



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

Prishtina, 01 June 2017
Ref.no.: MM 1090/17

Dissenting Opinion

of

Judge Snezhana Botusharova

Case No. KI 22/16

Applicant

Naser Husaj

**Request for constitutional review of Judgment Rev. No. 335/2015 of the
Supreme Court of Kosovo, of 14 December 2015**

1. I respect the decision of the Majority of Judges of the Constitutional Court (hereinafter 'the Majority'). However, I cannot agree with the final conclusion and the reasoning due to some omissions.

2. Firstly, I consider that the text of the Judgment did not follow the constitutional requirements for the admissibility of the Referral, namely whether or not the Applicant had exhausted legal remedies.
3. The Applicant claims that the composition of the Court of Appeals included a judge who should have been excluded.
4. The law applicable to the matter of exclusion of judges is the Law No. 03/L-006 on Contested Procedure (LCP), Chapter III [Exclusion of the Judge from the Case]. The question is whether the Applicant could have requested the exclusion of a judge of the Court of Appeals deciding on his appeal against the decision of the Basic Court.
5. This question – whether such a request could have been raised – was not addressed by the Majority, which went directly to a finding of a violation on certain grounds.
6. I consider that the question whether the Applicant could have known the composition of the Panel of the Court of Appeals is of the utmost importance for the proper, transparent and foreseeable functioning of the judiciary.
7. I am not going to take a stand on that, but I want to note that it was for the Majority to elaborate whether there was a way for the Applicant to request the exclusion of a judge to sit in the panel of the Court of Appeals.
8. If there was no way to notify the President of the Panel (about the request for exclusion), that would mean that the Majority should have pointed out what is the next remedy to be used. Without this analysis to identify whether the Applicant met this requirement, further deliberation of the case should not have happened.
9. Secondly, the Majority found a violation because the Supreme Court did not specifically address the Applicant's complaint that in the composition of the Panel of the Court of Appeals there was a judge in an alleged conflict of interest vis-à-vis himself.
10. It deserves to be noted that, in principle, even if there might be a "potential" conflict of interest with one of the judges, the Panel of the Court of Appeals consisted of three judges, each of them independent, and there remained a legitimate majority of two judges to take the decision on the Applicant's case.

11. The allegation that the judge who the Applicant wanted excused influenced his two colleagues on the panel is not substantiated, and is even offensive.

12. I consider that the Supreme Court rightly reasoned in its decision, that,

“The enacting clause is clear, in full compliance with the reasoning, whereas in the reasoning, complete and sufficient reasons have been provided for all the valid relevant facts for a fair trial of this legal matter, therefore, [the Supreme Court] considers that the allegations of the Revision in relation to the essential violations of the procedural provisions cannot place in question the Judgments of the lower instances.”

13. By not elaborating on the exhaustion of legal remedies, and by not addressing properly what the Supreme Court should have reasoned, I consider that the stand of the Majority is equivalent to acting as a fourth instance court.

Respectfully submitted,

Snezhana Bolusharova
Judge

