



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

Pristina, 21 October 2013
Ref.no.:RK484/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI135/12

Applicant

Svetozar Nikolić

**Constitutional Review of the Judgment of the Supreme Court of Kosovo,
Rev. No. 36/2010 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
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Svetozar Nikolić residing in Kraljevo, Republic of Serbia.

Challenged decision

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo, Rev. No. 36/2010 dated 12 September 2012, that he received on an unspecified date in September 2012.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Judgment of the Supreme Court of Kosovo, Rev. No. 36/2010 dated 12 September 2012, in which the Applicant's requested a revision of the Pristina District Court Judgment Gz No. 993/2008 dated 2 July 2009, which was rejected.
4. The case concerns the compensation of material damages to the Applicant suffered during the March 2004 events in Kosovo. Due to this the Applicant sued the Government of Kosovo.

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 27 December 2012, the Applicant submitted a referral to the Constitutional Court.
7. On 10 January 2013, 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.
8. On 21 January 2013, the Court notified the Applicant and the Supreme Court with the registration of the referral.
9. On 6 June 2013, the Applicant submitted to the Court the 31-page written submission entitled "*Clarification of Referral Svetozar Nikolić...*".
10. On 9 September 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. The Applicant was the owner of two houses located in the street called Vojvoda Bojović in Kosovo Polje.

12. According to the Applicant, *“during the night between the 17th and the 18th of March 2004, he was forced to leave his house due to threats of violence and terror. Immediately after the Applicant’s departure, the house was looted by organized groups of assaulters and was set on fire until it burnt to its foundations, although at that time, the KFOR troops and other international factors, including the local authorities were present and responsible for security in Kosovo.”*
13. Following that event, the Applicant initiated two different sets of civil proceedings to receive compensation for the damage he suffered.
14. The first set of the proceedings was finalized by the Judgment of the Supreme Court of Kosovo (Rev. No. 36/2010) on 12 September 2012. It is the constitutionality of this case that the Applicant is challenging before the Constitutional Court.

The proceedings can be summarized as follows:

15. On 14 June 2004, the Applicant submitted a claim to the Municipal Court in Pristina for the compensation of damage, against the Municipality of Pristina and the Government of Kosovo. During this proceeding, the Applicant specified his claim and requested the Municipal Court in Pristina to oblige the Government of Kosovo to compensate him the damage he suffered in the amount of 377,850 Euro with interest from the date 14 June 2004.
16. On 16 April 2008, the Municipal Court in Pristina issued judgment No. P 1295/04 and rejected the Applicant’s claim as ungrounded. In the reasoning of the judgment, it was stated that *“it is view of the Court that the Government of Kosovo does not have civil law liability for damage occurred by the acts of violence that happened in Kosovo on 17 March 2004, since in this case the damage did not occur by unlawful or inappropriate work exercised by its bodies in exercising of their function.”*
17. It was further argued by the Applicant that on 17 March 2004 in Kosovo, *“KFOR and UNMIK were obliged to prevent such acts from happening. Taking into account that in accordance with Article 8 (a) of the Constitutional Framework for Kosovo issues of security and public order were under reserved powers of the SRSG, what means that KFOR and UNMIK were obliged to prevent dangers against citizens and their properties”.*
18. On 17 June 2009, the Applicant submitted an appeal challenging, *inter alia*, the absence of passive legitimacy of the Government of Kosovo. The Applicant recalled that Article 180 of the Law on Obligations and Article 6 of the Constitutional Framework were applicable in the case at hand.

19. On 2 July 2009, the District Court in Kosovo rejected the Applicant's appeal as ungrounded.
20. On 30 November 2009, the Applicant submitted a revision to the Supreme Court of Kosovo and reiterated the legal arguments he raised in his appeal to the District Court. He also added that District Court wrongly cited and interpreted the Article 8.1 (a) of the Constitutional Framework.
21. On 20 December 2010, the Applicant submitted a request for urgency to the President and Administrator of the Supreme Court in order to speed up the proceedings pending before the Supreme Court.
22. On 8 March 2011, the Applicant reiterated his request to the President and Administrator of the Supreme Court.
23. On 21 March 2011, the Administrator of the Supreme Court replied to the Applicant's request from 8 March 2011. He also informed him that the Supreme Court had received his request for urgency and revision on 28 May 2010. It was further stated by the Supreme Court Administrator that the Supreme Court "*is overburdened with cases of all subject matters, including the civil law matters. In this situation in accordance with the rules on deciding cases with priority in deciding, we strive to decide the cases of the same level of urgency following the date we receive the case. Therefore your case will be decided in accordance with these rules.*"
24. On 12 September 2012, the Supreme Court issued the Judgment Rev.br 36/2010 and rejected the revision of the Applicant as ungrounded.
25. The Supreme Court found the Applicant's arguments unfounded and added that "*by the UN Resolution of Security Council 1244 ...in Article 9 (d) of the Resolution it was decided that responsibility for international security presence...will be exercised by the international community.*"
26. The Supreme Court further recalled that both Article 8 of the Provisional Constitutional Framework and the provisions of the Kumanovo Military Agreement, that is part of the UN Resolution 1244, provide that the United Nations and KFOR are liable for, among other things, the compensation of damages.
27. In his referral the Applicant also mentioned the second set of proceedings he initiated before the Municipal Court in Pristina also on 14 June 2004. In this case the Applicant sued for the compensation of the damage caused by the same events in 2004. However, in this case the Applicant sued UNMIK and KFOR.
28. These proceedings were finalized by the judgment of the District Court in Pristina GZ. No 176/2008 on 5 March 2010. The Applicant's appeal was rejected as ungrounded based on the UNMIK Regulation 2000/47 on the Status and Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo

which provides that for both KFOR and UNMIK their property, funds and assets are immune from any legal process.

Applicant's allegations

29. In his referral and the subsequent written submission of 6 June 2013, the Applicant provides a detailed account of the human rights violations that he alleged to have taken place.
30. The Applicant emphasized that *"the conduct of the court in the Republic of Kosovo has caused violation of my rights to enjoy personal property and rights to safety, because there is a duality of judicial and administrative decisions. The State has taken the responsibility of protecting the properties of citizens, and simultaneously is legal heir of international institutions of Kosovo, and legally there is no possibility of a situation in which no institution is held liable for the damage caused to my property in the 2004 riots."*
31. The Applicant claims that from the facts of the case it appears that there has been a violation of Articles 3 and 24 [Equality before law] since *"the same court first decides and reasons that UNMIK and KFOR are liable for the damage caused, while in the second case, it negates their liability and transfers the liability to the Government of Kosovo."*
32. The Applicant also claims that his right to a fair and impartial trial, guaranteed by Article 24 of the Constitution, has also been violated. He alleges that *"two judgments of the same Court, on the same case, are in collision with each other-if there was a regular hearing that would not be allowed."*
33. The Applicant further claims that the facts of the case proves that *"procedure held on compensation of material damage on the basis of destroyed property by terrorist acts, are left aside selectively- only for Serbian nationals."* He therefore considers that there has been a violation of Article 32 of the Constitution, the Right to Legal Remedies .
34. In addition to this, the Applicant claims that there has been violation of Article 46 [Protection of Property] of the Constitution since he has never realized any compensation for the damage he suffered in 2004 and since he and his family have been left without a home.
35. The Applicant further listed the following Articles of the Constitution that he considered to be violated: Article 54 (Judicial Protection of Rights), Article 56 (Fundamental Rights and Freedoms), Article 102 (General Principles of Judicial System), Article 156 (Refugees and Internally Displaced Persons), Article 19 (Applicability of International Law) and Article 53 (Interpretation of Human Rights Provisions) of the Constitution.

36. The Applicant requests the Constitutional Court to adopt a decision on the compensation of his material damage, and further to award him in the amount of 377,850 Euro as well as for immaterial damage in the amount of 33,000 Euro.
37. Consequently, the Applicant requested the Court to adjudicate his referral on the basis of the Court's judgment in the case KI 72/12 Applicants Veton Berisha and Ilfete Haziri dated 17 December 2012.
38. In his written submission of 6 June 2013, the Applicant mainly reiterated his initial allegations. He emphasized that he wants "*to complete the amendment to his referral... with new evidences on the violation of my constitutional rights, as well as the rights guaranteed by the European Convention on Human Rights...*"
39. Thus, the Applicant reiterated that the civil proceedings he initiated on 14 June 2004 were finalized only after 8 years, i.e. on 12 September 2012, when the Supreme Court issued challenged judgment the Rev. No. 36/2010. He therefore considers that there has been violation of Article 6 of the European Convention on Human Rights
40. In this respect, the Applicant submitted a detailed account of urgencies he submitted to the respective courts requesting them to speed up of the procedure at issue.

Assessment of the Admissibility of the Referral

Preliminary Issue:

41. As the preliminary issue the Court recalls the Applicant's request to adjudicate his referral based on the Court's judgement in the Case No 72/12 of the Applicants Veton Berisha and Ilfete Haziri (Constitutional review of the Supreme Court judgment A.nr.1053/2008, dated 31 May 2012). The Court notes that this case is factually and legally distinguishable from the Applicant's case.
42. With regard to the facts of the case in the Berisha and Haziri case, the Court notes that this was a specific decision of a public authority, not an unidentifiable mob, to destroy the Applicant's property.
43. The Court further notes that the decision to destroy the property in the Berisha and Haziri case was made on 20 June 2008, 5 days after the Constitution entered into force on 15 June 2008, not 17 March 2004; 4 years and 3 months before the Constitution entered into force.
44. Furthermore, the Applicant's case is distinguishable from the Berisha and Haziri case because in their case the Court found that "*the reasoning of the Supreme Court is not sufficiently expressed and elaborated, as the relationship between pertinent evidence, relevant assessment of applicable legal provisions and merit findings is not clearly and completely established*" and there is "*the failure of the*

Supreme Court to provide clear and complete answers vis-a-vis crucial property submissions” (see paras. 62 and 63 of the Berisha and Haziri judgment quoted above). None of these issues are applicable to the Applicant’s case.

45. The Court does however note that the Applicant’s case is more similar to the case KI 01/11, in which the Applicant was a Private Enterprise Gradjevinar (see Resolution on Inadmissibility of 4 October 2011). In that case, the Applicant complained against a judgment of the Supreme Court. The applicant had requested the compensation of damage that occurred in the second part of 1999, but this was rejected.
46. In that case, the Applicant claimed that there had been a “legal vacuum” with regard to the passive legitimacy of KFOR, UNMIK and the Government of Kosovo. However, the Court observed that “*it is clear that this legal vacuum does not exist because the Regulation sets...the UNMIK ...as the sole responsible authority.*” The Court also referred to UNMIK Regulation 2000/47 on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo, which prescribes immunity from any legal process for KFOR and UNMIK. Consequently, the Applicant’s referral was rejected as inadmissible.
47. In the case of Behrami and Saramati against France, Germany and Norway,(Nos. 71412/01 and 78166/01, 2 May 2007), Grand Chamber of the European Court of Human Rights addressed the claim of several individuals who were injured by unexploded bombs or illegal detention during the period in Kosovo under the administration of KFOR and UNMIK. In deciding that their claims were inadmissible the European Court on Human Rights reasoned:

“... UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organization of universal jurisdiction fulfilling its imperative collective security objective.” (See Paragraph 151 of the Decision as of to the Admissibility).

48. The European Court on Human Rights then concluded that in these circumstances the Applicants’ complaints must be declared incompatible *ratione personae* with the provisions of the European Convention on Human Rights. The Court concluded that it did not have jurisdiction to hear the claim because of the international persons involved.

Admissibility

49. The Court first examines whether the Applicant has fulfilled the admissibility requirements set out in the Constitution, and further specified in the Law and the Rules of Procedure.
50. The Court refers to Article 113 (1) of the Constitution which establishes that:

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

51. The Court takes into account Article 48 of the Law on the Constitutional 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 a public authority is subject to challenge”.

52. In connection with this, the Court notes that the substance of the Applicant’s complaints relate to the alleged violation of his right to fair trial (including his right to trial within a reasonable time) and right to property both guaranteed by the Constitution.

53. The Court also notes that while the Applicant challenges Judgment of the Supreme Court of Kosovo, Rev. No. 36/2010 of 12 September 2012, the crux of his complaint is with regard to the *“duality of judicial and administrative decisions”*, arguing that his above mentioned rights have been violated since *“no institution is held liable for the damage caused to my property in the 2004 riots”* (see above paragraph 28). In this respect he also elaborates the second set of the proceedings he initiated against UNMIK and KFOR (see above paragraph 26).

54. With regard to the Applicant’s complaints, the Court recalls that Article 31.1 and 2[Right to Fair and Impartial Trial] of the Constitution, insofar relevant reads as follows:

“Everyone shall be guaranteed equal protection of rights in the proceedings before courts...”.

“2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations ... within a reasonable time ...”

55. The Court also 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:

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

56. The Constitutional Court recalls that, under the Constitution, it is not the task of the Constitutional Court to deal with errors of fact or of 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).

57. 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).

58. In this regard, the Constitutional Court notes that the Applicant has used all legal remedies prescribed by the Law on Contentious Procedure, by submitting the revision against the Judgment of the District Court in Pristina and that the Supreme Court took this into account and indeed answered his appeals on the points of law.
59. The Court notes that the findings of the Supreme Court related to the lack of passive legitimacy on the side of the Government of Kosovo, for the damage the Applicant's suffered during the riots in 2004 coincides with the findings of the International Court of Justice (ICJ) in its Advisory Opinion of 22 July 2010 (Accordance with International Law on Unilateral Declaration of Independence in respect of Kosovo).
60. In that Opinion, ICJ stated, *inter alia*, "that on 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1,... Under this regulation, "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary", was vested in UNMIK and exercised by the Special Representative. Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration.
61. Therefore, the Court considers that there is nothing in the Referral indicating 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).
62. As regards the Applicant's complaints with regard to the alleged unreasonable length of his civil proceedings, the Court observes that the civil proceedings the Applicant complains of commenced on 14 June 2004.
63. However, the period which falls within the Court's jurisdiction did not begin on that date, but on 15 June 2008 when the Constitution entered into force (see, *mutatis mutandis*, Horvat v. Croatia, no. 51585/99 § 50, ECHR - 2001-VIII). The proceedings were concluded on 12 September 2012. They therefore lasted for eight years, two months and twenty-seven days of which a period of four years, two months and twenty six days is to be examined by the Court.
64. The Court reiterates that in order to determine the reasonableness of the length of time in question, regard must be had to the state of the case on 14 June 2008. In

connection with this, the Court notes that at the time of the entry into force of the Constitution the proceedings had lasted for four years.

65. The Court further reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria established by its case-law, particularly the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, *Frydlender v. France* [GC], no.30979/96, § 43, ECHR 2000-VII).
66. The Court notes that in the period to be taken into account two judgments were issued in the Applicant's case, i.e. judgment of the District Court in Pristina on 5 March 2010 and the Supreme Court judgment of 12 September 2012.
67. Having regard to all the circumstances of the case, the Court concludes that the Applicant did not substantiate a violation of his right to fair trial due to the unreasonable time as regards to the civil court proceedings after 15 June 2008.
68. Therefore, this part of the referral is manifestly-ill-founded in accordance with Rule 36 of the Rules of Procedure.
69. Concerning, the Applicant's complaints with regard to his allegation of the alleged violation of his property rights guaranteed by Article 46 of the Constitution related to the events occurred in 2004, the Court recalls that the relevant parts of Article 46 of the Constitution read as follows:

"The right to own property is guaranteed.

Use of property is regulated by law in accordance with the public interest.

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."

70. The Court notes that from the facts of the case it is evident that the Applicant's property was destroyed in March 2004.
71. The Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference.
72. Pursuant to Rule 36 of the Court's Rules of the Procedure "*Referral may also be deemed inadmissible in any of the following cases: h) the Referral is incompatible ratione temporis with the Constitution*".
73. Similar admissibility criterion is applied by the European Court on Human Rights.

74. The European Convention on Human Rights imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date (see *Kopecný v. Slovakia* [GC], § 38, ECHR 2004-IX) As the European Court stated in the *Kopecny* judgment “*Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlies the law of State responsibility*”.
75. Based on all above Applicant’s referral with regard to the alleged violation of his property rights related to the events that occurred prior 15 June 2008 is incompatible “*ratione temporis*” with the provisions of the Constitution.
76. Accordingly, the Court finds that the Referral was not referred to the court in a legal manner, pursuant to Article 113 (1) of the Constitution, Article 48 of the Law and Rule 36 inadmissible.

FOR THESE REASONS

The Constitutional Court pursuant to Article 113 (1) of the Constitution, Article 48 of the Law and Rule 36 of the Rules of the Procedure, unanimously:

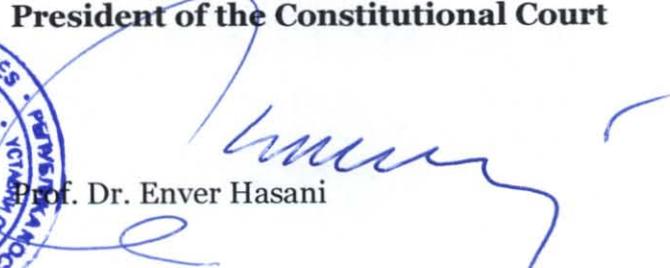
DECIDES

- 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. TO DECLARE this Decision immediately effective.

Judge Rapporteur


Robert Carolan

President of the Constitutional Court


Prof. Dr. Enver Hasani

