



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

Prishtina, on 12 May 2016
Ref. no.:RK936/16

RESOLUTION ON INADMISSIBILITY

In

Case KI76/15

Applicant

Dušana Mitić

**Constitutional review of Judgment AC-I-13-0114-A0001 of the
Special Chamber of the Supreme Court of Kosovo on Privatization Agency
of Kosovo Related Matters, of 11 December 2014**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Robert Carolan Judge
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 is submitted by Mrs. Dušana Mitić Simić from village of Lapje Selo, Municipality of Gračanica (hereinafter, the Applicant), represented by Mr. Visar Vehapi, a lawyer practicing in Prishtina.

Challenged decisions

2. The Applicant challenges Judgment AC-I-13-0114-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter, the Appellate Panel) of 11 December 2014, which was served on the Applicant on 12 February 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violated Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 46 [Protection of Property] and 53 [Interpretation of Human Right Provisions] of the Constitution.

Legal basis

4. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution) and Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law).

Proceedings before the Constitutional Court

5. On 11 June 2015, the Applicant via Post Office filed a Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court) which arrived at the Court on 15 June 2015.
6. On 3 August 2015, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of judges Robert Carolan (presiding), Ivan Čukalović and Arta Rama-Hajrizi.
7. On 4 September 2015, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel.
8. On 16 March 2016, after having considered the report of the Judge Rapporteur, the Review Panel recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 21 April 2008, the Applicant submitted a Claim with the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter, the Specialized Panel) for annulment of purchase contracts over two cadastral parcels located in Llapje Sellë/Laplje Selo Village.
10. The Applicant claimed that the contracts of sale of these parcels were concluded under the pressure of the state authorities of that time.

11. On 20 June 2013, the Specialized Panel (Judgment SCC-08-0105) rejected as ungrounded the Claim of the Applicant.
12. In the reasoning of this Judgment, it is said that *"the Claimant based its action on Article 103 of the Law of Contract and Torts of the year 1978 and Article 8A of the Law on Transfer of Immovable Property of 1981. However, Article 1106 of the Law of Contract and torts explicitly excludes the retroactive effect of legal provisions and therefore cannot apply for deeds of 1960, linked by the Claimant's predecessor. (...) When we are referring to Article 8 of the Law on Transfer of Immovable Property, the court is of the opinion that this Law has never been applied in Kosovo. The law was approved in 1981 in Serbia by the Assembly of Serbia (Official Gazette of Serbia 45/81) and in the same year in Kosovo by the Kosovo Assembly (Official Gazette (45/81). Both laws have the title "Law on Transfer of Immovable Property". On 23.07.1987 Serbia lawmakers amended the law regarding Article 8a. Serbian legislature also had no power to amend the laws of a next legislature. So Kosovo Law on Circulation of Real Estate, had never adopted the provision of Article 8 of the Law of Serbia"*.
13. On 11 July 2013, the Applicant submitted an appeal due to: *"Essential violations of the contested procedure provisions; Erroneous and incomplete ascertainment of the factual situation; Erroneous application of substantive law – LAW"*.
14. On 11 December 2014, the Appellate Panel refused the appeal as unfounded and upheld the Judgment of the Specialized Panel.
15. In the reasoning of this Judgment the Appellate Panel of the SCSC states:

"... the Appellate Panel concludes the same as the court of the first instance, that the Law on Contracts of Torts of 1978 and the Law on Transfer of the Immovable Property of 1981, respectively amended article (8a in 1987), on which the Appellant bases its allegations on the appeal, explicitly exclude their retroactive effect, and thus may not apply to contracts of 60s, entered by the predecessor of the Claimant. (...). Amendments of this article were made by Serbia unilaterally after 1987, despite the fact that it still had not legislative power to amend the laws of Kosovo, therefore that provision has never been valid in Kosovo, but after it was finally abolished the substantial autonomy of Kosovo".
16. Moreover, the Appellate Panel found that *"the current applicable law for cases related to such requests is the Law of the Special Chamber of the Supreme Court of Kosovo no. 04/L-033, which in Article 11, paragraph 2, solves the dilemma of such requests."*..

Applicant's allegations

17. The Applicant claims that the Judgment of the Appellate Panel violated her rights to equality before the Law, to fair and impartial Trial and consequently to protection of Property.
18. The Applicant alleges that the Appellate Panel deprived the Applicant from the right to fair and impartial trial, because it *"rendered completely political judgments and not legal ones, because it is not in the competence of the Court to deal with the abrogation of any law (...) whereas the exercise of legal power and application of laws in force fall in the competency of the courts"*.
19. The Applicant further alleges that alleges that the Appellate Panel *"violated also Article 24 of the Constitution of the Republic of Kosovo (...), because it treated the Applicant - Ms. Dushanka Mitiq-Simiq in an unequal manner before the law, compared to those thousands of case laws before 1999 and thousands of others after 1999"*.
20. In addition, the Applicant concluded that *"by violating the provisions mentioned above, the SCSCK has also violated Article 46 of the Constitution of the Republic of Kosovo, which guarantees the protection of the property right"*.
21. Finally the Applicant requests the Court namely *"to declare invalid"* the challenged Judgment and *"to remand Judgment (...) for retrial"*.

Admissibility of the Referral

22. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
23. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

"Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."
24. The Court also refers to Article 48 of the Law, which provides:

"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge".
25. The Court further takes into account Rule 36 of the Rules of Procedure which foresee:

“(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: [...] (d) the Applicant does not sufficiently substantiate his claim”.

26. The Court recalls that the main argument of the Applicant has to do with the applicability of Article 8 a) of the Law on Transfer of Immovable Property of the Republic of Serbia *“in the entire territory of the Republic of Serbia, which means that it was applicable in Kosovo, too”.*
27. In fact, the Applicant argued that *“certain provisions (at that time) were regulated in a unique manner, pursuant to Article 300 of the Constitution of Serbia in the entire territory of the former Republic – which means that of former SAPK, too; and for that, such a provision was approved to be applied by former SAPK, too”.*
28. The Court considers that the Appellate Panel thoroughly analyzed the allegations made by the Applicant, reasoning in a detailed manner why her appeal was refused as unfounded.
29. In fact, the Appellate Panel explained that *“the Law on Contracts of Torts of 1978 and the Law on Transfer of the Immovable Property of 1981, respectively amended article (8a in 1987), on which the Appellant bases its allegations on the appeal, explicitly exclude their retroactive effect, and thus may not apply to contracts of 60s, entered by the predecessor of the Claimant”.*
30. Moreover, the Appellate Panel further concluded that *“in this actual case there wasn’t any contradiction between the law of Kosovo and Serbia”.*
31. The Court considers that the alleged erroneous application of certain legal provisions instead of others pertains to the domain of legality, which falls under the prerogatives of the regular courts. Moreover, that allegation configures a “fourth instance” appeal submission.
32. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). (See, for example, Case No. KI72/14, Applicant *Besa Qirezi*, Judgment of 4 February 2015, para.65)
33. In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (See, *mutatis mutandis*, *García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).

34. The Constitutional Court recalls that its role is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance" court (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
35. The Court reiterates that, as a general rule, the establishment of the facts of the case and the interpretation of law are a matter solely for the regular instances whose findings and conclusions in this regard are binding on the Constitutional Court. However, where a decision of a regular court is clearly arbitrary, the Court can and must call it into question. (See *Sisojeva and Others v. Latvia*, [GC], application no. 60654/00, Judgment of 15 January 2007, para. 89).
36. The Court considers that the proceedings before the Appellate Panel were not arbitrary; the proceedings were fair and the Judgment was entirely justified and reasoned, namely explaining why the legislation invoked by the Applicant was not applicable to her case. (See case *Shub v. Lithuania*, No. 17064/06, ECHR, Decision of 30 June 2009).
37. Moreover, the Court considers that the Applicant has not built her allegations on a constitutional basis. In fact, the Applicant has not substantiated and proved that the Appellate Panel denied her rights, while deciding that the retroactive effect is excluded.
38. On the contrary, the Court notes that the Applicant based her complaint on "*Erroneous application of substantive law – LAW*", which pertains to the domain of legality and as such does not fall under the jurisdiction of the Constitutional Court.
39. In addition, the fact that the Applicant disagrees with the outcome of the case cannot of itself raise an arguable claim of a breach of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution.
40. Consequently, the Referral is manifestly ill-founded on a constitutional basis and is inadmissible pursuant to Rule 36 (1) d) and (2) d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 (7) of the Constitution, Article 48 of the Law and Rules 36 (1) d) and (2) d) of the Rules of Procedure, in the session held on 16 March 2016, unanimously

DECIDES

- I. TO DECLARE 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 effective immediately.

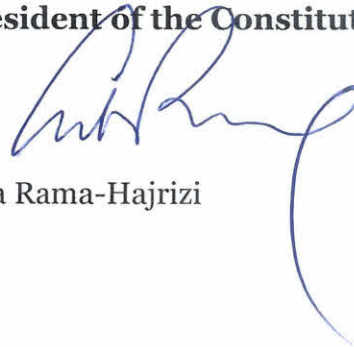
Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Arta Rama-Hajrizi