



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

Pristina, 15 October 2010
Ref. No.: RK 47/10

RESOLUTION ON INADMISSIBILITY

Case No. KI 14/09

Heirs of Ymer Loxha and Sehit Loxha

vs.

Decision No. PKL.Nr.21/07
of the Supreme Court of the Republic of Kosovo,
dated 17 December 2008

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 Cukalovic, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicants

1. Based on the submissions, the Applicants

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|-------------------------|-----------------------|
| (1) Xhafer Loxha, | (10) Agim Loxha, |
| (2) Nezije Koro, | (11) Nexhmedin Loxha, |
| (3) Behide Elshani, | (12) Behixhe Loxha, |
| (4) Myzafere Gacaferri, | (13) Aferdita Vokshi, |
| (5) Nexhdet Loxha, | (14) Xhavit Loxha, |
| (6) Zebra Broqi, | (15) Nekibe Jadrashi, |
| (7) Besim Kardesh, | (16) Nemide Hadri, |
| (8) Belkize Gjogoviqi, | (17) Resmije Peja and |
| (9) Atifete Loxha, | (18) Xhevdet Loxha |

are the heirs of the brothers Ymer and Sehit Loxha, former traders in Peja and represented in the proceedings by Adem Vokshi, a practicing lawyer in Mitrovica.

Challenged decision

2. In their Referral, the Applicants challenge Decision No.PKL.Nr.21/07 of the Supreme Court of Kosovo, dated 17 December 2008.

Subject matter

3. By Decision of 17 December 2008, the Supreme Court rejected the request for protection of legality, which the Applicants had filed against the decision of the District Court in Peja of 10 January 2007 to refuse to reopen criminal proceedings before the District Court in Peja in 1945, by which the brothers Ymer and Sehit Loxha had been declared enemies of the people and, since they had fled to Albania, their property and assets had been confiscated, based on the Law on Confiscation of Property and Execution of Confiscation (Official Gazette of the Democratic Federation of Yugoslavia, NOAO/45 of 9 June 1945).
4. The Supreme Court also found that the request for protection of legality was filed by unauthorized persons, pursuant to Article 453(2)(2) and Article 454(2) of the Provisional Criminal Procedure Code of Kosovo.
5. The Applicants complain that the Supreme Court's decision violates their rights to legal remedies, as guaranteed by Article 32 of the Constitution, Article 2(1) of Protocol No. 7 of the European Convention of Human Rights, Article 14(5) of the International Covenant on Civil and Political Rights and Article 8 of the Universal Declaration on Human Rights.

Legal basis

6. The Referral is based on Article 113.7. of the Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution); Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law), and Section 54(b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Proceedings before the Court

7. On 25 April 2009, the Applicants filed a Referral with the Constitutional Court. On 4 February 2010 the Review Panel, composed of Judges Kadri Kreyziu (Presiding), Enver Hasani and Iliriana Islami, considered the Report of the Reporting Judge, Gjyljeta Mushkolaj, and made a recommendation on the inadmissibility to the full Court.

Summary of the facts

8. From the documents submitted by the legal representative of the Applicants it appears that, by Decisison K.K.Br.18/45 dated 29 December 1945, the District Court in Peja decided to "confiscate the immovable property of public enemies and fugitives from the people's authorities in Albania Imer and Sehit Loxha", based on the Law on Confiscation of Property and Execution of Confiscation (Official Gazette of the Democratic Federation of Yugoslavia, N0.40/45 of 9 June 1945).

9. In 2006, the Applicants, as heirs of Ymer and Sehit Loxha, filed a request with the Municipal Court in Peja in order to have the criminal proceedings from 1945 reviewed. On 23 May 2006, the Municipal Court, by Decision KP.Nr.5/05, rejected the request on the ground that the proceedings in question were not of a criminal nature, but concerned a property confiscation procedure, based on the Law on Confiscation of Property and Execution of Confiscation of 1945.
10. The Municipal Court further stated that it was completely ungrounded to request the reopening of criminal proceedings concerning a court decision taken on the basis of the Law on Property Confiscation and that the present decision was taken in line with Article 445(1)(2)¹, in conjunction with Article 438 of the PCPCK².
11. The legal representative of the Applicants filed an appeal with the District Court in Peja, challenging the Decision "due to essential violations of the procedural rules, erroneous and incomplete ascertainment of the factual situation, and erroneous application of the material law". In the appeal it was also proposed to the District Court to uphold as founded the Request to reopen the criminal proceedings and to declare invalid Decision K.K.Br.18/45 of the Municipal Court in Peja of 29 December 1945.
12. By Decision Pn.Nr.74/06 of 10 January 2007, the District Court in Peja rejected as unfounded the Applicants' appeal and confirmed the decision of the Municipal Court dated 23 May 2006. The Court stated that the appeal allegations related to the discriminatory nature of the laws applicable at the time and that the unjustified facts mentioned in Decision K.K.Br.18/45 could not be subject to review of a repeated criminal procedure; moreover, these allegations would be relevant in case of re-evaluation of legislation or laws referring to seizure of property through implementation of provisions and acts of nationalization, agricultural reform, confiscation, sequestration, expropriation and other provisions applied after 9 March 1945. In the Court's opinion, therefore, reassessment of the legislation at the time, when the District Court in Peja took Decision K.K. Br. 18/45 is "an issue of legal reassessment of restoring confiscated properties and of indemnifying former owners, which is a competency of the Kosovo legislature to comply with requirements of the European Convention on the Protection of Fundamental Human Rights and Freedoms." The Court concluded that "Decision K.K.Br.18/45 was not a criminal ruling following criminal proceedings, but only a declaratory decision on confiscation of property, taken in the spirit of the then applicable provisions, which means that the request to reopen the criminal procedure is rightly rejected".
13. On 9 March 2007, the legal representative of the Applicants filed a request for protection of legality with the Supreme Court in Pristina, challenging Decision KP.Nr.5/05 of the Municipal Court and Decision Pn.Nr.74/06 of the District Court in that they constituted an essential violation of procedural rules and an erroneous and incomplete assessment of the factual situation, and an erroneous application of material rights. The legal representative requested the Supreme Court to amend the challenged decisions, to allow the Applicants' request for revision of the criminal procedure and to declare invalid Decision K.K.Br.18/45 of the Municipal Court in Peja of 29 December 1945 as well as the sanctions derived there from.

¹ Article 445.1.2 of the Provisional Criminal Procedure Code (UNMIK Regulation No. 2003/26): (1) The court shall dismiss the request by a ruling on the basis of the request itself and the files of previous proceedings if it finds that: 2) There are no legal grounds for reopening of proceedings.

² Article 438 of the Provisional Criminal Procedure Code (UNMIK Regulation No. 2003/26): Criminal proceedings terminated by a final ruling or a final judgment may be reopened upon the request of authorized persons only in instances and under conditions provided for by the present Code.

14. At its session held on 17 December 2008, the Supreme Court, by Judgment Pkl.Nr.21/07, did not allow the request for protection of legality, stating that, in conformity with Article 451.1 of the PCPCK, "the request for protection of legality may be presented against a final judicial decision in criminal proceedings", and that "...the case file shows that Ymer and Sehit Loxha were not the subject of criminal proceedings". In the Court's opinion, the District Court was right in finding that the remedy to review criminal proceedings is not foreseen for court proceedings by which the property of a person is confiscated, when he/she has not been declared guilty of a criminal offence. Moreover, the request for protection of legality was not foreseen either for judicial decisions in which this sanction is stipulated and for which the decision is not taken based on a criminal procedure and in which the person is neither tried nor declared guilty of a criminal offence.
15. The Supreme Court further ruled that Ymer and Sehit Loxha did not possess the quality of sentenced persons, nor did their lawyer have the quality of their defense lawyer, but was just the representative of their heirs. In the Court's opinion, persons authorized to submit a request for protection of legality are the Kosovo public prosecutor, the defendant and his defense lawyer, hence the request for the protection of legality was submitted by an unauthorized person and was unacceptable, pursuant to Articles 453(2)(2) and 454(2) of the PCPCK.

Applicants' allegations

16. The Applicants now complain that the Supreme Court denied to them the right to a fair and impartial trial and the right to an effective remedy, contrary to Articles 31(2) and 32 of the Constitution and to certain provisions of international human rights instruments³, by not allowing them to initiate proceedings for protection of legality and has, therefore, not interpreted the law properly. They submit that, as heirs of Ymer and Sehit Loxha, they are persons authorized to file a request for protection of legality, through their lawyer, in accordance with Article 452(1) of the PCPCK. They also allege that the Supreme Court did not interpret Article 452 of the PCPCK properly, thereby denying them the right to submit an appeal.
17. Furthermore, the Applicants allege that the case, decided upon by the District Court in Peja in 1945, was a criminal case, because the confiscation of property, pursuant to the Law on Criminal Acts against the People and the State ("Official Gazette 6611 of 1945) was only applied to convicted persons; moreover, in the same court decision, the brothers Ymer and Sehit Loxha were proclaimed (even without due process) enemies of the people, and, therefore, their property was confiscated.
18. The Applicants also claim that the sole fact that the District Court's decision has the reference code K.K, confirms that, formally, the decision was of a criminal nature, in that the code KK is used for decisions on criminal confiscation, the meaning of this code being "kriminalna konfiskacija".
19. They argue that crimes committed by the communist regime are well-known, including amongst others, the denial of individual rights to a fair and impartial trial. Hence, according to the Applicants, the denial of these rights cannot be used as a reason to deny the fact that the property confiscation was a criminal case, although no criminal proceedings had been initiated against the brothers Ymer and Sehit Loxha in order to proclaim them enemies of the people. In their submission, the sole fact of their proclamation as enemies of the people in the court decision on property

³ Article 8 of the Universal Declaration of Human Rights; Article 14(5) of the Convention for the Protection of Civil and Political Rights and Article 2(1) of Protocol 7 to the European Convention on Human Rights.

confiscation confirms that, at that time, the right to a fair and impartial trial was violated.

Assessment of the admissibility of the Referral

20. The Constitutional Court first notes that the Applicants complain that, by Decision Pkl.Nr.21/07 of 17 December 2008, the Supreme Court rejected their request for protection of legality. They had filed this request against the decisions of the Municipal Court in Peja, dated 23 May 2006, and of the District Court in Peja, dated 10 January 2007, by which their request to review the criminal proceedings before the District Court in Peja in December 1945 had been refused. Allegedly, these proceedings had terminated in the confiscation of the property of Ymer and Sehit Loxha..
21. In fact, the Applicants appear to disagree with the findings of these courts that the proceedings before the District Court in 1945 were not of a criminal nature, but were related to a property confiscation procedure under the Law on Confiscation of Property and Execution of Confiscation (Official Gazette No. 40/45 of 29 December 1945 of the Democratic Federation of Yugoslavia).
22. They also complain that the Supreme Court misinterpreted the Law and that the disputed court decisions violate their rights to a fair and impartial trial and to an effective legal remedy, as guaranteed by Articles 31(2) and 32 of the Constitution as well as by Article 8 of the Universal Declaration of Human Rights and Article 2(1) of Protocol 7 to the European Convention on Human Rights and Fundamental Freedoms.
23. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, García Ruiz v. Spain, no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-I).
24. The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see among others authorities, Report of the Eur. Commission on Human Rights in the case Edwards v. United Kingdom, App. No 13071/87 adopted on 10 July 1991).
25. However, having examined the documents submitted by the Applicants, the Constitutional Court does not find any indication that the proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis* Application No. 53363/99, Vanek v. Slovak Republic, ECHR Decision of 31 May 2005). Also the Supreme Court gave ample reasons, why it did not allow the Applicants' request for protection of legality. It follows that this complaint is ill-founded and must be rejected.
26. The Applicants further requested the Constitutional Court to declare the decision of the District Court in Peja in 1945 null and void, including the sanctions given thereby.
27. However, the Constitutional Court notes that the Applicant's complaint relates to events prior to 17 February 2009 that is the date of the entry into force of the Constitution of the Republic of Kosovo. It follows that the application is out of time and, therefore, incompatible "ratione temporis" with the provisions of the Constitution

and the Law (see *mutatis mutandis* Asinine v. Lithuania, Application no. 41510/98, ECHR Judgments of 6 March and 6 June 2003).

28. Finally, as far as the question of restitution of property is concerned, the Constitutional Court refers to the Comprehensive Proposal for the Kosovo Status Settlement, in particular, to its Article 8(6), stipulating, *inter alia*, that "...Kosovo shall address property restitution issues,..., as a matter of priority, in accordance with Annex VII of this Settlement. Article 6.1 of this Annex provides more details about the issue, stating that "... Kosovo shall also address property restitution issues,...,as a matter of priority. Kosovo shall establish an independent mechanism to formulate the policy, legislative and institutional framework for addressing property restitution issues ...".
29. Furthermore, Annex XII of the Settlement, in its Article 2 (Legislation to be formally approved during or adopted after the Transition Period⁴) requires the Assembly to adopt, "as a matter of priority immediately upon the conclusion of the transition period...", *inter alia*, a "Law of Restitution" (Article 2.13).
30. In this connection, the Court also makes reference to the Constitution of Kosovo itself, which stipulates, in its Article 1.1, that the "Constitution shall be consistent in all its provisions with the Settlement and be interpreted in accordance with this Settlement". The Protection of Property, guaranteed by the Constitution in its Article 46, must, therefore, also be interpreted by the Court in light of the Settlement.
31. Finally, Article 143 of the Constitution provides that "All authorities in the Republic of Kosovo shall abide by all of the Republic of Kosovo's obligations under the Comprehensive Proposal for the Kosovo Status Settlement...".
32. As to the issue of property restitution, these provisions mean, *inter alia*, that the Assembly of Kosovo is under the obligation, as a matter of priority immediately upon the conclusion of the transition period (i.e. immediately after 26 July 2007), to adopt a "Law on Restitution". However, the Court notes that no such law, has so far, been adopted by the Assembly of Kosovo.
33. The Court therefore reminds the authorities of the Republic of Kosovo of the obligation "to establish an independent mechanism to formulate the policy, legislative and institutional framework for addressing property restitution issues, as required by Annex VII, Article 6(1) the Comprehensive Proposal for the Kosovo Status Settlement, and the Assembly to adopt a Law on Restitution, pursuant to Article 143 of the Constitution in conjunction with Article 2(1)3 of Annex XII (Legislative Agenda) of the Comprehensive Proposal for the Kosovo."

⁴ Article 15(1) of the Settlement provides that "Upon the entry into force of this Settlement, there shall be a 120 day transition period".

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law and Section 54(b) of the Rules of Procedure, unanimously,

DECIDES

- I. TO REJECT the Referral as inadmissible;
- II. This Decision shall be notified to the Parties and to the President of the Assembly of the Republic of Kosovo, and shall be duly published in the Official Gazette, in accordance with Article 20(4) of the Law.
- III. This Decision is effective immediately.

Judge Rapporteur

Dr. Gjyljeta Mushkolaj

President of the Constitutional Court

Prof. Dr. Enver Hasani

