



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 30 October 2017
Ref. no.: RK 1148/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI13/17

Applicant

Bedri Prishtina and Fahri Bekteshi

Constitutional review of Judgment CA. No. 3442/2016 of the Court of Appeals of Kosovo, of 10 October 2016

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Applicants are: Bedri Prishtina and Fahri Bekteshi from Prishtina (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge Judgment CA. No. 3442/2016, of the Court of Appeals of Kosovo, of 10 October 2016, which was served on the Applicants on 20 October 2016.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicants' rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 24 [Equality before the Law], Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 1 of Protocol 1 [Protection of Property] and Article 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the 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

5. On 13 February 2017, the Applicants submitted the Referral through mail service to the Constitutional Court (hereinafter: the Court).
6. On 20 March 2017, the President of the Court by Decision appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel, composed of Judges: Almiro Rodrigues (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
7. On 12 April 2017, the Court notified the Applicants about the registration of the Referral, and sent a copy of the Referral to the Court of Appeals.
8. On 4 July 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

9. On 8 July 2016, the Basic Court in Prishtina by Decision C. No. 3216/2014 rejected the Applicants' proposal for imposition of the security measure as ungrounded by which they requested to prohibit the respondent - the opponent of the security M. Zh to enter into any contract with other persons, to impose on a mortgage or any other real encumbrance or obligation or to take action that would change the immovable property structure which is the subject of the ownership dispute on the surface and cadastral parcels mentioned as in the

proposal, until the decision on merits according to the request of the claimants is rendered.

10. On an unspecified date, against the decision of the first instance court, the Applicant's representative filed an appeal with the Court of Appeals of Kosovo on the grounds of essential violations of the provisions of the contested procedure, incomplete and erroneous determination of factual situation and erroneous application of the substantive law.
11. On 10 October 2016, the Court of Appeals in Prishtina, by Decision CA. No. 3442/2016, rejected the Applicants' appeal as ungrounded, and upheld the decision of the Basic Court in Prishtina.
12. On 28 October 2016, the Applicants, through their authorized representative, filed with the Office of the Chief State Prosecutor a request for protection of legality against Judgment CA. No. 3442/16 of the Court of Appeals in Prishtina, of 10 October 2016.
13. On 7 November 2016, the Office of the Chief State Prosecutor by Notification KMLC. No. 73/16 informed the legal representative of the Applicants that the request for protection of legality was not approved.

Applicant's allegations

14. The Applicants allege that the right to fair and impartial trial guaranteed by the Constitution (Article 31) and the right to a fair trial guaranteed by the ECHR (Article 6) have been violated because of the violation of the principle of equality of the parties to the procedure (equality of arms) and because the evidence presented by the parties was not treated equally by the regular courts and, moreover, the court decisions were not sufficiently reasoned.
15. The Applicants have also claimed that the property right was violated as a result of this impartial trial, stating that the factual situation was determined incompletely and incorrectly as well as the applicable law was incorrectly applied.

Admissibility of the Referral

16. In order to adjudicate the Applicant's Referral, the Court first examines whether the Applicants have met the admissibility requirements established in the Constitution and further specified in the Law and the Rules of Procedure.
17. In this regard, 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.”

18. In addition, the Court takes into account Article 48 of the Law, which stipulates:

“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.”

19. The Court refers to Rule 36 of the Rules of Procedure, which provides:

“The Court may consider a referral if:

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

and

(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;

20. Based on the foregoing, the Court finds that the Referral was filed in accordance with Article 113 of the Constitution within the time limit provided for in Article 49 of the Law and after exhausting legal remedies in this stage of the court proceedings. However, must assess whether the requirements set out in Article 48 of the Law and Rule 36 of the Rules of Procedure have been met.
21. The Court recalls that the Applicants allege violation of paragraph 1 of Article 31 [Right to Fair and Impartial Trial] of the Constitution, because by the challenged decisions the regular courts rejected the request for security measure and, consequently, there has been a violation of Article 46 (Protection of Property) of the Constitution.
22. The Court reiterates 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 (ECtHR).”*

Relevant constitutional provisions and of ECHR regarding the case as presented by the Applicants

Article 31 [Right to Fair and Impartial Trial]

“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

Article 6 of ECHR [Right to a fair trial]

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
[...]

Article 46 [Protection of Property]

1. *The right to own property is guaranteed.*
 2. *Use of property is regulated by law in accordance with the public interest.*
 3. *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*
23. When reviewing the allegations of a violation of the right to fair and impartial trial, the Court assesses whether the proceedings in its entirety were fair and impartial, as required by Article 31 of the Constitution (see, *inter alia, mutatis mutandis, Edwards v. United Kingdom*, 16 December 1992, p 34, Series A No. 247, and *B. Vidal v. Belgium*, 22 April 1992, p. 33, Series A no 235).
24. In relation to the foregoing, the Court finds that the Applicants have requested to assess whether Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated by Decision CA. No. 3442/2016 of the Court of Appeals, which rejected as ungrounded the appeal of the Applicants regarding the application of a security measure for a property which is otherwise subject to a property dispute between the Applicants and the opposing parties in that process and for which there is still no final decision regarding the main dispute.
25. Regarding the foregoing, the Court recalls that the Basic Court in Prishtina, by Decision C. No. 3216/17 of 8 July 2016, rejected the Applicant's proposal for the application of the security measure against the counter proposers, whereas in item II of this Decision, the Basic Court had annulled the earlier decision of that

court to impose the interim measure against the proposer SHKP "Viva" imposed on 12 December 2014.

26. Reasoning the abovementioned decision, the Basic Court emphasized, *inter alia*, that "Article 297 of the Law on Contested Procedure clearly stipulates the following: "Measures for insurance can be determined: if the propose of the insurance makes it believable the existence of the request or of his subjective, and, in case there is a danger that without determining a measure of the kind the opposing party will make it impossible or make it difficult the implementation of the request, especially with alienating of its estate, hiding it, or other way through which it will change the existing situation of goods, or in another way will negatively impact on the rights of the insurance party that proposed."
27. The Basic Court further reasoned that "The evidence presented by the party proposing the respective security measure in support of his claim are rather contradictory and they cannot substantiate in any way the existence of his claim or of his subjective right."
28. The Court of Appeals, after considering the appeal, reasoned "Having assessed the appealing allegations and the conducted proceeding with respect to ordering of the security measure, the court found that the first instance court through correct application of the LCP with which requirements for ordering the security measure had been fulfilled, has rendered the decision highlighted in the enacting clause of the decision. This is due to the fact that ordering of the security measure shall imply essential determination of factual situation to the extent of such degree of credibility and if there is a danger that without ordering such a measure the opposing party might render the enforcement of the statement of claim impossible or substantially difficult."
29. The decision further reiterates that "This implies that the evidence shall be administered only when ordering a measure before exhausting all the evidence, since that would imply that the factual situation has been reviewed in its entirety, namely the procedure has reached such maturity that all conditions have been fulfilled for rendering a merit – based decision. Therefore, the court has not justified in a separate manner the appealing allegations with reference to the subject of the statement of the claim, since this shall be resolved as per the main matter."
30. The Court further finds that although the Applicants attached to the Referral the Notification of the Office of the Chief State Prosecutor, KMLC 73/16, they have neither challenged nor alleged any constitutional violation by this legal act, therefore, the Court will not assess the compatibility of this act with the Constitution.
31. The Court recalls that the Court of Appeals rejected the Applicants' appeal against the Decision of the Basic Court and, accordingly, rejected the request for the imposition of the security measure requested by the Applicants.

32. In this regard, the Court reiterates that it is not the role of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). 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*, Judgment of the European Court of Human Rights (hereinafter: ECHR) of 21 January 1999, *García Ruiz v. Spain*, no. 30544/96, par. 28).
33. Regarding the foregoing, the Court notes that the Basic Court and the Court of Appeals have assessed the factual situation of the case and fully addressed the Applicants' allegations in relation to their request and provided a sufficient reasoning based on law and in relation to the allegations raised.
34. The Court also notes that the Applicants were given the opportunity to be active in all stages of the proceedings, and they have also exercised the legal remedy of the appeal, therefore from the aspect of constitutionality the Court did not find that the court decisions are arbitrary or indicate to violation of any right guaranteed by the Constitution.
35. In the circumstances of the case, the role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and. Therefore, the Constitutional Court cannot act as a "fourth instance court" (See ECtHR Judgment of 16 September 1996, *Akdivar v. Turkey*, No. 21893/93, para. 65, see: also *mutatis mutandis* case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
36. Taking into account the fact that the court proceedings regarding the issue of determination of the title of ownership have not yet been concluded, but it was decided only with respect to the required security measure, the Court at this stage cannot assess the allegation of a possible violation of the right to property, under Article 46 of the Constitution.
37. In sum, the Court considers that nothing prevents the Applicants from submitting a new Referral to the Constitutional Court after the completion of the court proceedings in entirety, but at this stage of the procedure, regarding the subject matter of the Referral, they did not present any evidence, facts and arguments that show that the proceedings before the Court of Appeals have in any way constituted a constitutional violation of their rights guaranteed by the Constitution, namely the right to fair and impartial trial and the right to protection of property, and accordingly, have not sufficiently substantiated their allegations.
38. Accordingly, based on the foregoing assessments, the Court finds that the Referral in respect of allegations of violation of Article 31 of the Constitution, Article 6 of the ECHR and Article 46 of the Constitution in the form submitted by the Applicants, is manifestly ill-founded on constitutional basis, and therefore, in accordance with Articles 113. 7 of the Constitution, Article 48 of the

Law and Rule 36 (1) (d) and (2) (d) of the Rules of Procedure, is declared inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 of the Law, and Rules 36 (1 and 2) (d) and 56 (b) of the Rules of Procedure, on 4 July 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- 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

Altay Suroy



President of the Constitutional Court

Arta Rama-Hajrizi