



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

Pristine, 30 August 2012
Ref. No.: RK290/12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI158/11

Applicant

Municipal Court in Ferizaj – Branch in Shterpce

**Request for constitutional review of the Decision of the Constitutional Court of
Serbia, Tu. No. 367/90, dated 21 March 1991**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is the Municipal Court in Ferizaj – Branch in Shterpce.

Challenged decision

2. The challenged decision of the public authority, whose constitutional review is requested from the Constitutional Court, is the Decision of the Constitutional Court of Serbia, Tu. No. 367/90, dated 21 March 1991.

Subject matter

3. The subject matter of the issue referred to the Constitutional Court of the Republic of Kosovo on 7 December 2011 is the constitutional review of the Decision of the Constitutional Court of Serbia, Tu. No. 367/90, dated 21 March 1991, declaring as unconstitutional the Decision of Ferizaj Municipal Assembly approving the Detailed Urban Plan of the Weekend-Area in Sharr (dated 24 January 1979), published in the Official Gazette of SAPK, No. 6, dated 23 February 1979.

Legal basis

4. Article 113.8 of the Constitution of the Republic of Kosovo (hereinafter referred to as the "Constitution"), Article 51 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2009, which entered into force on 15 January 2010 (hereinafter referred to as the "Law"), and Section 29 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

5. On 7 December 2011, the Constitutional Court received a Referral submitted by the Municipal Court in Ferizaj – Shterpce Branch, which was signed on its behalf by Judge Musa Konxheli. By this Referral it is requested the constitutional review of the challenged act mentioned in paragraph 2 of this Resolution.
6. On 30 January, the Constitutional Court sent a notification to the Municipal Court in Ferizaj – Shterpce Branch that their Referral has been registered with the Constitutional Court under no. KI-158/11.
7. On 17 January 2012, the President of the Court, by Decision Gjr. KI 158/11, appointed the Deputy-President of the Court, Mr. Kadri Kryeziu, to draft the preliminary report concerning the Referral. On the same date, the President of the Court, by Decision KSH-KI 158/11, appointed the Review Panel composed of: Altay Suroy (Presiding) and Judges Robert Carolan and Prof. Dr. Enver Hasani, Panel members.
8. On 19 April 2012, in the deliberation session on this Referral, the Review Panel unanimously proposed to the full Court the inadmissibility of the Referral.

Summary of the facts

9. On 24 January 1979, the Municipal Assembly of Ferizaj had issued Decision 01 no. 03-1645 approving the Detailed Urban Plan of Sharr Weekend-Area and this decision became effective after publication in the Official Gazette of the former Province of Kosovo (see Gazette no. 6, dated 23 February 1979, page 176).
10. The Detailed Urban Plan included immovable properties in Vërbishtica cadastral municipality and Shterpce cadastral municipality, listed in cadastral plots under Article 1 of the said decision.

11. The immovable properties specified in the decision of Ferizaj municipality, dated 24 January 1979, in order to implement that decision, had been expropriated pursuant to the applicable legislation of that time.
12. In 1988 (date illegible), the Constitutional Court of Kosovo (SAPK) had issued Decision U. 77/88 1988, rejecting the request of Shterpce Local Community to declare the decision of Ferizaj Municipal Assembly regarding the Detailed Urban Plan of the Weekend-Area SHARR incompatible with the Constitution, and, as a result, the expropriation of immovable properties included in this Urban Plan (this fact is ascertained through the copy of the Decision of the Constitutional Court of Serbia, Tu. No. 367/90, dated 21 March 1991).
13. On 13 May 2011, Mrs. Milica Petkovic's authorized representative, the lawyer Mr. Sadri Godanci, had filed a lawsuit on the confirmation of the property with the Municipal Court in Ferizaj – Shterpce Branch, requesting this institution to confirm the right to property over plots with an area of 1444 m², respectively 725², which had been expropriated thorough the decision of 1979 of Ferizaj Municipal Assembly. This case was registered with this Court under number C. no. 17/11.
14. As a proof in support of his client's Referral, plaintiff's representative had presented the Decision of the Constitutional Court of Serbia, Tu. No. 367/90, dated 21 March 1991, declaring as unconstitutional the Decision of Ferizaj Municipal Assembly concerning "Sharr" Weekend-Area.
15. On 10 October 2011, during the court session, the respondent, Ferizaj municipality, had challenged this evidence and proposed, *inter alia*, to suspend the process and that the Constitutional Court of Kosovo should declare itself regarding the constitutionality of the decision of the Constitutional Court of Serbia.
16. On 30 November, the Judge of the case, Mr. Musa Konxheli, had issued a resolution approving respondent's proposal and referred the issue to the Constitutional Court of Kosovo requesting the constitutional review of the challenged decisions of the Constitutional Court of Serbia.
17. On 7 December 2011, the Constitutional Court received a formal request on this matter.

Alleged violations of constitutionally guaranteed rights

18. The Applicant has not specified what constitutional violations could have been committed with the challenged decision, but he requested the assessment of its compatibility with the Constitution in general.
19. The Applicant has also requested from the Constitutional Court of Kosovo to give a meritory interpretation whether the challenged decision has been issued by an authorized body considering the time and place of the issuance of the decision (year 1991, after Kosovo's autonomy has been stripped off, in Belgrade), and whether the decision is discriminatory and whether the Municipal Court in Ferizaj – Branch in Shterpce should consider this decision as a relevant fact while examining cases – lawsuits on the confirmation of property, since this fact has been challenged by one of the parties to the proceedings and the Municipal Court in Ferizaj – Shterpce Branch has suspended it pending a decision by the Constitutional Court of Kosovo.

Assessment of the admissibility of the Referral

20. In order to be able to adjudicate the Applicant's Referral, the Constitutional Court needs first to examine whether the Applicant has fulfilled all the admissibility requirements laid down in the Constitution, further specified in the Law on the Constitutional Court and in the Rules of Procedure of the Court.
21. In this regard, the Court refers to Article 113.8 of the Constitution, which stipulates:

"The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue,"

and

Article 51, paragraphs 1 and 2, of the Law on the Constitutional Court, which explicitly stipulates:

1. A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

2. A referral shall specify which provisions of the law are considered incompatible with the Constitution.

The Court also takes into account:

Rule 36, paragraph 3, of the Rules of Procedure of the Constitutional Court, which stipulates:

"(3) A Referral may also be deemed inadmissible in any of the following cases:

f) the Referral is incompatible *ratione materiae* with the Constitution.

22. Referring to the request of the Municipal Court in Ferizaj on the matter raised for review, the Courts holds:

Concerning the constitutional issue and authorized party:

23. As it was mentioned in paragraph 21 of this Resolution, courts are authorized parties to refer constitutional matters within the guidelines prescribed by Article 113.8 of the Constitution and Article 51 of the Law on the Constitutional Court, and the matter they referred to the Constitutional Court should always be covered with constitutional provisions as far as constitutional matters are concerned (see *mutatis mutandis* X v. Germany, Application No. **7462/76, Decision on Inadmissibility – ratione materie, 7 march 1977**).
24. In fact, both the constitutional and legal definition regarding court competences to have recourse to the Constitutional Court clearly determines that they are authorized to

request the assessment of the compatibility of LAWS, not of any other legal act (incidental control of the constitutionality), with the Constitution.

25. From the referral submitted by the Municipal Court in Ferizaj – Shterpce Branch, it can undoubtedly be concluded that this court had not requested the assessment of the compatibility of any law with the Constitution, but of a court decision, which does not fall within the purview of constitutional competences of courts pursuant to Article 113.8 to refer matters to the Constitutional Court.
26. The Constitutional Court emphasizes that even though the matter raised by the Municipal Court is directly linked to the judicial process it is considering, the main matter raised is, nevertheless, RATIONE MATERIE compatible with the Constitution because it is not a legal act whose constitutional review can be requested by courts.

Concerning issues whose constitutional review is requested:

27. The Constitutional Court stresses that as far as substantial matters raised in this Referral are concerned, it is not a fact-finding court and cannot prejudice what facts can be taken into consideration by regular courts examining cases they have under consideration.
28. The correct and complete determination of the factual situation is a full jurisdiction of regular courts and its role (the role of the Constitutional Court) is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and can, therefore, not act as a “fourth instance court” (see, *mutatis mutandis*, i.a., Akdivar v. Turkey, 16 September 1996, R. J. D, 1996-IV, para. 65).
29. Moreover, the Constitutional Court notes that the Decision of the Constitutional Court of Serbia, Tu. No. 367/90, dated 21 March 1991, pointed out the fact that in 1988, the Constitutional Court of Kosovo issued Decision U no. 77/88 declaring itself as a competent constitutional court at that time and this fact should be considered by regular courts as well.
30. Under these circumstances, the Applicant has not raised a constitutional matter within the competences prescribed under Article 113.8, so, in conformity with Article 36, paragraph 3 (f), the Referral should be declared inadmissible because it is “*ratione materiae*” incompatible with the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.8 of the Constitution of the Republic of Kosovo, Article 47 of the Law on the Constitutional Court and Rule 36 of the Rules of Procedure, in its session held on 19 April 2012, unanimously

DECIDES

- I. TO REJECT the Referral as inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law on the Constitutional Court; and
- III. This Decision is effective immediately.

Judge Rapporteur


Mr. Sc. Kadri Kryeziu

President of the Constitutional Court


Prof. dr. Enver Hasani

