the right to property.
24. The Applicants finally request the Court to annul the challenged Judgments of the Court of Appeals and of the Supreme Court.



## Admissibility of Referral

25. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.
26. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

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

*(...)*

*7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law”.*

27. The Court refers to Article 49 [Deadlines] of the Law, which stipulate:

### *Article 49*

*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”.*

28. The Court refers to Article 48 [Accuracy of the Referral] of the Law which provides:

### *Article 48*

*“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. The Court further takes into account Rule 36 (2) (d) of the Rules of Procedure, which specifies:

*“(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*

*[...]*

*d) the Applicant does not sufficiently substantiate his claim.”*

30. In the present case, the Court notes that the Applicants are authorized parties, that they have exhausted all legal remedies in accordance with paragraphs 1 and 7 of Article 113.7 of the Constitution, and that the Referral was submitted within the legal deadline of 4 (four) months as provided by Article 49 of the Law.

31. The Court must further establish whether the Applicants have specified and substantiated their constitutional allegations as provided by Article 48 of the Law and further specified in Rule 36 (2) (d) of the Rules of Procedure.

32. Finally, the Court refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which establishes:

*„Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.“*

33. As to the Applicants' allegation of violation of a fair trial and protection of property, the Court notes that the regular courts have responded to all their central allegations by explaining the issue of the statutory limitation of the statement of claim, the issue of compensation after the expropriation, the question of the certification of the expropriation decision and the obligation of the Applicants to substantiate their allegations with concrete evidence.

34. The challenged Judgment of the Supreme Court, in the relevant part, reads:

*“...This Court considers that there is no violation of the provisions of the procedure, because the abovementioned decision on expropriation and the cadastral parcel number 7072 is in the case file (Article 24 of the Decision), and there are no ambiguities. The allegation in the revision that the second instance court failed to confirm that the aforementioned expropriation decision was not served to the claimants' predecessors is ungrounded because the claimants did not prove such an allegation and were obliged to prove the facts on which they based their requests and allegations in accordance with Articles 7 and 319 of the LCP ...the Supreme Court accepts in this respect as all the legal and factual findings of the second instance court as grounded regarding the rejection of the claimants' statement of claim as ungrounded, including the fact that the immovable property under the procedure established by law was expropriated from the claimants' predecessors in 1959, was transferred to the ownership of the expropriation beneficiary, so that in accordance with Article 20.2 of the Law on the Basic Property Legal Relations, the respondent, based on the decision of the state authority, acquired the right to use and possess the plots in question. Therefore, the claimants have no legal basis for recovering the use and possession of the parcels in question“.*

35. In this regard, the Court notes that the Applicants had the benefit of the conduct of the proceedings based on adversarial principle; that they were able to adduce the arguments and evidence they considered relevant to their case at the various stages of those proceedings; they were given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, relevant for the resolution of their case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and that, according to the circumstances of the case, the proceedings,



viewed in entirety, were fair (See, for example, *Garcia Ruiz v. Spain*, [GC], application no 30544/96, Judgment of 21 January 1999, paragraph 29).

36. The Court reiterates that Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 (Right to a fair trial) of the ECHR, do not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provide for the Court to challenge the application of substantive law by the regular courts of a civil dispute, where often one of the parties wins and the other loses (Constitutional Court of the Republic of Kosovo: Case no. KI142/15 Applicant: *Habib Makiqi*, Constitutional review of Judgment Rev. No. 231/2015, of the Supreme Court of Kosovo, of 1 September 2015, Resolution on Inadmissibility of 1 November 2016, paragraph 43).
37. In this respect, in order to avoid misunderstandings on the part of applicants, should be borne in mind that the "fairness" required by Article 31 of the Constitution is not "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (Constitutional Court of the Republic of Kosovo: Case no. KI42/16 Applicant: *Valdet Sutaj*, constitutional review of Decision Rev. No. 201/2015 of the Supreme Court of Kosovo, of 8 September 2016, Resolution on Inadmissibility of 7 November, para. 41 and other references therein).
38. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and material law (See, *mutatis mutandis*, *Garcia Ruiz v. Spain* [GC], No. 30544/96, para. 28, European Court of Human Rights [ECtHR] 1999-I).
39. In addition, the Constitutional Court recalls that it is not a fact-finding court and that the correct and complete determination of factual situation is within the full jurisdiction of the regular courts. The role of the Constitutional Court is solely to ensure the compliance of the proceedings before the regular courts with the constitutional rights and standards, therefore, it cannot act as "*fourth instance court*" (see case *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court of the Republic of Kosovo: case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility, of 5 April 2012).
40. The Court notes that it is not the duty of the Constitutional Court to deal with the errors of fact or law allegedly made by regular courts when assessing evidence or applying the law (legality), unless and insofar this may have resulted in a violation of the rights and freedoms protected by the Constitution (constitutionality).
41. The fact that the Applicants disagree with the outcome of the case cannot serve them as a right to raise an arguable claim on violation of the rights and freedoms guaranteed by the Constitution and ECHR (See: Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).

42. Based on the foregoing, the Court considers that the Applicants only enumerate and generally describe the content of the constitutional provisions without precisely indicating their violation as foreseen by Article 48 of the Law and as further specified in Rule 36 (2) (d) of the Rules of Procedure.
43. Therefore, the Referral, on constitutional basis, is manifestly ill-founded and is to be declared inadmissible as established in Article 113.7 of the Constitution, foreseen in Article 48 of the Law and further specified in Rule 36 (2) d) of the Rules of Procedure.

### **FOR THESE REASONS**

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rules 36 (2) (d) of the Rules of Procedure, on 17 January 2018, unanimously

### **DECIDES**

- I. TO DECLARE the Referral 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 effective immediately.

**Judge Rapporteur**

Selvete Gerxhaliu-Krasniqi



**President of the Constitutional Court**

Acta Rama-Hajrizi