



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

Prishtina, on 20 October 2017
Ref. No.: RK 1141/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI100/16

Applicant

Živorad Dutina

**Constitutional review of Judgment No. GSK-KPA-A-97/2014 of the Appellate
Panel of the Supreme Court of Kosovo on Kosovo Property Agency, of 19
February 2016**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Cukalovic, Deputy President
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 was submitted by Živorad Dutina (hereinafter: the Applicant) from Obiliq.

Challenged decision

2. The Applicants challenges Judgment GSK-KPA-A-97/2014 of the Appellate Panel of the Supreme Court of Kosovo on Kosovo Property Agency (hereinafter: the Appellate Panel), of 19 February 2016.
3. That Judgment was served on the Applicant on 29 March 2016.

Subject Matter

4. The subject matter is the constitutional review of the abovementioned Judgment of the Appellate Panel whereby the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 [Right to a fair trial] and Article 13 [Right to an effective remedy] of the European Convention on Human Rights (hereinafter: ECHR) have allegedly been violated.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 47 and 48 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 15 July 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 16 August 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Altay Suroy and Gresa Caka-Nimani.
8. On 5 September 2016, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Appellate Panel.
9. On 27 January 2017, the President of the Court appointed Judge Ivan Cukalovic as a member of the Review Panel replacing Judge Robert Carolan, who had resigned from the position of the Judge of the Court on 9 September 2016. Judge Altay Suroy was appointed as presiding judge of the Review Panel.
10. On 4 September 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 22 May 2007, the Applicant filed a property claim to the Kosovo Property Agency (KPA), whereby he requested the re-possession over parcels number 474 and 475, measuring a total surface area of 00.43.44 sqm, and located in Millosheva Village, Obiliq, Vise Sela, registered in Possession List no. 75.

12. On 11 June 2013, the Kosovo Property Claims Commission (hereinafter: KPCC), by its Decision KPCC/D/A/204/2013 rejected the property claim due to having no jurisdiction.
13. On 20 February 2014, the Applicant filed an appeal against the decision in question to the Appellate Panel.
14. On 19 February 2016, the Appellate Panel by Judgment GSK-KPA-A97/2014 rejected as unfounded the Applicant's appeal and upheld Decision of KPCC, of 11 June 2013.
15. The relevant part of the Judgment of the Appellate Panel reads:

"...Pursuant to Article 3.1 of Law no. 03/L-079, the KPA has jurisdiction to solve the property claims "involving circumstances directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999". This means that the KPA assessment framework includes the confirmation of the following elements: who possessed the claimed property before 27 February 1998; who currently possessed the property; when and why was the possession lost between the period covering 27 February 1998 and 20 June 1999. If the Commission concludes that the loss of property had happened before or during the aforementioned dates, or if the loss of possession is not related to the armed conflict, then it rejects the property claim pursuant to Article 11.4 (b) of Law no. 03/L-079.

"...Since we have reached the conclusion that neither the Appellant nor his siblings have used the claimed property after 1995, the Supreme Court considers that the property claim falls out of the KPCC jurisdiction. The question whether a sale contract was concluded with the Appellant's brother in 1995 might have a legal effect or not, is largely insignificant for the results of the proceedings conducted before the present Court, because the allegations submitted by the parties themselves fall into the category of disputes that are to be resolved by a civil court having jurisdiction. The consideration of other elements related to the purchase of property rights fall out of the KPCC jurisdiction.

"...Hence, given that the Appellant has not demonstrated that he had been in the possession of the claimed property for the period between 27 February 1998 and 20 June 1999, that he had lost his possession during the conflict, the Supreme Court considers that the appeal should be rejected as ungrounded.

Applicant's allegations

16. The Applicant alleges that his rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32[Right to Legal Remedies], 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution, as well as Articles 6 [Right to a fair trial], and 13 [Right to an effective remedy] of the ECHR have been violated.
17. The applicant complains about *"the lack of a mechanism, or lack of their implementation, on the occasion of loss of the property since June 1999, which led to the violation of his rights guaranteed by the Constitution as stated in this submission. The Applicant also complains because he considers that the authorities having jurisdiction did not fairly and lawfully act in case of his request."*
18. He particularly alleges that the Appellate Panel made an erroneous determination when it found that his case does not fall under the jurisdiction of KPA. What is more, the

Applicant also alleges that the Appellate Panel has not verified the adduced evidence completely and in a legally valid manner.

19. He declares that *“First of all, his request was rejected alleging that it does not fall under the jurisdiction of the KPA, because the property had, since the pre-war period, not been under his possession. During the proceedings before the court, the Applicant has testified that he has freely been enjoying this property, with the other co-owners until June 1999. No contract has been concluded on the alienation of the property. The evidence presented by the responding party are contradictory to the common sense and evidently falsified. The Court has not reviewed the Applicant’s allegations in a legally valid manner and completely nor the Court during the evidentiary procedure verified the signatures and other circumstances pertaining to the contract attached as main item of evidence.”*
20. The applicant alleges that his rights to a reasoned decision was violated because the *“the Judgements do not contain reasoned stances concerning the reasons owing to which the Courts did not review the evidence presented by the Applicant, and which were important in terms of the precondition of the guarantee for a fair decision. On the other hand, they show arbitrariness in confirming the stance concerning the lack of the opportunity to verify the documentation and the insufficient grounds of such stances and decisions; therefore, by doing so, they show arbitrariness.*
21. He further considers that, *“... there was a violation of the right to access the court, because during the proceedings conducted, there was no review of the essence of the violation of the right with the alleged impossibility to verify the documentation attached, but also the factual and legal nature of the use of the disputed property until June 1999.”*
22. The Applicant also contests *“the interpretation of the Commission and Court that the disputed immovable property has been transferred in a large part, namely lost the possession before the 1998/99 conflict. The mere reasoning of the appealed decision is ambiguous and vague. First of all, it contains no relevant reasons, criteria and evidence which were decisive and valid so that the alleged contract could have been considered as credible and that the applicant had lost his property in 1995. By doing so, the Committee had acted contrary to its legal obligations and the principle of justice, in the sense that it has not clearly and intelligibly explained the legal nature of the alleged contract and the Appellant’s allegations that he had enjoyed his property until June 1999.”*

Assessment of admissibility of the Referral

23. The Court first will examine whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure.
24. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish 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.”

25. The Court refers to Article 49 [Deadlines], which provides that *“the referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision”*.
26. The Court considers that the Applicant is an authorized party. Besides that the Referral was submitted in accordance with the provided deadline and the Applicant has exhausted all legal remedies.
27. The Court further refers to Article 48 of the Law [Accuracy of the Referral], which foresees:

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.

28. The Court notes, that the Applicant has clarified what act of a public authority is subject to challenge and what rights allegedly have been violated as provided for by Article 48 of the Law. In this respect, the Court must also determine whether the Applicant has substantiated his allegations as required by Article 48 of the Law and as further specified by rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure.
29. Thus, the Court further refers to Rule 36 [Admissibility Criteria] (1) (d) and (2) (b) and (d) of the Rules of Procedure, which specify that:

(1) The Court may consider a referral if:

[...]

(d) the referral is prima facie justified or not manifestly ill-founded.”

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

[...]

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights.

[...]

(d) the Applicant does not sufficiently substantiate his claim

30. Based on the above considerations with respect to the admissibility criteria, the Court must now determine whether the Applicant’s referral is prima facie justified; and whether, he has substantiated his allegations in compliance with Article 48 of the Law and rule 36 (2) (b) and (d) of the Rules of Procedure.
31. In this connection, the Court notes that the gist of the referral is that the Applicant disagrees with the findings of the courts as to the time when he lost the factual possession of his real property.
32. The Court recalls that, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, *“human rights and fundamental freedoms guaranteed*

by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights”.

33. In this regard, the Court reiterates that the European Court of Human Rights (hereinafter, the ECtHR) found that “*the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law*”. See: *mutatis mutandis*, ECtHR case *García Ruiz v. Spain*, no. 30544/96, 21 January 1999, paragraph 28.
34. In that respect, the Court notes that the Appellate Panel thoroughly reviewed the evidence and the analysis made by the KPCC.
35. The Court notes that the Appellate Panel took it into account and analyzed all the allegations made by the Applicant in his appeal. The Panel explained the question of the jurisdiction of the KPCC and the burden of proof placed on the Applicant in order to substantiate his allegations.
36. In addition, the Court reiterates 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).
37. The Constitutional Court recalls that it is not a fact-finding Court and that the correct and complete determination of the factual situation is within the full jurisdiction of regular courts, while 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).
38. The Applicant’s Referral does not indicate that the regular courts acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to substitute its own assessment of the facts with that of the regular courts and, as a general rule, it is the duty of these courts to assess the evidence made available to them. The Constitutional Court can only consider whether the regular courts’ proceedings in general have been conducted in such a way that the Applicant had a fair trial (see: case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission of Human Rights of 10 July 1991).
39. The fact that the Applicant disagrees with the outcome of the proceedings cannot of itself raise an arguable claim for breach of Articles 31 [Right to a Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property], 54 [Judicial Protection of Rights] of the Constitution in connection with Articles 6 [Right to fair trial] and 13 [Right to an effective remedy] of the ECHR (see: case *Mezotur-Tiszazugi Tarsulat vs. Hungary*, No.5503/02, ECtHR, Judgment of 26 July 2005)
40. In these circumstances, the Court considers that the Applicant has not substantiated, nor has he sufficiently justified his claim of violation of human rights and fundamental freedoms guaranteed by the Constitution, in particular, violation of Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution, as well as Articles 6 [Right to a fair trial], and 13 [Right to an effective remedy] of the ECHR, because the facts presented by him do not show in any way that the regular courts denied him the rights guaranteed by the Constitution.

41. Therefore, the Referral is manifestly ill-founded, on constitutional basis, and is to be declared inadmissible, as established by Article 113.7 of the Constitution, provided for by the Article 48 of the Law and as further specified by the admissibility criteria, Rule 36 (2) (b) and (d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113 1 and 7 of the Constitution, Article 48 of the Law and Rule 36 (2) (b) and (d) of the Rules of Procedure, in the session held on 4 September 2017, 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; and
- IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur



Snezhana Botusharova



President of the Constitutional Court



Arta Rama-Hajrizi