



REPUBLIKA E KOSOVËS
Republika Kosova - Republic of Kosovo
Gjykata Kushtetuese / Ustavni sud / Constitutional Court

Pristina, 15 October 2010
Ref. No.: RK 48/10

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 17/10

Vesel Tmava and Others

Vs.

The Ministry of Transport and Communication of the Republic of Kosovo

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
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. The named Applicant is Mr. Vesel Tmava, a citizen of Kosovo residing in Llugaxhi in the Municipality of Lipjan, who is joined by a group of similarly affected citizens. Applicants are collectively represented by Mr. Naser Gashi, a practicing lawyer in Pristina.

Opposing Party

2. The Opposing Party is the Ministry of Transport and Communication of the Republic of Kosovo (hereinafter: the "Ministry").

Subject Matter

3. The Applicants allege that the Ministry's Administrative Instruction 2008/08, issued on 1 January 2009 (hereinafter referred to as: the Instruction), violated their right to property.

Legal Basis

4. Article 113 (7) of the Constitution, Articles 20 and 22 (7) and (8) of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008,, (hereinafter: "the Law") and Section 54 (b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: "the Rules of Procedure").

Proceedings before the Court

5. Applicants submitted the Referral to the Court on 11 February 2010.
6. On 2 March 2010, the Court sent a copy of the Referral to the Ministry and requested a response. The Court received the Ministry's reply on 8 March 2010.
7. On 14 April 2010, the Court sent a copy of the Ministry's reply to the Applicants' legal representative and invited the legal representative to comment on the Ministry's answer. The Applicants' legal representative, however, did not respond to the request.
8. On 14 June 2010, the Review Panel consisting of Judges Robert Carolan (Presiding), Enver Hasani and Ivan Cukalovic considered the report of the Judge Rapporteur Almiro Rodrigues and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

9. Applicants are owners of vehicles in which the steering wheel is on the right side of the vehicle. These vehicles were primarily imported from Great Britain. Applicants have paid custom duties on the vehicles and were each provided with a Unique Customs Document. The vehicles have also undergone technical examinations and were registered in Vehicle Registration Centre.
10. On 1 January 2009, the Ministry issued the challenged Instruction, which compels the "homologation" of vehicles on the road in Kosovo.¹
11. To further the standardization process required by the Instruction, the Ministry adopted Decision No. 303/09 (hereinafter referred to as: the Decision) on 24 June 2009, requires all persons who own a vehicle designed for the markets of Great Britain, Cyprus, or Malta to "obtain a certificate of conformity from an authorized institution in the Republic of Kosovo."² The Decision took effect on 1 July 2009.³

Applicant's allegations

¹ Introduction of the Administrative Instruction No. 2008/08.

² Decision No. 303/09, paragraph 4.

³ Ibid. at paragraph 5.

12. Applicants complain that they will not be able to obtain a compliance certificate for their right-side steering wheel vehicles and, thus, the new requirements retroactively apply to all vehicles registered before 1 July 2009.
13. Applicants assert that such a retroactive effect was neither provided by Law No. 02/L-70 on Road Traffic Safety nor by the Instruction.
14. Thus, Applicants claim that the Decision deprives them of the ability to exercise their right to property as guaranteed by Articles 46.1 and 46.2 of the Constitution. For the same reasons, Applicants also claim that the Decision violates Article 3 (2) [Equality Before the Law], Article 16 (1) [Supremacy of the Constitution], Article 24 (1) and (2) [Equality Before the Law], and Article 55 (1) [Limitations on Fundamental Rights and Freedoms] of the Constitution.
15. Due to the large number of right-side steering wheel vehicles in Kosovo, Applicants also argue that implementing the Instruction and the Decision “may cause irreparable damage,” and, as a result, the public interest compels the Court to prevent such damage.
16. Therefore, Applicants request that the Court impose interim measures under Article 116 (2) of the Constitution and Article 27 (1) of the Law. Specifically, Applicants request that the Court “suspend [the] retroactive capacity” of the Decision and the Instruction until the Court decides on the merits of the case.

Submissions by the Opposing Party

17. The Ministry, in response, claimed that the “Decision has no retroactive legal basis”⁴ and only affects vehicles registered after 1 July 2009.
18. The Ministry concedes, however, that the owners of right-side steering wheel vehicles that were registered prior to 1 July 2009 must still obtain a compliance certificate before renewing the registration of such vehicles.⁵ The Ministry insists that obtaining such a certificate does not require owners to return the affected vehicles to their original country.⁶ The Ministry instead encourages owners to “seek a technical solution” that would move the steering wheel to the left side of the vehicle.⁷
19. The Ministry argues that legalizing vehicles with steering wheels on the right side would pose a “permanent danger to the drivers of these vehicles and other participants in the road traffic.”⁸ The Ministry is particularly concerned that road signs are not placed to accommodate drivers on the right side of the vehicle.⁹ Therefore, the Ministry believes that the public interest actually militates in favor of the Decision.

Assessment of the request for Interim Measures

20. Applicants specify neither the reasons for requesting the interim measures nor the precise consequences, if such measures are not granted. Thus, the arguments

⁴ Reply, Reference No 50508, dated 8 March 2010, paragraph 12.

⁵ See *ibid.*

⁶ See *ibid.* at paragraph 13.

⁷ *Ibid.*

⁸ *Ibid.* at paragraph 10.

⁹ See *ibid.* at paragraph 11.

made by Applicants do not sustain the constitutional requirement of “unrecoverable damages.”¹⁰

21. It follows that, the request for interim measures is ungrounded and must be rejected as inadmissible.

Assessment of the admissibility of the Referral

22. In order to be able to adjudicate Applicants’ Referral, the Court must first examine whether Applicants have fulfilled the admissibility requirements laid down in the Constitution.

23. Article 113 (7) of the Constitution provides:

“Individuals are authorized to refer violations by authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”

24. Article 47.2 of the Law stipulates:

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

25. Applicants concede that “regular court proceedings have not begun in any of the cases (...) because authorities have not issued any rejection decisions to parties (...) through Technical Examination Centres.”

26. The Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right 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.¹¹ However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies requirement is satisfied.¹²

27. Applicants assert, however, that such court proceedings, once initiated, would take three to five years to complete due to the great backlog of the courts. Applicants claim that once three years have passed, they would be required to change the steering wheels in their vehicles. Thus, Applicants assert that disputing the Instruction through regular proceedings would be “unreasonable” and “would hold no legal value.”

28. Because “applicants are only required to exhaust remedies that are available and effective,”¹³ Applicants thus claim that the Court should view the Referral as admissible.

29. The Court notes that Applicants admit that they have not challenged the Instruction or Decision through regular administrative or judicial proceedings. The Court also notes that Applicants did not seek relief through any other remedy that may have been available to them under applicable laws.

¹⁰ Article 116 (2) of the Constitution.

¹¹ See, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999.

¹² See, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004

¹³ Resolution, Case No KI 23/09, Ahmet Arifaj vs. Municipality of Klina, paragraph 13.

30. Applicants indeed had other legal remedies, even before the authorities issued rejections regarding registration, because the Law on Administrative Procedure includes means for complaining about administrative silence.
31. Applicants instead submitted their referral directly to the Constitutional Court with the claim that available remedies were ineffective. Applicants, however, must first attempt to seek relief through available remedies before concluding that such remedies are ineffective. The abstract allegation that available remedies are ineffective does not satisfy the exhaustion requirement.
32. As a result, the Court concludes that Applicants have not fulfilled the requirement of exhaustion of all legal remedies provided by law under Article 113 (7) of the Constitution.


FOR THESE REASONS

33. The Constitutional Court, pursuant to Articles 27 (1) and 47 of the Law, and Sections 52 (1) and 55 of the Rules of Procedure, by MAJORITY VOTE,

DECIDES

- I. TO REJECT the Request for Interim Measures.
- II. TO REJECT the Referral as Inadmissible.
- III. 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.
- IV. This Decision is effective immediately.

Judge Rapporteur


Almiro Rodrigues



President of the Constitutional Court


Prof. Dr. Enver Hasani