



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, 14 October 2011
Ref.No.:RK 127/11

RESOLUTION ON INADMISSIBILITY

in

Case N

o. KI 52/09

Applicant

Shejh Ali Shehu

**Constitutional review of the Judgment of the Supreme Court of the Republic of
Serbia, Rev. 995 /99, of 2 February 2000**

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 Mr. Shejh Ali Shehu, from Gjakova, who is duly represented by Mr. Besnik Haxhijanuzi, a lawyer from Gjakova, residing at Mother Theresa St, no number.

Challenged Decision

2. The challenged decision is the Judgment of the Supreme Court of the Republic of Serbia, Rev. 995/99, of 2 February 2000.

Subject Matter

3. The subject matter of the case submitted for review with the Constitutional Court of the Republic of Kosovo on 14 October 2009 is the assessment of the constitutionality of the Judgment of the Supreme Court of the Republic of Serbia, Rev. 995/99, of 2 February 2000, whilst the party has not provided any general specification as to which constitutionally guaranteed rights have allegedly been violated with the challenged Judgment

Alleged violations of constitutionally guaranteed rights

4. Even though Article 48 of the Law on the Constitutional Court of the Republic of Kosovo stipulates 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 public authority is subject to challenge", the applicant did not base his referral on the provisions of the Law and Constitution, although it can be assumed that the Applicant complains about a violation of the right to property based on Article 46 of the Constitution, although he did not attach any evidence to support his claims.

Legal basis

5. Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, of 16 December 2009 (hereinafter referred to as: the Law), and Section 29 of the Rules of Procedure).

Proceedings before the Court

6. On 14 October 2010, the Applicant filed his Referral with the Constitutional Court.
7. On 21 October 2010, the Constitutional Court notified the Applicant on the registration of his Referral with the Secretariat of the Court.
8. On 13 December 2010, after having considered the Report of the Judge Rapporteur, Kadri Kryeziu, the Review Panel, composed of Judges Almiro Rodiges (Presiding), Iliriana Islami and Gjyljeta Mushkolaj, members, on the same date, recommended to the full Court to reject the Referral as inadmissible.

Applicant's Complaint

9. The Applicant requests the Constitutional Court to assess the constitutionality of the Judgment of the Supreme Court of the Republic of Serbia, Rev. 995/99, of 2 February 2000, and declare it as incompatible with the Constitution and applicable laws in the Republic of Kosovo, and as a legal act that does not produce any legal effects, assuming that it is exactly because of the operation of this Judgment that he has been seriously damaged in the issue of enjoying the property he had gained earlier, according to him, in a legal manner.

Summary of the facts

10. Applicant's mother is Nazife Shehu (now deceased). His father is Shejh Muharrem Shehu (also deceased now). When Muharrem Shehu passed away, Nazife inherited all his property (Decision T. nr. 52/70, of 16.03.19979), whereas their heirs had agreed they would divide the property in equal shares after her death.
11. Pursuant to the donation contract (Ov. br. 237/96, of 1 March 1996), Nazife donated a part of the property to her son, Ali Shehu (now, the Applicant). However, when the other son of Nazife, Aziz Shehu, who was also her caretaker, explained to her what contract she had concluded, "she was terrified, objected it and requested an urgent procedure" for the annulment of the contract.
12. Aziz Shehu, as stated above, was the caretaker of Mrs. Nazife, and, through her authorization, he filed a lawsuit against Ali Shehu with the Municipal Court in Djakova for the annulment of the donation contract, and this Court, through Judgment (P. br. 279/97) of 9 July 1997: (1) annulled the donation contract, and (2) ordered plaintiff's procedural expenses to be paid.

The contract was annulled for three main reasons:

- a) Insanity: According to the applicable law at that time, parties to a contract should have "ability to act" in order to enter into contractual relations (Article 56, para 1, Law on Torts and Obligations of SFRY). Mrs. Nazife suffered from chronicle arteriosclerotic insanity. When she signed the contract, she was not capable of understanding what she was doing. So, the contract should be annulled;
 - b) Language: The contract was drafted in Serbian, and Mrs. Nazife "could hardly speak her own mother tongue", and had little or no knowledge of Serbian; and
 - c) Manipulation: Mr. Ali took advantage of his mother's visit to his house to instruct her (under pressure) to sign the contract.
13. On 7 October 1998, the District Court in Peja issued Judgment Gz. br. 480/98 rejecting Mr. Ali's appeal as ungrounded and confirming the Judgment of the Municipal Court.
 14. On 11 November 1998, the Applicant filed a request for revision with the Supreme Court of Serbia in Belgrade.
 15. On 2 February 2000, the Supreme Court of Serbia issued Judgment Rev. 995/99 rejecting Mr. Ali's revision as ungrounded. It found there was no violation of the Law on Contested Procedure (SFRY), and that the lower Court had correctly applied respective laws.
 16. Nine years later and after the death of his mother, Mr. Ali Shehu submitted a request with the Municipal Cadastral Office in Gjakova in order to register his property. On 19 May 2009, the Municipal Cadastral Office recognized his right to register the real estate (Nr. 436/09).
 17. On 28 July 2009, the Municipal Cadastral Office in Gjakova annulled Decision 436/09, of 19 May 2009. This Office found that evidence from previous legal proceedings showed that Ali Shehu had deliberately deceived the Municipal Cadastral authority, and it reinstated the previous situation.

18. On 24 August 2009, Ali Shehu filed an appeal with Kosovo Cadastral Agency requesting from the Agency to declare the Decision of the Municipal Cadastral Office in Gjakova as unlawful and to leave Decision 436/09 in force, which would allow him to register the property. The decision was pending since the date of the submission of the request.

Assessment of the admissibility

19. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements, laid down in the Constitution.

20. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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".

21. Article 47.2 of the Law on the Constitutional Court of the Republic of Kosovo provides:

"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".

22. Article 48 of the Law on the Constitutional Court 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".

23. In the capacity of the interested party, Mr. Aziz Muharrem Shehu addressed the Constitutional Court with a request to obtain a copy of the Referral submitted with this Court by Mr. Shejh Ali Shehu saying that: "There is an ongoing property dispute at the Municipal Court in Gjakova pursuant to the lawsuit of the plaintiff Sheh Ali Shehu, from Gjakova, against his brothers and relatives, Afijete Shehu and others, registered under C. nr. 314/01. Mr. Aziz Shehu has also notified the Constitutional Court that Mr. Sheh Ali Shehu's representative, the lawyer Besnik Haxhiujonuzi, has requested from the Municipal Court to stop the procedure for the revision of this heritage until the Constitutional Court reaches a decision on his client's request for the assessment of the constitutionality of the Judgment of the Republic of Serbia, Rev. nr. 995/99, of 2 February 2000, registered at the Constitutional Court under number KI 52/09, whose resolution he considers a preliminary issue.

24. Based on what was said above, the Court considers that this issue is still ongoing with the Municipal Court in Gjakova, and, since there is no final decision and legal remedies have not been exhausted in order to challenge the eventual decision unsatisfactory for the parties to the dispute, the admissibility requirements set forth under Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court of the Republic of Kosovo concerning the exhaustion requirement have not been met.

25. The Court wishes to emphasize that the rationale of the rule for the exhaustion of legal remedies is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. This rule is based on the

assumption that the legal order of the Republic of Kosovo will provide effective legal remedies for the protection of the violation of constitutional rights (see, *mutatis mutandis*, ECHR, *Selmouni v. France*, no. 25803/94, Decision of 28 July 1999).

26. The Court also emphasizes that even if the Referral were submitted after the exhaustion of legal remedies available, the Referral would nonetheless be inadmissible since its Applicant requests the assessment of the constitutionality of an act of a public authority that has not been issued by the Institutions of the Republic of Kosovo and it was done prior to the entry into force of the Constitution of the Republic of Kosovo. In this regard, always taking into account time limits, the Court notices that the assessment of the constitutionality of acts of public authorities dating prior to the entry into force of the Constitution of the Republic of Kosovo (15 June 2008) is not possible.
27. Considering the fact that pursuant to general provisions of the international law (non-retroactivity of agreements-treaties), provisions of the European Convention on Human Rights do not oblige contracting parties regarding any act that has been issued or a legal situation that ceased existing prior to the entry into force of the convention (see, *mutatis mutandis*, *Blečić v. Croatia*, Application no. 59532/00, ECHR Judgment of 29 July 2004), the Constitutional Court cannot assess the constitutionality of legal acts that have allegedly violated a constitutionally guaranteed right because at that time they were neither specified nor guaranteed by the Constitution since the Constitution itself did not exist.
28. The Applicant has not clarified the Referral, has not reasoned it in the procedural and substantial aspect to prove that a constitutional right has been violated and under these circumstances, the Referral is manifestly ill-founded.

FOR THESE REASONS

The Court, after having considered all submitted facts and evidence, and after having considered this issue on 13 December 2010, concluded that the Applicant has filed his Referral prior to the exhaustion of legal remedies available and he has not clarified and reasoned his Referral, and unanimously

DECIDED

- 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.
- III. This Decision is effective immediately.

Judge Rapporteur

Altay Surroy

President of the Constitutional Court

Prof. Dr. Enver Hasani

