



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

Prishtina, on 2 March 2017
Ref. no.:RK 1045/17

RESOLUTION ON INADMISSIBILITY

in

Case no. KI102/16

Applicant

Shefqet Berisha

**Constitutional review of Judgment Rev. no. 50/2016, of the Supreme
Court of Kosovo, of 4 April 2016**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

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

Applicant

1. The Referral was submitted by Shefqet Berisha (hereinafter: the Applicant) from Prishtina.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 50/2016, of the Supreme Court, of 4 April 2016, in conjunction with Judgment Ac. No. 401/2014, of the Court of Appeal, of 26 October 2015, and Judgment C. No. 162/09, of the Basic Court in Prishtina, of 29 October 2013.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment Rev. no. 50/2016, of the Supreme Court, of 4 April 2014.
4. The Applicant alleges a violation of Article 31 [Right to Fair and Impartial Trial], Article 22.2 [Direct Applicability of International Agreements and Instruments] and Article 54 [Judicial Protection of Rights] 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 on Human Rights (hereinafter: the Convention).
5. The Applicant requests the imposition of interim measure and prohibition of the execution of the challenged decisions of the Supreme Court, Court of Appeal and the Basic Court in Prishtina.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 27, 47 and 48 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rules 55 and 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 4 August 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 19 September 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović (judges).
9. On 10 November 2016, the Court notified the Applicant about the registration of the Referral, and sent a copy of the Referral to the Supreme Court.
10. On 14 December 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 29 October 2013, the Basic Court in Prishtina by Judgment C. no. 162/09 approved the statement of claim of the claimant KSH and obliged the Applicant to pay the claimant the outstanding loan.
12. The Basic Court in Prishtina noted as it follows:

“I. APPROVED the statement of claim of claimant Komjet Shala from Peja, and the respondent Shefqet Berisha from Prishtina IS OBLIGED to pay the amount of 17.500 euro on behalf of the debt under the agreement on unpaid loan, with the interest rate of 3.5% which the banks pay for the term deposits within a year, without certain destination, starting from the date of filing the claim, 02.02.2009, all within a time limit of 15 days from the date the judgment was rendered under the forced execution.

II. The respondent is obliged to compensate to claimant the costs of the proceedings in the amount of € 568, within a time limit of 15 days from the day the judgment was served on him under the threat of forced execution.”
13. The Applicant filed appeal with the Court of Appeal on the grounds of essential violation of the procedural provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law, with a proposal that the appealed judgment be annulled and the case be remanded for retrial.
14. On 26 October 2015, the Court of Appeal by Judgment CA. no. 401/2014 rejected the appeal of the Applicant as ungrounded and upheld the Judgment of the Basic Court. The Court of Appeal found that based on the witness statements, the Applicant owed to claimant the amount of € 17,500, that the statement of claim was not statute-barred, because based on the witness statements, the Applicant accepted the extension of the time limit of the debt; whereas it did not specifically reasoned other allegations, because it considered that those allegations do not question the fairness of the decision of the Basic Court.
15. On 23 November 2015, the Applicant filed a request for revision with the Supreme Court on the grounds of essential violation of the procedural provisions, erroneous application of the substantive law and erroneous and incomplete determination of factual situation. The Applicant mainly complained that: (i) the Basic Court did not approve his proposal to hear an important witness, (ii) the legitimacy and identity of the claiming party was not accurately determined and that his identity is not known (iii) the statement of claim of the claimant was statute-barred and (iv) the decisions of the lower instance courts are not reasoned, because they do not contain clear reasons for the decisive facts.
16. On 4 April 2016, the Supreme Court by Judgment Rev. No. 50/2016 rejected as ungrounded the revision of the Applicant, upheld his obligation to the claimant and modified the decisions of lower instance court only in terms of the interest rate.

17. The relevant part of the Judgment of the Supreme Court reads:

“In the conducted proceedings there is no essential violation of the contested procedure provisions under Article 182.2 item (n) of LCP, which the claimant refers in the revision, as the judgments of the lower instance courts contain clear and full reasons for decisive facts, the enacting clauses of the judgments are clear and complete for the decisive facts, are not in contradiction with the given reasons and administered evidence, and by the challenged judgment were assessed all appealing allegations of the claimant, which are important for deciding in this legal matter.

The allegations in the revision for erroneous application of the substantive law, are ungrounded. Based on the determined factual situation it was concluded that the respondent owes to claimant the amount of 35.000 DM, which was converted into € 17.500. The debt results from the legal relationship of the contract on loan, where the claimant in the name of loan gave to the respondent the amount of 35.000 DM. Based on the agreement on loan in 1999, the respondent was obliged to return to the claimant the amount of loan until 31.12.2002, while this deadline was extended until 31.12.2008, and even after this time limit, the respondent did not return the debt to the claimant. The existence of legal relationship of the contract on loan between the litigants was confirmed by the statements of the witnesses heard Islam Jahjaga, Abaz Berisha and Selman Berisha.

Based on determined factual situation, according to the assessment of the Supreme Court of Kosovo, when deciding on this legal matter, the substantive law was correctly applied, where it was concluded that the litigants entered into the obligational relationship under the contract on loan, pursuant to Article 557 of the Law on Obligational Relationship (Official Gazette of SFRY no. 29/1978) which was applicable when the legal relationship was established. The respondent as a borrower, pursuant to Article 562 of LOR, was obliged to return the loan within the contracted deadline, and that the deadline for return of the loan, under the agreement between the litigants, initially was until 31.12.2002 and that later it was extended to 31.12.2008, and that after this deadline, the respondent did not fulfill his obligations under this contract. The claimant as a creditor has the right to request that the respondent as a debtor fulfils the obligation under the contract on loan, in accordance with Article 262.1 of LOR.

The allegations in the revision that the first instance court did not accept to hear the witness Ismet Ali Sopi, the imam of the mosque "Sofalia" in Prishtina, are ungrounded, due to the reason that the first instance court assessed that the proposal for hearing the witness in question is irrelevant for deciding this legal matter. The allegations in the revision that the heard witnesses did not clarify the relevant facts for deciding in this legal matter, are ungrounded, because the first instance court heard the witnesses under the circumstances that have to do with the fact whether the legal relationship under the contract on loan between the litigating

parties had existed, which fact was relevant for rendering a fair decision on this legal matter, due to the reason that the litigating parties concluded the verbal agreement on the loan.

The respondent in the revision challenges the fact of the legitimacy and identity of the responding party, emphasizing that the claimant, in addition to the identity of Komjet Shala, has the identity of Andreas Carsten Robert Shëarz, as a German citizen. However, in the minutes of the hearing of the first instance court on 19.4.2013, the court made the identification of the claimant based on the passport no. K000432720 and that in this hearing was present in person the respondent and his authorized representative Hasan Rexha, who did not have any remarks on the identity of the claimant, as well as in the later hearings, therefore, the allegations in the revision that the identification of the claimant was not carried out are ungrounded.

The first instance court has correctly applied the substantive provisions when it found that the claimant's request has not become statute-barred, in accordance with Article 361 .1 of LOR, because we have the interruption of the statutory limitation, in accordance with Article 387 and Article 392 of LOR and that with the interruption of the statutory limitation, the deadline runs as of the beginning, thus, in this respect, the allegations are ungrounded.

The revision may be filed on the grounds of incomplete and erroneous determination of the factual situation, in accordance with Article 214.2 of LCP, therefore, in this respect, the allegations in the revisions were not assessed.”

18. On 15 February 2016, the Basic Court in Prishtina, by Decision C. no. 2929/2015 approved as grounded the proposal of the claimant K.SH. to impose the security measure and to order the Applicant to not construct anything, to not sell, and to not contract and certify the contract on the sale-purchase of the immovable property with the competent notary in Prishtina and wider in the cadastral unit assigned in Prishtina until another decision of this court is rendered.
19. The Applicant filed appeal against the abovementioned Decision of the Basic Court with the Court of Appeal.
20. On 24 April 2016, the Court of Appeal, by Decision Ac. no. 1347/16 rejected as ungrounded the Applicant's appeal and upheld the Decision of the Basic Court.
21. The Applicant submitted a request for protection of legality to the Office of the Chief State Prosecutor, claiming, *inter alia*, that the claimant KSH, during all the time was presented with a false identity and that this was not proved by the regular courts, despite numerous complaints of the Applicant.
22. In the request for protection of legality, the Applicant alleges among the other:

“During the court hearings in the Basic Court in Prishtina we raised the issue of identity of the claimant, who is in fact Mr. Andreas Carsten Robert Schwarz, a German citizen with no. Ausweis 5683830991 from Iserlohn/Hagen - with emplacement and permanent residence in the Federal Republic of Germany, but in Kosovo was presented with a false identity/falsified Komjet Shala (identity that is used in the claim and in the court procedure). Accordingly, considering the issue raised, the Court ex officio should have acted in accordance with Article 278.2 of LCP, because there were presented at least the criminal offenses (by claimant-responding party) the falsifying document, fraud and mistake. The court should have taken into consideration the information submitted - evidence presented in the first session.”

23. On 31 May 2016, the Office of the Chief State Prosecutor notified the Applicant that it has received his initiative and has submitted a request for protection of legality.

Applicant’s allegations

24. The Applicant alleges a violation of Articles 31 [Right to Fair and Impartial Trial], 22.2 [Direct Applicability of International Agreements and Instruments] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 (Right to a fair hearing) of the Convention.
25. The Applicant alleges that the regular courts at all instances did not take into account the evidence proposed by him, nor have they justified why they have rejected those evidence, when, *inter alia*, rejected to determine precisely the identity of the clamant K.SH. and to hear the witness I.S. – who according to the Applicant - is an important witness for the fair resolution of his case. The Applicant alleges that in his case - due to rejection and lack of reasoning of the rejection of evidence and the witness proposed by him- the principle of equality of arms and the right to a reasoned decision were violated, as a component of the general right to fair and impartial trial.
26. The Applicant alleges that: *“The Supreme Court of Kosovo violated Article 6 of the Convention, because it did not deal at all with the request for participation in the session of revision submitted on the grounds of violation of human rights and freedoms -Article 6 of Convention. Through this request I requested the court to hold the hearing in which it would hear my allegations for violation of fundamental human rights and freedoms -Article 6 of Convention. The arguments for violation of fundamental human rights and freedoms by the previous courts (violations that have prevented fair and impartial trial) are attached to this letter and are justified by reference to the case law of the ECtHR.”*
27. The Applicant states that: *“The State Prosecution requested the annulment of the court decisions that were rendered in the proceedings of deciding on security measure– considering that there are elements of the criminal offence (falsified identity of the claimant), because he is not Komjet Shala (Kosovo citizen), but he is Andreas Carsten Roben Schwartz, German citizen, with permanent residence and emplacement in the Federal Republic of Germany.*

Taking into account that the FRG bans two citizenships, the existence of these criminal offences cannot be excluded. Even if two citizenships were allowed, the use of different identities in different countries is not allowed in any way, because the identity is not determined by personal name and in this respect is also determined the personality and legitimacy of a party. It is not about the same person – but about different personalities. How can it be considered a regular procedure, as long as the identity of the parties in the proceedings is not certain?”

28. The Applicant alleges that the Supreme Court and the Court of Appeal rendered unreasoned decisions: *“The Court of Appeal, except it did not reason its decisions/conclusions, it even did not reiterate the reasoning of the first instance court – and does not give justification as to why it agrees with the reasoning of the first instance court...the Supreme Court of Kosovo reiterated silently all violations of the previous instances, by turning them into continuous violation of human rights and fundamental freedoms by the state judiciary. The Court, inter alia, does not justify at all its decision that there has not been a violation of the formal law and that there has not been a violation of the substantive law.”*
29. The Applicant requests the imposition of the interim measure, in accordance with Article 27 of the Law and Rule 54 of the Rules of Procedure. *“In this respect, the Applicant emphasizes: “... I submit to the Constitutional Court of the Republic of Kosovo this request for imposition of the interim measure against Judgment Rev. No. 50/2016 of the Supreme Court of Kosovo, Judgment CI. no. 41 O/2014 of the Court of Appeal and final Judgment C. no. 162/2009 of the Basic Court in Prishtina.”*
30. The Applicant requests the Court to impose an interim measure because the decisions of the regular courts are unconstitutional and that the implementation of these decisions would cause him irreparable damage.
31. Finally, the Applicant requests the Court: (i) to declare the Referral admissible, (ii) to hold a violation of Articles 31, 22.2 and 54 of the Constitution in conjunction with Article 6 of the Convention, (iii) to declare invalid Judgment Rev. No. 50/2016 of the Supreme Court, of 4 April 2016, and (iv) to remand the case for retrial in accordance with the Judgment of the Constitutional Court.

Admissibility of the Referral

32. The Court shall first examine whether the Applicant fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and Rules of Procedure.
33. 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.”

34. The Court also refers to Article 47 of the Law which foresees:

“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.”

35. The Court also refers to Article 27 of the Law which provides:

*Article 27
Interim Measures*

“The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.”

36. The Court, further takes into account Rule 36 (1) (b) of the Rules of Procedure that specifies:

*Rule 36
Admissibility criteria*

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

*...
(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted.”*

37. In the present case, the Court notes that the Office of the Chief State Prosecutor notified the Applicant that it has received his initiative and that he submitted a request for protection of legality.
38. The Court notes that based on the case law of the European Court on Human Rights, the individuals need not to use discretionary or extraordinary remedies, for example requesting a court to review its decision or requesting the reopening of proceedings (see: *Çinar v. Turkey* and *Prystavka v. Ukraine*). The individuals are also not obliged to exhaust legal remedies that are not directly at their disposal, but had to rely on the exercise of discretion by the mediator (see: for example *Tanase v. Moldova*, [GC] paragraph 122).
39. However, the Court also recalls that it has already established its case law that if the proceedings are ongoing before the regular courts, then the Applicants' Referral is considered premature (see, for example, Resolution on Inadmissibility in individual cases no. KI23/10, KI32/11, KI113/12, KI114/12, KI07/13 and KI58/13).

40. In this respect, the Court wishes to reiterate that the rationale for the exhaustion rule is to afford the public authorities, including the courts, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order provides an effective remedy for the violation of constitutional rights (see, *mutatis mutandis*, ECHR, *Selmouni v. France*, no. 25803/94, Decision of 28 July 1999)
41. The Court notes that the Referral raises important issues dealing with the procedural legitimacy of the parties and hearing of witnesses. However, based on the principle of subsidiarity, the Court is obliged to provide the opportunity and give advantage to regular courts to address these issues. In this regard, the Court takes into account the fact that the State Prosecutor approved the Applicant's request to file a request for protection of legality (for a more detailed explanation of the principle of subsidiarity see Case no. KIO8/11, Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo, of 10 May 2012, paragraphs 46 and 47 and other references cited in that decision).
42. The Court considers that - despite the proceedings that are ongoing before the regular courts and without prejudice to those proceedings - nothing prevents the Applicant that in the future submits the constitutional referral within the legal deadline of four months from the date the final decision on his case is served on him by the regular courts.
43. Therefore, the Applicant's Referral is premature and is to be declared inadmissible, on constitutional basis, as it is established in Article 113.7 of the Constitution, provided for in Article 47 of the Law and further specified in Rule 36 (1) (b) of the Rules of Procedure.

Request for interim measure

44. The Applicant requested the imposition of an interim measure because the decisions of the regular court were rendered, *inter alia*, in contradiction with the principle of equality of arms, they are unconstitutional and that he will suffer irreparable damage.
45. The Court refers to Rule 55 (4) of the Rules of Procedure, which specifies:

"[...] Before the Review Panel may recommend the approval of the request for interim measures, it is necessary that:

(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;
46. As stated above, the Referral is premature, because there is no *prima facie* case. Accordingly, the request for interim measure is to be rejected as ungrounded.

FOR THESE REASONS,

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 27 and 47 of the Law and Rules 36 (1) (b) and 55 (4) of the Rules of Procedure, on 14 December 2016, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO REJECT the request for interim measure;
- 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. This Decision is effective immediately;

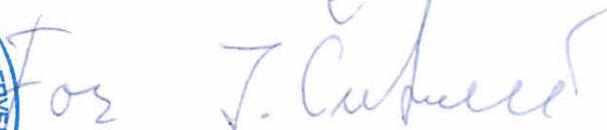
Judge Rapporteur



Bekim Sejdiu



President of the Constitutional Court



Arta Rama-Hajrizi