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

Prishtina, on 8 June 2018
Ref. No.: RK 1253/18

RESOLUTION ON INADMISSIBILITY

In

Case No. KI143/16

Applicant

Muharrem Blaku and others

Request for constitutional review of Judgment ASC -11-0012 of 22 September 2016 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters

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 Applicants are Muharrem Blaku, Imer Blaku, Murat Blaku and Rifat Blaku from Podujeva (hereinafter: the Applicant), represented before the Court by Muhamet Shala, a lawyer from Prishtina.

Challenged decision

2. The Applicants challenge the Judgment [ASC-11-0012] of 22 September 2016 of the Appellate Panel of the Special Chamber of the Supreme Court on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of SCSC), which was served on them on 7 October 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicants' rights and freedoms guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention of Human Rights (hereinafter: the ECHR) and Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 9 December 2016, the Applicants submitted the Referral to the Constitutional Court (hereinafter: the Court).

6. On 16 January 2017, the President of the Court, appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Ivan Čukalović.

7. On 27 January 2017, the Court notified the Applicants about the registration of the Referral and sent a copy of the Referral to the Appellate Panel of the SCSC.

8. On 17 May 2018, the Review Panel considered the report of the Judge Rapporteur and by majority made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 6 January 1960, the National Council of the Municipality of Podujeva, based on the then applicable Law on nationalization (effective from 26 December 1958), through Decision [No. 7732/59], according to the Applicants, nationalized a part of the immovable property of the Applicants' predecessor and registered it as socially owned property.

10. From the case file it results that the Applicants had submitted a request to the Commission for Land Restitution in the Municipality of Podujeva in 1993 and to the Directorate for Legal and Property Affairs in the Municipality of Podujeva in 2002, for the restitution of the contested property.

11. On 30 March 2006, the Applicants filed a claim, including a request for interim measure, with the Specialized Panel of the Special Chamber of the Supreme Court (hereinafter: the Specialized Panel of the SCSC) against the respondents, the Municipality of Podujeva and Agricultural Cooperative "Përparimi" in Podujeva, requesting confirmation of property rights over certain cadastral parcels, claiming that these properties were taken by the government in 1960 through a political decision and without the necessary compensation.

12. On 18 May 2006, the Specialized Panel of the SCSC, by the Decision [SCC-06-0139], referred the case to the Municipal Court in Podujeva to decide regarding the Applicants' claim. In the aforementioned Decision, it was stated that the parties dissatisfied with the decision of the Municipal Court may file an appeal with the SCSC.

13. On 18 June 2008, the Municipal Court in Podujeva, through the Judgment [C.No.214/2006] rejected the statement of claim as ungrounded. The Municipal Court, through its Judgment, rejected the abovementioned statement of claim, among others, based on the fact that the claimants, namely the Applicants, had failed to establish that the disputed immovable property was owned by their predecessors or that it was transferred to the social ownership without a legal basis, and that in fact, according to the Judgment, this immovable property had been registered in the ownership of the respondent, namely, the Agricultural Cooperative "Përparimi" since 1952. In addition, the Municipal Court reasoned that in the present case the legal requirements for the acquisition of the property rights stipulated by Article 20 of the Law on Basic Property Relations, have not been met.

14. On 15 September 2008, the Applicants filed an appeal with the Specialized Panel of the SCSC, alleging violation of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation, and erroneous application of the substantive law, requesting that the appealed Judgment be annulled and that the case be remanded for retrial. The claimants, namely the Applicants, mainly challenged the professionalism and accuracy of the expert's report regarding the clarification of the situation before 1952.

15. On 2 June 2009, the SCSC included in the proceedings as respondents the Kosovo Trust Agency (hereinafter: the KTA) and the Privatization Agency of

Kosovo (hereinafter: the PAK). The latter, on 8 November 2011, submitted a response to the claim of the claimants, namely of the Applicants, arguing that they had no fact or evidence that they had in the possession the disputed immovable property at least since 1952.

16. On 13 January 2011, the Specialized Panel of SCSC issued Judgment [SCA-08-0085], by which the Applicant's appeal was rejected as inadmissible, and the Judgment [C. No. 214/2006] of 18 June 2008 of the Municipal Court in Podujeva, was upheld.

17. On 21 February 2011, the Applicants filed an appeal with the Appellate Panel of the SCSC, alleging violation of the contested procedure provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law, requesting that the appealed Judgment be annulled and the case be remanded for retrial.

18. On 8 April 2014, the Applicants also filed a request for interim measure with the Appellate Panel of the SCSC in order to prevent the PAK from bidding the contested immovable property until the final adjudication of the case.

19. On 22 September 2016, the Appellate Panel of the SCSC by Judgment [ASC-11-0012] decided that the appeal and the request for interim measures filed by the Applicants be rejected as ungrounded and the Judgment [SCA-08 -0085] of 13 January 2011 of the Specialized Panel of the SCSC be upheld, with a detailed reasoning.

Applicants' allegations

20. The Applicants allege that the challenged Judgment, which upholds the Judgments of the SCSC and of the Municipal Court in Podujeva, pertaining to the Applicants' property claims over the immovable property which they maintain to have been nationalized through a political decision and without compensation in 1960, was rendered in violation of their constitutional rights, guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

21. The Applicants build their case on allegations for violation of procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, alleging violation of the principle of equality of arms because they were not notified about the session held in the Appellate Panel of the SCSC and a violation of the right to a reasoned decision, because the challenged Judgment failed to justify the essential allegations over the ownership and the lack of compensation pertaining to the disputed property.

22. The Applicants also emphasize that the ECHR guarantees and the case law of the European Court of Human Rights (hereinafter: the ECHR) are directly applicable in the legal order of the Republic of Kosovo, based on Articles 22 and 53 of the Constitution. In this regard, in support of their allegations for violation of the principle of equality of arms, the Applicants refer to the

findings of case *Grozdanoski v. FYR Macedonia* (ECtHR Judgment of 31 May 2007) and *Gusak v. Russia* (ECtHR Judgment of 7 June 2011) and the case of the Court KI108/10 (Applicant *Fadil Selmanaj*, Judgment of 5 December 2011), while in support of their allegations for a violation of the right to a reasoned decision, they refer to the findings of cases *Garcia Ruiz v. Spain* (ECtHR Judgment of 21 January 1999), *Pronina v. Ukraine* (ECtHR Judgment of 18 July 2006), *Nechiporuk and Tonkalo v. Ukraine* (ECtHR Judgment of 21 July 2011), *Mala v. Ukraine* (ECtHR Judgment of 7 July 2014), *Hirvisaari v. Finland* (ECtHR Judgment of 25 December 2001) and *Hadjianastassiu v. Greece* (ECtHR Judgment of 16 December 1992) as well as the case of the Court KI22/16 (Applicant *Naser Husaj*, Judgment of 9 June 2017).

23. Finally, the Applicants request the Court to declare their referral admissible; to annul the challenged Judgment of the Appellate Panel of the SCSC; and to order to remand their case for a retrial.

Assessment of the admissibility of Referral

24. The Court first examines whether the Referral has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.

25. 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."*

26. The Court also examines whether the Applicants have met the admissibility requirement as defined by the Law. In this connection, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority."*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

Article 48
[Accuracy of Referral]

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".

27. Regarding the fulfillment of these requirements, the Court notes that the Applicants are authorized parties challenging an act of a public authority, namely the Judgment [ASC-11-0012] of 22 September 2016 of the Appellate Panel of the SCSC, after exhaustion of all legal remedies provided by law. In this regard, the Applicants' referral meets the requirements established in paragraphs 1 and 7 of Article 113 of the Constitution and those of Article 47 of the Law. The Applicants have also accurately specified the rights guaranteed by the Constitution and the ECHR, which have allegedly been violated in accordance with Article 48 of the Law and filed a referral within the 4 (four) month period provided for in Article 49 of the Law.

28. In addition, the Court needs to consider whether the Applicants have met the admissibility requirements established in Rule 36 [Admissibility Criteria] of the Rules of Procedure. Rule 36 (1) of the Rules of Procedure specifies the requirements under which the Court may consider a Referral, including the requirement that such a Referral is not manifestly ill-founded. Under Rule 36 (2), a referral is manifestly ill-founded if the Court is satisfied that:

"(1) The Court may consider a referral if:

[...]

(d) the referral is prima facie justified or not manifestly ill-founded.

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

[...]

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights.

[...]

(d) the Applicant does not sufficiently substantiate his claim."

29. In this regard, the Court recalls that the Applicants allege that Judgment [ASC-11-0012] of 22 September 2016 of the Appellate Panel of the SCSC was rendered in violation of their rights guaranteed by Article 21 [General Principles], Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 53 [Interpretation of Human Rights Provisions] of the Constitution, because, according to the allegations, the challenged Judgment was issued in a) violation of their right to equality of arms because they were not notified about the court session held at the Appellate Panel of the SCSC and b) a violation of their right to a reasoned court decision.

30. The Court initially notes that the essential Applicants' allegations pertaining to alleged violations of the procedural safeguards guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, namely, the equality of arms and the right to a reasoned decision, have been interpreted in detail through the case law of the ECtHR, in accordance with which the Court, pursuant to Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, in interpreting the allegations for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECHR.

31. The Court also notes that the ECtHR consistent case law maintains that the fairness of a proceeding is assessed based on the proceeding as a whole. (See the ECtHR Judgment of 6 December 1988, *Barbera, Messeque and Jabardo v. Spain*, no. 10590/83, paragraph 68). Consequently, in determining the merits of the Applicants' allegations, the Court shall adhere to this principle. (See also the Case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38).

32. In this respect, the Court will first examine the Applicants' allegations as to the alleged violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and initially pertaining to the allegations related to the violation of the principle of equality of arms, to continue with allegations for a violation of the right to a reasoned court decision.

The fundamental principles on equality of arms and the right to a public hearing under the ECtHR case law

33. Through its case law, the ECtHR has held that the principle of "*equality of arms*" is one of the key elements of the right to a fair trial and that "*each party to the proceedings to be given a reasonable opportunity to present his case - including evidence - under conditions that do not place him at a substantial disadvantage vis- -vis his opponent.*" (see the ECtHR Judgment, *Nideröst-Huber v. Switzerland*, of 18 February 1997, paragraph 23; the ECtHR Judgment, *Kress v. France*, 7 June 2001, paragraph 72; the ECtHR Judgment of *Yvon v. France*, 24 April 2003 and the ECtHR Judgment of *Gorraiz Lizarraga and Others against Spain*, of 27 April 2004, paragraph 56).

34. The principle of equality of arms further implies that anyone who is a party to the proceedings must have equal opportunity to present his case and that "*a*

fair balance" must be established between the parties. (See *Dombo Beheer B. v Netherlands*, ECtHR Judgment of 27 October 1993, Series A. No. 274, paragraph 33).

35. In this regard, the right to participate in the trial should not be considered as a formal right, where the parties are merely guaranteed physical presence during the civil proceedings, on the contrary, firstly the procedural legislation, and subsequently the judge during the trial, must provide the parties with equal opportunities, to present arguments and evidence in defense of their interests.

36. The failure to comply with this principle does not depend on the unfairness in the assessment of evidence and facts. The procedural violation in itself results in a violation of the right to a fair trial. (See, among others, *Bulut v. Austria*, ECtHR, 22 February 1996, paragraph 84). For example, with regard to cases involving "*civil rights and obligations*", there will be a violation of the principle of equality of arms if one party attends the hearing, while the other does not. (see *Komanicky v. Slovakia*, ECtHR, 4 June 2002, paragraph 45).

37. In this respect, the Court recalls that the requirements of a fair hearing, in principle imply the right of the parties to be present in person at the trial and that this right is closely linked to the right to a hearing and the right to follow the proceedings in person. (see the ECtHR Judgment of 23 February 1994, *Fredin v. Sweden*, Application no. 18928/91, paragraphs 10 and 11; and ECtHR Judgment of 26 May 1988, *Ekbatani v. Sweden*, Application no. 10563/83, paragraph 25; and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 40).

38. The Court reiterates that, although not expressly mentioned in the text of Article 6 of the ECHR, an oral hearing constitutes a fundamental principle enshrined in Article 6 (1). (See: *Jussila v Finland* the ECtHR Judgment of 23 November 2006 and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 42).

39. However, the ECtHR, through its case law, also defines the limits of the application of this rule and the relevant exceptions. It holds that the right to a hearing is not absolute in the appeal processes. In this respect, the ECtHR states that *"in cases in which there has been an oral hearing at the first instance, or in which, one has been waived at that level, there is no absolute right to an oral hearing in any appeal proceedings that are provided"*. (See the ECtHR Judgment of 12 November 2002, *Dory v. Sweden*, no. 28394/95, paragraph 37 and case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 43).

40. In addition, the ECtHR further maintains that when the proceedings involve an appeal only on points of law, an oral hearing is generally not required. (See the ECtHR Judgment of 8 December 1983, *Axen v Germany*, Application no. 8273/78, paragraph 28 and the case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 44). If an appeals court is called upon to decide questions of fact, an oral hearing may or may not be required, depending upon whether one is necessary to ensure a fair trial. (See case of the

Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 45).

41. In this respect, the Court notes that whether an oral hearing is required at the appellate level, according to the ECtHR case law, "*depends on the special features of the proceedings involved, account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein*". (see the ECtHR Judgment of 26 May 1988, *Ekbatani v. Sweden*, Application No. 10563/83, paragraph 27 and the ECtHR Judgment of 2 March 1987 *Monnell and Morris v. the United Kingdom*, Application Nos. 9562/81 & 9818/82, paragraph 56; see also case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 46).

42. Therefore, the Court summarizes that a right to an oral hearing at the appellate proceedings is not absolute according to the ECtHR case law. In general, the hearing is not required when the appellate proceedings only involve a review on points of law. Whether one is required when the proceedings involve a review of both points of law and fact, depends on whether an oral hearing is necessary to ensure a fair trial. (See case of the Court KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 49).

The Application of the principles referred to above in the circumstances of the present case

43. The Court recalls that in the present case, the Applicants were parties to a civil proceeding and claim that they did not attend the hearing of the Appellate Panel of the SCSC, in which their appeal was reviewed.

44. In this regard, the Court notes that a hearing was not held before the Appellate Panel, because the respective Panel decided not to hold a hearing based on the authorizations provided by the Law on the SCSC. The Panel decided based on the appeal and the response to the appeal to uphold the Judgment [SCA-08-0085] of 13 January 2011 of the SCSC.

45. With the exception of the allegation that they did not participate in the session of the Appellate Panel of the SCSC, the Applicants present no other arguments different from those submitted to the other judicial instances and do not present any facts that the Appellate Panel reviewed any evidence or fact that the Applicants' did not possess or which placed them in a "*substantially unequal*" position with the other parties to the proceedings.

46. Therefore, in the light of the principle of equality of arms, which the Applicants allege to have been violated, the Court notes that the Applicants do not present any fact that they might have been put in a less favorable position vis-à-vis the opposing party. No party attended the hearing before the Appellate Panel because one was not held at all. In this regard, the Court notes that the Applicants' case differs from case KI108/10 to which they refer. This is because, in that case, the applicants were not at all aware of the proceedings before the Supreme Court, had no access to the claim of the respective municipality addressed to the Supreme Court, had no opportunity to respond

to the claim, and moreover, were not notified about the Judgment of the Supreme Court.

47. Therefore, case KI108/10 differs substantially from the circumstances of the present case because, except that no hearing was held, which is the main allegation of the Applicants, the latter do not substantiate in any other way that they were placed in a less favorable position in relation to the opposing party pertaining to the case file based on which the Appellate Panel had made the decision.

48. In continuation, the Court will review whether the absence of a hearing in the circumstances of the present case may result into a violation of the Applicants' rights guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

49. In this regard, the Court refers to the case law of the ECtHR referred to above, to emphasize once again that the right to a hearing in appeal proceedings is not absolute. In principle, if a hearing was held in the first instance court, in the appeal procedure, one is not necessarily required.

50. The Court notes that in the circumstances of the present case, a hearing was held at the first instance court. The Municipal Court in Podujeva held a main trial session where the facts of the case were considered with the participation of all parties to the dispute. The Applicants had the opportunity to submit their arguments and evidence to the main hearing, which the Court considered insufficient to approve the claim. From the Judgment it is also clear that the expertise of the independent experts were also reviewed in the session of the main trial.

51. In addition, the circumstances of the present case also substantially differ from the circumstances of the cases of *Grozdanoski v. FYR Macedonia* and *Gusak v. Russia* of the ECtHR, to which the Applicants are referred. In the first case, the request for revision was submitted by the opposing party, while the request for protection of legality by the state prosecutor, whereas the respective Supreme Court in none of the cases had notified the applicant, thus giving no opportunity for comment or possibility to oppose the facts and arguments presented. This is different from the Applicants' case, where they themselves filed the appeal with the Appellate Panel of the SCSC and the decision of this Panel was rendered on the basis of their appeal and the evidence provided in the case file. Whereas, in the second case, the ECtHR found a violation justified by the fact that the respective applicant was not provided sufficient time to prepare his defense.

52. Based on the foregoing and taking into account the characteristics of the case, the allegations raised by the Applicants and the facts presented by them, the Court, also based on the standards established in its case law in similar cases and the case law of the ECtHR, does not find a violation of the principle of equality of arms or the right to a hearing, as an integral element of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

General principles on the right to a reasoned decision as developed by the ECtHR case-law

53. The Court emphasizes that the right to a fair hearing includes the right to a reasoned decision. The ECtHR has reiterated that, according to its established case-law, which reflects a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. (See *Tatishvili v Russia*, ECtHR Judgment of 22 February 2007, paragraph 58).

54. The ECtHR has also held that although 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 ECtHR case *Hadjianastassiou v. Greece*, application no. 12945/87, Judgment of 16 December 1992, paragraph 33, see also case of the Court KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018, paragraph 45).

55. According to the ECtHR case-law, the essential function of a reasoned decision is to demonstrate to the parties that they have been heard. In addition, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice. (See, among others, *Hirvisaari v. Finland*, no. 49684/99, 27 September 2001, paragraph 30; *Tatishvili v. Russia*, ECtHR Judgment of 22 February 2007, paragraph 58; case of the Court KI97/16, Applicant *"IKK Classic"*, Judgment of 9 January 2018, paragraph 46; and KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017, paragraph 40).

56. However, while the ECtHR maintains that Article 6, paragraph 1, obliges the courts to give reasons for their decisions, it has also held that this cannot be understood as requiring a detailed answer to every argument. (See the ECtHR cases *Van de Hurk v. the Netherlands,* Judgment of 19 April 1994, paragraph 61; *Higgins and Others v. France,* no. 134/1996/753/952, Judgment of 19 February 1998, paragraph 42; case KI97/16, Applicant: *"IKK Classic"*, Judgment of 9 January 2018, paragraph 47).

57. The extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. (See ECtHR cases *Garcia Ruiz vs Spain*, application no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, Judgment of 9 December 1994, paragraph 27; *Higgins and Others v. France, Ibidem,* paragraph 42; case of the Court KI97/16, Applicant: *"IKK Classic"*, Judgment of 9 January 2018, paragraph 48 and KI22/16, Applicant: *Naser Husaj*, Judgment of 9 June 2017, paragraph 44).

58. For example, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision. (See the ECtHR cases *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 26, and *Helle v. Finland,* Judgment of 19 December 1997, paragraphs 59 and 60). A

lower court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal. (See the ECtHR case *Hirvisaari v. Finland*, application no. 49684/99, Judgment of 27 September 2001, paragraph 30; case of the Court KI97/16, Applicant: *"IKK Classic"*, Judgment of 9 January 2018, paragraph 49).

59. However, the ECtHR has also noted that, even though the courts have a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, a domestic court is obliged to justify its activities by giving reasons for its decisions. (See the ECtHR case *Suominen v. Finland*, application no. 37801/97, Judgment of 1 July 2003,_paragraph 36; and case of the Court KI97/16, Applicant: *"IKK Classic"*, Judgment of 9 January 2018, paragraph 50).

60. Therefore, while it is not necessary for the court to deal with every point raised in argument (see also *Van de Hurk v Netherlands, Ibidem,* paragraph 61), the Applicants' main arguments must be addressed. (See the ECtHR cases *Buzescu v. Romania*, application no. 61302/00, Judgment of 24 May 2005, paragraph 63; *Pronina v Ukraine*, application no. 63566/00, Judgment of 18 July 2006, paragraph 25). Likewise, giving a reason for a decision that is not a good reason in law will not meet Article 6 criteria. (See case of the Court KI97/16, Applicant: *"IKK Classic"*, Judgment of 9 February 2016, paragraph 51).

61. Finally, the Court also refers to its own case law where it considers that the reasoning of the decision must state the relationship between the findings on the merits and considerations on the proposed evidence on 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. (See cases KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012, paragraph 61; and KI97/16, Applicant: *"IKK Classic"*, Judgment of 9 February 2016, paragraph 52).

The Application of the abovementioned principles in the circumstances of the present case

62. The Court recalls that the Applicants allege that Judgment [ASC-11-0012] of 22 September 2016 of the Appellate Panel of the SCSC was not reasoned because it failed to establish the key facts regarding the Applicants' ownership of disputed immovable property and the lack of market value compensation.

63. In this regard, the Court first notes that the decisions of the regular courts in fact reject the Applicant's allegations due to the lack of evidence proving the ownership, subsequent to which the assessment of facts for the alleged lack of appropriate compensation would have depended.

64. In addressing the allegations pertaining to the confirmation of ownership, the Appellate Panel, in the relevant Judgment, *inter alia*, reasoned:

> *"the only document that the Appellants are referring to in their appeal is so called "posedovna prijava" (possession report/application), which*

names Bajramoviq Sherif Latifa as possessor of a number of cadastral parcels. This document was submitted to the court together with the claim. However, the contested parcel is not listed in this document and the Appellants did not specify any of the parcels from that report/application that would match with the contested parcel".

65. The Appellate Panel further reasoned:

> *"Based only on this document the Claimants were unable to prove the ownership right of their predecessor and illegal expropriation, as already stated by the Municipal Court in Podujeva and confirmed by the Trial Panel of the SCSC. The document they submitted on 8 April 2014 together with the request for preliminary injunction (Decision of the People`s Committee of Podujeve Municipality, number 7322/59 of 25 January 1960) does not relate to the parties and the contested real property in case at hand. Therefore it is not suitable to support the claim."*

66. Furthermore, the Court notes that in addition to the allegations for the erroneous determination of facts, the Applicants did not further specify in their Referral what key arguments they had raised in their appeal and which were not addressed by the Appellate Panel through the challenged Judgment.

67. The Court reiterates, referring to the ECtHR principles on the right to a reasoned decision as elaborated above, that, in principle, the extent of the obligation to provide reasons may vary depending on the nature of the decision and must to be determined in the light of the circumstances of the case. Therefore, while it is not necessary for a court to deal with every point raised in the argument, the essential ones must be addressed.

68. However, the Court in the present case considers that the substantive arguments of the Applicants were addressed and reasoned by the Appellate Panel of the SCSC. The relevant Judgment explains in detail why the appeal was ungrounded and what facts were important and what were not to reach the conclusion as in the challenged Judgment, which also clearly defines the legal basis and the applicable law upon which the final conclusion was based.

69. In addition, as it pertains to the allegations for erroneous determination of facts, the Court reiterates that it is not its role to deal with errors of facts or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). It cannot itself assess the law that lead a regular court to issue one decision instead of another. If it were different, the Court would act as "fourth instance court", which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See: case *Garcia Ruiz v. Spain*, ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also, cases KI70/11, Applicants *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011; and KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, 18 December 2017, paragraph 41).

70. Finally, the Applicants refer to a number of cases of the Court and the ECtHR in building their arguments in support of their allegations for a violation of the right to a reasoned decision. Among others, the Applicants refer to case KI22/16, which in fact is not applicable in the circumstances of the present case due to the differences in the allegations made and differences on the regular court's respective assessments, as the essential argument in the case referred to by the Applicant was not addressed at all by the Supreme Court.

71. In addition, the Court notes all the Applicants' allegations pertaining to the application of the specific ECtHR cases, including *Garcia Ruiz v. Spain, Pronina v. Ukraine, Nechiporuk and Tonkalo v. Ukraine, Mala v. Ukraine, Hirvisaari v. Finland and Hadjianastassiu v. Greece* have been reflected in the references that elaborate the fundamental principles of the ECtHR as to the right to a reasoned decision. However, none of the cases referred coincides with the circumstances of the present case and that only their mentioning by the Applicants without specifying the essential common elements with their case, does not automatically make them applicable.

72. Based on the foregoing and taking into account the particular features of the case, the allegations raised by the Applicants and the facts presented by them, the Court based on the standards established through its case law in similar cases and the case law of the ECtHR, does not find that the right to a reasoned court decision, as one of the integral elements of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, has been violated.

73. In addition, when examining the allegations for a violation of the right to a fair and impartial trial, the Court considers that the court proceedings in their entirety were fair and impartial, as required by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

74. Finally, the Applicants also allege violation of paragraph 4 of Article 21 [General Principles] and 53 [Interpretation of Human Rights Provisions] of the Constitution.

75. As it pertains to the first allegation, the Court notes that the Applicants have merely mentioned Article 21.4 of the Constitution and quoted its content, without providing any explanation as to how and under what circumstances this provision was allegedly violated. Moreover, this constitutional provision in its substance specifically refers to "legal persons", stipulating that the fundamental rights also apply to them to the extent applicable, implying the possibility that even the legal persons may be affected with violations of fundamental rights and freedoms, when they have applicability in a specific case. In the present case, the Applicants filed an individual Referral and in this context, the Court finds that there is no connection between their Referral and the relevant constitutional provision.

76. As it pertains to the second allegation, the Court notes that Article 53 of the Constitution expressly states that the fundamental rights and freedoms guaranteed by the Constitution must be interpreted in accordance with the ECtHR case law. This constitutional obligation is primarily addressed to the

institutions that decide on the fundamental rights and freedoms, including the Court, which fulfills this obligation in each case when deciding on individual referrals reviewing the possible violations of fundamental rights. (See case 74/17, Applicant *Lorenc Kolgjeraj*, Resolution on Inadmissibility of 5 December 2017, paragraph 28). Having said this, the ECtHR cases referred to by the Applicants and which allegedly were applicable for their case, have been specifically addressed by the Court throughout this decision.

77. As a result, and based on the abovementioned elaboration, the Court considers that the Applicants did not support the allegations that the relevant proceedings conducted by the regular courts were in any way unfair or arbitrary and that the challenged Judgment violated the rights and freedoms guaranteed by the Constitution and the ECHR. (See, *mutatis mutandis, Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

78. Therefore, the Court finds that the Applicants' Referral does not meet the admissibility requirements established in the Rules of Procedure, because the Referral is manifestly ill-founded on constitutional basis, because the facts presented do not in any way justify the allegation of a violation of a constitutional right and that the Applicants do not sufficiently substantiate their allegations of constitutional violations.

79. In sum, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and, in accordance with Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, it is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 49 of the Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, in its session held on 17 May 2018, by majority

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; and

IV. TO DECLARE this Decision effective immediately;

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

Judge Rapporteur | **President of the Constitutional Court**

Gresa Caka-Nimani

Gresa Caka-Nimani | Arta Rama-Hajrizi