



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

Pristina, on 4 July 2016
Ref. No.:RK965/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI144/15

Applicant

Ismet Shabanaj

Constitutional review of Decision AC -II-12- 0084 of Appellate Panel of the Special Chamber of the Supreme Court of Kosovo of 1 October 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral is submitted by Ismet Shabanaj (hereinafter, the Applicant) represented by Qerim Ferizi, a lawyer practicing in Deçan.

Challenged decisions

2. The Applicant challenges Decision AC -II-12- 0084 of Appellate Panel of the Special Chamber of the Supreme Court of Kosovo (hereinafter, the SCSC Appellate Panel) of 1 October 2015.

Subject matter

3. The subject matter is the constitutional review of challenged Decision AC-II-12-0084 of the SCSC Appellate Panel of 1 October 2015.
4. The Applicant alleges violation of Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo.

Legal basis

5. The Referral is based on Articles 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law).

Proceedings before the Constitutional Court

6. On 8 December 2015, the Applicant submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On 22 January 2016, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of judges Altay Suroy (presiding), Snezhana Botusharova and Arta Rama-Hajrizi (judges).
8. On 18 February 2016, the Court notified the representative of the Applicant about the registration of the Referral and asked him to provide explicit power of attorney for representation before the Court. On the same day a copy of the Referral was sent to the Special Chamber of the Supreme Court.
9. On 20 May 2016, the Review Panel considered the report of Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. The Applicant is the grandson and heir to the estate of the testator DSH.
11. On 19 June 2003, DSH authorized the Applicant to represent him in court proceedings in case C. no. 18/01 before the Municipal Court in Deçan pertinent to verification of property title. The Applicant was authorized to represent DSH before judicial and administrative organs in Kosovo.
12. DSH passed away on 10 October 2003 and on 11 June 2007 the Municipal Court in Deçan in inheritance proceedings declared the Applicant heir to the estate of DSH.

13. In the interim, there ensued court trials and retrials commencing from 2005 until 2010 before the SCSC and the Municipal Court in Deçan pertinent to a lawsuit for verification of property title – filed by the representative of the deceased DSH - of cadastral plots nos. 894 and 895 in Cadastral Zone in Deçan. The respondent parties were SOE “Ramiz Sadiku” unit Deçan, Kosovo Privatization Agency and the Municipality of Deçan.
14. On 2 February 2010, the Municipal Court in Deçan by Judgment C. No. 287/2008 approved the lawsuit of DSH as founded and upheld that DSH is the owner of the cadastral plot no. 895 and obliged SOE “Ramiz Sadiku” unit Deçan – the Kosovo Privatization Agency, the Municipality of Deçan to hand over the property in question in addition to registration of that property under the name of DSH.
15. On 6 April 2010, the Kosovo Privatization Agency filed an appeal with the Special Chamber alleging violation of the law and erroneous and incomplete assessment of the factual situation.
16. The Applicant as heir to the estate of DSH and interested party also filed an appeal in the proceedings before the Special Chamber.
17. On 29 May 2015, the Special Chamber ordered (Order AC-II-12-0084) the representative of the Applicant to submit: (i) authorization for representation in proceedings before the Special Chamber and (ii) Decision on the change of surname.
18. On 25 June 2015, the registry of the Special Chamber received an authorization for representation - for the case in question - given by the Applicant for his lawyer, a submission from the official register for the change of surname and the death certificate of DSH of 5 October 2003.
19. On 26 June 2015, the Special Chamber issued a new order requesting from the Applicant to submit Authorization given by the claimant DSH. The Special Chamber stated that the authorization submitted by the Applicant on 25 June 2015 was not given by the claimant, and added that, if the Applicant does not submit the requested evidence within fifteen (15) days, the Special Chamber will reject the appeal as inadmissible.
20. In the interim, the Applicant submits Authorization given to him by DSH pertinent to case C. no. 18/01, death certificate of the claimant DSH and Decision on inheritance.
21. On 1 October 2015, the SCSC Appellate Panel by Decision AC-II-12-0084 held the following:

“1) the appeal is grounded, 2) Judgment of the Municipal Court in Deçan C. nr. 287/08 dated 02.02.2010 is hereby set aside, 3) the claim is dismissed as inadmissible, 4) no court costs are to be imposed for the appeal proceeding”.

22. Whether the SCSC Appellate Panel held an oral hearing, the relevant part of the Decision reads:

“Based on Article 64.1 of the Annex of Law No. 04/L033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (Annex), the Appellate Panel decided to dispense with the oral part of the proceedings”.

23. As to the Applicant’s allegation on violation of his right to be heard, the relevant part of the SCSC Appellate Panel reads:

“Pursuant to reasons provided hereupon the Appellate Panel may not accept any of the authorizations as regular, consequently the claim filed with the SCSC does not meet the admissibility criteria, the claim is not signed by the claimant and the power of attorney is missing to authorize an attorney-at-law to sign the claim. The claim was not supplemented even after an order issued by the Appellate Panel...decisions of the SCSC Appellate Panel on admissibility of a claim do not deny the claimants’ right to file a new claim, in accordance with admissibility criteria provided by law”.

24. As to the validity of the Decision (C. nr. 287/08 dated 02.02.2010) of the Municipal Court in Deçan, the relevant part of the Decision reads:

“The appealed decision of the Municipal Court in Deçan C.nr.287/2008, is incorrect in the outcome and legal reasoning, therefore it shall be set aside. The claim filed with the SCSC on 08 November 2005, signed by an attorney-at-law Pashë Kuqi. The claimant enclosed the power of attorney with the case files for the attorney-at-law, to the Municipal Court in Peja for the case no. 845/95 of 1997. After an order issued by the court for submission of power of attorney given by the claimant, grandson of the claimant Ismet Ali Shabanaj, a power of attorney for representation by the claimant Ismet Ali Shabanaj, for the case no. C.nr. 18/01 to the Municipal Court of Deçan, whilst on 10 June 2015 he filed a decision on review of inheritance and provided the claimant’s death certificate. By the death certificate, it indicates that the claimant passed away on 05/08/2003”.

25. As to the validity of documents provided for by the Applicant, the relevant part of the Decision reads:

“Both power of attorneys are related to other cases in different courts and are not valid for the SCSC. The power of attorney given by the claimant for Ismet Ali Shabanaj is a copy and dated in 2003. In such clarified circumstances the Appellate Panel considers that there was no proper claim signed by the claimant. The filed Powers of attorney are neither in accordance with article 25 of the Administrative Direction no. 2008/6 (AD) nor in accordance with the Law on SCSC no. 04/L-033. Based on this article: “The original of every pleading must be signed by the party or by the party’s lawyer, if that party has legal representation.....” Pursuant to Article 28.2 of Administrative Direction no. 2008/6 (AD) and Annex to the

Law on SCSC no. 04/L-033, the claim is admissible only if: Pleadings are submitted in accordance with conditions set forth by article 25 of this Administrative Direction, namely the Annex. Article 28.4 of AD 2008/6 provides that if the claimant fails to submit a completed or corrected claim which meets the requirements set forth in paragraph above within the period prescribed in the order, the Trial Panel shall reject the claim on the grounds of inadmissibility. Pursuant to reasons provided hereupon the Appellate Panel may not accept any of the authorizations as regular, consequently the claim filed with the SCSC does not meet the admissibility criteria, the claim is not signed by the claimant and the power of attorney is missing to authorize an attorney-at-law to sign the claim. The claim was not supplemented even after an order issued by the Appellate Panel”.

Relevant legislation

Law No. 04/L033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters

*Article 64
Oral Appellate Proceedings*

The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application must be filed prior to the closing of written appellate procedures.

UNMIK ADMINISTRATIVE DIRECTION NO. 2008/6

AMENDING AND REPLACING UNMIK ADMINISTRATIVE DIRECTION NO. 2006/17, IMPLEMENTING UNMIK REGULATION NO. 2002/13 ON THE ESTABLISHMENT OF A SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON KOSOVO TRUST AGENCY RELATED MATTERS

*Section 25
Filing of Pleadings*

The original of every pleading must be signed by the party or by the party's lawyer, if that party has legal representation. The original, accompanied by all annexes referred to therein, shall be filed at the Registry together with four copies for the Special Chamber and a copy for every other party to the proceedings. The copies shall be certified by the party filing them. The Registrar may refuse to accept pleadings that are not in conformity with this section.

Applicant's allegations

26. The Applicant alleges violation of Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo.

27. The Applicant asserts that he is the legal heir to the estate of DSH. The applicant proffers as proof Decision on Inheritance of the Municipal Court in Deçan of 11 June 2007.
28. As to the continuation of this civil matter, the Applicant alleges: *“In order to continue this contested procedure, Ismet (Ali) Shabanaj as universal successor to the estate, has authorized Qerim Ferizi a lawyer practicing in Deçan, to undertake all procedural measures pertaining to the claimant in the case AC-II-12-0084. Proof: Power of attorney 18.06.2015, LRP nr. 1926/2015 notarized”*.
29. As to the validity of the documents provided for by the Applicant before the SCSC Appellate Panel, the Applicant alleges: *“Since the Special Chamber of the Supreme Court of Kosovo in the impugned decision has stated that in relation to his claim there is no power of attorney by the claimant to file the claim, this can be verified because in the case-file exists power of attorney GIVEN by DSH to his grandson Ismet (Ali) Shabanaj, whereby, inter alia, it is stated that: the authorized in my name and on my account can represent me in case no. C. nr. 18/’01 before the Municipal Court in Deçan for verification of property until this matter is finalized. Also, the authorized can represent the claimant even after eventual death (post mortum)”*.
30. As to the right to fair and impartial trial, the Applicant alleges: *“Based on case-law the person authorized by the claimants should have been summoned in the oral hearing before that court of 22 September 2015, in order to set forth arguments and proof during the hearing, so that without being present in the hearing, the same could have not exercised his right to a fair and impartial trial and subsequently Decision C-III-13-0482 was rendered to the detriment of the claimants”*.
31. Finally, the Applicant requests the Court to hold the following:

“APPROVE the request for protection of constitutionality, submitted by the authorized of Ismet (Ali) Shabanaj from Deçan, so that it is ANNULLED decision of the Special chamber of the Supreme Court of Kosovo in Prishtina AC-II-12-0084 dated 01.10.2015 and to

UPHOLD the judgment of Municipal Court in Deçan C. nr. 287/2008 of 02.02.2010”.

Assessment of admissibility

32. The Court first will examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules of Procedure.
33. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

“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.”

34. The Court also refers to Article 48 of the Law, which 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”.

35. The Court further takes into account Rule 36 2 (d) of the Rules of Procedure which foresee:

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

...

(d) the Applicant does not sufficiently substantiate his claim

36. The Court notes that in the instant case, the crux of the Applicant’s referral pertains to the SCSC Appellate Panel erroneous assessment of the documents provided for by the Applicant showing that he is the legal successor and heir of DSH, and that, his right to a fair and impartial trial was breached because his representative was not summoned in the oral hearing held before the SCSC Appellate Panel.
37. As to the Applicant’s allegation on violation of Article 31 of the Constitution, the Court notes that that the SCSC Appellate Panel – in accordance with the applicable law - decided to dispense with the oral part of the proceedings. Moreover on this point, the Court notes that the SCSC Appellate Panel rejected the Applicant’s claim on procedural grounds in addition to stating that the Applicant is not precluded to file a new claim before it in accordance with the admissibility criteria.
38. As to the Applicant’s allegation pertinent to the validity of documents adduced by him before the SCSC Appellate Panel, the Court notes that the SCSC Appellate Panel ordered the Applicant to supplement his claim in accordance with legal requirements which the latter failed to do. Furthermore on this point, the Court notes that the SCSC Appellate Panel explained that documentation provided for by the Applicant was in relation to other cases and other courts, and therefore, not valid for the proceedings before the SCSC in addition to being copies and not originals as is required by the law.
39. The Court considers that the Applicant cannot claim that he did not have the benefit of adversarial proceedings or to adduce the arguments and evidence he considered relevant to his case. In this respect, the Court – in accordance with the principle of subsidiarity – cannot substitute its own decision with that of the SCSC Appellate Panel and make a fresh assessment of questions of fact and law already adjudicated by the SCSC Appellate Panel.

40. It should be borne in mind – since this is a very common source of misunderstandings on the part of applicants – that the “fairness” required by Article 31 is not “substantive” fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but “procedural” fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See the case of *Star Cate – Epilekta Gevmata and Others v. Greece*, application no. 54111/07, ECtHR, Decision of 6 July 2010).
41. In this respect, the Court reiterates that the Applicant only quotes provisions of the Constitution without substantiating how those constitutional norms were violated to his detriment as is required by Article 48 of the Law.
42. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
43. In fact, 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).
44. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of regular courts. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
45. The fact that the Applicant disagrees with the outcome of the case it cannot serve him as a right to raise an arguable claim on the violation of Articles 24, 31 and 46 of the Constitution (See, for example, Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 May 2012, paragraph 28).
46. In these circumstances, the Court considers that the Applicant has not substantiated the allegations of a violation of fundamental human rights guaranteed by the Constitution. The facts of the case do not reveal that the SCSC Appellate Panel acted in breach of procedural safeguards established by the Constitution.
47. Consequently, the Referral, on constitutional grounds, is manifestly ill-founded and must be declared inadmissible as established by Article 113.7 of the Constitution, provided for by Article 48 of the Law and further specified by Rule 36 (2) (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (2) (d) of the Rules of Procedure, on 20 May 2016, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY the Parties of this Decision;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law;
- IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi