



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

Prishtina, 27 April 2020  
Ref. no.: RK 1553/20

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## **RESOLUTION ON INADMISSIBILITY**

in

**case No. KI180/19**

Applicants

**Miloš Šćekić and Ljubica Šćekić**

**Constitutional review of Judgment K. No. 2169-17 of the Basic Court of 28  
March 2019**

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

composed of:

Arta Rama-Hajrizi, President  
Bajram Ljatifi, Deputy President  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge  
Gresa Caka-Nimani, Judge  
Safet Hoxha, Judge  
Radomir Laban, Judge  
Remzije Istrefi-Peci, Judge, and  
Nexhmi Rexhepi, Judge

#### **Applicant**

1. The Referral was submitted by Miloš Šćekić and Ljubica Šćekić from Prizren, with permanent address in Čačak, Republic of Serbia, (hereinafter: the Applicants), represented by the Free Legal Aid Office from Gračanica.

## **Challenged decision**

2. The Applicants challenge Judgment K. No. 2169-17 of the Basic Court of 28 March 2019.
3. The challenged judgment was served on the Applicant's legal representative on 13 June 2019.

## **Subject matter**

4. The subject matter of the Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicants' rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property], Article 54 [Judicial Protection of Rights] and Article 109 [State Prosecutor] paragraph 1 and 2 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 8 (Right to respect for private and family life), as well as Article 1 of Protocol 1 (Protection of Property) of the European Convention on Human Rights (hereinafter: the ECHR).

## **Legal basis**

5. The Referral is based on Article 113.7 of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

6. On 3 October 2019, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 4 October 2019, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu, (Presiding) Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
8. On 10 October 2019, the Court notified the Applicants' representative about the registration of the Referral and sent a copy of the Referral to the Basic Court.
9. On 12 February 2020, the Review Panel considered the Report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

## Summary of facts

10. The Court notes from the case file and the Applicants' Referral that the Applicants have initiated two separate court proceedings and that they have their own specificities. The first court proceedings concerned the recognition of the occupancy right over the property in question and the return of possession of the property, while the second court proceedings concerned the criminal proceedings initiated by the State Prosecutor upon the criminal report by one of the Applicants against the person M.GJ. on the grounds of criminal offence of inviolability of residences and premises, as well as unlawful occupation of someone else's immovable property.

### ***Procedure for the recognition of occupancy right over the property in question and the return of possession of the property***

11. Until 1999, the Applicants lived in Prizren, in an apartment located at Karadjordjeva Street 66/6. Due to the events that occurred in 1999, the Applicants left their apartment. In the meantime, the apartment was usurped by person M.Gj.
12. The Applicants submitted a request to the Housing and Property Directorate (hereinafter: the HPD) requesting recognition of the occupancy right over the property in question as well as the return of possession of the property. The HPD registered the Applicant's claim with the number DS200565.
13. Also, M.Gj filed a claim with HPD claiming that he was entitled to the property in question. The HPD registered that claim with number DSOO7444.
14. On 20 August 2005, the Housing and Property Claims Commission (hereinafter: the HPCC) rendered decision HPCC/D/210/205/AC, deciding to recover the rights to M.Gj over the property in question, thereby M.Gj acquired all the rights of the A category party. By the same decision, the Applicants were entitled to compensation as C-category parties.
15. The Applicants filed with the HPCC request for review of the first instance decision HPCC/D/210/205/AC.
16. On 17 January 2007, the HPCC rendered new decision HPCC/Rec/88/2007, which approved the Applicant's request for review of the first instance decision HPCC/D/210/205/AC. In a new decision, the HPCC decided to recognize to Applicants the occupancy right over the property in question, and rejected the claim of M.Gj., citing that, „*M.Gj was not discriminated against in the way he lost his property rights in 1992, because the court order for eviction of the party dates back to 1987, and this is the period before the introduction of discriminatory provisional measures.*
17. On 24 August 2008, the Applicants filed a claim with HPD requesting that their subject property be placed under HPD management. The HPD approved the request and the apartment in question was under their authority until 2009, when the Applicants filed a request for eviction, namely, for the release of the subject property from the usurper.

18. The HPD has evacuated the property in question and according to the procedure, the apartment is locked and stamped with HPD seal, while the keys to the property in question are handed over to the Applicants.
19. The Applicants state that M.Gj, after a few days from the eviction conducted by the HPD, again usurped the property in question on his own initiative.

***Criminal proceedings against M.Gj, for the criminal offense of inviolability of residences and premises and unlawful occupation of someone else's immovable property***

20. The Court finds it necessary to note that as a party to the criminal proceedings before the Basic Court there appears only the wife of Miloš Šćekić, namely, Ljubica Šćekić, who filed a criminal report with the Basic Prosecution against person M.Gj who again usurped the immovable property in question.
21. On 8 June 2012, the Applicant's wife filed a criminal report with the Basic Prosecutor's Office in Prizren against M.Gj, on the grounds of the criminal offense „unlawful usurpation of immovable property under Article 332.1 of the Criminal Code of Kosovo“ (hereinafter: the CCK).
22. On 21 November 2017, the Basic Public Prosecutor's Office filed an indictment with the Basic Court in Prizren against M.Gj., on reasonable suspicion that he committed the criminal offense of unlawful usurpation of immovable property under Article 332.1 of the CCK.
23. On 28 March 2019, the Basic Court rendered Judgment K. No. 2169-17, rejecting the indictment of the Basic Prosecutor's Office against M.Gj, stating: „that during the main hearing the Prosecutor withdrew from the criminal prosecution of the accused M.Gj., stating: “that on the basis of the case file, it found that the user of the disputed apartment was Miloš Šćekić, and his family members his wife Ljubica, son Nemanja, second son Dmitari daughter Jelena, as family members, used the same apartment with the lease with the recipient of the apartment, Miloš Šćekić, that the said apartment does not have a resolved property issue, a matter which is confirmed also from the response of the Geodesy and Cadastre Directorate in Prizren, dated 18 October 2018, which stated that this apartment is not registered in the name of any owner”.

*Based on the case file, I assess that only Miloš Šćekić should be damaged, and not any other family member, because, as I mentioned, the members of his family could possibly have status, only if the injured Miloš Šćekić would die and not while alive. The criminal offense of which the accused is suspected can only exist when the property is defined by law, or when there is an owner, under Article 332, paragraph 1 of the CCK, also due to the fact that the property issue of the apartment is still not legally defined, the State Prosecutor WITHDRAWS from the criminal prosecution of the accused.*

*The family members of the injured party, as well as the injured party Miloš Šćekić himself, can file the claim with the court in the contested procedure, because there is no element of a criminal offense in this criminal matter.*

*The dissatisfied party has the right to file appeal against this judgment within 15/fifteen/days from the date of its receipt with the Court of Appeals“.*

24. On 7 August 2019, the Applicants' legal representative filed an initiative for protection of property with the State Prosecutor „that in the Supreme Court files the request for protection of legality against Judgment K. No. 2169-17 of the Basic Court“.
25. On 7 September 2019, the State Prosecutor responded to the Applicants' legal representative, stating „that there is no legal basis for filing the request for the protection of legality with the Supreme Court“.

### **Applicant's allegations**

26. The Applicants state at the outset *“that the legal effects of the HPD decisions are known, that they are binding and enforceable and that they cannot be subject to review by any other judicial or administrative authority in Kosovo. However, despite the decision of 2007 is final, they enter into possession of the apartment despite the fact that they initiated criminal proceedings against the occupier of the apartment”*.
27. In fact, the Applicants state that the alleged violation of Articles 24, 31, 32, 46, 54, 109 of the Constitution, as well as Article 8, and Article 1 of Protocol 1 of the ECHR are solely related to the conduct of the State Prosecutor as well as the judge of this case in the Basic Court in Prizren.
28. More specifically, the Applicants consider that they are *„discriminated against by the action of the Public Prosecutor and the Judge of the case in favor of favoring one of the parties in criminal proceedings, because in the case law of the Kosovo courts when it comes to the commission of the criminal offense under Article 332.1 of the CCK, unlawful seizure of immovable property, passed convictions in favor of the injured parties, there is a large number of judgments where the state prosecutor represented the indictment against the accused for the criminal offence, while the courts rendered judgment on conviction in favor of the injured parties“*.
29. The Applicants further state that, after the criminal report was filed, the Basic Prosecutor's Office filed an indictment, but that after several hearings, the Prosecutor arbitrarily decided to withdraw from further criminal prosecution, because he considered that there were no elements of the criminal offence, citing as the main reason that only Miloš Šćekić may appear as a party, thereby violating Article 31 of the Constitution.
30. In this regard, the Applicants consider that they do not now have at their disposal other legal remedies by which they could exercise their rights as defined by the HPCC decision.



31. The Applicants allege that Article 54 of the Constitution provides that everyone is entitled to judicial protection, however, it can be seen from the foregoing that the prosecutor's arbitrary withdrawal from the indictment denied the injured parties the right to judicial protection, thereby directly violating Article 46 of the Constitution as well as Article 1 of the Protocol 1 of the ECHR, because they are prevented from enjoying their property peacefully.
32. The Applicants address the Court with a request *„to establish that there has been a violation of the constitutional provisions, to quash Judgment K. No. 2169/17 of the Basic Court, to order the Prosecution and the Basic Court to review the first instance proceedings and remand the case for retrial“*.

### **Admissibility of the Referral**

33. 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.
34. 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.“*

35. The Court also refers to Article 47.2 of the Law, which establishes:

*„[...]  
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.“*

36. In addition, the Court takes into account Rule 39 (1) (b) which establishes:

*„1. The Court may consider a referral as admissible if  
[...]  
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.“*

37. The Court, having regard to the chronology of the Applicants' taken legal actions, as well as the timeframes within which the regular courts decided on the substance of their allegations, finds that the Applicants in fact filed two separate court proceedings, in which, and although in essence, the intention was the same, namely, the restoration of occupancy right and right to possession of the property in question. On this occasion, the court proceedings differed in procedural terms, both in terms of time limits within which the competent authorities decided and in terms of the substance of the cases they dealt with.

38. It is this diversity of procedures that has influenced the Court to perceive and analyze these proceedings differently.

**The first court proceeding regarding the statement of claim for restitution of occupancy right and return of possession of the property in question**

39. The first court proceeding was initiated by the Applicants in 2005 before the HPD, which concerned the recognition of the occupancy right over the property in question, and the return of possession of the property. The Court concludes that this proceeding ended with a final decision of the HPCC HPCC/Rec/88/2007.
40. More specifically, in the decision HPCC/Rec/88/2007, the HPCC recognized the occupancy right to the Applicant and, consequently, the return of possession of the property in question.
41. The Court, having regard to the fact that the first court proceedings concerning the return of possession of the occupancy right and the property in question was resolved by a final decision of the HPCC, and in the Applicant's favor, finds that it will not deal with this part of the court proceedings, because the decisions of the HPCC are in his favor, and that the Applicant does not specifically cite the aforementioned violations in connection with the first court proceedings before the HPCC, but solely in connection with the proceedings initiated against upon the criminal offence of Ljubica Šćekić, the spouse of the occupancy right holder of the property in question.

**Second court proceedings regarding criminal report for usurpation of the property in question**

42. With regard to the second court proceeding, the Court notes that it was initiated by the wife of Miloš Šćekić (appearing before this court as one of the applicants), on 8 June 2012, when she filed a criminal report with the Basic Prosecutor's Office against M.Gj. because of the usurpation of the property in question.
43. The Court notes that it is precisely this procedural action of the Applicant's wife that will influence the further course of the procedure upon the criminal report, both before the Basic Prosecutor's Office and before the Basic Court.
44. More specifically, the Court notes that the Basic Prosecutor's Office first approved the criminal report filed by the Applicant's spouse, and accordingly filed an indictment before the Basic Court in Prizren against person M.Gj., on the grounds of reasonable suspicion that he had committed the criminal offence of "*unlawful usurpation of immovable property under Article 332.1 of the CCK*".
45. However, the Court finds that the Basic Prosecution has in the meantime withdrawn from the prosecution of M.Gj for several reasons:

**i)** as the holder of the occupancy right over the property in question in the HPCC decision refers to the husband of Miloš Šćekić and not to the wife of Ljubica Šćekić, who appears before the Basic Prosecution as a claimant. In fact, on the basis of a criminal report filed by the HPCC, the prosecution concluded that, pursuant to the final decision of the HPCC, Miloš Šćekić was approved the occupancy right over the property in question, and not the claimant, in the present case of Ljubica Šćekić.

**ii)** since the property issue of the said apartment is not resolved, which is concluded on the basis of the inspection of the documentation of the Geodesy and Cadastre Service in Prizren, of 18 October 2018, specifically, that, and if there is a final decision of the HPCC regarding the apartment in question, the holder to whom the HPCC restored the occupancy right over the property in question, namely Miloš Šćekić, did not take all the necessary procedural steps to register them as such with the relevant service, which the prosecution concluded on the basis of relevant documents issued at the request of the competent municipal office.

**iii)** and as the third reason for withdrawing from the criminal indictment, the prosecution cited the fact that the criminal offense under Article 332 paragraph 1 of the CCK, for which is suspected that the respondent can only exist when the property is defined by law and when there is an owner of the property in question who initiates a criminal report, which in the above reasoning is not the case here.

46. The Court notes that the Basic Court, having regard to the reasoning of the Basic Prosecutor's Office, rendered the judgment rejecting the claim against person M.Gj.
47. Therefore, the Court finds that the Applicants' primary allegation of a violation of their rights and freedoms relates to the fact that the Basic Prosecution, by arbitrary waiver of criminal prosecution, denied them the right to a legal remedy in the course of proceedings before the regular courts, thereby violating all other rights and freedoms which they have stated in the Referral.
48. Based on this, it may be asked whether, the Applicants despite the fact that the Basic Prosecutor's Office waived the criminal prosecution, had at their disposal the legal remedies to proceed with the court proceedings concerning the property in question.
49. The Court dealing with this Applicants' allegation, has carefully analyzed the decision of the Basic Prosecution to withdraw from the criminal prosecution, finding that, despite the fact that the Prosecution challenged the legitimacy of the claimant, in this case, the spouse of the occupancy right holder, Miloš Šćekić, does not prevent him to initiate again the criminal report relating to the usurpation of the property in question, thus removing a procedural barrier that would allow both the Basic Prosecutor's Office and the regular courts to continue prosecuting the respondent.
50. The Court cannot fail to note that, despite the withdrawal of the Basic Prosecutor's Office from the criminal prosecution of M.Gj., it provided



guidance to the Applicants on how they can exercise their rights by instructing them to the contested procedure. In this connection, the Basic Court stated: *"The family members of the injured party, as well as the injured party Miloš Šćekić himself, can file the claim with the court in the contested procedure, because there is no element of a criminal offense in this criminal matter"*.

51. Moreover, the Court finds that the Applicants have also ignored the instructions on the legal remedy of the Basic Court regarding the possibility to file appeal with the Court of Appeals within 15 days of the judgment of the Basic Court. Therefore, the Applicants waived this legal remedy for the purpose of filing *"Initiative to initiate a request for the protection of legality with the State Prosecutor"*.
52. Taking this into account, the Court finds it obvious that the Applicants did not take into account the legal arguments and legal instructions which, the Basic Prosecutor's Office and the Basic Court provided in their decisions, thereby, they did not eliminate the procedural flaws that would enable them to file again the criminal report with the Basic Prosecutor's Office, or alternatively, they did not initiate the contested proceedings before a competent court to discuss the merits of their "request" in respect of the property in question, to which they were entitled upon the instruction on the legal remedy of the Basic Court.
53. Accordingly, the Court comes to its first conclusion, that there were legal possibilities that allowed the Applicants to continue with the court proceedings, leading to the second conclusion that, before filing the Referral with the Constitutional Court, the Applicants had not exhausted all legal remedies provided for by the Constitution, the Law and the Rules of Procedure, and thus have not reached a final decision on their rights and obligations. The Court recalls that the final decision is an answer to the last legal remedy, which is effective and adequate to examine the lower instance decision, both factually and legally (see decision in case KI134/19, *Dobrica Pucar*, Resolution on Inadmissibility, paragraph 30).
54. On the basis of the foregoing, the Court finds, in fact, that the Applicants have brought themselves in a procedural situation that their statement of claim cannot be considered on merits by the regular courts, on the ground that they did not comply with the procedural requirements and legal obligations that make it possible to initiate proceedings before the competent courts.
55. The Court adds that there is nothing to prevent the Applicants from proceeding with the removal of procedural obstacles, both those following a criminal report filed with the Basic Prosecutor's Office and the initiation of contested proceedings before the competent courts, thereby creating procedural opportunities for the regular courts that pursuant to Article 31 in conjunction with Article 32 of the Constitution take into account and consider all their allegations, as well as all the appealing allegations, and therefore, to decide on the right in accordance with Article 46 of the Constitution, which leads to the creation of a legal situation which opens the possibility for the Applicant to obtain at a certain moment a final decision regarding the property in question, against which, if they are not satisfied, they can, within the legally prescribed period, address the Constitutional Court.

56. Based on all the foregoing, the Court concludes that the Applicants have not exhausted all legal remedies in respect of the property in question prescribed by law (see, *inter alia*, the cases of the Constitutional Court, KI07/09, *Demë and Besnik Kurbogaj*, Resolution on Inadmissibility of 19 May 2010, paragraphs 28-29, KI178/18, *Bujar Hoti*, Resolution on Inadmissibility of 30 January 2019, paragraph 26).
57. Therefore, the Applicant's Referral is inadmissible for review in accordance with Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

### **FOR THESE REASONS**

The Constitutional Court, in accordance with Article 113, paragraphs 1 and 7 of the Constitution, Article 47 of the Law, and Rule (1) (b) of the Rules of Procedure, in the session held on 12 February 2020, unanimously

### **DECIDES**

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Bajram Ljatifi

Arta Rama-Hajrizi



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