



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

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Pristine, 26 September 2012  
Ref. No.: RK305/12

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI75/10**

Applicant

**Blerim Hoxha**

**Constitutional Review of the Judgment of the Supreme Court of Kosovo  
A.no.942/2009, of 24 March 2010**

### **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

#### **The Referral**

1. The Referral was filed by Blerim Hoxha (the Applicant) from the Municipality of Peja.

2. The Applicant challenges the Judgment of the Supreme Court of Kosovo A.no.942/2009, dated 24 March 2010, which was served on him on 13 April 2010.
3. The subject matter of the Referral is the assessment of the constitutionality of the Judgment of the Supreme Court A.no.942/2009 of 24 March 2010, by which it rejected the claim suit of the Applicant for recognition of his right to the pension for persons with disabilities.
4. The Applicant claims a violation of Articles 21 [General Principles], Article 22 [ Direct Applicability of International Agreements and Instruments] , Article 23 [Human Dignity], Article 24 [Equality Before the law], Article 26 [Right to Personal Integrity], Article 27 [ Prohibition of Torture, Cruel, Inhuman or Degrading Treatment], Article 31 [Right to Fair and Impartial Trial], Article 41 [ Right of Access to Public Documents], Article 51 [Health and Social Protection] and Article 55 [Limitations on Fundamental Rights and Freedoms], all of the Constitution of the Republic of Kosovo (hereinafter, the "Constitution").
5. The Referral is based on Art. 113.7 of the Constitution; Articles 46, 47, 48 and 49 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (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 4 August 2010, the Applicant submitted a referral to the Constitutional Court of Kosovo (hereinafter, the "Court").
7. On 16 August 2010, the Court informed the Applicant and the Supreme Court that the referral had been received and registered.
8. On 21 October 2010, the President appointed Judge Gjyljeta Mushkolaj as Judge Rapporteur and a Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Snezhana Botusharova.
9. On 20 June 2011, the Court requested to the DAPK clarification of whether the Applicant had been invited to the hearings before the first and second instance bodies of the DAPK.
10. On 4 July 2011, the DAPK informed that "through the designated authority of the Office of Doctor's Commissions it completed the review on 17 August 2009 with a panel composed of three doctors who with their signature confirm that they have completed the "control and assessment of the applicant" pursuant to the Article 4 Paragraph 6 of Law on Disability Pensions (Law no 2003/23). The DAPK also submitted photocopies of the above-mentioned review. The DAPK further stated that the Applicant was not present at the second instance hearing and that where it was mentioned in the Decision No 5093399 dated 23 October 2009 that he was present it is an administration error.
11. On 2 July 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur, replacing Judge Gjyljeta Mushkolaj.
12. On 10 July 2012, after having considered the Report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

## **Facts of the case**

13. On 21.05.2009, the Applicant filed a request for disability pension at the Ministry of Labour and Social Welfare – Department of Pension Administration of the Republic of Kosovo (DAPK).
14. On 01 September 2009, the DAPK (Decision No 5093399) rejected the Applicant's request, because the Medical Commission concluded that "the permanent and complete disability is non-existent".
15. On 13 October 2009, the Applicant appealed the DAPK Decision arguing that it is "absolutely invalid, because the decision was taken in contradiction to the procedure foreseen by the provisions of the Law on Disability Pension of Kosovo and the Law on Administrative proceedings." The Applicant also argued that the Commission did not hear him.
16. On 26 October 2009, 28 October 2009 and 16 May 2010, the Applicant request to review, revise and photocopy the case files (No. 5093399).
17. On 23 October 2009, the DAPK Appeals Board (Decision no 5093399) rejected the Applicant's appeal, stating that "there is no sufficient evidence for him to become a valid beneficiary of pension with permanent disabilities". It was also stated that "the Commission of second instance medical experts in the medical session in the presence of the applicant assessed completely the medical documentation". the DAPK Appeals Board further concluded that there is insufficient evidence to fulfil the criteria for becoming a valid beneficiary of Pension with permanent and complete disabilities.
18. At least on 29 October 2009, the DAPK informed the Applicant that "on the 13.10.2009 sent the appeal with all the case files to the Appealing Board for examination of all the claims filed in the appeal".
19. On 17 November 2009, the Applicant filed a request for correction of Decision no. 5093399 dated 23 October 2009 in relation to the date of its drafting which the DAPK received on 20 November 2009. He also made a question to review and photocopy the indicated case file.
20. On 01 December 2009, the DAPK sent the Applicant a notification with reference number 345/2009, informing him of his right to appeal.
21. At least, on 21 and 30 April 2010, and 12 May 2010, the Applicant filed with the Supreme Court a request to review and photocopy the case A.nr.942/2009. The Applicant based his request on Article 41 of the Constitution in conjunction with Article 1, 3 and 60 of the LAD in conjunction with Article 122 paragraph 1 of the Law on Contested Procedure of the Republic of Kosovo (2008/03-L006).
22. On 2 December 2010, the Applicant filed an appeal with the Supreme Court against the Decision of the DAPK Appeals Board, on the grounds set out bellow.
23. The Applicant further requested the Supreme Court to "to appoint the panel hearing, (...) in order of better clarify the matter, additional clarifications should be given in relation to hearing of the parties so as to avoid the contradictions and based on law to take a righteous decision".

24. On 24 March 2010, the Supreme Court “found that the claim suit is ungrounded” and concluded that (...) “the plaintiff [the Applicant] does not fulfil the legal conditions for recognition on the requested right”.
25. On 21 and 30 April 2010, the Supreme Court (Agj.Nr.217/2010) informed the Applicant that this [Supreme] Court after taking its decision, returned the files of the case and the decision A.no.942/2009, to the Ministry of Labour and Social Welfare – Department of the Pension Administration – Appealing Board for Pensions of Persons with disabilities, with a seat in Prishtina”.

### **The legal arguments**

26. The Applicant based his appeal to the Supreme Court “on the following grounds: 1. The mentioned failed to apply or applied in wrongful manner the material legal provisions, or the provisions of material regulations; 2. The challenged decision was taken by an unauthorized institution; 3. Procedures, which preceded the challenged Decision taken by the respondent institution, did not apply the procedural provisions or did not act according the procedural regulations, especially the factual situation was not verified in a correct manner, or a wrong decision was taken from the verification of the facts in relation to the factual situation; 4. Essential violation of provisions of European Convention on Human Rights”.
27. The Applicant concluded his allegations stating that “The challenged decision contains essential violation of the provisions from the Article 10 paragraph 1 point 3 of Law on Administrative Procedure in conjunction with Article 2 paragraph 2, with Article 3 paragraph 2 point a), point b), point c), point d) of the law on pensions of persons with disabilities in Kosovo (...)”.
28. In the end, the Applicant, requested the Supreme Court: “to approve the claim suit as grounded; to annul entirely the decision no.5093399 of the 13.10.2009 of the Appealing Board of the Pension Administrative Department of Republic of Kosovo, as unlawful and return the case for redress or the Supreme Court of Republic of Kosovo should decide based on merits of this administrative matter”.
29. In sum, the Applicant makes numerous and different allegations:
  - a) In the Referral, but not in the appeal to the Supreme Court;
  - b) In the appeal to the Supreme Court, but challenging the legality of the Judgment;
  - c) In the appeal to the Supreme Court, challenging human rights violation.

### **Assessment of admissibility**

30. At this moment, the Court considers appropriate for the assessment of the allegations and legal arguments presented by the Applicant, and assessment of the admissibility, to recall some relevant legal provisions.
31. Article 113 (1) and (7) of the Constitution establishes that:
  1. *The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
  7. *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.*

32. Article 47 (2) of the Law provides that:

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

33. Article 48 of the Law also provides 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.*

34. In addition, Rule 36 of the Rules which foresees what follows.

*1. The Court may only deal with Referrals if:*

*a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted*

*2. The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:*

*a) the Referral is not prima facie justified, or*

*d) when the Applicant does not sufficiently substantiate his claim*

35. Finally, Art 48 of the Law establishes that

*“the Constitutional Court receives and processes a referral (...) if it determines that all legal requirements have been met”.*

36. Therefore, the Applicant is bound to bring the Referral to the Court “in a legal manner”, namely, “after exhaustion of all legal remedies provided by law” and “sufficiently substantiate his claim”. In the end, the Court can consider the Referral, “if it determines that all legal requirements have been met”.

#### **a) Allegations in the Referral, but not in the appeal to the Supreme Court**

37. The Applicant states in his Referral that “My rights were violated during the administrative procedure managed by the Pension Administration Department of Kosovo (DAPK) and in the first and second instance procedure, and also in the proceedings before the Supreme Court of Kosovo, as following: a) The right to a fair and impartial trial, b) the right to access in public documents, c) the right to a fair and impartial trial, d) the right to prohibition of torture, inhuman and degrading treatment, e) the right to personal integrity, f) the right to equal legal protection without discrimination, the right to human dignity, g) the right to direct application of international agreements and instruments, and i) the right to general principles. These rights have been foreseen in par 3 of the Constitution Preamble, in conjunction with Article 21, 22, 23, 24, 26, 27, 31, 41, 51, 55, of the constitution in conjunction with the Preamble of the Universal Declaration, in conjunction with Article 2.2, 4 of the second part of the Universal Declaration, in conjunction with Article 9, of the third part, in conjunction with Article 30 of the fifth part of the Universal declaration, in conjunction with the Preamble of the International Covenant on Economic Social and Cultural Rights (Hereinafter the International Covenant), in conjunction with Article 6.1 of the European Convention on Human Rights”.

38. As it can be seen from above quotation, the Applicant made in his Referral numerous repeated and different allegations which were not brought to the Supreme Court, including allegations of violation of Articles 21 [General Principles], Article 22 [Direct Applicability of International Agreements and Instruments] , Article 23 [Human Dignity], Article 24 [Equality Before the law], Article 26 [Right to Personal Integrity], Article 27 [ Prohibition of Torture, Cruel, Inhuman or Degrading Treatment] of the Constitution.
39. However, taking into account the principle of subsidiary and the rule of exhaustion, the Court can only consider the allegations made before the Supreme Court which is the intervening final authority.
40. The Court considers that the rationale for the exhaustion rule is to afford the authorities concerned, including the Supreme Court, the opportunity to prevent or remedy the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights (see, *mutatis mutandis*, ECHR, Selmouni against France, no. 25803/94, decision of 28 July 1999).
41. Thus, the Applicant actually failing to take some procedural step in the regular courts, namely before the Supreme Court, is liable to have his case declared inadmissible, as it shall be understood as a waiver of the right to further proceedings on objecting the violation. (See Resolution on inadmissibility, Case No. KI 16/12, para 25).
42. That means that all the claims made outside the appeal to the Supreme Court will not be considered as the Applicant waived the right to further complain about them.

**b) Allegations in the appeal to the Supreme Court, challenging the legality of the Judgment**

43. The Court considers that the grounds of the Supreme Court Applicant's appeal 1, 2 and 3 have to exclusively with legality; none of these grounds is based on human rights violations. In fact, the Applicant alleges that the Judgment of the Supreme Court "failed to apply or applied in wrongful manner the material legal provisions, or the provisions of material regulations"; "was taken by an unauthorized institution"; did not apply the procedural provisions"; "the factual situation was not verified in a correct manner".
44. The Court reiterates that it is not the task of the Constitutional Court to deal with errors of fact or errors of law (legality) allegedly committed by the Supreme Court, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). Thus, the Court cannot act as a court of third instance in the instant case. It is the task and obligation of regular courts assess accurately the facts and to interpret and apply pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECHR] 1999-I).
45. The Court can only consider whether the evidence has been presented in such a manner that the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see among others authorities, Report of the European Commission on Human Rights in the case Edwards v. United Kingdom, App. No 13071/87 adopted on 10 July 1991).

**c) Allegations in the appeal to the Supreme Court, challenging human rights violation**

46. The Applicant based his appeal to the Supreme Court on “essential violation of provisions of European Convention on Human Rights”, without mentioning in his appeal any legal provision either of the Constitution or of the European Convention. Furthermore, no argument is supporting the allegation. The appeal of the Applicant, except for the mere indication, is silent in relation to this ground.
47. Nevertheless, as said above, the Applicant in his referral pointed out to “violations of his right to a fair and impartial trial, his right of access to the file case, his right to prohibition of torture, inhuman and degrading treatment, his right to personal integrity, his right to equal legal protection without discrimination, his right to human dignity, his right to direct application of international agreements and instruments and his right to general principals”.
48. Furthermore, the Applicant enumerates violation of “Article 21, Article 22 Paragraphs 1, 2 and 3, Article 23, Article 24 Paragraphs 1 and 2, Article 26 Paragraph 2 and 3, Article 27, Article 31 Paragraphs 1 and 2 Article 41 Paragraph 1 and 2, and finally Article 55 Paragraph 1”. Apparently all these articles are of the Constitution.
49. In accordance with the legal provisions quoted above, the allegation of “essential violation of provisions of European Convention on Human Rights” made before the Supreme Court and, now subsidiary before the Constitutional Court, must be “*sufficiently substantiated*” for the Court to receive and process the Referral.
50. However, the mere indication of violated rights and enumeration of constitutional legal provisions is not of itself enough to meet the requirement of a referral “*sufficiently substantiated*”. The Applicant does not specify in its appeal to the Supreme Court what were the facts which analyzed under certain legal provisions could lead to the conclusion that there was a violation.
51. The Court considers that the Applicant has not sufficiently substantiated his claims on constitutional grounds, showing why and how the Supreme Court committed a violation of his rights guaranteed by the Constitution and European Convention, and he did not provide evidence that his rights and freedoms have been violated by the Supreme Court. So, the Constitutional Court cannot find why and how the relevant proceedings in the Supreme Court 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).
52. Having said that, the Court finds that the Referral does not fulfil the requirements of Article 46 of the Law and Rule 36.2 b) and d), as such it is manifestly ill-founded and, in accordance with Art 48 of the Law, it cannot be received and processed.

## FOR THESE REASONS

The Constitutional Court pursuant to Article 113.7 of the Constitution, Article 27 of the Law and Rule 36 of the Rules of the Procedure 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; and
- III. This Decision is effective immediately.

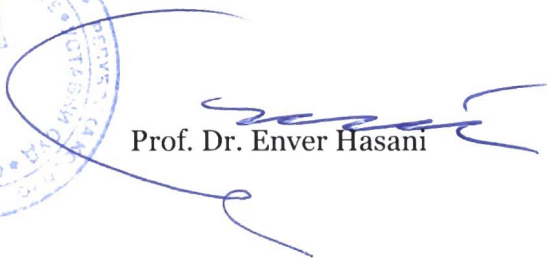
**Judge Rapporteur**



Almiro Rodrigues



**President of the Constitutional Court**



Prof. Dr. Enver Hasani