



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

Pristina, 16 December 2011
Ref. no.: RK178/11

RESOLUTION ON INADMISSIBILITY

in

Case no. KI 70/11

Applicants

**Faik Hima
Magbule Hima
Bestar Hima**

**Constitutional Review of the Judgment of the Supreme Court, A. No.
983/08, dated 7 February 2011.**

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 and
Iliriana Islami, Judge

Applicants

1. The Applicants are Mrs. Faik Hima, Magbule Hima and Bestar Hima residing in Gjakova.

Challenged decision

2. The Applicants challenge the Judgment of the Supreme Court, A. No. 938/08, of 7 February 2011, which was served on the Applicants on 10 March 2011.

Subject matter

3. The subject matter of the Referral is the assessment by the Constitutional Court of the Republic of Kosovo (hereinafter: the “Court”) of the constitutionality of the Judgment of the Supreme Court, A. No. 938/08, by which it rejected the Applicants’ request for restitution of the expropriated immovable property in Gjakova.
4. The Applicants complains that:
 - a. The party was not enabled to file an appeal with the Kosovo Central Government, because the decision of the President of the Municipality of Gjakova mentioned an erroneous legal remedy. Consequently, the right to an effective access to justice was made impossible.
 - b. This expropriation case was initiated on 2 May 2002 and has been prolonged until now, thus violating the standard established under the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols for solving the case “...within a reasonable deadline...”, Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
 - c. There has been a violation of the principle of prohibition of discrimination, because the procedural and substantive law that is the most favourable to the party has not been applied.
 - d. The right to property provided for and guaranteed under Article 1 - Protection of Property, Protocol no. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been violated.

Legal basis

5. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, No. 03/L-121, (hereinafter: the “Law”) and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the “Rules of Procedure”).

Proceedings before the Court

6. On 26 May 2011, the Applicants submitted the Referral to the Court.
7. On 9 August 2011, the Court communicated the Referral to the Supreme Court.
8. On 17 August 2011, the President, by Decision No. GJR. 70/11, appointed Deputy-President Kadri Kryeziu as Judge Rapporteur. On the same date, the President, by Decision No. KSH. 70/11, appointed the Review Panel composed of Judges Snezhana Botusharova (Presiding), Enver Hasani and Gjyljeta Mushkolaj.
9. On 21 November 2011, Judge Gjyljeta Mushkolaj informed the Court that, on 21 November 2011, she had written to the President of the Court that, due to the family relationship with the Applicant, she wished to be excluded “ex officio” from participating in the proceedings before the Court in Case KI 70/11, pursuant to Rules 8(1)(1) of the Rules of Procedure and Article 18 (1)(2) of the Law.

10. On 25 November 2011, the President, by Decision No. KSH 70/11, pursuant to Rule 8.2 of the Rules of Procedure, replaced Judge Gjyljeta Mushkolaj with Judge Iliriana Islami as member of the Review Panel.
11. On 12 December 2011, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on inadmissibility of the Referral.

Summary of facts

12. On 1 June 1984, the Municipal Department for Property Legal Issues in Gjakova (hereinafter: the "Department"), expropriated immovable property of the Applicants' family for the purpose of constructing a Monument for the fighters who fell during the Second World War (Decision No. 03-463-17/17).
13. On 2 May 2002, the Applicants filed a request for restitution with the Department, since, allegedly, the expropriated immovable property was not used for the purpose that it was expropriated for. However, the Department, apparently, never took a decision.
14. On 12 April 2007, the Applicants filed a request with the Department and with the Kosovo Cadastral Agency to decide on the Applicants request, since the Department had not taken a decision on the matter for five years.
15. On 21 May 2007, the Kosovo Cadastral Agency ordered the Department to render a decision in the Applicants' case (Conclusion no. 03/278/07).
16. On 30 July 2007, the Department suspended the procedure because "*it was ascertained that some parcels were in the ownership of the Municipal Assembly of Gjakova*". "*Based on such an ascertained situation this department deems that the procedure on this matter should be terminated once the circumstances of the ascertained state are verified.*" (No. 03-463-17-14/02).
17. On 18 August 2007, the Applicants filed a complaint against the conclusion of the Department with the Chief Executive Officer of the Municipal Assembly of Gjakova to annul the conclusion of the Department.
18. On 10 September 2007, the Chief Executive Officer of the Municipal Assembly of Gjakova rejected the complaint of the Applicants as unfounded (Decision No. 11-03-463-17-14/02).
19. On 20 September 2007, the Applicants filed a complaint against the decision of the Chief Executive Officer of the Municipal Assembly of Gjakova with the Kosovo Cadastral Agency.
20. On 19 November 2007, the Kosovo Cadastral Agency approved the complaint of the Applicants as founded and annulled the decision of the Chief Executive Officer of the Municipal Assembly of Gjakova and the case was sent back for retrial to the Department (Decision No. 799/07), "*since in this specific matter no other body can decide on this administrative matter except for the body that conducted the expropriation*".
21. On 27 June 2008, the Department rejected the request of the Applicants as unfounded since "*the immovable property was expropriated for the purpose of building a memorial in "Qabrat" for the soldiers who fell during World War II.*" (Decision No. 03-463-17-14/02).

22. On 8 July 2008, the Applicants complained against the decision of the Department to the Municipality Mayor of the Municipal Assembly of Gjakova (hereinafter: the "Mayor").
23. On 21 July 2008, the Mayor rejected the complaint of the Applicants as unfounded and upheld the decision of the Department (Decision No. 11-03-463-17-14/02).
24. On 4 August 2008, the Applicants complained against the decision of the Mayor to the Supreme Court.
25. On 7 February 2011, the Supreme Court rejected as unfounded the complaint of the Applicants reasoning that:

"...

Pursuant to Article 21 paragraph 4 and 5 of Law on Expropriation of SAPK (Official Gazette of the Socialist Autonomous Province of Kosova dated April 28th 1978) it is foreseen that a final decision on expropriation shall be annulled based on a request of the previous owner of the expropriated immovable property, if the user of the expropriated property in the time period of three years, since the decision became final, has not carried out, as per the nature of the facility, the necessary works on that object. Once 10 years have passed since the date when the decision on expropriation became final a claim for annulment of the decision cannot be submitted.

While pursuant to provisions of article 10 (4) of Law on Amendments and Supplementations of Law on Expropriation "Official Gazette of Kosovo", dated 22 November 1986) it is foreseen that once a parcel of land is expropriated a final decision on expropriation shall be annulled through a claim submitted by the previous owner, if in the time period of 5 years since the decision came into power, no works have taken place on preparing and arranging the land. After the period of 6 years have passed since the day the decision on land expropriation was taken, no claim for annulment of this decision can be submitted (Article 10 (4)).

The Supreme Court confirms that the claimants submitted their claim for the annulment of the decision on expropriation after the expiration of time period pursuant to the above-mentioned provisions, as the claimants submitted the request for annulment of the expropriation decision in May 2002.

..."

Applicant's allegations

26. The Applicants make the following allegations:
 - a. the Mayor of the Municipality of Gjakova mentioned an erroneous legal remedy by giving the legal advice that a complaint should be filed with the Supreme Court and not with the Kosovo Cadastral Agency. Consequently, the right to effective approach to justice was made impossible.
 - b. The case has not been decided "...within a reasonable deadline...".
 - c. The Supreme Court should have applied the procedural and substantive law that is more favourable to the party, i.e. Article 36 of Law on Expropriation of Serbia "Official Gazette of RS" 53/95.
 - d. The right to property has been violated.
 - e. There is no international criterion or standard that would allow taking away a private property from a citizen and not use it for the expropriated destination.

Assessment of the admissibility of the Referral

27. The Applicants allege that his right guaranteed by Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments] and 24 [Equality Before the Law] of the Constitution and Article 6 [Right to fair trial] of ECHR and Article 1 of Protocol 1 of ECHR have been violated. The Court observes that, in order to be able to adjudicate the Applicant's complaint, it is necessary to first examine whether he has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
28. In this connection, the Court refers to Article 48 of the Law:
- "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."*
29. Under the Constitution, it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the Supreme Court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (constitutionality). 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, García Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court on Human Rights [ECHR] 1999-I).
30. Therefore, the Constitutional Court can only consider whether the proceedings, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (see, mutatis mutandis, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No. 13071/87 adopted on 10 July 1991).
31. In the present case, the Applicants merely dispute whether the Supreme Court correctly applied the applicable law and disagree with the courts' findings.
32. Having examined the proceedings before the Supreme Court as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see mutatis mutandis, Shub v. Lithuania, ECHR Decision on Admissibility of Application No. 17064/06 of 30 June 2009).
33. In conclusion, the Applicant has neither built a case on a violation of his right to a fair trial by the Supreme Court nor has he submitted any prima facie evidence on such a violation (see Vanek v. Slovak Republic, ECHR Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005).
34. It follows that the Referral is manifestly ill-grounded pursuant to Rule 36 1. (c) of the Rules of Procedure which provides that *"The Court may only deal with Referrals if: c) the Referral is not manifestly ill-founded."*

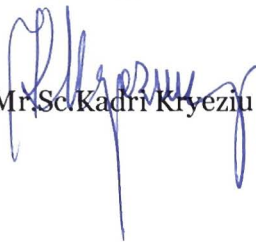
FOR THESE REASONS

The Constitutional Court, pursuant to Rule 36 1. (c) and Rule 56 (2) of the Rules of Procedure, on 12 December 2011, 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;
- III. This Decision is effective immediately.

Judge Rapporteur


Mr. Sc. Kadri Kryeziu

President of the Constitutional Court


Prof. Dr. Enver Hasani

